IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN M. SCIANNELLA, Individually and on Behalf of All Others Similarly Situated,	)	
Plaintiff Below, Appellant,	)	No. 303, 2024
v.	)	Case Below:
ASTRAZENECA UK LIMITED, ASTRAZENECA PLC, TYRELL RIVERS, PH.D., PASCAL SORIOT, ZHENGBIN YAO, PH.D., EDWARD HU, YANLING CAO, ANDREAS WICKI, CHRIS NOLET, and RACHELLE JACQUES,	)	Court of Chancery of the State of Delaware C.A. No. 2023-0125-PAF **REDACTED PUBLIC VERSION FILED: November 15, 2024**
Defendants Below, Appellees.	)	

<u>DIRECTOR APPELLEES' ANSWERING BRIEF</u>

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Dated: October 31, 2024

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

NATURE OF PROCEEDINGS

On February 12, 2021, Viela Bio, Inc. ("Viela" or the "Company") announced that it had entered into an Agreement and Plan of Merger (the "Merger Agreement") with affiliates of Horizon Therapeutics plc (together with the affiliates identified below, "Horizon"). The Merger Agreement provided for the acquisition of Viela by Horizon in a two-step transaction, consisting of a cash tender offer at a purchase price of $53.00 per share (the "Tender Offer"), followed by a cash merger pursuant to 8 *Del. C.* § 251(h) (the "Merger" and together with the Tender Offer, the "Acquisition"). The Tender Offer represented a premium of approximately 52.8% over the Company's closing price on the last trading day before Viela's board of directors (the "Board") approved the transaction. The Merger was valued at approximately $3 billion.

Plaintiff Stephen M. Sciannella ("Plaintiff") filed a verified putative stockholder class action complaint on February 2, 2023 (the "Complaint"). In his Complaint, Plaintiff alleged, among other things, that the stockholder vote was uninformed because the Company's directors failed to fully disclose certain alleged facts about the Company's contracts, financial disclosures, and CEO's compensation.

The Court of Chancery dismissed the Complaint on July 7, 2024, holding that the Complaint "fails to allege that the recommendation statement was materially misleading or omitted material facts." Op. 2.[1] Accordingly, the Court of Chancery determined that the transaction was subject to business judgment review under *Corwin*. *Id.*

Plaintiff now appeals the Court of Chancery's dismissal of the Complaint. As described below, this Court should affirm this dismissal based on *Corwin* and its progeny. Alternatively, this Court should affirm dismissal as to the Director Defendants because Plaintiff has failed to plead a non-exculpated breach of the duty of loyalty.[2]

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[1] References to the Court of Chancery's Memorandum Opinion appear in the format of "Op. __." References to "A__" are to pages in the Appendix to Appellant's Opening Brief. References to "¶__" refer to paragraphs of the Complaint, which begins at A97. References to Appellant's Corrected Opening Brief appear in the format "OB __." References to "B1__" are to pages in the Appendix to AstraZeneca Appellees' Answering Brief. References to "B2__" are to pages in the Appendix to Director Appellees' Answering Brief.

[2] References to the "Director Defendants" refer to Zhengbin Yao, Ph.D., Edward Hu, Yanling Cao, Andreas Wicki, Chris Nolet, and Rachelle Jacques.

SUMMARY OF ARGUMENT

1. Denied. AstraZeneca UK Limited ("AstraZeneca") did not act as a conflicted controlling stockholder such that entire fairness should govern the motions to dismiss. The Director Defendants join the arguments set forth in the AstraZeneca Appellees' Answering Brief for this argument.

2. Denied. As the Court of Chancery concluded, the Director Defendants did not materially mislead or omit material facts in the Company's registration statement. ***First***, the information about the letter sent by AstraZeneca on January 8, 2021 to Dr. Yao (the "January 8 Letter"), including AstraZeneca's potential sale of its stock in Viela and its proposals for the contracts between AstraZeneca and Viela, was not material. Op. at 86, 88. ***Second***, the circumstances surrounding the creation of the Company's financial projections did not cast doubt on their reliability, and therefore, any purported omissions about earlier financial projections in the Company's registration statement were immaterial. Op. at 97. ***Third***, the Company disclosed detailed information about Dr. Yao's post-transaction compensation, and therefore, any purported omissions about Dr. Yao's communications with Horizon were immaterial. Op. at 101. Therefore, because the disclosures fully informed

stockholders in deciding whether to tender their shares, and there is no allegation of stockholder coercion, the business judgment rule applies under *Corwin*.

3. Alternatively, this Court should affirm the Court of Chancery's dismissal of the Complaint as to the Director Defendants on the independent basis that Plaintiff has failed to plead a non-exculpated breach of fiduciary duty in accordance with *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, 115 A.3d 1173 (Del. 2015). The Company's certificate of incorporation contains an exculpation provision pursuant to 8 *Del. C.* § 102(b)(7), and Plaintiff has not sufficiently alleged that a majority of the Board members were interested in the transaction or acted in bad faith by consciously disregarding their duties in approving the transaction.

STATEMENT OF FACTS

The alleged facts demonstrate that the Company's Board fulfilled its fiduciary duties in securing a premium deal, which was approved by a fully-informed majority of the Company's stockholders who tendered their shares following a comprehensive sales process and thorough strategic and financial review.[3]

A. Viela and Its Board

Viela was a biotechnology company headquartered in Gaithersburg, Maryland, dedicated to the discovery, development and commercialization of novel treatments for autoimmune and severe inflammatory diseases. A120 ¶ 39. Prior to Viela's acquisition by Horizon in 2021, AstraZeneca was the direct owner of 26.72% of Viela's common stock. A115 ¶ 26. During the relevant time period, Viela's board consisted of the following individuals: Tyrell Rivers, Ph.D., an Executive Director

[3] The Complaint relies upon and incorporates by reference certain documents produced to Plaintiff in response to his books and records demand under 8 *Del. C.* § 220. Similarly, virtually all of the exhibits submitted by Defendants in their motions to dismiss were incorporated into the Complaint, either expressly or through the parties' agreement. B1_890 ¶ 15; *see* B1_77-86; B1_1037; B2_61-63; B2_438-40. As such, the Court may rely on these documents in connection with the motion to dismiss. *See* Op. at 3 n.2; *see also Freedman v. Adams*, 2012 WL 1345638, at *16 (Del. Ch. Mar. 30, 2012), *aff'd*, 58 A.3d 414 (Del. 2013); *see also Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016), *abrogated on other grounds by Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019).

