IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN M. SCIANNELLA, Individually and on Behalf of All Others Similarly Situated, Plaintiff Below, Appellant, v. 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, Defendants Below, Appellees.	No. 303, 2024 Case Below: Court of Chancery of the State of Delaware C.A. No. 2023-0125-PAF

APPELLANT'S REPLY BRIEF

OF COUNSEL:

ROBBINS GELLER RUDMAN
& DOWD LLP
Randall J. Baron
David A. Knotts
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

JOHNSON FISTEL, LLP
Brett M. Middleton
501 West Broadway, Suite 800
San Diego, CA 92101
(619) 230-0063

ROBBINS GELLER RUDMAN
& DOWD LLP
Christopher H. Lyons (#5493)
Tayler D. Bolton (#6640)
1521 Concord Pike, Suite 301
Wilmington, DE 19803
(302) 467-2660

BLOCK & LEVITON LLP
Kimberly A. Evans (#5888)
Lindsay K. Faccenda (#5772)
Robert Erikson (#7099)
222 Delaware Ave., Suite 1120
Wilmington, DE 19801
(302) 499-3600

Attorneys for Plaintiff Below, Appellant

DATED: November 15, 2024

TABLE OF CONTENTS

Page

Page

TABLE OF CITATIONS

CASES **PAGE**

Page

STATUTES, RULES, AND REGULATIONS

PRELIMINARY STATEMENT

The Trial Court erred when finding that Plaintiff did not plead a reasonably conceivable "constellation of facts" supporting AstraZeneca's general and transactional control over Viela. The Trial Court further erred when finding that *Corwin* cleansed multiple "troubling facts" that were not actually disclosed to stockholders in the 14D-9.

Defendants do not defend these errors on the Complaint as pleaded, nor do they address the multiple legal standards that the Trial Court simply failed to apply. Instead, Defendants ask this Court to affirm the Trial Court's factual mistakes and inaccurate inferences based on Defendants' appellate submission of 77 extraneous exhibits containing over 1,500 pages. But these contested facts foreclose pleading-stage dismissal here.

When reviewing the grant of a motion to dismiss, just one dispositive factual or legal error warrants reversal. Here, the Trial Court's dismissal ruling fails to apply longstanding Delaware legal standards, draws improper inferences, and is marred by crucial factual mistakes. The ruling should be reversed.

ARGUMENT

I. PLAINTIFF ADEQUATELY ALLEGED THAT ASTRAZENECA WAS A CONTROLLING STOCKHOLDER

The Trial Court erred in finding no reasonably conceivable inference that AstraZeneca was a controlling stockholder. "'Sources of influence and authority must be evaluated holistically, because they can be additive.'" *Tornetta v. Musk*, 310 A.3d 430, 501 (Del. Ch. 2024).[1] As a result, any material factual errors in the "holistic" analysis will infect and undermine the ultimate holding. The Trial Court's control ruling was skewed by several material factual mistakes, as outlined in Appellant's Corrected Opening Brief and below. *See* POB at 4, 28-37; *infra* at 2-3, 6-13. This alone warrants reversal.

The Trial Court also erred by repeatedly accepting Defendants' self-serving assertions in extraneous documents "for the truthfulness of [the statements contained therein]." *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613-14 (Del. 1996); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995) ("The Court of Chancery should not have considered the

[1] Unless otherwise indicated, all emphasis is added and all citations and footnotes are omitted. In addition, unless otherwise noted, all capitalized defined terms can be found in the Glossary of Appellant's Corrected Opening Brief ("POB"), filed September 24, 2024.

assertions in the Joint Proxy [as true] in support of defendants' motion to dismiss [non-disclosure claims]"). In response, AstraZeneca concedes this error but claims that the Trial Court made the mistake "*only in limited circumstances*." AZB at 46 n.188.[2] Not so. This repeated error materially impacted the Trial Court's rulings on both control and *Corwin*. *See infra* at 11, 21-22; POB at 33-34. This too warrants reversal.

When attempting to defend this error, AstraZeneca cites D.R.E. 201(b) but identifies no document for which it seeks judicial notice nor any document for which the Trial Court took judicial notice. Self-serving documents drafted by a defendant concerning hotly contested factual matters are not subject to judicial notice. *See, e.g.*, *Totta v. CCSB Fin. Corp.*, 2021 WL 4892218, at *2-3 (Del. Ch. Oct. 20, 2021) (judicial notice should be "used with caution," cannot resolve factual disputes, and "typically, the judicial notice doctrine does not extend to the truth of [extraneous] documents' contents").

