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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| SMART LOCAL UNIONS AND COUNCILS PENSION FUND, on behalf of itself and all other similarly situated former stockholders of EIDOS THERAPEUTICS, INC.<br><br>Plaintiff Below, Appellant,<br><br>v.<br><br>BRIDGEBIO PHARMA, INC., NEIL KUMAR, ALI SATVAT, and UMA SINHA,<br><br>Defendants Below, Appellees. | C.A. No. 13, 2023<br><br>Court Below:<br><br>Court of Chancery of the State of Delaware, C.A. No. 2021-1030-PAF<br><br>**UNREDACTED PUBLIC VERSION FILED: MARCH 20, 2023** |

# APPELLANT'S OPENING BRIEF

OF COUNSEL:

David Wales
SAXENA WHITE P.A.
10 Bank Street, 8th Floor
White Plains, NY 10606
(914) 437-8551

Adam Warden
Jonathan Lamet
SAXENA WHITE P.A.
7777 Glades Rd., Suite 300
Boca Raton, FL 33434

Mark Lebovitch
Christopher J. Orrico
Margaret Sanborn-Lowing
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

Jeremy Friedman
David Tejtel
FRIEDMAN OSTER &
TEJTEL PLLC
493 Bedford Center Road, Suite 2D
Bedford Hills, NY 10507
(888) 529-1108

Thomas Curry (#5877)
Tayler D. Bolton (#6640)
SAXENA WHITE P.A.
824 N. Market Street, Suite 1003
Wilmington, DE 19801
(302) 485-0483
tcurry@saxenawhite.com
tbolton@saxenawhite.com

Gregory V. Varallo (#2242)
Andrew E. Blumberg (#6744)
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3601
greg.varallo@blbglaw.com
andrew.blumberg@blbglaw.com

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# GLOSSARY

| Term | Definition |
|---|---|
| 2019 Committee | The special committee formed by the Board on August 11, 2019, in connection with BridgeBio's August 8, 2019 proposal |
| 2019 Proposal | BridgeBio's August 8, 2019 offer to acquire Eidos's minority shares for an implied value of $38.31/share |
| Appellant or Plaintiff | SMART Local Unions and Councils Pension Fund, on behalf of itself and all other similarly situated former Eidos stockholders |
| Appellees or Defendants | BridgeBio, Kumar, Ali Satvat and Uma Sinha |
| ATTR | Transthyretin amyloidosis disorder |
| Board | Eidos's board of directors |
| BridgeBio | BridgeBio Pharma, Inc. |
| Centerview | Centerview Partners LLC |
| CEO | Chief Executive Officer |
| Collaboration Proposal | GSK's August 16, 2020 proposal to collaborate with Eidos on the launch and commercialization of acoramidis |
| Complaint | Plaintiff's Verified Stockholder Class Action Complaint, filed in the Trial Court on November 26, 2021 |
| Eidos | Eidos Therapeutics, Inc. |
| GSK | GlaxoSmithKline plc |
| Hooper | Susan Hooper |

| Term | Definition |
|---|---|
| Individual Defendants | Kumar, Ali Satvat and Uma Sinha |
| IPO | Initial Public Offering |
| ISS | Institutional Shareholder Services Inc. |
| Kumar | Neil Kumar |
| Lis | William Lis |
| Proxy | Eidos definitive proxy statement filed with the SEC on December 15, 2020, and all amendments and supplements thereto |
| Rohlen | Duke Rohlen |
| S-4 | BridgeBio Amended Form S-4 filed with the SEC on December 11, 2020 |
| SEC | U.S. Securities and Exchange Commission |
| Special Committee or Committee | The special committee formed by the Board on August 24, 2020, in connection with the Transaction |
| Transaction | BridgeBio's acquisition of all outstanding shares of Eidos, which closed on January 26, 2021 |
| Trial Court | The court that presided over the action styled *Smart Local Unions & Councils Pension Fund v. BridgeBio Pharma, Inc.*, C.A. No. 2021-1030-PAF, in the Court of Chancery |

## NATURE OF PROCEEDINGS

This is a direct action on behalf of former Eidos stockholders challenging a controlling stockholder-led minority squeeze-out. Plaintiff appeals from the Trial Court's Memorandum Opinion dismissing the Complaint on the grounds that Defendants satisfied the conditions for dismissal set forth in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*").

This appeal requires this Court to navigate the *MFW* doctrine through a doctrinal crossroads. The path that will keep *MFW* linked to its thoughtfully-crafted policy-driven foundations requires reversal. The other path turns *MFW* into a rigid checklist, a tool to be weaponized by controllers without regard to basic notions of equity or minority stockholder interests.

After Eidos and its controller, BridgeBio, agreed to a minority squeeze-out at $73.26/share, global pharmaceutical giant GSK presented a credible offer to pay ***at least $120/share*** for a full buyout. The Committee concluded the obvious: that GSK's intervening bid was financially superior and that they would breach their duties by not exploring it. BridgeBio then abandoned any pretense of acting solely on the "buy-side" of the squeeze-out by ***actively blocking*** GSK's offer and refusing to sell its shares at any price—demonstrating that BridgeBio itself valued Eidos at greater than $120/share. In response, GSK proposed to purchase Eidos's minority

shares for $110/share subject to limited governance concessions, but BridgeBio again refused.

The Committee recognized that Eidos needed a material transaction to develop its only drug (acoramidis). Considering BridgeBio's abject refusal to renegotiate or entertain any alternative deal, the Committee had to accept BridgeBio's deal. Stockholders, believing that they had no other option—and materially uninformed about the events leading to the Transaction and the credibility and capability of "Company C" (as GSK was named in the Proxy)—likewise accepted BridgeBio's unfair $73.26/share deal.

Applying *MFW* to this unusual fact pattern is inconsistent with *MFW*'s expressed intent to protect minority stockholders. In *In re MFW Shareholders Litigation*, 67 A.3d 496 (Del. Ch. 2013) ("*In re MFW*"), then-Chancellor Strine focused on the benefits to minority investors of rewarding controllers with business judgment review for employing the dual protections, which he hypothesized would "empower[] negotiating agents to bargain for the best price." *Id.* at 502-03.

In its *MFW* decision, this Court expanded upon the Chancellor's reasoning. Recognizing the market does not typically provide a pricing proxy for controlled companies facing squeeze-outs, this Court expressed its view that "the underlying

purposes of the dual protection merger structure utilized here and the entire fairness standard of review both converge and are fulfilled at the same critical point: "**price**." *MFW*, 88 A.3d at 644-45. Since *MFW*, while this Court has refined the doctrine's application, it has never abandoned the doctrine's intent to operate as "the procedural approach most favorable to minority investors." *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 756 (Del. 2018). Application of *MFW* here is antithetical to that expressed intent.

BridgeBio was entitled to refuse to sell its shares. But BridgeBio should not be permitted to weaponize *MFW* to judicially cleanse a conflicted controller transaction that clearly provided minority stockholders significantly less than fair value because of its unwillingness to sell. In this highly atypical fact pattern—where a third-party emerges with a dramatically more valuable takeover bid—a controller should have to choose between renegotiating the squeeze-out price and then seeking judicial cleansing or exercising its control to effect the unfairly priced squeeze-out and then seeking to establish fairness. Putting BridgeBio to that choice is consistent with *MFW*'s stated purpose of protecting minority stockholders. Permitting BridgeBio to use its power to leave the minority with no practical choice but to

accept the controller's facially unfair and inadequate price turns *MFW*'s stated purpose on its head.

But even assuming this Court's *MFW* doctrine applies, the Trial Court misapplied it. In mid-August 2020, GSK approached Eidos management with a credible collaboration proposal that offered Eidos stockholders more cash than Eidos's then-current market capitalization *and* an ongoing interest in acoramidis. Importantly, short of actively removing Board members, BridgeBio could not have blocked that deal, which required only the Board's consent and no stockholder vote. However, BridgeBio and Eidos management prevented the Committee from considering the Collaboration Proposal or otherwise engaging with GSK before agreeing to the Transaction, thereby causing the Committee to breach its duty of care. In rejecting that argument, the Trial Court committed legal error by discrediting Plaintiff's well-pled allegations, drawing pleading-stage inferences in Defendants' favor, and crediting the Proxy for the truth of the matter asserted.