within AstraZeneca's Corporate Development group (A116 ¶ 29); Pascal Soriot, CEO of AstraZeneca PLC, who was on Viela's board until September 18, 2020 (A117 ¶ 31);[4] Zhengbin Yao, Ph.D., Viela's CEO from March 2018 to April 2021, and Chairman of Viela's Board from January 2019 to April 2021 (A117 ¶ 32); Edward Hu, founder of non-party 6 Dimensions Capital ("6 Dimensions") (A117-18 ¶ 33); Yangling Cao, a founding member of non-party Boyu Capital Advisory Company Limited (A118 ¶ 34); Andreas Wicki, the CEO of non-party HBM Healthcare Investments AG (A118-19 ¶ 35); Chris Nolet, a retired Partner of Ernst & Young (A119 ¶ 36); and Rachelle Jacques, the President and CEO of Akari Therapeutics PLC (A119 ¶ 37).

B. Viela Begins to Look for New Partnerships

In July 2020, Viela and Horizon executives began discussions about a potential collaboration between the two companies. A55. On July 15, 2020, Viela entered into a Confidentiality Agreement with Horizon, but the agreement did not include a standstill provision. A144 ¶ 81; A55. Viela agreed to provide Horizon with confidential information regarding the Company portfolio, and the two

[4] Mr. Soriot, Dr. Rivers, AstraZeneca UK Limited, and AstraZeneca PLC are referred to herein collectively as the AstraZeneca Defendants.

companies agreed that Horizon would conduct a detailed review. A55. Thereafter, Horizon conducted preliminary due diligence on clinical, safety and regulatory data about the Company's product and product candidates. *Id.* By the end of the summer, Horizon expressed an interest in further exploring partnering discussions. *Id.*

C. Viela Engages Goldman Sachs to Develop Strategies for Maximizing the Company's Value

On September 18, 2020, Goldman Sachs & Co. LLC ("Goldman Sachs") presented the Board with updates on how Wall Street viewed the Company and strategic alternatives for the Company moving forward. *Id.* In its presentation, Goldman Sachs noted that [redacted]. B1_432. Goldman Sachs advised that [redacted]. B1_433. At the end of the Board meeting, the Board passed a resolution to engage Goldman Sachs to assist in identifying and exploring "partnership+" strategic alternatives for the Company. A142 ¶ 78; B1_414. Two weeks later, on October 6, 2020, the Company formally engaged Goldman Sachs to assist it with one or more potential partnership or licensing transactions. A142 ¶ 78; A56. Specifically, Goldman Sachs' engagement letter provided that it was being engaged "(i) as exclusive financial advisor in connection with one or more potential partnership or licensing transactions with a third party to sell, market and distribute all or a portion of the Company's products . . . and (ii) as financial advisor in connection with the possible sale of all or portion of the Company." A142 ¶ 78; B2_65. This project was referred to as "Project Zenith." A146 ¶ 85.

As part of this process, Goldman Sachs analyzed a wide variety of companies and eventually conducted outreach to eight global pharmaceutical companies based in and outside of the United States to gauge interest in potentially partnering with Viela (separate from the Company's ongoing discussions with Horizon). *Id.*; A56. Five of these eight companies expressed an interest in partnering discussions with the Company, while the other three stated that they had no such interest. A56. The interested five companies signed confidentiality agreements with Viela, two of which contained standstill provisions. *Id.*

At the same time, the Company continued its discussions with Horizon. A143 ¶ 79; A56. In early October, Dr. Yao informed Horizon's CEO that the Company would be interested in a broader collaboration with Horizon, and Horizon confirmed that it, too, would be interested in such a transaction. A56.

Even with Horizon's interest, the Company continued to pursue options with other interested companies as part of Project Zenith. A146 ¶ 85; A56-57. The

Company conducted formal management presentations with each of the five companies and held other meetings between the interested companies and Goldman Sachs and the Company. A57.

D. Viela Receives Acquisition Offers Only from Horizon

On October 29, 2020, Horizon informed the Company that it was interested in acquiring the Company and presented the Company with a non-binding offer to acquire the Company for $44.00 per share. A143 ¶ 80; A57. On the day before Horizon's offer, the closing price of the Company's shares was $32.54 per share. A57. Horizon's offer was not subject to any financing condition, and Horizon expressed a desire to announce a transaction with the Company before Thanksgiving 2020. *Id.*

On November 3, 2020, the Board met with members of management, including the Company's general counsel, and Goldman Sachs to discuss Horizon's October 29 proposal. *Id*. After its evaluation, the Board ***rejected*** Horizon's proposal, and Dr. Yao informed Horizon's CEO that Horizon's proposal substantially undervalued the Company. A57-58.

Horizon then increased its offer. A58. On November 12, 2020, Horizon's CEO presented Dr. Yao with a non-binding offer to acquire the Company for $49.50

per share, representing an approximately 12.5% increase from the last offer on October 29. *Id.* The closing price for the Company's shares on the day before Horizon's second proposal was $35.27 per share. *Id.* Again, Horizon indicated that it wanted to execute a definitive agreement quickly. *Id.*

The next day, on November 13, 2020, the Board met with members of management, Goldman Sachs, and outside legal counsel at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. ("Mintz") to discuss Horizon's latest proposal. *Id*. At this time, the Company had not received any offers through Project Zenith. *Id*. Still, the Board determined that Horizon's revised offer price was ***insufficient***. *Id.* The Board decided that the best next step was to provide guidance to Horizon towards a revised offer of $55.00 per share. *Id.*

On November 16, 2020, Dr. Yao informed Horizon's CEO that Viela required a revised offer that was closer to $55.00 per share than $49.50. *Id*. Following that conversation, Horizon submitted its best and final offer price of $53.00 per share, representing an approximately 20% increase from its first proposal on October 29. *Id.* On the day of Horizon's offer, the Company's closing price of its shares was $34.99 per share. *Id.* Thus, Horizon's November 16 Proposal represented an approximately 58% premium to the Company's shares' 30-day volume-weighted average stock price as of that day. *Id.*

The day after Horizon's revised offer, the Board met with members of management, representatives of Goldman Sachs and Mintz. *Id*. at 18. The Board evaluated the revised offer in comparison to the valuations prepared by Goldman Sachs and other metrics. *Id.* The Board also discussed the status of Project Zenith, from which the Company still had not received any proposals. *Id.* The Board directed Goldman Sachs to engage with the two companies that were most likely to be interested in an acquisition of the entire Company and to ask specifically whether they would be interested in submitting a proposal to acquire Viela. *Id.* Both companies told Goldman Sachs that they were not interested in making an acquisition proposal. A146 ¶ 85; A59. Goldman Sachs did not reach out to other companies that were then remaining in Project Zenith because they were viewed as unlikely to be interested in a whole company acquisition based on previous conversations with them and circumstances specific to those companies. A59.

