IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NEIL D. ROSS, on behalf of himself and all others similarly situated,	:	
Plaintiff,	:	
v	:	C. A. No. 2019-0822-AGB
LINEAGE CELL THERAPEUTICS, INC., f/k/a BIOTIME, INC., BROADWOOD CAPITAL, INC., BROADWOOD PARTNERS, L.P., NEAL C. BRADSHER, MICHAEL H. MULROY, DON M. BAILEY, ALFRED D. KINGSLEY, RICHARD T. LEBUHN, ANDREW ARNO, STEPHEN L. CARTT, and ADITYA MOHANTY,	:	
Defendants.	:	

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, September 21, 2020
11:00 a.m.

- - -

BEFORE: HON. ANDRE G. BOUCHARD, Chancellor

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TELEPHONIC RULINGS OF THE COURT ON DEFENDANTS' MOTIONS TO DISMISS

CHANCERY COURT REPORTERS
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THE COURT: Good morning, Counsel. This is the Chancellor on the line. May I please have appearances for the record, starting with counsel for the plaintiff?

MR. LONG: Good morning, Your Honor. May it please the Court, this is Brian Long from Rigrodsky & Long on behalf of the plaintiff. I've also got with me on the line Carl Stine and Adam Blander from the Wolf Popper firm.

THE COURT: Thank you. By the way, before I go to defendants, let me confirm we have a court reporter on the line?

THE COURT REPORTER: Good morning, Your Honor. It's Karen.

THE COURT: Thank you, Karen. Appreciate that.

And who do we have on the line for the defendants?

MR. MICHELETTI: Your Honor, Ed Micheletti from Skadden Arps on behalf of the director defendants. And with me today is my colleague Bonnie David from the Wilmington office, and my partners Peter Morrison and Virginia Milstead from the Los Angeles office of Skadden.

THE COURT: Thank you, Mr. Micheletti.

MR. MEASLEY: Good morning, Your Honor. Mac Measley from Morris Nichols on behalf of Lineage Cell Therapeutics, Inc. With me on the line, Koji Fukumura and Pete Adams, and Chase Leavitt from Lineage Cell.

MR. ATHEY: Good morning, Your Honor. Clayton Athey of Prickett Jones & Elliott for the Broadwood defendants and Neal Bradsher. With me on the line is Elizabeth Wang of my office, as well as Jack Yoskowitz and Laura Miller of Seward & Kissel.

THE COURT: Anyone else?

(No response)

THE COURT: Thank you. I don't know if my assistant informed you or not, but I asked you to get on the line today because I want to give you a ruling on the motion to dismiss. This is the most efficient way for me to get a ruling to you in a timely fashion, given the plethora of other matters before the Court.

This will take probably about 30 minutes, just so everybody can plan. And, as I usually do, I'll give you sort of the bottom line up front, and then I'm going to explain my reasons.

Before the Court are three motions to dismiss four claims asserted in a verified complaint that was filed by plaintiff Neil Ross on behalf of a class of stockholders of Asterias Biotherapeutics, Inc. For simplicity, I'm going to refer to these three motions collectively as one motion to dismiss.

For the reasons I will explain, I'm going to grant in part and deny in part the motion to dismiss as to Count I, deny the motion as to Count II, and grant the motion as to Counts III and IV of the complaint.

I'm going to begin by providing some background to this action. On November 7, 2018, the board of directors of Asterias entered into a merger agreement with Lineage Cell Therapeutics, Inc., which was formerly known as BioTime, Inc. At that time, BioTime owned approximately 40 percent of Asterias' common stock.

In the merger agreement, BioTime agreed to acquire all of the outstanding common stock of Asterias that it did not already own in a stock-for-stock merger with an exchange ratio of 0.71 BioTime shares for each share of Asterias.

The merger closed on March 8, 2019.