Additionally, *MFW* was not satisfied because BridgeBio secured stockholder approval of the Transaction through a coercive and uninformed vote. Eidos stockholders' options were a sale to BridgeBio at an unfair price or attempting to dramatically ramp up its internal capacity to pursue a risky and suboptimal

independent acoramidis commercialization. And because Eidos had not prepared for the latter option, the "status quo [was] sufficiently unattractive to prevent a stockholder vote from operating as a clear endorsement of [the Transaction] and therefore having cleansing effect." *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *26 (Del. Ch. June 11, 2020).

Finally, the Proxy was materially deficient in at least three respects, each independently warranting reversal. The Proxy's deficiencies created the materially false and misleading impressions that: (i) the Board discussed the Collaboration Proposal and made a considered determination that pursuing it was not in the Company's best interests; (ii) GSK was inexperienced in the relevant field and partnering with GSK was thus an unattractive alternative to the Transaction; and (iii) all third-party proposals were "illusory," even though GSK indicated an undisclosed willingness to work around BridgeBio's refusal to cooperate.

The Trial Court's decision should be reversed as inconsistent with—and a misapplication of—the *MFW* doctrine, which was never intended to be weaponized by controllers as BridgeBio did here.

## SUMMARY OF ARGUMENT

1. *MFW* should not apply in a circumstance like this, where an intervening credible third-party bid proves definitively that the squeeze-out price was unfair. BridgeBio should not benefit from depriving Eidos's minority stockholders from accepting GSK's superior proposals. The Trial Court's application of *MFW* to these unusual facts was reversible legal error.

2. Even if *MFW* could apply to these unusual facts, Plaintiff well-pled that the *MFW* conditions were not satisfied because the Committee breached its duty of care, the vote was coerced, and the vote was materially uninformed. The Trial Court's determination that the *MFW* conditions were satisfied rests on reversible legal error.

## STATEMENT OF FACTS

### A. Eidos's Business: A Single Blockbuster Drug In Need of a Fundamental Transaction

Eidos was a development-stage biopharmaceutical company focused on developing a single drug, acoramidis, which treats ATTR. (A26, ¶32).[1] Acoramidis is one of the only drugs that treats ATTR's underlying causes, and was recognized as a promising and potentially "best-in-class … treatment for ATTR patients." (A26-28, ¶¶33-38). By March 2019, acoramidis had progressed to a Phase 3 trial for the treatment of ATTR cardiomyopathy, "which, if successful, would be the last step before seeking regulatory approval." (A28, ¶¶38-39).

Eidos lacked the internal resources necessary to independently launch and commercialize acoramidis, and thus had essentially two "well-worn path[s]" for maximizing acoramidis's potential: (i) selling itself to a larger pharmaceutical company with the capacity to launch and commercialize acoramidis; or (ii) entering a licensing or collaboration agreement with a larger pharmaceutical company with the capacity to launch and commercialize acoramidis. (A31-32, ¶¶46-48). Eidos's only other option—to "radically ramp[] up its internal capacity and seek[] to launch

[1] Citations to "¶__" and "¶¶__" refer to the Complaint.

and commercialize acoramidis independently"—had a poor track record of success for similar "first-time launchers of pharma products[, which have] struggle[d] to maximize drug adoption and realize the expected value from their launches." *Id*.

### B. BridgeBio Controlled Eidos, and Previously Proposed an Underpriced Squeeze-Out

BridgeBio is a biotechnology company. In 2017, BridgeBio invested $27 million in Eidos in exchange for a majority stake. (A27, ¶35). In 2018, BridgeBio sold a minority Eidos stake through an IPO, maintaining 54.8% of Eidos's outstanding shares immediately thereafter. (A27, ¶36). Eidos conceded in its public filings that BridgeBio controlled Eidos. (A27-28, ¶37).

In August 2019, BridgeBio made the 2019 Proposal to acquire Eidos's minority shares in a deal that implied a $38.31/share value. (A29, ¶41). The Board formed the 2019 Committee to evaluate that proposal. (A29-30, ¶42). In September 2019, after engaging advisors, the 2019 Committee rejected the 2019 Proposal as inadequate. (A30, ¶43). Thereafter, BridgeBio announced it was no longer pursuing an acquisition, and the Board dissolved the 2019 Committee. (A30, ¶44).

### C. GSK Proposes a Transformative Deal with Eidos and BridgeBio Immediately Responds by Proposing a Defensive Squeeze-Out

In the summer of 2020—with the Phase 3 trial underway—pharmaceutical giant GSK approached Eidos concerning a potential collaboration agreement for

acoramidis. (A33, ¶49). During the ensuing discussions, GSK "conveyed [its] interest in Eidos" more generally, suggesting the possibility of a broader deal. (A33, ¶50). GSK was an ideal partner for Eidos given GSK's experience as a commercialization partner for smaller companies and its unparalleled experience with ATTR. (A34-35, ¶54).

On August 16, 2020, GSK proposed to Eidos senior management the Collaboration Proposal regarding acoramidis which contemplated: (i) GSK paying Eidos $1 billion in cash upfront and $700 million in milestone payments; and (ii) a 50/50 commercialization cost/profit share within the U.S., with Eidos having a 17.5-25% royalty in the rest of the world. (A508-510 (Collaboration Proposal)) (A33-34, ¶51). The Collaboration Proposal's cash payments alone exceeded Eidos's then-current market capitalization and would have allowed Eidos stockholders to share in acoramidis's future profits. (A15-16, ¶6).

The Collaboration Proposal did not require BridgeBio's consent, and its acceptance by the Board would impede BridgeBio's ability to secure 100% of acoramidis's upside for itself. (A34-35, ¶¶53, 56). Thus, immediately after learning of GSK's Collaboration Proposal, BridgeBio and the Individual Defendants began pursuing a squeeze-out of Eidos's minority stockholders. (A35-37, ¶¶57-59).

On August 18, 2020, the Board met. GSK's Collaboration Proposal appears nowhere in the extremely detailed, six-single-spaced-page minutes of that meeting or in the meeting materials. (A512-518 (Minutes)) (A38-39, ¶61). Thus, the Individual Defendants apparently never provided the Board with any analysis concerning GSK's Collaboration Proposal, the Board never discussed the Collaboration Proposal or its terms, and the Board never determined whether to engage with GSK. (A36-37, ¶¶58-59).[2]

On August 19, 2020, with no documentary evidence that the Board received ***any*** analysis of GSK's Collaboration Proposal, BridgeBio director and CEO (and Eidos director and CEO) Kumar informed the Board of BridgeBio's interest in acquiring Eidos. (A14-15, 36-37; ¶¶4, 59).

At an August 24, 2020 Board meeting, the Board formed the Special Committee consisting of directors Rohlen, Hooper and Lis. (A36-37, A41; ¶¶59,

[2] *See also In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 578 (Del. Ch. 2007) ("[I]t is more reasonable to infer that exculpatory documents would be provided [in response to a Section 220 demand] than to believe the opposite: that such documents existed and yet were inexplicably withheld.").

64).[3] Like the 2019 Committee, the Special Committee retained Centerview as its financial advisor. (A41, ¶64).

### D. The Committee, Either Unaware of the Value of GSK's Proposal or Blocked from Engaging with GSK, Negotiates What It Can From BridgeBio

On a September 1, 2020 call between BridgeBio's and the Committee's advisors, BridgeBio's advisors requested that the acquisition process be kept from the public, presumably to keep GSK and other interested parties from submitting competing offers before BridgeBio could reach agreement with Eidos. (A41-42, ¶65). Meanwhile, GSK continued to submit follow-up information to Eidos management, which was never relayed to the Committee. (A36-37, ¶59, n.23).

