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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SMART LOCAL UNIONS AND COUNCILS PENSION FUND, on behalf of itself and all others similarly situated former stockholders of EIDOS THERAPEUTICS, INC., Plaintiff Below, Appellant, v. BRIDGEBIO PHARMA, INC., NEIL KUMAR, ALI SATVAT, and UMA SINHA, Defendants Below, Appellees.	**PUBLIC VERSION** **Filed on April 18, 2023** No. 13, 2023 Case Below: The Court of Chancery of the State of Delaware, C.A. No. 2021-1030-PAF

APPELLEES' ANSWERING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

In 2014, this Court issued its watershed opinion in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"). In *MFW*, this Court definitively held that:

> business judgment is the standard of review that should govern mergers between a controlling stockholder and its corporate subsidiary, where the merger is conditioned *ab initio* upon ***both*** [(i)] the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; ***and*** [(ii)] the uncoerced, informed vote of a majority of the minority of stockholders.[1]

"[A]pplying the business judgment standard to the dual protection merger structure 'is consistent with the central tradition of Delaware law, which defers to the informed decisions of impartial directors, especially when those decisions have been approved by the disinterested stockholders on full information and without coercion.'" *Id.* at 644 (the dual protections "accord minority investors the transactional structure that respected scholars believe will provide them the best protection"). When the dual protections are used and business judgment review applies, "[t]he price question is not one for a court applying the business judgment rule standard…." *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 767 (Del. 2018). Instead, that "price question" is for "stockholders to vote on themselves." *Id.*

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[1] *MFW*, 88 A.3d at 644 (emphases and romanettes added).

"[T]he whole point of encouraging this structure was to create a situation where defendants could effectively structure a transaction so that they could obtain a pleading-stage dismissal against breach of fiduciary duty claims." *Swomley v. Schlect*, C.A. No. 9355-VCL, at 66 (Del. Ch. Aug. 27, 2014) (TRANSCRIPT), *aff'd*, 128 A.3d 992 (Del. 2015). Therefore, where defendants have demonstrated adherence to the prerequisites of *MFW* "in a public way suitable for judicial notice, such as board resolutions and a proxy statement," the Court will apply business judgment review to a controller buyout at the motion to dismiss stage. *Id.* at 69-70.

Defendant and controlling stockholder BridgeBio Pharma, Inc. ("BridgeBio") followed *MFW*'s clear path to business judgment review when it made an offer to acquire the 36.8% of Eidos Therapeutics, Inc. ("Eidos") that it did not already own (the "Transaction"). As is common, at the outset, BridgeBio expressed an unwillingness to sell its shares to a third party. (Op. 30)[2]

Plaintiff does not dispute that (i) BridgeBio conditioned its offer *ab initio* on *MFW*'s dual protections; (ii) an independent, adequately-empowered Special Committee of Eidos directors negotiated with BridgeBio, secured price increases and ultimately approved and recommended the Transaction; and (iii) an

[2] The Memorandum Opinion ("Op.") is attached as Exhibit A to Appellant's Opening Brief ("OB").

overwhelming majority-of-the-minority stockholders voted to approve the Transaction, which has closed.

Plaintiff nevertheless filed suit for breach of fiduciary duty against BridgeBio and three affiliated directors. Defendants moved to dismiss the complaint based on BridgeBio's demonstrated adherence to the prerequisites of *MFW*. Plaintiff then argued that the court should decide the "price question" despite BridgeBio's adherence to *MFW* because a third party tested BridgeBio's unwillingness to sell its shares with a supposedly "apples-to-apples" offer that "conclusively demonstrates" the "price was far outside the range of fairness." (OB 29)[3] The Court of Chancery faithfully applied this Court's precedents, found no pled facts sufficient to call into question compliance with the *MFW* standard and dismissed Plaintiff's complaint under business judgment review.

First, the Court of Chancery rejected Plaintiff's due care challenge, which argued that the Special Committee failed "to meaningfully consider viable strategic alternatives" from GlaxoSmithKline plc ("GSK"), which were a "substantial premium" to the Transaction price. (Op. 35-38) Those alternatives required BridgeBio to sell its shares or self-sacrifice, which BridgeBio refused to do, and were nevertheless considered by the Special Committee, which pressed BridgeBio

[3] Plaintiff agreed that its Complaint incorporated by reference the nearly 4,000 pages of 220 documents that had been produced to Plaintiff. (A114)

to consider the alternatives. The Court of Chancery correctly explained that "a controlling stockholder is not required to accept a sale to a third party or to give up its control"; and that, under *Flood*, "[d]isagreeing with the special committee's strategy is not a duty of care violation"; and "a plaintiff cannot 'plead a duty of care violation…by questioning the sufficiency of the price.'" (Op. 30, 34 (quoting *Flood*, 195 A.3d at 768))

Second, the Court of Chancery rejected Plaintiff's argument that the stockholder vote was coerced because, as pled, "a deal with BridgeBio was the only viable option," recognizing that "[d]espite BridgeBio's refusal to sell its shares. . .realistic alternatives existed in the absence of approval of the Transaction." (Op. 54, 58)

Third, the Court of Chancery rejected Plaintiff's disclosure challenges because Plaintiff failed to plead a false or misleading statement in the proxy statement. (Op. 39-53)

Recognizing the correctness of the Court of Chancery's decision under controlling law, Plaintiff now asks this Court to overrule *MFW*, take "the price question" away from stockholders, give that question to the courts and deny BridgeBio the dismissal required by the business judgment rule. As explained more fully below, this Court should reject Plaintiff's request and affirm the Court of Chancery's faithful application of *MFW* to the pled facts.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery faithfully applied this Court's controlling precedent and granted business judgment review because each and every element of *MFW* was satisfied. The Court of Chancery correctly recognized that BridgeBio had an absolute legal right to refuse to sell its shares of Eidos and correctly refused to insist that BridgeBio abandon that right in order to receive the benefits promised by *MFW*.

2. Denied. The Court of Chancery correctly applied this Court's controlling precedent and held that Plaintiff failed to plead that the Transaction did not satisfy all six elements of *MFW*, only three of which were challenged; correctly holding that Plaintiff failed to plead a care violation, coercion or a disclosure defect.