When the merger was approved, the Asterias board consisted of nine directors. Seven of those individuals are named as defendants in this action, namely, Arno, Bailey, Cartt, Kingsley, LeBuhn, Mohanty, and Mulroy. The other two directors, Ricciardi and Scher, are not named as individual defendants in this case.

I will refer to the seven individuals who are named as defendants here as the "director defendants." The remaining two, as I just indicated, Ricciardi and Scher, are conceded to have been independent and are not named as defendants.

Four members of the board -- Arno, Bailey, Cartt, and Ricciardi -- served on a special committee that was formed to negotiate the merger and make a recommendation to Asterias' board.

In addition to BioTime and the seven directors, the complaint named as defendants Broadwood Capital, Inc., Broadwood Partners, L.P., and Neal Bradsher, Broadwood Capital's president. I will refer to these three parties at times collectively as "Broadwood."

Before the closing of the merger, Broadwood owned 9.8 percent of Asterias' stock and

23.8 percent of BioTime's outstanding stock.

The complaint asserts four claims. Count I asserts that the director defendants breached their fiduciary duties in connection with the merger. Count II asserts that BioTime breached its fiduciary duty as a controlling stockholder of Asterias. Count III asserts that BioTime and Broadwood, acting in concert with each other, breached their fiduciary duties as a control group. Count IV asserts, in the alternative, if BioTime and/or Broadwood are found not to owe fiduciary obligations, that they aided and abetted the director defendants' breach of fiduciary duties.

All of the defendants moved to dismiss the Complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim for relief. In addition, Broadwood moved to dismiss the complaint with respect to Broadwood Partners and Bradsher under Court of Chancery Rule 12(b)(2) for lack of personal jurisdiction.

Under Court of Chancery Rule 12(b)(6), dismissal is appropriate only when the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible to proof.

The Court will accept all well-pled allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff.

I'm going to start by addressing Counts II and III, because both present a threshold issue bearing on the standard of review for the merger, namely, whether the complaint pleads facts supporting the application of the entire fairness standard based on the presence of a controlling stockholder or a control group that stood on both sides of the merger, rather than the business judgment rule that ordinarily would apply to a stock-for-stock merger.

As I just mentioned, Count II asserts that BioTime breached its fiduciary duty as a controlling stockholder of Asterias. To be more specific, Count II asserts that BioTime possessed a combination of stock voting power and managerial authority to exercise *de facto* control over Asterias, which allowed it to engineer a conflicted transaction that was unfair to the other stockholders of Asterias.

Under Delaware law, a stockholder is a controller only if it owns more than 50 percent of the voting power of a corporation or owns less than

50 percent of the voting power of the corporation but exercises control over the business affairs of the corporation.

This case, of course, falls into the second category, in which case -- and I'm now quoting from Vice Chancellor Laster's recent decision in *Voigt v. Metcalf* -- "A plaintiff can plead that a defendant had the ability to exercise actual control by alleging facts that support a reasonable inference of either ... control over the corporation's business and affairs in general or ... control over the corporation specifically for purposes of the challenged transaction."

"To plead that the requisite degree of control exists generally, a plaintiff may allege facts supporting a reasonable inference that a defendant or group of defendants exercised sufficient influence 'that they, as a practical matter, are no differently situated than if they had majority voting control.'"

"To plead that the requisite degree of control existed for purposes of a particular transaction or decision, a plaintiff does not have [to] make such a pervasive showing."

That's also a quote from *Voigt v.*

Metcalf.

Before turning to the factual allegations in the complaint relevant to analyzing whether it is reasonably conceivable that BioTime was a controller, I want to emphasize that this determination is not a cookie-cutter exercise that turns on a particular level of stock ownership, although that is certainly an important consideration. Rather, the analysis turns on the overall constellation of well-pled facts that exists in each case.

To illustrate this point, this court has granted motions to dismiss in cases challenging transactions with alleged controllers where a stockholder held 33.5 percent, 39.5 percent, and 44 percent of the target's stock. Those are respectively the *Rouse*, *Sea-Land*, and *Superior Vision* cases.

