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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 JANUARY 3, 2022

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NATURE OF PROCEEDINGS[1]

Plaintiff, an alleged former stockholder of Tesaro, Inc., appeals from the Court of Chancery's order dismissing his claims against the former directors and officers of Tesaro for purported breaches of fiduciary duty, and against Tesaro's financial advisor Citi, and minority stockholder NEA, for purported aiding and abetting. The underlying case arises from Plaintiff's post-closing challenge to the arms-length, third party merger in early 2019 in which GlaxoSmithKline, plc ("GSK") acquired Tesaro, an oncology-focused biopharmaceutical company, for $75.00 per share in cash, which represented a 182% premium to Tesaro's unaffected stock price. The Court of Chancery dismissed the action under *Corwin v. KKR Financial Holdings*, 125 A.3d 304 (Del. 2015), because a majority of Tesaro's disinterested stockholders tendered their shares in connection with the transaction.

The only pre-condition to *Corwin*'s application that Plaintiff challenges is whether the tender process was fully informed. Rather than point to any error in the Court of Chancery's ruling rejecting his disclosure claims, Plaintiff instead bases his

[1] "OB" or "Opening Brief" refers to Plaintiff's Opening Brief filed in this Court on November 16, 2021. Dkt. 14. "Recommendation Statement" refers to the Schedule 14D-9 recommendation statement Tesaro filed with the Securities and Exchange Commission on December 14, 2018. A347-426. Citations to "Opinion" refer to the Court of Chancery's Memorandum Opinion issued on August 31, 2021. Dkt. 2. Undefined capitalized terms have the meanings afforded in the Opinion.

appeal on a wholesale re-characterization of his pleading, comprised of fact-bare speculation and innuendo, and unsupported by any well-pled allegations in his Complaint. In other words, Plaintiff seeks reversal based on unpled attorney argument, not the actual pleading he filed and which the Court of Chancery dismissed with prejudice.

First, Plaintiff claims that Tesaro's Recommendation Statement materially omitted that Tesaro management "used Citi" to engage in a "surreptitious solicitation" of an acquisition proposal from GSK in June 2018 without the Tesaro board's authorization. OB at 31-37. But the Complaint contains no factual allegations supporting that claim. Though Plaintiff repeats this claim of a "surreptitious solicitation" or "overture" throughout his Opening Brief, the *sole allegation* he relies on in support is that in June 2018, Citi presented to GSK: (i) a public profile developed with Tesaro management and (ii) an analysis of multiple hypothetical multi-company acquisition scenarios, which included Tesaro among several other companies in one scenario. A487 (¶ 158). The Complaint alleges no undisclosed communications between Tesaro management and Citi or GSK about a sale and no directive from Tesaro management to Citi to solicit GSK. Nor does the Complaint allege that Citi's presentations—which Citi fully disclosed to the Board—invited an acquisition proposal or contained any of Tesaro's confidential information, or that Tesaro management directed Citi to solicit an acquisition proposal using the presentations. Thus, contrary to Plaintiff's insinuation that the Court of Chancery "miss[ed] the point" in not addressing his unpled solicitation theory, OB at 35, the court correctly concluded that (i) the Recommendation Statement adequately disclosed Citi's working relationship with GSK, and (ii) Citi's June 2018 presentations to GSK were immaterial because they neither "suggested any particular transaction or the terms of any such transaction," nor "shared crucial, non-public information." Opinion at 46-48.

Second, Plaintiff argues that Tesaro's Recommendation Statement should have disclosed that NEA and Defendant Mott—a NEA general partner and Tesaro board chairman—were conflicted in the Merger due to NEA's alleged desire to sell its Tesaro holdings quickly to help raise its next fund. OB at 37-44. But Plaintiff never explains how NEA's alleged fundraising plans could be material when he does not contend that NEA controlled Tesaro, and particularly where the Complaint contains *zero* allegations that Mott (or anyone affiliated with NEA) had any specific role in the sale process. Plaintiff tries to remedy this deficiency by (again) grossly misrepresenting the Complaint, claiming that it "expressly alleges" that Mott "knew about and directed" the supposed "surreptitious solicitation" of GSK. OB at 39-40. This assertion, in turn, rests on a single sentence in the Complaint, which states that "[i]nferably, Mott knew that Tesaro management had provided [Citi] with valuation materials for delivery to GSK." A487 (¶ 159). Nothing in that sentence begins to suggest that Mott knew about or directed any supposed "surreptitious solicitation" of GSK. Indeed, the single sentence in the Complaint on which Plaintiff relies is not an allegation but an inference—and an unreasonable one at that, given that no factual allegations in the Complaint support it. In any event, Plaintiff has also failed to plead any conflict of NEA in the Merger, because Plaintiff's theory that NEA's investment cycle incentivized it to favor a near-term sale is indistinguishable from those that Delaware courts have repeatedly rejected.

Finally, Plaintiff asserts that the Recommendation Statement should have disclosed Tesaro's strategic long-range plan ("LRP") projections in addition to the two sets of projections on which Tesaro's financial advisors based their analyses of the transaction, which were labeled "Case A" and "Case B." OB at 44-48. But Plaintiff fails to address the dispositive defect with this claim: the November LRP projections were materially the same as the "Case A" projections, and thus disclosure of the November LRP projections would not have altered the total mix of information available to Tesaro stockholders. This conclusion, left unchallenged by Plaintiff on appeal, also forecloses each of Plaintiff's other arguments, at least one of which is new and thus waived in any event.

The Court of Chancery's order dismissing the Complaint should be affirmed.

<u>SUMMARY OF ARGUMENT</u>

1. **Denied.** The Court of Chancery correctly held that the Complaint does not adequately plead facts supporting a reasonable inference that stockholder approval of the Merger was not fully informed. Plaintiff argues that the Recommendation Statement should have disclosed "the outreach extended to GSK respecting a potential sale of Tesaro outside of a board-approved sale process," OB at 7, but the Complaint does not allege that any such outreach occurred. Plaintiff also argues that the Recommendation Statement should have disclosed "the planned launch of a new NEA fund in early 2019," *id.*, but the Court of Chancery rightly held that information to be immaterial given the absence of allegations that NEA or Mott had any role in the sale process. This disclosure claim also fails because Plaintiff does not adequately plead that NEA's fundraising plans gave rise to any conflict of interest. Finally, Plaintiff's claim that the Recommendation Statement should have disclosed the "existence and substance of the November LRP projections," *id.*, fails because, as the Court of Chancery correctly held, the November LRP was materially the same as the Case A projections that were disclosed, and thus could not have substantially altered the total mix of information available to Tesaro stockholders.

STATEMENT OF FACTS[2]

A. The Parties

Prior to GSK's acquisition of non-party Tesaro (the "Merger"), Tesaro was a publicly traded, oncology-focused biopharmaceutical company. A448-449 (¶¶ 73-75).