A. AstraZeneca's Significant 26.7% Equity Stake in Viela

Though this Court has recognized "the importance of examining whether an insurgent could win a proxy contest or whether the company could take action without

[2] "AZB" refers to Appellees AstraZeneca UK Limited, AstraZeneca PLC, Tyrell Rivers, Ph.D., and Pascal Soriot's Answering Brief, filed October 31, 2024.

the stockholder's consent," the Trial Court did not meaningfully examine AstraZeneca's voting power. *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304, 307 n.7 (Del. 2015). AstraZeneca's voting power effectively ensured completion of the Acquisition, particularly given the concealment of highly material information regarding AstraZeneca's conflicts and Viela's standalone value. POB at 24.

AstraZeneca also does not substantively address 8 *Del. C.* § 203(c)(4) and its presumption of control at 20% ownership. POB at 23. Instead, AstraZeneca argues for waiver. But appellate waiver applies to *issues*, not each and every citation within a broader general question. Supr. Ct. R. 8; *Watkins v. Beatrice Cos., Inc.*, 560 A.2d 1016, 1020 (Del. 1989) ("mere raising of *the issue* is sufficient"). AstraZeneca concedes that Plaintiff raised the issues of AstraZeneca's control and voting power. AZB at 34 n.158. As a result, there is no waiver.

B. AstraZeneca Wielded Its Contractual Influence over Viela

1. AstraZeneca Does Not Refute the Legal Viability of the Control Theory Pled in the Complaint

AstraZeneca does not attempt to defend the Trial Court's failure to analyze AstraZeneca's overall *leverage* over the Board in light of AstraZeneca's powerful combination of voting control, contractual influence, and other factors (including

supermajority voting requirements) afforded by AstraZeneca's status as a founder and commercial supplier. POB at 23-36.

Sources of transactional control can include "the exercise of contractual rights to channel the corporation into a particular outcome by blocking or restricting other paths and the existence of commercial relationships that provide the defendant with leverage over the corporation, such as status as a key customer or supplier." *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *26 (Del. Ch. July 6, 2018) (citing multiple cases), *aff'd sub nom. Davenport v. Basho Techs. Holdco B, LLC*, 221 A.3d 100 (Del. 2019). AstraZeneca's brief ignores that standard.

AstraZeneca also does not attempt to distinguish the ruling in *Williamson* that the contractual leverage held by two 17.1% stockholders contributed to a pleading-stage inference of control. *Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375, at *5 (Del. Ch. June 5, 2006). The *Williamson* court held: "The Cable Companies were [the company's] only significant customers and [the company] *depended on their cooperation as customers* if it was going to operate its business profitably." *Id.* Viela disclosed the same level of dependence on AstraZeneca. A124, ¶45 ("if AstraZeneca is unable or unwilling to satisfy its obligations under these agreements, we could incur operational difficulties or losses that could have a material

and adverse effect on our business, prospects, financial condition and results of operations"). The court in *Williamson* ruled that "[t]hese allegations support the inference that the Cable Companies had *significant leverage* over [the company] and were able to dictate to [the company] the terms of the [relevant transaction]." 2006 WL 1586375, at *5. The same allegations exist here. A105, 122-28, ¶¶5, 43-51.

AstraZeneca's citations to *Superior Vision Services* highlight the legal viability of Plaintiff's claims. *See* AZB at 34, 37 (citing *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426 (Del. Ch. Aug. 25, 2006)). In that case, the Court of Chancery recognized: "There may be circumstances where the holding of contractual rights, coupled with a significant equity position and other factors, will support the finding that a particular shareholder is, indeed, a 'controlling shareholder' especially if those contractual rights are used to induce or to coerce the board of directors to approve (or refrain from approving) certain actions." 2006 WL 2521426, at *5. The Complaint here alleges that factual scenario.

2. AstraZeneca Now Concedes that It Was "Required" to Abandon Viela, a Problem the Acquisition "Solved"

AstraZeneca's brief sheds additional light on the depth of its intended extrication from Viela. AstraZeneca now concedes that, because of Soriot's pursuit of Alexion, AstraZeneca was "*required*" to abandon Viela. AZB at 3. Alexion was so

important to Soriot's "capital redeployment" strategy that AstraZeneca included a "hell or high water clause" in its merger agreement with Alexion, which "obligat[ed] AZ to 'take, *or cause to be taken*, all actions and [] do, *or cause to be done*, all things necessary, proper or advisable' to obtain antitrust approval." *Id.* at 18 (citing B1_561).

