DELAWARE CORPORATE LAW BULLETIN

MFW DEFENSE AVAILABLE DESPITE CONTROL STOCKHOLDER'S REFUSAL TO NEGOTIATE WITH CREDIBLE COMPETING BIDDER

Chancery Court determines that approval process and related proxy disclosures for freeze-out merger were adequate to justify pleading-stage dismissal of minority stockholder challengE

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INTRODUCTION

In *Smart Local Unions and Councils Pension Fund v. BridgeBio Pharma, Inc.*, C.A. No. 2021-1030-PAF (Del. Ch. December 29, 2022) ("*BridgeBio Pharma*"), the Delaware Court of Chancery ("*Chancery Court*") examined the negotiation and approval process underlying a control stockholder's buyout of minority shares *via* a freeze-out merger. As usually is the case in control stockholder-related litigation in Delaware, the key gating issue for Vice Chancellor Paul A. Fioravanti, Jr. was selection of the appropriate standard of judicial review.

I.LEGAL BACKGROUND

Traditionally, the Chancery Court reviewed challenges to control stockholder-related transactions under the entire fairness standard—the most exacting standard of review. In this context, the control stockholder bears the heavy burden of establishing the transaction's entire fairness. *See* Robert S. Reder, *MFW Framework Requires Majority-of-Minority Stockholder Approval Even When Controller Structures Transaction to Avoid Statutory Stockholder Vote*, 75 Vand. L. Rev. En Banc 157 (2022).

The Delaware Supreme Court uprooted this tradition in *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*") when it "approved a framework that would alter the standard of review in a conflicted controlling stockholder transaction from entire fairness to the more lenient business judgment standard." Under this framework (now commonly referred to as the "*MFW Framework*"), six conditions must be satisfied before a Delaware court will permit the favorable shift from entire fairness to business judgment:

(i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders;

(ii) the Special Committee is independent;

(iii) the Special Committee is empowered to freely select its own advisors and to say no definitively;
(iv) the Special Committee meets its duty of care in negotiating a fair price;
(v) the vote of the minority is informed; and
(vi) there is no coercion of the minority.

Pleading-stage dismissal generally follows when the *MFW* Framework is satisfied. *See* Robert S. Reder & Lauren Messonnier Meyers, *Delaware Supreme Court Affirms Pleading-Stage Dismissal of Control Stockholder Buyout Litigation*, 69 Vand. L. Rev. En Banc 17 (2016).

Although *MFW* was decided in the context of a freeze-out merger, several subsequent decisions extended application of the *MFW* Framework to other corporate transactions benefitting control stockholders. *See* Robert S. Reder & Alexandra Bakalar, *Chancery Court Indicates Willingness to Extend M&F to Compensation Award to Controlling Stockholder*, 73 Vand. L. Rev. En Banc 61 (2020). Last year, the Chancery Court utilized the *MFW* Framework when examining the approval process for a corporate charter amendment structured to help a majority stockholder retain voting control. *See* Robert S. Reder & Kathryn A. Fish, *Application of MFW Framework Defeats Challenge to Corporate Charter Amendment Favoring Control Stockholder*, 76 Vand. L. Rev. En Banc 111 (2023).

* * *

Control stockholder-led buyouts rarely face challenges from competing bidders. This should come as no surprise: usually, the control stockholder's twin advantages of a large equity position and access to non-public information will discourage third-party bids. In *BridgeBio Pharma*, however, a determined third-party bidder with significant resources and industry expertise emerged to challenge, and, ultimately, outbid the control stockholder. When the control stockholder nevertheless "just said no," the third party withdrew and the buyout was completed. A former minority stockholder challenged the transaction, arguing that, by effectively blocking the competing bid, the control stockholder forfeited its right to invoke the *MFW* defense. Vice Chancellor Fioravanti found this argument to be "without merit." Further, upon determining that the *MFW* Framework's six conditions were satisfied, the Vice Chancellor applied the business judgment standard in granting defendants' pleading-stage motion to dismiss.