Tesaro's board of directors (the "Board") comprised ten individuals at the time of the Merger, eight of whom are named as defendants. A432 (¶ 4); *see* B23-26. Six of those defendants were outside directors who held no other positions at Tesaro. The remaining two, Moulder and Hedley, co-founded Tesaro and served as Tesaro's Chief Executive Officer, and President and Chief Operating Officer, respectively. A432 (¶ 4), A434-436 (¶¶ 12, 18, 20). Defendant Pearson served as Tesaro's Chief Financial Officer and was not a director. A436 (¶ 22).

Plaintiff also purported to state aiding and abetting claims against corporate entities affiliated with NEA and Citi.[3] A445-448 (¶¶ 60-72), A508-509 (¶¶ 229-235).

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[2] By reciting the Complaint's allegations, Defendants do not admit their truth or completeness. Unless otherwise indicated, all internal quotations and citations are omitted and all emphasis is added.

[3] For purposes of this Brief only, and without waiver of any Defendant's arguments, rights, or defenses, Defendants use the terms "NEA" and "Citi," as Plaintiff does in his Complaint, to also include each entity's affiliates. A430-432 (¶¶ 3, 5).

NEA is a venture capital firm that, at all relevant times, beneficially owned approximately 19% of Tesaro's common stock. A449 (¶ 75). Although Plaintiff's Opening Brief references "many NEA-affiliated directors," *e.g.*, OB at 4, the Complaint alleges that only two of Tesaro's ten directors were affiliated with NEA: Mott (an NEA general partner) and Patel (an NEA "Venture Partner").[4] A434 (¶ 11), A438 (¶ 29). In addition, although Plaintiff's Opening Brief speculates that it would have been in NEA's interest to "engineer" the Merger, *e.g.*, OB at 3, 12, 21, the Complaint does not allege that NEA actually did so. In fact, the Complaint does not allege that NEA or any of its agents participated in the sale process at all.

Citi is one of two investment banks that advised Tesaro during its strategic review process in 2018. A448 (¶ 71), A490 (¶ 167). According to the Complaint, Citi was also "GSK's principal relationship banker." A486-487 (¶ 157). The other investment bank Tesaro retained, which rendered a separate and independent fairness opinion, and which Plaintiff does not name as a defendant in his Complaint, is Centerview Partners LLC ("Centerview"). A490 (¶ 167).

[4] The other so-called "affiliations" consist almost exclusively of allegations that Tesaro directors serve or served on the board of a company in which NEA had invested an unspecified amount at some unspecified time. OB at 8-11. Absent from the Complaint are any allegations that NEA ever controlled those companies or had anything to do with the directors' board appointments.

B. The Sale Process

In early 2017, Tesaro's stock was trading at around $190 per share. A450 (¶ 78). Around that time, Tesaro obtained FDA approval for its product ZEJULA for use in treating ovarian cancer, and it was anticipating further regulatory approvals relating to another product, VARUBI. B31; A470 (¶ 115). In February 2017, the Board retained Citi to advise it on a potential sale of Tesaro and other strategic alternatives. A362, A450 (¶ 77). Over the next several months, Citi contacted various potential acquirors. A363. Ultimately, the Board did not pursue a transaction. *Id.*

By 2018, Tesaro had encountered setbacks in connection with both ZEJULA and VARUBI. A competitor drug's FDA approval in August 2017 stripped ZEJULA of its status as the only drug of its kind approved for maintenance treatment in ovarian cancer and created a direct competitor for market share. B5, B34. Reports of adverse side effects relating to VARUBI's second formulation ultimately led Tesaro to sell its rights to VARUBI in July 2018—leaving Tesaro with just one FDA-approved drug. A365. Tesaro's stock price had declined to approximately $70 per share by the beginning of 2018. A450 (¶ 79). By August 2018, it had fallen to approximately $30 per share. *Id.*

Beginning in February 2018, the Board resumed its focus on exploring a wide range of strategic alternatives to address future cash needs, and over the next nine months, it extensively evaluated several standalone strategies to maximize stockholder value. A363. These included (1) a potential co-development/co-promote collaboration involving ZEJULA with Bristol Myers Squibb (the "BMS Transaction"); (2) a potential synthetic royalty transaction with Royalty Pharma (the "RP Royalty Transaction"); and (3) expense sharing arrangements for certain immuno-oncology based assets outside of the United States and Europe. A363-371, A483-486 (¶¶ 145-155). The Board continued actively to consider and negotiate these potential transactions throughout 2018, including during Tesaro's acquisition discussions with GSK. A368-370, A486 (¶¶ 153-155).

Plaintiff's Opening Brief asserts that acquisition discussions with GSK commenced in mid-2018, when "Tesaro management used Citi to solicit an acquisition proposal from [GSK] outside of any board-approved sale process." OB at 35. But the Complaint does not contain that allegation—or anything like that. Plaintiff alleges only that, in mid-2018, Citi (i) presented GSK "with materials suggesting Tesaro as an acquisition target" and (ii) "provided GSK with public marketing valuation materials" that Citi had "prepared with Tesaro management." A487 (¶ 158). The sole source of these allegations is a written relationship disclosure that Citi provided to Tesaro's Board prior to the Merger. A256-257. This relationship disclosure states that Citi "regularly" had strategic discussions with its longstanding client, GSK, and in June 2018 presented to GSK: (i) an analysis of various multi-company hypothetical acquisition scenarios, which included Tesaro in one scenario, and (ii) a public information profile developed with Tesaro management. *Id*. The Complaint does not allege that Citi's presentations invited an acquisition proposal or contained any of Tesaro's confidential information.

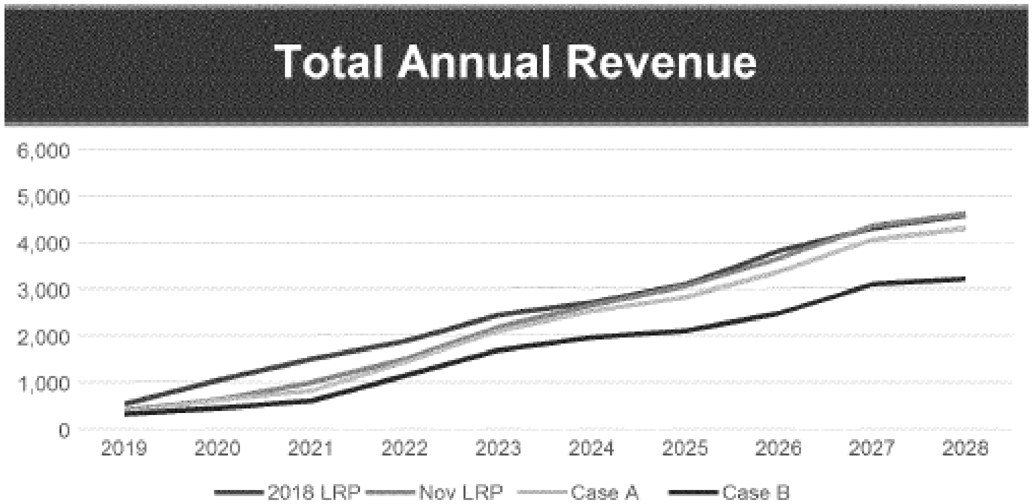
The Complaint does allege that, in June 2018, Hedley initiated discussions with GSK regarding a potential ZEJULA co-development/co-promote collaboration. A487 (¶ 158). Per the Complaint, until September 2018, "discussions between Tesaro and GSK had focused exclusively" on this "potential co-development/co-promote collaboration." A488 (¶ 160). In September 2018, GSK expressed interest in acquiring Tesaro, and the Board authorized the retention of Centerview as a second financial advisor. A488 (¶ 160), A490 (¶ 167). All of these allegations are drawn from the Recommendation Statement. A365-371.

