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Case No. 2024-0111-PAF

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DRUGCRAFTERS, L.P., THE DUGABOY INVESTMENT TRUST, NEXPOINT EVENT DRIVEN FUND, NEXPOINT ASSET MANAGEMENT, L.P., NEXPOINT REAL ESTATE OPPORTUNITIES, LLC, NEXPOINT CLIMATE TECH FUND, HIGHLAND GLOBAL ALLOCATION FUND, and NEXPOINT ADVISORS, L.P.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2024-0111-PAF
EVAN LOH, MICHAEL F. BIGHAM, ADAM WOODROW, RANDY BRENNER, and WILLIAM M. HASKEL,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: June 30, 2025
Date Decided: November 26, 2025

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FIORAVANTI, Vice Chancellor

Under *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), a corporate change of control transaction that is not governed by the entire fairness standard of review can effectively be dismissed if the transaction is approved by an uncoerced and fully informed vote of the disinterested stockholders. This case involves such a transaction. The stockholder plaintiffs who challenge the merger in this case contend that *Corwin* "cleansing" is not available for two reasons. First, they argue that the transaction is subject to entire fairness review because the conflicted and self-interested defendants perpetrated a fraud on the board of directors that approved the transaction. That fraud, according to the plaintiffs, created a stain that *Corwin* cannot erase. Second, the plaintiffs allege that the stockholder vote in favor of the transaction was not fully informed because the proxy statement omitted material information or was otherwise materially misleading.

It is undisputed that a majority of the board of directors that approved the transaction, including all of the members of the special committee that led and oversaw the negotiations, were disinterested and independent. Accepting the well-pleaded allegations of the complaint as true, and drawing all reasonable inferences in favor of the plaintiffs, the complaint must be dismissed. It is not reasonably conceivable on these facts that the defendants (five officers, two of whom were also directors), pulled the wool over the eyes of the board or the transaction committee, or that the stockholder vote was not fully informed and uncoerced.

I. BACKGROUND

The following recitation of facts is drawn from the Verified Class Action Complaint (the "Complaint"),[1] the documents integral thereto, and public filings subject to judicial notice.[2]

A. The Parties and Key Players

Plaintiffs DrugCrafters, L.P., The Dugaboy Investment Trust, Nexpoint Event Driven Fund, Nexpoint Asset Management, L.P., Nexpoint Real Estate Opportunities, LLC, Nexpoint Climate Tech Fund, Highland Global Allocation Fund, and Nexpoint Advisors, L.P. (collectively, the "Plaintiffs") are former stockholders of Paratek Pharmaceuticals, Inc. ("Paratek" or the "Company").

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[1] Unless otherwise defined herein, citations to the docket in this action are in the form of "Dkt. [#]." The Complaint in this action, Dkt. 1, will be cited as "Compl." After being identified initially, individuals are referenced herein by their surnames without regard to formal titles such as "Dr." No disrespect is intended.

[2] The Complaint incorporates by reference documents filed with the U.S. Securities and Exchange Commission. The court may take judicial notice of these documents on a motion to dismiss. *In re Santa Fe Pac. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995).

Exhibits entered into the record by Defendants (defined below) are cited as "Defs.' Ex. __." Certain of those documents were produced to Plaintiffs pursuant to 8 *Del. C* § 220 and incorporated by reference into the Complaint by agreement of the parties. Defs.' Ex. 2 (Confidentiality Agreement) § 18. The court is permitted to consider these documents on a motion to dismiss. *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016) ("[A] plaintiff may not reference certain documents outside the complaint and at the same time prevent the court from considering those documents' actual terms."), *abrogated on other grounds by Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019). While the court may consider documents produced pursuant to a Section 220 demand that are incorporated by reference into an ensuing complaint, the incorporation by reference doctrine does not "change the pleading standard that governs a motion to dismiss." *Id.* at 798.

Plaintiffs owned 11.7% of Paratek's outstanding common stock at the time of the transaction giving rise to this action.[3]

Plaintiffs' Complaint alleges that five Paratek officers, two of whom were also directors, breached their fiduciary duties in connection with the September 2023 merger (the "Merger") between Paratek and affiliates of Gurnet Point Capital ("Gurnet Point"). Prior to the Merger, Paratek was a publicly traded Delaware corporation, focused on the development and commercialization of treatments to address antimicrobial resistance. Paratek's primary product is NUZYRA (omadacycline) ("NUZYRA"), which treats community-acquired bacterial pneumonia, acute bacterial skin infections, and skin structure infections.[4]

At all relevant times prior to the Merger, Paratek's nine-person board of directors comprised Michael Bigham, Minnie Baylor-Henry, Dr. Thomas Dietz, Dr. Tim Franson, Rolf Hoffman, Evan Loh, Kristine Peterson, Robert Radie, and Dr. Jeffrey Stein (the "Board").[5] Loh was also the Company's Chief Executive Officer ("CEO"), and Bigham was the Executive Chairman of the Board until the Merger.

[3] Compl. ¶ 1.

[4] *Id.* ¶ 27.

[5] *Id.* ¶¶ 21–22, 30–36.

Bigham and Loh are the only directors named as defendants. The other three defendants—Randy Brenner, William Haskel, and Adam Woodrow—were officers of the Company. Brenner served as Paratek's Chief Development and Regulatory Officer since June 2019. Brenner was on the executive team responsible for regulatory affairs, quality assurance, and manufacturing of NUZYRA.[6] Haskel joined Paratek in 2015 and has served as Chief Legal Officer, General Counsel, and Corporate Secretary since June 2020.[7] Woodrow joined Paratek in 2014 and has served as Paratek's President and Chief Commercial Officer since June 2019.[8]

B. The Company's Formation and Adoption of the Revenue Performance Incentive Plan

Paratek was formed in 2014. The Company had promising business prospects due to NUZYRA's market potential, but its development was still in its infancy. Consequently, NUZYRA's high development costs left Paratek struggling to maintain a sufficient cash balance to fund its operations.[9] To raise capital, Paratek issued $165 million in convertible notes in April 2018, with a maturity date of May 1, 2024 (the "Convertible Notes"). The Convertible Notes were due in full on

[6] *Id.* ¶ 24.

[7] *Id.* ¶ 25.

[8] *Id.* ¶ 23.

[9] *Id.* ¶ 38.

the maturity date, subject to the Company's optional redemption or the holders' optional conversion into equity before maturity.[10]

In October 2018, the U.S. Food and Drug Administration (the "FDA") approved NUZYRA to treat certain bacterial infections. Shortly thereafter, the Board's compensation committee approved a revenue performance incentive plan (the "RPIP"). The purpose of the RPIP was to incentivize management to market NUZYRA.[11] Each Defendant was eligible for payments under the RPIP.

The RPIP was a performance-based incentive plan, with payouts tied to cumulative product revenue milestones for NUZYRA. The RPIP set aside a cash pool of $50 million, plus interest, to be awarded to RPIP participants. The RPIP was split into two $25 million tranches. The first tranche required management to achieve over $300 million in cumulative product revenues by December 31, 2025. The second tranche required $600 million in cumulative product revenues by December 31, 2026.[12]

RPIP participants would become vested for each tranche at a rate of 25% per year for every year of continued employment through December 31, 2022. If a

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[10] *Id.*

[11] *Id.* ¶¶ 39–40; *see* Defs.' Ex. 3 at 2.

[12] Compl. ¶ 40; Defs.' Ex. 3 at 2. "Product Revenues" included all "Net Sales" of the Company's products. Compl. ¶ 40. "Net Sales" included gross receipts from sales less returns, rebates, and other types of discounts. *Id.* Product Revenue targets were achievable independent of the costs associated with marketing and distribution. *Id.*

participant's employment terminated before December 31, 2022, the participant vested in only 25% of each tranche otherwise vesting that year. When a tranche's revenue milestone was reached, RPIP participants were paid at their then-vested percentage, multiplied by $25 million, which would be multiplied by the participant's individual percentage allocation of the total incentive pool. First tranche payments were due in the first quarter of 2026; second tranche payments were due in the first quarter of 2027. Failure to meet a revenue milestone by the deadline resulted in forfeiture of that tranche's payment.

The RPIP provided for accelerated vesting and payment upon a change of control. Participants who remained employed through a change of control would become fully vested in each tranche of their RPIP award. Revenue milestones that were met before a change of control would be fully paid at the time of the change of control's closing. If revenue milestones for either tranche were only partially achieved at the time of the change of control, the RPIP treated the tranches as achieved in part using preset formulas: the first tranche would be deemed achieved at a percentage equal to the greater of (i) 50% and (ii) the cumulative product revenues as of the change of control divided by $300 million; the second tranche would be deemed achieved at a percentage equal to the greater of (i) 30% and (ii) the cumulative product revenues as of the change of control divided by $600

million.[13] The immediate payout for each participant would be calculated by multiplying the then-vested percentage by $25 million, multiplied by the participant's allocation percentage, which would then be multiplied by the percentage of the tranche deemed achieved at the time of the merger. Following a change of control, the successor company would have to assume the future milestone payment obligations under the RPIP.

For example, if a change of control occurred on January 1, 2022, and cumulative product revenues equaled 80% of tranche one and 40% of tranche two, a participant allocated 25% of the incentive pool would immediately receive $7.5 million at closing (*i.e.*, $6.25 million multiplied by 80% plus $6.25 million multiplied by 40%).[14] The participant would also be eligible to receive the remaining $5 million in the first quarters of 2026 and 2027 if the revenue milestones were reached by their deadlines.[15]

The five Defendants were collectively allocated 80% of the $50 million RPIP incentive pool.[16] The RPIP provided that, once approved, the Company could not

[13] *Id.* ¶ 42; Defs.' Ex. 3 at 2.

[14] Payout per tranche = $25m x (participant's allocation) x (deemed achievement). *See* Compl. ¶ 43.

[15] *Id.* The acquiring company would be obligated to pay out the remaining $5 million in 2026 and 2027. *Id.* ¶ 42.

[16] Defendants received the following percentages: Loh (25%), Bigham (25%), Woodrow (14%), Brenner (8%), and Haskel (8%). *Id.* ¶ 44; Defs.' Ex. 1 ("Proxy") at 74–75.

unilaterally alter the terms of the awards if doing so would materially and adversely affect the participant's rights.[17] The RPIP was disclosed to the Company's stockholders via a Form 8-K and in the Company's subsequent public filings.[18]

In December 2019, the Biomedical Advanced Research Development Authority ("BARDA") awarded the Company a five-year contract to support the development of NUZYRA to treat pulmonary anthrax, a bioterrorism threat (the "BARDA Contract").[19] The BARDA Contract was valued at up to $303.6 million and promised Paratek four procurements of NUZYRA for $38 million each. NUZYRA procurements were delivered in June 2021 and December 2022, which were counted towards the RPIP revenue milestones.

In August 2021, the FDA granted NUZYRA an orphan drug designation. The designation qualified NUZYRA for tax credits for certain clinical trials and exclusive marketing rights.[20] Upon receiving the designation, Paratek began phase

[17] Compl. ¶ 44; Defs.' Ex. 3; *see also* Proxy at 29 n.1.

[18] *See, e.g.*, Defs.' Ex. 3 (summarizing the terms and linking the RPIP); Paratek, Annual Proxy (Form DEF14-A) (Mar. 23, 2021) at 35, 40; Paratek, Annual Report (Form 10-K) (Mar. 16, 2023) at 127, 144.

[19] Compl. ¶ 47.

[20] *Id*. ¶ 48.

II clinical trials. By June 2022, the Company received a "Fast Track" designation, resulting in an expedited FDA process.[21]

C. The Sale Process Takes Off.

Despite NUZYRA's promise, the Company's financial position weakened. The Company was spending significantly on marketing NUZYRA.[22] It also faced commercial challenges, upcoming debt maturities, including the Convertible Notes, and lower-than-expected NUZYRA sales.[23] For instance, at the end of the first quarter of 2021, the Company had only generated $154 million in cumulative product revenues from NUZYRA.[24]

In mid-2021, the Board and the Company's banker, Moelis & Company ("Moelis"), began evaluating strategic alternatives. Moelis and the Company contacted eighteen parties; eleven expressed interest, and three submitted non-binding indications of interest.[25]

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[21] *Id.* NUZYRA's potential made certain analysts optimistic about Paratek's stock. *Id.* ¶ 49. A Jefferies Financial Group analyst set a $15 price target for Paratek stock in 2021. *Id*. In March 2022, a HC Wainwright analyst set a $22 price target, predicting NUZYRA's NTM revenue could be $723 million by 2030. *Id*. In August 2022, a BTIG analyst considered Paratek set a $30 price target. *Id*.

