



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TEUZA – A FAIRCHILD)
TECHNOLOGY VENTURE LTD.,)
Individually And On Behalf Of All)
Others Similarly Situated,)

Plaintiff,)

v.)

MARK LINDON, MICHAEL)
DREYER, ANOOSHEH BOSTANI,)
DAVID SCOTT, NICHOLAS)
TERRAFRANCA, JOSEPH RUBLE,)
ALFRED E. MANN TRUST, MANN)
GROUP, LLC, BIOVENTUS LLC, and)
BIOVENTUS INC.)

Defendants.)

C.A. No. 2022-0130-SG

**PUBLIC VERSION
FILED MAY 13, 2022**

**AMENDED VERIFIED CLASS ACTION COMPLAINT
FOR BREACH OF FIDUCIARY DUTY**

Teuza – A Fairchild Technology Venture LTD. (“Plaintiff” or “Teuza”), by its undersigned counsel, brings the following amended class action complaint against the defendants named herein to remedy their breaches of fiduciary duty in connection with the sale of Bioness Inc. (“Bioness” or the “Company”) to Bioventus LLC, a subsidiary of Bioventus Inc. (collectively, “Bioventus”)¹ in a merger that was

¹ Unless otherwise noted, Bioventus Inc. and Bioventus LLC are collectively referred to herein as “Bioventus.” At all times during the events detailed herein,

announced on March 30, 2021 (the “Transaction”). The allegations of the amended complaint are based on the knowledge of Plaintiff as to itself and its own actions and stockholdings, and on information and belief as to all other allegations, premised upon investigation of counsel, which included, *inter alia*, a review of documents filed and/or published by Defendant, news reports, press releases, conference call transcripts, and other publicly available documents.

INTRODUCTION

1. Bioness was a medical device company founded in 2004 as a joint venture between Alfred E. Mann (“Mr. Mann”), a prominent billionaire philanthropist and medical entrepreneur, and Neuromuscular Electrical Systems Ltd. (“NESS”), an Israeli medical device manufacturer.² At the time, Ness’ largest

Bioventus LLC, a subsidiary of Bioventus Inc., was acting on behalf of its parent company.

² At the time of the Transaction, Bioness was a leading provider of innovative technologies helping people regain mobility and independence. Bioness solutions included implantable and external neuromodulation systems, robotic systems and software-based therapy programs providing functional and therapeutic benefits for individuals affected by pain, central nervous system disorders and orthopedic injuries. At the time of the Transaction, Bioness offered six medical devices within its commercial portfolio, which were distributed and sold on five continents and in over 40 countries worldwide. Bioness innovations had been implemented in many of the most prestigious and well-respected institutions around the globe with 17 of the top 20 rehabilitation hospitals in the United States currently using one or more Bioness solutions.

stockholder was Teuza. Following a reorganization in 2007, the companies were restructured, with NESS becoming a subsidiary of Bioness.

2. As part of the reorganization, Teuza and the other former shareholders of NESS were granted two seats, later reduced to one seat, on the Bioness Board of Directors (the “Board”). This position was filled by Avi Kerbs (“Kerbs”) who, pursuant to a December 31, 2007 Stockholders Agreement was the designee of nearly fifty former NESS stockholders who became Bioness stockholders. Kerbs served on the Board of Bioness continuously from the time of his appointment through the consummation of the Transaction.

3. The majority of Bioness common stock was held by The Alfred E. Mann Trust (the “Mann Trust”). The Mann Trust was, at all times, the record holder of the Bioness shares. The Mann Trust contains a provision that upon Mr. Mann’s death, the Mann Trust assets, with few exclusions, would, going forward, be administered by the same trustees but under an “Administrative Trust”. Mr. Mann served as active Chairman of Bioness until 2013, and thereafter until his death in February 2016, he served as director of Bioness and continued to be actively engaged in its business. His unique leadership style saw him contribute significant funds to

Bioness in the form of “loans” provided by Mann Group, LLC (“Mann LLC”), an investment vehicle controlled by Mr. Mann.³

4. This unique interaction between the two entities resulted in Mann LLC being Bioness’ largest creditor. In fact, with the exception of a *modest* loan from Bank of America, all of the Company’s debt was held by Mann LLC. Michael Dreyer and Anoosheh Bostani (together, the “Trustees” and collectively with the Mann Trust and Mann LLC, the “Controller”) control the Mann Trust (as its trustees) and Mann LLC (as its managers). Through that control they also, as described below, controlled the Company, and accordingly all four were fiduciaries to it and its stockholders. Following Mr. Mann’s death, administrative control of Mr. Mann’s shares of Bioness transferred into the Administrative Trust, and control of the Mann Trust, Mann LLC, and ultimately the Company itself, fell into the exclusive hands of the Trustees, who used this control to benefit the Mann Trust and its affiliate as the Company’s largest stockholder and largest creditor. In short, not only did Controller hold more than 50% of the Company’s outstanding stock, but it also controlled nearly all of Bioness’s debt.

