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Case Number 309,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN M. KIHM, individually and on behalf of all others similarly situated, Appellant, Plaintiff-Below, v. DAVID M. MOTT, LEON O. MOULDER, DR. MARY LYNNE HEDLEY, TIMOTHY R. PEARSON, KAVITA PATEL, LAWRENCE M. ALLEVA, GARRY A. NICHOLSON, PASCALE WITZ, DR. BETH SEIDENBERG, NEW ENTERPRISE ASSOCIATES 13, L.P., NEA PARTNERS 13, L.P., NEA 13 GP, LTD., NEA 15 OPPORTUNITY FUND, L.P., NEA PARTNERS 15-OF, L.P., NEA 15 GP, LLC, NEW ENTERPRISE ASSOCIATES, INC., NEA MANAGEMENT COMPANY, LLC, CITIGROUP INC., and CITIGROUP GLOBAL MARKETS, INC., Appellees, Defendants-Below.	No. 309, 2021 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2020-0938-MTZ **PUBLIC VERSION** **FILED ON: DECEMBER 1, 2021**

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDING

This appeal challenges the Vice Chancellor's dismissal of a complaint under *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015). The dismissal contradicts the rule that non-disclosure of "material information undermining the integrity or financial fairness of the transaction" precludes stockholder ratification. *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 898 (Del. Ch. 1999), *quoted in Morrison v. Berry*, 191 A.3d 268, 275 n.18 (Del. 2018), and *Corwin*, 125 A.3d at 312 n.27. The non-disclosures central to this appeal go directly to the integrity of the challenged transaction, as well as its financial fairness.

The challenged transaction is the sale of Tesaro, Inc. ("Tesaro" or the "Company") to GlaxoSmithKline, plc ("GSK") for $5.1 billion, which was publicly announced on December 3, 2018. (A430 ¶1.) Tesaro's value turned on the potential of its cancer drug Zejula, which was in clinical trial for first-line maintenance therapy for ovarian cancer and wider applications. (A430 ¶1.) Tesaro management expected positive results in 2019 from the clinical trial. (A430 ¶1.) In 2018, Tesaro's board of directors oversaw the exploration of various financing transactions, any of which would fund Tesaro through completion of the clinical trial. (A482-86 ¶¶143-55.)

The financing transactions were disfavored by Tesaro's largest stockholder, a fund of global venture capital firm New Enterprise Associates (together with its affiliates, "NEA"), which possessed deep connections with Tesaro's senior officers and many of its directors, including Chairperson David Mott, who was a general partner of NEA. (A430-32 ¶¶3-4; A434-45 ¶¶11-58.) The Verified Class Action Complaint (the "Complaint") details how NEA deeply preferred a sale of Tesaro in 2018. NEA was planning on launching a huge fund in 2019. To meet NEA's fundraising goals and maintain its precarious position in the uppermost tier of venture capital firms that can charge investors a [redacted] carry, NEA needed to boost year-end returns for its main fund invested in Tesaro and tout Tesaro as a successful investment and exit. (A430-32 ¶3; A451-69 ¶¶81-113; A516-32.) Tesaro's Schedule 14D-9 respecting GSK's tender offer (the "14D-9") did not disclose NEA's plan to launch a new fund in early 2019, or otherwise disclose Mott's and NEA's unique interest in publicly announcing the sale of Tesaro by the end of 2018. (A500-01 ¶¶202-03.)

The Vice Chancellor states that NEA "is everywhere and nowhere" in the Complaint, and that the Complaint "does not allege that Mott contributed to any deficiency in the sale process, or that NEA was involved at all." (Mem. Op. at 1, 57.) This is error. The Complaint alleges that Mott inferably knew about a critical undisclosed fact: "that Tesaro management had provided [an investment banker] with valuation materials for delivery to GSK" in June 2018, months before the board authorized any sale process. (A487-88 ¶159; A499 ¶193.) Plaintiff is entitled to the very reasonable inference that Tesaro management's overture to GSK did not happen behind Mott's back. The Complaint pleads that Mott was close to everyone involved in this undisclosed overture—the senior officers of Tesaro, the investment banker who carried it out, and GSK (A434-35 ¶¶11-12; A435 ¶¶15-16; A436 ¶¶21-22; A437 ¶¶24-26; A486-87 ¶157; A487-88 ¶159; A254)—and that the overture enabled NEA's favored type of transaction within NEA's favored time frame. The Vice Chancellor erred in characterizing the Complaint as excusing Mott and NEA and instead "plac[ing] blame squarely on [the investment bank], Hite, and Tesaro management." (Mem. Op. at 57.) To the contrary, the Complaint alleges that Mott worked with senior Tesaro management, a conflicted investment banker, and GSK to facilitate a sale overture that the full board had not authorized and did not learn about until just before ultimate approval of the challenged transaction. (A487-88 ¶¶158-59; A508 ¶230; A257.)

The Vice Chancellor further erred by holding that NEA's undisclosed preference for a near-term sale is immaterial because the Complaint supposedly fails to allege any "bad acts" or "any wrongdoing" related to the overture to GSK.

(Mem. Op. at 57 & n.160.) The overture by Tesaro's senior officers, through the investment bank, with Mott's knowledge, was outside of any board-approved sale process and it succeeded in eliciting acquisition interest from GSK, thereby enabling a near-term, single-bidder sale process that favored GSK at a time when Tesaro's stock price was temporarily depressed due to the pendency of the clinical trial and the investing public's lack of insight into the prospects for Zejula. Mott's influence over the many NEA-affiliated directors on the Tesaro board of directors helped secure a sale on NEA's favored time frame. The omitted facts about (i) the unauthorized June 2018 overture to GSK and (ii) NEA's plan to raise a new fund in early 2019 (which highly incentivized Mott to secure a sale of Tesaro in 2018) are material because they create the basis for a *Revlon* claim; they are "troubling facts regarding director behavior" that "would have helped the stockholder to reach a materially more accurate assessment of the probative value of the sale process." *Morrison*, 191 A.3d at 284.

This Court has recognized that directors may be conflicted due to "personal reasons for pushing a near-term sale." *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 826 (Del. 2015). As stated in a recent, prominent case: "The desire to wrap up an existing fund or to provide potential investors with attractive realizations while raising a new fund can affect a fund manager's approach to achieving liquidity for an investment." *Firefighters' Pension Sys. of City of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212, 258 (Del. Ch. 2021). Conflicted investment harvesting by Mott and NEA is well pled here. The Vice Chancellor erred in rejecting this liability theory under the rubric of a *Corwin* analysis by incorrectly holding that the Complaint fails to plead any nexus between Tesaro's sale process and the unique economic motivations of Mott and NEA.

Separately, the Vice Chancellor erred in holding that disclosure of the financial projections that Tesaro management updated and provided to the board of directors in November 2018 as part of management's periodic updating of its long-range plan (the "November LRP projections") would not have altered the total mix of information. (Mem. Op. at 32-42.) The 14D-9 disclosed two other sets of projections: the supposedly "optimistic, but achievable" Case A projections and "more conservative" Case B projections, both of which were used by Tesaro's financial advisors for their valuation work. (A404.) The Vice Chancellor reasoned that the November LRP projections did not need to be disclosed because they were only "marginally higher" than the Case A projections. (Mem. Op. at 39-40.)

This holding is erroneous because disclosure of the contemporaneously updated November LRP projections would have cast doubt on the integrity of the *Case B projections and any valuation range derived from or bracketed by the Case*

B projections. (A495 ¶182.) The 14D-9 disclosed broad valuation ranges created by Citi—a discounted cash flow ("DCF") range and a sum-of-the-parts ("SOTP") range—the lower bounds of which were derived from the Case B projections. Centerview's DCF range based on the Case B projections was entirely below the deal price.

