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Case No. 2020-1061-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEWART N. GOLDSTEIN, M.D., individually and on behalf of all others similarly situated, Plaintiff, v. ALEXANDER J. DENNER, SARISSA CAPITAL MANAGEMENT, L.P., SARISSA CAPITAL DOMESTIC FUND LP, SARISSA CAPITAL OFFSHORE MASTER FUND LP, and SARISSA CAPITAL MANAGEMENT GP LLC, Defendants.	)	C.A. No. 2020-1061-JTL

ORDER GRANTING PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE TRIAL TESTIMONY FROM LATE-IDENTIFIED WITNESSES

1. Plaintiff Stewart N. Goldstein moved to preclude the trial testimony of three witnesses whom the defendants sought to add to the witness list on March 22, 2024, six weeks after the deadline for designating trial witnesses and less than one month before trial. This order grants the motion.

2. Some factual background is helpful for understanding the court's ruling. Given the procedural posture, the following factual summary does not constitute formal findings of fact. It rather reflects how the record appears at this stage of the proceedings.

a. Defendant Alexander J. Denner is the founder and controlling principal of Sarissa Capital, an activist hedge fund. Four of his affiliates are defendants (collectively, "Sarissa").

b. In 2017, Denner was a director of Bioverativ, Inc., a publicly traded biotechnology company. In May, Sanofi S.A. approached Denner and another director, Brian S. Posner about acquiring Bioverativ for $90 per share. Bioverativ's common stock closed that day at $54.86 per share, so the proposal represented a 64% premium to market. Posner reported Sanofi's interest to Bioverativ's other directors. The parties dispute whether he disclosed the proposed price at that time.

c. Shortly after Denner's meeting with Sanofi, Sarissa began purchasing Bioverativ stock. Before those purchases, Sarissa only owned 155,000 shares. Within a week after Denner's meeting with Sanofi, Sarissa had purchased 1,010,000 shares for $56.3 million. Bioverativ stock went from 3.3% of Sarissa's portfolio to 27.7%.

d. Sanofi reapproached in June 2017 and again in September 2017, but Denner responded that Bioverativ was not for sale. The parties dispute whether avoiding the short-swing profits rule set out in Section 16(b) of the Securities Exchange Act of 1934 played any role in Denner's rebuffing of Sanofi in June and September 2017. In October 2017, Sanofi came calling again. This time Denner proposed a single-bidder process. Several weeks later, in late November 2017, Sanofi offered to acquire Bioverativ for $98.50 per share.

e. Denner led the negotiations for Bioverativ. Bioverativ's management team and its financial advisors valued the company at more than $150 per share. After receiving Sanofi's offer, the directors asked for a higher bid, and

Sanofi increased its offer to $101.50. At that point, the directors countered at $105 per share, almost one-third below the standalone valuation. Sanofi accepted.

f. On December 15, 2020, the plaintiff filed this lawsuit. The complaint asserted a claim against Denner for breaching his fiduciary duties by engaging in insider trading and a claim against Sarissa for aiding and abetting Denner's breach.

g. On March 17, 2021, the defendants moved to dismiss the complaint. On May 26, 2022, the court issued a decision denying the defendants' motions to dismiss the sale process claims. *Goldstein v. Denner (Sale Process Decision)*, 2022 WL 1671006 (Del. Ch. May 26, 2022). On June 2, 2022, the court issued a decision denying the motion to dismiss the insider trading claim against Denner and the aiding and abetting claim against Sarissa. *Goldstein v. Denner (Insider Trading Decision)*, 2022 WL 1797224 (Del. Ch. June 2, 2022).

h. On June 2, 2023, the court entered the operative scheduling order, which the parties had submitted in stipulated form. Dkt. 178 (the "Scheduling Order"). Paragraph 1(k) of the Scheduling Order memorialized the agreed-upon deadline for identifying trial witnesses. It lists "February 9, 2024, at 5:00 pm" as the deadline for "[i]dentification of trial witnesses (including adverse and third-party witnesses and experts)." *Id.* ¶ 1(k) (the "Witness Deadline"). The Witness Deadline thus applied to all trial witnesses, including third-party witnesses.

i. Paragraph 5 of the Scheduling Order created an exception to the Witness Deadline that allowed the parties to designate "additional party witnesses"

either by agreement or with leave of the court. *Id.* ¶ 5 (the "Additional Party Witness Exception"). The Additional Party Witness Exception only applied to party witnesses.

j. On September 13, 2023, the court approved a settlement of the sale process claims. Dkts. 192 & 193. The settlement agreement preserved the plaintiff's ability to continue prosecuting the insider trading and aiding and abetting claims against Denner and Sarissa.