II. FACTUAL BACKGROUND

Eidos Therapeutics, Inc. ("*Eidos*" or "*Company*") "is a development-stage biopharmaceutical company focused on developing a product to treat transthyretin amyloidosis, a progressive condition that can lead to heart failure and other life-threatening conditions." Its principal product is a drug "known as acoramidis or AG10" ("*AG10*"). In 2017, BridgeBio Pharma, Inc. ("*BridgeBio*"), a "publicly traded" company engaged in the development and commercialization of "treatments for genetic diseases," purchased a majority stake in then privately-owned Eidos for twenty-seven million dollars. Neil Kumar ("*Kumar*"), who served as CEO and a director of BridgeBio, assumed similar positions at Eidos. Two other members of Eidos's six-person board of directors ("*Board*") also held positions with BridgeBio.

As AG10 "continued to progress through the initial stages of testing," in mid-2018, Eidos conducted an initial public offering ("*IPO*") that "reduc[ed] BridgeBio's majority ownership to 54.8%." By 2019, "rapid clinical successes set the stage for a sale of Eidos."

A. BridgeBio's Initial Efforts to Buy Out the Minority

"[J]ust fourteen months after the IPO," BridgeBio offered to buy out Eidos's minority stockholders *via* a merger transaction "at an exchange rate of 1.30 BridgeBio shares for each Eidos share." To discourage competition, BridgeBio advised the Board that "it intended to retain control of Eidos and was unwilling to participate in any alternative transactions." In response, the Board formed a special committee of independent directors ("*2019 Special Committee*") to evaluate the offer. The Special Committee retained Centerview Partners LLC ("*Centerview*") as its financial advisor. However, after three months of unsuccessful negotiations with the 2019 Special Committee, BridgeBio "publicly announced it was no longer pursuing a merger with Eidos. Thereafter, the 2019 Special Committee was dissolved."

B. GSK Enters the Picture

The following year, "global pharma giant GlaxoSmithKline plc" ("*GSK*") "set its sights on Eidos." On August 16, 2020, GSK proposed a licensing arrangement calling for "$1 billion in upfront payments to Eidos and up to $700 million in milestone payments . . . ." At that time, Eidos "had a market capitalization of around $1.6 million."

Nevertheless, "shortly after" receipt, the Board rejected GSK's proposal.

C. BridgeBio Renews its Interest

Faced with GSK's interest, Kumar advised the Board of "BridgeBio's renewed interest in acquiring Eidos." The Board promptly formed a new special committee ("*Special Committee*") with "authority to retain advisers and to consider any transaction proposal *and any alternatives* to any such proposal." [emphasis added] The Special Committee reengaged Centerview, which advised that, "given the 'volatility and limited trading history of BridgeBio's common stock,' " the Special Committee should seek an all-cash transaction. In response to a Special Committee inquiry, BridgeBio reiterated "it had no interest in selling its stake . . . ." On this basis, the Special Committee concluded "it was pointless to reach out to any potential third-party buyers" to compete with BridgeBio.

On October 2, BridgeBio formally proposed a buyout structured to grant minority stockholders the option to exchange their Eidos shares "for either 1.55 shares of BridgeBio common stock or $61.38 in cash." To comply with the *MFW* Framework, BridgeBio conditioned the buyout on a majority-of-the-minority vote of Company stockholders unaffiliated with BridgeBio ("*Majority-of-the-Minority Vote*"). The Special Committee rejected this offer, as well as two subsequent proposals, on the ground they "undervalued the Company." Then, in response to a Special Committee "counteroffer of 1.88 shares of BridgeBio common stock per Eidos share or . . . $74.45" in cash, BridgeBio delivered its "'best and final' offer of 1.85 shares of BridgeBio common stock or $73.26 cash per share, up to a cap of $175 million." This proposal "implied a total Eidos equity value . . . of $2.9 billion (representing $1.1 billion of value to the minority stockholders of Eidos)." After negotiation of a merger agreement and Centerview's delivery of a fairness opinion, the Special Committee recommended the buyout to the Board. On October 4, the Board (with Kumar absent and the other two BridgeBio principals recused) approved the transaction. The two companies signed a merger agreement the next day and then publicly announced the transaction.