The 14D-9's omission of the November LRP projections was intended to mislead reasonable stockholders into believing that Tesaro's actual prospects lay somewhere between the "optimistic" Case A projections and the "conservative" Case B projections. If the 14D-9 had disclosed the substance of the November LRP projections, and the fact that they represented the updated version of what management historically presented to the board of directors in the ordinary course, stockholders would have had good reason to question the characterization of the Case A projections as "optimistic," the bona fides of the Case B projections, and any valuation range that was capped by the Case A projections or derived from the Case B projections. The creation of the Case A and Case B projections and non-disclosure of the November LRP provisions reflects a scheme to mislead stockholders about Tesaro's value.

SUMMARY OF ARGUMENT

1. The business judgment rule only can be invoked for judicial evaluation of a sale process if there was a "fully informed, uncoerced stockholder vote[]," and not "if troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder[.]" *Corwin*, 125 A.3d at 312. The non-disclosure of "material information undermining the integrity or financial fairness of the transaction" precludes stockholder ratification. *Huizenga*, 751 A.2d at 898. Material undisclosed facts here include (i) the outreach extended to GSK respecting a potential sale of Tesaro outside of a board-approved sale process; (ii) the planned launch of a new NEA fund in early 2019; and (iii) the existence and substance of the November LRP projections.

STATEMENT OF FACTS

A. Tesaro and Its Many NEA-Affiliated Fiduciaries

Tesaro is an oncology-focused biopharmaceutical company founded in 2010 with backing from NEA, one of the world's largest venture capital firms. (A430-32 ¶3; A448 ¶73.) NEA invested again in Tesaro in 2011 and 2012, owning over 50% of its common stock as of Tesaro's June 2012 IPO. (A449 ¶¶ 74-75.) NEA was always the dominant investor in Tesaro, even after its ownership stake declined to approximately 19% in 2017. (A449 ¶¶ 75-76.) Two other venture capital firms owned significantly smaller stakes. (*Id.*)

NEA's dominant position and longtime investment in Tesaro allowed NEA to cultivate deep relationships with many of Tesaro's officers and directors by the time of the sale to GSK in 2018:

<u>David M. Mott</u>, Tesaro's longtime chairperson, was a longtime general partner of NEA who led its health care investment practice. (A434 ¶11.)

<u>Leon O. Moulder</u>, a Tesaro co-founder in 2010 and its CEO and a director from its inception, was the longtime Chairman of the Board of another biopharmaceutical company in which NEA was a lead investor with a substantial ownership stake. (A434-35 ¶¶12, 15.) Additionally, because Moulder had plans to start his own biotechnology investment firm, which he formed in March 2019, just

after Tesaro's sale to GSK, it was important for Moulder to secure substantial liquid assets (such as the $166 million he received from the sale of Tesaro) and to stay in the good graces of NEA, one of the largest biotechnology venture capital firms. In 2019, Moulder became an NEA venture advisor. (A435 ¶¶16-17.)

Dr. Mary Lynne Hedley, a Tesaro co-founder and its President and COO and a director from inception, had been appointed in April 2017 to the board of another biopharmaceutical company in which NEA was the largest stockholder. (A436 ¶¶18, 21.)

Timothy R. Pearson, who became CFO of Tesaro in May 2014, was a longtime former colleague of Mott at a company Mott had founded. Pearson joined the board of an NEA-controlled company in March 2014, and he joined the board of another NEA portfolio company in May 2016. (A436-37 ¶¶22, 24, 26.)

Kavita Patel, who began serving as a Tesaro director in March 2016, joined NEA as a Venture Partner on Mott's healthcare team in November 2017, joined the board of another NEA portfolio company in February 2018, and joined the board of another NEA portfolio company in February 2019. (A438-40 ¶¶28, 30, 33.)

Lawrence M. Alleva, who began serving as a Tesaro director in March 2012, had previously served as an accountant to various pharmaceutical and biotechnology clients, including Abraxis BioScience, Inc. when Moulder was its

CEO, MedImmune, Inc. when Mott was its CEO, Cubist Pharmaceuticals, Inc. when Moulder was a director, and Shire plc when Mott was a director. (A440-41 ¶37.) Alleva joined the boards of four other NEA portfolio companies during his tenure at Tesaro, and in June 2019, he joined the board of another NEA portfolio company. (A440-42 ¶¶35, 37-43.)

Garry A. Nicholson, who began serving as a Tesaro director in May 2015, became President, CEO, and a director of an NEA portfolio company for which Mott was a director in September 2015, until it went out of business in 2018. (A442-43 ¶¶44-50.) In September 2018, Nicholson was appointed to the board of a publicly held company in which a venture capital fund founded by Mott was a significant stockholder, which suggests that Nicholson's appointment was on Mott's recommendation. (A443 ¶47.) Nicholson joined the boards of other NEA portfolio companies in February 2019 and January 2020. (A442-44 ¶¶44, 46-47, 49-50.)

Pascale Witz began serving as a Tesaro director in June 2018, a year after she joined the board of another NEA portfolio company. (A443 ¶¶51-52.)

Dr. Beth Seidenberg, who began serving as a Tesaro director in June 2011, was at all relevant times a partner with venture capital firm Kleiner Perkins Caufield & Byers ("Kleiner Perkins"). (A444 ¶54.) In September 2018, Seidenberg founded venture capital firm Westlake Village BioPartners and began "transitioning out" from Kleiner Perkins. (*Id.*) By that time, Kleiner Perkins owned just 4% of the Company's shares, and it was the only venture capital investor other than NEA with Board representation. (A444 ¶¶56-57.) NEA and Kleiner Perkins had deep co-investment relationships, and Seidenberg and Mott had sat together on various boards. (A445 ¶58.) Seidenberg's founding of a new venture capital firm in late 2018 focused on the life sciences sector made her disinclined to alienate NEA, given its prominence in that sector. (*Id.*)

B. The Import of Tesaro To NEA

New Enterprise Associates 13, L.P. ("NEA 13") directly owned 9,681,039 Tesaro shares at the time of the challenged transaction. (A445 ¶60.) NEA 15 Opportunity Fund, L.P. ("NEA 15") directly owned 739,516 Tesaro shares. (A446 ¶63.) Those 10,420,555 Tesaro shares were cashed out for $75 per share, or over $781 million, in the sale to GSK. (*See* A430 ¶1; A448 ¶70.)

Through much of 2017, NEA appeared brilliant for having decided to retain a large stake in Tesaro, cultivate relationships with numerous Tesaro directors and officers, and keep Tesaro independent. Tesaro's stock price skyrocketed to over $190 per share on February 1, 2017, and it remained over $120 per share as of September 2017. (A450 ¶78.) By the beginning of 2018, however, Tesaro's stock price had dropped to approximately $70 per share. (A450 ¶79.) By August 2018, Tesaro's stock price had plummeted to approximately $30 per share. (*Id.*) Nearly $2 billion of investment value for NEA had evaporated in 18 months. (*Id.*)

The plunge in Tesaro's stock price came at a horrible time for NEA. Throughout 2018, NEA was preparing to raise its next and largest fund, which would be known as New Enterprise Associates 17, L.P. ("NEA 17"). (A451-52 ¶81.) Potential investors in NEA 17 would be scrutinizing the 2018 year-end returns of NEA 13, which was NEA's most mature fund post-dating the global financial crisis. (*Id.*) NEA 13's returns were mediocre. (*Id.*)

The Complaint explains in exhaustive detail why engineering the near-term sale of Tesaro was critical to delivering higher returns to investors in NEA 13, to enlisting new investors in NEA 17, and thus to the fate of NEA. (A451-68 ¶¶81-113.) NEA had a vaunted history, but its longtime managing partner had retired in 2017 after raising NEA's sixteenth fund. A new sole managing general partner, Scott Sandell, was raising NEA 17. (A453 ¶¶83-85.) Other major venture capital firms had struggled after the retirement of generational leaders. (A454 ¶88.) A major problem confronting Sandell and NEA was that it had become increasingly difficult to trigger exits from portfolio companies within the lifespan of a venture capital fund. The problem plagued the entire venture capital industry, but it was recognized publicly as acute for NEA. (A453-54 ¶¶86-87.) Raising NEA 17 in early 2019 was a major litmus test for Sandell and NEA.