By contrast, this court has denied motions to dismiss challenging transactions with alleged controllers where a stockholder held 34.8 percent and as little as 22.1 percent of the target stock. Those are the *Voigt* and *Tesla* cases.

Turning to the factual allegations of

the complaint here, Ross alleges that BioTime owned approximately 40 percent of Asterias' common stock before the merger. BioTime, in its opening brief, represents that the ownership level actually was 38.9 percent at that time.

This level of ownership is significant for purposes of alleging control as a general matter. As Vice Chancellor Laster explained in *Voigt*, various studies show that stockholder "meetings typically attract participation from just under 80 percent of the outstanding shares," in which case "anything over 40 percent of the voting power is sufficient to prevail" at the meeting, assuming the standard for taking action is a majority of the shares present and entitled to vote.

The Court went on to explain, based on the same assumption, that "if [a] holder of a 35 percent block favors a particular outcome at a meeting, then the block holder will win as long as holders of 1-in-7 shares votes the same way," and "the opponent must garner over 90 percent of the unaffiliated shares to win."

A 38.9 percent block of shares takes on particular significance in this case, given the

alleged facts in paragraph 38 of the complaint that voter turnout at Asterias likely would be low because Asterias has a small float and a broad retail stockholder base.

Indeed, it is alleged that these considerations over low voter turnout caused the special committee to express concern that conditioning the merger on a majority of the minority vote would introduce deal risk. That appears at paragraph 38 of the complaint. That concern was well-founded, as only approximately 62 percent of Asterias' outstanding shares voted in favor of the merger. Those figures appear at paragraph 96 of the complaint.

Notably, if you back out BioTime's 38.9 percent position, that means only 23.1 percent of the rest of Asterias' outstanding shares voted in favor of the merger. And if you back out BioTime's 38.9 percent position, as well as Broadwood's 9.8 interest in Asterias -- which I will discuss further in a moment -- only about 13.3 percent of the rest of the shares voted in favor of the merger.

According to the vote tabulations in an 8-K submitted with the director defendants' brief, approximately 1.1 million shares voted against the

merger with only approximately 55,000 shares abstaining. Thus, the approval percentages I just mentioned, when you back out BioTime or you back out BioTime and Broadwood together, would not change much if one were to calculate them in terms of the votes cast as opposed to the votes in favor.

Two other pled facts further support the inference that a 38.9 percent block of Asterias afforded BioTime control as a general matter. First, as alleged at paragraph 33 of the complaint, Asterias' 2017 10-K, which was filed in March 2018, acknowledges that BioTime "has the voting power to significantly impact any matter that requires shareholder approval." The 10-K goes on to state, based on its level of voting power and BioTime's relationship with several of the directors on Asterias' board that, "BioTime has significant influence over our business operations and capital-raising activities and, therefore, BioTime could cause corporate action to be taken even if the interests of BioTime conflict with the interest of our other shareholders. This concentration of voting power could have the effect of deterring or preventing institutional investor interest in Asterias or a change in control that might be beneficial to our

other stockholders."

Second, the complaint alleges at paragraph 38 that Raymond James, the special committee's own financial advisor, identified BioTime as a controlling stockholder in a slide it prepared of M&A deals from 2015 to 2018. While this allegation by itself would not be sufficient to support the inference that BioTime was a controller, it is a telling indication of marketplace reality that should be considered in the mix.

Taking into account all of the allegations I've discussed together and drawing all reasonable inferences in plaintiff's favor, as I must at this stage of the case, it is reasonably conceivable, in my opinion, that BioTime was a controller of Asterias as a general matter.

Focusing specifically on the merger, the complaint alleges additional facts indicative of BioTime's ability to exert control with respect to the merger itself.