k. On November 14, 2023, the plaintiff moved for sanctions due to the defendants' spoliation of text messages. Dkt. 195 (the "Sanctions Motion"). The parties briefed the motion and the court heard argument.

l. On January 26, 2024, the Court issued a decision imposing sanctions on Denner and Sarissa for recklessly failing to retain text messages. *Goldstein v. Denner (Sanctions Decision)*, --- A.3d ---, 2024 WL 303638 (Del. Ch. Jan. 26, 2024), *appeal refused*, 2024 WL 1103110 (Del. 2024). As a curative sanction, the court held that it would presume at trial that Sarissa traded on the basis of Sanofi's approach. *Id.* at *28. The court also held that it would presume that Sarissa's trading caused the sale process to fall outside the range of reasonableness. *Id.* Because presumptions are inherently rebuttable and the defendants' spoliation deprived the plaintiff of evidence that they could use to impeach the defendants' testimony, the court elevated the burden of proof that the defendants would have to meet to rebut the presumptions by one level—from a preponderance of the evidence to clear and convincing evidence. *Id.* at *28–29.

m. The court issued the *Sanctions Decision* two weeks before the Witness Deadline. On February 5, 2024, four days before the Witness Deadline, the defendants filed an application for certification of an interlocutory appeal. Dkt. 227 (the "Application"). In the Application, the defendants expressed concern that testimony from their own witnesses would not be enough to carry their burden at trial. App. ¶ 2 ("The tone of the Opinion makes clear that, even without testimony, the Court has concluded that Defendants were lying, thus rendering trial moot."). The defendants also claimed that the *Sanctions Decision* increased the scope of what the defendants needed to prove at trial. *Id.* ¶ 31 ("Indeed, Defendants now must not only defend their trading, but radically expand trial to prove that the sale fell within a range of reasonableness . . . .").

n. On February 9, 2024, in compliance with the Witness Deadline, the parties exchanged witness lists. Mot., Ex. B. The defendants did not identify Fabienne Lecorvaisier, Diane Souza and Thomas Südhof, three directors from Sanofi (the "Sanofi Witnesses"). The defendants purported to "reserve the right to supplement [their] list with additional fact and/or expert witnesses to address issues raised in the Court's January 26, 2024 Opinion." *Id.* The plaintiff purportedly reserved rights as well. Opp., Ex. I. No one sought leave to amend the scheduling order to accommodate those purported reservations of rights, nor did they submit a stipulated modification to the scheduling order providing for the purported reservations of rights.

o. Seven weeks after the *Sanctions Decision*, on March 15, 2024, the defendants provided their markup to the plaintiff's initial draft pre-trial stipulation. Mot., Ex. C. The defendants did not identify the Sanofi Witnesses in that markup. *Id.*

p. Eight weeks after the *Sanctions Decision*, on March 22, 2024, the defendants identified the Sanofi Witnesses for the first time in a further draft of the pre-trial stipulation. Mot., Ex. D.

q. On March 25, 2024, the plaintiff moved to exclude the Sanofi Witnesses. The defendants filed an opposition, and the court held argument on March 29, 2024.

3. "Parties must be mindful that scheduling orders are not merely guidelines but have the same full force and effect as any other court order." *In re ExamWorks Gp., Inc. S'holder Appraisal Litig.,* 2018 WL 1008439, at *6 (Del. Ch. Feb. 21, 2018) (citation omitted). Put simply, "deadlines matter." *S'holder Representative Servs., LLC v. Alexion Pharms., Inc.*, 2023 WL 4235209, at *1 (Del. Ch. June 26, 2023) (ORDER).

4. Deadlines are particularly important when conducting discovery and preparing for trial. The Delaware Supreme Court "has long recognized that the purpose[s] of discovery [are] to advance issue formulation, to assist in fact revelation, and to reduce the element of surprise at trial." *Levy v. Stern,* 687 A.2d 573, 1996 WL 742818, at *2 (Del. Dec. 20, 1996) (ORDER). "The underlying purpose of discovery in general is to reduce the element of surprise at trial by advancing the time at which disclosure can be ordered from the trial date to a date preceding that date." *Empire*

Box Corp. v. Ill. Cereal Mills, 90 A.2d 672, 678 (Del. Super. 1952). "Scheduling orders and discovery cutoffs further these important purposes and policies by ensuring that parties provide discovery in a timely fashion, thereby avoiding trial by surprise and the prejudice that results from belated disclosure." *IQ Hldgs. v. Am. Com. Lines, Inc.,* 2012 WL 3877790, at *2 (Del. Ch. Aug. 30, 2012). In *Alexion*, the court excluded belatedly identified trial witnesses simply because the party identified them after the deadline passed. *Alexion*, 2023 WL 4235209, at *1.

