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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SMART LOCAL UNIONS AND COUNCILS PENSION FUND, on behalf of itself and all other similarly situated former stockholders of EIDOS THERAPEUTICS, INC., Plaintiff Below, Appellant, v. BRIDGEBIO PHARMA, INC., NEIL KUMAR, ALI SATVAT, and UMA SINHA, Defendants Below, Appellees.	C.A. No. 13, 2023 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2021-1030-PAF **PUBLIC VERSION** **AS FILED ON MAY 4, 2023**

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Delaware law does not provide corporate controllers blanket immunity from judicial scrutiny when effecting self-interested minority stockholder squeeze-outs. On the contrary, Delaware law recognizes controller-led squeeze-outs present a paradigm of fiduciary conflict that presumptively requires entire fairness review to ensure fairness. In abandoning the general rule that all conflicted controller transactions are subject to entire fairness review, this Court very clearly articulated the policy underlying *MFW*: incentivizing controllers to engage with both independent committees and minority stockholders at arm's-length to achieve a process likely to deliver a fair price for minority stockholders.

Defendants assert that a ruling for Plaintiff on this unique fact pattern would overrule *MFW*. Untrue. Plaintiff's position is consistent with *MFW*'s plain language and underlying policy, and Plaintiff merely urges this Court to not expand the *MFW* doctrine in a manner inconsistent with its policies and historical scope. Conversely, Defendants seek an ill-advised and indefensible expansion of the doctrine to provide themselves—and future controllers—blanket immunity to force through objectively unfair deals, even when a credible competing bidder emerges with a materially superior bid.

Defendants' insistence that *MFW* applies even where market evidence proves a controller's proposed squeeze-out is unfair engenders unsupportable outcomes. Two hypotheticals demonstrate how Defendants' position perverts *MFW* away from its minority-protection roots.

First, suppose that instead of GSK proposing a joint venture in August 2020, it offered to buy Eidos for $120/share. According to Defendants, BridgeBio could still block that proposal, launch its own squeeze-out at $73.26/share, and if a special committee and stockholder base see no viable alternative, secure dismissal.

Second, suppose that instead of offering ***only*** $120/share after the Committee accepted BridgeBio's "best and final" $73.26/share offer, GSK offered $1200/share. Under Defendants' view of Delaware law, so long as BridgeBio made clear it would not sell regardless of the price and stockholders otherwise saw no path to achieving superior value for their shares, dismissal would be required.

Holding that *MFW* does not apply where a controller's proposal is so facially unfair that a credible and materially superior alternative emerges is consistent with *MFW*'s focus on setting *ex ante* incentives that result in fair outcomes for minorities. After all, if controllers know they will have to demonstrate fairness in the rare instance when a committee receives an intervening bid that the committee, in its own judgment, deems both credible and superior, controllers will be more likely to:

(i) negotiate fair deals up front; and (ii) respond to *bona fide* superior proposals by improving their own proposal. If, alternatively, controllers know they can weaponize their refusal to sell (a right they have) to effectuate an unfair transaction and still receive pleading-stage dismissal (a right they do not have), then committees will lack the leverage necessary to insist controllers pay fair value.

While the Court should confirm *MFW* does not apply, this case should proceed to discovery even if the Court applies *MFW* because the Committee breached its duty of care, and the vote was both coerced and materially uninformed.

The Committee acted without the requisite care by recklessly: (i) failing to explore GSK's valuable and fully-negotiable pre-signing Collaboration Proposal; and (ii) abandoning post-signing discussions with GSK despite its expressed willingness to work around BridgeBio's unwillingness to sell. Defendants' counterarguments require this Court to impermissibly draw inferences in their favor and credit the Proxy for the truth of the matter.

The vote to approve the $73.26/share Transaction price despite the market's determination that Eidos was worth more than $120/share was also situationally coerced. Defendants' counterarguments rest on a misrepresentation of the situational coercion standard and an assumption that Eidos could have pursued an independent launch of acoramidis. The question, however, is not whether an

independent launch, no matter how unattractive, was theoretically ***possible***, but whether the status quo was "sufficiently unattractive to prevent [the] vote from operating as a clear endorsement of a transaction and therefore having cleansing effect." *In re Dell Class V S'holders Litig.*, 2020 WL 3096748, at *26 (Del. Ch. June 11, 2020). The Complaint adequately pleads that it was.