[22] *Id*. ¶ 50.

[23] *Id.* ¶¶ 50, 52.

[24] *Id.* ¶ 52.

[25] *Id*. ¶ 53; Proxy at 24.

On January 11, 2022, Gurnet Point contacted Loh to arrange a meeting with the Company.[26] On January 24, Loh and Chris Bostrom, the Company's then-Vice President of Finance, met with Gurnet Point to discuss the Company's business.[27] A week later, a follow-up call between Loh, Bostrom, Woodrow, Gurnet Point, and representatives of a portfolio company of Gurnet Point took place "to explore a potential strategic relationship with the portfolio company."[28]

On March 9, 2022, the Board met to discuss the sale process. Moelis gave a presentation about the parties that had expressed interest in a potential transaction, but the presentation did not include Gurnet Point.[29]

On March 26, MannKind Corporation ("MannKind") contacted Loh to learn more about the Company. The Company and MannKind entered into a non-disclosure agreement ("NDA"), and discussions between the parties ensued in April.[30] On May 4, 2022, MannKind sent the Company a non-binding indication of

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[26] Compl. ¶ 56.

[27] *Id.*; Proxy at 25.

[28] Plaintiffs quote the Proxy in support of their allegation regarding the follow-up call but omit that a portfolio company was involved and truncate the quotation before its reference that the potential strategic relationship was with that company. *Compare* Compl. ¶ 56 (alleging "a follow-up call with Gurnet Point on February 3, 2022 in which Loh, Bostrom, and Woodrow participated 'to explore a potential strategic relationship.'"), *with* Proxy at 25 (Defendants "had a follow-up call with representatives of Gurnet Point, as well as representatives of a portfolio company of Gurnet Point, to explore a potential strategic relationship *with the portfolio company*." (emphasis added)).

[29] Compl. ¶ 57.

[30] *Id.* ¶ 58; Proxy at 25.

interest to acquire 100% of Paratek's shares for $2.75–$3.75 per share, payable in MannKind stock, along with a potential contractual contingent value right ("CVR") payable upon achievement of an unspecified milestone.[31]

On May 5, the Board formed a transaction committee comprising Dietz, Peterson, and Stein (the "Transaction Committee").[32] The Transaction Committee had the authority to "direct, oversee, and monitor the Company's evaluation of potential business combination transactions," with the Board retaining authority over final approval of any transaction.[33] At the Board meeting, Haskel

> proceeded to review with the Board best practices regarding how it should conduct itself in connection with any strategic transaction, including confidentiality and the process to follow if any Board member were to be approached to discuss this transaction. He noted that all inquiries should be referred to the Executive Chairman, CEO, or members of the [T]ransaction [C]ommittee.[34]

On May 11, the Board, Moelis, and the Company's counsel, Ropes & Gray LLP ("Ropes & Gray"), met and discussed MannKind's May 4 proposal. Moelis presented on the proposal, and the Board resolved to respond with a counterproposal.[35] The next day, the Transaction Committee met. Bigham and Loh

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[31] Compl. ¶ 60; Proxy at 25; *see also* Defs.' Ex. 10.

[32] Compl. ¶ 61; Defs.' Ex. 12 at 3.

[33] Defs.' Ex. 12 at 3.

[34] *Id.*; *see also* Compl. ¶ 61 (quoting Defs.' Ex. 12 at 3).

[35] Compl. ¶ 62.

attended the meeting, and Loh introduced MannKind's May 4 proposal.[36] The Transaction Committee decided on a counterproposal of $4.00 per share, payable in MannKind stock, and a CVR worth a maximum of $4.50 per share based on achieving certain NUZYRA revenue targets.[37]

MannKind received the counterproposal on May 12, 2022.[38] Loh and Bigham met with MannKind's CEO the next day to discuss "the apparent gap in valuation and how the parties might seek to narrow that gap."[39] On May 16, Bostrom, Brenner, Woodrow, and Steve St. Onge, Paratek's Senior Director of Business Development, had a call with MannKind.[40] Two days later, on May 18, MannKind made a second proposal. The May 18 proposal offered the same range of consideration—$2.75 to $3.75 per share—but included a CVR that would pay up to an additional $1.00 per share upon achieving certain NUZYRA-related milestones.[41]

On May 20, 2022, the Transaction Committee met to discuss MannKind's May 18 proposal and a potential counterproposal. Bigham and Loh attended the meeting.[42] The Transaction Committee resolved to send a counterproposal to

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[36] *Id.*

[37] *Id.*; Proxy at 26.

[38] Proxy at 26; Compl. ¶ 62.

[39] Compl. ¶ 63 (quoting Proxy at 26).

[40] *Id.*

[41] *Id.*

[42] *Id.* ¶ 64.

MannKind, which the Company delivered that day.[43] The May 20 counterproposal sought $4.00 per share, payable in MannKind stock, plus a CVR of $3.25 per share based on a combination of (1) achievement of commercial NUZYRA gross revenue in a fiscal quarter in excess of $50 million, (2) receipt of the third procurement from BARDA before December 31, 2025, and (3) cumulative revenue from governmental entities (other than the existing BARDA procurement) in excess of $100 million prior to December 31, 2029.[44] The Transaction Committee also authorized Loh to contact Melinta Therapeutic, Inc.'s majority owner, a party with whom he had a preexisting relationship, to explore a strategic possibility.[45]

On May 24, 2022, MannKind's CEO informed Loh that the parties were far apart on valuation and shared "his perspectives" on MannKind and the Company.[46] Two days later, Loh and Bigham sent a letter to MannKind sharing the rationale behind the May 20 counterproposal.[47] Then, on May 28, MannKind submitted a third proposal, offering $3.00 per share in MannKind stock and a CVR of an

[43] *Id.*; Proxy at 26.

[44] Proxy at 26; Compl. ¶ 64.

[45] Defs.' Ex. 14 at 2; Proxy at 26; *see also* Compl. ¶ 64 (quoting Proxy at 26).

[46] Compl. ¶ 65 (quoting Proxy at 27).

[47] *Id.*; Proxy at 27.

additional $1.00 per share based on NUZYRA milestones. MannKind told the Company that the proposal was intended to "bring the negotiation to resolution."[48]

On June 1, 2022, the Transaction Committee met and discussed MannKind's May 28 proposal. Bigham and Loh attended the meeting. The Transaction Committee concluded that "it was clear from [MannKind's] actions and bidding strategy that they considered [Paratek] to be a distressed opportunity."[49] The Transaction Committee determined that Hoffmann, who had a preexisting relationship with a director of MannKind, should provide the Company's next response.[50] The Transaction Committee authorized and directed the Company's management and Moelis to explore other potential strategic opportunities.

The next day, Hoffman told MannKind that the Company would not submit a counterproposal because the parties were too far apart in their negotiations.[51] Hoffman noted that the Company would not accept a price below $6.00 per share, including a CVR. The same day, Moelis checked with two entities that had previously conducted due diligence but dropped out of the process. Shionogi, Inc.

[48] Compl. ¶ 65 (quoting Proxy at 27).

[49] *Id.* ¶ 66.

[50] *Id.*

[51] *Id.* ¶ 67.

("Shionogi") remained uninterested, but Emergent Biosolutions, Inc. ("Emergent") said it was interested in conducting additional due diligence.[52]

On June 5, 2022, MannKind submitted its "best and final" offer of $3.75 per share, payable in MannKind stock, plus a CVR of $0.75 per share upon certain NUZYRA milestones.[53] Two days later, the Transaction Committee met to discuss MannKind's June 5 proposal and recent contacts with other potential transaction parties. Bigham and Loh attended the meeting. Bigham led the discussion on MannKind's June 5 proposal, noting that the attainment of the proposed CVR milestones was highly unlikely given the Company's forecasts.[54] Loh informed the Transaction Committee he had "preparatory conversations" with two other potential counterparties and expected to engage with Emergent.[55] The Transaction Committee directed Moelis to communicate to MannKind that any transaction would need to include a total value of $5.50 per share, including a CVR. Upon receiving Moelis's message, MannKind responded that it would discontinue negotiations.[56] After

[52] *Id.*

[53] *Id.* ¶ 68.

[54] *Id*. ¶ 69; Defs.' Ex. 15 at 1. Moelis also concluded that MannKind's proposal "reduce[d] the likelihood of attain[ing]" the CVR milestones. *Id*. at 2.

[55] Compl. ¶ 69 (alteration omitted); Defs.' Ex. 15 at 2.

[56] Compl. ¶ 70.

learning of MannKind's response, the Transaction Committee instructed management to "keep the door open" with MannKind.[57]

One month after MannKind walked away, Emergent submitted a non-binding offer to acquire the Company for $3.70–$4.45 per share in cash, without a CVR, and requested a 45-day exclusivity period to conduct due diligence and to negotiate definitive documentation.[58] The next day, the Transaction Committee and its advisers met with Company management, including Loh and Bigham, to discuss Emergent's proposal. The Transaction Committee resolved to provide additional diligence materials to Emergent and requested a proposal or revised proposals from all potentially interested parties, no later than August 5, 2022.[59] During the meeting, Bigham provided an update on potential financings that may allow the Company to raise sufficient cash to address the near-term maturity of the Convertible Notes.[60]

On August 4, 2022, the Company released its second quarter 2022 earnings. The results showed cumulative product revenues of approximately $265 million under the RPIP, meaning the first tranche was 88% achieved, and the second tranche

[57] *Id.*

[58] *Id.* ¶ 71; Defs.' Ex. 11.

[59] Compl. ¶ 72.

[60] *Id.*

was 44% achieved.[61] After the earnings announcement, Emergent requested more time to submit a revised bid.[62] None of the potential bidders submitted revised proposals by the Transaction Committee's August 5 deadline.[63]

The earnings announcement prompted inbound inquiries. On August 4, MannKind's CEO contacted Loh, requesting an update on the Company's business.[64] They met the next day.[65] Gurnet Point, which had made a couple of preliminary inquiries to management earlier in the year, arranged for a call with Bostrom, Brenner, Loh, St. Onge, and Woodrow on August 11 and "expressed interest in learning more about the Company's business."[66] On August 15, Company management met with MannKind and provided an update on the Company's business.[67]

Also on August 15, Emergent notified the Company it was withdrawing from negotiations due to its own business challenges.[68] In parallel, Gurnet Point and the

[61] *Id.* ¶ 74. Had a change of control occurred at this time, Defendants would have received approximately 80% of what they were ultimately entitled at the time of the Merger. *See* Dkt. 28 Ex. 1 at 2.

[62] Compl. ¶ 73.

[63] *See* Proxy at 28.

[64] *See* Compl. ¶ 75; Proxy at 28.

[65] Compl. ¶ 75; Proxy at 28.

[66] Compl. ¶ 76 (quoting Proxy at 28).

[67] *Id.* ¶ 77.

[68] *Id.*

Company entered into an NDA that same day.[69] On August 29, Gurnet Point was provided access to a virtual data room, and Gurnet Point representatives met with the Company several times through September.[70]

D. The Sale Process Slows in the Fall of 2022.

On September 8, 2022, the Board met with management and received an update from Stein on the Transaction Committee's recent meetings and the status of strategic discussions.[71] On September 28, Gurnet Point informed St. Onge that it might be interested in acquiring the Company.[72] The next day, the Company informed Gurnet Point that it was focusing on executing its ongoing strategic priorities in the immediate future, but the parties agreed to continue discussions about a potential transaction.[73]

On November 3, 2022, the Company announced its third-quarter earnings, reflecting quarter-on-quarter growth of 1%.[74] Paratek's stock price dropped from $3.42 to $2.53 the next day.[75] Sensing a bargain, MannKind's CEO contacted Loh

[69] *Id.* ¶ 76.

[70] *Id.* ¶ 78; Proxy at 28.

[71] Compl. ¶ 79; Proxy at 28; *see* Defs.' Ex. 4 at 4.

[72] Compl. ¶ 80.

[73] *Id.*

[74] *Id.* ¶ 81.

[75] *Id.*

on November 14 and expressed a renewed interest in a transaction.[76] That led to several meetings between MannKind, Brenner, and Loh in the ensuing days.[77] In the meantime, on November 21, Loh contacted Gurnet Point to offer a business update on the Company.[78]

On November 26, 2022, MannKind delivered a non-binding indication of interest for $2.75 per share, payable in MannKind stock, plus a CVR of $1.00. MannKind's proposal was conditioned on the Company's management reducing the payments owed under the RPIP.[79]

The Transaction Committee and its advisers met on November 28. Bigham and Loh attended the meeting.[80] Loh discussed MannKind's November 26 proposal, including the condition that management reduce its RPIP awards.[81] The Transaction Committee instructed management not to communicate with MannKind until receiving prior authorization from the Transaction Committee.[82] At the meeting, Bigham informed the Transaction Committee that Gurnet Point had expressed

[76] *Id.* ¶ 82.