COUNTERSTATEMENT OF FACTS

A. Eidos, BridgeBio And The Individual Defendants

Eidos was a publicly traded, Delaware incorporated, development-stage biopharmaceutical company focused on developing a drug, known as acoramidis or AG10. (Op. 2-3; A15-16 ¶¶32-34)

Defendant BridgeBio is a Delaware corporation headquartered in Palo Alto, California. (Op. 3; A25 ¶27) Defendants Neil Kumar, Ali Satvat and Uma Sinha were three of the six members of the Eidos Board. (Op. 3; A14-15 ¶4)[4] At the time of the Transaction, each served simultaneously as a director, officer, or both, of BridgeBio. (Op. 4; A25-25 ¶¶28-30)

B. The 2019 Special Committee Process

In 2019, BridgeBio owned 54.8% of Eidos shares. (Op. 5-6; A27-28 ¶¶36-38) On August 8, 2019, BridgeBio made an offer to acquire the minority shares it did not own at an exchange rate of 1.30 BridgeBio shares for each Eidos share. (Op. 6; A29 ¶41) The offer was subject *ab initio* to approval by a special committee and a nonwaivable majority-of-the-minority vote. (*Id*.) In the offer, as is common, BridgeBio indicated that it was unwilling to participate in alternative transactions and intended to retain control of Eidos. (*Id.*)

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[4] The other three members of the Eidos Board were outside directors and were not named as defendants. (Op. 4 n.8; A15 ¶4)

On August 11, 2019, the Eidos Board formed a special committee, consisting of two directors, to evaluate BridgeBio's offer (the "2019 Special Committee"). (Op. 6; A29-30 ¶42) The 2019 Special Committee hired Centerview Partners LLC as financial advisor, Cravath, Swaine & Moore LLP as legal advisor and Navigant Consulting, Inc. as an industry consultant. (*Id.*) After deliberation, the 2019 Special Committee rejected BridgeBio's initial proposal as inadequate. (Op. 6-7; A30 ¶43)

Negotiations continued through early October until it became clear that BridgeBio and the 2019 Special Committee could not agree on merger terms. (Op. 7) On October 14, 2019, BridgeBio publicly announced it was no longer pursuing a merger with Eidos. (Op. 7; A30 ¶44) The 2019 Special Committee was thereafter dissolved. (*Id.*) There are no allegations that BridgeBio retaliated in any way thereafter. Instead, "Eidos thereafter continued to successfully develop acoramidis and advance the drug towards approval and commercialization." (A31 ¶45)

C. GSK Expresses Interest In Eidos

In the summer of 2020, a large pharmaceutical company, GSK, identified in the Proxy as Company C, expressed interest in Eidos. (Op. 7; A231) In July 2020, Eidos and GSK entered into a non-disclosure agreement. (A33 ¶50)

On August 16, 2020, following an exchange of confidential information, GSK proposed a licensing and collaboration agreement with Eidos (the "August 16

Collaboration Proposal"). (Op. 7; A33-34 ¶¶50-51) The August 16 Collaboration Proposal contemplated $1 billion in upfront payments and a maximum of $700 million in milestone payments in exchange for Eidos's continued funding of research and development activities. (Op. 7; A15 ¶6) The August 16 Collaboration Proposal was described by GSK as a "nonbinding, preliminary proposal for a potential license and collaboration" for acoramidis and GSK stated that it "hope[d] this letter [would] form[] the basis for discussions." (A508-510; A33-34 ¶¶51-53) The August 16 Collaboration Proposal was immediately shared with the Eidos Board. (Op. 7; A231)

A previously scheduled board meeting was set to take place two days later, on August 18. (A40 ¶63) At the meeting, the Eidos Board unanimously rejected the August 16 Collaboration Proposal. (Op. 8; A231)

At the same meeting, Dr. Kumar, on behalf of BridgeBio, informed the Eidos Board that BridgeBio management was preliminarily considering the possibility of proposing a transaction with Eidos, which would be conditioned on approval by a special committee of independent directors and would be subject to a non-waivable majority-of-the-minority vote. (*Id.*) All of this was disclosed in the Proxy (defined below). (*Id.*)

The August 16 Collaboration Proposal is not explicitly mentioned in the minutes of the August 18, 2020 Board meeting, which were forthrightly produced to

Plaintiff in connection with its pre-suit inspection of books and records. (Op. 8) The minutes do describe that the Board meeting was adjourned temporarily for a meeting of the compensation committee, following which an executive session was reconvened and "[a] variety of additional topics were discussed." (Op. 8)

D. BridgeBio's Proposal And The Formation Of An Independent, Fully Empowered And Well-Advised Special Committee.

The Eidos Board met again on August 24; during the meeting, Dr. Kumar formally disclosed BridgeBio's interest in a potential transaction. (Op. 9; A36-37 ¶59) The proposal was expressly conditioned on approval of a special committee of independent directors of the Company and approval of a majority of the outstanding shares of the Company not held by BridgeBio. (Op. 9; A41 ¶64) Plaintiff concedes that this proposal satisfied *MFW*'s *ab initio* requirement.

In response, at the same meeting, the Eidos Board created another special committee comprised ultimately of directors Hooper and Lis (the "Special Committee"). (Op. 9; A41-42 ¶¶64, 66) Plaintiff does not challenge the independence of the members of the Special Committee.

The Special Committee was granted the full power and authority to retain advisors, consider any transaction proposal and any alternatives to any such proposal, and definitively say "no" to a transaction with BridgeBio. (Op. 9, 33; B2-7; A41 ¶64) The Special Committee retained Centerview as its financial advisor, Cravath as legal advisor and Guidehouse as its industry consultant. (*Id.*) Plaintiff

does not challenge the Special Committee's mandate, power or authority. Nor does it challenge the independence of the advisors or the quality of their advice.

E. The Special Committee Process.

The Special Committee's advisors began discussions with BridgeBio's advisors in late August and reported their preliminary conversations to the Special Committee at a September 1, 2020 meeting. (Op. 10; A41-42 ¶65)

On September 28, 2020, the Special Committee asked if BridgeBio was willing to sell its controlling stake in Eidos to a third party. (Op. 11; A44 ¶70) BridgeBio responded that it had no interest in selling its stake, which prompted the Special Committee to conclude on September 30, 2020 "that it was pointless to reach out to any potential third-party buyers as it was 'unlikely that any potential interested counterparty would pursue an acquisition of the Company at this time.'" (*Id.*) Nothing, however, prevented the Special Committee from reaching out to any potential third-party, including GSK, had it concluded otherwise. (B53:9-13)

On October 1, 2020, Centerview presented the Special Committee with preliminary financial analyses. (Op. 11-12) "The Special Committee determined that it would consider an offer from BridgeBio if it reflected a substantially higher price than Eidos's current trading price." (Op. 12) Centerview conveyed the Special Committee's position to BridgeBio's financial advisors. (*Id.*)

On October 2, 2020, BridgeBio made an offer to acquire all Eidos stock that it did not already own for either 1.55 shares of BridgeBio common stock or $61.38 in cash, at the election of Eidos stockholders, subject to proration. (Op. 12; A46 ¶75) BridgeBio reiterated its unwillingness to consider selling its shares of Eidos to a third party or to participate in an auction process. (Op. 12; A237) The same day, the Special Committee met and rejected the offer as inadequate based on the relative valuations of the companies. (Op. 12-13; A47 ¶76)

On October 3, 2020, BridgeBio increased its offer to 1.69 BridgeBio shares per Eidos share, or an equivalent amount in cash, with a maximum cash expenditure of $150 million. (*Id.*) The Special Committee again rejected BridgeBio's offer, concluding that the revised proposal still undervalued Eidos. (Op. 13; A47-48 ¶77)

Later that same day, BridgeBio again increased its offer to 1.77 BridgeBio shares per Eidos share or $70.09 per share, with a $150 million cash cap. (Op. 13; A48 ¶78) For a third time, the Special Committee rejected BridgeBio's proposal. (Op. 13; A48-49 ¶79)

Thereafter, Centerview advised the Special Committee that BridgeBio "was unlikely to make a fourth offer without receiving any counteroffer." (*Id.*) The Special Committee then authorized a counteroffer of 1.88 shares of BridgeBio common stock per Eidos share, or roughly $74.45 per share. (*Id.*)

BridgeBio responded with a "best and final" offer of 1.85 shares of BridgeBio common stock or $73.26 in cash per share, with a revised cap of $175 million in cash. (Op. 13; A49 ¶80) The Special Committee determined that this offer "represented the highest proposal that BridgeBio was likely to offer." (Op. 14; A49-50 ¶81) The Special Committee decided that it would recommend the Transaction to the full Eidos Board if Centerview could deliver a fairness opinion as to the merger consideration and the Special Committee could negotiate acceptable transaction terms. (*Id*.)