Finally, the vote was materially uninformed because the Proxy: (i) falsely stated that the Board considered and rejected the Collaboration Proposal on August 18; (ii) misleadingly suggested GSK was an unsuitable commercialization partner for acoramidis; and (iii) omitted information regarding GSK's willingness to pursue more valuable transaction alternatives that did not require BridgeBio's approval. Each such deficiency led stockholders to believe the Transaction, although facially unfair, was the best option available.

In sum, the Trial Court's Opinion should be reversed because (i) *MFW* should not apply where a materially higher third-party bid conclusively demonstrates the Transaction's unfairness, and (ii) even if *MFW* ***did*** apply, its conditions were not satisfied.

ARGUMENT

I. CONTROLLERS, SPECIAL COMMITTEES AND MINORITY STOCKHOLDERS SHOULD KNOW *EX ANTE* THAT THE *MFW* DOCTRINE IS INAPPLICABLE IN THE FACE OF A MATERIALLY HIGHER CREDIBLE THIRD-PARTY OFFER

Defendants' brief rests on the premise that the *MFW* doctrine was intended to serve the interests of controllers and that Plaintiff is asking this Court to reverse *MFW*. False. Plaintiff simply explains that *MFW* was never intended to apply to the unique situation presented here, and that extending it to cover such circumstances contravenes the policy underpinning the doctrine.

Plaintiff's Opening Brief established that the *MFW* doctrine's expressed intent was to root out strike suits and incentivize controllers to accept procedural guardrails designed to ensure minority stockholders receive a fair price in conflicted transactions. OB 24-28. Even after *MFW*, business judgment protection for controllers effecting conflicted transactions has never been an entitlement. *See Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 769 (Del. 2018) ("[*MFW*] was careful to warn that defendants would have difficulties in invoking such protections through a motion to dismiss.") (Valihura, J., dissenting). Rather, business judgment protection must be earned via an arm's-length process that ***benefits*** minority stockholders. Indeed, this Court has never abandoned its expressed intent that *MFW* serve to

protect minority stockholders and not be used as some perverse weapon for controllers. *See, e.g.*, *id.* at 756 (confirming that *MFW*'s core purpose is to incentivize controllers "to embrace the procedural approach most favorable to minority investors").

The *MFW* doctrine rests on two core assumptions. *First*, the market lacks a pricing proxy for controlled companies where minority stockholders are squeezed out. And *second*, because courts cannot look to market forces to assess a squeeze-out's fairness, where the controller employs the dual-pronged minority stockholder protections, the conditions supporting an ***inference*** of fair price are achieved and dismissal is appropriate. OB 24-28. As this Court stated in *MFW*: "[T]he underlying purposes of the dual protection merger structure utilized here and the entire fairness standard of review both converge and are fulfilled at the same critical point: **price**." *Kahn v. MFW Worldwide Corp.*, 88 A.3d 635, 644-45 (Del. 2014).[1]

But where, as here, the market ***does*** provide a pricing proxy for an asset's value—and where that price exceeds the Transaction price by over ***60%***—the second

[1] The focus on price is consistent with this Court's entire fairness jurisprudence. *See id.* at 645 ("[T]his Court has consistently held that … in a non-fraudulent transaction 'price may be the preponderant consideration outweighing other features of the merger.'" (citation omitted)).

assumption does not hold. Put differently, while a third party rarely attempts to intervene in a controller-led buyout, if the *MFW* protections are deployed but the transaction price is so patently inadequate that a third party launches a materially higher proposal, the core assumption that the *MFW* protections ensured a fair price is defeated. In those rare circumstances, *MFW* should not apply. If instead the *MFW* doctrine is applied so rigidly as to foreclose exception, it will become a weapon for controlling stockholders to achieve judicial cleansing of conflicted controller transactions effectuated at facially unfair prices.