As a result of that "hell or high water" provision, AstraZeneca now agrees with the "*reality* that AZ *would have to divest its Viela stake and disentangle from the Support Agreements*." *Id.* at 3. AstraZeneca also now admits that the Merger "solved" AstraZeneca's need to sell Viela stock. *Id.* Yet the Trial Court erroneously and repeatedly found that AstraZeneca conveyed no such position. Opinion at 71-73, 80-88. The Trial Court also made a counter-factual finding that there is no "reasonable inference that the underlying business relationship [was] being abandoned." *Id.* at 84. AstraZeneca's brief thus *confirms* that the Trial Court erred in failing to credit the Complaint's well-pleaded allegations that AstraZeneca wielded its power to effectuate a sale of Viela.

3. AstraZeneca Repeats the Same Factual Errors Made by the Trial Court When Finding that AstraZeneca Did Not "Otherwise Abandon" Viela

The Trial Court committed a series of reversible errors when arriving at its keystone factual finding that "AstraZeneca did not threaten to terminate the Support

Agreements or otherwise abandon Viela in the January 8 Letter." Opinion at 71. The Trial Court included four factual mistakes in support:

> AstraZeneca did not threaten to terminate the Support Agreements or otherwise abandon Viela in the January 8 Letter. **[1]** A close examination of the Support Agreements reveals that AstraZeneca only had an express right to terminate the Clinical Supply Agreement for convenience, which was subject to a lengthy notice and winddown period. **[2]** Both Viela and AstraZeneca had the right to terminate the Commercial Supply Agreement for convenience, which was subject to a similar notice and winddown period as the Clinical Supply Agreement. **[3]** Viela, but not AstraZeneca, had a right to terminate the TSA, License Agreement, and MSDSA for convenience. **[4]** Viela was also permitted to seek alternative suppliers under the MSDSA.

Id. (numerical emphasis added).

The Trial Court overlooked that the "required" steps in AstraZeneca's January 8 Letter plainly involved *breaching* the notice provisions of the Support Agreements. A148, ¶88 ("[redacted]"). AstraZeneca's brief repeatedly emphasizes the same errors. Each enumerated sentence in the paragraph above is addressed in turn below.

[1] The Trial Court erred when it found that AstraZeneca could not wield its power because "AstraZeneca only had an express right to terminate the Clinical Supply Agreement for convenience, which was subject to a lengthy notice and winddown period." Opinion at 71. The Trial Court relied on the Clinical Supply

Agreement's "five-year term" and its requirement that AstraZeneca "provid[e] at least 30 months' written notice to Viela" before terminating the contract. *Id.* at 8, 71. AstraZeneca's brief touts the same provisions. AZB at 8, 36. But AstraZeneca made clear that it would breach those very provisions by "requiring" to "[redacted]." A148-49, ¶89.

AstraZeneca thus clearly articulated to Viela that it would no longer comply with its contractual obligations. *Id.* Yet the Trial Court counterfactually inferred that AstraZeneca could not "threaten … or otherwise abandon" Viela because of the very same provisions that AstraZeneca threatened to breach. Opinion at 71. This inaccurate and unreasonable factual finding for Defendants – at the pleading stage – is reversible error.

In addition, when determining whether AstraZeneca had "an express right to terminate," the Trial Court did not account for Viela's repeated warnings of a corporate catastrophe if AstraZeneca was merely "unwilling" to perform. *See* A123-24, 129-30, ¶¶45, 55 ("if AstraZeneca is *unable or unwilling to satisfy its obligations under these agreements*, we could incur operational difficulties or losses"). Rather than defend this issue on the merits, AstraZeneca again claims waiver. AZB at 40. That argument is meritless. Plaintiff described the impact of AstraZeneca being

"unable" or "unwilling" to perform on *six* separate occasions below. *See* A105, 110-11, 123-24, 129-30, ¶¶6, 18, 45, 55; MTD Answering Brief at 12, 65 (A211, 264).

[2] The Trial Court likewise erred when it found that AstraZeneca could not wield its power because the "Commercial Supply Agreement … was subject to a similar notice and winddown period as the Clinical Supply Agreement." Opinion at 71. When relying on the Commercial Supply Agreement's "ten-year term" that could only be terminated "upon three years" notice, *id.* at 8, 71, the Trial Court missed that AstraZeneca again flouted those exact same provisions with the following "required" step: "AstraZeneca's *notice of termination of the Commercial Supply Agreement*." A148-49, ¶89. AstraZeneca provided mere weeks of notice, in clear breach of the agreement. *Id.*

[3] The Trial Court compounded these errors when finding that AstraZeneca was kept at bay because "Viela, but not AstraZeneca, had a right to terminate the TSA, License Agreement, and MSDSA for convenience." Opinion at 71; *see* AZB at 7, 9, 36. But AstraZeneca blew past those same provisions when "requiring" [redacted]. A148-49, ¶89.