[77] *Id.*

[78] *Id.*

[79] *Id.* ¶ 83.

[80] *Id.* ¶ 84; Proxy at 30.

[81] Compl. ¶ 84.

[82] *Id.*

interest in a potential transaction.[83] Following the meeting, at the direction of the Transaction Committee, Moelis contacted Emergent, Shionogi, and four other parties. Only Emergent and Shionogi engaged.[84]

On December 9, 2022, Moelis informed MannKind that the Company was pausing negotiations because it was in possession of material nonpublic information concerning the results of a NUZYRA efficacy study that could lead to a second BARDA procurement.[85] On December 14, Bostrom, Brenner, Loh, St. Onge, and Woodrow met with Gurnet Point to discuss the Company's recent financial performance and near-term strategy.[86] The Company publicly released the NUZYRA study results on December 19.[87] Three days later, the Transaction Committee met with Loh and Bigham in attendance and discussed MannKind's November 26 proposal.[88] The Transaction Committee directed Moelis to inform MannKind that the proposal undervalued the Company and that it should increase the offer.[89]

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[83] *Id.*; Proxy at 30.

[84] Proxy at 32.

[85] Compl. ¶ 85; Proxy at 30.

[86] Compl. ¶ 85.

[87] *Id.*

[88] *Id.* ¶ 86.

[89] *Id.*

E. The Sale Process Gains Momentum in Early 2023.

On January 3, 2023, with Transaction Committee authorization, Loh informed MannKind's CEO that the Transaction Committee—not Loh—would lead future strategic discussions.[90] One day later, Gurnet Point notified St. Onge that it had located a potential equity partner, Novo Holdings A/S ("Novo Holdings"), to enter into a transaction.[91]

On January 6, 2023, MannKind submitted a revised proposal for $2.75 per share payable in MannKind stock plus a CVR of up to $1.00 per share—$0.50 payable if NUZYRA achieved $75 million in quarterly net revenue before January 1, 2025, and another $0.50 tied to a potential licensing of NUZYRA in Asia.[92] The same day, the Company, Gurnet Point, and an affiliate of Novo Holdings entered into an NDA.[93]

On January 8, the Transaction Committee met with its advisers to discuss MannKind's January 6 proposal. The Transaction Committee expressed concerns

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[90] *Id.* ¶ 87.

[91] *Id.* Novo Holdings is a Danish investment firm that specializes in investing in life sciences businesses. *Id.* ¶¶ 28–29.

[92] *Id.* ¶ 88. The Complaint and Proxy do not specify whether MannKind's January 6 proposal required a reduction in the RPIP. *See Id.*; Proxy at 31. Subsequent events in January 2023, however, suggest that it did. *See* Proxy at 32 (January 16, 2023, Transaction Committee meeting indicating MannKind's "previous proposal" sought a reduction in RPIP); Compl. ¶ 91 (indicating same).

[93] Compl. ¶ 88.

over the prospects of achieving the CVR payment triggers and noted the importance of continuing to engage with MannKind and other counterparties to obtain superior proposals.[94] Moelis also informed the Transaction Committee that management anticipated meeting potential buyers at an upcoming health care conference.[95] At the conference, Gurnet Point told Loh that Gurnet Point and Novo Holdings expected to deliver a non-binding offer in late February.[96]

At the January 13 Transaction Committee meeting, Loh summarized his discussions with Gurnet Point at the conference.[97] Moelis indicated that it was difficult to "gauge true interest" other than from MannKind.[98] As an alternative to an immediate sale, Loh discussed the possibility of refinancing the Convertible Notes and said he was optimistic about the Company's prospects as an independent entity.[99]

At the January 16 Transaction Committee meeting, Bigham relayed that management was unwilling to amend the terms of their RPIP payments as proposed by MannKind.[100] The Transaction Committee resolved to inform MannKind that

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[94] *Id.* ¶ 89.

[95] Proxy at 32.

[96] Compl. ¶ 89.

[97] *Id.* ¶ 90.

[98] *Id.*

[99] *Id.*

[100] *Id.* ¶ 91.

more fruitful negotiations required a meaningful improvement of its offer.[101] MannKind responded that it would not make an improved offer until it received a counterproposal.[102]

Brenner, Loh, St. Onge, and Woodrow met with Gurnet Point on January 27.[103] Three days later, Shionogi informed the Company it was no longer interested in an acquisition.[104] On February 10, Gurnet Point and Novo Holdings submitted a non-binding proposal to acquire the Company for $2.55 per share in cash. The proposal specified that Gurnet Point was interested in discussing a potential rollover of management's equity and the RPIP, but the rollover was not a condition of the offer.[105]

On February 14, the Transaction Committee met to discuss Gurnet Point's February 10 proposal and determined to counter at $3.15 per share.[106] On February 21, Gurnet Point responded with a revised proposal of $2.85 per share in cash.[107] That same day, the Transaction Committee met to discuss Gurnet Point's

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[101] *Id.*

[102] *Id.*

[103] *Id.* ¶ 92

[104] Proxy at 32.

[105] Compl. ¶ 92.

[106] *Id.* ¶ 93.

[107] *Id.*

February 21 proposal.[108] The Transaction Committee determined to engage in further diligence discussions with Gurnet Point, particularly given that, absent a transaction, the Company was planning to announce a material reduction in its workforce.[109]

On February 22, the Board discussed Gurnet Point's latest proposal. Loh informed the Board that the Company would need to make changes in the absence of a transaction with Gurnet Point, given its unfavorable financial results.[110] On February 24, the Company delivered a counterproposal to Gurnet Point at $3.00 per share.[111] The Company and Gurnet Point agreed to begin preparing definitive

[108] Proxy at 33.

[109] There is a minor discrepancy between the Complaint, Plaintiffs' briefing, and the Proxy over the dates of meetings of the Transaction Committee and the Board in the time period when the reduction in force was discussed. The discrepancy is only the matter of a day, and it is not material to the result. *Compare* Compl. ¶ 93 (alleging a full Board meeting occurred on February 22, 2023, but not alleging anything concerning a reduction in force), *with* Plaintiffs' Answering Brief in Opposition to Defendants' Motion to Dismiss ("Pls.' Answering Br.") (Dkt. 13) at 21 (indicating a reduction in force was discussed at the February 22, 2023, Board meeting), *and also with* Plaintiffs' Supplemental Answering Brief in Opposition to Defendants' Motion to Dismiss ("Pls.' Supplemental Br.") (Dkt. 36) at 10 (citing to paragraph 93 of the Complaint and referencing a *Transaction Committee* meeting that took place on February 22, 2023, where a reduction in force was discussed). The Proxy, however, indicates a Transaction Committee meeting occurred on February 21, 2023, where the reduction in force was discussed, and a full Board meeting was held the next day. *See* Proxy at 33. The court references the Proxy only to provide context, not for its truth.

[110] Compl. ¶ 93.

[111] *Id.* ¶ 95; Proxy at 34.

transaction documents, subject to due diligence, with a completion target of mid-April.[112]

While negotiating with Gurnet Point, the Transaction Committee was also hoping to entice MannKind to submit another bid. On February 17, 2023, Moelis notified MannKind that the Company had received a cash offer.[113] On March 3, 2023, MannKind's financial advisers informed the Company that MannKind would not pursue an acquisition with the Company any further.[114]

F. The Transaction Committee Accepts Gurnet Point and Novo Holdings' Offer, and the Merger Closes.

On March 16, 2023, the Company disclosed in its Form 10-K for 2022 that there was "a substantial doubt regarding the Company's ability to continue as a going concern through 2023."[115] On March 21, a news report revealed the Company was engaged in takeover discussions.[116] The Company's stock price spiked up 35.8%.[117] On April 6, 2023, Loh informed the Board that Gurnet Point was unlikely to meet the mid-April timeline to execute definitive agreements, and it was unlikely

[112] Compl. ¶ 95.

[113] Proxy at 33.

[114] Compl. ¶ 95.

[115] *Id.* ¶ 94.

[116] *Id.* ¶ 96.

[117] Proxy at 35.

to proceed with a transaction at $3.00 per share.[118] The Transaction Committee then sought to re-engage with MannKind.[119]

On April 11, the Transaction Committee met regarding Gurnet Point's ongoing diligence and how to re-engage MannKind.[120] Days later, at a meeting with Bigham, Loh, and St. Onge, Gurnet Point indicated that it was not willing to move forward unless it could find an additional equity partner beyond Novo Holdings.[121] In the meantime, MannKind informed the Company that it was willing to make a revised proposal but would seek a reduction in the RPIP.[122]

Discussions with MannKind and Gurnet Point continued. On May 18, 2023, Bigham and Loh met with Gurnet Point and suggested the addition of a CVR component to the $3.00 per share consideration in the prior proposal.[123] The next day, Gurnet Point and Novo Holdings submitted a non-binding proposal for $2.10 per share in cash, plus a CVR of $0.90 per share based on NUZYRA sales of $350 million in any calendar year by year-end 2026.[124] Gurnet Point indicated that

[118] Compl. ¶ 96.

[119] *Id.*

[120] Proxy at 35; *see also* Compl. ¶ 96.

[121] Compl. ¶ 97.

[122] *Id.*

[123] *Id.* ¶ 98.

[124] *Id.*

it did not have the material flexibility to increase its offer.[125] The Transaction Committee countered at $2.50 per share in cash, with two CVRs each worth up to $0.25 per share upon (i) achievement of $240 million of annual net NUZYRA sales by year-end 2025, and (ii) achievement of $320 million of annual net NUZYRA sales by year-end 2026.[126]

On May 22, 2023, Gurnet Point submitted a "best and final offer" of $2.15 per share in cash, with a CVR of $0.85 per share contingent on achievement of $320 million of NUZYRA sales within the United States in any year before the end of 2026.[127] That day, the Transaction Committee agreed to the merger consideration and to start negotiations of definitive transaction documents with Gurnet Point.[128]

Upon learning that the Company was negotiating definitive documentation with Gurnet Point, on May 25, MannKind increased its offer to $2.75 per share in MannKind stock.[129] The proposal was conditioned on a 50% reduction in the amount due under the RPIP.[130] MannKind also requested a 45-day exclusivity period. That

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[125] *Id.*

[126] *Id.* ¶ 99.

[127] *Id.* ¶ 100.

[128] *Id.* The Proxy notes that Loh contacted Emergent on May 23, 2023, to inquire about its potential interest in a transaction, but did not receive a response. Proxy at 37. It does not appear Emergent was involved after this point.

[129] Compl. ¶ 101.

[130] *Id.* The proposal required that management accept an aggregate of $25 million under the RPIP, payable in MannKind shares. Proxy at 38.

same day, Gurnet Point and Loh discussed post-closing employment and the reinvestment of a portion of the RPIP awards in the post-closing entity.[131] On May 26, following meetings of the Board and the Transaction Committee, Stein encouraged MannKind's CEO to consider offering full payment of the RPIP in MannKind stock, which management indicated it was willing to accept.[132]

On May 30, 2023, MannKind delivered a revised proposal for $2.50 per share and payment of the full value of the RPIP in MannKind stock, excluding accrued interest, both payable in MannKind stock.[133] The Transaction Committee met the next day, without Bigham and Loh, to discuss MannKind's offer. The Transaction Committee countered that the Company would agree to engage in final diligence and negotiate definitive documentation if MannKind increased its offer to $2.75 per share and submitted a binding proposal by June 9.[134] MannKind responded the next day, indicating that it would not be able to meet the required timeline to provide a binding offer.[135]

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[131] Compl. ¶ 101.

[132] *Id.* ¶ 102; Proxy at 39.

[133] Compl. ¶ 103.

[134] *Id.*

[135] Proxy at 40.

