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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

| IN RE: TRANSKARYOTIC THERAPIES, INC. | REDACTED PUBLIC VERSION<br><br>Consolidated<br>Civil Action No. 2776-CC |
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# REPLY BRIEF OF DEFENDANTS JONATHAN S. LEFF AND RODMAN W. MOORHEAD, III IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT

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**TABLE OF CONTENTS**

PRELIMINARY STATEMENT ..... 1

ARGUMENT ..... 3

I. LEFF AND MOORHEAD DID NOT VIOLATE THEIR DUTY OF LOYALTY ..... 3

A. Leff and Moorhead Did Not Have a Disabling Conflict of Interest ..... 3

1. Warburg Did Not Decide to Sell TKT On the Cheap Through an "M&A Exit". ..... 3

2. Warburg Had No Reason to Want to Sell TKT on the Cheap. ..... 9

B. Plaintiffs Cannot Show Disloyalty by Moorhead. ..... 13

C. Leff's Actions Are Evidence of Diligence, Not Disloyalty. ..... 15

1. Leff's Questioning of Management and Its Advisors Was In Furtherance, Not Dereliction, Of His Directorial Duties ..... 15

2. Leff's Actions Relating to the Proposed Zuma Transaction Were Focused Entirely on Promoting Shareholder Value ..... 16

3. Leff's Efforts to Structure and Negotiate the Best Possible Transaction Reflected His Concern For Shareholder Value ..... 21

4. Leff's Efforts to Solicit Support for the Board-Approved Merger Agreement Were Entirely Proper ..... 23

II. LEFF AND MOORHEAD ARE ENTITLED TO BE "FULLY PROTECTED" UNDER SECTION 141(E). ..... 25

III. LEFF AND MOORHEAD ARE NOT LIABLE FOR ANY BREACH OF THEIR DUTY OF DISCLOSURE ..... 27

CONCLUSION ..... 30

**TABLE OF AUTHORITIES**

**CASES** **Page(s)**

*Aronson v. Lewis*,
473 A.2d 805 (Del. 1984) ....................15

*ATR-KIM Eng Fin. Corp. v. Araneta*,
No. Civ. A. 489-N, 2006 WL 3783520 (Del. Ch. Dec. 21, 2006) ....................14

*In re Best Lock Corp. S'holder Litig.*,
845 A.2d 1057 (Del. Ch. 2001) ....................29

*Brehm v. Eisner*,
746 A.2d 244 (Del. 2000) ....................25

*Cinerama, Inc. v. Technicolor, Inc.*,
663 A.2d 1134 (Del. Ch. 1994) ....................25

*In re CompuCom Sys., Inc. S'holders Litig.*,
No. Civ. A. 499-N, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005) ....................12

*Goodwin v. Live Entm't, Inc.*,
No. Civ. A. 15765, 1999 WL 64265 (Del. Ch. Jan. 25, 1999) ....................3

*Henry v. Nanticoke Surgical Associates, P.A.*,
931 A.2d 460 (Del. 2007) ....................6

*Hewlett v. Hewlett-Packard Co.*,
No. Civ. A. 19513-NC, 2002 WL 818091 (Del. Ch. Apr. 30, 2002) ....................24

*Hill Stores Co. v. Bozic*,
769 A.2d 88 (Del. Ch. 2000) ....................25

*In re Lukens Inc. S'holders Litig.*,
757 A.2d 720 (Del. Ch. 1999) ....................27, 28

*In re MONY Group, Inc. S'holder Litig.*,
853 A.2d 661 (Del. Ch. 2004) ....................24

*McGowan v. Ferro*,
859 A.2d 1012 (Del. Ch. 2004) ....................3

*Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*,
728 A.2d 25 (Del. Ch. 1998)....................16

*Mercier v. Inter-Tel (Del.), Inc.*,
929 A.2d 786 (Del. Ch. 2007)....................24

*NBC Universal, Inc. v. Paxson Commc'ns Corp.*,
No. Civ. A. 650-N, 2005 WL 1038997 (Del. Ch. Apr. 29, 2005)....................27

*Perlegos v. Atmel Corp.*,
Nos. Civ. A. 2320-N, 2321-N, 2007 WL 475453 (Del. Ch. Feb. 8, 2007)....................26

*TCG Sec., Inc. v. S. Union Co.*,
Civ. A. No. 11282, 1990 WL 7525 (Del Ch. Jan. 31, 1990)....................29

*Wolf v. Assaf*,
No. C.A. 15339, 1998 WL 326662 (Del. Ch. June 16, 1998)....................28

**STATUTES**

8 Del. C. § 102(b)(7)....................27

8 Del. C. § 141(e)....................25

8 Del. C. § 213....................23

8 Del. C. § 251(b)....................8

## PRELIMINARY STATEMENT

Plaintiffs' Answering Brief fails to confront the central problem with their case against Jonathan Leff and Rodman Moorhead: it makes no sense. Plaintiffs' disloyalty charge against Leff and Moorhead rests entirely on the assertion that their affiliation with TKT's largest shareholder, Warburg Pincus, gave them "improper incentives". AB at 63.[1] The opposite is true. Warburg's five million shares of TKT, and Moorhead's own holding of over 50,000 shares, perfectly *aligned* Leff and Moorhead's incentives with the rest of TKT's shareholders and motivated them to maximize the value of TKT. Plaintiffs do not dispute, or even address, this economic reality.

Instead, in an effort to fabricate "incentives" for Warburg to squander the value of its TKT investment, plaintiffs distort record evidence and, in some cases, invent "facts" out of whole cloth. Time and again, a simple comparison of plaintiffs' *description* of the evidence to the *evidentiary record* shows the extreme liberties plaintiffs have taken. In opposing summary judgment, plaintiffs are entitled to reasonable inferences from the evidence, but they cannot avoid summary judgment by misstating evidence, presenting arguments with *no* evidentiary support or ignoring

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[1] Citations to "Ex. __" refer to the Transmittal Affidavit of Matthew F. Davis, Esq., filed with our Opening Brief, or the Supplemental Davis Affidavit filed herewith. Citations to "Tab __" refer to the exhibits attached to plaintiffs' Appendix filed with their Answering Brief. Citations to "McCauley Ex. __" refer to the exhibits attached to the Affidavit of Charles A. McCauley, III, Esq., filed with Shire's Opening Brief. Citations to the deposition transcripts lodged with the Court by Shire are in the form of [Deponent's Name] Dep. [page number(s)]. Citations to "LM Br." refer to the Opening Brief of Leff and Moorhead in Support of Their Motions for Summary Judgment. Citations to "AB" refer to Plaintiffs' Opposition to Defendants' Motions for Summary Judgment.

evidence that contradicts the unreasonable and unsupported inferences they want the Court to draw.

As shown below, plaintiffs' assertions about Leff and Moorhead's "incentives" are pure fiction:

- Warburg did not decide to sell its investment in TKT. The very evidence plaintiffs rely on affirmatively shows that, as late as April 2005, the month the TKT/Shire merger was announced, Warburg was still *evaluating* what to do with its TKT shares.
- The contention that Warburg and Moorhead were willing to sell their TKT shares for *less* than the best price available is irrational on its face, and plaintiffs' assertion that Leff and Moorhead actually voted to accept an inferior price is a complete misrepresentation of the resolution on which the board voted.
- Plaintiffs' speculation that Warburg "needed" to divest its TKT shares in order to raise a new investment fund lacks any evidence actually linking the new fund and TKT, and plaintiffs' effort to suggest a possible link is based on a misrepresentation of the scant evidence relating to the new fund.