D. BridgeBio Rebuffs New Offers from GSK

After BridgeBio and Eidos went public with their transaction, GSK reemerged with a topping bid. On November 23, GSK issued letters to both companies "proposing an acquisition of all outstanding

shares of Eidos for $120 per share in cash, to be finalized within two weeks." GSK also indicated it "would be willing to explore an acquisition of the Eidos shares held by Eidos stockholders other than BridgeBio at a significant premium to the BridgeBio transaction." Although "the Special Committee concluded that the GSK proposal would be more financially favorable to Eidos stockholders" and then sought to negotiate with GSK, BridgeBio reconfirmed its "disinterest in selling its Eidos stock . . . ."

One week later, "GSK informed the Special Committee that it was prepared to pay more than $120 per share if it could engage directly with BridgeBio to explore a transaction at a higher price." GSK "also stated that it was prepared to pay $110 per share for the public minority shares," and "separately raised the prospect of a possible collaboration agreement relating to AG10 . . . with an upfront payment of $2.2 to $2.4 billion." After additional back and forth, BridgeBio took several steps to throw cold water on GSK's efforts. First, on December 11, BridgeBio amended Securities and Exchange Commission ("*SEC*") filings to "disclose[ ] GSK's proposals and interactions with the Special Committee and BridgeBio . . . ." This amendment, which referred to GSK only as "Company C," labelled Company C "[an un]suitable collaboration partner for" AG10. GSK "did not take kindly" to BridgeBio's SEC filing. BridgeBio then "sent a letter to GSK stating that BridgeBio was not interested in pursuing any of GSK's proposals." Despite encouragement from the Special Committee to reengage, "GSK did not respond with a revised proposal." *Bloomberg* subsequently "identified GSK as the unidentified 'Company C' . . . ."

With GSK out of the picture, on December 15, Eidos and BridgeBio filed definitive proxy materials ("*Proxy*") with the SEC. At a special meeting of Company stockholders held on January 19, "80% of all outstanding minority shares . . . voted to approve the merger." The transaction closed on January 26.

E. Litigation Ensues

Ten months later, a former Eidos stockholder ("*Plaintiff*") challenged the transaction in Chancery Court, purportedly on behalf of all minority stockholders. Plaintiff charged that BridgeBio, as control stockholder, on the one hand, and the three BridgeBio-affiliated Board members, on the other, breached their fiduciary duties to the minority stockholders in orchestrating the merger. Anticipating an *MFW* defense, Plaintiff claimed the *MFW* Framework was unavailable, due both to BridgeBio's steadfast rejection of GSK's

interest, as well as the Special Committee's resulting inability to fully engage with GSK. BridgeBio also argued, in the alternative, that even if Vice Chancellor Fioravanti allowed BridgeBio and the three conflicted directors (collectively, "*Defendants*") to assert an *MFW* defense, the merger process failed to satisfy four of the *MFW* Framework's six elements. In *BridgeBio Pharma*, the Vice Chancellor rejected all of Plaintiff's arguments and then granted pleading-stage dismissal to Defendants.

III. VICE CHANCELLOR FIORAVANTI'S ANALYSIS

At the outset, Vice Chancellor Fioravanti explained that "[w]hen a controlling stockholder acquires the minority shares that it does not already own, the transaction is presumptively subject to the entire fairness standard." He added, however, that satisfaction of the *MFW* Framework's six conditions will "alter the standard of review . . . from entire fairness to the more lenient business judgment standard."

In considering the merits of Defendants' motion to dismiss, the Vice Chancellor focused, *first*, on Plaintiff's argument that the *MFW* defense was unavailable and, *second*, on Plaintiff's alternate contention that the merger's negotiation and approval process failed the *MFW* Framework's *third*, *fourth*, *fifth*, and *sixth* conditions.

A. Availability of MFW Framework

Plaintiff offered a novel "threshold argument" in support of its claim that the *MFW* defense was unavailable to Defendants: "*MFW* was never intended to apply to the facts of this case." By "cobbl[ing] together quotations from opinions applying the *MFW* framework," Vice Chancellor Fioravanti noted, Plaintiff was arguing, in effect, that "*MFW* cannot apply where a competing bidder makes an offer that is substantially higher than that offered by the controller and the controller refuses to sell control."

Vice Chancellor Fioravanti found this argument to be "without merit." Not only is "a controlling stockholder . . . not required to accept a sale to a third party or give up its control," but even more to the point, "*MFW* may be applied even where a competing bidder emerges with a higher offer." Actually, this was the fact pattern before the *MFW* Court. Thus, given the absence of any "legal authority that would foreclose" application "of the *MFW* framework in this case," the Vice Chancellor turned to Plaintiff's alternate argument.

B. Satisfaction of MFW Conditions

While conceding satisfaction of the first two conditions of the *MFW* Framework—(i) establishment of an independent special committee of the target board of directors to consider the transaction and (ii) approval of the transaction by a Majority-of-the-Minority Vote—Plaintiff contended that the third through sixth conditions had not been satisfied. Doubling down on its already-rejected threshold argument, Plaintiff based this contention principally on BridgeBio's refusal to engage with GSK, or at least to allow the Special Committee to do so. According to Vice Chancellor Fioravanti, Plaintiff failed to "plead a reasonably conceivable set of facts showing that any or all of those enumerated conditions did not exist . . . ."

1. Was the Special Committee Duly Empowered?

Under the *MFW* Framework's *third condition*, the Special Committee "must be empowered to select its own advisers" and "have the power to say no" to the control stockholder's proposed buyout. This condition was not satisfied, Plaintiff argued, because "the Special Committee . . . negotiated a transaction with BridgeBio instead of engaging GSK." For the Vice Chancellor, this argument, insofar as it pertained "to the quality of the [Special] Committee's work, not whether it was adequately empowered," was misplaced. "To be sure," he emphasized, "BridgeBio's refusal to sell its controlling stake or support the GSK proposal does not mean that the Special Committee lacked the power to reject a transaction with the controller."

2. Did the Special Committee Meet its Duty of Care?

Under the *MFW* Framework's *fourth condition*, the Special Committee must "meet[ ] its duty of care in negotiating a fair price." Neither "[d]isagreeing with the special committee's strategy" nor "questioning the sufficiency of the price" will suffice to establish a failure of this condition. Rather, "the standard of review for measuring compliance with the duty of care is whether the complaint has alleged facts supporting a reasonably conceivable inference that the directors were grossly negligent." This heightened standard "is only satisfied by conduct that really requires recklessness."

According to Plaintiff, the Special Committee breached its duty of care, on the one hand, by failing "'to meaningfully consider viable strategic alternatives' from GSK" and, on the other, by "having become 'disempowered' due to BridgeBio's 'affirmatively inserting itself into

the process.' " The Vice Chancellor noted, once again, that "Plaintiff's disagreement with the Special Committee's tactics and strategy are insufficient to establish gross negligence." To the contrary, he explained, the fact that the Special Committee

- "retained competent, independent legal, financial, and industry advisers,"
- "met twenty-four times over the course of four months, including nine times after the signing of the Merger Agreement,"
- "rejected BridgeBio's initial offer and two subsequent offers before making a counterproposal,"
- "continued to explore with BridgeBio whether it would be interested in a sale to GSK,"
- "arranged for BridgeBio and GSK to meet to discuss GSK's proposals, including a potential collaboration agreement," and
- "indicated to GSK a willingness to continue their discussions,"

served to "undercut[ ] any possible inference of gross negligence." Moreover, the fact "[t]hat GSK's acquisition proposals reflected a substantial premium over the merger price does not establish a lack of due care."

3. Were Stockholders Fully Informed?

In support of its argument that the *MFW* Framework's *fifth condition* was not satisfied, Plaintiff claimed "the Proxy was false, misleading, or contained material omissions about four topics . . . ." In addressing this contention, Vice Chancellor Fioravanti explained that "[t]he essential question is whether there is a substantial likelihood that disclosure of the omitted fact 'would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.' " On the other hand, he cautioned against disclosures "so voluminous that they would be practically useless." Against this backdrop, the Vice Chancellor turned to the four Proxy topics cited by Plaintiff.

a. Initial GSK collaboration proposal

First, Plaintiff challenged the lack of any reference to the AG10 licensing arrangement proposed by GSK in mid-August 2020, shortly before BridgeBio rekindled its interest in acquiring the minority shares. According to the Vice Chancellor, "[i]n light of the disclosure of

GSK's more recent proposals, disclosure of the terms of GSK's August [2020] collaboration proposal would not have 'significantly altered the "total mix" of information available' to stockholders when deciding how to vote on the merger."