After full consideration, the Board agreed that Horizon's offer of $53.00 per share justified entering into a process with Horizon to provide additional due diligence and negotiate a definitive merger agreement at this revised price. *Id.*

E. Horizon Withdraws, then Revives Its Last Offer

As Horizon's and Viela's outside counsel were working on a draft merger agreement, on December 17, 2020, Horizon informed Viela that it was stopping all discussions with the Company. A146-47 ¶ 86; A60. As alleged in the Complaint, Horizon stated that it was experiencing disruption in the manufacturing of one of its key FDA-approved products, caused by a government-mandated COVID-19 vaccine production order. A146-47 ¶ 86; A60. Horizon and Viela agreed to speak again at some point in mid-January 2021. A60.

At this time, only one of the eight companies that were part of Project Zenith remained in discussions with the Company. *Id.* However, this one remaining company had made no preliminary proposal to-date. *Id.*

One month after Horizon stopped discussions, on January 18, 2021, Horizon reached back out to Viela and informed the Company that its supply disruption issue had sufficiently progressed and that it was now comfortable moving forward with discussions. A151 ¶ 92; A60. The two companies' counsel exchanged revised drafts of the Merger Agreement, which was eventually finalized on January 31, 2021. *Id.*

F. The Board Receives Input from the Advisors

On January 29, 2021, the Board met with members of management and representatives of Goldman Sachs and Mintz to discuss the key provisions of the

Merger Agreement and other factors bearing on the proposed transaction. A61. Goldman Sachs provided its financial analysis, its draft fairness opinion, and its relationship disclosures. *Id.*

On January 31, 2021, the Board again met with members of management and representatives of Goldman Sachs and Mintz. *Id.* Mintz confirmed that the Merger Agreement did not have any material changes since the last Board meeting, and Goldman Sachs reiterated its financial analysis of the offer price and merger consideration, and rendered its opinion that the offer price and merger consideration was fair from a financial point of view. *Id.* In providing its opinion, Goldman Sachs stated that it reviewed, among other things: the Merger Agreement; the Company's Form 10-K for the year ended December 31, 2019; the Company's Form S-1, including the prospectus contained therein; interim reports to stockholders and the Company's Forms 10-Q; communications from the Company to its stockholders; publicly available research analyst reports for the Company; internal financial analyses and forecasts for the Company and product-level forecasts; and other analyses prepared by the Company's management related to the expected utilization by the Company of certain net operating loss carryforwards of the Company. A90. In addition, Goldman Sachs held discussions with members of the Company's senior management regarding the Company's past and current business operations, financial conditions and future prospects; reviewed the reported price and trading activity for the Company's shares; and reviewed the financial terms of recent business combinations in the biopharmaceutical industry. *Id.*

The Board then undertook a thorough consideration of the reasons for and against the proposed transaction. First, the Board considered the financial components of the transaction. A62. Among the favorable financial considerations were: (1) Horizon's cash offer provided immediate and certain value to the Company's stockholders; (2) Horizon's offer price reflected premium of approximately 52.8% over the Company's closing price on January 29, 2021, the last trading day before the Board's consideration; and (3) Horizon was the only party to make a proposal to acquire 100% of the Company's shares. *Id.* The Board also considered the then-current state of the economy, the uncertainty in drug pricing, and the potential effects of the COVID-19 pandemic on the Company's current and future business and operations. *Id*. Second, the Board considered the Company's financial condition, its long-term business plan and prospects, and the execution risks associated with the development, regulatory approval and commercialization of the Company's commercial product and product candidates. A63-64. For example, in order to further commercialize and fund the clinical development of the Company's product and product candidates, the Company needed to raise substantial additional capital, which would bring risks associated with financing and partnerships that could dilute stockholders' equity. A63. The Board also considered the risks associated with the Company's reliance on UPLIZNA as its only approved product and the risks related to the Company's development programs. *Id.* The Board's consideration also included the fact that the Company conducted a process with Goldman Sachs, which did not result in any proposals for an acquisition of the Company or other strategic alternatives. A64.

The Board also considered the specific terms in the Merger Agreement. A65-66. Among the relevant terms was the Company's ability to respond to unsolicited acquisition proposals. A65. If, prior to Horizon accepting for payment the tendered Company Shares, the Company received an acquisition proposal from a third party that would be superior to Horizon's offer, the Company could enter into a confidentiality agreement with the third party and engage in discussions and negotiations regarding the acquisition proposal. *Id.* The Company could also terminate the Merger Agreement and accept a superior offer from a third party. *Id.*

After these considerations, the Board approved the execution of the Merger Agreement and resolved to recommend that the Company's stockholders tender their shares. A68.

G. Horizon Acquires Viela

On February 1, 2021, Viela and Horizon issued a joint press release announcing the execution of the Merger Agreement to acquire all outstanding shares of Viela at a price of $53.00 per share in cash. A151 ¶ 92; A61. On February 12, 2021, the Company filed its Schedule 14D-9. A113 ¶ 22; *see* A88. The 14D-9 contains 44 pages of extensive and detailed information concerning the background of the transaction and the basis for the Board's recommendation and the fairness opinion rendered by Goldman Sachs. *See generally* A39-96. The Tender Offer expired on March 13, 2021, with holders of nearly 94% of the outstanding shares having tendered their shares. B2_79. The Merger was consummated on March 15, 2021. A103 ¶ 2.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE COURT OF CHANCERY'S DETERMINATION THAT ASTRAZENECA WAS NOT A CONTROLLING STOCKHOLDER.

A. Question Presented

Whether the Court of Chancery correctly dismissed the Complaint against AstraZeneca where Plaintiff failed to plead facts supporting a reasonable inference that AstraZeneca controlled Viela. B1_14-17; B1_43-65; B1_998-1001; B1_1008-1026.

B. Scope of Review

This Court's review of the Court of Chancery's decision to dismiss the Complaint is *de novo*. *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

C. Merits of Argument

The Director Defendants join the arguments set forth in the AstraZeneca Appellees' Answering Brief.