[4] The Trial Court erred on the fourth sentence in that crucial paragraph as well. The Trial Court found that AstraZeneca could not wield its power because

"Viela was also permitted to seek alternative suppliers under the MSDSA." Opinion at 71. But the MSDSA did not address the supply of Uplizna, which was Viela's only drug on the market and only material source of revenue. AZB at 9. AstraZeneca was Viela's exclusive manufacturer and supplier of Uplizna. A125, ¶¶47-48. And even as to the other clinical molecules subject to the MSDSA, the Trial Court missed Viela's repeated disclosures about the "added costs and delays in identifying and qualifying any such replacement." B1_934-35.

The Trial Court's pleading-stage fact findings are also difficult to square with the European Commission's finding that AstraZeneca had the "ability" to "foreclose" Viela's only commercial product by "discontinuing or degrading" its manufacture. A135, ¶64. Only after requiring amendments to the Support Agreements did the European Commission finally clear the AstraZeneca/Alexion Merger. *Compare* A135-36, ¶65 *with* AZB at 25 (attempting to rely on *post-European Commission-amendment* findings).[3]

[3] AstraZeneca's conjecture about Horizon's state of mind and what Horizon might have done under different factual scenarios has no place in a motion to dismiss analysis. *See* AZB at 42. And the antitrust "microscope" that AstraZeneca argues it was under (*id.*) is precisely why: (a) AstraZeneca was *required* to separate itself from Viela; and (b) AstraZeneca drafted the January 8 Letter with self-serving platitudes. The European Commission was not persuaded after a full investigation, but the Trial Court here improperly accepted AstraZeneca's own assertions as true at the pleading stage.

4. AstraZeneca Does Not Effectively Defend or Justify the Trial Court's Additional Factual Errors

Regarding the Trial Court's "brief discussion" of what it called an "unscrambled" timeline purporting to show AstraZeneca's lack of influence on the sale to Horizon, the Complaint is teeming with facts and evidence alleging that AstraZeneca threatened a departure *before* January 8, 2021. POB at 31-33. The Trial Court did not address those allegations. Opinion at 71-76. Those facts are absent from AstraZeneca's brief as well. The Trial Court's alternative timeline mistakenly equates Viela's July 2020 "partnership discussions" with Horizon to a pre-existing sale process unprompted by AstraZeneca. *Id.* at 72. The Trial Court did not account for the fact that "up until October [2021], Horizon was only interested in a limited partnership about one pipeline candidate, VIB7734." A143, ¶79. It was not until October 6, 2020, while Soriot was moving to acquire Alexion, that Yao "instructed" Horizon to submit an acquisition offer for Viela and the discussions turned to an outright acquisition. A143-44, ¶¶79-81.

The Trial Court further erred when finding that Soriot's disloyal failure to contemporaneously disclose his pursuit of Viela's competitor (while still a fiduciary of Viela) entitles Defendants to an inference that Soriot and Rivers could not have conveyed to Viela that, absent a sale of the Company, AstraZeneca was cutting ties.

See Opinion at 72-73 ("Plaintiff admits that there is 'no record' that Soriot disclosed the Alexion Acquisition discussions to Viela's Board when it approved the engagement of Goldman Sachs."); AZB at 13-14. In contrast, the Complaint alleges that, before January 8, 2021, Soriot and Rivers informed Viela that AstraZeneca was removing itself from the Company, without explaining the basis. A108, 141, ¶¶12, 76, 90 105 ("Viela provided no public rationale for Soriot's announced departure, but AstraZeneca had privately made clear to the Board that unless the Company was sold, AstraZeneca was out."). Simply because AstraZeneca's executives on Viela's Board did not contemporaneously explain the basis for the withdrawal does not absolve their misconduct when effectuating the withdrawal.

In sum, AstraZeneca's brief summarizes the Court's fact-finding as follows: "The Court also found that the Support Agreements' terms confirmed that the January 8 Letter *could not have insisted* on 'expeditious' or unilateral termination of AZ's support." AZB at 30 (citing Opinion at 71). The plain terms of that letter, however, insisted on "[redacted]" A147-50, ¶¶88-89. The Trial Court's "holistic" control analysis was impaired by myriad erroneous factual findings and should be reversed.