b. Disclosures regarding GSK

Second, Plaintiff complained "that the failure to identify GSK as 'Company C' and the disclosure of BridgeBio's view as to GSK's capabilities as a collaboration partner are materially misleading or false." In rebutting this claim, the Vice Chancellor noted that "proxy references to unsuccessful bidders by an anonymous code name is typical." Further, he explained, the Proxy's description of "Company C as 'a large international pharmaceuticals company' " was sufficient to "effectively communicate[ ] to Eidos stockholders that Company C's proposals were not only *bona fide*, but were capable of delivering greater value to the minority public shares." Thus, while perhaps "helpful," the Vice Chancellor observed, "such supplemental disclosures would not have significantly altered the total mix of information available to" Company stockholders.

c. Alternative transactions with GSK

Third, Plaintiff criticized the omission from the Proxy "that 'GSK was willing to consider potential alternative transactions that could have been accomplished without BridgeBio's involvement or approval.' " The Vice Chancellor rejected this contention, explaining "[t]here is no dispute that stockholders were provided with detailed descriptions of GSK's November and December 2020 proposals and the Special Committee's responses." Moreover, "additional disclosure that GSK had expressed interest in a potential, unexpressed, revised proposal . . . that did not require BridgeBio's approval would not have significantly altered the total mix of information made available to Eidos stockholders."

d. GSK offer price

Fourth, Plaintiff argued, "the Proxy should have disclosed the price that GSK was willing to pay to acquire the Company." The Vice Chancellor recognized "no disclosure claim here . . . ." Further, he observed, "[t]he fundamental flaw in Plaintiff's argument is that the board is only required to disclose 'information within the board's control.' " However, "[t]here is no allegation that the Board or Special

Committee knew how much GSK was willing to increase its $120 per share offer before GSK walked away."

4. Was the Stockholder Vote Coerced?

In response to Plaintiff's contention that the *MFW* Framework's *fifth condition* was not satisfied, Vice Chancellor Fioravanti explained that for a vote to be judged uncoerced, stockholders must "have been permitted to exercise their franchise free of undue external pressure created by the fiduciary that distracts them from the merits of the decision under consideration." Plaintiff claimed that BridgeBio's failure to engage with GSK "meant that a deal with BridgeBio was the only viable option, with the remaining alternative being 'a risky and suboptimal independent launch of [AG10].' " This, according to Plaintiff, constituted a case of "situational coercion."

According to Vice Chancellor Fioravanti, "[s]ituational coercion arises when the status quo is so unattractive that it prevents a stockholder vote from operating as a clear endorsement of a transaction." The Vice Chancellor recognized none of the earmarks of "situational coercion" in the facts before him:

- Company stockholders "had other acceptable alternatives to a deal with BridgeBio,"
- Eidos was not "financially distressed,"
- BridgeBio's buyout "presented a premium offer to Eidos stockholders,"
- "Eidos was nearing the end of the development process for a potentially profitable pharmaceutical product, AG10,"
- "Eidos stockholders may also have chosen to go it alone," and
- GSK's collaboration proposal for AG10 "would require no permission or approval by BridgeBio."

In sum, "[d]espite BridgeBio's refusal to sell its shares, which effectively blocked another acquiror from purchasing a majority of the Company, realistic alternatives existed in the absence of approval" of the BridgeBio buyout. As such, "the vote of the minority stockholders was informed and uncoerced."

CONCLUSION

While *BridgeBio Pharma* does not expand the applicability of the *MFW* defense—control stockholder-led buyouts are the staple of

decisions applying the *MFW* Framework—the emergence of GSK as a credible, deep-pocketed competing bidder gave Plaintiff an opportunity to try to poke a hole in Defendants' *MFW* defense. In this connection, Plaintiff argued that the roadblocks established by BridgeBio to deflect GSK's various proposals rendered the *MFW* Framework unavailable or, alternatively, precluded satisfaction of various elements of the *MFW* Framework. In roundly rejecting Plaintiff's arguments, Vice Chancellor Fioravanti clearly articulated that a control stockholder was not precluded from invoking, and ultimately satisfying, the *MFW* Framework solely because it refused to consider a third-party bid competing with its own buyout effort.