II. THIS COURT SHOULD AFFIRM THE COURT OF CHANCERY'S DISMISSAL OF PLAINTIFF'S COMPLAINT UNDER *CORWIN*.

A. Question Presented

Did the Court of Chancery correctly conclude that the Plaintiff failed to plead a material misrepresentation or omission in the 14D-9, and therefore, the Merger was approved by a fully informed, uncoerced vote of the disinterested stockholders, such that dismissal of Plaintiff's Complaint was proper under *Corwin*? B2_27-44; B2_408-20; Op. 101-02.

B. Scope of Review

This Court's review of the Court of Chancery's decision to dismiss the Complaint is *de novo*. *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

C. Merits of Argument

Under *Corwin*, when a transaction "not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies." *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 309, 314 (Del. 2015); *see In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 747 (Del. Ch. 2016), *aff'd*, 156 A.3d 697 (Del. 2017) (TABLE) (extending *Corwin* to tender offers). Here, a majority of disinterested stockholders tendered their outstanding shares, approving the Merger. Plaintiff argues that misstatements and omissions in the disclosures nevertheless preclude application of *Corwin*.

As the Court of Chancery found, however, Plaintiff's arguments fail for several reasons. ***First***, there was no "threat" by AstraZeneca that the Company was required to disclose. Op. 82-86. ***Second***, AstraZeneca's January 8 Letter does not support Plaintiff's allegations of an "intent to terminate" material contracts. Op. 87. ***Third***, even if including the earlier, optimistic, and undisclosed financial projections "may have provided a somewhat fuller picture," they were not material, especially in light of the reliability of the later financial projections that were disclosed. Op. 97. ***Finally***, the materials facts about Dr. Yao's compensation were disclosed, and the Board was not obligated to disclose any "redundant" or "insignificant details." Op. 101. In sum, none of the disclosure deficiencies alleged by Plaintiff precludes application of *Corwin*.

1. Plaintiff's Allegations Relating to AstraZeneca's Separation from Viela Are Unavailing.

a. Information About AstraZeneca's Plan to Sell Its Viela Stock Was Not Material.

Plaintiff argues that the Court of Chancery erred in holding that the January 8 Letter was not a "threat." OB 42. Plaintiff alleges that the January 8 Letter evidenced AstraZeneca's alleged "communicated abandonment and exit plan and the accompanying threats AstraZeneca made to the Board that it would sell its stock absent a sale of the Company," and should have been disclosed to the stockholders. A166 ¶ 120. The Court of Chancery correctly found that the January 8 Letter or the potential for AstraZeneca to dispose of its Viela stock if a sale did not occur were immaterial.

First, Plaintiff continues to attempt to twist the January 8 Letter into something it is not. He cherry-picks quotes from the January 8 Letter where AstraZeneca used the term "expeditiously" or "expedited" in relation to its separation from Viela to evince a "threat," but ignores that AstraZeneca wrote that it wanted to put Viela in the "best position" as AstraZeneca continued its journey to separate from Viela, and that AstraZeneca was "[redacted] . . . and to support [Viela] in the transition in a way that ensures business continuity." A33. The Court of Chancery reviewed the January 8 Letter in its entirety and correctly concluded that "[a] proposal that provides avenues for business continuity and seeks collaboration with a business partner during a transition phase does not support a reasonable inference that the underlying business relationship is being abandoned." Op. 84.

Second, Plaintiff accuses the Court of Chancery of "conflat[ing] two separate inquiries subject to separate legal standards" when it found that it was not reasonably conceivable that the Board was pressured to pursue a sale of the Company in response to the January 8 Letter. OB 42-43. Plaintiff argues that it is not "whether the Board was pressured" but rather whether the facts "altered the total mix" of information. *Id.* However, Plaintiff's preferred timeline of events in support of this argument does not match reality, and therefore, fails to pass muster.

When the Board received the January 8 Letter, the Company had long begun negotiations with Horizon. As the Court of Chancery correctly noted, Viela and Horizon had already reached an agreement on the per share sale price *prior* to the January 8 Letter. Plaintiff argues that the January 8 Letter is similar to the email in *Morrison v. Berry*, 191 A.3d 268 (Del. 2018), but that case is markedly different. In *Morrison*, the company's founder and significant stockholder, Ray Berry, stated his belief that it was "in the best interests of the shareholders for the board to pursue a sale of the company at this time due to the low valuation of the company in spite of a built-in buy-out premium" and that if the company remained public, he would "give serious consideration to selling his stock when permitted as he does not believe [the company] is well positioned to prosper as a public company and he can do better with his investment dollars elsewhere." *Id.* at 281, 286 n.90. Mr. Berry's email came at the beginning of the company's sale process, *prior* to the company initiating a process by which it began to solicit potential bidders. Therefore, it is conceivable that Mr. Berry's email could have affected the company's approach to the sale. The same circumstances do not exist here.

Not only does the January 8 Letter not have language similar to Mr. Berry's assertion that it is "in the best interests of the shareholders for the board to pursue a sale" or that AstraZeneca would "give serious consideration to selling [its] stock" *if* Viela did not consummate the sale with Horizon, but critically, the January 8 Letter was delivered *after* Viela and Horizon had been "engaged in a months-long sale process, had reached an agreement on the per share sale price, and had been exchanging drafts of the merger agreement." *See* Op. 84-85. Plaintiff fails to point to anything in the January 8 Letter that influenced Viela and Horizon's dealings.

Third, Plaintiff argues that a reasonable investor would have considered the January 8 Letter when deciding whether to tender because it would have highlighted various alleged conflicts by the AstraZeneca executives on the Board and that the "full Board may have been subjected to extraneous influences arising from the conflicts of its largest stockholder." OB 43-44. Tellingly, Plaintiff did not make any of these threadbare arguments in its briefing to the Court of Chancery as reasons for why the January 8 Letter should have been disclosed. Even now, Plaintiff does not even attempt to explain how the "full" Board was subjected to alleged conflicts on the part of AstraZeneca. In any event, Plaintiff's allegations that the Board could have been pressured by AstraZeneca's efforts to acquire Alexion do not hold water: if such pressure existed, then the Director Defendants would not have rejected Horizon's two earlier offers, as those offers would have enabled a smoother acquisition of Alexion by AstraZeneca while still obtaining a premium for stockholders. *See* Op. 72-76.

b. Information about the Company's Material Contracts Was Neither False Nor Materially Misleading.