On June 4, 2023, Loh informed Gurnet Point that another strategic buyer (*i.e.*, MannKind) had meaningfully progressed its diligence and negotiations with the Company and "encouraged Gurnet Point to finalize its deal."[136]

The next day, the full Board met with Company management, Moelis, and Ropes & Gray to discuss the status of the transaction.[137] The Board met again on June 6, with its legal and financial advisers. After Ropes & Gray summarized the key transaction terms and Moelis delivered a fairness opinion, the Board unanimously approved a transaction with Gurnet Point and Novo Holdings and resolved to recommend it to the Company's stockholders.[138] The Company entered into an agreement and plan of merger (the "Merger Agreement") with Gurnet Point and Novo Holdings on the same day.[139] At this point, the first RPIP tranche was fully achieved, and the second tranche was 62.4% achieved.[140]

Under the Merger Agreement, Gurnet Point and Novo Holdings agreed to acquire Paratek for $2.15 per share in cash, along with a CVR to receive an additional $0.85 per share upon the satisfaction of post-closing NUZYRA milestones. As part of the Merger, the RPIP participants, including Defendants,

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[136] Compl. ¶ 103.

[137] Proxy at 40.

[138] *Id.*; *see also* Compl. ¶ 104.

[139] Compl. ¶¶ 1, 104.

[140] *Id.* ¶ 104.

agreed to re-invest a percentage of their RPIP awards in post-Merger company equity.[141] Bigham and Haskel's equity would vest upon closing, while Brenner, Loh, and Woodrow's equity would vest in four equal installments every six months after closing.[142] Brenner, Loh, and Woodrow retained their employment, with Loh remaining as CEO and a director.[143]

Paratek filed its proxy statement (the "Proxy") on August 2, 2023.[144] The Company's stockholders approved the Merger on September 18, 2023,[145] and the Merger closed on September 22, 2023.[146] Because the first tranche of the RPIP was fully achieved and the second tranche was 62.4% achieved when the Merger Agreement was signed, Bigham and Loh were entitled to $10,415,332 under the RPIP at closing; Woodrow was entitled to $5,832,586, and both Brenner and Haskel were entitled to $3,332,906.[147]

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[141] *Id.* ¶ 105.

[142] *Id.*

[143] *Id.* ¶ 106.

[144] *Id.*

[145] *See* Defs.' Ex. 8 at 2.

[146] Compl. ¶106.

[147] *Id.* ¶ 104.

G. Procedural History

After the announcement of the Merger, Plaintiffs obtained books and records of Paratek in response to inspection demands under 8 *Del. C.* § 220.[148] Plaintiffs filed their Complaint on February 8, 2024. The Complaint contains two counts. Count I alleges Bigham and Loh breached their fiduciary duties in their capacity as directors.[149] Count II alleges Brenner, Loh, Haskel, and Woodrow (together with Bigham, the "Defendants") breached their fiduciary duties in their capacities as officers.[150]

Defendants have moved to dismiss the Complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[151] What follows is the court's ruling on the motion to dismiss following briefing and oral argument.

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[148] Defs.' Exs. 5, 7.

[149] Compl. ¶¶ 131–36.

[150] *Id.* ¶¶ 137–42. Paratek's Certificate of Incorporation contains an exculpatory provision pursuant to 8 *Del. C.* § 102(b)(7). Defs.' Ex. 9, art. VI. The court can take judicial notice of the exculpatory provision. *See McMillan v. Intercargo, Corp.*, 768 A.2d 492, 501 n.40 (Del. Ch. 2000) (explaining that this court can take judicial notice of an exculpatory provision in the corporation's certificate of incorporation when considering a pleadings-stage motion). The provision does not extend exculpation to the Company's officers. *Id.* As explained in this decision, Plaintiffs have not stated a claim for breach of the duty of loyalty or care against any of the Defendants, in any capacity.

[151] Dkt. 8.

II. ANALYSIS

On a motion to dismiss for failure to state a claim under Rule 12(b)(6):

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.

Savor, Inc. v. FMR Corp., 812 A.2d 894, 896–97 (Del. 2002) (citation modified); *see also Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531 (Del. 2011). Although it is a plaintiff-friendly standard, "[t]he court is not required to accept every strained interpretation of the allegations, credit conclusory allegations that are not supported by specific facts, or draw unreasonable inferences in the plaintiff's favor." *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020) (citation modified). "[A] claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

A. The Standard of Review

"The directors and officers of a Delaware corporation owe two overarching fiduciary duties—the duty of care and the duty of loyalty." *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1049 (Del. 2021). "Through standards of review,

Delaware courts review [fiduciaries'] conduct for compliance with their fiduciary duties." *In re Match Gp., Inc. Deriv. Litig.*, 315 A.3d 446, 459 (Del. 2024). Delaware has three tiers of review: the traditional business judgment rule, enhanced scrutiny, and entire fairness. *Emerald P'rs v. Berlin*, 787 A.2d 85, 89 (Del. 2001).

The default standard is the business judgment rule, which is a "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Match*, 315 A.3d at 459 (citation modified). If the rule applies, "a court will not second guess the decisions of disinterested and independent directors." *Id*. The court "will only interfere if the board's decision lacks any rationally conceivable basis, thereby resulting in waste or a lack of good faith." *Id*.

Enhanced scrutiny is Delaware's intermediate standard of review. *Emerald Partners*, 787 A.2d at 89. When a stockholder challenges a change of control transaction, such as an all-cash merger, enhanced scrutiny under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) is the presumptive standard of review. *Revlon*, 506 A.2d at 182. "Enhanced scrutiny applies in this setting because 'the potential sale of a corporation has enormous implications for corporate managers and advisors, and a range of human motivations, including but by no means limited to greed, can inspire fiduciaries and their advisors to be less

than faithful.'" *Goldstein v. Denner*, 2022 WL 1671006, at *29 (Del. Ch. May 26, 2022) (quoting *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 439 (Del. Ch. 2012)). "The key elements of *Revlon* enhanced scrutiny require both (i) reasonableness of the decision-making process employed by the directors, including the information on which the directors based their decision, and (ii) reasonableness of the directors' action in light of the circumstances then existing." *In re Mindbody, Inc., S'holder Litig*. (*Mindbody II*), 332 A.3d 349, 382 (Del. 2024).

Entire fairness is "our corporate law's most rigorous standard of review." *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 699 (Del. 2023). Under entire fairness review, corporate fiduciaries must establish "to the *court's* satisfaction that the transaction was the product of both fair dealing *and* fair price." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (emphasis in orginal). "Not even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness. Rather, the transaction itself must be objectively fair, independent of the board's beliefs." *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006).

The Merger was a change of control, and the stockholders received cash for their shares. Thus, enhanced scrutiny presumptively applies. *Mindbody II*, 332 A.3d at 382. But Defendants may "restore the business judgment rule through *Corwin*

cleansing." *Id*. at 385. To invoke *Corwin*, Defendants must show that the Merger was "approved by a fully informed, uncoerced majority of the disinterested stockholders." *Corwin*, 125 A.3d at 305–06.

Plaintiffs recognize that the Merger is presumptively subject to enhanced scrutiny and susceptible to *Corwin* cleansing if the stockholder vote was uncoerced and fully informed.[152] Plaintiffs argue, however, that *Corwin* cleansing is not available to Defendants because the Complaint pleads a claim for breach of the fiduciary duty of loyalty, which must be reviewed under the entire fairness standard.

Plaintiffs argue that entire fairness applies because Defendants were conflicted and self-interested in the transaction due to the potential payouts under the RPIP and the opportunity to obtain employment in the Company after the Merger.[153] Plaintiffs argue that Defendants furthered this self-interest by withholding material information from the Board and the Transaction Committee to advance their personal interests—perpetrating a fraud on the board. Separately, Plaintiffs allege there was inadequate Board oversight of Defendants' conduct.

The Delaware Supreme Court has elevated the standard of review from what was presumptively enhanced scrutiny to entire fairness in view of allegations that a minority of conflicted fiduciaries' "fraud upon the board" tainted the board's

[152] *See* Pls.' Answering Br. 26, 59.

[153] *Id*. at 27–48.

process. *See Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279, 1283 (Del. 1989). Plaintiffs argue for the same approach here.

B. Plaintiffs Do Not Adequately Plead Their Fraud on the Board Theory.

Plaintiffs do not assert claims against, or otherwise challenge the independence or disinterestedness of, the seven other directors who were on the Board at the time the Merger was approved. This includes the three-member Transaction Committee assigned to oversee the sale process. Instead, Plaintiffs allege that Defendants perpetrated a fraud on the board by manipulating the sale process and deceiving the Board and the Transaction Committee. The fraud is alleged to be the product of Defendants' withholding material information from the Board and the Transaction Committee.[154]

Plaintiffs' fraud-on-the-board theory relies on *Macmillan*. In that case, the Court elevated the standard of review to entire fairness because two officers of the company provided their preferred bidder with the precise terms of a competing bidder's offer and concealed their conduct from the board. 559 A.2d at 1275, 1279–83. The tip allowed the recipient to outbid the competitor and to demand an asset lockup, which the board accepted. *Id.* at 1282–83. The Court held the tips to the

[154] *Id.* at 42–46.

preferred bidder were "material" and the officers' concealment of that information "was a fraud upon the board," reflecting a breach of the duty of loyalty. *Id.*

Recently, our Supreme Court in *In re Oracle Corporation Derivative Litigation*, 339 A.3d 1 (Del. 2025), explained that when this court examines a fraud-on-the-board theory, "the court starts from familiar ground and decides whether a conflicted fiduciary violated his fiduciary duty of loyalty." *Oracle*, 339 A.3d at 22. The duty of loyalty is breached if the conflicted fiduciary "withholds material information from the board, engages in deceptive conduct, or otherwise misleads the board." *Id.* at 23. To state a duty of loyalty claim under a fraud-on-the-board theory, *Oracle* teaches that the plaintiff must plead sufficient facts to make it reasonably conceivable that the fiduciary was both conflicted and acted disloyally. The disloyal conduct must manifest itself in the withholding of material information, engaging in deceptive conduct, or misleading the board. *Id.* The Court also clarified that under this theory, "the board need not be ineffective for a plaintiff to prevail on a breach of the duty of loyalty claim." *Id.*

1. Defendants' alleged conflicts

The parties dispute whether Defendants faced a conflict as to the Merger. Plaintiffs allege that all Defendants were conflicted because they stood to receive payments under the RPIP upon a change of control, were permitted to reinvest some

of their RPIP payments into equity in the post-Merger entity, and, in the case of Loh, Woodrow, and Brenner, would receive post-Merger employment.[155]

The Defendants' payouts under the RPIP pre-dated the Merger. RPIP participants were entitled to immediate payouts upon a change of control in an amount determined by the extent to which the revenue milestones had been met. Milestones fully achieved before the transaction obligated full payment of the award at closing. But even if a milestone had not been fully achieved, RPIP participants would receive a partial payment in a change of control, and the acquirer would still be responsible for any remaining payments if the milestones were achieved after the transaction.[156] At closing, Loh and Bigham each were entitled to receive $10.4 million, Woodrow was entitled to receive $5.8 million, and Brenner and Haskel each were entitled to receive $3.3 million in RPIP awards.[157] In other words, 100% of the first tranche had been reached, and 62.4% of the second tranche had been reached.

Plaintiffs' fraud-on-the-board theory is novel. It is, as they say, "essentially the inverse of the common factual scenario in which fiduciaries seek an early

[155] *Id.* at 30–40.

[156] Compl. ¶ 42.; *see also* Pls.' Answering Br. 10; Defendants' Opening Brief in Support of Their Motion to Dismiss ("Defs.' Opening Br.") (Dkt. 11) at 6.

[157] Compl. ¶ 104.

transaction to facilitate liquidity needs."[158] Plaintiffs assert that rather than tricking the board into approving a quick transaction to generate liquidity, Defendants were supposedly incentivized to "sabotage[] any potential deal for nearly two years" so that the Company could grow NUYZRA sales and increase the Defendants' RPIP payout.[159] But then, according to Plaintiffs, Defendants' scheme simultaneously pushed the Company to the brink of bankruptcy (which would have wiped out the RPIP), and at the last minute, Defendants coerced the Board into closing a deal with an acquirer willing to honor the RPIP's obligations in full.[160] Plaintiffs allege that Defendants steered the sale process to Gurnet Point because it was willing to continue employing Loh, Woordow, and Brenner after the transaction and because all were offered additional upside benefits through the reinvestment of their RPIP payouts into equity in the post-transaction company.[161]

For the purposes of this Opinion, the court assumes that the allegations support a reasonable inference that all of the Defendants were conflicted. But conflict alone is not enough to state a duty of loyalty claim against these Defendants. *See In re Baker Hughes, Inc. Merger Litig.*, 2020 WL 6281427, at *19 (Del. Ch. Oct.