Specifically, the complaint alleges that Broadwood, which owned 9.8 percent of Asterias' common stock and 23.8 percent of BioTime stock, was incentivized to support the merger due to its

significantly larger ownership interest in BioTime and the allegedly unfair consideration offered to Asterias' stockholder in the merger, which necessarily would make the transaction attractive to BioTime and its stockholders.

When combined with BioTime's 38.9 percent share ownership in Asterias, Broadwood's support for the merger would essentially clinch securing the vote of a majority of Asterias' outstanding shares to approve the merger.

In sum, whether looking at the issue of control from the perspective of general control or control with respect to the challenged transaction, it is reasonably conceivable from the facts pled in the complaint that BioTime would be deemed a controller. Given this, and given that BioTime was on both sides of the merger, the entire fairness standard would apply to the merger. Given, furthermore, the complaint's allegations challenging the fairness of the merger consideration, Count II states a claim for relief.

Count III asserts a fiduciary duty claim against BioTime and Broadwood acting in concert and together as a group. Ross contends "it is

reasonably conceivable that Broadwood formed a control group with BioTime." I disagree.

Under Delaware law, a control group exists when stockholders are "connected in some legally significant way ... to work together toward a shared goal," such as "by contract, common ownership, agreement, or other arrangement." That's a quote from our Supreme Court's decision in *Sheldon v. Pinto Technology Ventures*.

As previously discussed, it is reasonably conceivable that Broadwood's interests were aligned with BioTime in the merger, given Broadwood's relative ownership stake in each corporation and the alleged unfairness of the merger. But it is well-established that "parallel interests alone are insufficient as a matter of law to support the inference that the shareholders were part of a control group." That's a quote from the *Hansen* case.

Ross argues that Broadwood is essentially an investment affiliate of BioTime. The complaint does not allege facts to suggest, however, that Broadwood's investments in BioTime and Asterias were coordinated with BioTime or were part of a long-term investment strategy with BioTime, nor does

the complaint allege they held themselves out as a group to the public or the Securities & Exchange Commission.

Putting Broadwood's position in Asterias aside, the only parallel investment activity alleged in the complaint is a single private placement offering in February 2015 in which Broadwood Partners participated alongside one former BioTime director and an unnamed third party. This allegation does not come close, in my view, to the type of long-standing coordinated investment history necessary to support a reasonable inference of a control group.

By comparison, for example, *Hansen* involved a 21-year investing history with the controller that involved seven different companies. And *Garfield v. BlackRock Mortgage Ventures* involved founding sponsors of a company who shared a ten-year investment history with no gaps.

Ross alleges that Bradsher successfully managed to get Broadwood senior vice president, defendant LeBuhn, a seat on the Asterias board, and that the fact that BioTime and Broadwood kept their collective holdings to just several fraction points under 50.01 percent of Asterias makes

it reasonably conceivable that these two entities did so consciously, in order to attempt to preclude a finding that they constituted a majority stockholder group.

The first allegation is conclusory and speculative. But even if Bradsher did have a hand in getting LeBuhn on the Asterias board when he joined it in 2014 -- which may create conflict of interest issues as I will address -- that action would not support a reasonable inference that BioTime and Broadwood formed a legally significant connection to work towards a shared goal.

The assertion that there was some form of agreement with BioTime to stay fraction points under 50.01 percent ownership is odd, given that Delaware law recognizes that a controller could hold less than 50 percent of voting power of a corporation. In any event, this allegation also is conclusory and speculative. Absent from the complaint are any details concerning when Broadwood acquired its interest in Asterias or the circumstances under which that occurred vis-a-vis BioTime to support such an assertion.

In sum, the complaint fails to

adequately plead facts that would support a reasonable inference that BioTime and Broadwood constituted a control group. Accordingly, the motion to dismiss as to Count III will be granted.

I'm now turning to Count I, which asserts a fiduciary duty claim against the director defendants in connection with their approval of the merger.