On October 4, 2020, the Special Committee met two more times. (Op. 14; A50 ¶82) Centerview rendered an oral opinion to the Special Committee that the merger consideration to be paid to the minority stockholders was fair from a financial point of view. (*Id.*) The Special Committee determined that the Transaction was fair and in the best interest of Eidos and its stockholders and recommended the Transaction to the Eidos Board. (*Id.*) Later that day, the Special Committee presented its recommendation to the Eidos Board and, without Defendants, determined that the Transaction was fair to, and in the best interests of, Eidos and its stockholders and voted to approve it. (Op. 15; A241) On October 5, 2020, Eidos and BridgeBio executed the merger agreement and announced the Transaction. (Op. 15; A50 ¶83)

F. GSK's Renewed Interest

On November 15, 2020, a financial advisor to GSK reached out to a member of the BridgeBio board to convey GSK's interest in buying all of Eidos's outstanding equity at a premium to the terms of the Transaction. (Op. 15; A52 ¶87) BridgeBio responded that it was not interested in selling its stake in Eidos. (*Id.*)

On November 23, 2020, GSK told Cravath that GSK intended to submit a buyout proposal to the Special Committee. That same day, GSK sent letters to both Eidos and BridgeBio proposing an acquisition of all outstanding shares of Eidos for $120 per share in cash, to be finalized within two weeks. (Op. 16; A53-54 ¶¶89-90) GSK conveyed that if BridgeBio was not willing to sell its stake, then GSK would be willing to explore an acquisition of the Eidos shares held by stockholders other than BridgeBio at a significant premium to the BridgeBio transaction. (Op. 16; A52-54 ¶90)

The Special Committee met with its advisors and concluded that the GSK proposal would be more financially favorable to Eidos stockholders than the Transaction and decided to respond. (Op. 16; A54-55 ¶92) The BridgeBio board also met with its advisors on November 23, 2020, and unanimously reaffirmed BridgeBio's disinterest in selling its Eidos stock, which it contended rendered the GSK proposal outside of the Merger Agreement's definition of a "Company

Superior Proposal." (Op. 16; A55 ¶93) The BridgeBio board conveyed its position to the Special Committee. (Op. 16-17)

The Special Committee met again on November 24, 2020 and discussed the possibility that GSK may be able to make an offer high enough that BridgeBio would consider it. (Op. 18; A56 ¶96) The Special Committee also concluded that GSK's proposal could result in a Company Superior Proposal under the merger agreement and that a failure to engage with GSK would be inconsistent with their fiduciary duties. (*Id.*)

The Special Committee directed its advisors to ask GSK: (i) if it would increase its offer as to all of Eidos's shares; (ii) what its proposed terms were for acquiring only the minority shares; and (iii) how much due diligence GSK needed to consummate a transaction. (Op. 18-19; A243) The Special Committee communicated its decision to engage with GSK to the BridgeBio board. (Op. 19; A56 ¶97)

On November 27, 2020, GSK informed the Special Committee's advisors that it was willing to provide a "substantial premium" to acquire the minority shares of Eidos if BridgeBio was willing to provide "certain fairly standard 'governance and other rights.'" (Op. 19) The Special Committee categorized these demanded

governance rights as reasonable, but recognized that they would require BridgeBio's consent as majority stockholder.[5] (Op. 19; A56 ¶98)

On November 29, 2020, Dr. Kumar asked the Special Committee for permission to speak directly with GSK in order "to better understand GSK's plans for the asset and intended road forward." (Op. 20; A57 ¶100) The next day, on November 30, 2020, GSK informed the Special Committee that (i) it was prepared to pay more than $120 per share if it could engage directly with BridgeBio; (ii) it was prepared to pay $110 per share for the public minority shares so long as it received the demanded governance rights which required BridgeBio's consent as majority stockholder; and (iii) it would consider the prospect of a possible collaboration agreement relating to AG10. (Op. 20; A57-58 ¶101) The Special Committee gave permission for BridgeBio and GSK to speak directly, subject to asking BridgeBio to keep the Special Committee informed on the status of such discussions. (Op. 20; A58 ¶102)

The next day, BridgeBio affirmed its lack of interest in selling its majority stake in Eidos. (Op. 20; A58 ¶103) During a phone call the next day with Dr. Kumar, GSK requested that BridgeBio identify a price at which it would support a

[5] The demanded governance rights included (i) the right to appoint two directors to the Eidos board; (ii) anti-dilution rights, and (iii) a requirement that GSK participate in approving third-party transactions. (Op. 19 n.90; A243-244) GSK is not alleged to have ever made an offer for the minority shares without the demanded governance rights.

GSK acquisition of Eidos. Dr. Kumar responded that BridgeBio was unwilling to sell its interest in Eidos regardless of the price. (Op. 20; A59 ¶104)

Thereafter, in a letter to the Special Committee, BridgeBio expressed a willingness to have further discussions with GSK only if a member or representative of the Special Committee also participated. (Op. 20-21; A59-60 ¶¶105-106) That discussion occurred on December 9, 2020, during which GSK presented its capabilities and proposed a collaboration with an upfront payment of $2.2-$2.4 billion. (Op. 21; A60 ¶107; A245) The proposal further contemplated that GSK would book all revenue from acoramidis, that the parties would share profit 50/50 domestically, and that collaboration efforts would be overseen by a joint steering committee controlled by GSK. (Op. 21; A245) (the "December 9 Collaboration Proposal.")