In sum, plaintiffs' assault on Leff and Moorhead is as irresponsible as it is baseless. Once the attack on Warburg's "incentives" is stripped away, plaintiffs' argument is reduced to the contention that the Court should infer disloyalty on the basis that Moorhead was not active enough and that Leff was too active. An objective look at the evidence—as opposed to plaintiffs' distortions, speculations and pure fabrications—shows that Leff and Moorhead did exactly what one would expect directors of TKT to do, and particularly directors who were partners in the investment firm that was TKT's largest shareholder: they worked to maximize the value of TKT's shares.

## ARGUMENT

### I. LEFF AND MOORHEAD DID NOT VIOLATE THEIR DUTY OF LOYALTY.

#### A. Leff and Moorhead Did Not Have a Disabling Conflict of Interest.

Plaintiffs' entire case against Leff and Moorhead rests upon a single, economically irrational assertion: that Leff and Moorhead's affiliation with TKT's largest shareholder created "improper incentives" with respect to the Shire merger. AB at 63. Because Warburg's incentives and those of other TKT shareholders were naturally aligned, plaintiffs must make "a strong factual showing", *McGowan v. Ferro,* 859 A.2d 1012, 1035 (Del. Ch. 2004), through "record evidence" that some other motive undercut Leff and Moorhead's "natural desire" to maximize the value of TKT's shares, *Goodwin v. Live Entm't, Inc.*, No. Civ. A. 15765, 1999 WL 64265, at *23 (Del. Ch. Jan. 25, 1999). Plaintiffs have not advanced even a coherent theory, let alone any record evidence, that Leff and Moorhead had any other motive.

##### 1. *Warburg Did Not Decide to Sell TKT On the Cheap Through an "M&A Exit".*

Plaintiffs cannot show that (a) Warburg had decided to divest its TKT shares (b) through a sale of the entire company (c) at less than the best available price. The internal Warburg documents and testimony identified by plaintiffs (*see* AB at 9-10) actually contradict all three of these notions.

*First*, Warburg had not made a decision to divest its TKT shares. Plaintiffs assert that "the evidence demonstrates that Warburg was looking to divest its interest in TKT as early as May 2004". *Id.* at 65. This is false, and the testimony cited

does not support it. Plaintiffs say that at his deposition Leff "acknowledged that the 'potential divestment of some or all of Warburg's investment in TKT' was an action item for Warburg in 2004". *Id.* at 10 (citing Leff Dep. 377-78). Leff actually stated: "I recall communicating with others at Warburg Pincus about *the process of evaluating* potential divestment of some or all of Warburg's investment in TKT". Leff Dep. 377 (emphasis added). Plaintiffs have distorted Leff's testimony and fabricated the idea of an "action item".

Plaintiffs cite Moorhead's testimony for the assertion that "most of Warburg's investments received little or no discussion at all, rendering the TKT-related exit discussions even more conspicuous by their existence". AB at 10 (citing Moorhead Dep. 101, 106). Moorhead said nothing of the sort. He testified that he did not recall any specific discussion about TKT in 2004 or 2005 (Moorhead Dep. 101, 106), but that such internal deliberations would not be unusual (*id.* 106), because Warburg "consider[s] a lot of things academically or theoretically", as it is Warburg's "business to make investments and to realize gains over time. *We discuss how you might do that from day one, day two, day three, day four, continually.*" *Id.* 151-52 (emphasis added).

Plaintiffs mischaracterize the "internal Warburg documents" that they claim "confirm that its exit from TKT was the subject of 'intensive' internal discussions in 2004". AB at 9 (citing Tabs 90, 91, 93). In fact, these documents show nothing but continuing *evaluation* of Warburg's investment in TKT. In January 2004, Leff noted that one of the Warburg biotech team's objectives for 2004 would be to "[e]valuate exit alternatives vs. ongoing opportunity" for its investment in TKT. Tab 90. By May 2004,

Leff wrote that he was "evaluating distribution or sale, and would probably be inclined to do something if the stock gets back to the high teens". Tab 91. However, by January 2005, despite the fact that TKT's stock had risen to the low $20s, Warburg still held onto its TKT shares. It remained "engaged in an intensive process right now of *evaluating whether* to exit some or all of our position prior to the [I2S] results in June, and *if so*, when and how". Tab 93 at LEFF 014728; *see also* Ex. 98 (emphasis added).

None of the cited evidence suggests that Warburg had *decided* to sell its TKT shares. It instead shows a private equity firm doing what such firms do every day—evaluating the economic merits of whether to continue holding a portfolio investment. *See* Moorhead Dep. 151-52. Plaintiffs cannot point to a single Warburg document to support their basic assertion that the firm had made a decision to exit its TKT investment. That is because it never happened.

In fact, the evidence is clear that Warburg had ***not*** made a decision to divest its TKT shares.

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[2] Unable to find any Warburg internal documents or testimony from Warburg professionals to support their assertion that Warburg had decided to divest, plaintiffs try

*Second*, the very evidence plaintiffs rely on for the proposition that "Warburg was looking for an 'M&A exit'" (AB at 9) shows that Warburg had in fact not made such a decision. The internal Warburg emails and testimony cited by plaintiffs discuss the possibility of a "distribution" of the shares directly to Warburg's investors (*see* Tab 91)—which is how Warburg disposed of its earlier 1988-2000 investment in TKT (*see* Leff Dep. 225-27)—or exiting "some or all" of Warburg's investment (*Id.* 377; Tab 93). Leff noted in January 2005 that if Warburg did decide to exit, "when and how" still needed to be considered. Tab 93; Ex. 98. As late as April 2005, the same month the

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to manufacture a case through the speculation of outsiders (*see* AB at 10 (citing Tabs 24, 28, 83, 129, 132)), but the statements on which they rely are inadmissible hearsay, not cognizable on a motion for summary judgment. *See, e.g.*, *Henry v. Nanticoke Surgical Assocs., P.A.*, 931 A.2d 460, 462-63 (Del. 2007). For instance, the 12/23/04 email cited by plaintiffs in footnote 9 of their Answering Brief (*see* Tab 129) is not only double hearsay (an internal Shire email attributing a statement to a TKT employee, who was himself not affiliated with Warburg), but the TKT employee actually testified that he did not make the statement attributed to him (*see* Perry Dep. 141-43). Likewise, the statement in the last document cited in that footnote (*see* Tab 83) is triple hearsay, at the very least (TKT's proxy solicitor reporting on an "implication" from ISS that it had heard something from an unknown source).

The other documents cited by plaintiffs on page 10 of their Answering Brief do not even logically support the notion that Warburg had made a decision to divest. On their face, they reflect only that outsiders *perceived* that Warburg was "interested in doing a transaction" once merger discussions had begun. *See* Tabs 28, 132. These documents are also hearsay. The block quote appearing on page 10 of the Answering Brief is from an email written by a very junior Cowen professional whom Leff never met (*see* Leff Dep. 130-33); who did not attend the board meeting at issue (Ex. 32); who was clearly speculating (*see* Tab 132 ("from what I understand")); and whose conjecture was refuted by more senior Cowen personnel who did attend the board meeting (Quirke Appr. Dep. 57-58). The same goes for the documents originating with Goldman. Plaintiffs point to no evidence that Leff, Moorhead or Warburg spoke to Shire's bankers at Goldman (*see* Tabs 24, 28), and the italicized assertion that "Warburg had already expressed [to Goldman] its willingness to support an acquisition of TKT" before merger discussions even started (AB at 10) is based on nothing more than a handwritten note from a Shire employee speculating that Warburg might give "*possible* irrevocable support in advance of any announcement" (Tab 24) (emphasis added). The possibility that a large stockholder might do so, such as through a voting agreement, is a standard consideration in any merger.

merger was announced, Warburg was still "[e]valuat[ing] exit alternatives" from TKT and weighing "M&A versus equity markets". Tab 98. In addition, plaintiffs simply ignore the facts—presented in our opening brief—that Warburg regularly uses numerous alternatives to divest shares of its publicly traded portfolio companies, and

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*Third*, even if plaintiffs could show that Warburg had decided to sell its TKT shares through M&A, they have no evidence that Warburg was prepared to sell those shares on the cheap. None of the evidence cited by plaintiffs even suggests that Warburg was willing to accept less than maximum value for its $123 million investment in TKT. At most, plaintiffs insinuate that exiting on the cheap was an option for Warburg because of so-called "TKT fatigue"—*i.e.*, that "TKT had been [] 'volatile,' 'disappointing,' and 'a problem investment' for Leff". AB at 9 & n.8. That is economically irrational. Warburg would have no incentive to exit an investment prematurely or at an inadequate price simply because it had performed poorly in the past, especially if Warburg believed the share price would soon rise.

Lacking any documentary evidence for the proposition that Warburg wished to obtain less than full value for its TKT shares, plaintiffs claim that "the most obvious evidence of the Warburg Directors' true motivation is their otherwise inexplicable vote in favor of Shire's initial $31 offer—an offer they knew to be less than Shire was willing to pay." AB at 65; *see also id.* at 25-26. Again, the evidence cited does not support their description of that vote or the inference of disloyalty they wish to

draw. *See id.* at 26 (citing Ex. 54; Gilbert Dep. 92). The TKT board minutes are clear that the resolution put to the board on February 26, 2005 was as follows:

> "Resolved: That the offer to purchase the Company for a purchase price of $31 as set forth in the Offer Letter be rejected." (Ex. 54.)

Leff and Moorhead "dissent[ed]" (*id.*), meaning they voted *against rejecting* Shire's pending offer—a quite different proposition than voting to *accept* it. *See* Gilbert Dep. 94 ("The minutes convey to me that Mr. Leff voted against rejecting the offer."). At the time this vote was taken, the board had not requested or received a fairness opinion (Ex. 55), due diligence had not been completed (Ex. 49), and a merger agreement had not even been negotiated (*id.*). There was neither a merger to "accept" nor a sufficient record for the board to hold a vote on "accepting" one. *Compare* 8 Del. C. § 251(b) (describing board resolutions required to approve merger). Instead, as the minutes and testimony reflect, the board voted on a resolution to "reject". Leff and Moorhead dissented from that flat rejection—which had the potential to end the discussions with Shire prematurely—and then, later in the same board meeting, supported a resolution instructing Cowen to try to elicit a higher offer. *See* Ex. 54. That is hardly evidence that Leff and Moorhead were "focused on the prompt liquidation of Warburg's investment in TKT, without regard for the interests of the other shareholders". AB at 64.[3]

[3] Even if Leff and Moorhead had sought "prompt liquidation of Warburg's investment", a minority vote against rejecting Shire's offer would have been a remarkably ineffectual means to achieve it. A simple divestiture of Warburg's shares using one of the many non-M&A means available (*see* LM Br. at 30-31; Curt Aff. ¶ 14) would have provided a much surer and swifter exit than the lengthy, uncertain process needed to negotiate a merger agreement, hold shareholder votes at TKT and Shire, and close a merger.

### 2. Warburg Had No Reason to Want to Sell TKT on the Cheap.

Plaintiffs not only have no evidence *that* Warburg decided to sell its TKT shares on the cheap, but have offered neither a coherent theory nor any evidence as to *why* Warburg would be motivated to behave in such an economically irrational manner. Plaintiffs initially claimed that Warburg "needed liquidity to wind-up its funds". Compl. ¶ 22. However, they do not offer a speck of evidence that Warburg "needed liquidity".[4] In fact, the record is undisputed that (1) the fund that held Warburg's TKT investment, Warburg Pincus Equity Partners, L.P. ("WPEP"), still has not been "wound up" even today;

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and (4) it had no "need" for the proceeds from the sale of TKT. *See* LM Br. at 26-28.[5]

Rather than press their "wind[ing] up its funds" theory, plaintiffs have concocted a new theory: that Leff and Moorhead deliberately accepted inferior returns

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[4] Plaintiffs either declare without support that Warburg needed liquidity (*see, e.g.*, AB at 34 ("Warburg . . . would be back to square one on its liquidity problem.")), or cite testimony that does not refer to needing liquidity (*see id.* at 9 (citing Astrue Appr. Dep. 36-37 to say Warburg "wanted to sell TKT in order to obtain liquidity"; Astrue never refers to any goal of liquidity); AB at 11 (citing Langer Dep. 153 to say Langer "noted Warburg's desire for liquidity"; Langer never mentioned a need for liquidity but rather testified only to "an impression" that Warburg "might be looking to monetize its investment")).

[5] Plaintiffs do reiterate their related claim that Warburg was "fatigued" because it had held its TKT investment for an "extraordinarily long time" (Compl. ¶ 22; *see also* AB at 9, 12), but they offer no supporting evidence for this assertion and fail to address its inherent implausibility in light of Warburg's "*average* investment period of five to seven years", the numerous WPEP investments that have now lasted for over seven years, and Warburg's initial twelve-year investment in TKT. *See* LM Br. at 28-29.

for Warburg's TKT shares in order to help Warburg market a new private equity fund, Warburg Pincus Private Equity IX, L.P. ("WP IX"). *See* AB at 11-12. Plaintiffs' entire case rests on this new WP IX theory—for they suggest no other motive to explain Leff and Moorhead's allegedly urgent desire to sell TKT for less than the best available price. But plaintiffs' WP IX theory, too, is devoid of record support, contradicted by the undisputed facts, and illogical.

*First*, plaintiffs' theory is pure speculation. Plaintiffs have not cited a shred of evidence that links the raising of the WP IX fund to TKT, or even mentions the two subjects in the same breath, much less uses WP IX as a rationale for accepting less than full value for Warburg's TKT investment. The most that plaintiffs do to attempt to link WP IX and TKT with evidence is to cite to Tab 98 for the proposition that "Warburg's plans to raise its largest ever ($8 billion) private equity fund" was "another key factor 'favoring an M&A exit' from its TKT investment". AB at 11. This is an especially egregious maneuver. The cited document *does not mention WP IX at all.*[6] There is no evidentiary support for plaintiffs' theory because they have manufactured it out of thin air. Such conjecture cannot defeat summary judgment.[7]

[6] In addition, the slide titled "Factors favoring an M&A exit" is a general discussion of the subject, in which TKT is not mentioned. Tab 98 (at X003000016489). With respect to TKT, the presentation is clear that numerous "exit alternatives" including "equity markets" remained under evaluation. *Id.* (at X003000016425, -500).

[7] Indeed, plaintiffs' theory is undermined by the actual sequence of events. As plaintiffs admit, "[i]nvestment closings for Warburg IX occurred in June 2005, and were complete by August 2005". AB at 11 n.10 (citations omitted). In fact, the WP IX fund accepted its final commitments on August 15, 2005 (*see* Tab 116), which was three days ***before*** Warburg delivered the proceeds from the sale of TKT to the investors in WPEP

*Second*, plaintiffs' assertion that "Warburg was constrained in its ability to raise new funds" (AB at 12 (citing Moorhead Dep. 109)) grossly mischaracterizes the cited testimony. The only fund-raising constraint Moorhead mentioned was that "we're not allowed to start the process of raising a new fund until the previous fund is 70 to 75 percent ***invested***". Moorhead Dep. 109 (emphasis added). The *realization* of investments in a prior fund is irrelevant. In any event, WPEP was not the "previous fund" to WP IX. *See* Ex. 96 (showing that other Warburg funds had initiated and completed fundraising in the interim). As plaintiffs admit, "[WP IX] would be the ***third fund*** that Warburg had raised since WPEP". AB at 12 (emphasis added). By 2005, WPEP had long since exceeded the "75 percent invested" mark. The TKT investment in no way "constrained" Warburg's ability to raise its new fund.

*Third*, plaintiffs' contention that "Warburg faced considerable pressure from [its] investors to return previously invested capital" (*id.* at 11) is offered with no evidentiary support.[8] Moreover, it makes no sense in light of the undisputed facts that

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(b) Warburg funds that were formed prior to WPEP continue to hold investments (*id.* ¶ 11); and (c) in addition to WPEP, Warburg

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(Ex. 94). As such, the TKT proceeds could not have been used in connection with new investments in WP IX or for the marketing of the fund.

[8] The Moorhead testimony plaintiffs cite (AB at 12 (citing Moorhead Dep. 115)) does not relate to WP IX or even to Warburg's raising of investment funds generally. Rather, as part of a general explanation of how Warburg earns money from its funds, Moorhead explained that the investors in a given fund "look over their shoulder" to ensure that they receive their capital back from that fund before Warburg takes profits from that fund, in the form of carried interest. Moorhead Dep. 115.

managed several other active private equity funds in 2004 and 2005 (*id.*; Ex. 96). The notion that the TKT investment (which represented a small fraction of the $5 billion WPEP fund and an even smaller fraction of all the funds managed by Warburg) was somehow singled out from all of Warburg's other similarly situated investments as requiring urgent disposition in order to raise WP IX is nonsense.

*Fourth*, plaintiffs' theory is inconsistent with their contention that Warburg wanted an "M&A exit". If Warburg's goal had simply been to "return previously invested capital" to its investors to encourage reinvestment in WP IX (AB at 11), Warburg could have done so faster and with greater certainty through one of the many non-M&A means for divesting its shares. *See* LM Br. at 30-31; Curt Aff. ¶ 14. *See In re CompuCom Sys., Inc. S'holders Litig.*, No. Civ. A. 499-N, 2005 WL 2481325, at *10 (Del. Ch. Sept. 29, 2005).

At bottom, plaintiffs' theory runs up against the fact that selling TKT, or any other investment, on the cheap would rob Warburg of its own profits. Tellingly, when the Shire merger was announced and again when it closed, numerous internal Warburg documents show colleagues applauding Leff and Moorhead for maximizing TKT's value, while not one document says a word about any significance to WP IX.[9] Plaintiffs have the burden of overcoming the presumption that Leff and Moorhead acted

[9] *See, e.g.*, Ex. 103 (Nick Lowcock tells Leff, "Well done. Nice premium."; Leff responds that the drop in Shire's stock price upon the merger announcement "[s]uggests that we definitely got a very nice price for TKT shareholders"); Tab 195 (John Vogelstein tells Leff, "I well remember the stock at 5. In any event this goes down as one of the most successful saves in Warburg Pincus history[.]"); Ex. 104 (internal Warburg report notes: "We are pleased with the company's agreement to be acquired by Shire, as we believe the cash acquisition price represents an attractive value to TKT's shareholders.").

rationally to maximize the value of Warburg's investment, along with the rest of TKT's shares, and they cannot come close. The analysis of plaintiffs' disloyalty claims could, and should, stop here. In the interest of completeness, however, we address—in the remainder of this Part I—plaintiffs' arguments that the Court may *infer* a disloyal motive from the role Leff and Moorhead played in the merger process.

**B. Plaintiffs Cannot Show Disloyalty by Moorhead.**

In the one paragraph of their Answering Brief dedicated to Moorhead, plaintiffs confirm that their disloyalty case against him rests solely on his supposedly "support[ing] the effort to liquidate Warburg's investment". AB at 67. But because the so-called "effort to liquidate" is a product of plaintiffs' invention (*see* Part I.A.1), the disloyalty claim against Moorhead must fail. Further, plaintiffs entirely ignore that Moorhead *personally* held 54,446 shares of TKT, worth over $2 million at the merger price. Ex. 1 at 60. That investment, as well as Warburg's approximately five million shares, plainly aligned Moorhead's incentives with those of TKT's other shareholders.

Instead of confronting this evidence, plaintiffs attempt to manufacture an inference of disloyalty by asserting that Moorhead (a) "voted to accept" Shire's $31 offer, and (b) was a "stooge director" who demonstrated "blind allegiance" to Leff. AB at 67. Neither argument finds any support in the facts. As shown in Part I.A.1 above, plaintiffs' assertion that Moorhead "voted to accept" the $31 offer in February 2005 is simply untrue. A motion to "accept" an acquisition at $31 was never made and was never voted on by Moorhead, Leff, or anyone else. As for the contention that Moorhead was a "stooge", it is both legally and factually unfounded. Unlike the "stooges" condemned by

the sole case plaintiffs cite, Moorhead helped *found* TKT, served as its Chairman for fifteen years, and was an experienced investment professional with extensive board service in the health care industry. Moorhead Dep. 18-24, 41-43; Ex. 21.[10] Plaintiffs also ignore the facts that Moorhead served as a TKT director for twelve years before Leff joined the board and was formerly Leff's boss. Moorhead Dep. 33-35, 41-43.[11] Not surprisingly, plaintiffs have not identified even a single instance in which Moorhead took instruction from Leff and failed to exercise independent judgment on a matter before the TKT board.[12] Moorhead was a significant TKT shareholder and an experienced director—not a "stooge".

[10] *Compare ATR-KIM Eng Fin. Corp. v. Araneta*, No. Civ. A. 489-N, 2006 WL 3783520, at *20-*21 (Del. Ch. Dec. 21, 2006) (describing as "stooges" the niece of the majority shareholder, who said "she would take [her uncle's] word as authoritative", and another director who "took the word of [the uncle] as being the word of the company").

[11] Plaintiffs' reliance on Moorhead's pending retirement (AB at 67 n.53) barely deserves mention. As plaintiffs acknowledge, he was in the process of retiring "from his *Warburg* responsibilities" (*id.* (emphasis added)), not from the board of TKT (Moorhead Dep. 18, 32-33). In fact, from Shire's initial expression of interest until the closing of the merger, Moorhead attended every TKT board meeting (*see* Exs. 32, 39, 99, 54, 63, 69, 75, 78), was Chairman of TKT's Compensation Committee (Moorhead Dep. 142-43), and served as a director of four other companies (*id.* 39-40).

[12] Instead, to support their statement that Moorhead "relied extensively on Leff with respect to his directorial responsibilities" (AB 67-68 n.53), plaintiffs cite an unremarkable email in which Leff provided Moorhead with his thoughts on a TKT draft 10-K filing (Tab 127) and another in which Leff simply reported that the merger had closed (Tab 126). As for plaintiffs' assertion that "Leff was 'leading the Warburg effort' with respect to TKT and had 'primary responsibility for the investment'" (AB at 67-68 n.53), it is beside the point. The fact that Leff was primarily responsible for the TKT investment *within Warburg* says nothing about whether Moorhead discharged his duties in the TKT boardroom. *See* Moorhead Dep. 134.

### C. Leff's Actions Are Evidence of Diligence, Not Disloyalty.

As with Moorhead, plaintiffs provide no *reason* why Leff would be disloyal to TKT other than their unsupportable conjecture regarding Warburg. Instead, plaintiffs seek to portray Leff's commendable engagement in the M&A process as something sinister. That tactic turns Delaware jurisprudence on its head; it would send an icy chill through boardrooms if being "hands-on" somehow created an inference of disloyalty. Leff's active involvement was precisely the kind of conduct that Delaware courts encourage. All the more so here, given the unrefuted evidence—which plaintiffs ignore—that TKT's CEO obstructed the Shire interactions and told the board he opposed Shire as an acquirer, for reasons unrelated to shareholder value. *See* LM Br. at 5-8.[13]

#### 1. *Leff's Questioning of Management and Its Advisors Was In Furtherance, Not Dereliction, Of His Directorial Duties.*

Remarkably, plaintiffs point to Leff's questioning of projections and analyses presented by TKT management and Chestnut Partners as evidence of his alleged disloyalty. *See* AB at 24-25, 65-66. However, directors not only "have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them", *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), they also must have

[13] Although plaintiffs laud Astrue's performance as CEO prior to the Shire interactions and lavish attention on his résumé (*see* AB at 7-8), they do not address—much less defend—Astrue's improper statements and actions with respect to the proposed merger. For example, it is undisputed that Astrue said he would sell to a "decent party" at "around $35" but that he would refuse to sell to Shire (Astrue Fid. Dep. 33-34; Lepanto Dep. 168-70; Quirke Fid. Dep. 59-61; Leff Dep. 70-71; Ex. 41); that he stood in the way of due diligence (Quirke Fid. Dep. 56-59, 62-64; Exs. 43-46); that he threatened Shire's CEO that TKT's key executives would quit upon a merger (Astrue Fid. Dep. 88-89; Exs. 50-51); and that the TKT board was told that he "created a significant cost" (Quirke Fid. Dep. 82-84; Ex. 51) by acting "not in good faith" (Ex. 48; Quirke Fid. Dep. 76-77).

"a good faith basis" to believe that any projections they rely upon are "reasonable", *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 728 A.2d 25, 34 (Del. Ch. 1998). Leff had good faith concerns about certain forecasts because "the plan put forward by management . . . assumed that every product achieved its time lines and was successfully commercialized and achieved successful penetration of its market", which in his experience "rarely if ever happens, especially in biotechnology". Leff Dep. 128. He also wanted to apply his experience as an investment professional to understand the rationale for the discount rates employed and ensure that they represented "reasonable ranges". *Id.* 126-27.

Leff's questions of TKT's management show nothing but his diligence. Al Holman of Chestnut Partners testified that Leff "was very professional in his approach to the topic at hand" (Holman Dep. 152) and that Leff posed "good professional questions", "appropriate questions asked by a board . . . being presented with a series of projections by the management team" (*id.* 155). Leff's effort to probe the assumptions underlying projections and valuation analyses cannot support an inference of disloyalty.

### 2. *Leff's Actions Relating to the Proposed Zuma Transaction Were Focused Entirely on Promoting Shareholder Value.*

Plaintiffs spend a great deal of time on the proposed Zuma transaction (AB at 27-33), but little of the evidence they identify relates to Leff and none of it supports an inference that Leff was disloyal. All parties agree that "[t]here was nothing wrong with the [Zuma] idea itself", as it had the potential to create value for TKT (Compl. ¶ 48), and there is no dispute that neither Warburg nor Leff stood to gain anything directly from the proposed transaction (*see* LM Br. at 11-14, 35-39).

Nonetheless, plaintiffs speculate—without citation, on the basis of "rumor", and in direct contradiction of the record—that Leff "bought Langer's vote" and "[t]he price was the Zuma transaction". AB at 30, 33. That accusation rests on four baseless assertions.

*First*, plaintiffs' only "evidence" of any *quid pro quo* between Leff and Langer is rank hearsay from Astrue. *See* AB at 30. Astrue testified that "the rumor was rampant around the company that [Langer] had cut a deal about these assets with Jonathan Leff" on a trip to India. Astrue Appr. Dep. 185. Plaintiffs fail to mention that Astrue admitted that he was "uncertain" as to the truth of these rumors, "do[esn't] know where they came from", and "do[esn't] remember who [he] heard them from" (Astrue Fid. Dep. 147). They also ignore the fact that Astrue clearly did not believe the rumors at the time, if in fact they existed. Instead, as Astrue wrote weeks after the India trip, his actual view was that "Leff ha[d] made substantial, but not complete, progress in pulling [Langer] into his camp *on the merits* of the ultimate issue of valuation" (Ex. 62 (emphasis added)).[14]

*Second*, plaintiffs' story depends on their assertion that "[a]s of late February 2005 . . . Leff was opposed to the Zuma transaction", but then "suddenly supported the Zuma deal" after traveling to India in March. AB at 66. Plaintiffs also

[14] Separately, plaintiffs rely on Astrue to smear Leff with the accusation that Leff offered Astrue the CEO position at another company as a "bribe". AB at 19-20. This alleged "bribe" has no support in any documentary evidence, and was raised by Astrue for the first time during his Appraisal Action deposition, nearly two years after it allegedly happened. Astrue Fid. Dep. 67. Astrue admitted at deposition that, even though he believed this "bribe" to be wrongful, he never bothered to mention it to anyone else on TKT's board (*id.* 69-71)—which is especially remarkable given how readily he had voiced allegations about other directors (*i.e.*, Yetter) in his effort to derail the interactions with Shire.

assert that Leff "testified in deposition that he remained opposed to Zuma after the India trip". *Id.* Plaintiffs provide no citations for these assertions, and they are not true. Plaintiffs made them up.[15] In fact, Leff testified that when "the Dr. Reddy's Z[u]ma transaction *began to be discussed*" in mid-2004, he had some concerns about the proposed terms. *See* Leff Dep. 114-18 (emphasis added). As plaintiffs acknowledge, however, the proposed terms went "through several iterations" (AB at 28), and the documents show that by late November 2004, Leff supported Zuma as long as it did not interfere with the Shire discussions. *See* Ex. 97. At a December 14, 2004 board meeting, Leff joined the rest of the board (except Langer, who recused himself) in "recommend[ing] that the Company proceed in negotiations with Dr. Reddy's" with the aim of finalizing the deal. Ex. 39. Thus, Langer's March 7, 2005 email that plaintiffs portray as a smoking gun (*see* AB at 30) utterly fails to support their theory of a secret Leff-Langer scheme. Rather, that email, and the India conversation it reflects, shows that Leff was focused on what was best for TKT, and it is consistent with what Leff had been saying for months—that the Zuma transaction "provided good value for TKT" but "might jeopardize any potential strategic transaction with [Shire]". Ex. 56. Moreover, that email definitively *disproves* plaintiffs' assertion that "Leff and Langer made sure their secret never even came close to being disclosed to the non-defendant directors" (AB at 52); the two recipients of the email were Astrue and board Chair Villa-Komaroff (Ex. 56).