³ While these transfers from Mann to the Company were structured as a loan, no interest was actually paid on the loans (the nominal interest was accrued) and there was no expectation by Mr. Mann that the loans would ever be repaid. Instead, Mr. Mann acted in his philanthropist role, using the Company to develop medical devices that could help others and funded those efforts through “loans” that he did not expect to be repaid, and did not want to dilute the equity holders in so doing.

5. Almost immediately following Mr. Mann's passing, the Controllers appointed Mark Lindon to the Company's Board and later as the Company's Chairman in or around August 2017. Following the appointment of Lindon, the Trustees worked against the interests of the Company and its minority stockholders to reject any opportunity the Board identified to raise funds necessary for the Company's operations from outside sources and through business combinations, and instead forced Bioness to obtain financing exclusively from the Controller in the form of loans. Additionally, without the knowledge and approval of the Board, the Trustees and Lindon collaborated to facilitate Mann LLC claiming a security interest over all of Bioness' assets (including all its intellectual property) to secure past loans. These actions by the Trustees and Lindon effectively gifted Mann LLC a lien against the Company for no consideration and without Board approval. The "lien" was void *ab initio*, and was never valid—but it was used by the Controller to carry out the transactions challenged here.

6. After forcing this arrangement on the Company, and ensuring that it was entirely dependent on the Controller for future funding, in August 2020, the Controller informed the Company that it intended to discontinue providing funding to Bioness. In short, following Mr. Mann's death, the Controller took actions that made the Company entirely dependent on it for funding, then abruptly withdrew that

funding and placed the Company in a helpless position in order to force a fire sale and block any alternative funding sources.⁴

7. Fire sales tend to attract fire-sale prices and that was the case here. Given the possible disaster of losing its tax-free status, the Controllers made no attempt to maximize the sale price of the Company. On information and belief, they thought that would take too long and put the Trust in a possible sticky tax situation. An immediate liquidation of the Company also conferred on Controller a huge tax benefit by claiming a write-off of its alleged investment in the Company. As a result, they orchestrated a sale of the Company for consideration they should have known—and quickly proved to be in fact—inadequate and unfair. Not surprisingly, the “process” they used was not only unfair but gave no evidence that Controller even understood there was a duty to follow a fair process. Indeed, the sale process orchestrated by the Controller was structured in a way that ignored potential suitors

⁴ Based on information and belief, the rush to sell the Company, that is described hereafter, was triggered by the unique circumstances in which Controller acquired its shares of Bioness. Under IRC Section 4943, which governs taxes on excess business holdings, a non-profit trust, like the Mann Trust, has a 5-year period to dispose of certain types of for-profit business assets before losing its non-profit status. The five-year clock starts ticking when the business interest or stock is contributed. Following Mann’s death, the assets were immediately administered by the Administrative Trust, and on February 25, 2016, the five-year clock began to tick and was set to expire on February 25, 2021. In short, with the clock ticking down, Controller sought to push through the Transaction before the pending deadline pursuant to which it would start having to pay taxes on its many holdings.

and instead simply forced through a fire sale to gain large tax benefits. Specifically, the Controller, led by Lindon, engaged in an utterly flawed and highly manipulated sales process that conspicuously ignored at least one superior offer and instead forced an immediate sale of the entire Company in a way that was structured to guarantee all proceeds went to the Controller.

8. As a result of this unfair process, the price paid for the Company was ridiculously low on its face, the Controller only looked at the interests of the Company's creditor and Controller's tax needs, and the Company's minority stockholders were forced out of the Company for a pittance—and that pittance was only grudgingly given after it became obvious to all how bad the deal was. Plaintiff brings this action on behalf of itself and a class of former Bioness stockholders to seek redress for the harms to the Class stemming from Defendants' breaches of fiduciary duty and to recover all amounts that Controller has cost the Company's stockholders.