In asking this Court to endorse a controller's weaponization of *MFW* to avoid judicial review of a facially-unfair transaction, Defendants do not address—much less dispute—the doctrine's intended purpose of protecting minority stockholders. Rather, Defendants start with the unremarkable (and undisputed) proposition that a controller does not have to sell. DAB 20. Defendants then illogically leap to the conclusion that a controller's refusal "to sell or otherwise engage in self-sacrifice" therefore cannot defeat *MFW*. DAB 21. The sole case upon which Defendants rely for that conclusion—*In re Books-A-Million, Inc. Stockholders Litigation*, 2016 WL 5874974 (Del. Ch. Oct. 10, 2016), *aff'd*, 164 A.3d 56, 2017 WL 2290066 (Del. May 22, 2017) (TABLE)—says no such thing.

As Plaintiff explained in its Opening Brief, *Books-A-Million* addressed the separate question of whether a committee acted in bad faith by failing to dilute a controller to facilitate a third-party bid. OB 28-29. The *Books-A-Million* court never addressed whether a materially higher third-party bid precluded pleading-stage judicial cleansing under *MFW*. Indeed, the court never had occasion to address that question both because the plaintiff never presented that argument ***and*** because the intervening third-party bid was deemed ***not*** materially higher after accounting for a control premium. 2016 WL 5874974, at *16. Even the *Books-A-Million* court, however, recognized that bad faith might be inferable where, as here, the delta between the controller's bid and the third-party bid is "extreme." *Id.*

Instead of directly confronting *Books-A-Million*, Defendants focus on the committee's inability to effectuate a transaction over the controller's opposition. DAB 22. To be sure, the *Books-A-Million* committee could not have forced the controller to accept the third party's bid or acted against the controller in good faith to facilitate that third-party bid. 2016 WL 5874974, at *16, 18. But a committee's inability to override the controller's refusal to sell does not logically result in giving that controller the benefit of pleading-stage judicial cleansing. To the contrary, where, as here, the delta between the controller's bid and the third-party bid is "extreme," judicial cleansing should be unavailable.

After distorting *Books-A-Million*, Defendants hyperbolically claim that Plaintiff is somehow asking this Court to overrule *MFW* by enforcing the doctrine's expressed intent. Defendants' primary argument is that *Synutra* foreclosed the reviewing court's ability to consider price in assessing *MFW*'s application. DAB 22-23. That argument rests on a flawed reading of *Synutra*.

Synutra narrowly addressed the plaintiff's argument that *MFW* footnote 14 meant he could plead a due care violation simply by questioning the price's sufficiency. 195 A.3d at 766-768. In rejecting that argument, this Court observed that if *MFW* "injects the reviewing court into an examination of whether the Special Committee's good faith efforts were not up to the court's own sense of business effectiveness," pleading-stage application of *MFW* would be impossible and controllers would not be incentivized to implement the minority stockholder protections. *Id.* at 766-67; *see also id.* at 767-68 (rejecting argument that the plaintiff could avoid dismissal merely by suggesting the special committee "could have negotiated [] differently" (citation omitted)).

This case does not merely allege that the Committee "could have negotiated differently," nor does it seek to inject "the reviewing court into an examination of whether the Special Committee's good faith efforts were [] up to the court's own sense of business effectiveness." To the contrary, this case is unusual precisely

because market evidence ***obviates*** the need for the reviewing court to inject its own business judgment or sense of fairness. *Synutra* does not address whether *MFW* requires the reviewing court to blind itself to compelling market evidence of price unfairness—*i.e.*, a fully-financed bid exceeding the Transaction price by over 60% (and yet which the controller was ***still*** unwilling to accept for ***its own*** shares).

Defendants alternatively argue that, even if the Trial Court were permitted to consider price, GSK's $110/share offer for Eidos's minority shares is not apples-to-apples with the Transaction price. DAB 24-25. That argument fails. While GSK's $110/share offer also entailed limited governance concessions,[2] Defendants do not—and cannot—argue that those limited governance concessions were worth nearly $37/share (*i.e.*, $110/share less $73.26/share). The precise value of those governance asks—and in turn the minimum value by which BridgeBio underpaid—should be left for trial.[3]

[2] *See* Op. 19 n.90.

[3] Defendants also argue that GSK could have dropped the governance demands and made a "true 'apples-to-apples' offer," but never did. DAB 25. This ignores that even ***after*** BridgeBio rejected the limited governance concessions, GSK communicated its intent to explore a superior transaction that could be effectuated without BridgeBio's consent. OB 17. Defendants therefore cannot seriously argue that Plaintiff fails to plead that GSK was willing to pay materially more on a perfectly apples-to-apples basis.