Plaintiff argues that the Company's 14D-9 was misleading when it stated that as of the date of the Merger Agreement, "no party to any Material Contract has given [Viela] written notice of its intention to cancel, terminate or suspend performance under any Material Contract." A167-68 ¶ 122; OB 44. Plaintiff faults the Court of Chancery for focusing on whether the January 8 Letter was "in fact" a notice of termination. OB 45.

First, the Court of Chancery correctly found that the January 8 Letter reflected a proposal, not a notice of intention to cancel, terminate, or suspend performance of the Support Agreements. Op. 87. Plaintiff continues to miss the mark by focusing on out of context words like "notice of termination" and "terminate." OB 45. As the Court of Chancery pointed out, the portions of Annex A to the January 8 Letter that Plaintiff quotes contain "a plan" of the required steps to "implement the ***Proposal***." Op. 88 (emphasis added). Rather than "terminate" its contracts, AstraZeneca outlines how it will *complete* its obligations under the various agreements. B2_32-37. In fact, AstraZeneca acknowledges that its proposal [redacted] in **close collaboration with you**." A33 (emphasis added). A company intending to cancel, terminate, or suspend performance would not seek "collaboration" and send "proposal[s]."

Second, while an objective and complete reading of the January 8 Letter suffices to discredit Plaintiff's theories, contemporaneous documents also show how the Director Defendants interpreted the January 8 Letter. In a disclosure letter Viela delivered to Horizon immediately prior to the execution of the Merger Agreement, the Company referred to the January 8 Letter as "a planning document" containing "propos[als]" and that "no contractual notice of termination of any contract between the parties . . . has been received." B2_156 (emphasis added). Nothing that Plaintiff has alleged or the documents upon which those allegations are based support a reasonable inference that the January 8 Letter evidenced a notice of termination.

In sum, the source of Plaintiff's complaint is not that the Court of Chancery applied any wrong standard, but rather that the Court of Chancery chose to review the entirety of the January 8 Letter rather than rely solely on Plaintiff's cherry-picked excerpts.

2. Plaintiff's Allegations Relating to the Supposed Omissions Concerning Financial Projections Are Immaterial.

Plaintiff argues that the 14D-9's omission of the Company's June Projections, which yielded expected returns exceeding $60.00 per share, misled the stockholders concerning the value of the Company. OB 46; A154, 168-69 ¶¶ 99, 124. As the Court of Chancery concluded, however, the Complaint does not plead facts to support a reasonable inference that these projections were material. Op. 97. Materiality of the alleged omission is necessary to overcome the application of the business judgment rule under *Corwin*. Plaintiff's chief complaint about the Court of Chancery's holding is that the Court of Chancery "overlooked *all*" of its allegations relating to the June Projections, and instead "referenced a paragraph in *an entirely different section of the Complaint* referencing analyst reports." OB 48 (emphasis in original). Not only did the Court of Chancery detail why *all* of Plaintiff's allegations did not pass muster, but it also correctly referenced analyst reports to unravel Plaintiff's unworkable spin.

First, as the Court of Chancery held, the Complaint does not plead facts to suggest that the October Projections did not reflect management's "best estimate of [Viela's] future cash flows." Op. 96. What was required to be disclosed is "the best estimate of the [C]ompany's future returns, as generated by management." *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 203 (Del. Ch. 2007). "Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information." *Kihm v. Mott*, 2021 WL 3883875, at *14 (Del. Ch. Aug. 31, 2021), *aff'd*, 276 A.3d 462 (Del. 2022) (TABLE) (holding that "even in a cash-out transaction, when stockholders are comparing cash on the table to their stock's potential upside, not every projection is material"). The Company did not have an obligation to disclose outdated information relating to projections prepared more than six months prior to the distribution of the 14D-9.

Plaintiff also claims that the June Projections were material because they were made in the ordinary course of business and are therefore presumptively reliable. A298. However, the fact that projections were created in the ordinary course of business does not necessitate their disclosure. Op. 90 ("As a general rule, management projections made in the ordinary course of business are reliable . . . [but w]hile reliability is a prerequisite to materiality, it does not equate to materiality.") (citing *Kihm*, 2021 WL 3883875, at *15). "Even reliable projections need not be disclosed if it is unlikely that doing so would 'significantly alter the total mix of information' available to stockholders." *Id*. (citing *Kihm*, 2021 WL 3883875, at *15); *see also In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *18 (Del. Ch. Aug. 18, 2006) (holding that the projections at issue were ***not*** reliable (and therefore immaterial) because they were outdated and obsolete in light of more recent forecasts and actual results, and were not required to be disclosed just because they were more optimistic). Indeed, here, as explained below, the June Projections were not even reliable.

Second, Plaintiff's allegation that there is no supportable reason for the increase in predicted losses in October 2020 is refuted by the facts. A161 ¶ 111. Indeed, the Board rejected Horizon's first *and* second offers – even after the October projections were purportedly "slashed" to justify the acceptance of Horizon's offer. A58. Moreover, the Company's public filings explain the change in the Company's financials. At the time of the June Projections, the Company reported that it had just received FDA approval for UPLIZNA in June, and its net loss at this time was $38.9 million and $79.6 million for the three and six months ended June 30, 2020, respectively. B2_259. By the end of the next quarter, while the Company had launched its one approved product, UPLIZNA, the Company did not generate "any significant revenue from product sales to date." B2_342. The Company also reported increased net losses of $37.6 million and $117.3 million for the three and nine months ended September 30, 2020, respectively. *Id.* Thus, Plaintiff's suggestion that [redacted]," (A157-58 ¶ 105), is belied by the Company's publicly filed financials. Put simply, the October Projections showed increased losses because the June Projections did not account for the fact that the Company saw no revenue growth from the launch of UPLIZNA between June and October.