The Recommendation Statement further detailed that, over the following weeks, the Board rejected acquisition proposals by GSK at $66 and $69 per share, respectively, and directed Citi to assess broader market interest in an acquisition by contacting seven other life science companies. A369-371, A489-491 (¶¶ 164–68, 172). Only after each of these companies declined to make a proposal, and after receipt of GSK's third "best and final" proposal to acquire Tesaro for $75 per share—which represented a 182% premium to Tesaro's unaffected stock price—did the Board grant GSK exclusivity on November 21, 2018. A371-372, A491 (¶ 173).

C. <u>The Projections</u>

Tesaro management periodically presented to the Board iterations of Tesaro's LRP, which was a continuously evolving estimate of Tesaro's aspirational strategic plan and objectives over the following five to ten years. A95-233, A242-249. In November 2018, Tesaro management presented an updated iteration of the LRP (the "November LRP"). A243, A492 (¶ 177). The November LRP was refined further to remove projected revenue associated with two potential future treatment indications for ZEJULA: one for the treatment of breast cancer and one for the treatment of platinum resistant ovarian cancer ("PROC"). A492 (¶ 177). At the time, Tesaro did not have a clinical study underway for either breast cancer or PROC indications for ZEJULA, much less sought or received approval for those indications. A477 (¶ 130), A503-504 (¶ 213). This further refined version of the LRP, which was based on relatively optimistic assumptions, was labeled "Case A"; a "Case B" based on "more conservative assumptions" was also presented. A404, A492 (¶ 177). The Case A and Case B projections were used by Citi and Centerview in performing their respective independent valuation analyses, and were disclosed in detail in the Recommendation Statement. A404. The Recommendation Statement also explained how Tesaro's LRP was developed and updated over a specific timeline to arrive at Case A and Case B. *Id.*

Although Plaintiff complains that the Board should also have disclosed the November LRP in the Recommendation Statement, he concedes that the *only* difference between the November LRP and the Case A projections is that the latter excluded speculative revenue streams for potential future indications of ZEJULA for breast cancer and PROC. A492 (¶ 177). He also concedes that the Case A projections and the November LRP were materially the same for the entire projected period. Indeed, as demonstrated in the below slide from a Board presentation on which the Complaint relies, projected revenues for the November LRP and Case A (the two middle lines on the graph) are virtually identical through the first half of the ten-year period, deviating only slightly during the second half of the projected period:



A245. The largest difference between the two projections is seen in the projected revenue for the year 2028—the tenth and final year of the projected period—and even then, the Case A projected revenue was only approximately 7% less than that of the November LRP. A492-493 (¶ 177) (showing $4.615 billion in 2028 revenues for the November LRP and $4.311 billion for Case A).

D. <u>The Board's Approval of the Merger</u>

On December 2, 2018, Citi and Centerview presented to the Board their respective valuation analyses using discounted cash flow and sum-of-the-parts methodologies based on Case A and Case B. A372, A378-381, A388-392. Based on these and other analyses, Citi and Centerview each independently opined that the $75 per share price offered by GSK was fair. A372. That day, the Board unanimously approved the Merger and authorized entry into the Agreement and Plan of Merger (the "Merger Agreement"). A372-373.

E. **Stockholders' Support for the Merger**

The Merger was accomplished by tender offer and back-end merger. A501 (¶ 206); 8 *Del. C.* § 251(h). On December 14, 2018, Tesaro filed its Recommendation Statement, which detailed the process that led to the Merger, summarized the reasons the Board recommended approving the Merger, included detailed summaries of the Case A and Case B forecasts and the independent financial analyses conducted by Citi and Centerview, and disclosed the interests of Tesaro's directors and officers in connection with the Merger. A350-359, A362-375, A376-393, A403-409, A497 (¶ 187). The Recommendation Statement also explicitly disclosed Citi's working relationship with GSK, detailing how: (i) "Citi and its affiliates in the past have provided, and currently provide, services to . . . [GSK] unrelated to the Transactions," and (ii) "[d]uring the past two years, Citi has received approximately $24.1 million in fees for investment banking services provided to [GSK] and its affiliates." A382, A385.

The tender offer expired on January 18, 2019. A501 (¶ 206). The number of tendered shares far exceeded the Merger Agreement's minimum tender condition of "one share more than fifty percent," with Tesaro's stockholders tendering approximately 82.8% of Tesaro's outstanding shares as calculated pursuant to the

Merger Agreement. B123, B128. The Merger closed on January 22, 2019. B128-129.

F. <u>Litigation Regarding the Merger</u>

On January 3, 2019, Plaintiff served the Board with a Section 220 demand to inspect Tesaro's books and records related to the Merger. After Tesaro timely rejected the demand, Plaintiff filed a complaint in the Court of Chancery seeking to compel inspection. *See Kihm v. Tesaro, Inc.*, C.A. No. 2019-0022-MTZ (Del. Ch.), Dkt. No. 2. Tesaro later produced documents in response to the demand. *See id.*, Dkt. Nos. 13, 15. Plaintiff made no objection to the production or its adequacy, and he voluntarily dismissed the Section 220 action with prejudice. *See id.*, Dkt. No. 16. Plaintiff did not file any pre-closing challenge to the Merger or the Recommendation Statement's disclosures.

Plaintiff instead waited to file his Complaint until November 2, 2020—nearly two years after the Merger closed. Defendants moved to dismiss the Complaint, arguing that the Merger was subject to business judgment review under *Corwin*. Defendants also argued that (i) Plaintiff failed to plead a non-exculpated claim against the director Defendants or any claim against the officer Defendants, and (ii) Plaintiff failed to state an aiding and abetting claim against NEA or Citi.

On August 31, 2021, the Court of Chancery issued a 64-page Memorandum Opinion dismissing the Complaint for failure to state a claim under *Corwin*. The only pre-condition to *Corwin*'s application that Plaintiff challenged below was whether the tender process for the Merger was fully informed.