Following the December 9 meeting, the Special Committee asked BridgeBio if it would (1) grant the governance rights that GSK had demanded to allow the minority stockholders to receive an offer to sell their stock to GSK for $110 per share; (2) sell its shares in Eidos to GSK in a transaction at more than $120 per share; or (3) increase the consideration BridgeBio was paying under the Merger Agreement. (Op. 21; A60-61 ¶108; A245) BridgeBio replied "no" to all three questions. (Op. 21; A60-61 ¶108) The Special Committee relayed these positions to GSK. (Op. 22; A60-61 ¶108; A246)

G. GSK Walks Away

On December 11, 2020, BridgeBio filed Amendment No. 1 to its Form S-4, containing an amended joint proxy statement. (Op. 22) The amendments disclosed GSK's proposals and interactions with the Special Committee and BridgeBio following the announcement of the Transaction. (*Id.*) Also included was BridgeBio's characterization of GSK as "an unsuitable collaboration partner for acoramidis" because of its "lack of presence in cardiovascular and rare genetic diseases." (Op. 22; A245-246) The same day, BridgeBio sent a letter to GSK stating that BridgeBio was not interested in pursuing any of GSK's proposals. (Op. 22)

In response, GSK wrote a letter to the Special Committee and stated that it perceived that the Special Committee had "apparently decided to discontinue discussions with GSK." (Op. 23; A63 ¶114) The Special Committee responded with a letter indicating that it was willing to field additional proposals from GSK. (Op. 23; A63-64 ¶116) GSK did not respond with any revised proposals, although nothing stopped it from doing so. (Op. 23)

H. Eidos Files Supplemental Disclosures Regarding GSK's Proposals

On December 15, 2020, Eidos and BridgeBio filed the Definitive Proxy Statement on Schedule 14A (the "Proxy"). (Op. 24; A17 ¶6 n.1)

On January 12, 2021, Eidos filed a Form 8-K containing supplemental disclosures to the Proxy (the "Supplement"). (Op. 24) The Supplement provided

additional information surrounding the communications with GSK that had occurred after December 9, 2020 and disclosed that the Special Committee had indicated to GSK in its December 13, 2020 letter that the Special Committee was willing to engage in further discussions with GSK. (Op. 24; B81)

I. The Stockholder Vote

On January 19, 2021, a majority of Eidos's minority stockholders voted to approve the Transaction. (Op. 25; A64-65 ¶118) Specifically, 99.67% of the non-BridgeBio affiliated shares voted and approximately 80% of all outstanding minority shares, voted to approve the merger. (Op. 25) The Transaction closed on January 26, 2021. (Op. 25; A78 ¶143)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT THE *MFW* FRAMEWORK APPLIES TO THE TRANSACTION.

A. Question Presented.

Whether the business judgment rule applies to controller buyouts that satisfy all six elements of *MFW* even if the controlling stockholder refuses to sell its shares to a third party or otherwise engage in self-sacrifice. (A532-535; Op. 30-31)

B. Scope Of Review.

This Court's review of a trial court's grant of a motion to dismiss is *de novo*. *Flood*, 195 A.3d at 757 n.7.

C. Merits Of The Argument.

MFW clearly and unambiguously provides that the business judgment standard of review will be applied to controller buyouts if:

> (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

88 A.3d at 645.

Nothing in *MFW* requires, in addition to these six elements, the controller satisfy a seventh element, and be willing to sell its shares to a third party or otherwise

engage in self-sacrifice to facilitate a competing offer for the minority by a third party in order to receive business judgment review, as Plaintiff now argues. (OB 29)

1. Controllers Refuse to Sell or Otherwise Engage in Self-Sacrifice in Connection with Virtually Every MFW Offer.

Delaware law holds that a controller has no obligation to sell its shares or otherwise engage in self-sacrifice. In *Bershad v. Curtiss-Wright Corp.*, the Court explained that "a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would profit the minority." 535 A.2d 840, 845 (Del. 1987). Subsequent cases are uniformly in accord. *See, e.g.*, *Buttonwood Tree Value Partners, LP v. Sullivan*, 126 A.3d 643, 2015 WL 6437218, at *1 (Del. Oct. 22, 2015) (TABLE); *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996) (observing one "basic precepts of corporate law [is] that controlling shareholders have a right to sell their shares" and explaining that the controlling stockholders had a statutory right to veto a takeover transaction); *In re MFW S'holders Litig.*, 67 A.3d 496, 508 (Del. Ch. 2013) ("Under Delaware law, [a 43% stockholder] had no duty to sell its block, which was large enough, as a practical matter, to preclude any other buyer from succeeding unless it decided to become a seller."), *aff'd sub nom. Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).[6]

[6] For these reasons, Plaintiff is wrong to argue BridgeBio did anything wrong by "refusing to sell its shares at any price," or does not qualify for business judgment review "because of its unwillingness to sell." (OB 1, 3)

See also In re Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1040 (Del. Ch. Aug. 17, 2012) ("Delaware law does not. . .impose on controlling stockholders a duty to engage in self-sacrifice for the benefit of minority shareholders.").

Just as BridgeBio did here, controllers refuse to sell or otherwise engage in self-sacrifice in connection with virtually every *MFW* offer. Yet, no court has ever held that this refusal defeats *MFW*. Indeed, as the Court of Chancery recognized, "[t]he *MFW* framework was derived in a case where the controller had 'no interest' in selling its shares to a third party and would not 'vote in favor of any alternative' transactions." (Op. 30 (quoting *MFW*, 88 A.3d at 641)) This Court has affirmed the application of *MFW* at the pleading stage numerous times when the controller refused to sell or self-sacrifice. *See also Flood*, 195 A.3d at 759-60 (noting controller was not a willing seller); *In re Books-A-Million, Inc. S'holders Litig.*, 2016 WL 5874974, at *3 (Del. Ch. Oct. 10, 2016), *aff'd*, 164 A.3d 56, 2017 WL 2290066 (Del. May 22, 2017) (TABLE) (same).

Knowing all this to be true, Plaintiff argues that this is a "rare" or "unusual" case because a third party actually tested BridgeBio's unwillingness to sell. (OB 29) But this has happened before. In *In re Books-A-Million*, the Court of Chancery applied *MFW* and business judgment review to dismiss a complaint despite allegations that, just like here, a third party had submitted a bid for the target company at a price higher than the controller's offer. 2016 WL 5874974, at *18. In

explaining why rejection of the third party's offer did not defeat application of *MFW*, the Court of Chancery noted that "the Committee could not force the [controller] to accept [the third party's] offer, nor was it in a position to take action against the [controller] to facilitate [the third party's] offer." *Id*. On appeal, this Court affirmed the dismissal. 164 A.3d 56 (TABLE). This Court should reach the same result here.

2. Plaintiff's Invitation To Overrule *MFW* Rests On Dicta And Flawed Logic.

Plaintiff seems to concede that it is not sufficient to defeat *MFW* to merely allege that the price is unfair, but relies on dicta in *Books-A-Million* to argue that the business judgment rule can be avoided based on *a particular kind* of allegation that the price is unfair. (OB 28-31) Seizing upon that dicta, it says BridgeBio's adherence to *MFW*'s elements "must give way to the objective reality" that a third-party offer suggests that the "price was materially unfair" and the court itself must take up "the price question." (OB 28, 30) This argument was definitively rejected in *Flood*. "The whole point of *MFW* is to give a pathway whereby judicial review of the economics of a transaction ***can be avoided*** if the correct parties (impartial directors and the minority stockholders themselves) are given the appropriate authority." *Flood*, 195 A.3d at 766 n.81 (emphasis added). Under the business judgment standard, courts will not "second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual

economic stake in the outcome (in the case of informed, disinterested stockholders)." *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 313-14 (Del. 2015).[7]

In other words, entire fairness "is applied in the controller merger context ***as a substitute*** for the dual statutory protections of disinterested board and stockholder approval…." *MFW*, 88 A.3d at 644 (emphasis added). When a controller merger is conditioned *ab initio* on the dual protections, business judgment review applies because the controller "disables itself from using its control to dictate the outcome of the negotiations and the shareholder vote." *Id*. Under the business judgment standard, courts do not engage in a judicial review of the economics of a transaction. *Flood*, 195 A.3d at 767 ("The price question is not one for a court applying the business judgment rule standard."). Thus, Plaintiff is wrong to argue that a court can, consistent with Delaware law, revisit "the price question" once business judgment review applies.