The Committee engaged with BridgeBio's advisors throughout September 2020, during which the Committee inquired as to "whether BridgeBio was willing to sell its controlling stake in Eidos to a third party." (A44-45, ¶¶70-72). BridgeBio consistently "rejected the idea of selling Eidos to a third party." (A44, ¶71). BridgeBio's advisors also consistently pressured the Committee, calling "approximately once a week asking for updates on the Special Committee's

[3] Rohlen resigned from the Committee after revealing that he had an investment in BridgeBio and relationships with BridgeBio directors. (A42, ¶66).

evaluation process" and "reiterat[ing] that BridgeBio … was seeking to conclude the process quickly." (A45-46, ¶73).

On October 2, 2020, BridgeBio offered to acquire all outstanding Eidos shares that it did not already own for either: (i) 1.55 shares of BridgeBio stock, or (ii) $61.38 in cash. (A46-47, ¶75).

On October 3, 2020, BridgeBio made its "best and final" offer of 1.85 shares of BridgeBio stock or $73.26/share in cash up to an aggregate maximum of $175 million in cash. (A49, ¶80). The Committee convened that same day and, determining that the offer represented the highest proposal ***BridgeBio*** was likely to offer, decided to recommend the Transaction. (A49-50, ¶81).

On October 4, 2020, the Committee recommended the Transaction to the full Board after receiving Centerview's oral fairness opinion. (A50, ¶82). Later that day, the Board voted to approve the Transaction. *Id.* At no point before agreeing to the Transaction did the Committee receive any advice or analysis regarding the Collaboration Proposal or its value. (A51-52, ¶85).

### E. GSK Presents a $120/Share Topping Bid, Demonstrating the Transaction Price's Unfairness

On November 15, 2020, GSK contacted the Board and conveyed its interest in buying Eidos's outstanding equity, including BridgeBio's stake. (A52, ¶87).

Conflicted Kumar and other Board members responded that BridgeBio refused to sell. *Id.*

GSK was undeterred. On November 23, 2020, GSK sent a letter to BridgeBio and Eidos, offering to acquire all outstanding Eidos shares for ***$120/share*** in cash, implying an Eidos equity value of approximately $4.8 billion—***$1.9 billion above Eidos's valuation in the Transaction***. (A53-54, ¶¶89-90). GSK noted that its proposal was "at a significant premium to the terms agreed between Eidos and BridgeBio" and that "[i]n the unfortunate event that BridgeBio is not willing to align with the other Eidos stockholders ... [GSK would] be willing to explore an acquisition of the Eidos Shares held by Eidos stockholders other than BridgeBio at a significant premium to the BridgeBio transaction." (A53-54, ¶90). GSK also emphasized that it could move quickly, stating: "We are confident that we can complete our remaining due diligence and can finalize a definitive agreement with [Eidos] within two weeks[.]" *Id.*

Reflecting suspicions that BridgeBio and Eidos management were keeping the Committee in the dark, GSK's offer letter noted that GSK had submitted the Collaboration Proposal in August 2020 for "consideration at Eidos's August 2020 Board meeting, followed by detailed materials on the benefits of the partnership to

Eidos," and that it was "surprised that [Eidos] did not engage with [GSK] to explore ... whether [it] would be prepared to offer significantly higher value for Eidos stockholders." (A53, ¶89). GSK documented its expectation, "given [the Board's] fiduciary responsibilities, that [the Committee] would have considered all options to realize the best outcome for [Eidos] stockholders." *Id.*

### F. The Special Committee Deems GSK's Bid Potentially Superior to the Transaction

At its November 23, 2020 meeting, the Committee determined GSK's proposal was a superior alternative for Eidos's public stockholders, resolving to explore and respond to GSK's proposal. (A54-55, ¶92).

That day, Kumar sent the Committee a letter from BridgeBio stating that it "ha[d] no interest in participating in, or supporting, any sale of its stake in Eidos to [GSK] or any third party. Therefore, the [GSK] proposal is incapable of being consummated and cannot be deemed to be a Company Superior Proposal under the merger agreement." (A55, ¶94). Kumar also personally called each Committee member, reiterating that BridgeBio would not sell its majority stake. (A55, ¶93).

On November 24, 2020, the Committee "determined that the GSK Proposal could result in a superior proposal and directed its advisors to seek information from GSK regarding the price of a potential minority stub transaction." (A56, ¶96).

On November 27, 2020, GSK again confirmed to the Committee's advisors that GSK would provide a "substantial premium" for Eidos's minority shares, conditioned only on GSK's receipt of standard governance rights from BridgeBio. (A56, ¶98).

### G. BridgeBio Ensures That Its Facially Inadequate Bid Is Stockholders' Only Option

On November 29, 2020, sensing the risk of remaining sidelined from negotiations between Eidos and GSK, Kumar emailed the Committee to request permission to speak directly to GSK "to better understand their plans for the asset and intended road forward." (A57, ¶100).

On November 30, 2020, GSK told the Committee that GSK was prepared to pay ***more than $120/share*** for Eidos if GSK could engage in direct discussions with BridgeBio or at least ***$110/share*** for Eidos's minority shares if BridgeBio refused to support a full-company deal. (A57-58, ¶101). The Committee let GSK and BridgeBio speak directly, without even participating in those discussions. (A58, ¶102).

Demonstrating that BridgeBio had no intention of engaging with GSK constructively or in good faith, on December 1, 2020 (*i.e.*, before discussions with

GSK could begin), BridgeBio's board unanimously affirmed its refusal to facilitate any transaction with GSK. (A58, ¶103).

On December 2, 2020, Kumar spoke with GSK without the Committee present. (A59, ¶104). GSK asked BridgeBio to name its price, but BridgeBio responded that it "would not sell its interest in Eidos" at any price. *Id.*

On December 9, 2020, BridgeBio, GSK, and the Committee finally met to discuss a potential collaboration agreement regarding acoramidis. (A60, ¶107). Following that discussion, BridgeBio reiterated to GSK and Eidos that BridgeBio (i) would not support a collaboration agreement between Eidos and GSK, (ii) would not sell its majority stake, (iii) would not grant any governance rights to GSK beyond the existing rights of other Eidos stockholders and (iv) did not intend to increase the consideration offered to minority stockholders. (A60-61, ¶108).

Recognizing Eidos's massive value and the substantial gulf between that value and BridgeBio's squeeze-out price, GSK crafted improved proposals, including some that could be implemented ***without BridgeBio's consent***. (A61, ¶109). Whether reflecting a lack of care or being coerced, the Committee failed to meaningfully explore alternatives that did not require BridgeBio's participation or consent. (A61, ¶110).

Early on December 11, 2020, with GSK on the verge of finalizing an improved proposal, the Committee and BridgeBio jointly filed the S-4 that mentioned GSK's proposals (identifying GSK as "Company C"), but reiterated the Committee's recommendation and baselessly disparaged GSK as "not a suitable collaboration partner for acoramidis" given its purported "lack of presence in cardiovascular and rare genetic diseases." (A61-62, ¶111).

GSK wrote the Committee later that day conveying frustration with the Committee's failure to explore a transaction that could be effectuated without BridgeBio's consent and at a substantial premium to the Transaction price:

> We were surprised to see that BridgeBio ... and Eidos ... filed an amended Form S-4 today, in particular because we understood that the Special Committee was encouraging GSK to submit a revised proposal. ***We were prepared to send this morning a proposal that would have shown a significant increase to our proposals in the November 30 letter to the Special Committee***.
>
> After the amended S-4 was filed this morning, we received a letter ... from BridgeBio [] stating that it was not interested in pursuing any of the proposals set forth by GSK, ***including delivering demonstrably higher and more certain value for the public stockholders of Eidos. To date, we have not received any separate communication from the Special Committee***.
>
> We are surprised that rather than exploring what GSK could have offered with an increased proposal and what governance provisions the Special Committee could have provided to GSK ***(that could have been granted without BridgeBio's participation)*** to reach an outcome that

> would have been highly beneficial to the public stockholders of Eidos, the Special Committee has apparently decided to discontinue discussions with us.

(A520 (Letter)) (A62-63, ¶¶112-114) (emphasis added). GSK also refuted the S-4's mischaracterization of GSK as an unsuitable commercialization partner, detailing "GSK's unsurpassed global platform and [its] senior team's many years of experience developing and commercializing some of the most successful cardiovascular and precision medicines[.]" (A520) (A63; ¶115).