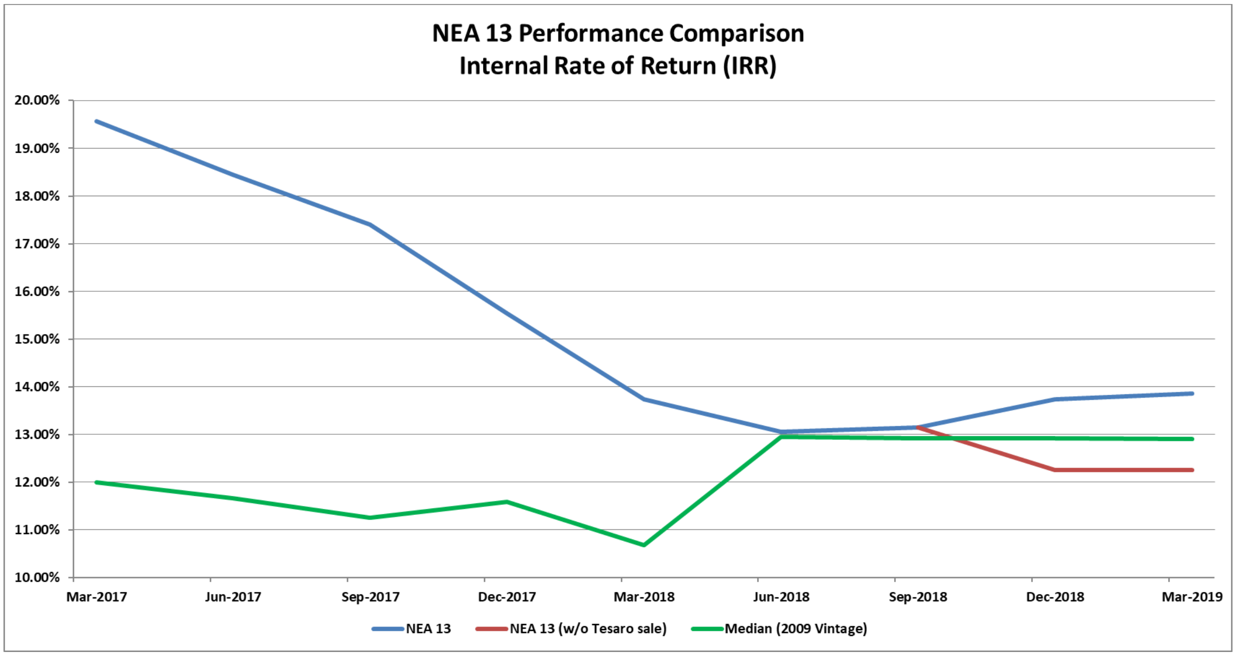
NEA's business model was premised on raising very large venture capital funds that charged investors a super-premium [redacted] carry (*i.e.*, the percentage retained by NEA on the gains achieved by the fund), instead of the industry norm of a 20% carry. (A455-57 ¶¶89-92.) Historically, NEA had ranked at the bottom of the exclusive cohort of venture capital firms that could charge super-premium carry. (*Id.*) Charging a super-premium carry was only possible for venture capital firms with excellent track records, a stable management team, and a happy investor base from prior funds. (*Id.*) Yet, NEA had a new generation of leadership, a reputation for struggling to return capital to old investors, and less than stellar returns for its mature funds, such as NEA 13. (*Id.*)

Venture capital funds are evaluated based on their performance relative to other funds launched in the same year, or vintage. (A457 ¶93). Relative fund performance is grouped according to quartile. (*Id.*) Prospective investors in NEA 17 would look closely at whether NEA 13, a mature fund with a 2009 vintage, was top quartile in key metrics. (A457-58 ¶¶93-94.) As of the end of 2017, NEA 13's performance was solidly above median but not quite upper quartile. (A60 ¶97.)

Tesaro represented 30% of NEA 13's unrealized value as of year-end 2017. (A461 ¶100.) Tesaro's precipitously dropping stock price in 2018 meant that NEA 13 was on track to be *below median* as of year-end 2018, and thus a poor performer. (*Id.*) That status would undermine NEA's lofty goals for NEA 17.

NEA was focused in 2018 on delivering returns for current investors so that NEA would be in the best possible situation in 2019 to raise the then-largest venture capital fund and to charge super-premium carry. (A460-61 ¶¶98-99.) NEA was also focused on generating liquidity. (A461 ¶100.) A major innovation implemented in 2018 by NEA was the creation of a new "spin-out" fund that paid $1 billion for NEA's stakes in 31 late-stage portfolio companies, thereby providing liquidity to current investors in older funds such as NEA 13. (A460-61 ¶¶98-99.)

Generating higher returns for NEA 13 meant pushing for the sale of Tesaro, as that was the only investment that would move the needle for NEA 13's results during 2018. (A461 ¶100.) If Tesaro could be sold for a significant premium by the end of 2018, that single transaction would lift NEA 13's returns above median and generate significant additional liquidity for NEA 13's investors. (A461-64 ¶¶100-04.) The chart below shows how the sale of Tesaro lifted NEA 13's internal rate of return as of year-end 2018 from significantly below median to significantly above median (while also providing significant liquidity to investors in NEA 13):



(A461 ¶102.)

The economic incentives for Mott and NEA's other general partners respecting the near-term sale of Tesaro were stark. (A464 ¶105.) A realistic chance of raising a mega-fund with a super-premium carry depended on a near-term premium sale of Tesaro. (*Id.*) If the size of NEA 17 was $1 billion less than planned, and if NEA could not charge investors a super-premium carry, the prospective lost fees to NEA's general partners would be on the scale of approximately *$1-2 billion*. (*Id.*) That magnitude of fees far outweighed the prospective gains to NEA's general partners from selling Tesaro at a higher price in 2019 or later, after the pending clinical trial for Zejula. (A465 ¶106.)

C. Financing the Clinical Trial for Zejula

Tesaro's primary product was Zejula, the brand name for Niraparib, a form of cancer medicine known as a PARP inhibitor. (A469-70 ¶¶114-15.) Following its approval by the FDA in March 2017, Zejula became the leading PARP inhibitor in ovarian cancer treatment. (*Id.*)

In 2018, Zejula was undergoing a clinical trial called the "PRIMA" trial, which was evaluating whether Zejula was effective for first line treatment of ovarian cancer for the population of patients beyond those who carried the mutated BRCA gene. (A480 ¶138.) Depending on the outcome of the PRIMA trial, the market for Zejula potentially could be three times or six to seven times the population with the BRCA mutation. (A480 ¶139.) Success in the PRIMA trial would also augur well for potential indications of Zejula apart from ovarian cancer. (*Id.*) Tesaro management placed 75% odds on the success of the PRIMA trial. (A481 ¶140.) So long as Tesaro could finance itself throughout the duration of the PRIMA trial, Tesaro could await expected positive results by the end of 2019, and be rewarded at that time by investors and market participants. (A481 ¶141.)

Tesaro possessed financing options in 2018, despite the slide in Tesaro's stock price, which made the public capital markets unattractive. (A482-83 ¶¶143-44.) Beginning in March 2018, Tesaro explored co-development/co-promote collaboration opportunities respecting Zejula. (A483 ¶145.) The 14D-9 discusses a series of communications between Tesaro and various other companies over a period of several months about potential transactions involving the licensing of the Company's intellectual property. (A363-71.) Three main options emerged.