Finally, Defendants baselessly assert that "[i]t is nonsensical to argue a controller would ever self-disable *ab initio*" if business judgment review does not apply. DAB 25. Controllers retain every incentive to adopt the *MFW* protections *ab initio*. The refusal to apply *MFW* here would impact controller behavior only in the rare circumstance where a materially higher credible third-party offer emerges. The impact on controller behavior in that unusual circumstance would be consistent with *MFW*'s intent, as it would require the controller to either: (i) further negotiate with minority stockholders; or (ii) abandon *MFW*-based judicial cleansing such that the transaction could face meaningful judicial review. Application of *MFW* here, by contrast, rewards controllers for effectuating conflicted transactions at unfair prices and deprives committees of the leverage necessary to insist that a controller pay fair value, even when market evidence demonstrates the controller's proposal is unfair.

* * *

This is no strike suit and *MFW*'s dual minority stockholder protections objectively failed to yield a fair price. If this case proceeds, GSK's willingness to pay materially more will be powerful evidence of price unfairness. *See Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 24 (Del. 2017) ("[T]he price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst."). Where, as here, a materially higher

credible third-party bid undermines the *MFW* doctrine's embedded assumption that the stockholder protections ensured a fair price, the *MFW* doctrine has failed to achieve its fundamental purpose and judicial cleansing is unwarranted.[4]

[4] The trial court routinely applies the materiality standard on a motion to dismiss. *See, e.g.*, *Morris v. Spectra Energy Partners (DE) GP, LP*, 246 A.3d 121, 136-39 (Del. 2021) (discussing materiality of *Primedia* claim at the pleading stage).

II. EVEN IF *MFW* COULD APPLY ON THESE FACTS, THE TRIAL COURT ERRED IN FINDING *MFW*'S CONDITIONS SATISFIED.

A. The Committee Breached Its Duty of Care By Failing to Engage with GSK Pre-Signing and Prematurely Terminating Post-Signing Negotiations

Plaintiff's Opening Brief established that Plaintiff adequately alleges the Committee breached its care duty by failing to evaluate or meaningfully explore credible alternatives proposed by GSK before and after signing. OB 33-41.[5]

Defendants' claim that "Plaintiff quarrels with the tactical decisions of the Special Committee" (DAB 27) ignores that: (i) BridgeBio was not free to deprive the Committee of material information concerning GSK's pre-signing interest; and (ii) the Committee was not free to make the "tactical" choice to deprive itself of material information concerning GSK's post-signing willingness to explore alternatives that would provide stockholders superior value. Rather, the Committee was required to "consider all material information reasonably available,"[6] including by "reasonably inform[ing] [it]self of alternatives[.]" *UIS, Inc. v. Walbro Corp.*, 1987 WL 18108, at *2 (Del. Ch. Oct. 6, 1987). The Committee failed to do so.

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[5] Defendants' assertion that Plaintiff waived the argument that the Trial Court misapplied the duty of care standard (DAB 28) ignores ***nine pages*** where Plaintiff argued exactly that. OB 33-41.

[6] *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005).

Defendants' pre-signing arguments invoke the false premise that "the Eidos Board had already unanimously rejected [GSK's Collaboration Proposal] before the Special Committee had been created," rendering it unnecessary for the Committee to "revisit" a GSK deal. DAB 28. That argument rests entirely on a self-serving *post-hoc* Proxy "disclosure" that is inconsistent with Eidos's contemporaneous Board minutes. OB 35-36. Given the absence of contemporaneous evidence that the Board considered the Collaboration Proposal on August 18, the Trial Court reversibly erred by crediting the Proxy for the truth of the matter and refusing to instead draw the reasonable inference that the Board did not consider the Collaboration Proposal on August 18. OB 35-37.