Working from the assumption that the complaint adequately pleads that BioTime was Asterias' controlling stockholder and that the entire fairness standard applies, the director defendants advance essentially two legal theories for dismissing Count I as to them. The first is based on the principle of abstention, and the second is brought under *Cornerstone*.

The first line of argument concerns Kingsley and Mulroy who plainly were conflicted with respect to the merger because they were serving simultaneously on the boards of BioTime and Asterias. Nonetheless, they seek dismissal on the theory that neither played a role in recommending the transaction.

Under Delaware law, as I discussed in my recent *Coty* decision, "a director can avoid

liability for an interested transaction by totally abstaining from any participation in the transaction." The inquiry into whether a director has done so is highly fact intensive, which is why abstention defenses are not usually resolved on a pleading-stage motion. I will address the allegations against Mulroy and Kingsley separately.

The complaint acknowledges that Mulroy recused himself from the board vote on the merger, but it goes on to allege that Mulroy participated in a number of events concerning Asterias' consideration of the merger.

Those allegations include the following: In July 2018, Mulroy presented to the special committee a summary of the due diligence conducted by Asterias and BioTime and made a presentation concerning Raymond James' capabilities to act as a financial advisor to the special committee.

In October 2018, Mulroy met with the special committee on at least three occasions to discuss, among other things, BioTime's exchange ratio offer, deal protections, and a majority of the minority provision.

In November 2018, Mulroy met with the

special committee and evaluated BioTime's 0.71 exchange rate offer. A few days later, Mulroy provided the special committee with a list of potential go-shop parties.

These allegations, which appear at paragraphs 58, 64, 69, 71, 77, 79 of the complaint are more than sufficient to demonstrate that Mulroy did not totally abstain from any participation in the transaction.

With respect to Kingsley, the complaint acknowledges that he also recused himself from the board vote on the merger, but, unlike Mulroy, does not identify Kingsley by name as participating in the merger negotiations.

Ross argues that while the proxy's background of the merger section does not specifically identify Kingsley as a participant during the merger discussions, that is not conclusive of his absence from them because there are numerous references in the proxy to the full Asterias board meeting to discuss the merger. I agree.

To that end, paragraph 66 of the complaint alleges that the full board met with Raymond James on October 10th, 2018, and received an update

from the special committee regarding the status of the merger negotiations. The reasonable inference of this allegation is that Kingsley participated in that meeting.

Additionally, page 52 of the proxy -- which is cited throughout the complaint -- states the follows concerning the November 7, 2018, meeting of the board during which the merger was approved: "Thereafter, representatives of Raymond James presented to the Asterias board regarding the fairness opinion rendered to the Asterias special committee earlier in the day and its view that the exchange ratio was fair. The Asterias board discussed these matters with representatives of Raymond James and the other participants at the meeting. Following this discussion, and based in part on the unanimous recommendation of the special committee, the Asterias board (other than Alfred D. Kingsley and Michael H. Mulroy, who recused themselves from the vote of the Asterias board) [approved the merger]."

The reasonable inference of this disclosure -- which is strikingly similar to the same situation I addressed in *Coty* in denying a motion to dismiss -- is that Kingsley and Mulroy both

participated in crucial discussions that occurred immediately before the other members of the board voted to approve the merger.

In short, the allegations of the complaint and statements in the proxy referencing the involvement of the full Asterias board at various points in the process leading to the merger are sufficient to support an inference that Kingsley and Mulroy did not totally abstain from any participation in the transaction.

For the reasons I've explained, the motion to dismiss Count I as to Mulroy and Kingsley will be denied.

I'm now turning to the director defendants' second legal theory for dismissal which is based on the existence of a Section 102(b)(7) provision in Asterias' certificate of incorporation and our Supreme Court's decision in *Cornerstone*.

There -- and I'm now referring to *Cornerstone* -- the Supreme Court held, "When a director is protected by an exculpatory charter provision, a plaintiff can survive a motion to dismiss by that director defendant by pleading facts supporting a rational inference that the director

harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith."

