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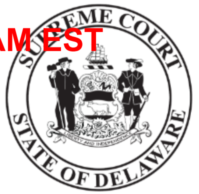

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 ON JANUARY 18, 2022**

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PRELIMINARY STATEMENT

The sole issue on appeal is whether the Complaint was properly dismissed under *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015). Plaintiff's opening brief discussed how Plaintiff pleaded three sets of undisclosed facts that each "undermin[e] the integrity or financial fairness of the transaction," thereby precluding stockholder ratification under *Corwin*. *Id.* at 312 n.27. Namely, the opening brief discussed Plaintiff's allegations of how:

(i) GSK's interest in Tesaro as an acquisition target grew out of presentations by Citi to GSK in June 2018 that included information about Tesaro that Citi had prepared with the assistance of Tesaro senior management, without contemporaneous approval or knowledge of the Tesaro board of directors, though inferably with the knowledge of Chairperson of the Board David Mott, a general partner of NEA, Tesaro's largest and most influential stockholder (OB at 16-21, 31-37);

(ii) NEA was planning to launch a new fund in early 2019, and NEA's ambitious fundraising goals for that new fund would be critically enhanced by the public announcement of the sale of Tesaro for a premium by the end of 2018 (*id*. at 8-15, 27-28, 37-44); and

(iii) in November 2018, Tesaro management presented to the board of directors an updated version of the LRP, which management prepared and updated in the ordinary course, and this undisclosed November LRP projected greater revenues than two sets of projections contemporaneously presented to the board that were disclosed in the 14D-9, which characterized one set as "optimistic, but achievable" and the other as "more conservative" (*id*. at 22-26, 29, 44-48).

Defendants' only arguments on appeal attempt to cast doubt on whether Plaintiff pleaded undisclosed material facts. According to Defendants, Plaintiff relies on a "wholesale re-characterization of his pleading, comprised of fact-bare speculation and innuendo," and "unpled attorney argument." (AB at 2.) In reality, Defendants are asking this Court: (a) not to accept Plaintiff's well-pleaded factual allegations, reasonable inferences therefrom, and the text of a document Defendants entered into the record and is incorporated by reference into the Complaint; and (b) to reject settled pleading standards. The Complaint, "when fairly read, supports a rational inference that material facts were not disclosed or that the disclosed information was otherwise materially misleading." *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018).

ARGUMENT

I. THE JUNE 2018 OVERTURE TO GSK

Defendants' central argument is that the Complaint lacks "a single allegation…supporting Plaintiff's contention in his Opening Brief that 'senior management made an acquisition overture to GSK through Citi.'" (AB at 21 (quoting OB at 35); *see also* AB at 23 (referring to "the dearth of allegations supporting Plaintiff's 'surreptitious solicitation' theory") (quoting OB at 32).) This argument reflects Defendants' unwillingness to accept the rational inferences that can be drawn from a fair reading of the Complaint.

The "surreptitious solicitation" of June 2018 is a core theory of the Complaint. It is spelled out in an introductory paragraph as follows:

> GSK's initial acquisition proposal was choreographed in advance, without Board involvement. In June 2018, Hite presented GSK with materials prepared by Tesaro management. GSK then obtained access to Tesaro's confidential information by feigning interest in a co-promote/collaboration relationship that GSK lacked a platform to develop….

(A433 ¶6.) The Complaint elaborates in paragraph 158:

> Hite had been working behind the scenes on a potential acquisition of Tesaro by GSK. In June 2018, Hite presented GSK with materials suggesting Tesaro as an acquisition target and provided GSK with public marketing valuation materials that Hite had prepared with Tesaro management. Around this same time, Hedley contacted Dr. Hal Barron, GSK's Chief Scientific Officer and President, R&D, to discuss a co-development/co-promote with respect to Zejula.

(A487 ¶158.) The Complaint alleges that the 14D-9 "failed to disclose that in June 2018, Hite provided GSK with public marketing valuation materials that he had prepared with Tesaro management" (A499 ¶193), and further alleges that the Defendants either engineered, facilitated, or approved the challenged transaction "without a formal sale process." (A506 ¶222; A507 ¶227; A508 ¶230; A509 ¶234.)