PARTIES

9. Plaintiff was, and had been at all relevant times, a beneficial stockholder of Bioness. Plaintiff is a publicly traded Israeli venture capital fund. Prior to the merger of Bioness and Bioventus, Teuza owned around 2.5% of the common stock of Bioness and was a stockholder of Bioness since 2007.

10. Defendant Mark Lindon was a director of Bioness, the Chairman of its Board since 2017, and a member of the Special Negotiating Committee (the “Committee”) that was formed by the Board to negotiate and recommend the sale transaction with Bioventus. Lindon was a conflicted director. In addition to being Chairman of Bioness, Lindon, a lawyer, was also counsel to the Company. On information and belief, Lindon was general counsel for Bioness from 2006 to 2021. Lindon was in-house counsel from 2006 to 2009 and has been a consultant and outside general counsel since 2009. Upon information and belief, Bioness has paid Lindon more than \$500,000 in legal fees over the two years preceding the Transaction, including a nearly \$17,000 monthly retainer. Moreover, Lindon also represented the Controller. According to his own law firm’s website:

Mr. Lindon also represented Mr. Mann in a wide variety of other matters unrelated to Bioness (including mergers & acquisitions, financings, joint ventures and litigation management) from 2009 until Mr. Mann’s death in 2016. Mr. Lindon was appointed to the Bioness Board of Directors in 2016 to fill Mr. Mann’s seat, was appointed Chairman of the Board in 2017 and served on the Board until 2021.

(<http://www.lindonlaw.net/biography.html>) (last visited Jan. 31, 2022). Lindon’s conflicts were well known and communicated to the Board. As recently as October of 2020, Lindon recused himself from the Board’s consideration of a request made by the Trust because he had from time to time represented (and currently represents)

the Trust on matters unrelated to the Company. As a result, Lindon was beholden to the Controller.

11. Defendant David Scott was a director of Bioness.

12. Defendant Nicholas Terrafranca was a director of Bioness.

13. Defendant Joseph Ruble (together with Scott and Terrafranca, the “Trust-Appointed Directors”), was a director of Bioness.

14. Defendant Alfred E. Mann Trust (the “Mann Trust”) was the Company’s controlling shareholder at all relevant times, holding more than 50% of Bioness’ outstanding stock. The Mann Trust was formed for Alfred E. Mann (“Mr. Mann”), and is located 12744 San Fernando Road, Sylmar, CA 91342.

15. Defendant Michael Dreyer is a Trustee of the Mann Trust and manager of Mann LLC.

16. Defendant Anoosheh Bostani is a Trustee of the Mann Trust and manager of Mann LLC.

17. Defendant Mann Group, LLC (“Mann LLC”), is an affiliate of the Mann Trust and is a major creditor of the Company. Mann LLC was formed in the State of Delaware and is managed by the Trustees, Michael Dreyer and Anoosheh Bostani.

18. Defendant Bioventus LLC is a Delaware limited liability company. Bioventus LLC is a subsidiary of Bioventus Inc. Majority ownership of Bioventus

LLC is held by Bioventus Inc., and Bioventus Inc. is the sole manager of Bioventus LLC. All individuals who serve as the principal officers of Bioventus LLC serve in the same capacities at Bioventus Inc.

19. Defendant Bioventus Inc., incorporated in Delaware, is a global leader of innovations for active healing. Through a combination of internal product development, product/business acquisition, and distribution agreements, the Company brings to market products that address a growing need for clinically effective, cost efficient, minimally invasive medical treatments that engage and enhance the body's natural healing processes. Bioventus Inc. was incorporated as a Delaware corporation on December 22, 2015, to facilitate the company's IPO, which resulted in Bioventus Inc. using the proceeds of the IPO offering to acquire a majority interest in Bioventus LLC. Bioventus Inc. is the sole manager of Bioventus LLC, and all individuals who serve as the principal officers of Bioventus LLC serve in the same capacities at Bioventus Inc. Bioventus trades on the Nasdaq under the ticker "BVS" and is headquartered in Durham, NC at 4721 Emperor Boulevard, Suite 100, Durham, NC 27703. The company has more than 1,100 employees worldwide.

CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action as a class action pursuant to Court of Chancery Rule 23 on behalf of former owners of Bioness common stock (the

“Class”). Excluded from the Class are defendants and their affiliates, immediate families, legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

21. The Class is so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through discovery, Plaintiff believes that there are at least fifty members in the Class.

22. Questions of law and fact are common to the Class, including, *inter alia*, the following:

- a. Whether the Controller and members of the Board breached their fiduciary duties to Plaintiff and the Class in connection with the Transaction; and
- b. Whether Plaintiff and the other members of the Class were damaged by the Board’s and Controller’s conduct.

23. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. Plaintiff’s claims are typical of the claims of the other members of the Class and Plaintiff has the same interests as the other members of the Class. Accordingly, Plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of the Class.

24. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class. That, in turn, would establish incompatible standards of conduct for defendant, or adjudications with respect to individual members of the Class, which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

25. Defendant acted, or refused to act, on grounds generally applicable, and caused injury to the Class and, therefore, final injunctive relief on behalf of the Class as a whole is appropriate.

SUBSTANTIVE ALLEGATIONS

A. Mann Finances Bioness and Promises to Forgive the Debt When the Company is Sold

26. Prior to his death, Mr. Mann was intimately involved in Bioness' operations. In addition to leading the Company as Chairman, Mr. Mann was the Company's controlling stockholder. On information and belief, Mann was also the beneficial owner of Mann LLC, and at all relevant times Mann acted as the sole authorized representative of Mann LLC in its dealings with the Company. Since the 2007 merger with NESS, Mr. Mann provided the Company with a significant amount of additional capital. While these transfers from Mann to the Company were

structured as a loan, no interest was actually paid on the loans (it was all “deferred”) and, more importantly, Mr. Mann had no expectation that they would be repaid. This arrangement was not unique to Bioness. As noted in the New York Times article following his passing, “[i]n all, *Mr. Mann started and largely financed 14 companies*, nine of which were acquired for a total of almost \$8 billion, according to MannKind.” (<https://www.nytimes.com/2016/02/27/business/alfred-e-mann-pioneer-in-medical-devices-dies-at-90.html>) (last visited Feb. 3, 2022). In effect, despite their structure, the “loans” operated as a form of charitable donation, very much in line with Mr. Mann’s many other philanthropic and business endeavors.

27. At the time that these “loans” were given, Mr. Mann had repeatedly confirmed to the Company’s Board and management, and on information and belief to other persons, *that his loans to the Company were not subject to repayment when the Company was eventually sold*. For example, in email correspondence between Kerbs and Alfred Mann in 2014, Alfred Mann reassured Kerbs that the loans would not need to be repaid and instead described the loans as such:

Avi, I advanced my loans to Bioness to support operation of the company with full understanding of the risk and the possibility that might not collect it at all. I had actually tried to write off 25 million in late 2012 but there were some significant obstacles under US tax law. Of course I want to be able to use any write off efficiently.

I want Bioness to succeed and am committed to create value for our stockholders. If needed I am prepared to write off some or even all of those loans but do not want to do anything formally until we are

operationally secure. I am very pleased with the progress but I am not yet ready to make a final adjustment.

I realize the loans give you some difficulty; I just have to find the best method and the right time to resolve all that.

Best regards.

Al

As the above email indicates, Mr. Mann intended and promised to write-off some or even all of these loans and sought to assure Kerbs, and the Board, that he did not consider the loans as having any detrimental effect on the Company's future.

28. More recently, in an email to Kerbs last year, Bioness' CEO Todd Cushman ("Cushman") admitted that "[o]n several occasions, [Mr. Mann] was challenged directly and stated to shareholders that he was going to retire the debt prior to exit." This was also expressly confirmed by Mr. Mann at a Board meeting held at its home in August 2015 in the presence of the Board and the trustees. In fact, these discussions were so prevalent, that in the Q&A section of the 262 Notice that was filed in connection with the Transaction, a question directly addressing this very issue was put before the Board:

There are rumors that Al Mann indicated to several people that he intended to forgive the debt. Shouldn't the Merger Consideration be allocated based on the forgiveness or the conversion to equity of the Mann Group debt so there is a larger payment to the holders of the Company Capital Stock?

The Board's response at this time is revealing. Rather than deny the claim outright, the Trustees instead responded that Al Mann personally never had the chance to actually forgive the debt or sign any agreement to do so. Clearly the Trustees, Lindon, and other members of the Board were aware of this arrangement. In fact, during the very same May 2016 meeting of the Board when Lindon was appointed, the Board held a lengthy discussion of the relationship between the Company, the Board, and the Trustees, following Mann's death. Specifically, the discussion concerned the concerned the Board members complaining about the involvement of the Trustees in the Company's affairs and financing arrangements.⁵

29. Mann's own dealings with the Company indicate that, even a year before his death, he did not consider the loans as having any effect on the Company's valuation. In fact, not only did Mann repeatedly promise Kerbs, Teuza, and other stockholders that the "loans" would be forgiven prior to an exit and would therefore not dilute their equity in Bioness, but in 2015, Mann offered Teuza a five-year put/call, that would give each of Mr. Mann and Teuza a put/call right in respect of their Bioness shares (the "Put/Call Proposal"). During the negotiations surrounding

⁵ Interestingly, a description of this discussion was omitted from the Board minutes by Lindon himself. When the Company's former chairman, David Hankin ("Hankin"), later emailed Lindon to note the absence of these discussions in the minutes, Lindon acknowledged their removal but never sought to include a description of the discussion.

the Put/Call Proposal, Mann attributed to the Bioness common shares a value of \$2.32 that, on its face, clearly ignores the loans and reflected a net enterprise value for Bioness of approximately \$230 million. Clearly, Mann's valuation of the Company ignored the loans. More importantly, Mann was expressing that Teuza could rely upon the promise that these loans would ultimately be forgiven. Adding even further credence to this understanding is the fact that no interest was actually paid on these "loans," which serves as a clear indication that they were never intended as real loans. Relying on Mann's promise, Teuza and other stockholders agreed to remain equity holders until an exit, and the Board agreed to Mann's wishes to not seek outside funding.⁶

30. Even more importantly, any security interest related to these loans had long since expired by the time of Mr. Mann's passing—again showing that Mr. Mann had no intent of collecting on them. In August of 2008, the Company granted Mann LLC a security interest over some of the assets of Bioness, and Mann LLC perfected its security interest by filing a UCC-1 on August 18, 2008 (the "First Mann LLC UCC-1"). Significantly, the security interest *expressly excluded* Bioness' intellectual property.

⁶ Teuza and other former NESS stockholders similarly agreed in 2010 to forego a put right they obtained in the 2007 business combination at the request of Mann.

31. On October 19, 2009, the First Mann LLC UCC-1 was amended to more expressly exclude the Company's intellectual property ("IP"). In addition to the general statement excluding the intellectual property, the amended UCC-1 also set forth a detailed description of the Company's specific IP being excluded.

32. That same day, a new UCC-1 was filed by Mann Foundation (the "Mann Foundation UCC-1"), this one covering only the Company's IP that was excluded from the First Mann LLC UCC-1. In fact, the IP description in the Mann Foundation UCC-1 is identical to the description of the excluded intellectual properties in the amended Mann UCC-1.

33. This arrangement continued for several years until, on May 7, 2013, the Mann Foundation UCC-1 was terminated, thereby removing all liens over Bioness' intellectual properties. A few months later, the First Mann LLC UCC-1 expired by its terms in August of 2013, thus removing all remaining liens over Bioness' assets.

B. The Mann Trust Exercised *De Facto* and *De Jure* Control Over Bioness

34. On February 25, 2016, Mr. Mann passed away. Following Mr. Mann's passing, control of the Mann Trust, and ultimately Bioness itself, fell to the Trustees, Michael Dreyer and Anoosheh Bostani, who also served as the managers of the Company's largest creditor, Mann LLC. The Controller, and specifically Messrs. Dreyer and Bostani, wielded control over Bioness and its Board by leveraging their position representing, at the same time, the Company's controlling stockholder and

largest “creditor.” To assist in these efforts, the Controller installed Lindon as a Bioness director shortly after Mr. Mann’s death, and eventually as the Company’s Chairman in or around August of 2017. Lindon was appointed Chairman to replace Hankin, who, based on information and belief, had resigned abruptly that same month after growing disagreements with the Trustees involvement in the affairs of Bioness. As detailed herein, Lindon was conflicted having worked extensively for the Controller in the past.⁷

35. With Lindon in place, and Hankin out of the way, the Controller immediately took steps to assert its rights over Bioness’ assets. On August 15, 2017—shortly after the Trustees installed Lindon as Chairman—the Trustees and Lindon caused Bioness and Mann LLC, *without Board knowledge or approval*, to execute an all-assets security agreement, attaching a promissory note dated June 27, 2017 (the “June 2017 Mann LLC Note”). The June 2017 Mann LLC Note purported to incorporate the cumulative loans provided by Mann LLC to Bioness since 2008.