On December 13, 2020, the Committee sent a half-hearted letter to GSK indicating the Committee's purported willingness to field additional proposals. (A63-64, ¶116). The Board and Committee then turned to securing approval from Eidos's minority stockholders of BridgeBio's preferred Transaction. (A64, ¶117).

### H. The Transaction Is Put to a Coerced and Materially Uninformed Vote

On January 19, 2021, a majority of Eidos's minority stockholders approved the Transaction. (A64-65, ¶118). The stockholder vote was coerced and solicited through materially false and misleading Proxy disclosures. *Id.*

#### 1. The Stockholder Vote Was Coerced

At the time of the vote, acoramidis was on the verge of commercialization. (A28, A23; ¶¶38-39, 49). Lacking the internal resources necessary to launch

acoramidis by itself, Eidos had three options: (i) sell to a large pharmaceutical company with the resources to effectively launch and commercialize acoramidis; (ii) enter into a licensing or collaboration agreement with a large pharmaceutical company that could launch and commercialize acoramidis; or (iii) attempt to dramatically ramp up its internal capacity and fundamentally change the nature of its business to pursue a risky and suboptimal independent launch of acoramidis. (A31, A65; ¶¶46, 119).

BridgeBio used its controlling stockholder status to block Eidos's ability to pursue value-maximizing alternatives, including a collaboration agreement with—or sale to—third parties like GSK. (A14, A28, A65-66; ¶¶3, 38, 119, 121). And the Proxy created the misleading impression that no third-party deal was feasible. Thus, Eidos's minority stockholders were led to believe that their only real option was selling to BridgeBio at whatever price it agreed to pay, since pursing a risky independent launch of acoramidis was plainly worth less than the pre-existing stock price. (A23-24, A66-67; ¶¶23, 123-124).

Moreover, Eidos's stockholders knew that voting down the Transaction would leave Eidos as a standalone company hamstrung by a controller with a demonstrated history of self-interested conduct. (A66-67, ¶¶122-123).

### 2. The Proxy Was Materially Deficient

The Proxy was materially false and misleading as to GSK and the alternative transactions GSK proposed.

*First*, the Proxy falsely stated that the Collaboration Proposal was discussed at the Board's August 18, 2020 meeting (*i.e.*, before Eidos commenced exclusive negotiations with BridgeBio), and that "[f]ollowing such discussion, the Eidos [B]oard," including its outside directors, "unanimously determined that the ... [C]ollaboration [P]roposal was not in the best interests of Eidos and its stockholders and determined not to pursue [it]." (A17, A37-38, A68; ¶¶11, 60, 128). That disclosure is irreconcilable with the contemporaneous minutes discussed above and created the materially misleading impression that the Committee made a considered determination to negotiate the Transaction without first contacting GSK to gauge its interest or, at a minimum, engage in price discovery.

*Second*, the Proxy was materially misleading as to GSK's suitability as commercialization partner. (A70-71, ¶¶131-132). The Proxy includes BridgeBio's biased, negative views of "Company C" as "not a suitable collaboration partner for acoramidis" because of its "lack of presence in cardiovascular and rare genetic diseases," but provides no context or countervailing views on GSK's capabilities.

(A70-71, ¶132). As GSK—one of the world's largest pharmaceutical companies—explained in materials provided to the Board on December 11, 2020, GSK not only had substantial experience in cardiovascular drug development and genetics, but "unrivaled experience with ATTR, having previously been involved in the development of multiple candidate treatments for the disease" and "the development of drugs to treat ATTR specifically." (A70-73, ¶¶132-33). Thus, stockholders were left with the materially misleading impression that partnering with GSK was not in Eidos's best interests. (A73, ¶134).

*Third*, the Proxy failed to disclose that—even after the Transaction's announcement and BridgeBio's stonewalling of alternative deals—GSK remained willing to explore alternatives with Eidos that could have been accomplished ***without*** BridgeBio's involvement or approval. (A76-78, ¶¶140-142). On December 11, 2021, GSK specifically informed the Committee that it remained interested in exploring deal structures that could be achieved "***without BridgeBio's participation***." (A77-78, ¶¶141-142). But the Proxy falsely stated that GSK was only interested in transactions that required BridgeBio's approval and, therefore, were illusory. (A76, ¶140). Indeed, in a December 29, 2020 presentation to ISS filed with the SEC that same day, the Committee insisted that all "third party

proposals are illusory." (A77, ¶142). Those false disclosures gave Eidos stockholders the false impression that Eidos lacked viable alternatives if they voted down the Transaction.

# ARGUMENT

## I. THE *MFW* DOCTRINE SHOULD NOT APPLY IN THE FACE OF A PLAINLY SUPERIOR AND CREDIBLE THIRD-PARTY OFFER

### A. Question Presented

Whether the Trial Court erred in finding that the *MFW* doctrine shields from judicial review a conflicted controller transaction consummated at a price more than 60% ***below*** a credible third-party bid. The question was raised below (A464-468) and considered by the Trial Court. (Op. 30-31).

### B. Scope of Review

This Court reviews the dismissal of a plaintiff's complaint for failure to state a claim *de novo*. *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019).

### C. Merits of Argument

Before assessing whether the Transaction nominally complied with *MFW* (it did not), this Court should reverse the Trial Court's decision because its outcome is inconsistent with *MFW*'s expressed intent of protecting minority stockholders. A core tenet of the *MFW* doctrine is that where the dual-pronged minority stockholder protections are employed, arm's-length negotiations have been simulated and a fair price has thus presumptively been achieved. Where contemporaneous evidence forecloses the possibility that the price was fair, that presumption cannot reasonably

be maintained. Judicial cleansing of a conflicted controller transaction consummated at a price more than 60% below a credible third-party bid is antithetical to the purpose for which the *MFW* doctrine was adopted.

The *MFW* doctrine was initially conceived of as a means for rooting out strike suits. In *In re Cox Communications, Inc. Shareholders Litigation*, 879 A.2d 604, 605 (Del. Ch. 2005), then-Vice Chancellor Strine lamented that, after this Court's decision in *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110 (Del. 1994), plaintiffs' lawyers reflexively sued on entire fairness *ab initio* transactions because there was no path to pre-trial dismissal. *Cox Commc'ns*, 879 A.2d at 619. In Vice Chancellor Strine's view, the inability to obtain pre-trial dismissal resulted in an uptick in meritless litigation challenging conflicted controller transactions. *Id.* at 619-21.[4] He thus proposed that business judgment review apply if a conflicted controller transaction was: (i) negotiated and approved by a special committee of independent directors; *and* (ii) approved by a majority of unaffiliated stockholders. *Id.* at 606. That "modest" reform to *Lynch*, he believed, would "improve the

[4] Citing *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797 (2004).

protections [Delaware law] offers to minority stockholders and the integrity of the representative litigation process." *Id.* at 606.

In *In re MFW*, then-Chancellor Strine focused acutely on the benefits the dual protections were expected to provide minority stockholders:

> [T]he adoption of this rule will be of benefit to minority stockholders because it will provide a strong incentive for controlling stockholders to accord minority investors the transactional structure that respected scholars believe will provide them the best protection, a structure where stockholders get the benefits of independent, empowered negotiating agents to bargain for the best price[.]

67 A.3d at 502-03. He contrasted that with the cost of applying business judgment review where the dual protections were satisfied, which he deemed "very little" "owing to the lack of evidence that entire fairness review in cases where both procedural protections are employed adds any real value that justifies the clear costs to diversified investors that such litigation imposes." *Id.* at 504. In other words, the court believed that where the dual protections were faithfully applied, it could be presumed that the deal price was in the range of fairness and that litigation would thus fall within the category of strike suits that *Cox Communications* focused on eliminating.