5. The plaintiff argues that the Sanofi Witnesses should be excluded because the defendants did not identify them by the Witness Deadline. The defendants argue that they can add the Sanofi Witnesses because the Additional Party Witness Exception does not apply to third-party witnesses. Contrary to the plain language of the Witness Deadline, the defendants contend they can add third-party witnesses at any time, without the plaintiff's agreement or leave of court. That is plainly wrong.

a. The Scheduling Order creates a rule—the Witness Deadline—and an exception to that rule—the Additional Party Witness Exception. The Witness Deadline applies to all witnesses, including "third-party witnesses." Scheduling Order ¶ 1(k). The deadline for identifying the Sanofi Witnesses was February 9.

b. The Additional Party Witness Exception creates an exception for party witnesses. It states:

> Following the identification of trial witnesses pursuant to subparagraph 1(k), any party may designate additional party witnesses, other than rebuttal witnesses designated within 10 business days of the identification of trial witnesses pursuant to subparagraph 1(k), for trial

> only upon agreement of the parties or leave of Court for good cause shown, and any such witnesses who were not previously deposed shall be made available promptly for a deposition.

Id. ¶ 5. The Additional Party Witness Exception only applies to "additional *party* witnesses." *Id.* (emphasis added).

c. The defendants argue that the term "'party witness' must mean a witness under the control of a party." Opp. ¶ 17. They support that interpretation by pointing to language in the Additional Party Witness Exception stating that any added witnesses "who has not been 'previously deposed shall be made available promptly for a deposition' by a party to the litigation." *Id.* (quoting Scheduling Order ¶ 5). The defendants reason that to avoid surplusage, the term "party witness" must mean something different than "witness" or "trial witness." Opp. ¶ 16. They conclude it must mean any witness under a party's control, because that is all that is required for a party to make the witness available for deposition. *See id.* ¶ 17.

d. If the Witness Deadline did not exist, then that interpretation of the Additional Party Witness Exception might be reasonable. Read in conjunction with the Witness Deadline, it is not. The Witness Deadline specifically refers to third-party witnesses. The Additional Party Witness Exception does not. That means that a party must identify all third-party witnesses on or before the Witness Deadline. After that deadline passes, a party can no longer add third-party witnesses, unless both sides agree or the party obtains leave of court.

e. The defendants' argument equates to the notion that because an exception to a rule does not apply, the rule does not apply. To the contrary, when an exception to a rule does not apply, the rule applies.

6. Alternatively, the defendants argue that because both parties reserved the right to supplement their witness lists, the parties tacitly agreed that they could add any kind of witness after the Witness Deadline. Not so.

a. Paragraph 7 of the Scheduling Order only permits amendments by written agreement. A party therefore cannot unilaterally amend the Scheduling Order. Nor can a dual "reservation of rights" amend a scheduling order. The parties could have submitted a stipulated, written amendment to the Scheduling Order. Or the defendants could have asked the court to modify the Scheduling Order for good cause shown.

b. Under the Scheduling Order, the defendants had to identify any third-party witnesses by the Witness Deadline. They did not identify the Sanofi Witnesses until March 22, 2024—over six weeks after the deadline. The defendants' attempt to add the Sanofi Witnesses is therefore untimely.

c. In rejecting the defendants' argument that the parties' parallel reservation of rights did not bind the court, the court acknowledges that the Delaware Supreme Court held last year that a party agreement in the form of a stipulation bound the court and that it was reversible error for the court not to follow it. *Holifield v. XRI Inv. Hldgs. LLC*, 304 A.3d 896, 936–97 (Del. 2023).

i. In *Holifield*, the parties did not ask the trial court to bifurcate the proceedings into a liability phase and a damages phase before trial, and the trial court held what the trial judge understood to be a single trial on all issues. The plaintiff did not present any evidence on damages, but in its post-trial brief, the

plaintiff mentioned in four places that it had the right to recover damages. *See id.* at 936. At the conclusion of a post-trial decision that was intended to address the case as a whole, the trial court asked the parties to submit a final order or to agree on the issues that needed to be addressed before a final order could be entered. *XRI Inv. Hldgs. LLC v. Holifield*, 283 A.3d 581, 668 (Del. Ch. 2022), *aff'd in part, rev'd in part and remanded*, 304 A.3d 896 (Del. 2023). That request was intended to smoke out any lingering issues that needed to be resolved before the case could be wrapped up, not to open the door to new trials on issues that could have been part of the original trial. The parties, however, submitted a stipulation for entry of a partial final judgment under Rule 54(b) that contemplated a second trial to address damages and to litigate five other issues.