In dismissing the Complaint, Vice Chancellor Zurn first addressed in detail and rejected each of Plaintiff's four disclosure claims. Opinion at 32-62. Having found that Plaintiff failed to plead that the stockholders' approval of the Merger was not fully informed, and noting that Plaintiff did not attempt to plead a claim for waste, the Court of Chancery held that *Corwin* applies to bar Plaintiff's breach of fiduciary duty claims. *See id.* at 62-63. Because Plaintiff failed to plead a breach of fiduciary duty, Plaintiff also did not state a claim for aiding and abetting. *See id.* at 63-64. Accordingly, the court dismissed Plaintiff's Complaint in its entirety and with prejudice. *See id*. Because the court found that *Corwin* provided an adequate ground for dismissing all of Plaintiff's claims, the court did not reach the Defendants' alternative grounds for dismissal.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFF DOES NOT SUFFICIENTLY ALLEGE THE TENDER PROCESS WAS NOT FULLY INFORMED

A. Question Presented

Did the Court of Chancery correctly hold that the Complaint fails to plead facts establishing that the approval of the Merger by Tesaro's stockholders was not fully informed? B138-150.

B. Scope Of Review

This Court's review of the Court of Chancery decision dismissing the Complaint is *de novo* and plenary. *See Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000). In addition, this Court may affirm dismissal of the Complaint on grounds different from those upon which the Court of Chancery's decision relied. *See Wit Capital Grp, Inc. v. Benning*, 897 A.2d 172, 177 n.13 (Del. 2006).

C. Merits Of The Argument

The Court of Chancery held that the Complaint fails to state a claim as to each of the four purported disclosure deficiencies Plaintiff then alleged. Plaintiff appeals as to three of those claims, asserting that the Recommendation Statement should have disclosed (i) the "fact that senior management made an acquisition overture to GSK through Citi," OB at 35; (ii) "NEA's plan to raise NEA 17 in 2019," *id*. at 37; and (iii) the November LRP projections, *id*. at 46. Plaintiff does nothing to undermine the Court of Chancery's conclusion that the Complaint fails to plead a material deficiency in the Recommendation Statement. The Court of Chancery's decision should therefore be affirmed.

1. Citi's Presentation Of Public Information To GSK

The Complaint challenged the Recommendation Statement's failure to disclose that, in June 2018, Citi banker Christopher Hite presented to GSK (i) "materials suggesting Tesaro as an acquisition target" and (ii) "public marketing valuation materials that Hite had prepared with Tesaro management." A487 (¶ 158), A499 (¶ 193). The sole source of these allegations is a written relationship disclosure that Citi provided to Tesaro's Board prior to the Merger, which referenced two presentations containing public information regarding Tesaro that Citi reviewed in June 2018 with GSK. A256-257. First, the relationship disclosure stated that Citi "regularly has strategic discusses [sic] with [GSK] concerning M&A and capital structure," and that Citi made a presentation to GSK "[i]n connection with such discussions." A256. The disclosure further stated that, in this presentation, (i) Tesaro was included as one of several companies aggregated together in comparing a hypothetical acquisition of smaller companies to one of larger companies; (ii) "[n]o individual hypothetical acquisition analysis of the Company alone was included"; and (iii) Citi based its analysis "solely on public information." A256-257. Second, the disclosure stated that Citi also reviewed "a public information profile" of Tesaro with GSK, which Citi had prepared with Tesaro management, and which "included an overview of the Company, including product pipelines and Wall Street analysts' perspectives." A257.

As the Complaint makes clear, the premise of Plaintiff's disclosure claim based on these presentations is Citi's supposed conflicts of interest: he introduces the allegations regarding the June 2018 presentations in a section titled "Citi's Hite Arranges the Acquisition and Deceives the Board," A486; labels the sub-section addressing this disclosure claim as "Citi's Conflicts of Interest," A499; and summarizes the claim as alleging that the Recommendation Statement "misled stockholders about Citi's and Hite's conflicts of interest," A497 (¶ 188). As the Court of Chancery correctly concluded, however, the Recommendation Statement sufficiently informed stockholders of Citi's work with GSK by disclosing "the existence of the conflict and the general nature of Citi's work with GSK," as well as "the specific amount of fees GSK paid Citi over the last two years." Opinion at 46. The Court of Chancery further correctly held that Tesaro was not required to disclose the immaterial fact of Citi's presentation of generic advisory materials to GSK, because the materials did not "suggest[] any particular transaction or the terms of any such transaction," nor did they "share[] crucial, non-public information." *Id*. at 47-48.

On appeal, Plaintiff makes no effort to explain how Citi's providing public information and hypothetical analyses to its longtime client would be material to a reasonable stockholder, especially given that Tesaro disclosed the ongoing advisory relationship between GSK and Citi. Instead, Plaintiff attempts to resuscitate his otherwise moribund theory by arguing that Citi's June 2018 presentations were a "surreptitious sale overture" to GSK that was directed by Tesaro management and Mott. *E.g.*, OB at 36. Plaintiff claims that this supposed "undisclosed overture to GSK" was material because it "trigger[ed] *Revlon*" and "fit the test for a well-pleaded *Revlon* claim." *Id*. at 36-37. He even accuses the Court of Chancery of having "miss[ed] the point" in concluding that Citi's presentations were not material because, according to Plaintiff, the "critical" omission is the "fact that senior management made an acquisition overture to GSK through Citi." *Id*. at 35.

Contrary to Plaintiff's suggestion, the Court of Chancery was not operating under any misapprehension and did not "miss" anything. What is "missing" is a single allegation in the entire 235-paragraph Complaint supporting Plaintiff's contention in his Opening Brief that "senior management made an acquisition overture to GSK through Citi." *Id.* As noted above, the Complaint alleges only that

Citi presented generic marketing materials containing public information to GSK. A487 (¶ 158). Nowhere in the Complaint does Plaintiff allege that Citi—let alone anyone supposedly taking action "through Citi," OB at 35—invited GSK to acquire Tesaro in June 2018, and any such inference would be unreasonable and directly contrary to the relationship disclosure that is the sole document on which Plaintiff relies for that assertion. A256-257. Indeed, the very existence of the relationship disclosure—in other words, the fact that Citi fully disclosed its presentations to GSK to the Board before the Merger—only further negates any inference of a secret overture.

The Court of Chancery correctly concluded that the relationship disclosure, which it found is "consistent with the Complaint," explains that the presentations Citi reviewed with GSK in June 2018 did not constitute "a specific pitch to buy Tesaro, but rather one of several regular 'strategic discussions' in which Tesaro was among a broad swath of potentially available oncology targets identified using 'public marketing valuation materials.'" Opinion at 47.

Similarly untethered to the Complaint are Plaintiff's assertions in the Opening Brief that unspecified members of "Tesaro management" and Mott "made" or "directed" this supposed "sale overture" to GSK through Citi. *See, e.g.*, OB at 18-19, 20, 33, 35. Plaintiff alleges only that Tesaro management helped Hite to "prepare" the public information profile that Hite ultimately presented to GSK, and that "[i]nferably," Mott knew that Tesaro management had provided Hite with such public information for delivery to GSK. A487 (¶¶ 158, 159). Moreover, Plaintiff does not plead that anyone at Tesaro, including Tesaro management or Mott, had any role in Citi's analysis of multiple hypothetical acquisitions, which included Tesaro in one hypothetical multi-company acquisition (again, a presentation that Citi fully disclosed to the Board). There simply are no allegations that any Tesaro officer, director, or agent, including Mott, was involved at any point in time in any undisclosed communication to GSK that conceivably could be inferred as a material acquisition solicitation.