[15] Plaintiffs go so far as to say that Leff's "contemporaneous notes" support their position. AB at 29. But they do not cite any notes, much less notes that are "contemporaneous" with the India trip. No such "contemporaneous notes" exist.

*Third*, plaintiffs contend—again without citation—that Cowen contacted Goldman about Zuma "*[e]ither* at the direction of Leff *or* of Langer (but without the knowledge or direction of Astrue, TKT's management, or TKT's chairwoman)". AB at 31 (emphasis added). Plaintiffs offer no evidence that Leff directed anything, because there is none. Further, the notion that Cowen acted in secret is contradicted by the evidence in our opening brief (*see* LM Br. at 12-14), which plaintiffs ignore. Cowen contacted Goldman about the potential Zuma deal with the knowledge and approval of the full M&A Committee to ensure that moving forward with Zuma while negotiations with Shire were ongoing would not negatively affect Shire's valuation of TKT. *See* Quirke Dep. 24-29, 49-51. Along with the rest of the M&A Committee, Astrue and Villa-Komaroff were included on, and even commented on, Cowen's Zuma-related communications (*see* Exs. 67-68), and "Mike [Astrue] discussed the proposed [Zuma] transaction with Shire at one of the due diligence meetings" (Ex. 80). Cowen also reported back to the M&A Committee as a whole on its Zuma-related discussions with Goldman. *See* Quirke Fid. Dep. 24-36; Ex. 89.

*Fourth*, plaintiffs pounce on innocent communications between Langer and Leff as evidence of a secret deal, claiming that "Langer routinely included [Cowen] and Leff as recipients on his e-mails pressing the Zuma transaction" (AB at 32 (citing Ex. 66; Tabs 72, 73, 74)). *None* of the exhibits cited by plaintiffs support their suggested inference. Most of those exhibits either do not include Leff as a recipient (*see* Ex. 66) or do not contain any reference to Zuma (*see* Tabs 72, 74). The one pre-signing communication between Langer and Leff that does relate to Zuma, in which Langer

merely forwards a copy of the latest Zuma term sheet (*see* Tab 73), was not a secret—the very same email was sent previously to Astrue (*see id.*). Langer also provided similar contemporaneous updates on Zuma to Villa-Komaroff. *See* Ex. 100. Moreover, not one of the documents says anything even suggesting that Leff and Langer had a *quid pro quo*. For example, seeking to draw an inference from a "sudden surge in communications" between Leff and Langer (AB at 32), plaintiffs cite a set of emails consisting solely of Leff and Langer's attempts to arrange phone calls with one another in early April 2005. *See* Tab 74. That is hardly incriminating, particularly given that Leff and Langer had recently begun serving on TKT's newly constituted M&A Committee (*see* Ex. 63 at 4; Ex. 69 at 1), which was actively negotiating a merger agreement with Shire.[16] As for the assertion that Langer "repeatedly employed [Leff's] help to get [Zuma] done" (AB at 32), plaintiffs cite no evidence to support it, and there is no evidence that Leff actually provided any such help.[17]

Plaintiffs' vote-buying charge against Leff is an unsupported smear. Plaintiffs have not offered a shred of evidence of (a) any communications between Leff

[16] Nor is there anything suspect about Leff's telling Langer, weeks after the merger agreement was signed, that he found Shire's decision not to permit TKT to execute the Zuma transaction "very surprising". Ex. 87. The entire M&A Committee had been told by Cowen that the Zuma assets "were not part of [Shire's] valuation for TKT" (Ex. 89; *see* Lepanto Dep. 32-34; Quirke Fid. Dep. 24-29); and in the very email to which Leff was responding, Langer had written that Shire's Chairman "told [Langer] as recently as yesterday . . . that they were going forward" (Ex. 87).

[17] The fact that, in the period between signing and closing of the merger agreement, Langer approached Leff—as well as fellow directors Villa-Komaroff, Yetter, and Pendergast—for assistance with respect to the Zuma deal (*see* Exs. 80-85, 87) does not show any secret vote-buying scheme. It shows only that Langer hoped that his fellow TKT board members would continue to support the transaction and hoped that they could help get Shire's approval for TKT to do it, as required under the merger agreement.

and Langer reflecting any *quid pro quo*; or (b) any contact *at all* between Leff and Shire (outside one TKT board meeting to which Shire personnel were invited), much less any contact regarding Zuma. The evidence plaintiffs have offered shows only Leff's expressions of concern that the potential Zuma deal not interfere with the far more significant Shire negotiations, which cannot support an inference of disloyalty.

### 3. *Leff's Efforts to Structure and Negotiate the Best Possible Transaction Reflected His Concern For Shareholder Value.*

Contrary to plaintiffs' contentions (*see* AB at 33-35, 66-67), Leff's exploration of possible ways to structure the Shire merger agreement supports an inference of diligence, not disloyalty. When discussions between TKT and Shire continued into late March 2005, Leff and other board members recognized that the forthcoming release of the I2S data could complicate the deal. But the board's concern was not, as plaintiffs assert, that *positive* data would "push TKT's stock price high enough that it would no longer be a viable merger target for Shire" (AB at 34). Rather, the record clearly establishes that the TKT board members were "all very conscious of . . . the risk that the [I2S] data might be *negative*" because they were concerned that Shire's shareholders might then reject the merger or Shire itself might claim a material adverse change. Leff Dep. 449-50 (emphasis added); *see* Moorhead Dep. 170-71. As TKT's Chairwoman wrote to Shire's Chairman on April 3, 2005, "our Board of Directors is acutely focused on the risk of entering into an agreement that could fail to close". Ex. 65. Therefore, after consulting counsel and experts in the field (*see* Exs. 101, 102), Leff, Villa-Komaroff, Langer, and Astrue (the M&A Committee) discussed the possibility of delaying the I2S results as a possible "structural solution[] to minimize that

risk to the TKT shareholders". Leff Dep. 450; *see also* Ex. 101; Tab 21; Langer Dep. 834-37; Moorhead Dep. 170-71.[18]

Ultimately, Leff and the M&A Committee found other ways to address that risk. Negative I2S results were carved out of the Merger Agreement's "Material Adverse Effect" provision (*see* Ex. 1 at 42-44; Ex. 2 §§ 1.01 (exclusion (iv)), 9.01-9.03), and Shire committed to make cash payments to TKT totaling $490 million if Shire's shareholders voted down the merger.[19] In addition, with Leff's active participation, the board was able to ensure ample time for an alternative bidder to emerge both *before* and *after* the release of the I2S results. The fact that none did stands as unrefuted confirmation that the board obtained fair value for TKT.[20] Plaintiffs' efforts to twist these facts to construct an inference of disloyalty are unsupportable.[21]

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[18] Plaintiffs' assertion that Leff was motivated "to get the Shire deal *signed* before I2S results could be released" (AB at 34 (emphasis added)) is contradicted by the very next sentence in their brief, which quotes Leff articulating his actual concern—that Shire might not be willing to "enter into an acquisition agreement unless they are confident that the deal can be *closed* prior to [I2S] data becoming available" (*id.* (citing Ex. 61) (emphasis added)). This illustrates plaintiffs' fundamental misapprehension of the structural concerns Leff sought to address. The point was not that positive data might prevent signing; it was that negative data might prevent closing, and that Shire might not be willing to grant TKT the extraordinary protections that the TKT board would require. *See* Tab 72 (Leff suggests that the board's April 3, 2005 response to Shire emphasize that TKT must be "appropriately protected against this risk" of "entering into an agreement that could fail to close" in light of "these specific and unusual circumstances").