In affirming *In re MFW*, this Court similarly focused on the dual protections' expected benefits to minority stockholders, particularly relating to ensuring price

fairness. Presenting the rationale for applying business judgment review where the dual protections are implemented *ab initio*, this Court made the following points, all focused on how the dual protections could serve as a proxy for achieving a fair price:

- Where the controller disables itself from the negotiations and vote, the merger "acquires the shareholder-protective characteristics of third-party, arm's-length mergers" (*MFW*, 88 A.3d at 644);
- The dual protections are "a potent tool to extract good value for the minority" and would "empower[] negotiating agents to **bargain for the best price and say no** if the agents believe the deal is not advisable for any proper reason" (*id.*); and
- "[T]he underlying purposes of the dual protection merger structure utilized here and the entire fairness standard of review both converge and are fulfilled at the same critical point: **price**." (*Id.* at 644-45).

Reflecting this Court's intense focus on ensuring that the *MFW* doctrine did not deprive minority stockholders of a fair price, the Court held: "The dual protection merger structure ***requires two price-related pretrial determinations***: first, that a fair price was achieved by an empowered, independent committee that acted with care; and, second, that a fully-informed, uncoerced majority of the minority stockholders

voted in favor of the price that was recommended by the independent committee." *Id.* at 645 (emphasis added).

Although this Court clarified certain price-related aspects of *MFW* in *Synutra*,[5] it confirmed that the *MFW* doctrine's core purpose is to incentivize controlling stockholders "to embrace the procedural approach ***most favorable to minority investors***." 195 A.3d at 756 (emphasis added). That procedural approach, courts have emphasized, simulates arm's-length bargaining and, in turn, allows special committees to achieve—and minority stockholders to receive—a fair price. *See, e.g.*, *In re MFW*, 67 A.3d at 503 (stating that dual protection structure would empower "negotiating agents to bargain for the best price").

As reflected in the cases discussed above, the *MFW* doctrine—and the judicial cleansing flowing therefrom—is intended to mitigate the conflicts and lack of market-based pricing methods inherent in controller-led conflicted transactions. It presumes that where the transaction structure scholars believe best protects minority stockholders is followed, the trial court will lack a basis to doubt that the resulting

[5] In clarifying the standard, this Court was concerned about the possibility that loose language in *MFW* would "inject[] the reviewing court into an examination of whether the Special Committee's good faith efforts were not up to the court's own sense of business effectiveness." *Id.* at 767. Market evidence here obviated the need for the Trial Court to inject its own sense of business fairness.

process and price were entirely fair. But in the exceptional—but repeatable—circumstances present here, the theoretical notion that adherence to *MFW*'s elements ensures that the price falls within the range of fairness must give way to the objective reality that it did not. While the Court's hypothesis that the dual protection merger structure generally protects minority stockholders was well-founded, our law should not blind itself to instances where the objective facts reveal that the structure did not work as intended.

The Trial Court cited *Books-A-Million, Inc. Shareholders Litigation*, 2016 WL 5874974 (Del. Ch. Oct. 10, 2016) for the proposition that a higher third-party bid does not preclude application of *MFW*. (Op. 31).[6] That decision, however, supports reversal. *Books-A-Million* answered the separate question of whether a special committee acted in bad faith by accepting the controller's offer of $3.25/share despite the existence of a $4.21/share third-party bid. *Id.* at *16. The *Books-A-Million* court was never asked to—and did not—decide whether *MFW* should apply in the first place, and in addressing a bad faith argument not directly

[6] The Trial Court also rejected Plaintiff's "policy argument" on the grounds that a controller's refusal to sell does not defeat *MFW*. (Op. 30). Plaintiff did not argue below that a controller's refusal to sell defeats *MFW* standing alone and does not press that argument on appeal either.

implicated by *MFW*'s six-prong test, found that the committee had not acted in bad faith because the third-party bid necessarily included a control premium, the controller's lower offer did not, and the offers were comparable after adjusting for the control premium. *Id.* Implicitly, the trial court found that the third-party bid supported the transaction's fairness.

Importantly, the *Books-A-Million* court contrasted that fact pattern with a situation where, like here, "the amount of the minority discount was extreme," which the court said might support a bad faith inference. *Id.* Here, the Court need not speculate about an appropriate control premium because GSK's $110/share offer for Eidos's minority shares is apples-to-apples with the Transaction price, and conclusively demonstrates that the Transaction price was far outside the range of fairness even for just a minority block.

More importantly, this Court should seize the opportunity afforded by this case's unusual facts to make clear that the entire fairness standard will remain operative in the rare instance when a controller affects a squeeze-out despite an objectively superior and credible competing offer. If controllers like BridgeBio know that entire fairness will apply when a plainly superior offer emerges, they will be more likely to: (i) make better offers in the first place, so as not to invite superior

intervening bids; and (ii) renegotiate deals, like the Transaction, that are reached by a special committee but end up with an objectively unfair price. Any other result would deprive special committees of the leverage necessary to insist that controllers pay fair value, thus undermining the careful balance between conflicted controllers and special committees that enables *MFW* to operate as intended.

Affirming the Trial Court's decision in the face of objective evidence that the Transaction price was materially unfair would, by contrast, reward controllers for effecting conflicted transactions that they *know* are unfair. In no other instance could a fiduciary that benefitted by preventing stockholders from accepting a third-party bid more than ***60%*** above the Transaction price avoid liability, much less achieve pleading-stage dismissal. The Court should be extremely wary of endorsing a regime that rewards conflicted controllers at the direct expense of minority stockholders, and nothing in *MFW* or its progeny (or the Trial Court's opinion) suggests any such intent.

* * *

The Trial Court's decision turns the purpose of the *MFW* doctrine on its head. In this exceptional circumstance where market evidence demonstrates conclusively

that the price was ***not*** entirely fair, the controller should not benefit from procedural protections intended to ensure that the price was entirely fair.

## II. EVEN IF THE *MFW* DOCTRINE APPLIES, THE TRIAL COURT ERRED IN FINDING THAT THE *MFW* CONDITIONS WERE SATISFIED

### A. Question Presented

Whether the Trial Court erred in finding that the *MFW* conditions were satisfied. This question was raised below (A468-504) and considered by the Trial Court (Op. 12-22).

### B. Scope of Review

This Court reviews the application of the *MFW* doctrine *de novo*. *Olenik*, 208 A.3d at 714.

### C. Merits of Argument

Even if the *MFW* doctrine could theoretically apply to insulate from judicial review a conflicted controller transaction effectuated at a price more than 60% below a credible third-party bid, reversal is still warranted because the Complaint adequately alleges that: (i) the Committee breached its duty of care (or its process was otherwise rendered ineffective by BridgeBio's actions); and (ii) the stockholder vote approving the Transaction was coerced and not fully informed. If the Court agrees that the Committee breached its care duty, that the stockholder vote was coerced, *or* that the vote was not fully informed, then the Trial Court's opinion must be reversed.

### 1. The Committee Breached its Duty of Care by Failing to Engage with GSK Before Agreeing to the Transaction

*MFW*'s dual protections require that a fully independent and disinterested special committee "act as the bargaining agent for the minority stockholders" against the controller. *See, e.g.*, *Dell*, 2020 WL 3096748, at *17. A special committee must "exercise[] real bargaining power" to prevent "the controlling stockholder [from] dictat[ing] the terms of the transaction." *MFW*, 88 A.3d at 646. Defendants cannot obtain judicial cleansing under *MFW* because their fiduciary misconduct precluded the Committee from serving as an effective bargaining agent for Eidos's minority stockholders.

It is self-evident that Eidos's stockholders would have benefited from the Committee engaging with GSK in transaction negotiations to test Eidos's market value *before* agreeing to the Transaction. *See In re Southern Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 800 (Del. Ch. 2011) ("Even if the practical reality is that the controlling stockholder has the power to reject any alternate proposal it does not support, the special committee still benefits from a full exploration of its options.").

As Plaintiff adequately alleges, Defendants—BridgeBio and its loyalists on Eidos's Board and management team (most notably Kumar, the CEO of both

companies)—disloyally prevented the Board and Committee from considering the Collaboration Proposal or otherwise engaging with GSK before agreeing to the Transaction. (A16-17, 35-36; ¶¶9-10, 56-59). Indeed, the Board's contemporaneous (and otherwise detailed) minutes are devoid of ***any*** indication that either GSK or the Collaboration Proposal were discussed at Eidos's August 18 Board meeting (A511-518), and it is undisputed that Kumar and his management team ***never*** provided the Committee any written analysis concerning the Collaboration Proposal's merits and value before agreeing to the Transaction.

Instead, after GSK made the Collaboration Proposal, BridgeBio immediately took steps to ensure that Eidos negotiated exclusively with BridgeBio. Kumar—who stood to realize significant non-ratable benefits from an Eidos/BridgeBio transaction—then withheld from the Committee follow-up materials provided by GSK to Eidos management ***during*** the negotiating process, further preventing the Committee from engaging with GSK. (A36, ¶59 n. 23).

Kumar's failure to provide the Committee any meaningful analysis concerning the Collaboration Proposal was a breach of his loyalty duty and undercut the Committee by depriving it of material information necessary to effectively bargain for stockholders—*i.e.*, information regarding a credible alternative

transaction at a materially higher price. By withholding material information from the Committee, Kumar caused the Committee to breach its duty of care. *See In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005) (finding that directors must "consider all material information reasonably available" to satisfy their care duty), *aff'd*, 906 A.2d 27 (Del. 2006) (internal citations omitted); *see also RBC v. Jervis*, 129 A.3d 816, 863 (Del. 2015) (recognizing a committee can be deemed to have breached its care duty as a result of misconduct by others in withholding information or providing misleading information).

The Trial Court did not reach the merits of this argument because it did not credit Plaintiff's well-pled allegations that Kumar and BridgeBio failed to provide the Committee analysis concerning the Collaboration Proposal's merit and value. Contravening the applicable pleading standards, the Trial Court rejected Plaintiff's allegation that such failure is necessarily inferable when contrasting the silence of the August 18 Board meeting minutes regarding the Collaboration Proposal with the otherwise detailed, specific information concerning numerous topics covered at that meeting. Plaintiff's allegation, based on contemporaneous evidence, supports a pleading-stage inference that the Collaboration Proposal was not presented, discussed, and/or voted on at the meeting. *See Cent. Mortg. Co. v. Morgan Stanley*,

27 A.3d 531, 535 (Del. 2011) ("[O]n a motion to dismiss, [the Court must] draw all reasonable inferences in favor of the non-moving party[.]"); *Voigt v. Metcalf*, 2020 WL 614999, at *27 (Del. Ch. Feb. 10, 2020) ("Other inferences are possible, but at the pleading stage, the plaintiff receives the benefit of ***any*** reasonable inferences that favor the plaintiffs' claim." (emphasis added)).

Instead of crediting Plaintiff's well-pled allegations and drawing reasonable inferences in Plaintiff's favor, the Trial Court assumed the truth of the Proxy's disclosure that "the Eidos board discussed the August 16 collaboration proposal" at the August 18 Board meeting and that "[f]ollowing such discussion, the Eidos [B]oard," including its outside directors, "unanimously determined that the August 16 [C]ollaboration [P]roposal was not in the best interests of Eidos stockholders and determined not to pursue [it]." (Op. 8, 35-36 ("Plaintiff first argues that the Special Committee failed to consider GSK's August 16 collaboration proposal. But the Eidos Board had already unanimously rejected that proposal before the Special Committee had been created.")).

The Court's conclusion of fact was legal error for two reasons: (i) it violated the obligation to credit well-pled allegations and draw reasonable inferences in Plaintiff's favor; and (ii) credited the Proxy for the truth of the matter asserted

therein, when Plaintiff had a reasonably conceivable basis to challenge the veracity of the Proxy's assertion. *In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *8 n.39 (Del. Ch. Jan. 5, 2017) ("[T]he Court may properly consider relevant portions of a proxy statement when analyzing disclosure issues, not to establish the truth of the matters asserted, but to examine what was disclosed to the stockholders."); *Abbey v. E.W. Scripps Co.*, 1995 WL 478957, at *1 n.1 (Del. Ch. Aug. 9, 1995) ("In deciding a motion to dismiss under Rule 12(b)(6), the court may judiciously rely on proxy statements not to resolve disputed facts but at least to establish what was disclosed to shareholders.").

The Trial Court compounded those errors by failing to address Plaintiff's allegations that Kumar and his management team failed to relay to the Committee follow-up information provided by GSK concerning the merits of its proposal ***during*** the Committee process, in a transparent effort to prevent the Committee from engaging with GSK or considering the value of Eidos implied by GSK's proposals. Kumar's refusal to provide the Committee that information provides an independent basis to conclude that Kumar breached his loyalty duty and thereby deprived the Committee of the opportunity to run a value-maximizing process. *See City of Fort Myers Gen. Employees' Pension Fund v. Haley*, 235 A.3d 702, 705 (Del. 2020)

(recognizing an officer acts disloyally by withholding material information from his Board).

Finally, even if the Trial Court correctly credited the Proxy disclosures over well-pled allegations based on contemporaneous documentary evidence, the Trial Court erred as a matter of law in concluding that the Committee met its duties and was well-functioning despite failing to engage with GSK before agreeing to the Transaction. The Trial Court found it unremarkable that "[o]nce created, the Special Committee and its advisers considered whether it should contact potential strategic buyers and decided not to do so after BridgeBio confirmed that it was not interested in selling to a third party." (Op. 35-36). However, GSK's Collaboration Proposal ***did not require BridgeBio's consent*** and was, therefore, an alternative available to Eidos's minority stockholders regardless of BridgeBio's refusal to sell. (A76, ¶140).

The existence of a credible and motivated third-party suitor that had demonstrated its significant interest in a transaction with Eidos provided the Committee with the ability to generate leverage and determine Eidos's actual value. *Southern Peru*, 52 A.3d at 800; *see also In re Digex, Inc. S'holder Litig.*, 789 A.2d 1176, 1205-14 (Del. Ch. Dec. 13, 2000) (finding likelihood of an unfair process because a board failed to use its leverage); *In re Tilray, Inc. Reorganization Litig.*,

2021 WL 2199123, at *14-15 (Del. Ch. June 1, 2021) (finding a committee's failure to use leverage harmed minority stockholders). Had the Committee contacted GSK prior to recommending the Transaction, it would have learned that GSK was willing to pay materially more and, in turn, that BridgeBio's offer was nowhere close to fair. The Committee thus breached its care duty by failing to "reasonably inform [it]self of alternatives" before agreeing to the Transaction. *See UIS, Inc. v. Walbro Corp.*, 1987 WL 18108, at *2 (Del. Ch. Oct. 6, 1987); *see also In re Loral Space and Commc'ns*, 2008 WL 4293781, at *26 (Del. Ch. Sept. 19, 2008) ("When … there appears to be no instance in which the Special Committee took any of the numerous opportunities available to ... determine whether it could obtain better terms than were available from the controlling stockholder, [] it is impossible for me to conclude that the Special Committee acted as an effective guarantor of fairness.").

### 2. The Committee Breached its Duty of Care by Prematurely Cutting Off Post-Signing Negotiations with GSK

Even assuming the Committee was an effective ***pre***-announcement bargaining agent (it was not), the Committee's ***post***-announcement actions rendered it ineffective. After the Transaction's announcement, the Committee learned that GSK was willing to (i) pay $120/share (*or more*) to acquire Eidos outright and $110/share for Eidos's minority shares subject to limited BridgeBio governance concessions,

and, even after BridgeBio foreclosed both paths, (ii) work with the Committee to explore alternative proposals that would provide more value to Eidos shareholders ***and*** could be accomplished ***without*** BridgeBio's participation. (A57-58, 62-63; ¶¶101, 113-14). Thus, the Committee had an affirmative obligation to fully explore value-maximizing alternatives. *Cf. Dell*, 2020 WL 3096748, at *18-19 (finding that, "within the *MFW* framework," a committee cannot "become a passive instrumentality" when post-signing events provided it an opportunity to "re-engage with the Company").

Despite that obligation, the Committee did not engage directly with GSK to ascertain the highest price it would pay, which could have (at least) been used as leverage against BridgeBio. Instead, the Committee allowed BridgeBio to speak with GSK outside its presence and, after BridgeBio refused to support any deal with GSK, prematurely terminated negotiations. The Committee then joined BridgeBio in filing the S-4 that reiterated the Committee's recommendation and included BridgeBio's baseless disparagement of GSK as "not a suitable collaboration partner for acoramidis." (A70-71, ¶132). That prompted GSK's December 11 letter in which GSK expressed its "surprise[e] that rather than exploring what GSK could have offered with an increased proposal and what governance provisions the Special

Committee could have provided to GSK (***that could have been granted without BridgeBio's participation***) to reach an outcome that would have been highly beneficial to the public stockholders of Eidos, the Special Committee has apparently decided to discontinue discussions with us." (A520 (Letter)) (A63, ¶114). By failing to explore value-maximizing alternatives that were achievable "without BridgeBio's participation," the Committee breached its duties. *UIS, Inc.*, 1987 WL 18108, at *2; *Loral*, 2008 WL 4293781, at *26.

The Trial Court rejected this argument, stating: "Even after BridgeBio balked at GSK's proposals … the Special Committee indicated a willingness to continue their discussions." (Op. 37). But GSK's December 11 letter demonstrates that the Committee could have achieved superior value for Eidos stockholders if it had engaged directly with GSK after GSK came forward with its $120/share proposal and repeatedly expressed a willingness to explore alternatives. That the Committee expressed a tepid willingness to engage with GSK at the eleventh hour does not excuse the Committee's failure to fulfill its obligations in the first place.

**3. The Stockholder Vote on the Transaction Was Coerced**

The stockholder vote was coerced because Eidos stockholders lacked the ability to reject the Transaction and return to an acceptable status quo. Coercion

occurs where a shareholder is "forced into a choice between a new position and a compromised position for reasons other than those related to the economic merits of the decision." *Gradient OC Master, Ltd. v. NBC Univ., Inc.*, 930 A.2d 104, 119 (Del. Ch. 2007) (citation and internal quotations omitted); *see also Dell*, 2020 WL 3096748, at *26 (vote is coercive if the "status quo [is] sufficiently unattractive to prevent a stockholder vote from operating as a clear endorsement of a transaction and therefore having cleansing effect.").

Acoramidis was on the verge of commercialization, but Eidos lacked the internal resources necessary to independently commercialize it effectively. By refusing to sell to a third-party, BridgeBio limited Eidos stockholders' options to (i) a sale to or other transaction with BridgeBio or (ii) dramatically ramping up its internal capacity and fundamentally changing its business to pursue a risky independent launch of acoramidis. (A23-24, 31, 65, 66-67; ¶¶23, 46, 119, 123-124). Because the latter option was not practically feasible, Eidos's stockholders had no ability "to exercise their franchise free of undue external pressure created by [BridgeBio] that distract[ed] them from the merits of the decision under consideration." *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *15 (Del. Ch. Apr. 11, 2017).

The Trial Court rejected Plaintiff's coercion argument on two grounds, neither of which withstand scrutiny. (Op. 57-58). *First*, the Trial Court held that "Eidos stockholders may also have chosen to go it alone. Although the launch of a pharmaceutical product by a first-time launcher is a complex and risky process, it is possible." (Op. 58). That finding ignores Plaintiff's well-pled allegations that Eidos had not taken steps to effectuate, and was not positioned to pursue, an independent launch of acoramidis. (A34-35, ¶¶46-48). Indeed, in its presentation to ISS that was disclosed to stockholders, the Committee confirmed that "[v]oting down the BridgeBio transaction right as Eidos enters a critical phase of clinical development ***would carry significant risk for Eidos stockholders***" given that "[a] successful product launch requires development of core multi-disciplinary capabilities years prior to launch." (A578 (Presentation) (emphasis added))

*Second*, the Trial Court held that other "alternatives to the purchase by BridgeBio were apparent to the stockholders"—*i.e.*, the ability to pursue a commercialization transaction with third parties not requiring BridgeBio's consent. (Op. 58). In so holding, however, the Trial Court ignored that Eidos stockholders were told BridgeBio refused to support a collaboration agreement between Eidos and "Company C" despite GSK's willingness to pay a massive premium to the

Transaction price. (A60-61, ¶108). Eidos stockholders thus had no reason to believe BridgeBio would support any available alternative, leaving Eidos stockholders with a coercive Hobson's choice "between an unappealing status quo and an alternative which, although unfair, was better than their existing situation." *Dell*, 2020 WL 3096748, at *32.

**4. The Stockholder Vote on the Transaction was Not Fully Informed**

The Proxy was false and misleading in three respects, each of which precluded dismissal. The Trial Court's holding to the contrary was legal error.

**a. The Proxy Created the Materially Misleading Impression that the Board and Committee Evaluated the Collaboration Proposal Before Negotiating with BridgeBio**

The Proxy falsely stated that, at the August 18 Board meeting, "the Eidos board discussed the August 16 collaboration proposal" and that "[f]ollowing such discussion, the Eidos [B]oard," including its outside directors, "unanimously determined that the August 16 collaboration proposal was not in the best interests of Eidos stockholders and determined not to pursue [it]." (A231 (Proxy)) (A68-69, ¶129). That disclosure misleadingly indicated that the Committee made an informed decision not to engage with GSK before approving the Transaction.

Plaintiff's well-pled allegations support a pleading-stage inference that the Proxy's description of the August 18 meeting was false. As discussed above, the

detailed meeting minutes make no mention of the Collaboration Proposal, much less a unanimous determination that pursuing it would not be in Eidos's interests. *See supra* at 10. The sharp discrepancy between the minutes and the Proxy supports a pleading-stage inference that the Proxy was materially false and misleading. *See Gantler v. Stephens*, 965 A.2d 695, 711 (Del. 2009) ("[A] board cannot properly claim in a proxy statement that it had carefully deliberated and decided that its preferred transaction better served the corporation than the alternative, if in fact the Board rejected the alternative transaction without serious consideration"); *see also In re Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *12 (Del. Ch. Dec. 10, 2018) (finding a proxy materially misleading because a committee "did not do the work attributed to it in the Proxy"); *Morrison v. Berry*, 191 A.3d 268, 275 (Del. 2018) (finding a proxy materially misleading for failing to disclose facts sufficient to show "the degree that [conflicted management's] influence may have impacted the structure of [the] sale process").

In rejecting this argument, the Trial Court "read words into the [August 18] minutes that do not appear and [drew] inferences in [Defendants'] favor." *H&N Mgmt. Group, Inc. v. Couch*, 2017 WL 3500245, at *5 (Del. Ch. Aug. 1, 2017) (declining to grant defense-friendly inferences concerning interpretation of board

minutes at the pleading stage). The Trial Court ***inferred*** that, because Kumar had previously emailed the Board the Collaboration Proposal, it ***must*** have been subjected to meaningful discussion and a vote at the August 18 meeting, even though the lengthy minutes that reflect detailed and specific consideration of comparatively trivial and mundane matters reflect no such discussion or vote. (Op. 43). That was reversible error.

The Trial Court's reliance on *In re GGP, Inc. Stockholder Litigation*, 2021 WL 2102326, at *27 (Del. Ch. May 25, 2021), *aff'd in part and rev'd in part on other grounds*, 282 A.3d 37 (Del. 2022), for the proposition that it can infer the Collaboration Proposal was discussed on August 18 was similarly misplaced. (Op. 42). The *GGP* court rejected the plaintiffs' assertion that there were purported material "conflicts" between a proxy and relevant minutes, where the proxy provided certain additional "granular" information not reflected in the minutes, finding inclusion of such "granular" information in the minutes would have "entail[ed] a titanic waste of resources" by the company and, in any event, none of the purported differences between the Proxy and minutes were material. *Id.*

Here, in contrast, the information omitted from the minutes was not "granular" detail; it concerned a credible proposal for a transformative, multibillion-dollar deal

from one of the world's largest pharmaceutical companies. A board's purported "unanimous determination" not to pursue a transformative proposal is the type of information one would reasonably expect to see reflected in corporate minutes.

The Trial Court also incorrectly distinguished *Gantler* and *Xura* because the plaintiffs in those cases purportedly cited more compelling direct evidence to support their desired pleading-stage inference. But the records in those cases contained evidence atypical at the pleading stage: in *Xura*, the "the allegations in the complaint were supported by discovery (including deposition testimony) from a related appraisal action that specifically contradicted statements in the proxy"; and in *Gantler* the ***plaintiff*** was a director who had "personally witnessed events in the boardroom" and claimed the proxy had misrepresented the degree of consideration the board afforded to a competing proposal. (Op. 42-43). Nothing in *Gantler* or *Xura* suggests that—contrary to the well-established Rule 12(b)(6) standard—such direct evidence is required to support a pleading-stage inference that the Proxy was false. *See Firefighters' Pension Sys. of Kan. City, Mo. v. Presidio*, 251 A.3d 212, 261 (Del. Ch. 2021) ("[T]he Court should deny a motion to dismiss when developing the factual record may be necessary to make a materiality determination as a matter of law."). Indeed, this Court has held that minutes can be sufficient to "support[] a

rational inference that ... the disclosed information was ... materially misleading." *Morrison*, 191 A.3d at 282 (finding based on minutes that the proxy was materially deficient). There is no reason that the minutes should be insufficient here.

### b. The Proxy Created the Materially Misleading Impression that GSK Was Unsuitable as a Commercialization Partner

The Proxy referred to GSK only as "Company C," and then proceeded to disparage its capabilities as a potential commercialization partner. At the time of the stockholder vote, a deal with GSK—and, in particular, a collaboration on acoramidis that did *not* require BridgeBio's approval—was the only alternative strategic option potentially available to Eidos and its stockholders (although, as discussed below, the Proxy distorted the probability of Eidos partnering with GSK). An accurate recitation of GSK's suitability as a commercialization partner "would have afforded [stockholders] a more balanced view of the risks attendant to the merger alternative, and would have better enabled them to evaluate those risks." *Gilmartin v. Adobe Res. Corp.*, 1992 WL 71510, at *12 (Del. Ch. Apr. 6, 1992).

Yet, the Proxy falsely and misleadingly characterized GSK and its capabilities, relaying BridgeBio's self-serving and pejorative view of Company C as "not a suitable collaboration partner for acoramidis," including because of Company C's "lack of presence in cardiovascular and rare genetic diseases." (A245-

246 (Proxy)) (A70-72, ¶132). That description counterfactually depicted GSK as inexperienced in the relevant field, and thus an unqualified and unacceptable collaboration partner, indicating to stockholders that a Company C collaboration was an unattractive Transaction alternative.

In reality, GSK had substantial experience in cardiovascular drug development and genetics, and "unrivaled experience with ATTR, having previously been involved in the development of multiple candidate treatments for the disease" and "the development of drugs to treat ATTR specifically." (A70-74, ¶¶132-135). Particularly in light of the Proxy's inclusion of BridgeBio's negative characterization of Company C, tempering information regarding Company C's identity, experience, and capabilities was required to "provide stockholders with an accurate, full, and fair characterization" of GSK's capabilities. *Arnold v. Soc'y for Savings Bancorp, Inc*., 650 A.2d 1270, 1280 (Del. 1994). Having traveled down the path of describing BridgeBio's view of GSK's capabilities, the Proxy was required, but failed, to provide full information on that topic. *See Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del. 1996) (finding a partial misleading disclosure gives rise to a duty to provide an accurate characterization of the partially disclosed information); *see also Doppelt v. Windstream Hldgs.*, 2016 WL 612929, at *5 (Del. Ch. Feb. 5, 2016)

(finding misleading statements in a proxy gave rise to an obligation to disclose clarifying information).

The Trial Court rejected Plaintiff's arguments regarding this misleading disclosure on the grounds that "[a] reasonable stockholder viewing the Proxy as a whole would recognize that the views expressed about Company C's capabilities reflected the opinion of the BridgeBio board and only the BridgeBio board." (Op. 48) Even if that were true, Eidos stockholders had no ability to assess GSK's capabilities for themselves. Indeed, the Proxy's omission of additional information concerning Company C's capabilities—let alone an accurate rebuttal of BridgeBio's pejorative mischaracterization—would have led a reasonable stockholder to believe the Committee endorsed BridgeBio's views, thereby causing a reasonable stockholder to discount the potential value of an Eidos/Company C collaboration. The Trial Court thus committed legal error by finding that inclusion of BridgeBio's mischaracterization of GSK did not render the Proxy materially misleading.

The Trial Court's determination to give weight to the Proxy's disclosure that Company C was "a large international pharmaceuticals company," which, according to the Trial Court, conveyed that "Company C was not some fly-by-night operation incapable of delivering premium value to the minority stockholders," was error for

the same reason. (Op. 46). That disclosure said nothing about GSK's suitability as a commercialization partner with Eidos ***on acoramidis***. It therefore did nothing to correct the misleading impression that GSK lacked relevant expertise.

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

The Committee represented, in a presentation disclosed to stockholders, that all "third party proposals are illusory" without disclosing that, even after the Transaction's announcement, GSK remained willing to explore alternatives that would have provided more value to Eidos's minority stockholders and that could have been accomplished ***without*** BridgeBio's approval. (A588 (Presentation)) (A76-78, ¶¶140-142). Disclosure of that information would have been material to minority stockholders assessing whether the Transaction reflected the highest value they could obtain for their shares. *Cf. In re Mindbody, Inc.*, 2020 WL 5870084, at *29 (Del. Ch. Oct. 2, 2020) (finding a prior indication of interest material because it raised questions about whether the merger price was value maximizing); *Gilmartin*, 1992 WL 71510, at *12.

The Trial Court found that information immaterial because the Proxy separately disclosed that GSK "would need to revise its proposals to … propose a

transaction that would not require the approval of BridgeBio" and because stockholders understood that they faced a binary choice of accepting the offer or returning to the bargaining table. (Op. 50-51). But the Trial Court ignored that, in making that binary choice, stockholders would have wanted to know that the third-party that was offering materially more for Eidos's minority shares had already indicated a willingness to work around BridgeBio's refusal to approve an Eidos sale. That information would have impacted stockholders' assessment of the viability of obtaining higher value for their shares if they voted down the Transaction and was thus material.

## CONCLUSION

For the reasons above, Plaintiff respectfully requests reversal of the Trial Court's dismissal of the Complaint.

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SAXENA WHITE P.A.

*/s/ Thomas Curry*
Thomas Curry (#5877)
Tayler D. Bolton (#6640)
824 N. Market Street, Suite 1003
Wilmington, DE 19801
(302) 485-0483
tcurry@saxenawhite.com
tbolton@saxenawhite.com

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

*/s/ Gregory V. Varallo*
Gregory V. Varallo (#2242)
Andrew E. Blumberg (#6744)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3601
greg.varallo@blbglaw.com
andrew.blumberg@blbglaw.com

*Counsel for Plaintiff*

OF COUNSEL:

David Wales
SAXENA WHITE P.A.
10 Bank Street, 8th Floor
White Plains, NY 10606
(914) 437-8551

Adam Warden
Jonathan Lamet
SAXENA WHITE P.A.
7777 Glades Road, Suite 300
Boca Raton, FL 33434
(561) 394-3399

Mark Lebovitch
Christopher J. Orrico
Margaret Sanborn-Lowing
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

Jeremy Friedman
David Tejtel
FRIEDMAN OSTER & TEJTEL PLLC
493 Bedford Center Road, Suite 2D
Bedford Hills, NY 10507
(888) 529-1108

## CERTIFICATE OF SERVICE

I, Thomas Curry, hereby certify that on this March 20, 2023, I caused the foregoing Unredacted Public Version of Appellant's Opening Brief to be filed and served via File and Serve *Xpress* upon the following counsel of record:

Cliff C. Gardner
Ryan M. Lindsay
Andrew D. Kinsey
Mallory V. Phillips
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
920 N. King Street
Wilmington, Delaware 19801

Gregory V. Varallo
BERNSTEIN LITOWITZ BERGR
& GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, DE 19801

*/s/ Thomas Curry*
Thomas Curry (#5877)