As a result of the dearth of allegations supporting Plaintiff's "surreptitious solicitation" theory, his analogy to *Morrison v. Berry*, 191 A.3d 268 (Del. 2018), *as revised* (July 27, 2018), falls flat. In *Morrison*, the "troubling facts regarding director behavior" that the Court found material included that the board chair (i) personally formed an oral agreement with the potential acquiror to roll over his equity in the event of a successful transaction, (ii) lied to the board about this agreement, and (iii) pressured the board to sell the company by threatening to sell his shares if no sale was undertaken. 191 A.3d at 284-87. The Complaint here contains nothing remotely similar.

Likewise, Plaintiff's reliance on *In re Columbia Pipeline Group, Inc.*, 2021 WL 772562 (Del. Ch. Mar. 1, 2021), for the proposition "that enhanced scrutiny began to apply when a CEO invited a bid that led to a company sale for cash" only further highlights the absence of any allegations of an undisclosed "invited . . . bid" here. OB at 36. Plaintiff also ignores that the *Columbia Pipeline* court also based its holding that enhanced scrutiny was triggered on the allegations that, at the same time as the "invited bid," the CFO had also "provided confidential information to" the acquiror and "indicated that management had eliminated [the acquiror's] competition." 2021 WL 772562, at *39-40. The Complaint here does not contain even conclusory allegations of any such communications. To the contrary, in stark contrast to *Columbia Pipeline*, Plaintiff concedes that Citi's routine presentations to GSK contained only public information concerning Tesaro and were disclosed to the Board.[5]

[5] Plaintiff's reliance on *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989) is similarly misplaced, as there the record demonstrated conflicted company management's "illicit manipulation of a board's deliberative processes," including by giving one bidder a "telephonic tip" of a competing bidder's offer "to stymie . . . the bidding process." *Id.* at 1281-82.

The remaining cases on which Plaintiff relies to suggest that he has pleaded a material omission similarly expose the insufficiency of his allegations.[6] For example:

- In *Teamsters Local 237 Additional Security Benefit Fund v. Caruso*, 2021 WL 3883932, at *28 (Del. Ch. Aug. 31, 2021), the proxy omitted an exchange during the negotiation process between the potential bidder and the target's CEO in which the potential bidder, who indicated that the target's CEO would maintain his position as CEO post-closing, expressed "price enthusiasm" for a certain price range, and the target's CEO responded that the board had "shown willingness to engage" at a price within that range.

- In *Chester County Employees' Retirement Fund v. KCG Holdings, Inc.*, 2019 WL 2564093, at *1, *19 (Del. Ch. June 21, 2019), the proxy omitted that, during early acquisition discussions, and without the target board's knowledge, the target's financial advisor allegedly (i) proposed to the acquiror that it divest the target's standalone bondtrading platform post-acquisition; (ii) stated that this divestiture would increase the target's book value; and (iii) gave the acquiror "confidential information" about the platform.

- In *In re PLX Technology Inc. Stockholders Litigation*, 2018 WL 5018535, at *33 (Del. Ch. Oct. 16, 2018), the proxy failed to disclose a "tip" from the

[6] Plaintiff also cites *In re John Q. Hammons Hotels Inc. Shareholder Litigation*, 2009 WL 3165613, at *16 (Del. Ch. Oct. 2, 2009), but this case is also inapposite. In *Hammons*, the court suggested that the proxy should have disclosed a conflict of interest arising from communications between the target's financial advisor and the acquiror about the possibility of the acquiror retaining the financial advisor to assist with the acquiror's debt refinancing after the acquisition. The Court of Chancery correctly distinguished *Hammons* on the basis that the relationship between the financial advisor and the acquiror there had not otherwise been disclosed—whereas here, the Recommendation Statement already disclosed the relationship between Citi and GSK. Opinion at 48-49. In any event, *Hammons* does not help Plaintiff, because he has abandoned his theory as to Citi's purported conflicts on appeal, and he fails to explain how *Hammons* establishes (or in any way relates to) the materiality of the supposed "acquisition overture." OB at 35.

acquiror to the target's bank, also not shared with the target's management team or full board, that the acquiror "wanted to buy [the target], when it would bid, and how much it wanted to pay."

- In *Singh v. Attenborough*, 137 A.3d 151 (Del. 2016), the target company's financial advisor allegedly made a presentation "aimed at soliciting business from [the buyer] and propos[ing] an acquisition of [the target company] at a value of between $17 and $21 per share," which was not disclosed to the target's board until *after* the merger agreement was signed. *In re Zale Corp. S'holders Litig.*, 2015 WL 5853693, at *3 (Del. Ch. Oct. 1, 2015).

In contrast, here, the Complaint fails to allege the existence of any undisclosed communication in which Citi or Tesaro (i) proposed that GSK acquire Tesaro, (ii) proposed a specific price or any other term for a transaction, or (iii) shared any of Tesaro's confidential information with GSK.

This pleading failure is particularly striking because Plaintiff sought and received Tesaro's corporate books and records pursuant to Section 220 before filing the Complaint. The Court of Chancery has "encourage[d] stockholders, if feasible, to demand books and records before filing their complaints," including when they have "good reason to predict that a *Corwin* defense is forthcoming." *Lavin v. W. Corp.*, 2017 WL 6728702, at *9 (Del. Ch. Dec. 29, 2017). Plaintiff pursued that route before filing the Complaint and came up empty-handed. Plaintiff's attempt to revive his claim on appeal based on speculation that he could not substantiate through a pre-suit investigation and that he did not and could not allege in his Complaint fails.

2. NEA's Purported Liquidity Conflict

Plaintiff similarly bases his next claim—that the Recommendation Statement should have disclosed Mott's and NEA's supposed "unique interest in selling Tesaro before year-end 2018," A501 (¶ 203)—entirely on speculative assertions not pleaded in the Complaint and mischaracterization of the allegations that are in the Complaint. The Court of Chancery correctly rejected this claim, holding that Plaintiff failed to plead the materiality of any supposed conflict because "[t]he Complaint does not allege that Mott contributed to any deficiency in the sales process, or that NEA was involved at all." Opinion at 56-57. The Court of Chancery also expressed significant skepticism toward Plaintiff's theory that NEA or Mott had a liquidity conflict with respect to the Merger in the first place. *Id*. at 54. Although the Court of Chancery rested its rejection of this disclosure claim on Plaintiff's failure to allege any material involvement by NEA in the sale process, its assessment of Plaintiff's liquidity conflict theory was also correct, and provides a further basis for affirmance.

a. The Complaint Does Not Plead That Mott Or Anyone Affiliated With NEA Had Any Role In The Sale Process

The Court of Chancery correctly observed that "Plaintiff has disclaimed any argument that NEA is a controller: it was not a fiduciary and did not have its own power to pressure or force Tesaro's sale." *Id*. at 55. Citing nothing, Plaintiff nevertheless asserts in the Opening Brief that: "Mott was the pivotal figure who could make a sale of Tesaro happen." OB at 39. This assertion is completely divorced from the Complaint, which lacks *any* factual allegations that Mott (or anyone affiliated with NEA) had *any* role in bringing about the sale of Tesaro. In fact, the Complaint is devoid of a single factual allegation that Mott in particular (as opposed to Tesaro's Board as a whole) took *any* action at *any* point in time. Plaintiff's conspiracy theory is instead based on layer upon layer of unfounded speculation that Plaintiff makes in his Opening Brief, including: (i) that Citi invited an acquisition proposal from GSK in June 2018; (ii) that Mott was aware of such "surreptitious solicitation" (iii) because he was "close" to Tesaro management, Citi and GSK; and (iv) that Mott "directed" the supposed "solicitation" (v) to further NEA's supposed desire for a near-term sale. OB at 39-40. None of these speculative assertions is supported by any well-pled facts in the Complaint, and thus Plaintiff's attempt to will a disclosure violation into existence through sheer rhetoric in his Opening Brief fails.