One option was a co-development/co-promote proposal from Bristol Myers Squibb ("BMS") respecting Zejula that would cover all indications except prostate cancer and all nations but Japan, South Korea, Taiwan, Russia, Australia and China (the "BMS Collaboration"). (A483 ¶145.) Another option was granting a synthetic royalty option for Zejula and certain proprietary molecules to Royalty Pharma (the "RP Royalty Transaction"). (A484 ¶146.) A third option was a "Chinese NewCo" transaction, which contemplated that Chinese NewCo would develop Tesaro's proprietary molecule TSR-042 for multiple indications in China. (A486 ¶152.) Chinese NewCo was projected to IPO in two to three years, with Tesaro owning approximately 25% of the new entity. (*Id.*)

The BMS Collaboration and the RP Royalty Transaction each would have created significant impediments to a liquidity event, which made them undesirable options for NEA, given NEA's intense desire to deliver liquidity to investors in NEA 13 in 2018. The BMS Collaboration would effectively create a 50/50 joint venture between Tesaro and BMS, rendering a subsequent change-in-control transaction for Tesaro exceedingly difficult with any party other than BMS. (A485 ¶150.) The RP Royalty Transaction contemplated a giant payment in the event of a change-in-control. (A485 ¶151.)

D. Tesaro's Successful, Surreptitious, Undisclosed Overture to GSK

The 14D-9 identifies various discussions between Tesaro and GSK about a potential co-development/co-promote collaboration respecting Zejula. According to the 14D-9, those discussions occurred on June 10, July 21, August 14, September 3, September 12, September 17, and September 24, 2018. (A365-67.) The parties signed a confidentiality agreement on August 8, 2018. (A366.) There is no disclosed reference to a potential acquisition of Tesaro by GSK until September 24, 2018, when "representatives of Citi" discussed the idea with GSK's CFO. (A367; *see* A488 ¶160.)

GSK had no oncology platform for a collaboration. (A488 ¶161.) On information and belief, the disclosed discussions respecting a Zejula collaboration were designed to transfer confidential due diligence about Zejula and other immuno-oncology product candidates to GSK in aid of a potential acquisition bid. (*Id.*)

This hypothesis is bolstered by a series of undisclosed facts bearing on how Tesaro senior management and GSK used Christopher Hite, Global Head of

Healthcare Investment Banking at Citi, as an intermediary for a potential acquisition:

- "[I]n June [2018], Citi worked with senior Management of [Tesaro] to prepare a public information profile of the Company that was also reviewed with [GSK]. These materials included an overview of the Company, including product pipelines and Wall Street analysts' perspectives." (A257; *see* A487 ¶158.)
- "Chris Hite is the senior Citi member of the [GSK] coverage team and as such regularly has strategic discuss[ions] with [GSK] concerning M&A and capital structure. In connection with such discussions, in June 2018, Chris Hite reviewed materials … with [GSK] that included a screen of all biotech companies that had greater than $500 million in revenue in 2024, focused on oncology, and where their products were not substantially partnered. The … materials also included a general overview of the biopharma landscape, including public information overviews of [Tesaro] and multiple other industry participants. The … materials also had hypothetical acquisitions of two larger biotech companies compared to a hypothetical acquisition of three smaller companies that was termed a 'string of pearls' scenario…. In

one version of the … materials, [Tesaro] was included as one of the companies aggregated into the string of pearls." (A256-57; *see* A487 ¶158.)

The combination of Tesaro's outreach to GSK through Hite and direct discussions with GSK about a co-development/co-promote deal allowed GSK to receive confidential due diligence information from Tesaro without a competitive, board-approved sale process. (A488 ¶¶160-61.)

The limited record supports the allegation that Mott knew about the overture by Tesaro senior management to GSK, through Citi's Hite, to induce an acquisition bid. (A487-88 ¶159.) Mott was close to Hite. Hite and Citi had pursued a failed sale process for Tesaro in 2017, and Citi was a regular provider of investment banking services to Tesaro. (A486 ¶157.) Citi acknowledged that it "maintained a close relationship with [Tesaro's] senior management team for the past 16 years and has worked with the Company's Chairman, Dave Mott, for the past 18 years." (A254; *see* A487 ¶158.)

Mott and NEA were also close to GSK. In July 2018, Adaptimmune, an NEA portfolio company chaired by Mott, concluded a successful collaboration with GSK that had begun in 2014. (A487 ¶159.) A longtime partner of Mott's in NEA's healthcare practice had been a longtime external consultant to GSK, before his 2017 appointment as chair of the U.S. Food and Drug Administration. (*Id.*)

Mott was close to Tesaro's senior management team, who shared with Mott a common interest in a near-term sale to GSK. The sale allowed Moulder to liquidate his stake in Tesaro for over $150 million and then form a biotechnology investment firm. (A435 ¶¶13, 17.) Moulder was rewarded with a role as an NEA venture advisor shortly after the sale. (A436 ¶16.) Hedley liquidated her stake for over $100 million and stayed with GSK to run its oncology business outside of Moulder's shadow. (A436 ¶¶19-20.) Pearson pocketed over $15 million and maintained his connections with Mott and NEA. (A437 ¶¶23-26.) As discussed above, the incentives for Mott and NEA similarly favored a near-term sale of Tesaro.

The questionably timed, undisclosed, unauthorized overture to GSK, and the seemingly pretextual collaboration discussions with GSK, bore fruit. On September 28, 2018, Hite informed Tesaro's board of directors that GSK was looking to make an acquisition proposal. (A489 ¶163; A235-36.) The board noted that GSK "lacked any current oncology R&D or commercial resources or expertise, which would make [GSK] less attractive as a potential collaboration partner," and therefore authorized Tesaro management to inform GSK that Tesaro would consider an acquisition proposal, as opposed to a collaboration proposal. (*Id.*)

GSK made its initial proposal to acquire Tesaro for $66 per share on October 24, 2018. (A489 ¶164.) Without board authorization, Citi reached out to seven strategic parties respecting a potential acquisition, but not Roche Holding AG, which analysts considered the most logical likely acquiror. (A490 ¶168.) On November 18, 2018, Citi reported that no party other than GSK was interested in purchasing Tesaro, and GSK delivered a revised proposal at $69 per share and requested a two-week exclusive negotiating period. (A491 ¶172.) The Board agreed to exclusivity on November 21, 2018, when GSK raised its offer to $75 per share. (A491 ¶173.) The acquisition agreement was finalized at that price and approved by the board on December 2, 2018. (A491 ¶¶172-73.) GSK's acquisition of Tesaro was consummated by merger upon the expiration of GSK's tender offer on January 18, 2019. (A501 ¶206.)

E. The November LRP, Case A, and Case B Projections

Tesaro's standalone operations were guided by its long-range plan, or LRP, which reflected assumptions respecting the approval, production and commercialization of Tesaro's products. Tesaro's board of directors was regularly asked to review the LRP and to approve the Annual Operating Plan ("AOP"), which set the first-year baseline for the LRP. For example, on February 21, 2018, the board approved the Updated 2018 AOP, after reviewing presentation materials that projected cash flows through 2020. (A37; A80-94.) At a board meeting on August 2, 2018, the board considered the 2019-2023 Strategic Plan (*i.e.*, the then-LRP). (A95-233; A471-79 ¶¶120-33.)

The August 2018 board presentation included two scenarios: (i) an all-in, unadjusted plan that assumed unlimited funding; and (ii) a risk adjusted, or "gated" LRP that gated expenses to reflect "more realistic opex spend levels." (A471 ¶121.) The LRP predicted that focusing on lung and gynecologic cancers could lead to up to thirteen launches by 2023, and also charted a course for expansion into breast cancer. (A472-78 ¶¶122-31.) The LRP predicted base case global revenues of greater than $3 billion by 2024 on a risk-adjusted basis. (A478-79 ¶¶132-33.)

On October 20, 2018, Tesaro management presented the board with a revised outlook for year 2019 of the LRP. (A479 ¶¶134-35.) Denoted the "Gated LRP 2," these October 2018 revisions "gated" more of Tesaro's expenses in order "to live within our existing capital for the next twelve months." (*Id.*)

At the Tesaro board meeting of October 29, 2018, Pearson "reviewed management's ongoing update" of the LRP and further advised that management was preparing two potential cases of projections for the Board—"one based on relatively optimistic assumptions and one based on assumptions with higher probability of achievement"—and that management "was working with Citi to model the two cases." (A238.) The board was presented with *three* new sets of projections when meeting on November 7-8, 2018: (i) the November LRP; (ii) Case A; and (iii) Case B. (A480 ¶137; A492-93 ¶¶177-78; A29-34; A242-49.) One document entitled "LRP Case Review" compares the three sets of projections (A242-49), two pages of which are reprinted in the Complaint. (A492-93 ¶¶177-78; A243-44.)