Plaintiff argues as to each of the five remaining director defendants that it is reasonably conceivable they lack independence from BioTime and/or acted in bad faith.

Starting with the issue of independence, Ross makes a blanket argument that all of the director defendants labored with the understanding that they were being considered for director positions in a post-merger company and thus were not independent.

This court has rejected this theory as a basis to find the existence of a conflict of interest, including then-Vice Chancellor Steele's decision in *Krim v. ProNet, Inc.* Consistent with that precedent, and absent additional facts relevant to evaluating the significance of a board seat to any particular director, I'm not persuaded that the potential of obtaining a seat on the board of the post-merger entity created a conflict of interest or impugns the independence of any of the director

defendants *per se*.

Focusing on directors LeBuhn and Mohanty, Ross provides a reasonably conceivable basis to question their independence so as to negate application of *Cornerstone* as to them.

According to the complaint, BioTime appointed LeBuhn as a director of Asterias in April of 2014, where he served until the closing of the merger. LeBuhn also served as senior vice president at Broadwood Capital, which is the general partner of Broadwood Partners, L.P., since June 2016.

Thus, it is reasonable to infer that LeBuhn was a subordinate of Bradsher, who was the president of Broadwood Capital and was on the BioTime board throughout LeBuhn's tenure on the Asterias board.

Given that dynamic and given that Broadwood allegedly had an economic incentive to favor BioTime over Asterias in the merger, the complaint supports a rational inference that LeBuhn acted to advance the self-interest of an entity -- namely Broadwood and, indirectly, BioTime -- from which he could not be presumed to act independently.

Thus, the motion to dismiss Count I

will be denied as to LeBuhn.

Mohanty served as a director of Asterias from June 2016 until the closing of the merger. He also served, according to paragraph 34 of the complaint, as BioTime's chief executive officer from October 2014 to September 2018 and as a BioTime director from March 2016 to September 2018.

Although Mohanty was not a BioTime officer or director when the Asterias board approved the merger in November 2018, the complaint alleges that he was serving as a dual fiduciary of BioTime and Asterias for several months while negotiations over the merger with BioTime were ongoing at Asterias.

To be more specific, the complaint alleges that Mohanty told Mulroy that BioTime was considering a potential transaction with Asterias on May 14, 2018, and that BioTime submitted a letter to Asterias on June 6, 2018, indicating its desire to discuss the potential strategic transaction.

The complaint also alleges that on June 20th, 2018, the board resolved to form the special committee because of the conflicts that Mohanty, along with Mulroy and Kingsley, faced at the time because of their positions at BioTime. Mohanty

did not resign from his positions at BioTime for more than two months after that point in time.

This court has found that past service as a director or officer of a corporation does not necessarily mean that one could not exercise independent judgment when the interests of such corporation are at issue.

Here, however, the overlap of Mohanty's service as a director of BioTime and Asterias for several months during the merger negotiations, and the fact that he was not just a director but was BioTime's CEO when it formulated and delivered its indication of interest to pursue a strategic transaction, support a rational inference that he acted to advance the interests of an entity from which he could not be presumed to act independently by participating in the merger process and ultimately voting to approve the merger as a director of Asterias.

With respect to the remaining director defendants -- namely Arno, Bailey, and Cartt -- Ross advances essentially three arguments. The first one challenges the independence of these three individuals. The second two arguments assert they

acted in bad faith.

Ross challenges Arno's independence based on his service as a director of OncoCyte, which is described as an affiliate of BioTime, and based on his status as an employee of an investment bank called Chardan Capital Markets LLC, which participated in financings for BioTime and OncoCyte in 2017 and 2018, respectively.

These allegations are insufficient. The complaint does not allege that BioTime controlled OncoCyte, which undercuts the suggestion that Arno was beholden to BioTime. The complaint also provides no details concerning the amount of fees Chardan received in connection with the financing and whether or not they benefited Arno personally.