Recognizing these deficiencies, Plaintiff resorts to blatantly misrepresenting his Complaint, asserting that it "*expressly alleges* what is otherwise reasonably inferable—that Mott *knew about and directed* the outreach through Hite to GSK in June 2018." *Id.* The Complaint alleges no such thing, "expressly" or otherwise.

The Complaint contains just one isolated, conclusory sentence that even attempts to link Mott or anyone else affiliated with NEA to any action leading up to the Merger, and that sentence is as follows: "*Inferably*, Mott knew that Tesaro management had provided Hite with valuation materials for delivery to GSK." A487 (¶ 159). Not only is this an improper attempt to plead an inference rather than a factual allegation, but it is a manifestly unreasonable inference given that Plaintiff nowhere alleges facts to support it. *See Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008) (courts should not draw inferences "unless they truly are reasonable"); *see also Pfeffer v. Redstone*, 965 A.2d 676, 687 (Del. 2009) (rejecting the assertion that defendants "would (or must) have been told [certain] information" where plaintiff "did not sufficiently plead any other facts to support that inference").[7]

Indeed, the only basis Plaintiff provides in his Opening Brief for this "inference" is the entirely conclusory assertion that Mott was "close" to Tesaro's senior officers, Citi, and GSK. OB at 3, 20-21. That conclusory assertion *also* lacks any support in the Complaint. The Complaint contains no allegations suggesting the

[7] Plaintiff misleadingly suggests that the court "acknowledged the allegation that Mott knew about Tesaro's June 2018 overture to GSK through Citi." OB at 40. In fact, the court cited the paragraph asserting Mott's "inferable" knowledge as "[t]he closest the Complaint comes to pleading facts suggesting Mott's or NEA's involvement," *after* it had determined that "there are no allegations that Mott participated in the process at all." Opinion at 57 n.160. In the same discussion, the court further noted "the problems of pleading an 'inference.'" *Id.*

existence of *any* underlying relationship between Mott and Citi or Hite. Nor does the Complaint allege anything more than a general outside business relationship between Mott and any of Tesaro's officers, asserting only that one officer was Mott's "longtime former colleague." A437 (¶ 24). And the most Plaintiff can muster to suggest a "close" relationship between Mott and GSK is that (i) Mott served on the board of a biopharmaceutical company that engaged in business transactions with GSK, and (ii) one of Mott's *partners* at NEA previously served as an external consultant to GSK. A487-488 (¶ 159).

Moreover, even if Plaintiff *had* pled that Mott was close to Citi, Tesaro's officers, or GSK (which Plaintiff has not), that alone would not provide a basis to impute their knowledge to Mott for pleading purposes. And even if Plaintiff *had* adequately pled that Mott "knew that Tesaro management had provided Hite with valuation materials for delivery to GSK" (which Plaintiff also has not), that in no way supports an inference that Mott "*knew* about" any supposed "acquisition overture"—much less that he "*directed*" any such overture, as Plaintiff now asserts. OB at 39-40. Plaintiff invented this assertion for purposes of his Opening Brief in an improper attempt to gloss over his deficient pleading.

The conspicuous absence of any allegations about Mott's or NEA's role in the sale process distinguishes the authority that Plaintiff cites for the proposition that "[s]tockholders are entitled to be told about a director's personal reasons for seeking a particular transaction." *Id*. at 38. In all of those cases, unlike here, the directors or executives with allegedly undisclosed conflicts were also alleged to be materially involved in the deal negotiations. *See In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114 (Del. Ch. 2007) (CEO allegedly conducted merger negotiations after being granted the sole authority to do so); *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 705 (Del. 2020) (CEO was allegedly "spearheading" the merger negotiations); *Morrison*, 191 A.3d at 277 (company's founder allegedly entered into undisclosed equity rollover agreement with his preferred bidder and then exerted pressure on board to sell); *Columbia Pipeline*, 2021 WL 772562, at *34 (CEO and CFO were allegedly significantly involved in bringing about the merger, including by providing bidder with confidential information during negotiations).

Plaintiff's reliance on *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015), fails for the same reason. While Plaintiff asserts that *RBC* is "most analogous" to this case, he simultaneously concedes that *RBC* "summarized a long string of Delaware cases . . . standing for the rule" that a director may breach his duty of loyalty "if a desire to gain liquidity *caused [him] to manipulate the sales process*." OB at 42 (quoting *In re Rural/Metro Corp. S'holders Litig*., 102 A.3d 205, 257 (Del. Ch. 2014), *aff'd*, *RBC*, 129 A.3d at 822). Indeed, in *RBC* a conflicted director initiated and "played the most significant role" in the sale process, including by hiring an investment bank to sell the company without board authorization or a genuine exploration of alternatives, in order to "impede[] interested bidders from presenting potentially higher value alternatives." *RBC*, 129 A.3d at 816, 824, 854. Here, by contrast, the Complaint contains no allegation that Mott or NEA took any action with respect to the Merger, much less that they "manipulate[d] the sales process."

The Court of Chancery correctly held that given this "absen[ce] [of] any allegation of bad acts, or even any act at all" by NEA or Mott, "[e]ven assuming NEA has divergent liquidity interests, those specific interests do not add to the total mix of stockholder information about Mott or the sale process." Opinion at 56-57. Plaintiff's improper attempt to amend his Complaint on appeal through unpled attorney argument cannot rectify this pleading deficiency or provide any basis for reversing the Court of Chancery's holding.

b. The Complaint Fails To Plead That NEA Was Conflicted In The Merger

Even apart from the Complaint's fatal failure to plead that Mott or anyone else affiliated with NEA had any specific role in the sale process, Plaintiff has also failed to plead that NEA had a conflict of interest in the Merger to begin with.