These slides reflect that the projected net revenue for 2028, adjusted for probability of technical and regulatory success ("PTRS"), had been updated from $4.578 billion under the prior version of the LRP to $4.615 billion under the November LRP. (*Id.*) Case A stripped out from the latter number projected revenue for the treatment of breast cancer and platinum resistant ovarian cancer ("PROC") and projected net revenue for 2028, adjusted for PTRS, of $4.311 billion. (A492 ¶177.) Case B projected lower market shares for various other indications, and it projected net revenue for 2028, adjusted for PTRS, of $3.227 billion (*i.e.*, just 70% of the revenue projected in the November LRP). (A493-94 ¶178.) Both Case A and Case B pushed out timelines for regulatory approval and commercialization beyond what management had been telling the market and what analysts understood. (A494 ¶179.)

Citi and Centerview presented valuation analyses to the board based on the Case A and Case B projections, but not the November LRP projections. (A32.) By using Case B for its low end and Case A for its high end, Citi derived the following broad valuation ranges per share:

DCF	$46.50 to $107
SOTP	$52.25 to $93

(A495 ¶182; A272.) Citi's DCF valuation ranges per share were $69.52 to $107 for Case A and $46.38 to $71.14 for Case B. (A496 ¶184; A278-79.) Centerview's DCF valuation ranges per share were $79.45 to $95.85 for Case A and $51.95 to $63.95 for Case B. (A496 ¶184; A273.) DCF ranges based solely on the November LRP projections would not justify the sale price to GSK. (A495 ¶182.)

On December 13, 2018, the board approved the 2019 AOP, which had the same net revenues as the November LRP. (A315; A323.)

F. Tesaro's Misleading Schedule 14D-9

As noted above, the 14D-9 said nothing about Tesaro management's overture to GSK in June 2018 respecting the potential sale of Tesaro, through Citi's Hite, inferably and allegedly with the knowledge of Mott, but outside of any board-approved sale process. (A499 ¶193.) The 14D-9 also said nothing about

NEA's plan to raise NEA 17 in 2019, and NEA's and Mott's consequent interest in bringing about a sale of Tesaro before year-end 2018. (A500 ¶202.)

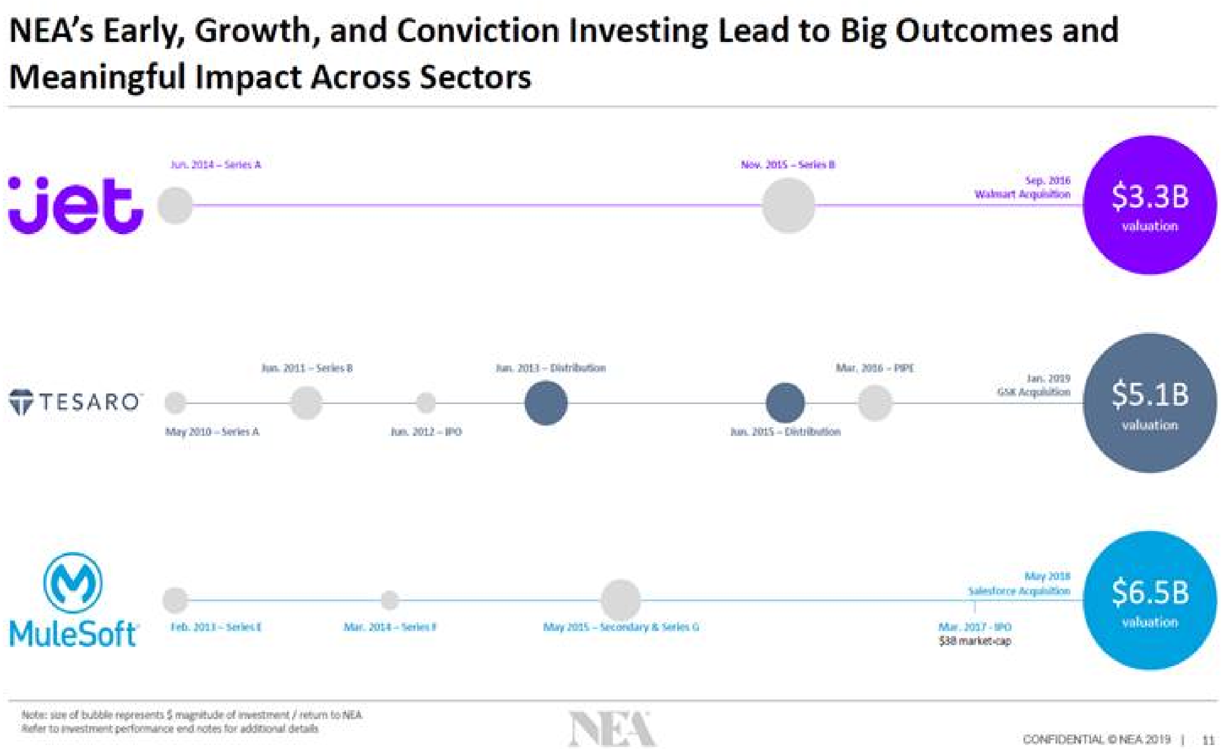
The 14D-9 did not disclose the November LRP projections. (A497 ¶189.) The 14D-9 falsely stated that "two sets of financial projections" were presented and discussed at the November 7-8 board meeting (A370), when, in fact, the undisclosed November LRP projections were also presented at that time (A492-94 ¶¶177-78). The 14D-9 misleadingly described the Case A projections as "optimistic, but achievable" and the Case B projections as "more conservative" (A404), when, in fact, the Case A projections stripped out revenue streams that were part of Tesaro's updated long range plan and the Case B projections were radically reduced compared to the November LRP projections. (A492-94 ¶¶177-79; A497-98 ¶¶188-92.)

The valuation ranges disclosed in the 14D-9 depended on the legitimacy of the Case B projections. Citi disclosed only broad valuation ranges for its DCF ($46.50 to $107) and SOTP ($52.25 to $93) analyses, the low ends of which were based on the Case B projections. (A381.) Centerview's disclosed Case B DCF valuation range ($51.95 to $63.95 per share) was entirely below the transaction price. (A392.)

G. NEA Touts Its Tesaro Exit When Launching NEA 17

On December 3, 2018, Tesaro publicly announced its sale to GSK, and NEA publicly announced the successful closing of its "spin out" fund, an event that had actually occurred several weeks earlier. (A466 ¶108.) Those twin public announcements set the stage for the public launch of fundraising for NEA 17, which began on March 1, 2019, with the stated goal of raising $3.6 billion and charging investors a [redacted] super-premium carry. (A466 ¶109.)

An NEA pitch book for NEA 17 highlighted various attributes of NEA that were true only because of the sale of Tesaro, such as NEA's sustained "top tier returns," its "liquidity engine" and its strategy of successfully investing additional capital over time in a "few concentrated positions." (A466-68 ¶¶109-12; A519; A527.) NEA's investment in, and exit from, Tesaro was one of three examples of NEA's investment strategy touted on a page of the pitch book:



(A468-69 ¶113 & A526.) NEA could not have touted its investment in Tesaro if its stock price was still languishing during the pendency of Zejula's clinical trial.