Even if the court could revisit "the price question" under business judgment review (and it cannot), Plaintiff's argument that "GSK's $110/share offer for Eidos's minority shares is apples-to-apples with the Transaction price" and "conclusively

[7] Notably, the dicta in *Books-A-Million* that Plaintiff relies upon was a discussion of whether the price of a competing offer might, in an extreme circumstance, give rise to an inference of bad faith on the part of a committee so as to undermine one element of *MFW*. The *Books-A-Million* court did not hesitate to apply *MFW* in the face of that competing offer (which application of *MFW* this Court affirmed), and Plaintiff does not argue bad faith as in the dicta it relies upon.

demonstrates" the "price was far outside the range of fairness" is fatally flawed. (OB 29) That offer was not "apples-to-apples."

GSK's offer of $110 per share for the minority shares was conditioned on BridgeBio agreeing in its capacity as majority stockholder of Eidos to certain demanded governance rights. (*See supra* pp.15-16; A57-61 ¶¶101-108) Those demanded governance rights were priced into the offer (but were not the minority's rights to sell) and make clear that GSK's offer was not "apple-to-apples." GSK never offered $110 for the minority shares. Instead, GSK proposed to pay $110 for a package that included *both* the minority shares *and* governance rights above and beyond those that would accompany the minority shares.

Former Chief Justice Strine, speaking as Chancellor, explained the point in *Sprint Nextel Corporation v. Dish Network Corporation*, C.A. No. 8650-CS, at 3-4 (Del. Ch. June 20, 2013) (TRANSCRIPT). There, Dish Network made a tender offer for a minority stake in Clearwire that was contingent on Clearwire granting Dish certain governance rights that Sprint alleged violated its rights as a significant stockholder of Clearwire. *Id.* In arguing against expedition, Dish argued that its offer was merely a tender offer directed at the minority stockholders and did not trigger Sprint's contractual rights. *Id.* at 4. Then-Chancellor Strine rejected that argument, explaining, "[t]he tender offer is, in fact, not for the value of the stock which is held by the Clearwire stockholders. It is for the value of that stock ***as***

enhanced by contractually binding promises that the Clearwire directors are supposedly to give to DISH in advance of DISH actually giving any money to the people who own stock. Those people don't have those contractual rights, so you're not purchasing anything they have." *Id.* at 9 ("So what you're comparing is the offer made by somebody who already has control of the corporation to an offer by somebody who doesn't that's premised on essentially taking from the controller things that they've already paid for, and essentially taking that value and giving it to someone else.") (emphasis added).

Notably, nothing prevented GSK from dropping its governance demands and making a true "apples-to-apples" offer to the minority. It never did.

Finally, Plaintiff's supposed policy arguments rest on flawed logic. (OB 24-30) This Court has already determined the public policy implicated by controller transactions and *MFW*; explaining that if the court reviews "the price question" then controllers will "have no incentive to use [the dual protections of *MFW*]." *Flood*, 195 A.3d at 767. It is nonsensical to argue a controller would ever self-disable *ab initio* in exchange for the promise of business judgment review if, as Plaintiff argues, an illusory, non-actionable offer from a third party could thereafter deprive the controller of the promised business judgment review. *Id.* (*MFW* "incentivizes controllers to precommit to *MFW*'s conditions early to take advantage of business judgment review").

* * *

This Court should affirm the Court of Chancery's application of *MFW*.

II. THE COURT OF CHANCERY CORRECTLY APPLIED *MFW*.

A. Question Presented.

Whether the Court of Chancery correctly applied the six elements of *MFW* resulting in application of business judgment review. (A119-144; A535-566; Op. 31-58)

B. Scope Of Review.

This Court's review of a trial court's grant of a motion to dismiss is *de novo*. *Flood*, 195 A.3d at 757 n.7.

C. Merits Of Argument.

Plaintiff challenged only three of the six elements of *MFW*: (i) whether the Special Committee met its duty of care; (ii) whether the stockholder vote was uncoerced; and (iii) whether the stockholder vote was fully informed. Plaintiff concedes that all other elements were satisfied.

1. The Special Committee Satisfied Its Duty of Care

The Court of Chancery correctly recognized that "[d]isagreeing with the special committee's strategy is not a duty of care violation" and that "[a] plaintiff can plead a duty of care violation only by showing that the Special Committee acted with gross negligence, not by questioning the sufficiency of the price." *Flood*, 195 A.3d at 768. Plaintiff concedes that the Special Committee: (i) was independent and disinterested; (ii) met a total of twenty-four times over four months (including nine times after the Merger Agreement was signed with BridgeBio); (iii) retained

competent and independent advisors; and (iv) extracted multiple price increases from BridgeBio. (Op. 36) On this pleading, the Court of Chancery correctly applied *Flood* and rejected Plainitff's due care challenges. (Op. 34 (citing *Flood*, 195 A.3d at 768))

Plaintiff does not challenge the Court of Chancery's application of the gross negligence standard on appeal. Indeed, its Opening Brief fails even to state the standard, much less explain how it was misapplied below. Plaintiff has therefore waived the argument. Supr. Ct. R. 14(b)(vi)(A)(3); *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004).

Instead, Plaintiff quarrels with the tactical decisions of the Special Committee. (OB 33-41) The Court of Chancery correctly rejected these arguments below because "disagreement[s] with the Special Committee's tactics and strategy" is "insufficient to establish gross negligence." (Op. 37 (citing *Flood*)) This Court should as well.

First, Plaintiff challenges the Eidos Board's decision not to engage with GSK prior to the formation of the Special Committee. (OB 34) "But the Eidos Board had already unanimously rejected that proposal before the Special Committee had been created." (Op. 35) Plaintiff offers no explanation for how the Special Committee's purported failure to revisit a conclusion reached unanimously by the Eidos Board

before the Special Committee was formed could amount to a breach of the committee's duty of care.

Second, what Plaintiff is really saying is that "stockholders would have benefited from the Committee engaging with GSK" after it was formed. (OB 33) The Court of Chancery correctly recognized that this argument is a challenge to the Special Committee's tactics foreclosed by *Flood*. (Op. 37); *Flood*, 195 A.3d at 767. Plaintiff concedes that nothing, other than tactical decision-making, prevented the Special Committee from reaching out to GSK once the committee was duly constituted. (B53 ("COURT: Counsel, was the special committee precluded from reaching out to GSK to consider its proposal as an alternative? [Plaintiff's Counsel]: They were not….")) The Special Committee's decision not to do so was made by independent directors and based on expert advice. (Op. 35-36 ("[T]he 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.")) This forecloses a care claim. *See Flood*, 195 A.3d at 768.