None of the circumstances found in other cases that cast doubt on the reliability of the revised projects are present here. For example, in *Chester County Employees' Retirement Fund v. KCG Holdings, Inc.*, the board had a set of earlier, more optimistic projections that: (i) the directors used to negotiate the merger, (ii) management had vetted, and (iii) the financial advisors had affirmed; none of which was true for the revised projections. 2019 WL 2564093, at *14 (Del. Ch. June 21, 2019). Also, the earlier projections had been prepared only one month prior to the revised projections, and the adjustments were not made until *after* the Board had approved the purchase price. Similarly, in *Goldstein v. Denner*, management created revised forecasts two weeks after the board agreed to the transaction price, which reduced the valuation by one-third and bought it just below the agreed sale price. 2022 WL 1671006, at *26-27 (Del. Ch. May 26, 2022). Those circumstances are markedly different than the facts at hand, where the October Projections were prepared before the Company had agreed to the transaction, and were the version vetted by management, affirmed by Goldman Sachs, and used in the Board's evaluation of the sale price during negotiations. Op. 95. The sole similarity among *KCG Holdings* and *Goldstein* and this case is that the earlier projections were more optimistic, but that fact alone does not overcome the many other indicators of reliability with respect to the October Projections. *See* Op. 95. As the Court of Chancery held, none of the allegations in the Complaint support a reasonable inference that Viela's management cut the financial forecasts to justify the Merger price. *See id*.

Third, Plaintiff's allegations about the June Projections also fail because the documents referenced in the Complaint foreclose any conceivable inference that those projections were material. Instead, the documents referenced in the Complaint and the Section 220 Production show that the June Projections were outdated and obsolete in light of newly available data and changing economic conditions, and consequently, the October Projections were more reliable as evidenced by (i) the market consensus reflecting similar adjustments to Viela's outlook, and (ii) Viela's actual performance metrics.

Specifically, the June Projections were prepared ***without*** any existing sales history and were entirely based on forward-looking assumptions and estimates that were speculative, while the October Projections were prepared months ***after*** the launch of UPLIZNA.[5] [redacted].[6] B2_449;

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[5] *Compare* June Projections (A154-55 ¶ 100; B2_449-97) *with* October Projections (A159 ¶ 107, A185-89 (Compl. Ex. A); B2_543-608).

[6] [redacted]

B2_455. Consequently, at the time the June Projections were prepared, there was ***no*** existing sales history.[7] At that time, management anticipated that there would be 85 patients on UPLIZNA by the end of 2020, and UPLIZNA would generate $18 million in revenue in 2020. B2_467-68. However, after UPLIZNA launched, the pandemic and other factors caused sales of UPLIZNA to be ***lower than anticipated***, including fewer patient visits and providers' hesitancy to change treatments virtually. B2_552. In fact, the third quarter Form 10-Q revealed that by the end of September, Viela had only sold ***20 prescriptions*** for UPLIZNA. B2_343. Plaintiff highlights that management revised revenue forecasts down to $11 million for 2020, and for the next several years, (B2_556), but fails to mention the next page of the presentation which reveals that the analyst consensus projections were also similarly reduced. B2_557.[8]

[redacted] B2_503.

[7] Viela historically did not report financial projections for the future due to the speculative nature and inherent unreliability of this information, as it explained in its 14D-9. A74.

[8] Viela's management reduced its revenue forecast from $18 million to $11 million for 2020, [redacted]. *Compare* B2_470, *with* B2_556.

Indeed, the same Wall Street analysts that Plaintiff touts also "slashed" their valuations of Viela between the summer and the fall. The November 3, 2020 Goldman Sachs presentation (A164-65 ¶ 117) reveals that the Wall Street analysts' price estimates were based on stale information – four out of the seven analysts had not updated their estimates since mid-August.[9] Ten days later (and three days after Viela released its third quarter Form 10-Q), the same seven analysts lowered their median price target ***from $60 to $52*** per share. *See* B2_332; B1_494. After publication of the Form 10-Q, all but one of the analysts reduced their valuations of the Company.[10] B1_494. Plaintiff simply ignores these reductions by independent Wall Street analysts.

Finally, the Viela Board further validated the reliability of the October Projections in the January Board meeting referenced by Plaintiff (A151 ¶ 91), wherein the Board reflected on the Company's 2020 performance. B2_630-53. [redacted] B2_639.

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9 [redacted] B1_457. [redacted] *Id.*

10 The sole analyst who did not reduce its valuation kept its price target at $50 – still lower than the median price target of $52. B1_494.

[redacted]

Under these circumstances, providing an outdated set of projections based upon assumptions that were known by October to be incorrect would have been misleading and not material to a reasonable stockholder. *See* Op. 97.

3. Plaintiff's Allegations Concerning Dr. Yao's Discussions with Horizon About His Post-Merger Compensation are Immaterial.

Plaintiff argues that 14D-9 was materially misleading because it failed to disclose certain communications Dr. Yao had with Horizon's CEO about the anticipated retention of Viela's executive management. OB 49. The Court of Chancery correctly found that, in light of the 14D-9's factual disclosures, information about Dr. Yao's discussions with Horizon's CEO "would not have significantly altered the 'total mix' of available information regarding the post-Merger compensation of Viela's management." Op. 101.

First, the 14D-9 provides ample amount of information about the post-acquisition compensation that would be available to the Company's executives. As the Court of Chancery noted, the 14D-9 included information about the employment arrangements between Horizon and Viela's employees, including Dr. Yao. Op. 98. Among the listed arrangements were: (l) "the accelerated vesting of Company Stock Options"; (2) "the receipt of payments and benefits by certain executive officers of enhanced severance benefits"; (3) increases in the base salaries and bonus compensations of executive officers; (4) a retention bonus by an executive officer; and (5) "continuing employees will continue to receive base salary or hourly wages and target annual cash bonus compensation no less than the base and target compensation they would have received from the Company for the 12-month period following the Effective Time and benefits no less favorable in the aggregate to those that Parent provides to employees of its U.S. subsidiaries or the Company provided to employees immediately prior to the Effective Time." A45.