Plaintiff concedes that NEA did not stand on both sides of the Tesaro sale; rather, NEA received cash for its shares like every other stockholder. A449, A463-464 (¶¶ 75, 104). The crux of Plaintiff's conflict theory is instead that NEA supposedly desired a near-term sale of Tesaro in order to "provid[e] liquidity" to its limited partners and give them "a cash return that they could reinvest" in a new fund, for which NEA would charge investors super-premium carry. A464, A465-466 (¶¶ 104, 107). In dismissing the Complaint, the Court of Chancery analyzed these allegations at length and expressed significant skepticism that NEA (and Mott by extension) had a liquidity-based conflict "due to [NEA's] investment life cycle and business model." Opinion at 54 & n.153.

The court's skepticism is well-founded. "Delaware courts ha[ve] been reluctant to find [that] a liquidity-based conflict rises to the level of a disabling conflict of interest" where, as here, "a large blockholder receives pro rata consideration." *Firefighters' Pension Sys. of City of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212 (Del. Ch. 2021) (alterations in original). That is because, "[b]y asserting [such a] theory," a plaintiff "ask[s] the Court to make an extraordinary inference: that rational economic actors have chosen to short-change themselves." *Larkin v. Shah*, 2016 WL 4485447, *16 (Del. Ch. Aug. 25, 2016).

In addition, as the court correctly observed, a long line of Delaware authority stretching from *Morton's* (which the Opening Brief ignores) to *Presidio* (on which the Opening Brief heavily relies) has consistently rejected theories—indistinguishable from Plaintiff's here—that an investment fund had a disabling liquidity conflict because the fund's investment cycle incentivized it to favor a near term sale. *See* Opinion at 53 & n. 149 (collecting cases); *see also In re Morton's Rest. Grp., Inc. Shareholders Litig.*, 74 A.3d 656, 667 (Del. Ch. 2013) (rejecting substantively identical theory that private equity firm sought a quick sale of a portfolio company so that it "could cash out the investors in [the firm's existing fund] and those investors would have money to reinvest in [the firm's new fund]"); *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *19 (Del. Ch. Oct. 24, 2014) (dismissing complaint alleging liquidity-driven conflict theory where it was alleged that the defendant investment management firm "usually holds its assets for five years, but has held its interest [in the relevant company] for eight," and that the firm's "longer-than-normal investment in [the company] reflected the illiquid size of its control block"); *Presidio*, 251 A.3d at 257 (rejecting theory that private equity sponsor "wanted to sell because under its private equity business model, the time had come for [it] to harvest its investment in the Company").

And the courts have so held for good reason. As then-Vice Chancellor Strine noted in *Morton's*, pushing a near term sale at a sub-optimal price is even more irrational in the fundraising context, because "investors in [the old fund] would be unlikely to invest in the new [fund] if they viewed [the investment firm] as having compromised their interests as an investor in [the old fund]." *Morton's*, 74 A.3d at 668. And, as the *Morton's* court also recognized, "starting a new investment fund" is a situation that "many firms in the industry face on a regular basis," and so accepting the plaintiff's theory that an investment firm's investment cycle incentivized it to favor a near-term sale would require finding a conflict "whenever [a private equity company] is in the process of starting a new investment fund." *Id.* at 667-68. This would transform what Delaware courts have recognized is an "extraordinary inference" into an entirely ordinary one that would apply at the later stages of the investment cycle for nearly every investment fund. *Larkin*, 2016 WL 4485447, at *16.

Plaintiff offers no cogent response to the Court of Chancery's skepticism that his liquidity conflict theory differs in any meaningful way from the theory rejected in *Morton's* and its progeny. *See* Opinion at 54 n.153. Plaintiff attempts to draw such a distinction in his Opening Brief by arguing that, whereas the *Presidio* plaintiff failed to plead a conflict because he alleged only the controller's general need for a "near-term" sale, here Plaintiff asserts that NEA wanted a sale by a specific time—the end of 2018—before raising its next fund. *See id.*; OB at 43. But that argument does not distinguish *Presidio*, because it still rests on the same general investment cycle and investment return incentives that Delaware courts have consistently found do not pose a liquidity conflict, and because the *Presidio* plaintiff's failure to plead something more specific than a "near-term" sale was not the sole deficiency in his complaint. Indeed, the Court of Chancery also expressed skepticism of Plaintiff's argument—which Plaintiff advanced in its Answering Brief below—by correctly noting that *Presidio*'s holding was based not only on the "timing deficiency" that he focused on, but also on "several other places where the [liquidity conflict] allegations fell short." Opinion at 54 n.153. Plaintiff's Opening Brief offers nothing to address that point. OB at 42-43.

Nor do any of the purported "specific facts" Plaintiff cites in his Opening Brief, such as the alleged "massive fee-generating potential" from raising a new fund with "super-premium 30% carry," or the supposed "impact of selling Tesaro by year-end 2018 on the critical fundraising metric of whether NEA 13 would be an [sic] above or below median," distinguish his liquidity theory from those that have been repeatedly rejected. *Id.* at 43-44. The Complaint itself acknowledges that there was nothing unusual about NEA charging "super-premium" carry; it alleges that NEA had charged "super-premium" carry for past funds, and that doing so was part of NEA's "business model." A455-457 (¶¶ 89-91). Moreover, and contrary to Plaintiff's suggestion in his Opening Brief, the Complaint also fails to allege how the sale of Tesaro was in any way determinative of NEA's ability to charge "super-premium" carry on its next fund. The Complaint merely hypothesizes that NEA 13's performance would be important to raising NEA 17, based on extrapolations from general industry data and commentary, but the Complaint is devoid of any well-pled facts to show that NEA actually held that view, and it does not plead that NEA needed to achieve any specific internal rate of return for NEA 13 in particular, in order to charge super-premium carry on NEA 17. Notably, while Plaintiff vaguely avers that "[p]rospective investors in NEA 17 would look closely at whether NEA 13 . . . was top *quartile* in key metrics," OB at 13, through sleight of hand pleading and an inapt graph, Plaintiff then alleges only that the Merger caused NEA 13's performance to rise above the *median* in those same metrics—thereby, at best, only incrementally increasing NEA's chances of charging super-premium carry. *E.g.*, A466 (¶ 107) ("Locking in a premium sale of Tesaro . . . *helped* NEA raise $3.6 billion for NEA 17 and charge investors a 30% carry."); A466 (¶ 109) (alleging that NEA was able to charge super-premium carry "due in material part to the sale of Tesaro").

Accordingly, even crediting Plaintiff's entirely speculative liquidity conflict allegations, they amount to nothing more than the unremarkable claim that the Merger enabled NEA to return value to investors and incrementally improve the interim performance of NEA 13. They accordingly do nothing to support the "extraordinary inference" that Plaintiff asks the Court to draw: that NEA "had an interest in short-chang[ing] [itself] in favor of liquidity," warranting disclosure. Opinion at 54 (alterations in original).