Third, Plaintiff argues that "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." (OB 40) This argument is also foreclosed by *Flood*. Plaintiff pleads that when GSK made its offers directly to the Special Committee,

the Special Committee actively engaged with those offers and encouraged BridgeBio to consider them. *See supra* 15-18. Plaintiff merely disputes the tactics of that engagement.

As alleged, the Special Committee met nine times after the Merger Agreement was signed to discuss GSK's proposals. It "directed its advisors to engage further with GSK and seek additional information from GSK," despite BridgeBio's stated unwillingness to sell. (A460) "The allegations of the Complaint demonstrate that the Special Committee responded to GSK's proposals and pressed BridgeBio to reconsider its stated unwillingness to sell its Eidos stake to GSK." (Op. 37) Ultimately, the Special Committee "determined that the best available alternative for Eidos and its stockholders (other than BridgeBio and its subsidiaries) was the transactions contemplated by the merger agreement due to the absence of an actionable offer from [GSK]." (Op. 25) As the Court of Chancery correctly concluded, the "Special Committee's efforts to engage with GSK and to test BridgeBio's unwillingness to sell undercuts any possible inference of gross negligence." (Op. 37-38 (citing *Books-A-Million*, 2016 WL 5874974, at *18))

Fourth, Plaintiff now contends (in an argument it failed to brief below) that part of the Special Committee's alleged breach of the duty of care was caused by BridgeBio allegedly withholding follow-up materials provided by GSK. (OB 34-35) Plaintiff failed to plead any details regarding these supposed follow-up materials

including: what information they contained; whether the Special Committee otherwise already had such information; when the materials were delivered and to whom or how they might have been helpful. Furthermore, once GSK made an offer, the Special Committee actively engaged and GSK was free to provide any and all information that would be helpful. (*See, e.g.*, A245 (On December 9, 2020, representatives of BridgeBio, the committee and GSK "held a videoconference meeting for the purpose of discussing a potential collaboration.”))

Finally, Plaintiff argues that the Special Committee "breached its duty of care by prematurely cutting off post-signing negotiations with GSK." (OB 39) But that argument is inconsistent with Plaintiff's own pleading. (A64 ¶116) "Even after BridgeBio balked at GSK's proposals, leading GSK to voice its displeasure with the representations in the Amended S-4, the Special Committee indicated to GSK a willingness to continue their discussions." (Op. 37) Nothing prevented GSK from making further offers. It declined to do so. (Op. 24-25)

2. The Stockholder Vote Approving the Transaction Was Not Coerced.

The Court of Chancery correctly rejected Plaintiff's "coercion" arguments. (Op. 53-58) "In the deal context, the inquiry focuses on whether the stockholders have been permitted to exercise their franchise free of undue external pressure created by the fiduciary that distracts them from the merits of the decision under

consideration." (Op. 53 (citing *Williams v. Geier*, 671 A.2d 1368, 1382-83 (Del. 1996)))

According to Plaintiff, "[t]he stockholder vote was coerced because Eidos stockholders lacked the ability to reject the Transaction and return to an acceptable status quo." (OB 41) It says that the status quo was not "acceptable" because "BridgeBio limited Eidos stockholders' options" by "refusing to sell to a third-party." (OB 42) This argument is fatally flawed.

First, as explained above, BridgeBio had an absolute legal right to refuse to sell its shares. (*See supra* pp. 21-22) Eidos was a controlled company before the Transaction. And, if the Transaction were to have been voted down, Eidos would have remained a controlled company that could not be sold without the consent of BridgeBio. (*Id.*) A transaction is not coercive merely because "[t]he status quo may be undesirable or unpleasant." (Op. 54 (citation omitted)) So long as "stockholders can reject the transaction and maintain the status quo, then the transaction is not coercive." *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *25 (Del. Ch. June 11, 2020).

Second, "fiduciaries can coerce stockholders by threatening to make their situation worse." *Dell*, 2020 WL 3096748, at *24. In *Williams v. Geier*, this Court affirmed a finding of no coercion because there were no threats against stockholders, only necessary disclosures. 671 A.2d 1368, 1383 (Del. 1996). Likewise, Plaintiff

identifies no threats made by BridgeBio that could cause the vote to turn on factors extrinsic to the merits of the Transaction. This pleading deficiency distinguishes this case from Plaintiff's cited authority. In *Dell*, "the Company created a coercive situation by threatening a Forced Conversion" of stock. *Dell*, 2020 WL 3096748, at *31. The complaint in Dell "identifie[d] a steady drumbeat of actions by which the Company signaled its intent to exercise the Conversion Right in the absence of a negotiated redemption." *Id.* As a result, the "potential exercise of the Conversion Right constituted improper threats that resulted in coercion." *Id.* at *32. No threat by BridgeBio is alleged here. *See, e.g.*, *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 124 (Del. Ch. 2007) (rejecting a plaintiff's coercion allegations in the absence of a pled threat).

Third, the pled facts here are nothing like those in *Saba*. In *Saba*, the company's stock had been delisted from NASDAQ after an accounting fraud was exposed. *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *3 (Del. Ch. Apr. 11, 2017). As part of a later settlement with the SEC, the company was required to file restated financials by a date certain. *Id.* When the company announced it would not meet the deadline, its stock price dropped dramatically, after which a private equity firm offered to acquire the company for $9 per share, which was below the then-current trading price. *Id.* at *5. The board approved the sale at that price, and nine days later the SEC deregistered the company's shares. *Id.* at *6.

On these extreme facts, the court held that it was reasonably conceivable that the stockholder vote was coerced. *Id.* at *16. The court observed that the stockholders faced a situation that the board had created "as a consequence of its allegedly wrongful action and inaction," due to its financial fraud, inexplicable failure to restate financials and the later inexplicable failure to meet the deadline that it agreed to honor in the settlement with the SEC. *Id.*

Here, the Court of Chancery correctly concluded that "Eidos stockholders were not coerced into approving the Transaction because they had other acceptable alternatives to a deal with BridgeBio." (Op. 57) It explained that, "[u]nlike Saba Software, Inc., Eidos was not a financially distressed company, whose stock had just been deregistered by the SEC and stockholders were being offered per share consideration 'well below its average trading price.'" (*Id.* (citation omitted)) "Rather, the Transaction with BridgeBio presented a premium offer to Eidos stockholders, who faced no threat of delisting." (Op. 58)

Fourth, Plaintiff is wrong in arguing the Court of Chancery ignored its allegations that Eidos "was not positioned to pursue, an independent launch of acoramidis."[8] (OB 43) The Court of Chancery explained that "Eidos stockholders

[8] Although Plaintiff argues on appeal that this option "was not practically feasible," it alleged in its Complaint that "[i]n recent years, the menu of options available to such companies has expanded…[and] it has become more realistic for

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. Additionally, alternatives to the purchase by BridgeBio were apparent to the stockholders. The Proxy discusses the [December 9 Collaboration Proposal], which would require no permission or approval by BridgeBio. Despite BridgeBio's refusal to sell its shares, which effectively blocked another acquirer from purchasing a majority of the Company, realistic alternatives existed in the absence of approval of the Transaction." (Op. 58) Notably, Plaintiff alleges that, prior to BridgeBio's offer, Eidos was continuing "to successfully develop acoramidis and advance the drug towards approval and commercialization." (A31 ¶45)

Finally, Plaintiff's conclusory argument that "voting down the Transaction would leave Eidos as a standalone company hamstrung by a controller with a demonstrated history of self-interested conduct" is contradicted by its own pleading. (OB 19) The Complaint alleges that a previous BridgeBio attempt to take Eidos private in compliance with *MFW* was rejected and that BridgeBio engaged in no retaliation whatsoever. (A29-31 ¶¶41-45)

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emerging biopharmaceutical companies to independently launch and commercialize new products." (A32 ¶48)

3. The Stockholder Vote to Approve the Transaction was Fully Informed.

The Court of Chancery correctly rejected Plaintiff's arguments that the Proxy was "false and misleading in three respects." (OB 44)

(a) The August 16 Collaboration Proposal.