NEA successfully brought about a near-term premium sale of Tesaro and used that sale to raise $3.6 billion for NEA 17 while charging investors a [redacted] super-premium carry. (A465-66 ¶107.) The sale of Tesaro exemplifies on a grand scale the venture capital strategy of "exit and fundraise." (*Id.*)

H. The Predicted Success of the PRIMA Trial

In July 2019, GSK announced data from the PRIMA trial that was so positive that it led skeptical analysts to conclude that GSK was wise to have bought Tesaro. (A503 ¶211.) On September 30, 2019, GSK announced further positive information from the PRIMA clinical trial and claimed that GSK had obtained insight about Zejula's properties and prospects during due diligence when buying Tesaro. (A503 ¶212.) In an earnings call on February 6, 2020, GSK summarized what had been learned about Zejula in 2019 and spoke positively about its prospects for treating PROC and breast cancer, revenue streams that had been stripped from the November LRP projections to create the Case A projections (as well as the Case B projections). (A503-04 ¶213; A243.)

ARGUMENT

THE COURT OF CHANCERY ERRED IN HOLDING THAT THE CHALLENGED TRANSACTION WAS CLEANSED UNDER *CORWIN*.

A. Question Presented

Did the Court of Chancery commit reversible error in determining that the 14D-9 disclosed all material facts and was not misleading? (A496-501 ¶¶185-203; A603-19.)

B. Scope of Review

An appeal from a decision granting a motion to dismiss is reviewed *de novo*. *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 252 (Del. 2017).

C. Merits of Argument

Stockholder ratification "applies only to fully informed, uncoerced stockholder votes, and if troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked." *Corwin*, 125 A.3d at 312. "The burden to prove that the vote was fair, uncoerced, and fully informed falls squarely on the board." *Huizenga*, 751 A.2d at 899, *quoted in Corwin*, 125 A.3d at 312 n.27. Non-disclosure of "material information undermining the integrity or financial fairness of the transaction" precludes stockholder ratification. *Huizenga*, 751 A.2d at 898, *quoted in Morrison*, 191 A.3d at 275 n.18, and *Corwin*, 125 A.3d at 312 n.27.

The standard of review of a dismissal based on *Corwin* cleansing turns on whether the Complaint, "when fairly read, supports a rational inference that material facts were not disclosed or that the disclosed information was otherwise materially misleading." *Morrison*, 191 A.3d at 282. The plaintiff is entitled to all reasonable inferences, and dismissal is warranted only if the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011).

1. Tesaro's Overture To GSK in June 2018

In *Morrison v. Berry*, this Court held that undisclosed facts about communications among a board chair, the board, a bidder, activist investors, and the corporation were material "because they would have shed light on the depth of the [chair's] commitment to [the bidder], the extent of [the chair's] and [the bidder's] pressure on the Board, and *the degree that this influence may have impacted the structure of the sale process*." 191 A.3d at 275 (emphasis added); *see also id.* at 284 ("would have helped the stockholder to reach a materially more accurate assessment of the probative value of the sale process"). The undisclosed communications here among senior managers, a banker, and GSK would shed light on how the full board was kept in the dark about soliciting an acquisition offer, and how that surreptitious solicitation impacted the structure and probative value of the Tesaro sale process.

The Complaint alleges that in June 2018, Citi's "Hite presented GSK with materials suggesting Tesaro as an acquisition target and provided GSK with public marketing valuation materials that Hite had prepared with Tesaro management." (A487 ¶158.) The record includes the factual disclosures made by Citi to the Tesaro board just before the ultimate December 2, 2018 board meeting, which were never disclosed to Tesaro's stockholders. (A256-57.)

These non-disclosures reveal the falsity of the narrative in the 14D-9 about the origins of the challenged transaction. Multiple pages of the 14D-9 make it appear as if GSK was one of many potential counter-parties with which Tesaro explored a potential co-development/co-promote collaboration, until Citi spoke to the CFO of GSK on September 24, 2018 about whether Tesaro "would be open to an acquisition proposal." (A367; *see* A488 ¶160.) Four days later, Citi informed the Tesaro board of that discussion, which led to an acquisition proposal from GSK four weeks later. (A489 ¶¶163-64.)

In actuality, Tesaro management and Citi had laid the groundwork with GSK in June 2018 about Tesaro's interest in receiving an acquisition proposal from GSK, at the same time that Tesaro was reaching out to GSK purportedly about a co-development/co-promote collaboration. GSK was able to gather due diligence toward a potential acquisition proposal without any board deliberation about the merits of undertaking a sale process. GSK was allowed to swoop in at the end of a separate board process about financing transactions, in which GSK participated even though it is far from clear whether GSK was even a viable potential collaboration partner. (A489 ¶163; A235-36.) Had the stockholders been told about Tesaro's prior outreach to GSK through Citi, it would have raised serious questions about why GSK was able to avoid a board-led sales process, and whether the actual sale process was designed to achieve effective price discovery.

"[O]nce defendants traveled down the road of partial disclosure of the history leading up to the Merger ... they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events." *Morrison*, 191 A.3d at 283 (internal quotation omitted). The failure to provide a fair and accurate description of interactions with a bidder is regularly found to be material. *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2021 WL 772562, at *34 & n.12 (Del. Ch. Mar. 1, 2021) (collecting authorities), *appeal* *refused*, 249 A.3d 801 (Del. 2021); *see also Teamsters Loc. 237 Additional Sec. Benefit Fund v. Caruso*, 2021 WL 3883932, at *28 (Del. Ch. Aug. 31, 2021) ("The Proxy contains a thorough recounting of the negotiation process, but it omits Ganzi's price enthusiasm in the $34 to $36 range and Caruso's suggestion to Ganzi that the Board was only willing to engage at '$35+.'"); *Chester Cty. Employees' Ret. Fund v. KCG Holdings, Inc.*, 2019 WL 2564093, at *11 (Del. Ch. June 21, 2019) (disclosed description of early communication between sell-side financial advisor and buyer was "materially misleading" because it did not identify a specific proposed asset divestiture); *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *33-34 (Del. Ch. Oct. 16, 2018) (disclosed description of meeting between target director and potential bidder omitted material fact that pricing was discussed), *aff'd*, 211 A.3d 137 (Del. 2019); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *16 (Del. Ch. Oct. 2, 2009) (denying summary judgment respecting undisclosed pitch by special committee's financial advisor to acquirer about planned post-merger underwriting). *Cf. Singh v. Attenborough*, 137 A.3d 151, 152 (Del. 2016) (belated disclosure to target's board about financial advisor's pitch to buyer was "considered by the board, determined to be immaterial, and fully disclosed in the proxy").

The Vice Chancellor distinguished *KCG* and *PLX* on the basis that the undisclosed communications with the buyers in those cases "were substantially more involved, and shared crucial, non-public information," while the substance of the non-disclosure here does "not rise to the same level of severity." (Mem. Op. at 48 & n.130.) The Vice Chancellor described the undisclosed June 2018 overture to GSK as consisting of presentation materials that "included only public information (unlike *KCG*), and did not discuss the details of a potential transaction (unlike *PLX*)." (*Id.*) These distinctions miss the point. The very fact that senior management made an acquisition overture to GSK through Citi was undisclosed. The existence of the acquisition solicitation, outside of any board-approved sale process, is the critical undisclosed fact.

The Vice Chancellor distinguished *Hammons* on the basis that in *Hammons*, "disclosure of the pitch was necessary to inform the target's stockholders of the relationship [between the bank and the buyer] in the first instance," whereas Citi's work with GSK was "adequately disclosed." (Mem. Op. at 48-49.) The import of the undisclosed solicitation of GSK goes well beyond showing that Citi was acting as a broker for both sides of the deal (which was not otherwise disclosed). Tesaro management used Citi to solicit an acquisition proposal from a favored bidder outside of any board-approved sale process.

Tesaro's undisclosed overture to GSK was sufficient to trigger *Revlon* duties. A recent case applied the teaching of this Court "that although usually it will be the board that causes the corporation to initiate an active sale process, other corporate actors can take action that implicates enhanced scrutiny." *In re Columbia Pipeline*, 2021 WL 772562, at *38 (discussing *McMullin v. Beran*, 765 A.2d 910 (Del. 2000), and *RBC Capital*, 129 A.3d 816). In *Columbia Pipeline*, the Court of Chancery found it reasonably conceivable that enhanced scrutiny began to apply when a CEO invited a bid that led to a company sale for cash. 2021 WL 772562, at *39. That happened here.

Not only did the undisclosed overture trigger *Revlon*, the facts surrounding the surreptitious sale overture fit the test for a well-pleaded *Revlon* claim: "there are iconic cases, such as *MacMillan*, that are premised on independent board members not receiving critical information from conflicted fiduciaries. And there are also cases where impartial board members did not oversee conflicted members sufficiently. *MacMillan* itself has a famous passage pointing to this possibility." *Kahn v. Stern*, 183 A.3d 715, 2018 WL 1341719, at *1 n.4 (Del. 2018) (discussing *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989)). The overture happened at a questionable time (during the pendency of the PRIMA trial) and it was made to a single, favored bidder. It was neither authorized by the board nor reported to the board in real time. The board was told by Hite on September 28 about a discussion he had with GSK's CFO four days earlier. (A488-89 ¶¶160, 163.) It was not until the eve of the December 2 board meeting that Citi provided the board with a relationship disclosure memorandum that disclosed the facts surrounding the June 2018 overture. (A491 ¶174; A257.)

Undisclosed facts that form the basis for *Revlon* scrutiny and a *Revlon* claim are material, precluding *Corwin*-cleansing on a motion to dismiss, because they are "troubling facts regarding director behavior." *Morrison*, 191 A.3d at 284; *Corwin*, 125 A.3d at 312. Without contemporaneous board knowledge and without public disclosure, GSK was afforded a bespoke sale process to perform due diligence and make an acquisition proposal on its own timeline, during the pendency of the PRIMA trial.

2. NEA's Plan to Raise NEA 17 in 2019

The 14D-9 disclosed nothing about NEA's plan to raise NEA 17 in 2019, which motivated Mott to bring about a sale of Tesaro in 2018 (A500-01 ¶¶202-03), which he did through his role in the surreptitious June 2018 outreach to GSK. (A487 ¶159; A499 ¶193.) Mott's motives and conduct were invisible to Tesaro stockholders.

Stockholders are entitled to be told about a director's personal reasons for seeking a particular transaction. For example, then-Vice Chancellor Strine granted an injunction for the failure to disclose that a CEO negotiating a going-private transaction had an "important economic motivation"; he was simultaneously negotiating with the board about obtaining liquidity for his substantial accrued retirement benefits, which meant that the challenged transaction "presented him with a viable route for accomplishing materially important personal objectives." *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114 (Del. Ch. 2007).

Vice Chancellor Laster recently collected "precedents [that] support the materiality of information that sheds light on the financial incentives and motivations of key members of management who are involved in negotiating the deal." *In re Columbia Pipeline*, 2021 WL 772562, at *34. One such case is *City of Fort Myers Gen. Empls.' Pension Fund v. Haley*, 235 A.3d 702, 720 (Del. 2020), which concerned the failure to disclose a CEO's expectation of compensation from a bidder. Another is *Morrison v. Berry*, 191 A.3d at 275, which concerned the failure to disclose a founder's expressed preference for a rollover transaction with a particular bidder. Applying these precedents and *Lear*, Vice Chancellor Laster held in *Columbia Pipeline* that the fact that a CEO and a CFO "planned to retire to the point of targeting dates in 2016 was a material fact that needed to be disclosed." 2021 WL 772562, at *36. Their planned retirement was material because the challenged transaction allowed them to "retire with their full change-in-control benefits." *Id.* at *40.

There exists a direct analogy between the materiality of the officers' undisclosed planned retirement in *Columbia Pipeline* and the materiality of NEA's undisclosed plan to raise NEA 17 in early 2019. The success of raising NEA 17 turned on announcing a premium sale of Tesaro by the end of 2018, which would dramatically improve the returns of NEA 13, bringing them above median for purposes of critical year-end benchmarking. (A461-64 ¶¶100-04.) As stated in an academic article cited in the Complaint (A465-66 ¶107): "beating the median is the main meaningful criterion when it comes to fundraising for established VC GPs." Brad M. Barber and Ayako Yasuda, *Interim Fund Performance and Fundraising in Private Equity*, 124 J. FIN. ECON. 172, 187 (2017).

Mott was the pivotal figure who could make a sale of Tesaro happen. He had cultivated professional relationships with the senior officers of Tesaro, many of the outside directors, Citi's Hite, and GSK. (A434 ¶¶11-12; A435 ¶¶15-16; A436 ¶¶21-22; A437 ¶¶24-26; A486-87 ¶157; A487-88 ¶159; A254.) The Complaint expressly alleges what is otherwise reasonably inferable—that Mott knew about and directed the outreach through Hite to GSK in June 2018. (A487-88 ¶159.)

The Vice Chancellor agreed that "stockholders are entitled to know whether their fiduciaries face conflicts of interest." (Mem. Op. at 50.) The Vice Chancellor ruled, however, that Mott's undisclosed interest in bringing about a near-term sale of Tesaro in advance of NEA raising NEA 17 was not material, due to the supposed insufficiency of allegations about Mott having any particular role in any deficiency with Tesaro's sale process. (*Id*. at 56-57.) The Vice Chancellor acknowledged the allegation that Mott knew about Tesaro's June 2018 overture to GSK through Citi, but stated that such knowledge is immaterial because it "does not suggest any wrongdoing." (*Id*. at 57 n.160.)

As discussed above, the Vice Chancellor's analysis overlooks how the unauthorized overture to GSK triggers *Revlon* scrutiny and creates a basis for *Revlon* liability. It does "suggest … wrongdoing" by Mott that he participated in that surreptitious overture. (*Id*.) If Mott believed that embarking on an effort to sell Tesaro to GSK (or anyone else) in mid-2018 was a value-maximizing strategy, he could have brought that strategy before the board of directors. But Mott did not convene any such discussion. He operated with stealth, through interested parties with whom he was closely connected.

The Vice Chancellor held that Mott's lack of alleged involvement in the sale process renders "immaterial" "further detail about the depths of Mott's allegedly bad intentions." (*Id*. at 57.) The Vice Chancellor discusses at length, but does not decide, the question whether the Complaint adequately pleads that NEA had "divergent liquidity interests." (*Id*. at 56.) The Vice Chancellor stated, however, that the "extraordinary inference" that NEA favored a near-term sale of Tesaro at a non-optimal price "rests on shaky ground" in light of precedent, and further stated: "I remain skeptical that Plaintiffs' liquidity conflict theory here is meaningfully different than the theory rejected in *Presidio* and its forebears." (Mem. Op. at 54 & n.153.)

There exists abundant precedent where a plaintiff has sufficiently alleged (or established) that an investment firm or its director designee operated under a conflict of interest due to an economic imperative that it prioritize near-term liquidity over optimal pricing. Perhaps most notable and most analogous is this Court's decision in *RBC Capital v. Jervis*, which affirmed a finding of unexculpated *Revlon* liability as to board chair Christopher Shackelton. 129 A.3d at 871. Shackelton was the principal of a hedge fund that owned 12% of Rural/Metro Corporation, and the Court of Chancery found after trial that "his fund had unique reasons to favor a near-term transaction that caused their interests to diverge from those of the Rural's equity as a whole." *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 257 (Del. Ch. 2014), *aff'd*, *RBC Capital*, 129 A.3d 816. "Perhaps most significantly, in late 2010, [the fund] was seeking to raise $150–$200 million of new capital, more than ever before. A sale of Rural would be a feather in Shackelton's cap and could be used to market the fund to new investors." *Id.* at 255.

In *Rural/Metro*, Vice Chancellor Laster summarized a long string of Delaware cases as standing for the rule "that a desire for liquidity is one benefit that may lead directors to breach their fiduciary duties, and stockholder directors may be found to have breached their duty of loyalty if a desire to gain liquidity caused them to manipulate the sales process and subordinate the best interests of the corporation and the stockholders as a whole." *Id.* at 257 (internal quotations omitted). Vice Chancellor Laster's more recent exposition of the law in *Presidio* creates no different rule.

Presidio notes that "[s]everal decisions of the court have concluded that complaints adequately alleged a divergent interest based on a liquidity-driven conflict." 251 A.3d at 256. Vice Chancellor Laster observes that "[t]he desire to wrap up an existing fund or to provide potential investors with attractive realizations while raising a new fund can affect a fund manager's approach to achieving liquidity for an investment." *Id.* at 258.[1] Nevertheless, he stated that allegations about "the cycle itself would [not] support an inference of a liquidity-based conflict." *Id.* The plaintiff in *Presidio* sought "to establish an inference … that Apollo wanted to sell *by the end of 2019*," but Vice Chancellor Laster held that the "allegations do not support a reasonable inference that Apollo wanted to sell by the end of 2019." *Id.* (emphasis in original).

Plaintiff has alleged in detail how and why NEA was looking to sell Tesaro by the end of 2018, in advance of the raising of NEA 17. The allegations are not merely about the life cycles of investments funds, but about the specific facts confronting NEA in terms of (i) its change of leadership, (ii) the massive fee-generating potential from the successful raising of NEA 17 with super-premium

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[1] *See also* Ronald W. Masulis and Rajarishi Nahata, *Venture Capital Conflicts of Interest: Evidence from Acquisitions of Venture-Backed Firms*, 46(2) J. FIN. AND QUANT. ANALYSIS 395, at 426 (2011) ("This is consistent with maturing VC funds pressuring their portfolio firms to expeditiously negotiate a sale of the company, while VC funds further away from maturity give target firms freer rein to negotiate higher purchase prices over longer negotiating horizons."); Roelef Botha, *The Sequoia Fund: Patient Capital for Building Enduring Companies*, MEDIUM (Oct. 26, 2021) ("Once upon a time the 10-year fund cycle made sense. But the assumptions it's based on no longer hold true, curtailing relationships prematurely and misaligning companies and their investment partners."), https://medium.com/sequoia-capital/the-sequoia-fund-patient-capital-for-building-enduring-companies-9ed7bcd6c7da.

30% carry, (iii) the relatively poor performance of NEA 13 compared to funds of the same vintage, (iv) the impact of selling Tesaro by year-end 2018 on the critical fundraising metric of whether NEA 13 would be an above or below median, (v) NEA's contemporaneous creation of the "spin-out fund," and (vi) how NEA touted NEA's investment in and exit from Tesaro when raising NEA 17. (A451-69 ¶¶81-113.) Additionally, the allegations about the surreptitious, suspiciously timed overture to GSK in June 2018, during the pendency of the PRIMA trial, fit NEA's imperative of selling Tesaro in 2018.

For all of the above reasons, the Vice Chancellor erred in dismissing the Complaint under *Corwin* despite the non-disclosures of (i) the June 2018 overture to GSK and (ii) NEA's plan to raise a new fund in 2019.

3. The November LRP Projections

"In the context of a cash-out merger, reliable management projections of the company's future prospects are of obvious materiality to the electorate." *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *15 (Del. Ch. Aug. 18, 2006). Stockholders "would obviously find it important to know" management's best estimate of future cash flows. *In re Netsmart Technologies Inc.*, 924 A.2d 171, 203 (Del. Ch. 2007). Management projections "made in the ordinary course of business … are generally deemed reliable," while management projections may be "rejected entirely when they lack sufficient indicia of reliability, such as when they were prepared … by a management team with a motive to alter the projections." *LongPath Cap., LLC v. Ramtron Int'l Corp.*, 2015 WL 4540443, at *10 (Del. Ch. June 30, 2015) (internal quotation omitted).

The Vice Chancellor ruled that "[e]ven assuming the November LRP projections were reliable, I cannot conclude that their omission was material because their inclusion would not have significantly altered the total mix of information available," given the "relatively small gap between the November LRP and the Case A projections," which "projected nearly identical revenue for five years before showing a slight deviation ten years out." (Mem. Op. at 38, 40 n.103, 41.) This reasoning is erroneous.

The Vice Chancellor relied principally on an inapt case, *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *10 (Del. Ch. June 27, 2008). In *Simonetti*, Vice Chancellor Noble held that management's decision to disclose its "Case 1 projections" created no obligation for management to disclose its more optimistic "Case 2" projections. *Id.* *Simonetti*'s reasoning was that the preliminary injunction "record indicates that the [Case 1] projections used by UBS reflected management's best estimates at the time." *Id.* *See also In re BioClinica, Inc. S'holder Litig.*, 2013 WL 673736, at *6 (Del. Ch. Feb. 25, 2013) ("Here, the

Plaintiffs' presume, incorrectly, that stockholders are entitled to something *more* than management's 'best estimates' of future performance when those 'best estimates' were the only forecasts used by a financial advisor in producing a fairness opinion.") (quoting *Simonetti*).

Simonetti has no application here. The undisclosed November LRP projections are an updated version of projections management created and presented to the board of directors in the ordinary course. The record does not reflect that management considered the November LRP projections inferior to the contemporaneously created Case A or Case B projections. Case A stripped out projected revenue for the treatment of breast cancer and PROC even though pursuit of those treatments was part of Tesaro's long range plan. (A477-78 ¶¶130-31; A480-81 ¶139; A492-93 ¶177; A503-04 ¶213.)

The 14D-9 described the Case A projections as "optimistic, but achievable" and the Case B projections as "more conservative." (A404; *see* A498 ¶192.) The disclosed Citi valuation ranges follow the logic of these characterizations; Citi used the Case A projections to create the top of its DCF and SOTP valuation ranges and used the Case B projections to create the bottom of its valuation ranges. (A381.) The 14D-9's omission of the November LRP was intended to mislead reasonable stockholders into believing that the most likely estimate of Tesaro's future cash flows was somewhere in between the "optimistic, but achievable" Case A projections and the "more conservative" Case B projections. (A404; *see* A498 ¶192.)

Disclosure of the November LRP projections, along with a description of them as an updated version of what management created for the board of directors in the ordinary course, would raise appropriate questions. Should Tesaros's value be derived from the November LRP projections? Why are the Case A projections deemed the very top of the valuation range if they eliminate two projected revenue streams (using Zejula to treat breast cancer and PROC) that management included in the ordinary course? Why should anyone pay attention to Case B projections that are radically lower than the November LRP projections? The opinion below does not address these questions.

In a recent case denying a motion to dismiss, the Court of Chancery held that a complaint "supports a reasonable inference that the Proxy selectively disclosed projections regarding its potential earnings in a manner that rendered the Proxy disclosures misleading." *City of Warren Gen. Employees' Ret. Sys. v. Roche*, 2020 WL 7023896, at *22 (Del. Ch. Nov. 30, 2020). *See also Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010) ("I believe that the proxy statement omits material information by, for reasons not adequately explained, selectively removing the free cash flow estimates from the projections provided to PLATO's stockholders."). In another recent case, the Court of Chancery held that the plaintiff had "pled facts making it reasonably conceivable that the earlier, more optimistic projections, which were prepared in KCG's ordinary course of business, were in fact reliable and thus material." *KCG Holdings*, 2019 WL 2564093, at *14.

Here, similarly, the reliable but omitted November LRP projections render misleading the 14D-9's discussion of:

(i) contemporaneously prepared Case A projections that are purportedly "optimistic" even though they selectively omit certain lines of projected revenue found in the November LRP projections (A404; A492-93 ¶177; A498 ¶192);

(ii) "two sets of financial projections" having been presented and discussed at the November 7-8 board meeting (A370; A492-94 ¶¶177-78).

(iii) supposedly "conservative" Case B projections (A404) that bear no resemblance to Tesaro's updated long range plan (A492-94 ¶¶177-79, A454-57 ¶¶88-92).

CONCLUSION

For the foregoing reasons, Appellant/Plaintiff-Below John M. Kihm respectfully requests reversal of the Court of Chancery's decision.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2021, I caused a true and correct copy of **Public Version of Appellant's Opening Brief** to be served upon the following counsel by File & Serve*Xpress*:

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