C. AstraZeneca and Its Executives Soriot and Rivers Were Conflicted

The Trial Court failed to assess AstraZeneca, Soriot, and Rivers' conflicts of interest. AstraZeneca's proposed alternative ground for dismissal on this issue fails. AZB at 49-50.

AstraZeneca "'had [a] material financial or other interest in the transaction different from the shareholders generally.'" *Chester Cnty. Employees' Ret. Fund v. New Residential Inv. Corp.*, 186 A.3d 798, 2018 WL 2146483, at *1 n.7 (Del. May 10, 2018) (TABLE). AstraZeneca's briefing never addresses or even attempts to defend the fact that Soriot, while sitting on the Viela Board and armed with Viela's confidential competitive analysis, pursued an acquisition of Viela's primary competitor. A113-14, 133-38, 141, ¶¶23, 61-69, 77 ("During his initial pursuit of Alexion (which Soriot concealed from Viela), Soriot was armed with Viela's own highly sensitive information regarding Viela's expected place in the market relative to Alexion and its competing drug Soliris."). AstraZeneca makes no argument that Soriot's actions did not constitute a breach of fiduciary duty to Viela stockholders.

As a conflicted dual fiduciary, Soriot chose to pursue the acquisition of Viela's largest competitor for the benefit of himself and AstraZeneca, to the detriment of Viela. *Id.* And once Soriot embarked on that path, as AstraZeneca now concedes, the

Alexion acquisition "required *both* selling [AstraZeneca's] Viela stake *and* amending the Support Agreements to disentangle from Viela." AZB at 3 (emphasis in original). The Acquisition of Viela then "solved" AstraZeneca's need to sell Viela's stock. *Id.*

"This conflict of interest was unique to AstraZeneca, Viela's largest stockholder. Other stockholders did not need to sell their shares of Viela because of any unique business strategies or pending acquisitions of a competitor." A113-14, 133-38, ¶¶23, 61-69. Because it is reasonably conceivable that AstraZeneca was a conflicted controller, entire fairness should have provided the operative standard of review. The Trial Court erred by granting the motions to dismiss under a lower standard.

II. PLAINTIFF ADEQUATELY ALLEGED THAT THE 14D-9 WAS MATERIALLY MISLEADING

Even if there was no reasonably conceivable inference that AstraZeneca was a controlling stockholder, the Complaint still pleads a viable claim under enhanced scrutiny. A181-82, ¶162; MTD Answering Brief at 105-11 (A304-10). Plaintiff amply alleged that the risk justifying enhanced scrutiny – "'that the board might harbor personal motivations in the sale context that differ from what is best for the corporation and its stockholders'" – is the reality here. *Chen v. Howard-Anderson*, 87 A.3d 648, 678 (Del. Ch. 2014). The Trial Court erred when dismissing under *Corwin* without reaching the enhanced scrutiny standard of review.

A. The 14D-9 Failed to Disclose, and Was Materially Misleading Regarding, AstraZeneca's Intent to Sever Ties with Viela

1. The Court Erred in Finding that AstraZeneca's Stated Separation Was Immaterial

The Trial Court erred in ruling that AstraZeneca's noticed separation from Viela was immaterial. The 14D-9 omitted facts that would have revealed the conflicting agenda of Viela's founder, largest stockholder, employer of two directors, landlord, and only commercial supplier.

"A reasonable stockholder would want to know that AstraZeneca – Viela's largest stockholder – communicated to the Board its intent to expeditiously divest its

shares and terminate its involvement with the Company absent the Acquisition." A166-67, ¶121. But when disregarding that well-pleaded allegation, the Trial Court repeated its erroneous finding (addressed in detail above) that AstraZeneca never "*threatened* to terminate any of the Support Agreements *or abandon Viela*." Opinion at 85. The Director Defendants likewise focus their argument on whether the January 8 Letter constituted a "'*threat*' by AstraZeneca that the Company was required to disclose." DDB at 19, 20-22.[4] But these positions are squarely contradicted by the Complaint's well-pleaded allegations, including Board minutes that explicitly discuss "AstraZeneca's interest in accelerating *the separation* between AstraZeneca and the Company." A166, ¶120.