Ross challenges Bailey's independence based on his service as a director of OncoCyte, which ended in November of 2017. This allegation is even weaker than the insufficient allegation made against Arno concerning OncoCyte.

Ross also alleges Bailey lacked independence from BioTime because he served as the president and CEO of another biotech company from November 2007 to August 2014, where he was colleagues

with several individuals who would later become directors of BioTime. This allegation also fails.

As Chancellor Chandler stated in *In re Dow Chemical Company Derivative Litigation*, "That directors of one company are also colleagues at another does not mean that they will not or cannot exercise their own business judgment with regard to the disputed transaction." Nothing in the allegations of the complaint here convinces me otherwise with respect to Bailey.

Finally, Ross challenges Cartt's independence because he served as a BioTime director from November 2014 until February 2016, before joining the Asterias board and before discussions regarding the merger first arose. In my opinion, this past service by itself is insufficient to support a rational inference that Cartt could not exercise independent judgment in considering the merger.

I'm now turning to Ross's contention that Arno, Bailey, and Cartt may not be dismissed on the theory they acted in bad faith. To prevail on this theory, Ross would need to show that these individuals "knowingly and completely failed to undertake their responsibilities" in connection with

the merger. That comes from the *Lyondell* case.

Ross articulated two different theories of bad faith which he contends applies to all of the director defendants equally. First, Ross contends that the director defendants acted in bad faith based on various decisions they made during the sale process. Specifically, he alleges that they declined to push for a majority of the minority provision, delegated considerable negotiating authority to Mulroy, retained Raymond James as an advisor despite its allegedly lucrative past engagements for BioTime, declined to ask Raymond James whether the AgeX trade-up was economically justified, and approved an exchange ratio reflecting a value that was multiples apart from analysts' expectations.

The reference to AgeX, as I glean from the complaint and plaintiff's brief, concerned BioTime's desire to distribute a majority of its ownership interest in AgeX to BioTime stockholders before the merger.

In my opinion, considered together, the various criticisms I've just recited reflect second-guessing of various judgments the directors made during the sale process and do not support a

rational inference that the director defendants consciously disregarded their fiduciary duties -- with the emphasis being on the word "consciously" -- or that the price achieved was so far beyond the bounds of reasonable judgment that it seemed inexplicable on any grounds other than bad faith.

Second, Ross argues that the director defendants acted in bad faith by approving and disseminating a misleading proxy. Ross points to six alleged defects in the proxy. The materiality of each of these alleged defects appears doubtful but, in any event, they collectivity do not support a rational inference that the director defendants knowingly and completely failed to undertake their responsibilities with respect to the proxy.

The first two alleged defects in the proxy concern minor differences between the proxy and board minutes. Specifically, Ross alleges that the proxy states that the special committee determined that the 0.71 exchange ratio was the best offer BioTime would offer -- even though no such determination is reflected in the minutes -- and that the proxy states the special committee retained Dentons as its legal advisor after confirming it had

no substantial relationship with BioTime, when the minutes reflect no such confirmation.

As this court stated in *Brown v. Perrette*, "the proxy is not a record of what took place in the board meetings and where the board reached roughly the same conclusion, albeit expressed somewhat differently in the minutes ... the discrepancy is *de minimis* and immaterial." That is the case here as well, in my view.

The third alleged defect is that the proxy fails to disclose Mulroy's opinion to the special committee that the premium reflected in BioTime's 0.64 exchange ratio offer was too low. Significantly, the exchange ratio to which Ross refers was not the final deal price; rather, it was a nonbinding proposal that was negotiated upward by the special committee.

Thus, the allegation here is entirely different than the facts of *Appel v. Berkman*, on which plaintiff relies, where a proxy was found to be materially misleading because it did not disclose that the corporation's founder and chairman abstained from voting on a transaction because he was disappointed with the final price.