ii. Whether to bifurcate a case is an issue for the trial court's discretion. Ch. Ct. R. 42(b); *cf. Younce v. Glaxosmithkline, LLC*, 2023 WL 7158056, at *1 (Del. Super. Oct. 30, 2023) (interpreting analogous Superior Court rule); *Wallace v. Keystone Ins. Gp.*, 2007 WL 884755, at *1 (Del. Super. Mar. 22, 2007) (same). Whether to permit a party to supplement the record is an issue for the trial court's discretion. *Rappa v. Hanson*, 209 A.2d 163, 165–66 (Del. 1965). Whether to enter a judgment under Rule 54(b) is an issue for the trial court's discretion. *E.g.*, *Stein v. Orloff*, 504 A.2d 572, 1986 WL 16298, at *2 (Del. 1986) (ORDER). Docket control generally is an issue for the trial court's discretion. *See Sammons v. Drs. for Emergency Servs., P.A.*, 913 A.2d 519, 528 (Del. 2006) ("The trial court has discretion

to resolve scheduling issues and to control its own docket." (citation omitted)); *accord Valentine v. Mark*, 873 A.2d 1099, 2005 WL 1123370, at *1 (Del. 2005) (ORDER).

iii. Believing for at least four reasons that the issues of post-trial bifurcation and supplementing the record were within the trial court's discretion, the trial judge rejected the stipulated partial final judgment and, in an abbreviated ruling, explained that those issues had not been sufficiently preserved to warrant further litigation. *XRI Inv. Hldgs. LLC v. Holifield*, 2022 WL 5185562, at *1–2 (Del. Ch. Oct. 3, 2022) (ORDER). The plaintiff appealed that decision, and the defendant who had agreed to the stipulation was hardly in a position to argue against it. The Delaware Supreme Court ruled that rejecting the parties' stipulation constituted reversible error as a matter of law. *Holifield*, 304 A.3d at 937. The high court directed the trial court, on remand, to consider the issues that were the subject of the parties' stipulated order and nominally left it "to [the trial court's] discretion as to whether and how the record might need to be supplemented." *Id.* at 940. Because the parties presented no evidence on damages at the first trial, and because the Delaware Supreme Court ordered the trial judge to address that issue on remand, the parties' stipulation meant that the trial judge had to hold a second trial and receive evidence on damages.

iv. A strong reading of *Holifield* suggests that party agreements bind trial court judges and that it constitutes reversible error for a trial judge not to follow them. Speaking for myself, I hope that is not the law. Such a party-centric rule might be consistent with concepts of common law pleading that predated

the Field Code and the adoption of the Federal Rules of Civil Procedure. By contrast, the concepts of case management that have prevailed over the last century take the view that the trial judge oversees the development of the case and has the ability to overrule the parties, not that the parties have the ability to control the judge. Consistent with that view, the Delaware Supreme Court has elsewhere stated that "Delaware trial courts have inherent power to control their dockets." *Solow v. Aspect Res., LLC*, 46 A.3d 1074, 1075 (Del. 2012). That authority includes determining how to proceed for the "orderly adjudication of claims." *Unbound P'rs Ltd. P'ship v. Invoy Hldgs. Inc.*, 251 A.3d 1016, 1030 (Del. Super. 2021) (citation omitted). Rule 1 instructs the members of this court that the rules "shall be construed, administered, and employed by the Court and the parties, to secure the just, speedy and inexpensive determination of every proceeding." Ct. Ch. R. 1. Commenting on the sibling federal rule, a leading treatise states that "[t]here probably is no provision in the federal rules that is more important than this mandate. It reflects the spirit in which the rules were conceived and written, and in which they should be interpreted." 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice and Procedure* § 1029 (4th ed.), Westlaw (database updated Apr. 2023) (footnotes omitted). Court of Chancery Rule 16(a) similarly contemplates that a court may take steps to "formulat[e] and simplif[y] . . . the issues" and to address "[s]uch other matters as may aid in the disposition of the action." Ct. Ch. R. 16(a)(1), (5). The same authoritative treatise explains that "case management [is] an express goal of pretrial procedure." 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal*

Practice and Procedure § 1521 (3d ed.), Westlaw (database updated Apr. 2023). To that end, the Advisory Committee's note to the federal rule emphasizes the need for "a process of judicial management that embraces the entire pretrial phase . . . ." Fed. R. Civ. P. 16 advisory committee's note to 1983 amendment. The commentary recognizes that "[t]he timing of any attempt at issue formulation is a matter of judicial discretion." *Id.*

v. Even if *Holifield* stands for a case-management proposition that would make Delaware an outlier among contemporary jurisdictions, the case involved a formal stipulation. Here, the defendants do not have a formal stipulation. They rely on a joint reservation of rights. The Delaware Supreme Court obviously has the authority to hold that a joint reservation of rights constitutes an amendment to a court order that binds the trial court. Unless and until that rule is announced, a joint reservation of rights should not have that effect. Thus, even assuming that a strong reading of the *Holifield* case is an accurate one, it does not apply to this case.

7. Because the defendants failed to meet the Witness Deadline, their opposition to the plaintiff's motion amounts to a request to modify the deadline. Court of Chancery Rule 6(b) governs that type of request. It states:

> When by these Rules, by a notice given thereunder, by prior agreement of the parties, or by order of Court an act is required or allowed to be done at or within a specified time, the Court for good cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule

> 59(b), (d), or (e), except to the extent and under the conditions stated in them.

Ct. Ch. R. 6(b). Thus, "[w]hen an act is required to be done within a specified period of time, the Court may, in its discretion, grant an extension or enlarge the time period for good cause shown." *Encite LLC v. Soni*, 2011 WL 1565181, at *2 (Del. Ch. Apr. 15, 2011). But "if a motion to extend a deadline is made *after* the expiration of the prescribed period, the Court may grant the extension 'where the failure to act was the result of excusable neglect.'" *Id.* (quoting Ct. Ch. R. 6(b)(2)).

a. The defendants did not move to enlarge the Witness Deadline before it passed. At this point, the Witness Deadline can only be enlarged if "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." Ct. Ch. R. 6(b)(2).

b. The defendants did not contend that they missed the Witness Deadline due to excusable neglect, thereby waiving the argument. *See Emerald P'rs v. Berlin,* 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."). Nevertheless, the court will consider whether excusable neglect warrants granting the defendants relief from the Witness Deadline.

c. "In evaluating excusable neglect, the trial court generally focuses on two issues: (1) whether a party has demonstrated reasonable diligence; and (2) whether the opposing party will be improperly prejudiced by an extension." *Mennen v. Fiduciary Tr. Int'l of Delaware*, 167 A.3d 507, 511 (Del. 2016). A finding of excusable neglect "is appropriate when there is a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for

noncompliance . . . ." *Id.* at 512 (cleaned up). "A mere showing of negligence or carelessness without a valid reason may be deemed insufficient." *White v. E. Lift Truck Co.*, 2021 WL 81721, at *2 (Del. Super. Jan. 8, 2021) (cleaned up).

d. During oral argument the court asked defense counsel whether the defendants' actions met the excusable neglect standard. He offered two arguments.

e. First, he claimed that the *Sanctions Decision* fundamentally changed the case and that the lawyers did not have sufficient time to wrap their heads around the implications in the two weeks before the Witness Deadline. That argument is not persuasive.

i. On the facts presented, the two weeks between the *Sanctions Decision* and the Witness Deadline were more than enough time. The defendants' litigation team consists of three highly experienced partners at a national law firm, two equally experienced partners at a Delaware law firm, and at least five associates. With that amount of mental horsepower, someone could have been considering whether the defendants needed to present additional witnesses at trial or seek to extend the Witness Deadline. Yet the defendants did not identify the Sanofi Witnesses until *eight weeks* after the *Sanctions Decision*, *six weeks* after the Witness Deadline had passed.

ii. Confirming that the defendants had time to assess that issue, they filed the Application ten days after the *Sanctions Decision* and four days before the Witness Deadline. The Application shows that the defendants had already

thought about the need to marshal additional evidence, including additional witnesses. *See* App. ¶¶ 2, 31. The Application even previewed one of the arguments that the defendants' now make, which is that the defendants must rely on other evidence because of credibility determinations the court supposedly made in the *Sanctions Decision*. *Compare* Opp. ¶ 1, *with* App. ¶ 2. Thus, before the Witness Deadline passed, the defendants were already revising their plans for trial in light of the *Sanctions Decision*.

iii. Because the defendants had already focused on what evidence they would present at trial in light of the *Sanctions Decision*, they could have sought leave to extend the Witness Deadline before it passed. Indeed, during oral argument, the court asked whether the defendants made a tactical decision to file the Application and thereby chose not to devote resources to other tasks. Defense counsel stressed that they had the team necessary to cover multiple bases at once. *Goldstein v. Denner*, C.A. No. 2020-1061-JTL, at 26–29 (Del. Ch. Mar. 29, 2024) (TRANSCRIPT). That is obviously true.

iv. The defendants' first argument thus does not support a finding of excusable neglect. To the extent there was neglect, it was not excusable.