The allegations above refute Defendants' argument that the Complaint does not "allege that Citi … invited GSK to acquire Tesaro in June 2018[.]" (AB at 22.) A fair reading of the Complaint is that it alleges exactly that.

Defendants further argue that "any such inference would be unreasonable and directly contrary" to the text of the Citi conflict disclosure ("the Citi Conflict Disclosure") that serves as the documentary basis for Plaintiffs' allegations respecting the June 2018 overture. (*Id.*) But a fair reading of the Citi Conflict Disclosure, which is incorporated by reference into the Complaint,[1] and was cited

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[1] *McElrath v. Kalanick*, 224 A.3d 982, 987 n.1 (Del. 2020) ("At this stage of the proceedings, we accept as true the complaint's well-pleaded allegations and also rely on documents referred to or incorporated by reference."); *Marchand v. Barnhill*, 212 A.3d 805, 808 n.13 (Del. 2019) ("The facts come from the plaintiff's complaint, documents incorporated by reference into the complaint, and the Court of Chancery's opinion based on these same documents."); (AR7 ¶14) ("The Stockholder agrees as a condition of any production of documents pursuant to the Demand that all such documents shall be incorporated by reference into any

repeatedly by the Vice Chancellor (Opinion nn.22-26, 41-43, 124, 126),[2] is that Citi suggested that GSK acquire Tesaro:

- Chris Hite … regularly has strategic discuss[ions] with [GSK] concerning M&A and capital structure. In connection with such discussions, in June 2018, Chris Hite reviewed materials…with [GSK] that included a screen of all biotech companies that had greater than $500 million in revenue in 2024, focused on oncology, and where their products were not substantially partnered…. The … materials also had hypothetical acquisitions of two larger biotech companies compared to a hypothetical acquisition of three smaller companies that was termed a "string of pearls" scenario….
- In one version of the … materials, [Tesaro] was included as one of the companies aggregated into the string of pearls…. In addition, in June, Citi worked with senior Management of [Tesaro] to prepare a public information profile of [Tesaro] that was also reviewed with [GSK]. These materials included an overview of [Tesaro], including product pipelines and Wall Street analysts' perspectives.

(A256-57.) In other words, Citi worked with Tesaro senior management to gather information that Citi used to suggest that GSK buy Tesaro as the first of a string of small oncology targets.

Defendants argue that the fact that the Citi Conflict Disclosure revealed the above information "only further negates any inference of a secret overture." (AB

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complaint or other pleading filed by the Stockholder that … relies upon, refers to, or otherwise relates to such documents[.]").

[2] The Citi Conflict Disclosure is part of Exhibit M to the Declaration of April M. Kirby. (D.I. 30, A251-59.)

at 22.) The opposite is true. The Citi Conflict Disclosure is dated November 29, 2018 (A251), and it was prepared in connection with the board meeting of December 2, 2018, the day before the anticipated public announcement of the transaction (A267). Defendants cannot point to any documented prior disclosure to the Tesaro board of the fact that Tesaro senior management provided documentation to Citi in June 2018 that Citi used to educate GSK about a potential acquisition of Tesaro. Citi's late disclosure to the board—coupled with the absence of any documented contemporaneous board disclosure and the non-disclosure in the 14D-9—suggests that the overture of June 2018 was made secretly, outside of any board-approved sale process. And contrary to Defendants' argument (AB at 24 & n.5), Citi's belated conflict disclosure supports Plaintiff's *Revlon* claim. *See In re PLX Technology Inc. S'holders Litig.*, C.A. No. 9880-VCL, at 40 (Del. Ch. Sept. 3, 2015) (TRANSCRIPT) (upholding *Revlon* claim where "the committee only learned the details of Deutsche's relationship with Avago when Deutsche chose to disclose them one day before presenting its fairness analysis"); Eric S. Klinger-Wilensky and Nathan P. Emeritz, *Financial Advisor Engagement Letters: Post-*Rural/Metro *Thoughts and Observations*, 71 BUS. LAW. 53 (Winter 2015-2016) (discussing *PLX* and the problem of the late disclosure of banker conflicts).

Again defying the text of the Complaint, Defendants argue that 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." (AB at 23.) But the Complaint expressly alleges that Hite worked "with Tesaro management" to prepare the materials that Hite provided to GSK when "suggesting Tesaro as an acquisition target." (A487 ¶158.)

The existence of the above-discussed allegations supporting a "surreptitious solicitation" of GSK in June 2018 necessarily implies the materiality of the non-disclosure of that solicitation. (*See* AB at 23.) After all, operative questions respecting materiality include whether the undisclosed fact "may have impacted the structure of the sale process" or if disclosure "would have helped the stockholder to reach a materially more accurate assessment of the probative value of the sale process." *Morrison*, 191 A.3d at 275, 284. GSK was afforded a unique opportunity to explore an acquisition, and obtain due diligence, outside of any sale process, while the board was overseeing an exploration of financing options that would finance Tesaro through completion of the PRIMA trial.

Defendants provide no legal support for the Vice Chancellor's ruling that the solicitation of an acquisition outside of any board-approved sale process is

immaterial if it involves "only public information" and does "not discuss the details of a potential transaction." (Opinion at 48 n.130.) Disclosing abundant outreach to potential co-development/co-promote partners (A363-70), while omitting the contemporaneous management-assisted solicitation of one of those parties to buy Tesaro, violates the "obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events." *Morrison*, 191 A.3d at 283; OB at 33-35. The omitted facts are critical to understanding when, how and why an exploration of financing alternatives turned into a sale to a single, favored bidder during the pendency of a clinical trial that was expected by management to yield blockbuster results.

Another applicable legal rule is that non-disclosure of "troubling facts regarding director behavior" forecloses dismissal. *Morrison*, 191 A.3d at 284 n.76; *Corwin*, 125 A.3d at 312. The "surreptitious solicitation" of June 2018 is troubling. As discussed further below, it fits "the paradigmatic context for a good *Revlon* claim," which "is when a supine board under the sway of an overweening CEO bent on a certain direction, tilts the sales process for reasons inimical to the stockholders' desire for the best price." *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1002 (Del. Ch. 2005), *quoted in Kahn v. Stern*, 183 A.3d 715, 2018

WL 1341719, at *1 n.4 (Del. 2018). Here, Mott and senior management converted a financing process into a single-bidder sale process.

II. NEA'S PLAN TO RAISE NEA 17 (AND RELY ON THE SALE OF TESARO TO DO SO)

Defendants make two arguments respecting the 14D-9's omission of NEA's plan to raise a new fund in early 2019, the prospects for which would be critically enhanced by the publicly announced sale of Tesaro for a premium in 2018. Both arguments supposedly compel the conclusion that NEA's economic motivations are immaterial. *First*, Defendants attempt to support the Vice Chancellor's holding in a footnote that NEA's David Mott is not alleged to have "participated in the process at all." (Opinion at 57 n.160.) *Second*, Defendants ask this Court to affirm on the alternative ground not reached by the Vice Chancellor that NEA's liquidity-driven conflict is inadequately pled as a matter of law. Both arguments fail.

A. Mott's Role

Defendants again defy the applicable pleading standard: whether the Complaint, "when fairly read, supports a rational inference that material facts were not disclosed." *Morrison*, 191 A.3d at 282. Defendants argue that the Complaint "lacks *any* factual allegations that Mott (or anyone affiliated with NEA) had *any* role in bringing about the sale of Tesaro." (AB at 28.) Defendants ask the Court to ignore the following allegation: "Inferably, Mott knew that Tesaro management had provided Hite with valuation materials for delivery to GSK." (*Id*. at 29.) According to Defendants, the above allegation is "an improper attempt to plead an

inference" and is "manifestly unreasonable" and "entirely conclusory" and "lacks any support in the Complaint." (*Id.*) Defendants also argue that the allegation, if accepted as true, "in no way supports an inference that Mott '*knew* about'—much less that he '*directed*' any such overture[.]'" (*Id.* at 30.)

Defendants protest too much. They are fighting a reasonable inference drawn from a fair reading of the well-pleaded allegations of the Complaint and the Citi Conflict Disclosure. They also ignore the implications of their argument.

If it were "manifestly unreasonable" to infer that Mott knew that Tesaro senior management had "worked with" Citi in June 2018 "to prepare a public information profile" of Tesaro that Citi then reviewed with GSK when pitching GSK about a potential acquisition of Tesaro (among other oncology targets) (A257), then the only reasonable inference must be that Tesaro senior management went behind Mott's back. In that case, Mott would have been shocked to read about the June 2018 overture in the Citi Conflict Disclosure. But nothing in the record suggests this is so.

There is every reason to believe that Mott knew about, approved of, and engineered the June 2018 overture to GSK via Citi. As detailed in the Complaint:

> Hite was the ideal person to broker a near-term sale of Tesaro to GSK. Hite had pursued a sale process for Tesaro in early 2017, and

> Citi was a regular provider of investment banking services to [Tesaro]. Citi was also GSK's principal relationship banker….
>
> …
>
> … A sale of Tesaro to GSK served NEA's interest in near-term liquidity, and for that reason was preferable to a financing transaction. Moreover, Mott, NEA, and GSK had longstanding relationships. In July 2018, Adaptimmune, a biopharmaceutical company chaired by Mott, announced that it had completed the transition of a valuable therapy program to GSK, concluding a successful collaboration that had begun in 2014….

(A486-87 ¶¶157, 159.) The Citi Conflict Disclosure provides supporting detail:

> Citi has maintained a close relationship with [Tesaro] senior management team for the past 16 years and has worked with [Tesaro's] Chairman, Dave Mott, for the past 18 years.

(A254.) The Complaint alleges numerous facts about NEA's and Mott's longstanding, multi-faceted relationships with Tesaro senior managers Moulder, Hedley, and Pearson. (A434-437 ¶¶11-12, 15-16, 18, 21-22, 24-26.) CEO Moulder became an NEA venture advisor in 2019, an unlikely outcome if Moulder had circumvented Mott in June 2018. Additionally, an entire section of the Complaint is devoted to explaining why a near-term sale of Tesaro was vital to the interests of NEA's general partners, such as Mott, and far preferable to them in comparison with the financing alternatives under discussion. (A451-69 ¶¶81-113; A483-86 ¶¶145-52; A526.)

This totality of allegations supports the reasonable inference that Mott was a key figure in the June 2018 overture of Tesaro to GSK, through Citi's Hite, with the assistance of Tesaro senior management. These allegations are a far cry from those in *Pfeffer v. Redstone*, 965 A.2d 676 (Del. 2009), a case cited by Defendants (AB at 29), in which this Court affirmed a holding that the plaintiff had failed to support the conclusory allegation that a parent company's board of directors knew about a "cash flow analysis performed by a midlevel treasury manager of a subsidiary corporation." *Id.* at 687. In the language of *Pfeffer*, Plaintiff has adequately pleaded Mott's knowledge of the June 2018 overture by having "offer[ed] well-pleaded facts from which it can be reasonably inferred that this 'something' was knowable and that the defendant was in a position to know it." *Id.* (internal quotation omitted).

Mott's well-pleaded contemporaneous knowledge of, and involvement in, the solicitation of GSK outside of any board-approved sale process eliminates Defendants' basis for distinguishing the line of cases from *In re Lear Corp. S'holder Litigation*, 926 A.2d 94 (Del. Ch. 2007), through *In re Columbia Pipeline Grp., Inc. Merger Litigation*, 2021 WL 772562 (Del. Ch. Mar. 1, 2021), *appeal refused*, 249 A.3d 801 (Del. 2021), about the "materiality of information that sheds light on the financial incentives and motivations of key members of management

who are involved in negotiating the deal." *Id.* at *34. (*See* OB at 38-40; AB at 30-31.) Chairperson Mott was the nexus of the challenged transaction. His personal financial incentives in a near-term sale are material information.

It is reasonable to infer that Mott's and NEA's undisclosed financial interest in the planned launch of NEA 17 in 2019 was material, and that Mott's undisclosed role in exploring, through Citi, the prospect of a near-term sale of Tesaro to GSK in June 2018, outside of any board-led sale process, was also material. As discussed below, it is reasonably conceivable that the planned launch of NEA 17 in 2019 motivated the solicitation of GSK in June 2018, outside of any formal board process and at a time when Tesaro's value was depressed due to the pendency of the PRIMA trial and the uncertainty among market participants about its outcome.

B. NEA's Liquidity-Driven Conflict

Defendants invite the Court to rule on an issue that the Vice Chancellor declined to reach—whether, as a matter of law, Plaintiffs have adequately pleaded that NEA and Mott were operating under a liquidity-driven conflict of interest. As discussed in the opening brief (OB at 4-5, 41-43), a string of cases that include *In re Rural/Metro Corp. S'holders Litigation*, 102 A.3d 205 (Del. Ch. 2014), *aff'd*, *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015), and *Firefighters' Pension Sys. of City of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212

(Del. Ch. 2021), stand for the proposition that the "desire to wrap up an existing fund or to provide potential investors with attractive realizations while raising a new fund can affect a fund manager's approach to achieving liquidity for an investment." *Presidio*, 251 A.3d at 258.

Defendants rely principally on (i) dicta in *In re Morton's Restaurant Group, Inc. S'holder Litigation*, 74 A.3d 656 (Del. Ch. 2013), which follows dicta in *In re Synthes, Inc. S'holder Litigation*, 50 A.3d 1022 (Del. Ch. 2012), and (ii) a misreading of *Presidio*. The dicta of then-Chancellor Strine in *Morton's* and *Synthes* is that pleading a disabling liquidity-driven conflict of interest for a controller or a blockholder such as NEA requires a plaintiff to allege "unusual circumstances [that] 'involve a crisis, a fire sale' in which the pressure on the controller to sell quickly is so high that the controller imposes pressure on the corporation to artificially truncate the market check and forgo the additional value that could be brought about by making 'logical buyers aware' that the company is for sale and giving them a reasonable time and fair opportunity to consider whether to make an offer." *Morton's*, 74 A.3d at 667 (citing *Synthes*, 50 A.3d at 1036.).

This dicta has been criticized recently by then-Vice Chancellor, now-Chancellor McCormick and by Vice Chancellor Laster. Then-Vice Chancellor McCormick wrote: "The court's hyperbolic language in *Synthes* is best read in the

context in which it was issued, where then-Chancellor Strine was reacting to a particularly poorly drafted complaint 'strikingly devoid of pled facts to support' the alleged liquidity-driven conflict." *In re Mindbody, Inc. S'holders Litig.*, 2020 WL 5870084, at *17 (Del. Ch. Oct. 2, 2020) ("*Mindbody 1*"). The better rule, according to *Mindbody 1*, is that "Delaware law recognizes that liquidity is one benefit that may lead directors to breach their fiduciary duties if a desire to gain liquidity caused them to manipulate the sales process and subordinate the best interests of the corporation and the stockholders as a whole." *Id.* at *15 (collecting authorities) (cleaned up). In *Presidio*, Vice Chancellor Laster followed *Mindbody 1* in saying that it "discussed *Synthes* at length, explaining persuasively why the extreme language in *Synthes* [about a "crisis" or "fire sale" and an "exigent need" for "immediate cash"] should not be read as establishing a general rule." 251 A.3d at 256.

Most recently, Chancellor McCormick issued *In re Mindbody, Inc. S'holders Litigation,* 2021 WL 5834263 (Del. Ch. Dec. 9, 2021) ("*Mindbody 2*"), which followed the rule set forth in *Mindbody 1* and upheld a claim against a private equity firm and its director designee, reasoning that the allegations "make it reasonably conceivable that Liaw had a divergent interest in obtaining liquidity for IVP and took action to ensure that IVP would obtain a quick exit from its

investment in Mindbody." *Id.* at *5. Two critical allegations were as follows: "In 2018, IVP decided to liquidate $200 million of its IVP 13 fund by the end of the year. To achieve the $200 million goal, Liaw needed to liquidate at least a portion of IVP's position in Mindbody." *Id.* at *2.

In *Presidio*, the plaintiff sought "to establish an inference not only that Apollo wanted to sell in the near-term, but that Apollo wanted to sell *by the end of 2019*." 251 A.3d at 258. The plaintiff's failing in *Presidio* was that its factual allegations "do not support a reasonable inference that Apollo wanted to sell by the end of 2019." *Id.* The plaintiff's allegations respecting Apollo's incentives and conduct were insufficient to permit a reasonable inference that "Apollo sacrificed a higher-priced deal with CD&R that would have closed, at the latest, in early 2020 because of a preference for completing a deal by year-end 2019." *Id.* at 260. In other words, a desire to sell by the end of 2019 was insufficiently alleged.

Here, as in *Mindbody 2*, but unlike *Presidio*, the Complaint pleads factual allegations that permit the reasonable inference that NEA and Mott had an undisclosed financial interest in announcing a sale of Tesaro by the end of 2018 that substantially outweighed their financial interest in obtaining a higher-priced deal at any later point. Plaintiff is not relying merely on "general investment cycle and investment return incentives that Delaware courts have consistently found do

not pose a liquidity conflict." (AB at 36.) As summarized in the opening brief, Plaintiff pleads specific facts:

- throughout 2018, NEA was preparing to raise NEA 17;
- potential investors in NEA 17 would be scrutinizing the 2018 year-end returns of NEA 13, which were on track to be *below median* as of year-end 2018, undermining NEA's lofty goals for NEA 17;
- NEA 17 would be raised by a new sole managing general partner of NEA, and the retirement of generational leaders historically posed a challenge for venture capital firms in raising new funds;
- the increasing difficulty of triggering exits from portfolio companies within the lifespan of a venture capital fund was recognized publicly as acute for NEA;
- NEA's business model was premised on raising very large venture capital funds that charged investors a super-premium [redacted] carry, but historically NEA ranked at the bottom of the exclusive cohort of venture capital firms that charge super-premium carry, and doing so was only possible for venture capital firms with excellent track records, a stable management team, and a happy investor base from prior funds, which did not describe NEA in mid-2018;

- NEA was focused in 2018 on generating liquidity, such as through NEA's creation of a new "spin-out" fund that paid $1 billion for NEA's stakes in 31 late-stage portfolio companies, thereby providing liquidity to current investors in older funds such as NEA 13;
- the sale of Tesaro was the only investment that would move the needle for NEA 13's returns during 2018, and a sale of Tesaro for a significant premium by the end of 2018 would lift NEA 13's returns above median, a critical benchmark, while also generating significant additional liquidity for NEA 13's investors;
- a realistic chance of raising a mega-fund with a super-premium carry depended on a near-term premium sale of Tesaro;
- if NEA 17 was $1 billion less than planned, and if NEA could not charge investors a super-premium carry, the prospective lost fees to NEA's general partners would be on the scale of approximately *$1-2 billion*, which far outweighed the prospective gains to NEA's general partners from selling Tesaro at a higher price after the pending PRIMA trial;

- Tesaro's public stockholders, on the other hand, stood to benefit from delaying a sale process until after the completion of the PRIMA trial in 2019, which gains instead were captured by GSK.

(OB at 12-15, 29, 39.) Moreover, Mott's pursuit of a near-term sale to GSK outside of a formal board process or auction, is consistent with his and NEA's economic incentives. This combination of factual allegations makes a claim for a liquidity-driven conflict reasonably conceivable under *Mindbody 1*/*Presidio* or *Morton's*.

III. THE NOVEMBER LRP PROJECTIONS

In the opening brief, Plaintiff argued that the undisclosed November LRP projections were material because they were the most reliable:

> The undisclosed November LRP projections are an updated version of projections management created and presented to the board of directors in the ordinary course. The record does not reflect that management considered the November LRP projections inferior to the contemporaneously created Case A or Case B projections. Case A stripped out projected revenue for the treatment of breast cancer and PROC even though pursuit of those treatments was part of Tesaro's long range plan.

(OB at 46.) Plaintiff also argued that the Vice Chancellor erred in ruling that the November LRP projections were immaterial even if reliable. (*Id*. at 45-47.) Plaintiff explained that omission of the higher November LRP projections was "intended to mislead reasonable stockholders into believing that the most likely estimate of Tesaro's future cash flows was somewhere in between the 'optimistic, but achievable' Case A projections and the 'more conservative' Case B projections." (*Id.* at 46-47.)

Defendants incorrectly argue that the 14D-9 "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[.]" (AB at 39.) No such explanation exists because the undisclosed November LRP

projections were created *contemporaneously* with Case A and Case B. (A242-49; A492-93 ¶¶177-78.) The page of the 14D-9 cited by Defendants misleadingly states that "two cases" were being prepared by management "to refine" the LRP. (A369.) But the undisclosed November LRP is *itself* a refinement of the LRP. The November LRP is the actual, updated, ordinary course version of the LRP.

The 14D-9 falsely states that only "two sets of financial projections" were presented on November 7-8, 2018. (A370.) Three sets of new projections were presented at that meeting—the November LRP, Case A, and Case B—along with the August LRP. (A242-49.)

Defendants' main argument is that it is a complete defense—supposedly undisputed on appeal and thus waived—that the LRP projections are "materially the same" and "substantially the same" as the Case A projections. (AB at 39-41.) As a preliminary matter, no such factual finding exists, and no valuation calculations have been performed. The Vice Chancellor stated that the November LRP projections were "marginally higher" than and "not substantially different from" Case A. (Opinion at 40, 41 n.104.)

More importantly, as discussed above and in the opening brief, any similarity between the November LRP projections and the Case A projections cannot be a license to commit intentional fraud. The omission of the

contemporaneous November LRP projections renders materially misleading the characterization of Case A as "optimistic, but achievable" and Case B as "more conservative." A reasonable stockholder could conclude that the undisclosed, higher November LRP projections are the actual best estimates of Tesaro management, and that Case A and Case B were created by management, used by the bankers, and characterized in the 14D-9 to make GSK's bids look fair.

The illogic of Defendants' argument can be demonstrated by a hypothetical. Assume that a management team created updated, ordinary course, reliable projections based on its long-term plan. Would it not be materially misleading to denominate the updated projections as "Case A," describe them as "optimistic, but achievable," arbitrarily create a second set of lower projections, denominate them as "Case B," describe them as "more conservative," and present both sets of projections to the bankers for their valuation work? In this hypothetical, Case A is *identical to* management's updated, ordinary course projections and Case A is disclosed.

Here, by comparison, the updated, ordinary course November LRP projections are (i) higher than both Case A and Case B and (ii) they are undisclosed. Delaware law does not license management teams to bury their best projections by disclosing a similar set of lower projections while also disclosing

another set of much lower projections. *See City of Warren Gen. Employees' Ret. Sys. v. Roche*, 2020 WL 7023896, at *22 (Del. Ch. Nov. 30, 2020) (holding that complaint "supports a reasonable inference that the Proxy selectively disclosed projections regarding its potential earnings in a manner that rendered the Proxy disclosures misleading"); *In re Netsmart Technologies Inc.*, 924 A.2d 171, 203 (Del. Ch. 2007) (stockholders "would obviously find it important to know" management's best estimate of future cash flows).

Defendants argue that Plaintiff did not preserve below the argument that disclosure of the November LRP projections would call into question the integrity of the Case B projections and any valuation range based on the Case B projections. (AB at 40.) This argument fails because the Complaint alleges that banker valuation of the November LRP projections "could not have justified the Acquisition price" (A495 ¶182), and because Plaintiff argued below that the November LRP projections had the most integrity (A570; A607-13). An appellant may present additional reasoning on appeal in support of a broader issue fairly presented below. *N. River Ins. Co. v. Mine Safety Appliances Co*., 105 A.3d 369, 382-83 (Del. 2014); *Mundy v. Holden*, 204 A.2d 83, 87 (Del. 1964).

Defendants' final argument was tacitly rejected below by the Vice Chancellor. According to Defendants, management was entitled to delete the

projected revenue streams for the use of Zejula to treat breast cancer and PROC because those two treatments were not yet the subject of a pending clinical trial. (AB at 43-44.) Defendants' citation of *In re Chelsea Therapeutics Int'l Ltd. S'holders Litigation*, 2016 WL 3044721 (Del. Ch. May 20, 2016), in support of that proposition is inapt because in that case directors of unchallenged independence had not disclosed potential revenue streams that depended on "speculation that the FDA would approve one of its products for currently-prohibited uses, or would remove a competing drug from the market altogether." *Id.* at *8. No such extraordinary assumption was required here. The Complaint pleads that GSK learned in due diligence about the unique tumor-penetration properties of Zejula, and GSK gained additional confidence from the outcome of the PRIMA trial that Zejula would be effective for the treatment of breast cancer and PROC. (A503-04 ¶¶212-13.) The deletion of these projected revenue streams from the November LRP is a function of the conflicts faced by the Defendants.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, appellant/plaintiff-below John M. Kihm respectfully requests that this Court reverse the *Corwin* dismissal by the Court of Chancery.

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I caused a true and correct copy of the foregoing **Public Version of Appellant's Reply Brief** to be served upon the following counsel by File & Serve*Xpress*:

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