The fourth alleged defect is the proxy failed to disclose BioTime's controlling stockholder status. It is questionable whether this statement would have altered the total mix of information, given that the proxy did disclose that BioTime has the ability to and continues to exercise significant influence over Asterias.

The fifth alleged defect is that the proxy failed to disclose that the special committee rejected a majority of the minority provision. As a general matter, however, corporations are not required to disclose the absence of provisions from a merger agreement.

The sixth alleged defect is that the proxy failed to disclose that, from its inception, the special committee members expected at least one of them would join the post-merger entity. Even if this is accurate, the materiality of this information is open to question in my view.

As I noted before, that BioTime might ask one or more of the directors of the special committee to serve on the board of a post-merger entity generally has not been deemed sufficient, by itself, to impugn the independence of directors who

might receive such an offer.

Finally, to repeat, even if one or more of these alleged defects arguably was material, the important point is that these allegations, when viewed collectively, do not support a rational inference that the director defendants knowingly and completely failed to undertake the responsibilities with respect to the proxy.

Thus, Ross's allegations regarding the proxy are not sufficient to support a reasonable inference that Arno, Bailey, or Cartt acted in bad faith. More generally, for all the reasons I discussed, Count I fails to state a claim against Arno, Bailey, and Cartt.

Finally, this brings me to Count IV of the complaint, where it is asserted that BioTime and Broadwood aided and abetted the breaches of fiduciary duty committed by the director defendants. This claim is bought in the alternative, to the extent it is determined that BioTime or Broadwood owed no fiduciary duty to Asterias' stockholders.

Under Delaware law, a claim for aiding and abetting a breach of fiduciary duty includes four elements: the existing of a fiduciary relationship, a

breach of the fiduciary duty, knowing participation in the breach by the nonfiduciary defendants, and damages proximately caused by the breach.

Because I have found that the complaint states a claim for relief against BioTime for breach of fiduciary duty as Asterias' stockholder, I do not need to address these allegations as they relate to BioTime and will dismiss Count IV as to BioTime. That dismissal will be without prejudice, however, in the event that defendants are able, after taking discovery, to disprove that BioTime was a controlling stockholder.

Turning to Broadwood, Ross devotes a single paragraph in its brief to the issue arguing that Broadwood "formed a group with BioTime and had its highest ranking employees as directors on each side of the transaction who obviously interacted with each other ... and it cannot seriously be denied that Broadwood, a longtime Asterias investor, understood that the director defendants' failure to insist on a majority of the minority provision guaranteed approval for the merger."

This argument is long on rhetoric and speculation, but fails for the basic reason that Ross

does not point to a single factual allegation in the complaint that supports a reasonable inference that Broadwood knowingly participated in a breach of fiduciary duty committed by the director defendants in their consideration and approval of the merger.

So, for those reasons, the motion to dismiss Count IV will be granted with prejudice as to Broadwood, but without prejudice as to BioTime.

Because Ross fails to state a claim against Broadwood under Court of Chancery Rule 12(b)(6), the Court will not reach the issues of personal jurisdiction as to Broadwood Partners and Bradsher.

That concludes my ruling. I believe there are forms of order for each of the three motions that were filed that I can utilize to document the conclusion of this ruling formally in a order -- or three orders. And I'll do that after the call.

Does anybody have any questions for me?

MR. MICHELETTI: Your Honor, this is Ed Micheletti. No, no questions from me.

THE COURT: All right.

Anyone else?

MR. MEASLEY: This is Mac Measley. No questions from me, Your Honor.

MR. LONG: And none from plaintiffs. This is Brian Long. Thank you, Your Honor.

MR. ATHEY: And, Your Honor, this is Clayton Athey. No questions.

THE COURT: Thank you, Counsel, for your patience so that I could go through this. I'm a little bit up against it this month for what I have due, and I wanted to get this to you as promptly as I could.

Have a good day.

COUNSEL: Thank you, Your Honor.

(Proceedings concluded at 11:44 a.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Merit Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 37 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 23rd day of September, 2020.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter