



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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STEWART N. GOLDSTEIN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 2018-____ - ____
BIOVERATIV INC.,	:	
	:	
Defendant.	:	
	:	
_____	X	

VERIFIED COMPLAINT TO COMPEL INSPECTION OF BOOKS AND RECORDS UNDER 8 DEL. C. §220

Plaintiff Stewart N. Goldstein (“Plaintiff”), by and through undersigned counsel, respectfully submits this Verified Complaint to Compel Inspection of Books and Records under 8 *Del. C.* §220 (“Section 220”), and upon knowledge as to himself and his own actions, and upon information and belief as to all other matters, alleges as follows:

NATURE OF THE ACTION

1. This is an action under Section 220 of the Delaware General Corporation Law, by a stockholder of Bioverativ Inc. (“Bioverativ” or the “Company”), seeking to enforce his right to inspection of books and records in order to determine whether wrongdoing or mismanagement has taken place such that it would be appropriate to file claims for breach of fiduciary duty, and to

investigate the independence and disinterestedness of the Company's directors generally and with respect to the Company's proposed acquisition (the "Proposed Acquisition") by Sanofi, S.A., and Blink Acquisition Corp. (together, Sanofi and Blink Acquisition Corp. are referred to herein as "Sanofi").

2. As described in more detail below, the Proposed Acquisition appears to have been driven by the self-interests and divided loyalties of the Company's directors and/or officers. These individuals were seemingly more concerned about (among other things) the interests of an activist stockholder and its designated director that exerted outsize influence on the Company's board of directors (the "Board") and wanted a short-term sale, and about their own interests in personal payouts, than about seeking the best alternative reasonably available for outside stockholders. While the public facts are sparse, it appears that a well-motivated director would have concluded that, particularly given the restrictions imposed on Bioverativ as a result of its recent spinoff from Biogen, Inc. ("Biogen") and the recent corporate tax reform which is expected to hugely benefit the Company, now is a uniquely inappropriate time to sell the Company. Nonetheless, the Board is going ahead with the Proposed Acquisition. Plaintiff seeks inspection to ascertain the truth of what led the Board and the Company to this point, and why.

3. Further, there are significant issues with the financial projections that were apparently prepared by management at a time that they had an interest in

ensuring that the Proposed Acquisition would be approved. Among other things, these projections reflect unexplained precipitous drop-offs in financial results that appear to contradict management's own expectations and those of analysts covering the Company. Plaintiff seeks inspection to learn the truth about the Company's management projections.

4. In short, the public information about the Proposed Acquisition supplies a credible basis to suspect wrongdoing that warrants investigation, but the information that is currently available is insufficient for Plaintiff's purpose of investigating that wrongdoing and for his separate but related purpose of investigating the independence of each of the Company's directors. Accordingly, Plaintiff seeks a summary order from this Court ordering the Company to produce the requested books and records for inspection.

THE PARTIES

5. Plaintiff is and has been, at all relevant times, a beneficial owner of shares of common stock in Bioverativ.

6. Bioverativ is a Delaware corporation with its principal place of business in Waltham, Massachusetts. Bioverativ is a global biotechnology company focused on the delivery, research, development and commercialization of innovative therapies for the treatment of hemophilia and other blood disorders. Bioverativ markets two products, Eloctate and Alprolix, which are extended half-

life clotting-factor therapies for the treatment of hemophilia A and hemophilia B, respectively. Bioverativ also has ongoing research activities relating to these products, including post-marketing studies exploring the potential of these therapies for long-term joint health, immunogenicity, and immune tolerance induction in hemophilia patients who develop inhibitors, and research activities relating to new products, including even longer-acting extended half-life hemophilia product candidates, non-factor products to treat hemophilia, and gene therapies for both hemophilia A and B, as well as programs relating to sickle cell disease and beta-thalassemia.