Moreover, the Director Defendants, like the Trial Court, overlook that in *Morrison*, this Court also disagreed with the characterization of Ray Berry's communication as a "threat," but still found that the communicated exit was material: "We do not embrace Plaintiffs' characterization of this as a threat, but *we do view it as an economically relevant statement of intent*." *Morrison v. Berry*, 191 A.3d 268, 286-87 (Del. 2018), as revised (July 27, 2018). Here too, the January 8 Letter was "an

[4] "DDB" refers to the Director Appellees' Answering Brief, filed October 31, 2024.

economically relevant statement of intent," an aspect of *Morrison* the Director Defendants do not attempt to deal with.

Instead, the Director Defendants argue that "Plaintiff fails to point to anything in the January 8 Letter that influenced Viela and Horizon's dealings." DDB at 22. That is not the standard. The Director Defendants cite no law for that proposition. The Court in *Morrison* did not find that Mr. Barry's communications "influenced" the "dealings" of the buyer and seller. *Cf.* 191 A.3d at 275. But just as Mr. Barry's communication that he would "give serious consideration to selling his stock" was an "economically relevant statement of intent," *id.* at 281, 286-87, so too here, "AstraZeneca had privately made clear to the Board that unless the Company was sold, AstraZeneca was out." A108, 141, ¶¶12, 76; A150-51, ¶90. The Board deliberated on these issues and then concealed the same facts from Viela stockholders. A109-10, 150-51, ¶¶15, 90-91.

Under Delaware law, stockholders are "entitled to know that certain of their fiduciaries have a self-interest that is arguably in conflict with their own." *Eisenberg v. Chi. Milwaukee Corp*., 537 A.2d 1051, 1061 (Del. Ch. 1987). Disclosure of AstraZeneca's intent to separate from the Company would have also apprised stockholders of the conflicts of interest harbored by Viela's largest stockholder and its two executives on the Board, one of whom (Rivers) actually recommended the

Acquisition to stockholders as an ostensibly independent director. A133-38, 141-42, 166-67, ¶¶61-69, 77, 121.

In response, the Director Defendants claim that this information is not material because "the '*full*' Board was [not] subjected to alleged conflicts on the part of AstraZeneca." DDB at 23. Again, that is not the standard. "[W]here, as here, the omitted information goes to the independence or disinterest of directors who are identified as the company's 'independent' or 'not interested' directors, the 'relevant inquiry is not whether an actual conflict of interest exists, but rather whether full disclosure of potential conflicts of interest has been made.'" *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 15 (Del. Ch. 2002); *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc.*, 319 A.3d 271, 292 n.118 (Del. 2024) (same). Such "full disclosure of potential conflicts," *id.*, did not occur here.

Plaintiff's opening brief noted that the Court has emphasized full disclosure of the potential conflicts of legal and financial advisors in two recent opinions. POB at 44 n.4 (citing *City of Dearborn Police & Fire Revised Ret. Sys. v. Brookfield Asset Mgmt. Inc.*, 314 A.3d 1108, 1132-33 (Del. 2024); *Inovalon*, 319 A.3d at 291-304). The Director Defendants ignore this point. They make no assertion that information regarding the potential conflicts of large blockholders (with significant commercial

ties) and multiple ostensibly "independent" directors are any less material than those of third-party advisors. Nor could they. In *Brookfield*, the Court also held that "it is reasonably conceivable that the Proxy's failure to disclose [the full extent of a controller's non-ratable benefit] likely significantly altered the 'total mix' of information." 314 A.3d at 1137. The Trial Court erred when failing to address this crucial driver of materiality.

2. The Court Erred When Failing to Assess Whether the 14D-9 Included a Misleading Partial Disclosure

The 14D-9 was also materially misleading in light of its attached representation that Viela had purportedly received no notice of an intent to suspend performance of the Support Agreements while concealing AstraZeneca's impending separation. A167-68, ¶¶122-23. "'Just as disclosures cannot omit material information, disclosures cannot be materially misleading.'" *Brookfield*, 314 A.3d at 1133. The Trial Court erred by not applying the misleading partial disclosure standard. The Director Defendants do not attempt to defend the Trial Court's error. *See* DDB at 23-25. They cite no law in this section of their brief and make no substantive argument on this standard. *Id.*

The Director Defendants' brief spotlights additional errors by the Trial Court. DDB at 24-25. The Trial Court ruled that the 14D-9's partial disclosure was

technically true, while relying on a Confidential Company Disclosure Schedule extraneous to the Complaint. Opinion at 88 n.263. In that confidential disclosure, Viela informed Horizon about AstraZeneca's January 8 Letter, but also claimed that "no contractual notice of termination of any contract between the parties, including the Commercial Supply Agreement, has been received." *Id.*; *see also* B2_156.