[19] Plaintiff's assertion that "[u]nder the merger structure Leff championed", Shire's shareholders could still vote the transaction down "with very little risk" (AB at 34) is plainly wrong. Not only would Shire be required to pay a reverse break-up fee of $40 million (*see* Ex. 2 § 11.04(c)), but it would also have to pay TKT $450 million in cash to license Dynepo (*see* Ex. 1 at 44-49; Ex. 2 §§ 10.02, 11.04(e); Ex. 3). That was significantly above the "base case" present value of the Dynepo license TKT had been contemporaneously negotiating with GSK. Exs. 72, 74.

[20] Plaintiffs' assertion that the $37 per share price was "justif[ied]" by the risk of negative I2S data (AB at 49) is unsupportable. The record is clear that the TKT board

#### 4. *Leff's Efforts to Solicit Support for the Board-Approved Merger Agreement Were Entirely Proper.*

Plaintiffs' novel proposition that Leff's advocacy of the Shire merger to TKT's record date shareholders constituted the "inequitable" chasing of "empty votes" (AB at 53-59) has no support in Delaware law. There is no legal principle that suggests directors may not solicit shareholders who sold after the record date. Rather, Delaware law affirmatively provides for record date voting. *See* 8 Del. C. § 213. To the extent that plaintiffs disagree with this practice, their quarrel is with the General Assembly, not with Leff. Plaintiffs knowingly purchased the bulk of their shares after the record date as a merger arbitrage opportunity (*see* Ex. 95 at 5-9), well aware that they would be unable to vote. They cannot now claim that their views on the merger should trump those of long-term shareholders who, as plaintiffs knew full well, retained the legal right to vote their shares. Moreover, the record date shareholders whose votes plaintiffs label as "empty" demonstrably thought the $37 price was attractive, as evidenced by their decision to sell at or near that price.[22]

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was not willing to sell unless Shire's offer fully valued the Company on the assumption that the I2S data would be positive, and the board assessed Shire's $37 offer on that basis. *See* Gilbert Dep. 202; Leff Dep. 444-46; Moorhead Dep. 173-84; Exs. 76-77.

[21] Plaintiffs also allege, without citation to the record, that Leff provided information to Shire "about the internal dynamics of TKT's board, including Warburg's support for the merger, Langer's interest in Zuma, and the other directors' reserve prices". AB at 90 n.63. But plaintiffs do not, and cannot, offer any evidence in support of this allegation. In fact, they do not offer evidence that Leff had any contact at all with Shire (outside the TKT board meeting to which Shire executives were invited).

[22] Further, plaintiffs' assertions as to which votes were purportedly "empty" cannot be taken at face value For example, contrary to plaintiffs' assertion that OrbiMed's 1.8 million "yes" votes "had nothing to do with the merits of the merger" (AB at 55), OrbiMed told Leff at the time that they believed "the board is absolutely doing the right

Once the board approved the Merger Agreement as in the best interest of TKT's shareholders, Leff's actions to promote that agreement were consistent with, and in furtherance of, his fiduciary duties. *See, e.g.*, *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 819 (Del. Ch. 2007) ("When directors act for the purpose of preserving what the directors believe in good faith to be a value-maximizing offer, they act for a compelling reason in the corporate context."); *In re MONY Group, Inc. S'holder Litig.*, 853 A.2d 661, 675-76 (Del. Ch. 2004) ("[O]nce a board of directors deems a merger agreement favorable, it may employ various legal powers to achieve a favorable outcome on a shareholder vote required to approve that agreement."). It would be shocking to draw an inference of disloyalty from a director's efforts to obtain record-date shareholder support for a board-approved transaction.

The suggestion that Leff employed the resources of Warburg to "coerc[e]" shareholder votes (AB at 98) is without legal or factual support. As in *Mercier*, "[t]he sophisticated investors" solicited by Leff "faced no sanction" if they did not support the merger, and "there is no evidence that [Leff or Warburg] made threats of any kind". 929 A.2d at 817. Plaintiffs cannot show that Leff used the prospect of business with Warburg "as a weapon" to coerce any votes. *Hewlett v. Hewlett-Packard Co.*, No. Civ. A. 19513-NC, 2002 WL 818091, at *15 (Del. Ch. Apr. 30, 2002) (no improper influence where chairwoman promoted a merger to shareholders by saying, "This is obviously of great

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thing and this is an excellent deal for shareholders" (Ex. 105). Plaintiffs also dismiss the votes of other long-term shareholders as "empty", without evidence that many of those shareholders (such as Aventis, a TKT shareholder since the mid-1990s that voted 2.2 million shares in favor of the merger) had in fact sold their shares prior to the merger.

importance to us as a company. *It is of great importance to our ongoing relationship.*"). Nor have plaintiffs cited evidence that Leff or Warburg ever suggested, promised or provided ***any*** favors for ***any*** solicited shareholder. Plaintiffs' coercion and vote-buying charges are unadulterated speculation.

## II. LEFF AND MOORHEAD ARE ENTITLED TO BE "FULLY PROTECTED" UNDER SECTION 141(E).

To defeat the presumption under 8 Del. C. § 141(e) that Leff and Moorhead's approval of the Shire merger was a proper exercise of their business judgment, plaintiffs expend great effort attacking TKT's financial advisors, Cowen and BofA. *See* AB at 36-44, 70-72.[23] Contrary to plaintiffs' effort to place the burden on the board (*id.* at 71), Delaware law "presume[s]" the professionals at issue to be "expert[s] on whom the Board was entitled to rely in good faith under Section 141(e)", and "[p]laintiffs must rebut the presumption that the directors properly exercised their business judgment, including their good faith reliance on [their] expertise". *Brehm v. Eisner*, 746 A.2d 244, 261 (Del. 2000).

Plaintiffs' three-pronged attack on the Section 141(e) presumption does not satisfy the required legal standards. *First*, plaintiffs contend that Cowen was conflicted because of its contingent fee arrangement. *See* AB at 36-38. However, plaintiffs ignore the fact that Cowen's 0.675% "success fee" was well in line with

[23] Plaintiffs do not dispute that Leff and Moorhead received and relied in good faith on extensive legal advice from qualified attorneys regarding, among other things, the adequacy of TKT's market check, the terms of the Merger Agreement and the process of soliciting shareholder votes. *See* LM Br. at 41. Section 141(e) applies to such legal advice. *See Hill Stores Co. v. Bozic*, 769 A.2d 88, 108-09 (Del. Ch. 2000); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1142 (Del. Ch. 1994).

industry practice and prior Delaware precedent. *See* LM Br. at 43. Nor can they show that the contingent portion of Cowen's fee, which was tied to a deal with ***any*** potential bidder, was improperly skewed in favor of Shire. *Id.* at 42-43.[24]

*Second*, plaintiffs assert that because (a) Leff and Moorhead "voted in favor of the Shire deal in February" and (b) Leff "micromanag[ed]" Cowen, they failed to actually "rely" on the financial advisors, and thus are not protected by Section 141(e). AB at 70-71. As explained above (*see* Part I.A.1, I.B.), plaintiffs' mischaracterization of the board's February vote to reject Shire's $31 offer is a non-starter. And it would be perverse to find that a director who actively engages with a board's financial advisor is somehow less entitled to the Section 141(e) presumption than one who is more passive. Cowen's providing Leff with the opportunity to consider and comment on draft presentations (Tabs 99, 100) and Leff's suggestions on negotiating strategy (Tab 101, 102) are well in line with the "active dynamic" and "adequate[] monitor[ing]" that should occur between board members and their advisors. *Perlegos v. Atmel Corp.*, Nos. Civ. A. 2320-N, 2321-N, 2007 WL 475453, at *21 (Del. Ch. Feb. 8, 2007).