FACTUAL BACKGROUND

7. Based on the information that is publicly available about the Proposed Acquisition, it appears that the Proposed Acquisition was driven by the self-interests of the Company's directors and/or officers, and that the Company's disclosures to stockholders about the Proposed Acquisition are materially incomplete and/or misleading. Plaintiff seeks inspection precisely because the truth of what happened during the sales process, and why, is not clear from the solicitation/recommendation statement on Schedule 14D-9 filed with the U.S. Securities and Exchange Commission ("SEC") on February 7, 2018 (the "14D-9"). Nonetheless, below are some of the pertinent publicly available facts that provide

Plaintiff a credible basis to suspect potential wrongdoing that warrants investigation.

8. Bioverativ has its origins as an independent company in a May 2016 announcement by Biogen that it would spin off its hemophilia business into a new entity. The Company was incorporated in August 2016, and became an independent public company on February 1, 2017, through a special dividend of Bioverativ shares to Biogen stockholders.

9. It appears, however, that the roots of the Proposed Acquisition go back even further. Beginning in 2008, Icahn Partners ran a multi-year proxy fight against Biogen, seeking to push Biogen to explore a split-up or a sale to a large pharmaceutical company. Icahn ultimately placed three directors on Biogen's board of directors, including Alexander Denner who was elected in a contested election in 2009. Ultimately, Denner and Icahn went their separate ways, with Denner founding his own hedge fund, Sarissa Capital Management, L.P., in 2012, and remaining on Biogen's board.

10. It appears that, once on Biogen's board, Denner continued to push for a split-up or sale of Biogen. As part of these efforts, at some point before May 2016, Biogen's board actively considered selling Biogen's hemophilia business to a third party acquiror, including through discussions with potential buyers. Citing unnamed sources, *Reuters* reported in April 2016 that this sale process was

ongoing and that Biogen was “working with an investment bank” on the potential sale. Instead, Biogen’s board decided a spin-off of the hemophilia assets would be preferable. As a result, Bioverativ was created and spun off from Biogen.

11. Biogen’s board was concerned about the tax treatment of the spinoff. As a result, in connection with the spinoff, it caused Bioverativ to enter into a Tax Matters Agreement with Biogen that limited Bioverativ’s ability to enter into certain transactions, including change of control transactions, if those transactions might be taxable to Biogen.

12. In connection with the spinoff, analysts saw significant potential in Bioverativ’s business. It was noted that Biogen’s two primary products, Eloctate and Alprolix, were “the fastest growing components of Biogen’s product mix.” In addition to the strength of those two products, the Company’s improving operating margins, and its promising pipeline of next-generation hemophilia drugs, analysts noted the potential for “meaningful upside from corporate tax reform if materialized,” given Bioverativ’s “extraordinarily high US tax rate,” and observed that tax reform in itself could increase analysts’ price targets significantly.

13. A few months after the spinoff, Sanofi contacted Denner and Brian Posner, Chairman of Bioverativ’s Board, to discuss Sanofi’s interest in acquiring the Company. The Board initially said the Company was not for sale, but by November 2017, in response to Sanofi’s non-binding proposal to acquire

Bioverativ for \$98.50 per share, the Company engaged J.P. Morgan Securities LLC (“J.P. Morgan”) and Guggenheim Securities, LLC (“Guggenheim”) to advise on a potential deal. J.P. Morgan and Guggenheim provided a list of “other industry participants that might be interested in potentially acquiring the Company,” but the Board decided not to contact any of those parties.

14. In deciding not to contact other potential acquirors, the Board cited “the tax considerations relevant to any strategic transaction involving the Company,” as well as “the benefits to the Company of avoiding a protracted sales process.” The 14D-9 does not reveal how those tax considerations would apply differently to potential acquirors other than Sanofi. Nor does it provide any information about which parties had explored acquiring Biogen’s hemophilia business before the spinoff, or what impact any such exploration may have had on those parties’ ability to acquire Bioverativ, whether for tax reasons, confidentiality/standstill agreement reasons, or any other reasons.