f. Defense counsel also argued during oral argument that their neglect was excusable because the plaintiff had never identified what "inside information" they claimed Denner possessed before acquiring additional stock in May. Defense counsel suggested that the defendants were confident they would prevail at trial because the plaintiff had the burden of proving the existence of inside

information, yet the defendants could not figure out what information the plaintiff was talking about. Defense counsel asserted that once the *Sanctions Decision* shifted the burden of proof, everything changed, because the defendants now have to prove a negative, and they still do not know what the plaintiff has in mind. That argument is preposterous.

i. The plaintiff has contended since the outset of the case that the inside information consisted of Sanofi's expression of interest at $90 per share combined with Sanofi's statement that it was not interested in anything other than a consensual transaction.

ii. The plaintiff's complaint alleged that Denner and Sarissa purchased shares after and because of Sanofi's May 2017 outreach. Compl. ¶¶ 87–94. The complaint alleged that Denner knew "Sanofi was only interested in a 'friendly transaction,'" supporting an inference that Sanofi would not engage unless invited. *Id.* ¶ 91. The complaint alleged that Denner rebuffed Sanofi's outreaches in June and September 2017. *Id.* ¶¶ 100–03. Then, in October 2017, Denner responded to yet another outreach by Sanofi by requesting a proposal. *Id.* ¶ 104. The complaint alleged that Denner rebuffed Sanofi's earlier overtures to ensure that the six-month short-swing profit rule would expire by the time any deal closed. *Id.* ¶ 105.

iii. Count Three of the complaint reiterated these allegations and identified the nature of the inside information that Denner allegedly possessed:

> After receiving the offer from Sanofi in May, Denner purchased 1,010,000 shares of Bioverativ stock through Sarissa. Denner and Sarissa were in possession of, and were benefiting from, material, non-public Company information when purchasing those shares. Denner and

> Sarissa were motivated, in acquiring those shares, by Denner's knowledge of Sanofi's expression of interest.

Id. ¶ 175. The complaint also identified Denner's alleged motivation and how he planned to circumvent the short-swing profit rule.

> Denner's motivation was to sell this stock for a quick profit. Denner was instrumental in bringing about the Acquisition. He had multiple discussions with Sanofi's advisor, Lazard – which he had worked with at Ariad just months earlier – and concealed several of those discussion from the Board. Denner invited Sanofi to make an offer in October that contemplated a sale without any pre-signing market check, without Board approval. He pressed for and then purportedly approved granting Sanofi exclusivity so that there was no competitive (and thus prolonged or delayed) bidding process for Bioverativ, because that ensured Denner and Sarissa would lock in a substantial and quick profit on the 1,010,000 shares he secretly bought several months earlier.

Id. ¶ 177.

iv. The complaint further alleged that Sarissa knowingly participated in Denner's breach of duty: "Denner purchased 1,010,000 Bioverativ shares through Sarissa. Denner and, therefore, Sarissa were in possession of, and were benefiting from, material, non-public information when purchasing those shares." *Id* ¶ 183. Thus, "[g]iven the imputation of Denner's knowledge and conduct, Sarissa knowingly participated in Denner's breach of fiduciary duty." *Id.*

v. Not only was this material alleged in the complaint, but the plaintiff reiterated those contentions in his brief in opposition to the defendants' motion to dismiss. Dkt. 31. at 1–6, 12–13, 17–18, 75–81, 85–86. The plaintiff articulated the theory at oral argument. Dkt. 72 at 52–53. Denner and Sarissa's counsel responded to the plaintiff's theory during oral argument. *Id.* 27, 32–34.

vi. Relying on the allegations in the complaint, the court issued two decisions that recognized the plaintiff's allegations about the initial approach and held that they were reasonably conceivable. *Sales Process Decision*, 2022 WL 1671006, at *1, *6–7; *Insider Trading Decision*, 2022 WL 1797224, at *1–2, *9.

vii. In the *Sales Process Decision*, the court described the allegations comprising the factual predicate for the case, including the plaintiff's insider trading theory. 2022 WL 1671006 at *1, *6–11. The court held that the complaint "supports an inference that Denner caused Sarissa to buy the shares based on inside information about Sanofi's interest in acquiring the Company. The complaint supports an inference that Denner caused Sarissa to buy the shares with the intention of making a quick profit on the sale of the Company." *Id.* at *8. The court also held that the complaint plead facts giving rise to a reasonable inference that Denner invited Sanofi's bid in October 2017 because "from Denner and Sarissa's perspective . . . October 2017 was an advantageous time for a sale, because the Section 16 disgorgement period was about to expire. That meant Sarissa could profit from a quick deal." *Id.* at *10.

viii. In the *Insider Trading Decision*, the court again described the plaintiff's theory of the case. Again drawing from the allegations in the complaint, the *Insider Trading Decision* reiterated the factual predicate underlying the plaintiff's insider trading theory. 2022 WL 1797224, at *1–2, *5–10. The court held that the complaint supported a reasonable inference that "Sanofi's initial expression

of interest represented material, non-public information in the sense required for a *Brophy* claim." *Id.* at *9. The court also held that "[i]t is reasonably conceivable that Denner's stock purchases in May 2017 were motivated by Sanofi's initial expression of interest." *Id.*

ix. The plaintiff is still pursuing the same theory he identified at the outset of the case. When the court asked defense counsel at oral argument what had changed about the plaintiff's theory, counsel argued that the complaint had asserted the insider trading was not disclosed. Counsel noted that the defendants filed Form 4s disclosing their trades. But those disclosures did not change the plaintiff's theory of the case or the nature of the inside information at issue. Nor did the *Sanctions Decision* have any bearing on that change. The defendants knew about the Form 4s since they filed them, and they argued when briefing the Sanctions Motion that the Form 4s defeated the non-disclosure aspect of the case. Dkt. 199 ¶ 1.

x. The defendants' assertion that they do not know what material, nonpublic information the plaintiff is talking about is not credible. It is frankly frivolous.

xi. Because the same insider information theory has been present in the case literally since the plaintiff filed the operative complaint, it does not support a claim of excusable neglect. Having known from the start about the plaintiff's theory, the defendants could amass a discovery record to defeat it. They could and did obtain documents form Sanofi. They could have deposed the Sanofi Witnesses. They could have made arrangements with Sanofi for the Sanofi Witnesses

to come to trial. They did none of those things. Nor did they act within the two weeks after the court issued the *Sanctions Decision* and before the Witness Deadline. They did not identify the Sanofi Witnesses until six weeks later, after the parties had exchanged multiple drafts of the pre-trial stipulation.

xii. A frivolous argument about the plaintiff's supposed change in position does not give rise to excusable neglect.

g. There is also a third issue that the defendants might have framed as an argument based on excusable neglect, even though the defendants did not present it that way. The defendants claim that they suddenly learned about a new theory of the case when the plaintiff proposed to add every conversation between Sanofi's financial advisor and Denner into the stipulated fact section of the pre-trial stipulation. Opp. ¶ 3. The defendants also stress that the plaintiff has refused to waive the ability to argue that an agreement, arrangement, or understanding existed between Denner and Sanofi or its financial advisor about when Sanofi would engage. According to the defendants, the plaintiff must have invented a new conspiracy theory. *Id.* ¶ 4.

i. For starters, the complaint fairly supported an inference that Denner and Sanofi, either directly or through Sanofi's financial advisor, could have reached some understanding that led to Sanofi re-engaging. *See* Compl. ¶ 177. That idea has been in the case from the start. There is nothing new about it.

ii. Next, even if the plaintiff's theory deviated to some degree from the allegations in the complaint, that would not matter. Under the system of

civil litigation ushered in by the Federal Rules of Civil Procedure, pleadings serve a notice function. *See In re McDonald's Corp. S'holder Deriv. Litig.*, 289 A.3d 343, 375–76 (Del. Ch. 2023); *HOMF II Inv. Corp. v. Altenberg*, 2020 WL 2529806, at *26, *36 (Del. Ch. May 19, 2020), *aff'd*, 263 A.3d 1013 (Del. 2021). That system of notice pleading rejects the antiquated doctrine of the "theory of the pleadings," i.e., the requirement that a plaintiff must plead a particular legal theory. *HOMF*, 2020 WL 2529806, at *26. The Federal Rules of Civil Procedure "effectively abolished the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief." 5 Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer, *Federal Practice and Procedure* § 1219 (4th ed.), Westlaw (database updated Apr. 2023) (footnote omitted). Under the Federal Rules of Civil Procedure, "particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not." *Gins v. Mauser Plumbing Supply Co.*, 148 F.2d 974, 976 (2d Cir. 1945) (Clark, J.). "[T]he federal rules—and the decisions construing them—evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining a defense upon the merits." 5 Wright & Miller, *supra*, § 1219 (footnote omitted). *See generally Johnson v. City of Shelby*, 574 U.S. 10, 11–12 (2014) (per curiam) (reversing dismissal of complaint for failure to articulate a claim under 42 U.S.C. § 1983; explaining that the Federal Rules of Civil Procedure rejected the "theory of the

pleadings" and "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.").