Second, the 14D-9 discloses specific employment arrangements with named executive officers, including Dr. Yao. For example, the 14D-9 provides that Horizon would pay Dr. Yao a "a monthly consulting fee of $50,000 and will reimburse him for travel expenses he incurs in connection with providing his services." A53. Critically, the 14D-9 provides that the employment and compensation arrangements are "conditioned on the consummation of the Merger." *Id.* In addition to the specific disclosures, the 14D-9 also warned that other Viela employees may enter into new compensation arrangements based on the execution of the Merger Agreement. *Id.*

Third, while Plaintiff tries to draw a parallel to the circumstances in *Mindbody*, the Court of Chancery correctly held that the alleged omissions in Viela are readily distinguishable. OB 49-50; Op. 100-01. In *Mindbody*, the court held that the CEO's discussions with the buyer concerning his future employment were material because the CEO had shown a preference for one bidder and refused to share information with bidders that he "did not want to work for." *In re Mindbody, Inc. S'holder Litig.*, 2020 WL 5870084, at *21 (Del. Ch. Oct. 2, 2020). Moreover, Mindbody's amended proxy statement stated that the preferred bidder and the company "had not discussed the terms of post-closing employment or equity participation for Mindbody management." *Id.* at *27. The opposite is true in this case: not only are there no well-pled allegations that Dr. Yao "influenced the negotiations and ultimate terms" of the Merger, but the 14D-9 openly disclosed information about Dr. Yao's employment and compensation post-transaction. Op. 101. "'Fully informed' does not mean infinitely informed . . . . Redundant facts, insignificant details, or reasonable assumptions need not be disclosed." *In re Merge Healthcare Inc. S'holders Litig.*, 2017 WL 395981, at *9 (Del. Ch. Jan. 30, 2017);

see also In re OM Grp., Inc. S'holders Litig., 2016 WL 5929951, at *11 (Del. Ch. Oct. 12, 2016) ("[A] board need not disclose 'consistent and redundant facts[.]'") (citing *Zirn v. VLI Corp.*, 1995 WL 362616, at *4 (Del. Ch. June 12, 1995), *aff'd*, 681 A.2d 1050 (Del. 1996)).

III. THIS COURT SHOULD AFFIRM THE DISMISSAL OF PLAINTIFF'S COMPLAINT ON THE INDEPENDENT BASIS THAT PLAINTIFF FAILS TO STATE A CLAIM FOR A NON-EXCULPATED BREACH OF FIDUCIARY DUTY.

A. Question Presented

Did Plaintiff fail to plead a non-exculpated breach of fiduciary duty by the Director Defendants? B2_44-60; B2_421-35.

B. Scope of Review

Although the Court of Chancery did not reach the Director Defendants' argument that Plaintiff's Complaint should be dismissed for failure to state a claim for a non-exculpated breach of fiduciary duty, this Court's *de novo* review may be based on "any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court." *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012).

C. Merits of Argument

Even if this Court were to conclude that the *Corwin* ratification doctrine does not apply here, this Court should, in the alternative, affirm the Court of Chancery's dismissal of the Plaintiff's Complaint as to the Director Defendants because Plaintiff fails to state a claim for a non-exculpated breach of fiduciary duty.

Where, as here, the Company's certificate of incorporation[11] contains an exculpatory provision that protects the Director Defendants "[t]o the fullest extent permitted" by Section 102(b)(7) (B1_348), Plaintiff must sufficiently allege that "[1] a majority of the board was not disinterested or independent, or [2] that the board was otherwise disloyal because it failed to act in good faith." *Nguyen v. Barrett*, 2016 WL 5404095, at *3 (Del. Ch. Sept. 28, 2016). Plaintiff does not come close to meeting his burden on either of these grounds.

1. Plaintiff Alleges No Disabling Self-Interest to Support a Duty of Loyalty Claim Against the Director Defendants.

The only individualized allegation of self-interest on the part of any of the Director Defendants is that of Dr. Yao on the basis of his future retention and compensation. This allegation does not demonstrate that Dr. Yao would favor selling to Horizon (or any other acquiror, for that matter) at the expense of stockholder value. Nor are there any allegations that Dr. Yao took any actions that differed from those taken by the remaining, disinterested directors. "[T]he law permits shareholders qua shareholders to act selfishly in deciding how to vote their

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[11] The Court can take judicial notice of the existence of a Section 102(b)(7) exculpatory provision. *See Malpiede*, 780 A.2d at 1090.

shares[.]" *Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *5 (Del. Ch. Oct. 29, 1993). Stockholders of a Delaware corporation have the right to vote and otherwise deal with their own shares in furtherance of their own interests, even if "their motives may be for personal profit, or determined by whim or caprice." *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987); *see also Williams v. Geier*, 671 A.2d 1368, 1380-81 (Del. 1996) ("Stockholders (even a controlling stockholder bloc) may properly vote in their own economic interest.").

But even if any of Plaintiff's allegations about Dr. Yao had merit (and they do not), a potential conflict of interest by one director alone is not material – especially when Dr. Yao's "self-interest" through his planned retention and compensation were thoroughly disclosed. *See In re OM Grp.*, 2016 WL 5929951, at *15 n.84 ("Plaintiffs do not cite a single case, and I am aware of none, in which a remote potential conflict of a single fiduciary was deemed per se material."); *cf. In re MONY Grp., Inc. S'holder Litig.*, 853 A.2d 661, 682 (Del. Ch. 2004) ("[D]isclosures relating to the Board's subjective motivation or opinions are not per se material, as long as the Board fully and accurately discloses the facts material to the transaction."); *Kahn v. Stern*, 2017 WL 3701611, at *16 (Del. Ch. Aug. 28, 2017), *aff'd*, 183 A.3d 715 (Del. 2018) (TABLE) ("The directors recommended a merger that included bonuses to executives and an employment agreement, post-close, for one of them. Both the existence and the operation of these Side Deals were disclosed in detail. To the extent the Plaintiff's theory is that the Board was trying to cover up the Side Deals . . . the detailed disclosures belie that intent. There is simply nothing, in light of the description of the Side Deals in the Information Statement, that suggests a cover-up or is otherwise redolent of bad faith on the part of the directors.").

The Complaint does not contain a single allegation that any of the other Director Defendants acted in self-interest. Instead, the Complaint alleges that the remaining Director Defendants acted to advance the self-interest of another stockholder, namely AstraZeneca. A181-82 ¶ 162. The only support Plaintiff provides for why these Director Defendants would act to advance AstraZeneca's interest is that they all invested in an "AstraZeneca-controlled spin-off from the outset." A111-12 ¶ 19. Plaintiff provides no allegations to support why these Director Defendants would be beholden to AstraZeneca or succumb to any of its purported pressure. "In order to overcome that presumption in the controller context, the plaintiff must plead facts that support a reasonable inference the director is either beholden to the shareholder or so under its influence that his discretion is sterilized."