15. Also in November 2017, the Board asked management to prepare “an overview of the Company’s long-range plan as a standalone business,” *i.e.*, projections of the Company’s standalone financial prospects and potential value. Management presented this information at a Board meeting on November 21, 2017—the same meeting where the Board opted not to contact any other potential

acquirors. Management then presented apparently similar information to Sanofi at an in-person meeting held on December 18, 2017.

16. Meanwhile, the U.S. Congress was voting on tax reform. On December 19, 2017, the Senate passed legislation, which was signed into law shortly thereafter, that had the effect of massively lowering Bioverativ's effective tax rate. At a January 2018 conference, Cox observed that the passage of tax reform would lower the Company's effective tax rate from about 34% to about 21%. It is not clear from the 14D-9, however, if the disclosed management projections reflect this development, and it does not appear that the Board used the favorable change in negotiations. Much less did they pause to consider whether, given the Company's improved standalone prospects, they should revisit the decision to pursue a sale process at all.

17. Instead, the Board simply continued its negotiations with Sanofi and, on January 4, 2018, decided to proceed with exclusive negotiations with Sanofi for a sale of the Company at a price of \$105 per share in cash. The parties negotiated the Merger Agreement, as well as a letter agreement between Bioverativ, Sanofi, and Biogen under which Sanofi would guarantee indemnification to Biogen in the event that the Proposed Acquisition caused the spin-off to fail to qualify as tax-free. On January 21, 2018, the Board approved the Merger Agreement, and on January 22, 2018, the Proposed Acquisition was announced.

18. The single-bidder nature of this process is far from the only reason to suspect that the Board may not have complied with its fiduciary duty to make reasonable efforts to maximize value for stockholders. From the publicly available information, it appears that the process was influenced by the personal financial interests of Bioverativ officers and/or directors. Bioverativ CEO John Cox stands to receive over **\$72 million** in connection with the Proposed Acquisition, before even considering his Company shares and vested options. This is partly because Sanofi explicitly agreed that Cox would experience an “Involuntary Employment Action” on October 1, 2018, thus triggering his so-called “double-trigger” severance benefits regardless of what his duties with the combined company may be at that time. Similarly, Bioverativ CFO John T. Greene stands to receive over **\$18.5 million** in connection with the Proposed Acquisition (triggered immediately upon consummation), and Chief Global Therapeutics Operations Officer Rogerio Vivaldi stands to receive over **\$18.2 million** (also triggered immediately upon consummation). These three individuals thus stand to receive over **\$108 million** – separate and apart from payment for their shares or vested options – for the sale of a Company they ran for just over a year.

19. The non-employee directors appear to have been similarly conflicted. As noted above, Denner is the founder, chief investment officer, and managing member of Sarissa Capital. As such, Denner may be deemed to beneficially own

Sarissa's shares, and thus to benefit from the *\$123 million* Sarissa will receive in the Proposed Acquisition. Moreover, by causing the sale of Bioverativ, Denner achieves what appears to be important liquidity for his fund, and allows him to add a "scalp" to his belt as an activist investor who, having stepped out from the shadow of Icahn, wants to prove himself as capable of forcing the type of strategic transaction Icahn has long forced. These appear likely to have been particularly strong motivators given that Denner has sunk nearly a decade of time and money into Biogen and, more recently, Bioverativ.

20. Denner appears to have wielded outsized influence over the Board. As an initial matter, given his long and notorious history of proxy fights against directors who do not capitulate to his demands as to corporate strategy, any director would be wary of crossing Denner when Denner wants a company to pursue a particular strategy. Although the Company has not disclosed material information on this issue, it appears that Denner is likely responsible for director Protopapas's appointment to the Board and she is loyal to him. Notably, Denner nominated Protopapas to the board of Ariad Pharmaceuticals in a proxy fight in 2015. After he successfully placed her on that board along with himself, she loyally helped him force that company's sale, just as it appears she did at Bioverativ.