The Trial Court's reliance on that extraneous document implicates multiple reversible errors. *First*, the Trial Court accepted the contents of that document as true, in Defendants' favor. This was improper. *See Vanderbilt Income & Growth Assocs.*, 691 A.2d at 613-14.

Second, Viela was incentivized to misstate to Horizon the impact of the January 8 Letter because a notice to terminate could have run afoul of a related provision in the Merger Agreement. A167-68, ¶122. Viela's self-serving, counter-factual statement is not entitled to binding acceptance against Plaintiff at the pleading stage. *Id*.

Third, this extraneous exhibit shows that Viela deemed the January 8 Letter material enough to disclose to Horizon, but Defendants chose to conceal the same fact from Viela stockholders. Yet the Trial Court determined that this same disclosure imbalance somehow absolved Defendants from liability under *Corwin*. This stands *Corwin* on its head.

At a minimum, these factual disputes belong as material for cross-examination at trial, not as factual findings in Defendants' favor on a motion to dismiss. *See, e.g.*, *Goldstein v. Denner*, 2022 WL 1671006, at *22 (Del. Ch. May 26, 2022) ("At a later stage of the case, the record may show that the Schedule 14D-9 described matters accurately, but on a motion to dismiss, the plaintiff is entitled to a favorable inference.").

B. The 14D-9 Failed to Disclose Viela's Most Recent Operational Projections Prior to the Merger

"[I]f the circumstances surrounding the preparation of interim projections reveal them to be reliable enough to aid stockholders in making an informed judgment, they should be disclosed, regardless of whether they were the final projections relied upon by the Board." *Chester Cnty. Employees' Ret. Fund v. KCG Hldgs., Inc.*, 2019 WL 2564093, at *14 (Del. Ch. June 21, 2019). The Director Defendants submit pages of factual quarrels about the projections based on extraneous exhibits, but, like the Trial Court, they do not address the Complaint's actual allegations. The Director Defendants do not substantively address or respond to Complaint Exhibit A. *See* A154-63, 185-89, ¶¶99-115, Complaint Exhibit A ("Changes to Revenues from the June Projections to the October Projections").

Neither the Trial Court nor the Director Defendants address *any* of the following alleged discrepancies with October Projections' adjustments:

- Viela management's statements that the Uplizna launch "is off to a solid start," "[redacted]" Complaint, Exhibit A at 1-2 (A186-87).
- [redacted] *Id.* at 2-3 (A187-88).
- [redacted] even though Yao informed investors that the Company had received positive interim data. *Id.* at 3-4 (A188-89).
- Horizon's public statements undermining the revenue assumptions contained in the October and Fairness Projections. A162-63, ¶¶113-115.
- The Board's award to Viela management of 125% to 150% of their target cash bonuses for 2020 because "we had in the aggregate exceeded our corporate goals." A161-62, ¶112.

The Director Defendants' citation to *Goldstein v. Denner* further undermines the Trial Court's projection ruling. There, the Court of Chancery held, based on similar allegations of unjustified changes to projections, that "it is reasonable to infer that the Schedule 14D-9 should have provided a description of both sets of projections so that a 'stockholder could readily track the changes and reasonably infer the rationale that went into the changes from one scenario to another.'" *Goldstein v. Denner*, 2022 WL 1671006, at *27. The same inference should apply here.

C. The 14D-9 Failed to Disclose Yao's Numerous Post-Merger Compensation Discussions with Horizon During the Merger Negotiation Process

The Director Defendants do not address the Trial Court's failure to apply the misleading partial disclosure standard as to Yao's employment and consulting discussions with Horizon. DDB at 33-36. The 14D-9 disclosed that Yao was offered a consulting agreement "[f]ollowing the execution of the Merger Agreement," Opinion at 99, but misleadingly omitted that Yao discussed such issues *before* execution of the Merger Agreement. A143-51, 169-70, ¶¶80-92, 125. The Director Defendants also do not attempt to address or defend the Trial Court's reliance on a disclosure that "'executive officers, members of the Board and affiliates *may* be considered to have interests … that *may* be different from or in addition to those of the Company's stockholders generally.'" Opinion at 98. This too constitutes reversible error. *See Inovalon*, 319 A.3d at 294 ("it was similarly misleading for the Proxy to state that Evercore 'may' provide advisory services … when, in fact, it was providing such services, and thus there was an actual concurrent conflict"); *Brookfield*, 314 A.3d at 1133 (same).

III. PLAINTIFF ADEQUATELY ALLEGED LIABILITY AS TO EACH OF THE DIRECTORS

Soriot, Rivers, and the Non-AstraZeneca Director Defendants each raise exculpation as an alternative ground for dismissal. AZB at 51-53. These arguments fail.