Flannery v. Genomic Health, Inc., 2021 WL 3615540, at *14 (Del. Ch. Aug. 16, 2021). The fact that the Director Defendants were all directors of the Company from its inception and they invested in an AstraZeneca spin-off is not enough to overcome the presumption of the directors' independence. *See, e.g.*, *id.* at *15 ("[I]t is useful to reiterate our Supreme Court's admonition that bare allegations that directors are friendly with, travel in the same social circles as, or have past business relationships with the proponent of a transaction … are not enough to rebut the presumption of independence.") (internal quotation marks and citation omitted); *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 997 (Del. Ch. 2014), *aff'd sub nom. Corwin*, 125 A.3d 304 (Del. 2015) ("[T]his Court has held in the context of dismissing claims under Rule 12(b)(6) that the 'naked assertion of a previous business relationship is not enough to overcome the presumption of a director's independence.'"). Indeed, if Plaintiff's theory were to be credited, then all directors would be deemed beholden to another director because they joined the board at the same time. That result is unworkable. *See, e.g.*, *In re KKR*, 101 A.3d at 996 ("It is well-settled Delaware law that a director's independence is not compromised simply by virtue of being nominated to a board by an interested stockholder."); *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *6 n.63 (Del. Ch. Jan.

31, 2013) ("The Complaint alleges that Shields has 'nearly twenty years of Board service alongside [an interested director] and a long-term relationship with [the other allegedly interested director].'. . . This type of allegation does not raise a reasonable doubt as to the independence of a director under Delaware law.").

2. Plaintiff Cannot Establish That the Board Acted in Bad Faith.

To show bad faith, Plaintiff must allege an "extreme set of facts" establishing that the Board "intentionally fail[ed] to act in the face of a known duty to act, demonstrating a conscious disregard for [their] duties." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009). To plead that an omission represents a failure to act in good faith, "Plaintiff must demonstrate knowing disregard of a duty, or point to disclosure deficiencies permitted by the directors, where that permission is inexplicable otherwise than as promoting an interest inimical to the Company." *Kahn*, 2017 WL 3701611, at *14. The Complaint is devoid of all such factual allegations, simply alleging in a conclusory manner that the Director Defendants acted in "bad faith." *See* A178 ¶ 156; A180-81 ¶¶ 160-61.

First, there are no well-pled allegations that the Director Defendants intended to conceal information from stockholders or took affirmative steps to do so. Nor would it make any sense for the Director Defendants to do so, given that (i) their incentives were aligned with those of the stockholders; (ii) they made fulsome disclosures; and (iii) they conducted a process with Goldman Sachs to solicit other offers for the Company. *See In re Zimmer Biomet Holdings, Inc. Derivative Litig.*, 2021 WL 3779155, at *12 (Del. Ch. Aug. 25, 2021), *aff'd*, 279 A.3d 356 (Del. 2022) (explaining that a determination of "whether the alleged misleading statements or omissions were made with knowledge or in bad faith requires an analysis of the state of mind of the individual director defendants" that, at the pleading stage, is inferred based on allegations in the complaint).

The Complaint does nothing more than attempt to plead that the Director Defendants erred in deciding what should be disclosed in the 14D-9. But an error in judgment is not an omission that represents a failure to act in good faith. *See In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *14 (Del. Ch. Oct. 13, 2011) ("An exculpatory provision under 8 *Del. C.* § 102(b)(7) . . . would preclude, for example, a claim for money damages for disclosure violations that were made in good faith – *i.e.*, for failures to disclose resulting from a breach of the fiduciary duty of care rather than from breaches of loyalty or good faith."); *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007) ("There is nothing in the Complaint, however, from which the Court reasonably could infer any of the alleged breaches was anything other than a good faith, erroneous judgment as to the proper scope of disclosure.”).

Second, Plaintiff fails to plead that the disinterested and independent Director Defendants acted in bad faith in negotiating and approving the Merger. “Claims of flawed process are properly brought as duty of care, not loyalty, claims . . . .” *In re Comverge, Inc. S’holders Litig.*, 2014 WL 6686570, at *13 (Del. Ch. Nov. 25, 2014). At most, Plaintiff conclusorily alleges that the Board was influenced by AstraZeneca to initiate and approve of a sales process. *See* A181-82 ¶ 162. Plaintiff alleges that Dr. Yao acted out of self-interest, while the other non-AstraZeneca affiliated directors prioritized AstraZeneca’s interests above their own. A179 ¶ 157; A181-82 ¶ 162. These allegations fail for at least two reasons. First, Plaintiff does not explain how or why the Director Defendants would have prioritized AstraZeneca’s interests above their own. Plaintiff’s allegation of a “controlled-mindset” based solely on the fact that the Director Defendants invested in the Company at the same time as AstraZeneca is facially deficient. In addition, any self-interest Dr. Yao may have had on account of his retention and compensation was fully disclosed to all stockholders. *Id*.

Third, Plaintiff failed to meet his burden to allege that the Merger was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *BJ's Wholesale Club*, 2013 WL 396202, at *7. Far from "utterly fail[ing] to attempt to obtain the best sale price," *Lyondell*, 970 A.2d at 243-44, the Board rejected two of Horizon's previous offers, obtained a 20% increase in price from Horizon when it made its final offer, and in the end, obtained premiums of approximately 53% over the last closing price of the Company's shares prior to the Board's approval.[12] To achieve that premium, the Board met, advised by experienced financial and legal advisors, and rejected multiple offers by Horizon that they felt did not reflect the Company's value. *See* A59; *Comverge*, 2014 WL 6686570, at *13 (where board is highly engaged in sale process, "this type of engagement precludes a finding of bad faith conduct").

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[12] In cases involving far smaller premiums, courts have declined to infer a failure to act in good faith. *See, e.g.*, *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *23 (Del. Ch. Oct. 24, 2014) (7.7% premium not indicative of failure to act in good faith); *In re Alloy*, 2011 WL 4863716, at *12 (14% premium not indicative of failure to act in good faith). The Court of Chancery in *Comverge* similarly refused to find a claim for failure to act in good faith where the acquisition price of $1.75 per share was $0.13 below the unaffected market price at the time of acquisition and significantly lower than the 52-week high per share ($5.09). *See* 2014 WL 6686570, at *12 (dismissing claim where unfair price claim did not establish failure to act in good faith as necessary to overcome exculpatory provision in certificate of incorporation).

Accordingly, even if this Court does not affirm the dismissal of the Complaint under *Corwin*, the Complaint should be dismissed as to the Director Defendants for failure to state a claim for a non-exculpated breach of the duty of loyalty.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the Court of Chancery dismissing Plaintiff's Complaint in its entirety.

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Dated: October 31, 2024

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2024, true and correct copies of the foregoing *Public Version of Director Appellees' Answering Brief* were caused to be served by File & Serve*Xpress* on the following counsel of record:

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