21. Similarly, Chairman of the Board Brian Posner serves with Denner on the board of Biogen. As a result, Posner would be doubly eager to stay on the right side of Denner, who could take his pick of companies at which to run a proxy contest against Posner. In addition, both Posner and Denner, as dual fiduciaries of Biogen and Bioverativ, may have had conflicting loyalties with respect to any potential acquisition of the Company that might have had adverse tax or competitive effects on Biogen. This might explain their otherwise difficult to explain haste to agree to the Proposed Acquisition now, rather than wait until the Tax Matters Agreement with Biogen expires in early 2019, at which time Bioverativ would have further proved its strength as an independent Company (especially after the tax reform legislation) and it would be free to sell to any third party, without any interference from Biogen. Meanwhile, director Paglia serves with Posner on the board of Arch Capital Group, meaning these considerations taint Paglia as well.

22. Beyond those apparent conflicts of interest and/or lack of independence, Bioverativ's non-employee directors have a material financial interest in pursuing the Proposed Acquisition that is not shared with the Company's public stockholders, in the form of accelerated payments for their unvested options and their restricted stock units. These cash payments are material for each director because, as shown below, they are significantly larger than each

director's 2017 director compensation which, in turn, was material enough to each director to induce that director to serve on the Board.

<u>Non-Employee Director</u>	<u>Value of Accelerated Options and RSUs</u>	<u>2017 Director Compensation</u>	<u>Options/RSUs as Percentage of 2017 Director Compensation</u>
Posner	\$2,470,701	\$490,000	504%
Denner	\$2,194,996	\$385,000	570%
Paglia	\$2,194,996	\$399,000	550%
Protopapas	\$1,790,253	\$366,000	489%
Germano	\$1,658,356	\$368,000	451%

23. Although Plaintiff believes inspection is necessary to investigate the nature and extent of these apparent conflicts of interest, and to investigate their influence on the process that led to the Proposed Acquisition, there does appear to be at least a credible basis to suspect that these various ulterior motivations may have led the Company's directors and officers to support the Proposed Acquisition even though it was not in the Company's public stockholders' best interests to sell the Company at this time, and certainly not without a full and fair auction process. The ulterior motivations may also explain other conduct, including the Company's delay in providing guidance for 2018, which caused the market to "turn cautious on the stock" late in 2017 notwithstanding its strong financial results, which included 27% year-over-year revenue growth in the third quarter of 2017. Similarly, in January 2018, Bioverativ reported 31% to 32% revenue growth for

fiscal 2017, but simultaneously with the announcement of those results it issued less optimistic guidance for 2018 of just 19% to 21% revenue growth. Plaintiff seeks to investigate whether this approach to guidance was motivated by a selfish desire to ensure the Proposed Acquisition would be completed.

24. In addition, the Board's financial advisors, J.P. Morgan and Guggenheim, were incapable of rendering impartial opinions on the Proposed Acquisition because they were incentivized by the terms of their engagement to advise the Board that the Proposed Acquisition was fair to common stockholders, which they did. The Board agreed to pay J.P. Morgan and Guggenheim \$31 million each, \$3 million of which was contingent on providing an opinion and the remainder of which is contingent on the Proposed Acquisition being consummated. In light of these issues, Plaintiff seeks to investigate whether the Board and management have acted and are acting in the best interests of the Company and all of its stockholders, or in pursuit of their own self-interest.

25. Plaintiff also seeks to investigate whether the consideration offered in connection with the Proposed Acquisition is fair to stockholders and whether the stockholders have been adequately informed of all material facts necessary to make that determination. Among other concerns, the disclosed multi-year financial projections reflect an unexplained sharp decline in operating income margins and growth between 2024 and 2027, and an unexplained drop in the Company's

unlevered free cash flow growth between 2022 and 2027. These projections appear to contradict the expectations of analysts, who had been predicting that Bioverativ's operating income margins would increase over time, and Bioverativ's own statements about the Company's prospects for growth from its existing products in current markets, for expansion into new markets, and for the "next generation" products Bioverativ is currently developing. In addition, it is unclear whether the disclosed projections reflect the significant expected benefits to the Company from tax reform. Plaintiff is entitled to inspection to investigate the suspicion that the disclosures regarding the Company's projections (and the financial analyses based thereon) are materially incomplete or misleading, and/or that the projections themselves were manipulated to make the Proposed Acquisition appear more favorable than it is.