Soriot and Rivers were dual fiduciaries, both for AstraZeneca (as officers and Soriot as a director) and Viela (as directors). In *Williamson*, two defendants were also executives of the alleged controlling stockholders. 2006 WL 1586375, at *4. The court ruled that the executives "could not be considered, in any sense of the word, independent of [the alleged controllers], and at this stage of the litigation[,] I must infer that they acted as the representatives of their employer's interests." *Id.* Here too, Soriot and Rivers, through their executive positions at AstraZeneca, were incentivized to instigate and favor a sale of Viela at any price. A113-14, 133-38, ¶¶23, 61-69.

Moreover, "[w]hile he sat on Viela's Board, and while he was privy to confidential Viela trade secrets about its products and markets, Soriot secretly caused AstraZeneca to pursue an acquisition of Viela's primary competitor, Alexion." A174, ¶142. Soriot did these things for the benefit of himself and AstraZeneca. *Id.* AstraZeneca provides no support for its argument that Soriot's departure from Viela

shortly before Board approval of the Acquisition somehow absolves him of disloyal acts while serving as a Viela fiduciary. There is "no dilution" of the duty of loyalty when a director "holds dual or multiple" fiduciary obligations and "no 'safe harbor' for such divided loyalties in Delaware." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

Yao is not exculpated because he obtained non-ratable, conflicting benefits in connection with the acquisition, including a $600,000 per year part-time consulting agreement with Horizon and $4.2 million in golden parachute payments. A153, ¶¶96-98; *see, e.g.*, *Chen*, 87 A.3d at 670 ("[the CEO] was interested in the Merger. He personally received more than $840,500 in benefits from the Merger that were not shared with the stockholders generally, including $272,803 in cash severance and other benefits ….").

All directors at the time of the Acquisition (including Rivers and Yao) are not exculpated because they "committed a knowing violation of the fiduciary duty of disclosure." *In re GGP, Inc. S'holder Litig.*, 282 A.3d 37, 71 (Del. 2022); *see also* A178, ¶155 ("grossly negligent" standard as to Yao as an officer); A177-78, 181, ¶¶151, 156, 161. The full Board discussed, but later knowingly concealed from stockholders, that AstraZeneca conveyed an "interest in accelerating the separation between AstraZeneca and the Company." A109-10, ¶15; *see also* A154-63, ¶¶100-

115 (Board awareness of concealed June Projections). "At this stage, [Defendants' blanket and summary denial] is not enough to defeat the Plaintiffs' well-pleaded claim that the Defendants committed a knowing violation of the duty of disclosure." *GGP*, 282 A.3d at 71.

CONCLUSION

For all of the foregoing reasons and those stated in the opening brief, Appellant respectfully requests reversal of the Trial Court's ruling.

ROBBINS GELLER RUDMAN
& DOWD LLP

/s/ Christopher H. Lyons
Christopher H. Lyons (#5493)
Tayler D. Bolton (#6640)
1521 Concord Pike, Suite 301
Wilmington, DE 19803
(302) 467-2660

OF COUNSEL:

ROBBINS GELLER RUDMAN
& DOWD LLP
Randall J. Baron
David A. Knotts
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

BLOCK & LEVITON LLP
Kimberly A. Evans (#5888)
Lindsay K. Faccenda (#5772)
Robert Erikson (#7099)
222 Delaware Ave., Suite 1120
Wilmington, DE 19801
(302) 499-3600

Attorneys for Plaintiff Below, Appellant

JOHNSON FISTEL, LLP
Brett M. Middleton
501 West Broadway, Suite 800
San Diego, CA 92101
(619) 230-0063

Dated: November 15, 2024

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2024, the foregoing *Appellant's Reply Brief [Public Version]* was caused to be served upon the following counsel of record via File & Serve*Xpress*:

Kimberly A. Evans
Lindsay K. Faccenda
Robert Erikson
BLOCK & LEVITON LLP
3801 Kennett Pike, Suite C-305
Wilmington, DE 19807

Daniel M. Silver
Benjamin A. Smyth
Alexandra Joyce
Sarah E. Delia
McCARTER & ENGLISH, LLP
Renaissance Centre
405 North King Street, 8th Floor
Wilmington, Delaware 19801

Kevin Gallagher
Nicole M. Henry
RICHARDS LAYTON
& FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801

/s/ Christopher H. Lyons
Christopher H. Lyons (#5493)