iii. Delaware adopted and maintains rules of civil procedure modeled on the federal rules, and Delaware's rules take the same approach to pleadings. *McDonald's*, 289 A.3d at 375–76. That means the pleadings are not a straitjacket for discovery and trial. At the pleading stage, parties can plead in the alternative. Ch. Ct. R. 8(e)(2). During discovery, parties are free to test any number of theories for their case. At trial, a plaintiff can present theories so long as the defendants had fair notice. Here, the plaintiff's theories have been the same since day one.

iv. At best for the defendants, the plaintiff's proposed stipulations of fact suggest an intent to emphasize certain facts and not others. That does not constitute a change of position that would enable the defendants to add additional third-party witnesses six weeks after the Witness Deadline. The defendants had every opportunity to identify the witnesses they wished to call on the Witness Deadline.

v. Finally, to the extent the defendants object to the plaintiff's efforts to put the communications between Denner and Sanofi's financial advisor in the pre-trial stipulation, they are deviating from what this court expects from officers of the court. Parties regularly stipulate to the dates and times of phone calls and meetings between counterparties to a transaction. Doing so streamlines the presentation of evidence at trial and in the parties' briefing. It also provides the court

with a rough timeline in advance of trial. There is nothing suspicious about including facts about communications between Denner and Sanofi's financial advisor in the pre-trial stipulation. Nor is there anything suspicious about the plaintiff's counsel refusing to waive their right to present evidence or make arguments before hearing witnesses at trial.

h. The defendants therefore cannot rely on the concept of excusable neglect to avoid the Witness Deadline. The defendants did not invoke excusable neglect, and the facts do not support it.

8. Finally, the defendants argue that they will suffer prejudice if the court does not permit them to call the Sanofi Witnesses. By contrast, they say, the plaintiff will not suffer any prejudice. That is not the relevant standard. Excusable neglect is the standard, and the defendants did not invoke it or establish it. But even if prejudice were the standard, the defendants have it backwards.

a. Allowing the defendants to add the Sanofi Witnesses would prejudice the plaintiff. The parties' pre-trial briefs are due in less than two weeks. Requiring the plaintiff to prepare for and take three depositions, then incorporate any new facts into their pre-trial brief, would impose significant burdens at a critical phase of the case. Devoting resources to those issues will divert resources from other matters. Trial begins in less than a month, and time is a finite resource. Permitting the defendants to call the Sanofi Witnesses would prejudice the plaintiff by changing the status quo to the plaintiff's detriment.

b. The defendants, by contrast, are not prejudiced—at least relative to the status quo. They are prejudiced relative to a world where they had properly and timely secured the attendance of the Sanofi Witnesses, but that is not the current world. The defendants are only prejudiced relative to a hypothetical world that does not exist. Denying the motion maintains the status quo. It does not prejudice the defendants relative to that baseline.

c. Importantly, to the extent the defendants cannot call the Sanofi Witnesses or introduce evidence that they might provide, the defendants only have themselves to blame. The defendants could have pursued additional discovery from Sanofi at any point in the case. As noted, the plaintiff's theory of the case did not change. The defendants also could have identified the Sanofi Witnesses after the *Sanctions Decision* and before the Witness Deadline. Or they could have asked the court to extend the Witness Deadline before it passed. Instead, the defendants find themselves in a situation of their own making. Denying them relief lets them lie in the bed they made.

9. As a policy matter, there are sound reasons for enforcing the Scheduling Order and not permitting the defendants to seek additional evidence in light of the *Sanctions Decision*.

a. "Sanctions serve three functions: a remedial function, a punitive function, and a deterrent function." *Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009). A sanctions ruling cannot serve those purposes if suffering the

sanctions equates to good cause to obtain replacement evidence. Such a rule would permit the sanctioned party to undo the consequences of the sanction.

b. The defendants argue that preventing them from calling the Sanofi Witnesses at this late date functionally increases the level of the sanctions that the court imposed. But that is not so. Enforcing the Witness Deadline and not allowing the defendants to identify new witnesses one month before trial maintains the level of the sanctions that the court imposed. The defendants' proposal would undercut the sanctions that the court imposed.

c. By definition, a sanctions ruling imposes prejudice on the sanctioned party. That is the point. But the sanctioned party does not get to transform that prejudice into grounds for special treatment. If discovery is ongoing, then the sanctioned party can pursue additional evidence. But when discovery has closed, a sanctions ruling is not a license to request a do-over. The *Sanctions Decision* therefore does not justify disregarding the Witness Deadline. Instead, granting leave from the Witness Deadline and permitting the Sanofi Witnesses to appear would undermine the *Sanctions Decision*.

10. The motion in limine is therefore granted. The defendants cannot call the Sanofi Witnesses to testify at trial.

/s/ J. Travis Laster
Vice Chancellor Laster
April 1, 2024