26. In short, Plaintiff seeks, through inspection, to evaluate his serious concerns with the disclosures disseminated to the Company's stockholders soliciting their approval of the Proposed Acquisition. Based on the public information, however, Plaintiff has more than a credible basis to suspect that the 14D-9 omits material information relating to the Proposed Acquisition, the process that led to it, and its financial fairness or unfairness.

THE DEMAND FOR INSPECTION

27. On February 27, 2018, Plaintiff made a written demand on Bioverativ to inspect and copy certain books and records of the Company pursuant to Section 220 (the “Demand Letter”). The Demand Letter meets all of the requirements of Section 220, and is targeted to seek the information that is necessary for Plaintiff to investigate whether Bioverativ’s Board or any others breached their fiduciary duty in connection with the negotiation and approval of the Proposed Acquisition, as well as to investigate the independence and disinterestedness of the Board members. A copy of the Demand Letter is attached hereto as Exhibit 1.

28. The Demand Letter requested inspection of the following categories of documents:

1. Copies of the books and records provided to the individuals who drafted the 14D-9 in connection with the drafting of the 14D-9, or referred to by those individuals in connection with the drafting of the 14D-9, including all correspondence described in the 14D-9;
2. Minutes of meetings of the Board or any committee thereof since August 4, 2016 (final versions or the most recent draft where final versions are not available), together with any attachments, presentations, reports, or other materials provided to Board members in preparation for or reviewed at those meetings, relating to the Merger Agreement, the Proposed Acquisition or any other strategic transactions/alternatives;
3. Any indications of interest, term sheets, draft acquisition agreements, or similar offers relating to the Company, together with any presentations or materials in support of such offers, provided to Bioverativ by Sanofi or any other actual or potential acquirors of Bioverativ;

4. Materials provided by Bioverativ to its financial or other advisors, including J.P. Morgan and Guggenheim, since August 4, 2016 regarding the Proposed Acquisition and/or consideration of strategic alternatives (including, but not limited to, projections);
5. Presentations or memoranda prepared by J.P. Morgan or any other financial advisors, before or after they were officially engaged, and provided to the Board or the Company's named executive officers since August 4, 2016, regarding the Proposed Acquisition and/or consideration of strategic alternatives;
6. Monthly, quarterly and/or other periodic financial summaries provided to the Board or any committee thereof in connection with meetings held since August 4, 2016 concerning Bioverativ's historical and projected financial performance, including product-specific revenues;
7. Books and records sufficient to show the interests, financial or otherwise, of any director or officer of the Company in the Proposed Acquisition or any strategic alternative;
8. Any materials created, modified or provided to the Board or any committee thereof since August 4, 2016 concerning the independence or non-independence of any director, including any disclosure questionnaires and any books and records relating to appointment of directors to serve on any committee of the Board;
9. All books and records reflecting communications between John G. Cox, Alexander Denner, Brian Posner, Richard Brudnick, John Greene, Lucia Celona, Andrea DiFabio, Tim Harris, or Rogerio Vivaldi, on the one hand, and any officer, director, employee or agent of J.P. Morgan, Guggenheim, Biogen, Lazard Frères & Co. LLC ("Lazard"), Sanofi, or any other potential acquiror of the Company or any part thereof, on the other hand, including notes, calendar entries and electronic communications regarding the Proposed Acquisition or any other potential strategic alternatives involving Bioverativ;