*Third*, plaintiffs attack the independence of Cowen and BofA by highlighting (a) their previous work on unrelated transactions involving Warburg, and (b) BofA's work on Zuma. *See* AB at 37-43, 72. But the notion that either Cowen or BofA was "beholden to Warburg" because of prior business dealings (AB at 72) is

[24] The claim that Cowen "sold-out" TKT's shareholders (AB at 36) is unfounded and irrelevant. Cowen's suggestion to Goldman of a price the TKT board would likely accept (Tab 146) was a perfectly appropriate negotiating strategy, and in any event cannot call into question Leff and Moorhead's good faith in relying on Cowen's valuation.

without merit. *See NBC Universal, Inc. v. Paxson Commc'ns Corp.*, No. Civ. A. 650-N, 2005 WL 1038997, at *7-*8 (Del. Ch. Apr. 29, 2005). If plaintiffs were correct that such prior business dealings establish "bias", no director affiliated with an investment firm could ever rely on a banker's fairness opinion. Instead, plaintiffs must put forth *evidence* that prior business, or the prospect of future business, with Warburg improperly impacted the valuations the bankers produced, such that the board could not reasonably rely on the end-product. There is nothing here to show that either Cowen or BofA altered its opinion one iota to "please" Warburg. As for BofA's work on Zuma, it is a red herring: the TKT management projections provided to BofA did not project revenues from the Zuma proteins (McCauley Ex. 4), and the Zuma deal was immaterial in the context of a $1.6 billion merger. Tellingly, while plaintiffs disparage the motives of both banks, they point to nothing in the substance of either bank's work that renders it unreliable.[25]

## III. LEFF AND MOORHEAD ARE NOT LIABLE FOR ANY BREACH OF THEIR DUTY OF DISCLOSURE.

To survive summary judgment on their disclosure claims, plaintiffs must (a) put forth evidence that material facts were omitted from the Proxy Statement, and (b) establish that those omissions were the product of disloyal behavior. *See In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 734 (Del. Ch. 1999); 8 Del. C. § 102(b)(7); Ex. 29 (at Ex. 3.1, Art. VII). Plaintiffs cannot satisfy either obligation. First, as shown above,

[25] Plaintiffs' contention that BofA's analysis was unreliable because it "contained mistakes that the Defendants knew about" (AB 42, 72) typifies their cavalier approach to the record. The very testimony plaintiffs cite establishes that there was one minor error and that BofA "discovered that th[e] morning [of the board meeting], discussed it with the board and our final version corrected that". Miller Dep. 231-32, 237.

plaintiffs cannot establish disloyalty by Leff or Moorhead. Second, none of their alleged "omissions" are actionable.

The vast majority of the alleged "omissions" are false, and disclosure would "do no more than reflect the plaintiffs' substantive allegations of wrongdoing". *In re Lukens Inc.*, 757 A.2d at 736. In response, plaintiffs contend that the issue is not that Leff and Moorhead "failed to confess wrongdoing; rather, the issue here is that Defendants failed to disclose ***facts*** that were material and which happen to reveal their wrongdoing." AB at 83. This end-run around the rule against requiring self-flagellation has been consistently rejected by Delaware courts.[26]

In any event, these "facts" that plaintiffs contend should have been disclosed are not true:

- Warburg did not play a "role in initiating and pushing for a sale of the Company in order to divest its investment", nor did it have "M&A exit" as a goal, nor did Leff and Moorhead "vote in favor of accepting the $31 offer" (AB at 74). *See* Part I.A.

- Leff did not "actively assist[] Langer" in pursuing Shire's approval of the proposed Zuma transaction "in exchange for Langer's vote in favor of the merger" (AB at 76). *See* Part I.C.

- Cowen and BofA were not conflicted (AB at 77-79). *See* Part II.

- Villa-Komaroff did not "switch[] her vote" based "on the individual Defendants' 'peer pressure' arguments" in order "to present a united front" (AB at 76). Plaintiffs' assertions about Villa-Komaroff's thought

[26] *See, e.g.*, *Wolf v. Assaf*, No. C.A. 15339, 1998 WL 326662, at *4 (Del. Ch. June 16, 1998) ("Plaintiff's artfully phrased siren song that he 'didn't care how the disclosure was characterized so long as the facts were there' does not dissuade me from concluding it is no more than an artifice designed to camouflage an attempt at compelling self-flagellation.").

process are based solely on hearsay from Astrue. AB at 44. The only person competent to provide evidence on this subject—Villa-Komaroff herself—specifically testified that "avoid[ing] the appearance of a one-vote margin" did not play any role in her decision. Villa-Komaroff Dep. 254-55. To the contrary, "in a formal vote, when I weighed the vote itself and what it meant, I voted yes. It was a fair value for our shareholders." *Id.*[27]

The remaining alleged "omissions" are immaterial as a matter of law:

- Whether the first contact between TKT and Shire about a potential transaction occurred on October 1, 2004, as plaintiffs assert (*see* AB at 75), or on October 13, 2004, as disclosed in the Proxy Statement (*see* Ex. 1 at 11), is not a material distinction. Including such "play-by-play detail[s]" in a proxy is unnecessary. *TCG Sec., Inc. v. S. Union Co.*, Civ. A. No. 11282, 1990 WL 7525, at *7 (Del Ch. Jan. 31, 1990).

- As explained in our opening brief (LM Br. at 49-50), the board was not required to disclose the content of Chestnut Partners' February 2005 valuation (AB at 79-81), as it did not rely on that valuation in forming its views on the Merger Agreement in April 2005 (*see* Ex. 71; Villa-Komaroff Dep. 132), and it had substantial criticisms of the valuation.

- No additional or different disclosure regarding "the bases for [BofA's] 'adjustments' to management's forecasts" (AB at 81) was required. The Proxy Statement disclosed that BofA performed two *separate* sets of analyses—one based on management projections and one based on BofA's "adjusted" cases. *See* Ex. 1 at 26. It further disclosed that the adjustments were made "to reflect more conservative assumptions than those made by management of TKT regarding, among other things, the probability that certain pharmaceutical products being developed by TKT would be approved for marketing and sale". *Id.* at 25-26. Nothing else was required. *See In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1073 (Del. Ch. 2001) ("Delaware courts have held repeatedly that a board need not disclose specific details of the analysis underlying a financial advisor's opinion.").

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[27] Thus, plaintiffs' claim that if any of the "*four* votes in favor of the merger" had been disqualified, "the merger would not have happened" (AB at 52 n.49 (emphasis added)) is disingenuous. Five directors, including Villa-Komaroff, indisputably voted in favor of the merger. Not only have plaintiffs failed to provide any legal basis for disregarding her vote, but plaintiffs' alleged reasons for her vote are factually unfounded.

## CONCLUSION

For the reasons set forth above and in our Opening Brief, summary judgment should be granted to Leff and Moorhead on Counts I and II. Leff and Moorhead join the portions of the briefs of Shire and Wayne Yetter relating to the plaintiffs' lack of standing, the unavailability of rescissory damages, the sufficiency of disclosures and Count III.


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