Moreover, even if the Proxy's *post-hoc* claim concerning the Board's rejection of the Collaboration Proposal could be accepted for its truth on a motion to dismiss (it cannot), the Complaint still pleads that BridgeBio and its loyalists on the Board: (i) never provided ***any*** written analysis concerning the Collaboration Proposal to the Committee; (ii) failed to provide the Committee follow-up materials provided by GSK to Eidos management during the process; and (iii) never disclosed GSK's continued requests to engage.[7] Those well-pled allegations support the

[7] Defendants' argument that Plaintiff waived its duty of care arguments premised on Defendants' failure to provide the Committee information regarding the

conclusion that, even if the Board unanimously rejected the Collaboration Proposal on August 18, BridgeBio still caused the Committee to breach its care duty by preventing it from "reasonably inform[ing] [it]self of alternatives." *UIS*, 1987 WL 18108, at *2.

As to post-signing, Defendants insist the Committee satisfied its care duty despite terminating discussions with GSK after BridgeBio refused to sell for $120/share (or more) or otherwise agree to facilitate a value-maximizing transaction for minority stockholders. DAB 29-31. In doing so, Defendants ignore GSK's willingness to work around BridgeBio's intransigence. Defendants recite the Trial Court's finding that "[e]ven after BridgeBio balked at GSK's proposals, leading GSK to voice its displeasure with representations in the Amended S-4, the Special Committee indicated to GSK a willingness to continue their discussions." DAB 31 (quoting Op. 37). As explained in Plaintiff's Opening Brief, however, GSK's December 11 letter reflects GSK's contemporaneous understanding that the Committee "decided to discontinue discussions with [GSK]" "rather than explor[e] what GSK could have offered with an increased proposal and what governance

Collaboration Proposal and GSK's continuing interest fails. Plaintiff pled detailed facts supporting those arguments (*see, e.g.*, ¶¶58-59), recounted those facts in its brief below (A456, A472, A493), and highlighted them at argument (Tr. at 41-44).

provisions the Special Committee could have provided to GSK (***that could have been granted without BridgeBio's participation***) to reach an outcome that would have been highly beneficial to the public stockholders of Eidos[.]" (A520) (emphasis added). At the pleading stage, the Court must credit as accurate GSK's account of events. *See Voigt v. Metcalf*, 2020 WL 614999, at *27 (Del. Ch. Feb. 10, 2020) ("Other inferences are possible, but at the pleading stage, the plaintiff receives the benefit of any reasonable inferences that favor the plaintiffs' claim."). The Committee breached its care duty by blinding itself to GSK's willingness to provide more value for stockholders.

B. The Stockholder Vote Was Coerced

The stockholder vote was coerced because Eidos stockholders lacked the ability to reject the Transaction and return to an acceptable *status quo*. OB 41-44. By refusing to accept GSK's superior proposal or otherwise facilitate GSK's acquisition of Eidos's minority shares, BridgeBio forced stockholders to decide between a BridgeBio deal or a highly risky independent launch. OB 42-44. That was a false choice. Eidos needed a deal with *someone*. Voting down the Transaction would leave Eidos in an increasingly precarious position as it approached approval of acoramidis without the capacity to independently launch, amplifying BridgeBio's leverage over the Company. Indeed, BridgeBio could watch Eidos starve for cash

and then decide to salvage the Company from a financing crisis by making an even lower offer. Stockholders' approval of the Transaction, therefore, represented stockholders' choice "between an unappealing status quo and an alternative which, although unfair, was better than their existing situation." *Dell*, 2020 WL 3096748, at *32.

Defendants respond by arguing coercion cannot be found absent a direct threat against stockholders. DAB 32-33. That argument rests on a misreading of *Dell* and *Saba*. In *Dell*, the court enumerated five "strands" of coercion, each involving different contexts and requiring different analyses. Of *Dell*'s five coercion theories, the Trial Court correctly identified "situational coercion" as applicable here. But the Trial Court (and Defendants) erred in relying on excerpts from *Dell* (*e.g.*, "The status quo may be undesirable or unpleasant, but that fact does not render the transaction coercive" (Op. 54, DAB 32)) from a section of the opinion discussing a ***different*** coercion theory (*i.e.*, "coercion by a fiduciary") entailing a ***different*** analysis.

Regarding situational coercion, the *Dell* court explained that a cleansing vote must reflect an endorsement of the transaction's merits, not just a preference for a marginally better alternative to the status quo:

> The arguably innovative step taken by the *Saba Software* court was to recognize that when determining whether a stockholder vote should have a cleansing effect and result in the application of the irrebuttable

> business judgment rule, the court must have confidence that the vote reflects an endorsement of the merits of the transaction, ***not just a preference for a marginally better alternative over an already bad situation. The resulting inquiry differs from the question of whether fiduciaries have acted disloyally by making coercive threats*** or creating a coercive, two-tiered structure. ***The situational backdrop of an unacceptable status quo does not give rise to a fiduciary breach, but it calls into question the meaning of a stockholder vote such that it should not be given cleansing effect***.

2020 WL 3096748, at *27 (emphasis added) (discussing *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *16 (Del. Ch. Apr. 11, 2017)). Here, particularly at the pleading stage, this Court cannot accept that the vote reflected an endorsement of the Transaction's merits in the face of a third-party bid that was more than 60% higher. Rather, it merely reflected stockholders' preference to sell to BridgeBio rather than accept the status quo of a Company with insufficient resources to independently commercialize acoramidis.

Defendants assert that the Trial Court did not ignore Plaintiff's allegation that "Eidos was not positioned to pursue, an independent launch of acoramidis." DAB 34. That position, however, cannot be squared with the fact that stockholders approved a Transaction price ***at least $47/share lower than both BridgeBio and GSK believed the Company was worth***, which clearly indicates coercion.

Yet even setting that aside, the fact that an independent acoramidis launch, although "complex and risky," was theoretically "possible" does not require

crediting the vote under *MFW*. DAB 35. The Complaint alleges that "Eidos itself lacked the internal resources necessary to independently launch acoramidis." (¶46). It further cites a McKinsey analysis discussing how developmental-stage biopharmaceutical companies like Eidos almost always follow "a well-worn path for their assets" of "licensing, partnership, [or] outright acquisition," and that such companies "struggle to maximize drug adoption and realize [its] expected value" such that their "share of successful launches is well below that of experienced launchers." (A31-32, ¶¶47-48). The Committee's presentation to ISS, moreover, explained that "[v]oting down the BridgeBio transaction right as Eidos enters a critical phase of clinical development ***would carry significant risk for Eidos stockholders***" given that "[a] successful product launch requires development of core multi-disciplinary capabilities ***years*** prior to launch." (A578). Against that backdrop, even if an independent acoramidis launch was theoretically "possible," the status quo was "sufficiently unattractive to prevent [the] vote from operating as a clear endorsement of a transaction and therefore having cleansing effect." *Dell*, 2020 WL 3096748, at *26.[8]

[8] Defendants likewise tout the Trial Court's holding that "alternatives to the purchase by BridgeBio were apparent to the stockholders," citing the December 9 Collaboration Proposal with GSK. DAB 35 (citing Op. 21). But the Proxy's

In short, while minority stockholders could theoretically accept slightly less cash from a controller than a third party may offer, it defies logic to believe that uncoerced minority stockholders would take 60% less from a controller than a credible third-party buyer offered.

C. The Stockholder Vote Was Not Fully Informed

The Trial Court erred by holding that Plaintiff failed to adequately allege a disclosure deficiency.

1. The Proxy Created the Materially Misleading Impression that the Board Evaluated the Collaboration Proposal Before Negotiating with BridgeBio

The Proxy created the materially misleading impression that the Committee made an informed decision not to engage with GSK prior to approving the Transaction. The Proxy falsely stated that, at the August 18 Board meeting, "the Eidos board discussed the August 16 collaboration proposal," "unanimously determined that [it] was not in the best interests of Eidos and its stockholders and determined not to pursue [it]." (A231 (Proxy)) (A68-69, ¶129). Plaintiff's well-pled allegations support a reasonable inference that the Proxy's description of the

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pejorative description of GSK as inexperienced in the relevant field falsely suggested to stockholders that a collaboration was an unattractive alternative.

August 18 meeting was materially misleading, as the detailed minutes for that meeting do not mention the Collaboration Proposal. OB 44-46.

Defendants' counterarguments fail. *First*, Defendants claim the Trial Court held that the "Collaboration Proposal ... was not material." DAB 36. False. The Trial Court held that "***the terms*** of GSK's August collaboration proposal" were immaterial. Op. 46 (emphasis added). The Trial Court accepted that the Collaboration Proposal's ***existence***—and its consideration by the Board—was material. Op. 41-43.

Second, Defendants fail to directly address the reasonable inference created by the conspicuous absence of any mention of the Collaboration Proposal in the detailed, six-single-spaced-page minutes that ***do*** discuss several topics significantly less material than—and indeed, trivial relative to—the Collaboration Proposal. Instead, Defendants simply rehash the Trial Court's discussion of *In re GGP, Inc. Stockholder Litigation*, ignoring that the *GGP* court merely rejected the plaintiff's assertion of a material inconsistency between the minutes and the proxy where the proxy provided additional "granular" information regarding tangential topics. 2021 WL 2102326, at *27 (Del. Ch. May 25, 2021). Here, the omitted information concerned a credible proposal for a transformative, multibillion-dollar deal from one of the world's largest pharmaceutical companies that was anything but "granular".

Defendants try distinguishing *H&N Management Group Inc. v. Couch* because it did not involve a proxy that included information omitted from minutes. DAB 39-40. That distinction is irrelevant, and *H&N* is directly on point. As Defendants concede, the *H&N* court made clear that "the description of events in the minutes" (DAB 39) or lack thereof controls the analysis at the pleading stage, and in *H&N*, like here, the minutes were devoid of any description of or reference to key events. 2017 WL 3500245, at *5 (Del. Ch. Aug. 1, 2017). The *H&N* court found the minutes "sufficient to raise a reason to doubt" whether those events occurred, refusing to "read words into the … minutes that do not appear and [draw] inferences in [the defendants'] favor." *Id.* The Court should do the same here.

Similarly, Defendants argue that other authority cited by Plaintiff—*i.e.*, *Gantler v. Stephens, In re Xura, Inc. Stockholder Litigation* and *Morrison v. Berry*—are inapplicable because they involved "circumstances in which a plaintiff pled a specific contradiction between the board materials and the proxy." DAB 40-41. But that is precisely what Plaintiff pleads here: that the Proxy's description of the Collaboration Proposal's discussion and rejection at the August 18 meeting directly contradicts the minutes which include no mention of any such discussion or rejection. (A36-37, ¶¶58-59). Those cases support that the "sharp discrepancy" (OB

45) between the minutes and the Proxy establishes a reasonable inference that the minutes are correct and the Proxy is misleading.

2. The Proxy Created the Materially Misleading Impression that GSK was an Unsuitable Commercialization Partner

The Proxy was materially misleading because it disparaged GSK's suitability as a commercialization partner for acoramidis, thereby distorting the attractiveness of pursuing a Transaction alternative. OB 48.

Defendants' spin on the Proxy's partial disclosures regarding GSK's capabilities cannot prevail. *First*, Defendants incorrectly claim that Plaintiff "does not identify a fact missing in the Proxy" regarding GSK's suitability as partner on acoramidis. DAB 42. Plaintiff pled numerous omitted material facts regarding GSK, including that it: (i) had "substantial experience in both cardiovascular drug development and genetics"; (ii) had "experience with ATTR, having previously been involved in the development of multiple [ATTR] candidate treatments"; and (iii) possessed a "global platform and [its] senior team[] [had] many years of experience developing and commercializing … successful cardiovascular and precision medicines[.]" (A70-74, ¶¶132-135) (A520) (A63; ¶115). Defendants could also have disclosed GSK's name and/or GSK's rejection of the Proxy's description of its capabilities, which GSK explained in its December 11 presentation

and letter in which it "specifically brought th[at] inaccuracy to the attention of the Eidos Special Committee …." (A73, ¶135).

Defendants respond to Plaintiff's authorities with irrelevant factual distinctions. But Defendants do not and cannot dispute longstanding Delaware law requiring a proxy to "provide the stockholders with an accurate, full, and fair characterization" of topics discussed. *Arnold v. Soc'y for Savings Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994). When Defendants chose to include information disparaging GSK's suitability as a commercialization partner, they were required to present a complete and accurate picture. *See Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del. 1996) (finding partial disclosures give rise to a duty to provide accurate characterizations of partially disclosed information).