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[158] Pls.' Answering Br. 31–32 (citing *In re Mindbody, Inc.* (*Mindbody I*), 2020 WL 5870084 (Del. Ch. Oct. 2, 2020); *McMullin v. Beran*, 765 A.2d 910 (Del. 2000); and *In re Answers Corp. S'holder Litig.*, 2012 WL 1253072 (Del. Ch. Apr. 11, 2012)).

[159] Pls.' Answering Br. 3; *see also* Compl. ¶¶ 6, 45.

[160] *See* Compl. ¶¶ 7, 45–46, 81.

[161] *See id.* ¶¶ 2, 8–9.

27, 2020) (explaining that whether the defendants "were financially motivated to favor the [m]erger ultimately [was] not the key issue," instead, the key issue was whether the complaint pleaded facts "to support a reasonably conceivable claim that [the officers] tainted the decisionmaking of [the] concededly independent and disinterested directors"); *City of Warren Gen. Empls.' Ret. Sys. v. Roche*, 2020 WL 7023896, at *15 (Del. Ch. Nov. 30, 2020) ("[E]ven assuming the [c]omplaint contained sufficient allegations that [the defendants] suffered from a material conflict of interest . . . the [c]omplaint fail[ed] to allege that [the defendants] breached their fiduciary duty of loyalty by manipulating or deceiving the [b]oard into approving the [b]uyout.").

2. The Complaint lacks well-pleaded allegations that Defendants deceived or withheld material information from the Transaction Committee or the Board.

Plaintiffs allege that Defendants deceived, misled, and withheld material information from the Transaction Committee and the Board, causing the Company to enter into an unfair transaction with an inferior counterparty. If the well-pleaded facts of the Complaint and the reasonable inferences drawn therefrom support that characterization, then the Complaint states a claim for breach of fiduciary duty and requires denial of the motion to dismiss.

"When interacting with the Board, the duty of loyalty requires a fiduciary to act in good faith." *Oracle*, 339 A.3d at 22 (citing *Stone v. Ritter*, 911 A.2d 362,

369–70 (Del. 2006)). "Good faith requires candor with the board." *Id.* The fiduciary must disclose material information to the board. *Id.* at 23; *Haley*, 235 A.3d at 718. Information is material in this context if it is "relevant and of a magnitude to be important to directors in carrying out their fiduciary duty of care in decision making." *Oracle*, 339 A.3d at 23 (quoting *Haley*, 235 A.3d at 718).

Plaintiffs initially focus on management's early discussions with Gurnet Point. Plaintiffs allege that management did not contemporaneously disclose those discussions to the Board or the Transaction Committee because Defendants wanted to delay the sale process.[162] Plaintiffs argue that if management had disclosed those discussions earlier, the Transaction Committee could have reached a better deal at an earlier time.[163] The initial discussions were ultimately disclosed to the Transaction Committee on November 28, 2022[164]—more than six months before the Merger Agreement was signed.[165]

Gurnet Point first contacted Loh on January 11, 2022.[166] On January 24, 2022, Loh and Bostrom met with representatives of Gurnet Point.[167] The Complaint does

[162] *See* Compl. ¶¶ 56–57, 76–80, 84; Pls.' Answering Br. 42–43.

[163] Pls.' Answering Br. 42–43.

[164] Compl. ¶ 84.

[165] *Id.* ¶ 104.

[166] *Id.* ¶ 56.

[167] *Id.*

not allege what was discussed at this initial meeting. A follow-up call occurred on February 3, 2022, to "explore a potential strategic relationship."[168] These communications occurred before the formation of the Transaction Committee in May 2022. For the next several months, Gurnet Point was not in the picture.[169]

On August 11, 2022, "in response to outreach by Gurnet Point," Loh arranged a discussion with Gurnet Point, Woodrow, Brenner, Bostrom, and St. Onge.[170] Plaintiffs note that the Proxy says Gurnet Point "expressed interest in learning more about the Company's business."[171] A few days later, the Company entered into an NDA with Gurnet Point.[172] At the end of August and throughout September, Gurnet Point had access to a data room, and representatives of both entities met several times.[173] These interactions took place six months after the initial contact with Gurnet Point.[174] Although the Complaint alleges the early discussions were not

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[168] *Id*. The discussion was to "explore a potential strategic relationship with [a] portfolio company" of Gurnet Point. *See* Proxy at 25.

[169] *See* Compl. ¶ 76 (alleging the next contact between Defendants and Gurnet Point occurred on August 11, 2022).

[170] *Id.*

[171] *Id*.

[172] *Id*.

[173] *Id.* ¶ 78.

[174] Plaintiffs question whether the discussions in August were authorized by the Transaction Committee. *Id*. ¶ 76. But Plaintiffs allege on June 1, 2022, the Transaction Committee specifically "authorized and directed management and Moelis to explore other potential opportunities." *Id*. ¶ 66.

contemporaneously disclosed to the Transaction Committee or other members of the Board, there are no allegations that Defendants tried to conceal them. Nor do Plaintiffs offer a persuasive argument to suggest these early management discussions with Gurnet Point were material.

Gurnet Point communicated its interest in acquiring the Company on September 28, 2022, after conducting due diligence.[175] When it did so, Gurnet Point informed St. Onge, not Defendants.[176] In response, the Company communicated that it was focusing on short-term strategic priorities.[177] When the Company released disappointing third-quarter earnings two months later, Loh reached out to Gurnet Point to "offer a business update on the Company."[178] At the next Transaction Committee meeting on November 28, 2022, Bigham informed the Transaction Committee of the discussions with Gurnet Point.[179]

Considering the allegations collectively, they do not support a reasonably conceivable inference that Defendants purposely concealed material information from, or intentionally misled, the Transaction Committee or the Board to delay a transaction. *See Macmillan*, 559 A.2d at 1277, 1282–83 (finding that conflicted

[175] *Id.* ¶ 80.

[176] *Id.*

[177] *Id.*

[178] *Id.* ¶ 82.

[179] *Id.* ¶ 84.

managers misled and deceived the board by "deliberately concealing" that they had provided a tip with "vital information" to their favored bidder that enabled the bidder "to prevail in the auction"); *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1069 (Del. Ch. 2004) (observing that if directors were "purposely duped," then "there was fraud on the board"), *aff'd*, 872 A.2d 559 (Del. 2005); *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 119 (Del. Ch. 1999) (finding fraud on the board where a director "[d]eliberately concealed his personal interest in the [t]ransactions and was silent in the face of a duty to disclose that interest to his fellow HMG directors" and "[i]ntended for the HMG [b]oard to rely on his concealment in approving the [t]ransactions."). Nor do the allegations make it reasonably conceivable that the meetings and discussions with Gurnet Point in 2022, all of which were general in nature, were of "a magnitude to be important to directors in carrying out their fiduciary duty of care in decisionmaking." *Haley*, 235 A.3d at 718.

Plaintiffs also argue that Defendants shared information with Gurnet Point in December 2022 that gave it an "unfair tactical advantage" over MannKind and did not disclose it to the Board.[180] Plaintiffs point to the December 14, 2022 meeting among Loh, Woodrow, Brenner, Bostrom, St. Onge, and Gurnet Point during a time when Moelis advised the Company to pause negotiations with MannKind because

[180] Pls.' Answering Br. 43 (quoting *Macmillan*, 559 A2d at 1283).

the Company may be in possession of material nonpublic information concerning NUZYRA.[181] But the Complaint does not allege that management shared any material nonpublic information with Gurnet Point on December 14.

Even assuming Defendants disclosed nonpublic information about the NUZYRA efficacy study to Gurnet Point at that time, the Complaint does not allege that it gave Gurnet Point an unfair advantage over MannKind (which had been receiving confidential Company information since April 2022) or any other potential bidder. At that point, Gurnet Point was seeking a financing partner and did not make an acquisition proposal until February 2023.[182] In any event, the Company released information about the efficacy study results and reengaged MannKind just days later.[183] Plaintiffs do not allege facts or a coherent theory as to how this meeting gave Gurnet Point an unfair tactical advantage in the bidding process at the end of 2022. Plaintiffs speculate that disclosure of this meeting to the Board could have caused the sale process to play out differently, but they fail to explain how so.[184]

The allegations here do not resemble the type of deceitful and misleading conduct present in *Macmillan* or similar cases sustaining claims premised on fraud

[181] Compl. ¶ 85.

[182] *Id*. ¶¶ 87–89, 97.

[183] *Id*. ¶¶ 85–86.

[184] Pls.' Answering Br. 43.

on the board.[185] In *Macmillan*, the board and special committee placed "the entire process in the hands" of a self-interested manager who deliberately advantaged a favored bidder. *Macmillan*, 559 A2d at 1280–82. To skew the bidding process, the manager provided a tip to the favored bidder, revealing "every crucial element," including "both the price and form" of a different bidder's first round bid. *Id.* at 1282–83. The favored bidder placed a nominally higher bid and imposed a "no-shop" requirement as part of its offer. *Id*. at 1283. The Court concluded the "vital information" gave the favored bidder an "unfair tactical advantage" and enabled the favored bidder "to prevail in the auction." *Id.* Unlike *Macmillin*, it is not reasonably conceivable that Gurnet Point obtained or would have obtained any unfair advantage in the bidding process by having received nonpublic information about the NUZYRA efficacy study from Defendants in December 2022.

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[185] *See, e.g.*, *Haley*, 235 A.3d at 723–24 (holding complaint sufficiently alleged a target's CEO and lead negotiator engaged in secret meetings and failed to inform the board that he received a proposed compensation package with potential upside of nearly five times his compensation from the acquirer); *Mindbody I*, 2020 WL 5870084, at *24–25 (holding complaint stated claim for fraud on the board where CEO initiated a sale process, did not disclose interactions with his favored bidder to the board, instructed members of management not to disclose expression of interest to the board, vetoed outreach to bidders, controlled the level of diligence provided to potential bidders, and eliminated bidders from the sale and go-shop process, while simultaneously providing his favored bidder with timing and informational advantages); *In re Columbia Pipeline Gp., Inc. Merger Litig.*, 2021 WL 772562, at *40 (Del. Ch. Mar. 1, 2021) (holding complaint stated claim premised on a fraud on the board where the CEO initiated a sale process without board approval, the CFO provided favored buyer 109 pages of confidential documents and talking points on how it could convince the target board to agree to a deal without putting the target in play, and CEO deceived the board by providing a misleading presentation that convinced the board to grant exclusivity to the favored buyer).

Plaintiffs next point to Loh's statement to Gurnet Point on June 4 that a competing strategic party had "meaningfully increased negotiation efforts."[186] Plaintiffs characterize this communication as a "tip" that encouraged Gurnet Point to sign the Merger Agreement on June 6, which deprived the Board of an opportunity to receive a counteroffer from MannKind.[187]

It is not reasonably conceivable from the allegations of the Complaint that Loh's communication with Gurnet Point on June 4 gives rise to a breach of fiduciary duty. The Complaint does not allege that MannKind was in a position to submit a bid by the June 9, 2023 deadline set by the Transaction Committee, which had been communicated to MannKind on May 31. To the contrary, the Proxy states that MannKind informed the chair of the Transaction Committee on June 1 that MannKind "would not be able to meet the required timeline to provide a binding offer." Proxy at 40.

These key distinctions separate this case from *Macmillan* and from *Firefighters' Pension System of Kansas City, Missouri Trust v. Presidio, Inc.*, 251 A.3d 212 (Del. Ch. 2021), which Plaintiffs also cite. In *Presidio*, the bidder and ultimate buyer had been informed of a competitor's bid, leveraged the tip, outbid its

[186] Compl. ¶ 103; Pls.' Supplemental Br. 14 (discussing Loh's June 4 outreach to Gurnet Point); *see also* Pls.' Answering Br. 43.

[187] Pls.' Supplemental Br. 14; Pls.' Answering Br. 43.

competitor by $0.10 per share, demanded an increase in the termination fee, and required the company to respond within twenty-four hours. *Id*. at 243–46. The board, oblivious of the tip, directed the competing bidder to respond within the tippee's deadline. *Id*. at 245–46. The competing bidder met the deadline, indicating that it could raise its bid by at least $0.50 per share by the original deadline, but informed the company that the new deadline was "unexpected," and it needed more time to conduct diligence before submitting an improved offer, which it promised to deliver before the original deadline. *Id*. at 245. The board, operating on the compressed time frame imposed by the tippee, accepted the tippee's offer, shutting down the process. *Id*. at 245–46. The court concluded that, because of the tip and its concealment from the board, the "rules of the game" had changed, and the board was prevented "from taking action to neutralize the effect of the tip and facilitate an active bidding contest." *Id*. at 269.