3. The November LRP Projections

Plaintiff lastly claims that the November LRP projections were material, such that they should have been disclosed in the Recommendation Statement along with the disclosed Case A and Case B projections. A497-498 (¶¶ 188, 189-92). But there "is no *per se* duty under Delaware law to disclose" projections—even those that were "given to and relied on by a financial advisor." *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *11 (Del. Ch. June 30, 2014). Rather, projections, like anything else, need only be disclosed if they would "significantly alter the total mix of information available to the Company's stockholders." *Id.*

Here, there is no dispute that the Recommendation Statement *did* disclose the projections used by the Board in evaluating the Merger and by Citi and Centerview in their financial analyses—Case A and Case B. A405-407. What is more, the

Recommendation Statement explained how Tesaro's LRP was developed and updated over a specific timeline to arrive at the versions that ultimately were used to evaluate the transaction—Case A and Case B—and provided detailed disclosures on the assumptions underlying those projections (including financing assumptions and product-level forecasts). *See, e.g.*, A369 (disclosing management's efforts "to refine the Company's long-range plan[,] . . . preparing two cases for consideration . . ."); *see also* A365, A370, A404-407 (detailing the development of Case A and Case B and their underlying assumptions).

In concluding that *also* disclosing the specific November 2018 iteration of the LRP "would not have 'significantly altered the total mix of information' available to Tesaro stockholders," the Court of Chancery correctly reasoned that these November LRP projections were "nearly identical" to the disclosed Case A projections through the first half of the ten-year projection period, and showed only "a slight deviation ten years out." Opinion at 39, 40 & n.103. In his Opening Brief, Plaintiff does not challenge, and has therefore waived any challenge to, the court's conclusion that the November LRP projections and Case A projections were materially the same. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."); S. Ct. R. 14(b)(vi)(A)(3). None of the arguments that Plaintiff offers on appeal overcome this fundamental defect in his claim.

Plaintiff first claims that disclosure of the November LRP projections would have "cast doubt on the integrity" of the "more conservative" *Case B* projections, as well as "any valuation range" created from those projections. OB at 5-6. That argument, made for the first time on appeal, is waived. *See* S. Ct. R. 8; *RockTenn v. BE&K Eng'g*, 103 A.3d 512 (Del. 2014). Plaintiff's new argument fails in any event, because the Case A projections, which were based on "optimistic, but achievable" assumptions, *were* disclosed to stockholders, as were the key assumption differences between the Case A and Case B projections. A404. Because the November LRP projections were substantially the same as the Case A projections, and the assumptions adjusting the Case A projections to yield the Case B projections were fully disclosed, additionally disclosing the November LRP projections would not have materially changed stockholders' impression of the Case B projections. Plaintiff offers no reasoned argument to the contrary.

The absence of any material difference between the November LRP projections and the Case A projections is similarly dispositive of the rest of Plaintiff's arguments. He argues, for example, that omitting the November LRP projections misleadingly led stockholders to believe that "the most likely estimate of Tesaro's future cash flows was somewhere in between" the Case A and Case B projections, OB at 46-47, but he fails to explain how this omission could be materially misleading when the November LRP projections were substantially the same as the Case A projections. Plaintiff also complains that the Recommendation Statement disclosed the presentation of "two sets of financial projections" to the Board rather than three, *id*. at 48, but he again fails to offer any reason this could be material when the third, undisclosed set of projections (the November LRP) was substantially the same as one of the disclosed sets. Nor does Plaintiff explain how omission of the November LRP projections could render misleading the characterization of the Case A projections as "optimistic," when the projections were materially identical, with the only difference being Case A's exclusion of two speculative future revenue streams. *Id*.

The Court of Chancery's unchallenged conclusion that Case A and the November LRP revenues were materially the same also renders inapposite the cases on which Plaintiff relies, which involved undisclosed projections estimating drastically higher profits than the disclosed projections. *See City of Warren Gen. Emps.' Ret. Sys. v. Roche*, 2020 WL 7023896, at *21 (Del. Ch. Nov. 30, 2020) (holding omission of projections estimating *25% higher* EBITDA than disclosed projections in third year of projection period to be material); *Chester Cnty. Emps.'*

Ret. Fund v. KCG Holdings, Inc., 2019 WL 2564093, at *8 (Del. Ch. June 21, 2019) (holding it reasonably conceivable that undisclosed projections estimating *21.8%* higher adjusted EBITDA in first year of projection period was material).[8]

Plaintiff nevertheless protests that the November LRP is "an updated version of projections management created and presented to the board of directors in the ordinary course," and that "[t]he record does not reflect that management considered the November LRP projections inferior to the contemporaneously created Case A or Case B projections." OB at 46. But as the Court of Chancery correctly concluded, "[e]ven reliable projections need not be disclosed if it is unlikely that doing so would 'significantly alter[] the total mix of information' available to stockholders." Opinion at 37-38 (second alteration in original). That includes where, as is undisputedly the case here, there are "insubstantial" differences between undisclosed projections and the projections that were disclosed. *Id.* at 38 (citing *Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 954 A.2d 319, 333 (Del. Ch. 2008) (rejecting claim that company should have disclosed additional projections that were "generally the

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[8] *Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010) is inapposite, though for a different reason, since it did not involve multiple projections. There, the company "excised" from the proxy "the free cash flow estimates that had been made by [the company's] management and provided to [the company's investment bank]" for purposes of its valuation analysis. *Id.* Here, there is no dispute that the Recommendation Statement disclosed the projections used by Citi and Centerview in their respective financial analyses.

same" as those disclosed)); *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *10 (Del. Ch. June 27, 2008) (same where undisclosed projections estimated immaterially higher revenues than disclosed projections). That rule makes good sense. If companies were required to disclose every reliable iteration or variation of financial projections, no matter how similar, proxy statements would "bury the shareholders in an avalanche of trivial information" and risk confusing stockholders instead of informing them. *Solomon v. Armstrong*, 747 A.2d 1098, 1130 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000).

In any case, Plaintiff has never pointed to any well-pled facts establishing that the November LRP represented a materially more current, reliable, or accurate estimate of Tesaro's future performance than Case A and Case B. To the contrary, Plaintiff has always conceded that the *only* difference between the November LRP and the Case A projections is that the latter excluded speculative revenue streams for potential future indications of ZEJULA for breast cancer and PROC, for which Tesaro did not even have a clinical study underway at the time of the Merger. *See, e.g.*, A477, A503-504 (¶¶ 130, 213) (acknowledging that Tesaro did not have any products with an approved indication for breast cancer or PROC as of the Merger). Thus, aside from being quantitatively immaterial, the two discrete potential revenue streams excluded from Case A were precisely the kind that Delaware law does not require to be disclosed due to their unreliable and speculative nature. *See In re Chelsea Therapeutics Int'l Ltd. S'holders Litig.*, 2016 WL 3044721, at *2, *5 (Del. Ch. May 20, 2016) (rejecting allegation that company should have disclosed "potential revenue streams that would result if the FDA should approve additional applications" of company's drug).

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Chancery's dismissal for failure to state a claim. If this Court does not affirm dismissal under *Corwin*, Defendants respectfully request that the Court remand this case for consideration of the alternative grounds for dismissal that Defendants previously asserted but which the Court of Chancery did not reach.

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Dated: December 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2022, my firm served the foregoing *Public Version of Appellees' Answering Brief* upon the following counsel of record by File & Serve*Xpress*:

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