Second, Defendants' assertion that the Proxy cannot be misleading because "the disclosure is expressed as the BridgeBio board's opinion, not as a fact or as a view of the Special Committee" (DAB 43) fails as a matter of fact and law. Factually, the Proxy does not characterize BridgeBio's statements as its opinion, but rather states that the BridgeBio Board discussed Company C's "lack of presence in cardiovascular and rare genetic diseases" as if it were an established fact. (A61-62, ¶111). Legally, even if that statement was BridgeBio's opinion, it is the only

disclosure in the Proxy regarding GSK's capabilities as a commercialization partner and thus is materially misleading.[9]

Third, Defendants argue that, notwithstanding that the Proxy's only direct statement on GSK's capabilities was that GSK was an unsuitable commercialization partner for acoramidis, stockholders should have divined from certain other information in the Proxy that GSK was an experienced and suitable partner "[]capable of delivering premium value to the minority stockholders." DAB 44 (quoting Op. 46). Inferring that your fiduciaries are obfuscating is not Delaware law. Material information must be disclosed in a "clear and transparent manner"; stockholders are not required to "go on a scavenger hunt[.]" *Vento v. Curry*, 2017 WL 1076725, at *3-4 (Del. Ch. Mar. 22, 2017).

3. The Proxy Omitted Material Information Regarding GSK's Willingness to Engage in a Transaction Without BridgeBio's Approval

The Committee represented to stockholders that all "third party proposals are illusory" without disclosing that GSK remained willing to explore valuable alternatives that could have been accomplished ***without*** BridgeBio's approval.

[9] Defendants' citation to *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607 (Del. Ch. Aug. 26, 2005) is unavailing, including because the plaintiff there did not allege a misleading partial disclosure.

(A588 (Presentation)); (A76-78, ¶¶140-142). Minority stockholders were strategically led to believe there were no viable Transaction alternatives. OB 51.

Defendants wrongly assert they had no obligation to disclose that information because it "requir[ed] speculation." DAB 44. No speculation was necessary: GSK told Eidos on December 11 that it remained interested in exploring transactions that could be achieved "without BridgeBio's participation." (A77-78, ¶¶141-142).[10]

Defendants also argue that disclosing GSK's December 9 proposal was sufficient because "nothing in the description of the terms of that proposal indicate that BridgeBio's approval was required to enter into the agreement." DAB 45 (citing Op. 49). But Defendants had to disclose that GSK remained willing to explore viable alternatives that did not need BridgeBio's approval "in plain English,"[11] particularly where Defendants affirmatively disclosed the opposite (*i.e.*, that all "third party proposals are illusory"). *See Doppelt v. Windstream Hldgs.*, 2016 WL 612929, at

[10] Defendants' authorities are inapplicable because they do not involve misleading statements requiring supplementation. *See Kahn ex rel. of DeKalb Genetics Corp. v. Roberts*, 679 A.2d 460, 468 (Del. 1996) (finding immaterial speculation by certain directors with which other directors disagreed); *Stroud v. Grace*, 606 A.2d 75 (Del. 1992) (involving statutory disclosure requirements); *Skeen v. Jo-Ann Stores, Inc.*, 1999 WL 803974, at *7-8 (Del. Ch. Sept. 27, 1999) (holding that a board need not disclose all prior expressions of interest from third-parties).

[11] *Voigt*, 2020 WL 614999, at *24.

*5 (Del. Ch. Feb. 5, 2016) (finding misleading statements obligate clarifying information).[12]

[12] *Cottle v. Standard Brands Paint Co.*, 1990 WL 34824 (Del. Ch. Mar. 22, 1990) is inapposite, as that court merely held there was "no basis for [a plaintiff's] premise that a stockholder, having been told nothing on this point, would assume that a special committee had retained advisers." *Id.* at *6.

CONCLUSION

This case presents a highly unusual fact pattern. Allowing BridgeBio to escape judicial scrutiny would transform *MFW* into a weapon for controllers, rather than an incentive-driven construct to help minority investors achieve fair outcomes. Affirmance would undermine *MFW*'s important role in Delaware law.

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CERTIFICATE OF SERVICE

Gregory V. Varallo hereby certifies that, on May 4, 2023, copies of the foregoing *Public Version of Appellant's Reply Brief* and this *Certificate of Service* were filed and served via File & Serve*Xpress* upon the following counsel of record:

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