Unlike *Presidio*, the Complaint here alleges the Transaction Committee set its own deadline several days *before* Loh's June 4 conversation with Gurnet Point.[188] There are no well-pleaded allegations that Gurnet Point, relying on Loh's alleged "tip," caused the Transaction Committee or the Board to change the rules of the game or prematurely end the sale process. Nor is there any reasonable inference that

[188] Compl. ¶ 103.

it otherwise interfered with the Transaction Committee or the Board's decision-making process. *Cf. Teamsters Loc. 237 Additional Sec. Benefit Fund v. Caruso*, 2021 WL 3883932, at *25 (Del. Ch. Aug. 31, 2021) ("There is also no allegation supporting a reasonable inference that [the defendant] put off any bidder willing to offer a higher price in favor of [the successful bidders]"); *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 194 (Del. Ch. 2007) ("There is no evidence in the record that any bidder was ever put off the hunt by [the defendant CEO] because of his self-interest.").

The Complaint fails to allege well-pleaded facts from which it is reasonably conceivable that any of the Defendants, individually or collectively, withheld material information from the Transaction Committee or the Board or otherwise engaged in deceptive and misleading conduct to support a claim that any of the Defendants breached their fiduciary duties of care or loyalty in connection with the negotiation of the Merger.

3. The Complaint does not allege well-pleaded facts from which it is reasonably conceivable that the Board failed to manage or oversee Defendants' alleged conflicts.

Plaintiffs also argue that the Board, although aware of Defendants' purported conflicts, failed to adequately oversee and manage Defendants' involvement in the

process. Plaintiffs devote only about two full pages of their answering brief to this argument,[189] and then seek to amplify it in their supplemental brief.[190]

Delaware law requires directors to be "active and reasonably informed when overseeing the sale process, including identifying and responding to actual or potential conflicts of interest." *Caruso*, 2021 WL 3883932, at *20. "[T]he conflict must be adequately disclosed to the [b]oard, and the [b]oard must properly oversee and manage the conflict." *Haley*, 235 A.3d at 721 n.69; *see RBC Cap. Mkts., LLC v. Jervis*, 129 A3d 816, 831, 850−57 (Del. 2015) (affirming trial court's findings that the board failed to oversee the special committee, failed to become informed about strategic alternatives and about potential conflicts faced by advisers, and approved a merger without adequate information).

Plaintiffs do not contend that the Board or the Transaction Committee were unaware of Defendants' alleged conflicts. Rather, they complain that Loh and Bigham were given "outsized roles in leading negotiations with counterparties and presenting on pending offers."[191] As the Delaware Supreme Court has explained:

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[189] Pls.' Answering Br. 44–46.

[190] *See* Pls.' Supplemental Br. at 7–11. The court requested supplemental briefing concerning Plaintiffs' fraud-on-the-board theory of liability in light of *Oracle*, 339 A.3d 1, which was issued the day before oral argument. Dkt. 31. Plaintiffs exceeded the scope of the Court's request by advancing new arguments not addressed in their answering brief. *See id*. at 7–11. Those new arguments, however, do not advance the Plaintiffs' position.

[191] Pls.' Answering Br. 45.

"There is nothing inherently wrong with a [b]oard delegating to a conflicted CEO the task of negotiating a transaction." *Haley*, 235 A.3d at 721 n.69.[192]

Although Plaintiffs again invoke *Macmillan*, that case does not help to advance their argument.[193] In *Macmillan*, the board of directors was "torpid, if not supine, in its efforts to establish a truly independent auction." 559 A.2d at 1280. The entire process was placed "in the hands of [the company's chairman and CEO], through [the CEO's] own chosen financial advisors, with little or no board oversight." *Id*. The "board materially contributed" to management's misconduct and "looked with a blind eye." *Id*.

The sale process here was not "put entirely in the hands" of Defendants, and the well-pleaded allegations do not suggest the Board or the Transaction Committee

[192] *See also Caruso*, 2021 WL 3883932, at *22–26 (dismissing claim against conflicted CEO that "played an integral role during the Merger negotiations" because the independent board was aware of his conflicts and conducted adequate oversight); *Wayne Cty. Empls.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *10–11 (Del. Ch. July 24, 2009) (dismissing loyalty claims challenging board's decision to allow two members of the board, who would remain employed by the company post-merger, to conduct negotiations), *aff'd*, 996 A.2d 795 (Del. 2010); *In re OPENLANE*, 2011 WL 4599662, at *5 (Del. Ch. Sept. 30, 2011) (concluding on a motion for a preliminary injunction that the allegedly conflicted CEO that led the negotiations did not "taint the process"); *In re MONY Gp. Inc. S'holder Litig.*, 852 A.2d 9, 20 (Del. Ch. 2004) (concluding on a motion for a preliminary injunction that "the independent Board's reliance on [the CEO] to conduct negotiations was reasonable and well founded," despite that he was entitled to significant change of control payments).

[193] Pls.' Answering Br. 44.

failed to oversee management.[194] The Complaint reflects that the Transaction Committee was actively engaged in the sale process, discussed offers as they were made, decided how to respond, sought to extract a higher price from bidders during the process, set its own deadlines, and worked to keep bidders engaged.[195] The

[194] Plaintiffs make much of Haskel's May 5, 2022, instruction to the Board to refer inquiries from third parties to Bigham, Loh, or the Transaction Committee. *Id.* at 4, 29. But it is not improper to instruct Board members who did not have an active role in the sale process to direct outside inquiries to those who were involved. *See Haley*, 235 A.3d at 721 n.69. The concern is whether the conflicted fiduciaries' conduct disables the board's ability to oversee those negotiations. *See Caruso*, 2021 WL 3883932, at *20. The Complaint does not support that inference.

[195] *See* Compl. ¶ 64 (Transaction Committee "resolved to submit a counterproposal to MannKind"); *id.* (Transaction Committee authorizing Loh to "to contact a party with whom he had a pre-existing relationship to explore strategic possibilities."); *id.* ¶ 66 (Transaction Committee determining Hoffman, rather than Loh and Bigham, should delivery message to MannKind); *id.* (Transaction Committee "authoriz[ing] and direct[ing] management and Moelis "to explore other potential opportunities"); *id.* ¶ 69 (Transaction Committee directing Moelis to communicate to MannKind to increase its proposal); *id.* ¶ 70 (Transaction Committee instructing management "to keep the door open" with MannKind); *id.* ¶ 72 (Transaction Committee deciding to provide Emergent additional diligence materials and seek updated proposals from all interested parties); *id.* ¶ 86 (Transaction Committee instructing Moelis to inform MannKind that its offer undervalued the Company); *id.* ¶ 89 (Transaction Committee evaluating MannKind's proposal and determining the Company would face challenges achieving proposed CVRs); *id.* ¶ 91 (Transaction Committee requesting improved offer from MannKind); *id.* ¶ 93 (Transaction Committee reviewing Gurnet Point counterproposal); *id.* ¶ 96 (Transaction Committee deciding to reengage MannKind); *id.* ¶ 99 (Transaction Committee countering MannKind's proposal); *id.* ¶ 100 (Transaction Committee agreeing to Gurnet Point's "best and final offer" and resolving to commence negotiations of definitive transaction documents); *id.* ¶ 103 (Transaction Committee determining "the Company would agree to engage in final diligence and negotiate definitive documentation," if MannKind increased offer). *See In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 488 (Del. Ch. 2010) (denying preliminary injunction because, among other reasons, the "[b]oard was actively engaged throughout the sale process, hiring investment bankers to seek out bidders, discussing offers as they were made, and seeking to extract a higher price from the bidders that were involved").

Transaction Committee was advised by independent counsel and a financial adviser—Moelis—which was active and involved.[196] The Board also met periodically and received updates on the sale process.[197] When MannKind conditioned an offer on a reduction of the RPIP payments, the Transaction Committee did not "turn a blind eye."[198] For example, two days after receiving MannKind's proposal, the Transaction Committee instructed management not to communicate with MannKind without prior authorization.[199] Loh, in turn, informed MannKind that he would no longer lead their strategic discussions.[200] The Transaction Committee stepped in and handled negotiations with MannKind concerning the RPIP.[201]

Management's prospects for post-Merger employment and reinvesting a portion of their RPIP payments into equity in the post-merger entity were not

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[196] Compl. ¶ 52. Plaintiffs do not contend that Moelis was not independent. Moelis's active involvement further undermines Plaintiffs' position that Defendants hijacked the sale process. *Venhill Ltd. P'ship ex rel. Stallkamp v. Hillman*, 2008 WL 2270488, at *25 (Del. Ch. June 3, 2008) (observing that "outside advisors . . . help check the potential that [a] conflicted party's personal motivations will cause the consummation of a transaction that should have been avoided or, at the very least, been priced much differently").

[197] Compl. ¶¶ 57, 61–62, 72.

[198] Plaintiffs disparage the Transaction Committee as being "independent in name only" (Pls.' Answering Br. 45), but the Complaint contains no well-pleaded allegations challenging the independence of any member of the Transaction Committee.

[199] Compl. ¶ 84.

[200] *Id.* ¶ 87.

[201] *Id.* ¶ 102.

discussed until after Gurnet Point and the Transaction Committee agreed on the terms of the merger consideration.[202] The Transaction Committee and the Board were also aware of both.[203] Thus, the Board was aware and maintained effective oversight of Defendants' conflicts.

In their supplemental brief, Plaintiffs focus on the involvement of some of the Defendants in Transaction Committee meetings.[204] Plaintiffs contend this enabled Defendants to manipulate the Board and Transaction Committee members into delaying a transaction, then favoring Gurnet Point, and, finally, preventing a superior bid. The well-pleaded allegations of the Complaint do not support this argument.

Plaintiffs contend Defendants "convinced," "urged," and "persuaded" the Transaction Committee to take or refrain from taking certain actions during the sale process, but the allegations in the Complaint do not support an inference that Defendants controlled the process or that the Board or the Transaction Committee failed to adequately oversee any real or perceived conflicts.[205]

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[202] *Id.* ¶¶ 100–01.

[203] *Id.* ¶ 92 (Gurnet Point's proposal specifying it was interested in a rollover of management's equity and the RPIP); *id*. ¶ 93 (Transaction Committee reviewing Gurnet Point's proposal). The Merger Agreement also contains a recital stating Gurnet Point's willingness to enter into the Merger Agreement was conditioned on management's agreement to enter into subscription agreements (the "Subscription Agreements"). *See* Proxy Annex A at A-1.

[204] Pls.' Supplemental Br. 7–11.

[205] *Id.* at 7–10.

For example, Plaintiffs allege Bigham and Loh "convinced" the Transaction Committee to reject MannKind's June 5, 2022, proposal by sharing their view that the CVR portion of MannKind's offer was unlikely to be met based on the Company's financial forecasts.[206] The Complaint does not allege that this view was inaccurate or unsupported. Plaintiffs also ignore that, at the same meeting, Moelis came to the same conclusion.[207]

Plaintiffs argue that in July 2022 (almost a year before the Merger Agreement was signed), Loh and Bigham "persuaded" the Transaction Committee to reject Emergent's July 20, 2022, proposal by discussing potential financings that could address the near-term maturity of the Convertible Notes.[208] The Complaint does not allege that the statements were inaccurate or that the Proxy's disclosure that the Company was exploring such refinancing was false.[209]

Plaintiffs contend that Loh and Bigham "convinced" the Transaction Committee to reject MannKind's January 6, 2023 proposal.[210] But the Complaint alleges that the Transaction Committee, on January 8, evaluated MannKind's

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[206] Compl. ¶ 69; *see also* Pls.' Supplemental Br. 8–9.

[207] *See* Defs.' Ex. 15 at 2.

[208] Compl. ¶ 72.

[209] Proxy at 28. Shortly after, Emergent exited discussions due to challenges with its own business. Compl. ¶ 77.

[210] Pls.' Supplemental Br. 9–10.

proposal and "determined it to be lacking given likely challenges to achieving the payment triggers for the CVR."[211] The Transaction Committee also decided it should gauge other bidders' interest while also maintaining engagement with MannKind.[212] Plaintiffs do not allege that Loh and Bigham attended or otherwise participated in that meeting. Still, Plaintiffs argue that the Transaction Committee's rejection of the January 6 proposal should be attributed to Loh's later discussion at the January 13 Transaction Committee meeting, where he shared his optimism about the possibility of the Company refinancing the Convertible Notes.[213] Plaintiffs say the potential refinancing was an "unsubstantiated possibility."[214] But the Complaint does not allege anything about the lack of viability of refinancing the Convertible Notes, how the Transaction Committee and its advisers could have been misled by this discussion, or that Loh's discussion had any effect on the Transaction Committee's decision to reject MannKind's proposal.

Rather, the Complaint attributes the rejection of MannKind's January 6 proposal to the unlikelihood of achieving the CVR portion of the proposal and Defendants' refusal to reduce their RPIP payouts.[215] Defendants' decision not to

[211] Compl. ¶ 89.

[212] *Id.*

[213] Pls.' Supplemental Br. 9–10; Compl. ¶ 90.

[214] Pls.' Supplemental Br. 9.

[215] Compl. ¶¶ 89–91.

surrender their contractual rights at that time did not breach their fiduciary duties. *See Odyssey P'rs, L.P., Odyssey-ABC Ltd. P'ship*, 1996 WL 422377, at *3 (Del. Ch. July 24, 1996) ("[F]iduciary obligation does not require self-sacrifice"); *see also id.* (explaining that the fiduciary obligation "does not necessarily impress its special limitation on legal powers held by one otherwise under a fiduciary duty, when such collateral legal powers do not derive from the circumstances or conditions giving rise to the fiduciary obligation in the first instance."); *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 598 (Del. Ch. 1986) (explaining that Delaware law does not "require that directors or controlling shareholders sacrifice their own financial interest in the enterprise for the sake of the corporation or its minority shareholders.").

Plaintiffs next argue that, on February 22, 2023, Loh and Bigham "urged" the Transaction Committee to enter a deal with Gurnet Point because the Company was struggling financially.[216] But the Complaint specifically alleges that the Company

[216] Pls.' Supplemental Br. 10; Compl. ¶ 93. Plaintiffs argue in their Supplemental Brief that, at a February 22, 2023 Transaction Committee meeting, Loh pushed a sale with Gurnet Point by warning the Committee that the Company "would otherwise have to announce a reduction in force that would make the Company less attractive for a sale going forward." Pls.' Supplemental Br. 10. But the Complaint does not mention anything about a reduction in force or Loh's warning. Instead of relying on allegations in the Complaint, Plaintiffs rely on assertions made by their counsel at oral argument that Loh's warning about a potential reduction in force was "without basis." *See* Pls.' Supplemental Br. 10 n.2. Arguments by counsel in a supplemental brief and at oral argument are no substitute for

was in a dire financial position at that time and recognized the urgency for a transaction.[217] In any event, the Transaction Committee countered Gurnet Point's proposal, reengaged MannKind, and ultimately did not agree to a proposal until months later.[218]

Viewing the allegations collectively, it is not reasonably conceivable that the Transaction Committee or the Board failed to adequately manage management's actual or potential conflicts. The Complaint therefore does not state a claim for breach of fiduciary duty against any of the Defendants. Thus, the Complaint is subject to dismissal if Defendants are able to show compliance with *Corwin*.

C. *Corwin* Cleanses the Merger

"[W]hen 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*, 125 A.3d at 309. The practical effect of applying the business judgment rule in this scenario is dismissal. *In re USG Corp. S'holder Litig.*, 2020 WL 5126671, at *2 (Del. Ch. Aug. 31, 2020), *aff'd sub nom*. *Anderson*

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well-pleaded allegations. *See Akrout v. Jarkoy*, 2018 WL 3361401, at *3 n.23 (Del. Ch. July 10, 2018) (explaining that a *post hoc* attempt to clarify allegations in a complaint during oral argument "cannot be received as a supplement or amendment to the pleading itself"); *see also Gerber v. EPE Hldgs., LLC*, 2013 WL 209658, at *4 n.38 (Del. Ch. Jan. 18, 2013) (noting that briefing in response to a motion to dismiss is not the appropriate vehicle "for expanding claims").

[217] Compl. ¶ 94.

[218] *Id.* ¶¶ 95–96, 100.

v. Leer, 265 A.3d 995 (Del. 2021) (TABLE). Plaintiffs do not allege the vote was coerced. Rather, they contend that *Corwin* cleansing is inapplicable because the stockholder vote was uninformed.[219]

At the pleadings stage, the court considers whether the "complaint, when fairly read, supports a rational inference that material facts were not disclosed or that the disclosed information was otherwise materially misleading." *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018). As the Supreme Court recently confirmed:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. Framed differently, an omitted fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available. But, to be sure, this materiality test does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote.

City of Dearborn Police & Fire Revised Ret. Sys. v. Brookfield Asset Mgmt. Inc., 314 A.3d 1108, 1131 (Del. 2024) (quoting *Morrison*, 191 A.3d at 282–83).

"Partial disclosure, in which some material facts are not disclosed or are presented in an ambiguous, incomplete, or misleading manner, is not sufficient to meet a fiduciary's disclosure obligations." *City of Sarasota Firefighters' Pension Fund v. Inovalon Hldgs., Inc.*, 319 A.3d 271, 304 (Del. 2024) (citation modified).

[219] Pls.' Answering Br. 49–59.

"[O]nce defendants travel[ ] down the road of partial disclosure of the history leading up to the Merger . . . they ha[ve] an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994). Sufficiently alleging one disclosure deficiency can defeat a *Corwin* defense. *Denner*, 2022 WL 1671006, at *19. Plaintiffs allege the Proxy did not disclose material information concerning: (1) management's discussion with bidders; (2) the Transaction Committee's rejection of superior offers; (3) Defendants' active involvement in Transaction Committee meetings; and (4) Defendants' conflicts regarding the RPIP and the sale process. The court addresses them in turn.

1. Details of discussions between Company management and prospective bidders

Plaintiffs allege the Proxy did not adequately disclose, or only partially disclosed, the details of Defendants' discussions with potential purchasers, including whether the RPIP or post-transaction employment were discussed.[220] Plaintiffs also allege the Proxy failed to adequately disclose whether there were "any efforts made by management to cause delay or tilt the process in favor of Gurnet Point."[221] According to Plaintiffs, more detailed descriptions were required.[222]

[220] Compl. ¶¶ 108–12.

[221] *Id.* ¶ 109.

[222] *Id.* ¶ 110.

Plaintiffs focus on the Proxy's disclosure of Loh's discussion with MannKind on November 18, 2022, where MannKind "informed Dr. Loh that [MannKind] was working on an updated proposal for a business combination."[223] Plaintiffs allege the Proxy "omits *whether* Loh discussed the terms of MannKind's upcoming proposal."[224] Plaintiffs argue that it is inferable that Loh discussed the RPIP with MannKind because MannKind's next offer sought a reduction in the RPIP. Plaintiffs also speculate that the alleged conversation must have prompted Loh to restart negotiations with Gurnet Point.

Speculating about whether something happened generally will not support a disclosure claim. *In re Sauer-Danfoss Inc. S'holders Litig*., 65 A.3d 1116, 1132 (Del. Ch. 2011) ("A plaintiff does not state a disclosure claim by asking whether or not something happened."); *see also id*. ("If a disclosure document does not say that the board or its advisors did something, then the reader can infer that it did not happen."). Even if additional details were omitted and Loh did discuss the RPIP with MannKind, the Proxy disclosed the discussions between Loh and MannKind, and between Loh and Gurnet Point.[225] It also disclosed the material terms of MannKind's updated offer, which sought to reduce the RPIP, and that the Company

[223] Proxy at 29.

[224] Compl. ¶ 111 (emphasis added).

[225] Proxy at 29; Compl. ¶¶ 110–11.

could not unilaterally amend the terms of the RPIP.[226] The Proxy further disclosed that the Transaction Committee was informed that management would not be willing to reduce their RPIP payments as MannKind had requested.[227] Thus, the material information regarding these topics was disclosed, and any additional details would not have altered the "total mix" of available information. *Brookfield*, 314 A.3d at 1131; *In re Merge Healthcare Inc*., 2017 WL 395981, at *9 (Del. Ch. Jan. 30, 2017) ("'Fully informed' does not mean infinitely informed.").

Plaintiffs analogize this case to the facts alleged in *In re Xura, Inc., Stockholder Litigation*, 2018 WL 6498677 (Del. Ch. Dec. 10, 2018), where this court held that *Corwin* cleansing did not apply. In *Xura*, the company failed to disclose that the CEO, without board knowledge or approval, communicated about the transaction in private with bidders, tipped off bidders, negotiated price terms, and advised his preferred bidder of terms that the board would accept. *Id*. at *12. The company also failed to disclose that the buyer's offer letters stated it would retain management. *Id*. Nor did the proxy disclose that the CEO's position was in jeopardy absent a transaction. *Id*.

This case is not like *Xura*, where "stockholders were entirely ignorant of the extent to which [the CEO] influenced the negotiations and ultimate terms of the

[226] Proxy at 29, 74–75.

[227] *Id.* at 32.

[t]ransaction." *Id.* at *13. The Proxy disclosed to Paratek stockholders, in detail, management's interest in the RPIP.[228] It also disclosed multiple instances when the RPIP was an item of negotiation or discussion.[229] Likewise, the Proxy disclosed that, in March 2023, the Board was informed that Gurnet Point intended to retain key employees, and the Board informed Gurnet Point it would not permit employee retention discussions until after the parties agreed on the merger consideration.[230] Discussions between Gurnet Point and Loh were disclosed in the Proxy, including those about post-Merger employment.[231] The Proxy also described management's amended employment agreements and reinvestment under the Subscription Agreements.[232]

2. The reasons the Transaction Committee did not accept earlier indications of interest

Plaintiffs allege the Proxy did not adequately explain why the Transaction Committee rejected proposals that Plaintiffs characterize as "superior" and how it

[228] Proxy at 29, 46, 68, 74–76.

[229] *Id.* at 29–33, 36, 38–39.

[230] *Id.* at 34, 38, 44.

[231] *Id.* at 38.

[232] *Id.* at 70, 73, 75–79, 93, 98. The recitals of the Merger Agreement, which was attached to the Proxy, state that Gurnet Point's willingness to enter into the Merger Agreement required certain members of management to enter into the Subscription Agreements. Proxy, Annex A at A-1.

derived its counteroffers.[233] "This court typically is not receptive to these kinds of 'why' or 'tell me more' disclosure claims that criticize the board for failing to explain its motives when making transaction-related decisions." *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *9 (Del. Ch. Mar. 31, 2017). "Delaware law does not require disclosure of a play-by-play of negotiations leading to a transaction or of potential offers that a board has determined were not worth pursuing." *City of Miami Gen. Emps. v. Comstock*, 2016 WL 4464156, at *15 (Del. Ch. Aug. 24, 2016), *aff'd*, 158 A.3d 885 (Del. 2017) (TABLE); *see IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *13 (Del. Ch. Dec. 11, 2017) ("Requiring disclosure of every material event that occurred *and* every decision not to pursue another option would make proxy statements so voluminous that they would be practically useless.") (emphasis in original). There is no dispute that the allegedly superior bids were disclosed to the stockholders. The Proxy fully and fairly disclosed the negotiation process, including each proposal and counterproposal, along with the price terms and structure.[234] The Proxy further

[233] Compl. ¶¶ 113–17.

[234] *See, e.g.*, Proxy at 25 (non-binding proposal from MannKind); *id*. at 26 (Company counter proposal); *id*. (MannKind updated proposal); *id*. (Company updated proposal to MannKind); *id*. at 27 (MannKind counteroffer); *id*. (Hoffman sharing that the Company "would not agree to a transaction at a price lower than $6.00 per share, including a CVR."); *id*. (MannKind "best and final" offer); *id*. at 28 (Party A non-binding indication of interest); *id*. at 29 (MannKind non-binding indication of interest); *id*. at 31 (MannKind revised non-

explained that the Board ultimately considered the benefit of an all-cash consideration transaction as compared to alternatives.[235]

Plaintiffs specifically target the Transaction Committee's counterproposals to MannKind's June 2022 offers.[236] Plaintiffs assert that a more detailed disclosure was required to explain why the Transaction Committee chose to counter at $6.00 and $5.50.[237] An explanation of how and why the Transaction Committee, with the assistance of its concededly independent financial adviser, derived its counteroffers in negotiations that occurred nearly a year before an agreement was reached did not require disclosure. *See Chen v. Howard-Anderson*, 87 A.3d 648, 690 (Del. Ch. 2014) ("Where arm's-length negotiation has resulted in an agreement which fully expresses the terms essential to an understanding by shareholders of the impact of the merger, it is not necessary to describe all the bends and turns in the road which led to that result.") (citation modified). No allegations suggest that the Transaction

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binding proposal); *id*. at 33 (non-binding proposal from Gurnet Point); *id*. (Gurnet Point revised proposal); *id*. at 34 (Company written counterproposal to Gurnet Point); *id*. at 37 (Gurnet Point revised proposal); *id*. (Company verbal counterproposal to Gurnet Point); *id.* (Gurnet Point verbal counteroffer); *id*. at 38 (MannKind updated proposal); *id*. at 39 (MannKind revised verbal proposal).

[235] *Id*. at 41. *Compare In re Pattern Energy Grp. Inc. S'holders Litig*., 2021 WL 1812674 (Del. Ch. May 6, 2021) (finding proxy materially misleading because, among other reasons, "[t]he [p]roxy's disclosure [did] not state the monetary value of the July offer, and most importantly, it does not disclose or suggest that [the competing bidder] offered even more value in August, September, and October 2019.").

[236] Pls.' Answering Br. 53–55; Compl. ¶¶ 67–69.

[237] Compl. ¶ 114.

Committee's counters were anything other than attempts to secure a more favorable proposal, and an additional explanation as to "why" specific price terms were chosen was not required. *See Merge Healthcare*, 2017 WL 395981, at *13 ("Put more simply, asking 'why' does not state a meritorious disclosure claim under our law.") (citation modified).

Plaintiffs also grumble that the Proxy did not disclose why the Company did not wait for a final response from MannKind before entering into the Merger Agreement.[238] But the Proxy discloses this information. As the negotiations were reaching a conclusion, the Company was also considering announcing a reduction in force, which Gurnet Point indicated could potentially reduce its interest in proceeding with the potential acquisition of the Company.[239] The Transaction Committee considered the timing risks and informed MannKind of the specific terms it would accept, provided a draft merger agreement in the form it had delivered to Gurnet Point, and imposed a response deadline of June 9, 2023.[240] MannKind responded that it would not be able to meet the deadline.[241] The Transaction Committee and the Board then moved forward with Gurnet Point. The Proxy fully disclosed the decision not to continue with MannKind, and nothing more was

[238] Pls.' Answering Br. 54

[239] Proxy at 39.

[240] *Id.*

[241] *Id.* at 40.

required. *See David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *12 (Del. Ch. June 27, 2008) (explaining where a board "has declined to continue negotiations with a potential acquirer because it has not received an offer worth pursuing, disclosure is not required.").

3. Defendants' involvement in the Transaction Committee's meetings

Plaintiffs allege the Proxy failed to disclose the extent to which Defendants participated in Transaction Committee meetings.[242] Plaintiffs argue the Proxy should have identified Defendants' attendance at each Transaction Committee meeting. Our law does not require this level of granularity.

van der Fluit v. Yates, 2017 WL 5953514 (Del. Ch. Nov. 30, 2017), which Plaintiffs cite, does not dictate otherwise. In *Yates*, the plaintiff challenged Oracle's acquisition of Opower, Inc. Opower did not appoint an independent committee to oversee the deal process. *Id*. at *8. The proxy disclosures merely indicated that various individuals were involved in the deal process but failed to identify any of the individuals "involved at key stages of the negotiations." *Id*. at *8. Instead, the proxy only described "a broad range of 'members of . . . management,' 'representative(s)' of different organizations, and 'advisors' involved at each stage of the transaction process." *Id*. at *8 & n.113. The court found that the proxy's vague descriptions

[242] *See* Compl. ¶¶ 116–17.

did not allow stockholders to determine whether the allegedly conflicted Opower CEO and president, each of whom received post-transaction employment and the conversion of unvested options, negotiated the transaction, or whether other independent members of the board conducted the negotiations. *Id*. at *8.

This case has no resemblance to the facts of *Yates*. The *Yates* proxy failed to identify at all the individuals involved in the sale process. *Id*. By contrast, the Paratek Proxy disclosed the source of Defendants' alleged conflicts: their RPIP interests, post-Merger employment, and reinvestment. The Proxy disclosed that Loh and Bigham attended Transaction Committee meetings[243] and were involved in meetings and discussions with interested parties during the process.[244] It also identifies by name the members of management and the Transaction Committee who had discussions with Gurnet Point and MannKind.[245] There are no well-pleaded

[243] Proxy at 26, 30, 31–32.

[244] *Id.* at 27–33, 35–43.

[245] *See, e.g*., *id.* at 26 ("On May 13, 2022, the CEO of [MannKind] spoke with Dr. Loh and Mr. Bigham."); *id*. ("On May 16, 2022, Dr. Loh, Mr. Woodrow, Randy Brenner . . . Mr. Bostrom and Steve St. Onge . . . met virtually with management of [MannKind.]"); *id.* at 27 ("On May 24, 2022, the CEO of [MannKind] communicated to Dr. Loh" about valuation.); *id*. ("On June 2, 2022, Mr. Hoffmann spoke with the director of [MannKind]."); *id.* at 28 ("On August 4, 2022, . . . the CEO of [MannKind] contacted Dr. Loh."); *id*. ("On August 5, 2022, the CEO of [MannKind and Dr. Loh met."); *id*. ("On August 11, 2022, Dr. Loh, Mr. Woodrow, Mr. Brenner, Dr. St. Onge and Mr. Bostrom conducted a discussion with Gurnet Point."); *id.* at 29 ("On September 28, 2022, Mr. Steckler indicated during a discussion with Dr. St. Onge that Gurnet Point may be interested in an acquisition."); *id*. ("On November 14, 2022, . . . the Chief Executive Officer

allegations that any of the Defendants controlled the Transaction Committee, controlled the merger negotiations, or misled the Board or the Transaction Committee. That the Proxy did not identify by name each member of management who attended each Transaction Committee meeting is not what the holding in *Yates* stands for or what our law requires. This alleged disclosure deficiency fails.

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of [MannKind] contacted Dr. Loh."); *id*. ("On November 17, 2022, Dr. Loh participated in a call with the CEO of [MannKind]."); *id*. ("On November 21, 2022, Dr. Loh contacted Gurnet Point."); *id*. at 30 ("On December 14, 2022, Dr. Loh, Mr. Woodrow, Mr. Brenner, Dr. St. Onge and Mr. Bostrom met with Gurnet Point."); *id*. at 31 ("On January 3, 2023, with the authorization of Dr. Stein . . . Dr. Loh contacted the Chief Executive Officer of [MannKind.]"); *id*. ("On January 4, 2023, Gurnet Point informed Dr. St. Onge that it had identified . . . a potential equity partner . . ."); *id*. at 32 ("On January 10, 2023, Dr. Loh met with Gurnet Point."); *id*. ("On January 27, 2023, Dr. Loh, Mr. Woodrow, Mr. Brenner, Dr. St. Onge and Mr. Brenner met with Gurnet Point."); *id*. at 33 ("On February 15, 2023, Dr. Loh and Dr. St. Onge met with Gurnet Point."); *id*. ("On February 21, 2023, Gurnet Point conveyed to Dr. Loh and Dr. St. Onge a revised proposal."); *id*. ("On February 22, 2023, Mr. Woodrow, Mr. Brenner and Dr. St. Onge spoke with [MannKind]."); *id* ("On February 23, 2023, Gurnet Point discussed the February 21 proposal with Dr. Loh and Dr. St. Onge."); *id*. at 35 ("On March 31, 2023, Dr. Loh and Mr. Bigham had a call with Gurnet Point . . ."); *id*. ("On April 14, 2023, Dr. Loh, Mr. Bigham, Dr. Stein, Dr. St. Onge met with Gurnet Point."); *id*. at 36 ("On April 21, 2023, Dr. Loh, Dr. Stein, Dr. St. Onge, and Mr. Bigham provided Gurnet Point with an update on the Company's financial performance . . . "); *id*. ("On May 10, 2023, Mr. Brenner, Mr. Woodrow, Mr. Bostrom and Dr. St. Onge met with members of [MannKind] management."); *id*. at 37 ("On May 18, 2023, Dr. Loh and Gurnet Point had a telephonic discussion."); *id*. ("On May 22, 2023, Gurnet Point and Novo Holdings provided a verbal counterproposal to Dr. Stein."); *id*. at 38 ("[O]n May 25, 2023, Dr. Loh and Gurnet Point discussed the status of the transaction process."); *id*. ("On May 25, 2023, [MannKind] communicated an updated proposal to Dr. Stein."); *id*. at 40 ("On June 1, 2023, [MannKind] informed Dr. Stein that it would not be able to meet the required timeline to provide a binding offer."); *id*. (On June 1, 2023, "Dr. Loh spoke with Gurnet Point."); *id*. ("[O]n June 4, 2023, Dr. Loh had a telephone call with Gurnet Point.").

4. Defendants' alleged conflicts concerning the RPIP and sale process

Plaintiffs argue that the Proxy did not adequately disclose "Defendants' favoritism toward Gurnet Point" as "influenced by the RPIP and their negotiations."[246] The Complaint does not allege a particular instance when Defendants engaged in discussions with Gurnet Point about the RPIP or post-Merger employment that was omitted from the Proxy. Plaintiffs disparage what they call the "surface-level descriptions of Defendants' private conversations with potential buyers,"[247] and seek the inference that a conversation must have occurred and should have been disclosed.

Plaintiffs' argument relies on *Morrison*. In *Morrison*, the company's founder and a significant stockholder, Ray Berry, was alleged to have had several undisclosed conversations with the buyer, Apollo. 191 A.3d at 277–78. The plaintiff also alleged that Berry reached an agreement to roll over his equity interest with Apollo early in the deal process, which he did not disclose to the board. *Id*. at 277. Not only did the proxy fail to disclose the agreement, but it also suggested no agreement existed. *Id*. The stockholders were also not informed that Berry divulged to the board of directors his clear preference for Apollo, his reluctance to consider

[246] Pls.' Answering Br. 56–57.

[247] Compl. ¶ 10.

bids from other purchasers, and his willingness to only roll over his equity with Apollo. *Id*. at 280–81. The Delaware Supreme Court determined that these omissions were material because "a reasonable stockholder would want to know [that] level of commitment to a potential purchaser." *Id*. at 283–84.

Morrison bears no meaningful resemblance to this case. Unlike in *Morrison*, Plaintiffs do not point to any event or agreement that was not disclosed or was falsely disclosed. *See id.* at 281 (falsely disclosing that the founder was "willing to consider an equity rollover with a party other than Apollo," which was contradicted by internal emails). Plaintiffs' speculation that the Proxy may have omitted discussions is not enough. The court "cannot infer the existence of undisclosed, intra-process . . . discussions between a target executive and an acquiror from speculation." *Teamsters Loc. 677 Health Servs. & Ins. Plan v. Martell*, 2023 WL 1370852, at *19 (Del. Ch. Jan. 31, 2023) (requiring "something more than speculation" that employment discussions occurred to support a disclosure claim). Here, the meetings between Loh and Gurnet Point and the substance of the discussions were disclosed.[248] Gurnet Point's desire to retain management and its conditioning of the Merger on management's agreement on go-forward employment were also disclosed.[249] The Proxy also disclosed Gurnet Point's requirement that management

[248] Proxy at 25.

[249] *Id.* at 25, 38.

reinvest its RPIP proceeds in the post-Merger company,[250] along with the terms of Defendants' Subscription Agreements.[251] The Proxy did not omit or misleadingly describe the RPIP terms, Defendants' interest in the RPIP, or how the RPIP and its resulting payouts were treated in the Merger. Nothing more was required.

The Complaint does not allege well-pleaded facts upon which it is reasonably conceivable that the stockholder vote on the Merger was either coerced or uninformed. Plaintiffs have failed to plead facts to refute the application of *Corwin*. Therefore, the business judgment rule applies to the court's review of the Merger. Where *Corwin* applies, a version of the business judgment rule applies under which the only remaining claim could be one for waste. *Martell*, 2023 WL 1370852, at *9 ("Absent waste, *Corwin*'s version of the business judgment rule has been described as 'irrebuttable.'"); *see also Singh v. Attenborough*, 137 A.3d 151, 152 (Del. 2016) (ORDER) ("[T]he vestigial waste exception has long had little real-world relevance, because . . . stockholders would be unlikely to approve a transaction that is wasteful." (citations omitted)). Plaintiffs have not attempted to plead a claim for waste. Therefore, the Complaint must be dismissed.

[250] *Id.* at 33, 38; *id*. Annex A at A-1.

[251] Proxy at 41, 70, 73–79, 93.

III. CONCLUSION

Defendants' motion to dismiss under Rule 12(b)(6) is **GRANTED**, and the Complaint is dismissed with prejudice.