10. Copies of all confidentiality agreements between the Company and any potential acquiror of the Company or any part thereof, or between Biogen and any potential acquiror of Biogen's pre-spinoff hemophilia assets relating to those assets;
11. Copies of all engagement letter agreements between the Company and J.P. Morgan or Guggenheim, and any amendments thereto; and
12. All documents produced to any other stockholder or their counsel in response to a demand pursuant to §220 or in connection with any stockholder litigation that relates to the Proposed Acquisition, including but not limited to *Booth Family Trust v. Bioverativ Inc. et al.*, Case No. 1:18-cv-10287-MLW (D. Mass.), *Sbriglio v. Bioverativ Inc.*, Case No. 1:18-cv-10291 (D. Mass.), and *Abrahamsen v. Bioverativ Inc.*, Case No. 1:18-cv-10293 (D. Mass.), as well as transcripts of any depositions of Bioverativ officers or directors taken in connection with any such litigation.

Ex. 1 at 2-4 (footnotes omitted).

29. Plaintiff's purpose for the Demand Letter was and is proper. Plaintiff seeks: (a) to determine whether wrongdoing or mismanagement has taken place such that it would be appropriate to file a breach of fiduciary duty action against the Board (and any officers who may have breached their fiduciary duties); and (b) to investigate the independence and disinterestedness of the directors generally and with respect to the Proposed Acquisition. As summarized above, Plaintiff has more than a credible basis to suspect wrongdoing that is worthy of investigation with respect to the Proposed Acquisition.

30. On March 6, 2018, Bioverativ responded to the Demand Letter, refusing to produce any books and records for inspection. A copy of the response letter is attached as Ex. 2.

31. In short, although Plaintiff is entitled to inspection of the categories of documents articulated in the Demand Letter, Defendant has wrongfully refused to make those documents available to Plaintiff. Accordingly, Plaintiff seeks a summary order pursuant to Section 220(c) requiring Defendant to produce all of the requested documents forthwith.

FIRST CAUSE OF ACTION

(Inspection of Books and Records Under 8 *Del. C.* §220)

32. Plaintiff repeats and realleges all of the allegations above as though fully set forth herein.

33. On February 27, 2018, Plaintiff made a written demand upon the Company for the inspection of the books, records, and documents identified in Plaintiff's Demand Letter.

34. Plaintiff has fully complied with all of the requirements of Section 220 with respect to the form and manner of making a demand for the inspection of the Company's books and records.

35. Plaintiff's demand for inspection is made for a proper purpose, which includes investigating possible breaches of fiduciary duty by members of the Board

and/or others in connection with the negotiation and approval of the Proposed Acquisition, and investigating the independence of the members of the Board.

36. The Company has refused to provide Plaintiff with access to the books and records demanded in the Demand Letter.

37. By reason of the foregoing and pursuant to Section 220, Plaintiff requests a summary order permitting him to inspect and make copies of the books and records identified in Plaintiff's Demand Letter.

38. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court summarily enter judgment in favor of Plaintiff and against Defendant:

A. Ordering the Company to produce to Plaintiff the books and records identified in Plaintiff's Demand Letter;

B. Awarding Plaintiff his costs and expenses incurred in this action, including reasonable attorneys' fees; and

C. Granting Plaintiff any and all further relief as the Court deems just and proper.

OF COUNSEL:

**ROBBINS GELLER RUDMAN
& DOWD LLP**

Randall J. Baron
David T. Wissbroecker
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

- and -

Christopher H. Lyons (#5493)
414 Union Street, Suite 900
Nashville, TN 37219
(615) 244-2203

JOHNSON FISTEL, LLP

W. Scott Holleman
99 Madison Avenue, 5th Floor
New York, NY 10016
(212) 802-1486

Dated: March 7, 2018

COOCH & TAYLOR, P.A.

/s/ R. Bruce McNew

R. Bruce McNew (#967)
1000 West Street, 10th Floor
Wilmington, DE 19801
(302) 984-3810

Attorneys for Plaintiff