According to Plaintiff, "[t]he Proxy falsely stated that, at the August 18 Board meeting, the Eidos board discussed the August 16 Collaboration Proposal and that following such discussion, the Eidos board, 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." (OB 44)

Plaintiff says that the mere absence of an explicit reference to the August 16 Collaboration Proposal in the meeting minutes alone is enough to plead "that the Proxy's description of the August 18 meeting was false." (*Id*.)

The Court of Chancery rejected this disclosure argument on two independent grounds. *First*, the Court of Chancery explained that even if there were an inaccuracy in the Proxy's description of the August 18 meeting, the August 16 Collaboration Proposal, which "had been rejected by the full Eidos Board prior to the creation of the Special Committee," was not material:

> ***The terms of the transaction were fully disclosed. GSK's August 16 collaboration proposal was not a competing offer at the time stockholders considered whether to approve the Transaction***.
>
> * * *

> By contrast, the Proxy disclosed, consistent with the Board's fiduciary duties, GSK's November and December 2020 proposals, including offers to acquire all shares of Eidos and the public minority shares. Of particular note, ***the terms of the December 9 collaboration proposal, which contained more favorable terms for Eidos than the August 16 proposal, such as an upfront payment of $2.2 to $2.4 billion, are fully disclosed in the Proxy***….

(Op. 44-45 (emphases added) (citations omitted))

The Court of Chancery concluded that, "[i]n light of the disclosure of GSK's more recent proposals, disclosure of the terms of GSK's August collaboration proposal would not have 'significantly altered the "total mix" of information available' to stockholders when deciding how to vote on the merger." (Op. 45-46 (citation omitted))

On appeal, Plaintiff does not challenge the Court of Chancery's determination on materiality. The Opening Brief contains no analysis of materiality, and, indeed, fails even to cite the controlling standard. Any challenge to materiality is "deemed waived." Supr. Ct. R. 14(b)(vi)(A)(3).

If this Court were nevertheless to review the Court of Chancery's holding on materiality, that holding was correct for the reasons articulated in the Opinion. (Op. 43-46) It is undisputed that the August 16 Collaboration Proposal was received before the Special Committee was formed and that the Proxy fully described the terms of GSK's subsequent collaboration proposal and the Special Committee's consideration of that proposal. Given the Proxy's full disclosure of the December 9

Collaboration Proposal, additional detail about the stale August 16 Collaboration Proposal would not have been material to stockholders in assessing whether to approve the Transaction. Delaware law "does not require disclosing details about offers that directors conclude are not worth pursuing." *City of Miami Gen. Emps. v. Comstock*, 2016 WL 4464156, at *15 (Del. Ch. Aug. 24, 2016), *aff'd on other grounds sub nom. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Comstock*, 158 A.3d 885, 2017 WL 1093185 (Del. Mar. 23, 2017); *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *15 (Del. Ch. Jan. 26, 2018) (holding that no disclosure claim was established by the failure to disclose different strategic alternatives that were not on the table at the time of the stockholder vote).

Second, the Court of Chancery held that "[a]lthough the board minutes do not reference the GSK proposal, they indicate that during an executive session '[a] variety of additional topics were discussed.'" (Op. 41) Reading the Complaint as a whole, the Court of Chancery explained that "the absence of an express reference to the GSK proposal in the board minutes does not support a reasonable inference that the Eidos Board did not consider the GSK collaboration proposal at the August 18 meeting." (Op. 41-43)[9] The Court of Chancery pointed out it was "undisputed that

[9] As this Court has explained, if a plaintiff has "premised [its] factual allegations squarely on the Proxy Statement, [it] cannot fairly, even at the pleading stage, ask a court to draw inferences contradicting the Proxy Statement unless [it] pleads

the proposal was circulated to the Board two days before [the] August 18 meeting and that Kumar indicated it should be discussed." (Op. 43; B9) The Court of Chancery recognized that "[t]he board minutes mention other topics being discussed in an executive session." (Op. 43; A517)

The Court of Chancery relied 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). In *GGP*, the proxy represented that certain presentations were made to the board and certain topics were discussed, but the board minutes did not mention discussion of these topics or presentations. *Id.* at *26-27. The *GGP* court declined to categorize these discrepancies as "conflicts," observing that proxies, by definition, contain more information than meeting minutes. *Id.* at *27. As the *GGP* court observed, there is no requirement that board minutes "be prepared to any specified level of particularity." *Id.*

Unlike in *GGP* and here, in *H&N Management Group Inc. v. Couch*—on which Plaintiff relies—the plaintiffs did not ask the Court to draw the unreasonable inference that events reported in a proxy must not have occurred because they were not referenced in the minutes. Rather, the Court found, based on the description of events in the minutes, that it was reasonably conceivable that the board was not

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nonconclusory contradictory facts." *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013). Plaintiff pled no such contradictory facts.

adequately informed when approving a transaction. 2017 WL 3500245, at *4-5 (Del. Ch. Aug. 1, 2017). That holding provides no support for Plaintiff here.

Plaintiff's other cited authority involves circumstances in which a plaintiff pled a specific contradiction between the board materials and the proxy, rather than increased detail in the proxy as here. For example, in *Gantler v. Stephens*, the proxy disclosed that the board had carefully deliberated about an alternative transaction, while the plaintiff—a director who personally witnessed the events in the boardroom—was able to allege that the board actually voted "[w]ithout any discussion or deliberation." 965 A.2d 695, 699-701 (Del. 2009).

In *In re Xura, Inc. Stockholder Litigation*, the proxy disclosed that a strategic committee was established to evaluate and negotiate the terms of a potential transaction, but discovery from a related appraisal litigation showed that the committee never met with the counterparty, and did not take any formal action or keep minutes, while one purported special committee member testified at his deposition that he did not know he was supposed to have served on the committee or that it even existed. 2018 WL 6498677, at *4, *12 (Del. Ch. Dec. 10, 2018).

In *Morrison v. Berry*, the plaintiff pointed to specific documents, most notably an email from counsel to the company's founder that specifically contradicted the disclosures in a Schedule 14D-9. 191 A.3d 268, 277-82 (Del. 2018). In light of the

contradictory 220 documents, this Court held that certain statements in the 14D-9 were materially misleading. *Id.*

Here, in contrast, Plaintiff inspected the company's books and records and found no similar contradictions.

(b) GSK's Suitability as a Commercialization Partner.

As is typical in proxy statements, the Proxy used the anonymous identifier "Party C" in referring to GSK and described GSK as "a large international pharmaceuticals company." (Op. 46) Although Plaintiff challenged the use of an anonymous identifier below, it has abandoned that challenge on appeal.[10] Supr. Ct. R. 14(b)(vi)(A)(3); *Roca*, 842 A.2d at 1242.

The Proxy disclosed the BridgeBio board's views of GSK as follows:

> During [a December 9] meeting, the BridgeBio Board discussed Company C's lack of presence in cardiovascular and rare genetic diseases, and noted that Company C had not provided satisfactory answers during the December 9 meeting regarding its plans with respect to development, life cycle management, commercial rebating, commercial network design and pharmacy benefit issues for Medicare in connection with Company C's proposed collaboration. The BridgeBio board unanimously determined that the terms of the Company C collaboration proposal were not attractive and Company C was not a suitable collaboration partner for acoramidis.

(A245-246)

[10] Plaintiff admits that it is typical to identify unsuccessful bidders by an anonymous code name. (Op. 46)

Plaintiff does not dispute that this disclosure was truthful; *i.e.*, that this disclosure accurately set forth the views of the BridgeBio board. Instead, Plaintiff argues that "[h]aving 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." (OB 49) But Plaintiff does not plead any missing information.

"To survive a motion to dismiss, the plaintiffs …must allege that facts are missing from the statement, ***identify those facts***, state why they meet the materiality standard and how the omission caused injury.'" *Malpiede v. Townson*, 780 A.2d 1075, 1086-87 (Del. 2001) (citation omitted) (emphasis added). Plaintiff failed to do these things below and does not do so on appeal. The Opening Brief does not identify a fact missing in the Proxy and provides no analysis of materiality.

Plaintiff's cited authority regarding partial disclosures is distinguishable and does not change this analysis. First, Plaintiff's citation to *Arnold v. Society for Saving Bancorp, Inc.* ignores that the Delaware Supreme Court held that omission of certain bids from the proxy failed to provide stockholders with "an accurate, full, and fair characterization of those *historic events.*" 650 A.2d 1270, 1280 (Del. 1994) (emphasis added). Plaintiff fails to plead any such historic events regarding BridgeBio's disclosed view that the Proxy omitted.

Next, *Zirn v. VLI Corp.*, 681 A.2d 1050 (Del. 1996) and *Gilmartin v. Adobe Res. Corp.*, 1992 WL 71510 (Del. Ch. Apr. 6, 1992) are readily distinguishable. In

both cases, the Court held that due to countervailing information that had been omitted from the Proxy, in *Zirn* the views of counsel about the company's chances in reconsideration for reinstatement of a patent and in *Gilmartin* the view of two board members that it was not a good time to sell the company painted an incomplete picture for stockholders. By contrast, here, Plaintiff does not allege that BridgeBio held any countervailing perspective, let alone one that would have been "extremely relevant to a reasonable stockholder's valuation of the corporation." *Zirn*, 681 A.2d at 1057.

Plaintiff also cites *Doppelt v. Windstream Holdings*, in which the Court held that it was reasonably conceivable that the proxy omitted relevant information regarding a spin-off that constituted a single transaction to the proposal that stockholders were being asked to vote on. 2016 WL 612929, at *5 (Del. Ch. Feb. 5, 2016). The Court held that the spin-off "was relevant and material to the Windstream stockholders' vote on the [p]roposals." Again, Plaintiff fails to adequately plead information relevant to BridgeBio's honestly held belief that was omitted.

Second, "the disclosure is expressed as the BridgeBio board's opinion, not as a fact or as a view of the Special Committee." (Op. 48 (citing *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *3 (Del. Ch. Aug. 26, 2005) ("[T]here is no allegation in the complaint[ ] that this statement of opinion was not honestly held,

i.e., false. Therefore, the plaintiff[ ] cannot bring any claims based on this factual allegation."))

Third, "[t]here is no dispute that stockholders were provided with detailed descriptions of GSK's November and December 2020 proposals and the Special Committee's responses." (Op. 52) Moreover, "the Proxy effectively communicated to Eidos stockholders that [GSK]'s proposals were not only *bona fide*, but were capable of delivering greater value to the minority public shares." (Op. 47) "A reasonable stockholder reading the Proxy would recognize that [GSK] was not some fly-by-night operation incapable of delivering premium value to the minority stockholders." (Op. 46)

(c) GSK's Willingness to Engage in a Transaction without BridgeBio's Approval.

Plaintiff last argues the Proxy failed to disclose that "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." (OB 51) But the materiality standard does not require speculation about what GSK "remained willing to explore" or whether such future alternatives "would have provided more value to Eidos's minority stockholders." *Kahn ex rel. of DeKalb Genetics Corp. v. Roberts*, 679 A.2d 460, 468 (Del. 1996) (finding no duty to disclose speculative information) (citation omitted). The Proxy disclosed the offers

GSK made to the Special Committee. Nothing more is required. *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992) (explaining "duty to disclose fully and fairly all material information within the board's control"); *Skeen v. Jo-Ann Stores, Inc.*, 1999 WL 803974, at *7-8 (Del. Ch. Sept. 27, 1999), *aff'd*, 750 A.2d 1170 (Del. 2000) (explaining where there is "an expression of interest" that has not yet led "to a firm offer, the board has no obligation to disclose the specifics of the expression.").

As for BridgeBio's approval, "[n]othing in the description of the terms of that proposal indicate that BridgeBio's approval was required to enter into the agreement."[11] (Op. 49) "The duty of complete candor cannot possibly mean that companies are required to disclose not only all material existing facts but also the *absence* of all other relevant facts." *Cottle v. Standard Brands Paint Co.*, 1990 WL 34824, at *6 (Del. Ch. Mar. 22, 1990); (Op. 49-50).

Plaintiff's citation to *In re Mindbody, Inc.* does not alter this analysis. 2020 WL 5870084 (Del. Ch. Oct. 2, 2020). In *Mindbody*, the proxy failed to disclose that the ultimate acquirer had previously expressed an interest in acquiring the company at "a substantial premium to recent trading range," which signaled a willingness to pay a price per share much higher than the ultimate merger price. *Id.* at *29. Here,

[11] The ISS presentation containing the words "third party proposals are illusory," referenced by Plaintiff clearly "distinguishes between GSK's acquisition proposals and the collaboration proposal." (Op. 51 n.165)

GSK's stated willingness to acquire Eidos at a premium to the Transaction price was fully disclosed; however those offers were not actionable. Additionally, all information regarding the terms of the collaboration proposal were fully disclosed and available for stockholders to consider in assessing the Transaction and the value it offered for their shares.

The Court of Chancery correctly held that Plaintiff failed to plead a disclosure claim.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Chancery below should be affirmed.

Respectfully submitted,

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