⁷ According to his law firm’s website, Mr. Lindon represented Mr. Mann in a wide variety of other matters unrelated to Bioness (including mergers & acquisitions, financings, joint ventures and litigation management) from 2009 until Mr. Mann’s death in 2016, and Mr. Lindon has continued to represent the Mann Trust after Mr. Mann’s passing. More glaringly, during a meeting of the Board in October of 2020, Mr. Lindon informed the Board that he was recusing himself during the Board’s discussion on the Trust’s request to retroactively increase the interest rate on their outstanding loans to the Company, because he has from time to time represented (and currently represents) the Trust on matters unrelated to the Company.

36. On August 30, 2017, Mann LLC filed a new UCC-1 purporting to cover all of Bioness' assets, *including* its IP (the "Second Mann LLC UCC-1"). This step was also taken without the Board voting to grant Mann LLC this security interest or approve the June 2017 Mann LLC Note, nor the filing of the new UCC-1. Instead, this was unilaterally orchestrated by Lindon at the behest of the Trustees, and without the knowledge or consent of the Board. As such, these actions constituted violations of fiduciary duty by Lindon and the Mann Trust, were void *ab initio*, and had no legal force and effect. But as a practical matter they allowed the Controllers to take the subsequent actions described herein.

37. The execution and delivery by Bioness to Mann LLC of the security agreement and the June 2017 Mann LLC Note, and the purported grant thereunder to Mann LLC of a lien over all of Bioness' assets, effected a self-dealing action by the Controller with the aid of Lindon, lacking any valid consideration. To make matters worse, the Trustees also improperly engaged in further self-dealing to increase Mann LLC's (and their) leverage over the Company, first by forcing the Company to obtain financing exclusively in the form of new loans from Mann LLC, blocking all efforts by the Board to obtain financing from outside sources or through business combinations, and then unilaterally demanding increases in the interest rate on the Mann LLC loan to 6% over LIBOR, which was implemented in an amended promissory note dated 2018, and then to 10% over LIBOR in October 2020.

38. As discussed herein, the execution and delivery by Bioness to Mann LLC of the security agreement and the June 2017 Mann LLC Note, and the purported grant thereunder to Mann LLC of a lien over all of Bioness' assets, effected a self-dealing action by the Mann Trust with the aid of Lindon, lacking any valid consideration. Unsatisfied with simply forcing a sale, these liens were utilized to help orchestrate the sale of the Company in a way that ignored potential suitors and other financing alternatives that would have allowed the Company to remain independent, and instead favored the Mann Trust and its priority for obtaining immediate liquidity at the expense of the Company and its other shareholders. These actions destroyed Bioness' stockholder value, giving rise to valuable corporate claims on behalf of Bioness (the "Derivative Claims").

39. The 2017 agreements and the lien were neither discussed nor approved by the Board. Furthermore, no documents relating to this transaction were produced pursuant to the 220 Action described below, which purported to deliver all board minutes since 2013. The Derivative Claims were first identified in the 220 Action filed by Kerbs and later expanded upon by Plaintiff in its Verified Complaint in Intervention that was filed on February 23, 2021 (the "Teuza Complaint"), and were left unresolved at the time that the Board voted to approve the Transaction. These claims have and continue to cast a shadow over this transaction. Having received the benefits of acquiring Bioness on the cheap, Bioventus was disincentivized to assert

the underlying Derivative Claim and did not provide value for it in the merger price. Instead, almost the entirety of the Merger Consideration is devoted to the satisfaction of these loans, accordingly the value of the Derivative Claims is material in the context of the merger.

C. Controller Rejects Other Financing Arrangements and Forces the Board to Sell the Company

40. After securing for themselves effective control of the Company and its assets, the Controller rejected multiple opportunities identified by the Board to raise funds from outside sources in the form of stock offerings and strategic transactions. Instead, the Controller, acting through Lindon, insisted that Bioness obtain financing *exclusively* from the Controller in the form of additional loans. This forced arrangement continued for some time until, in August 2020, the Controller informed the Company that it intended to discontinue funding to Bioness. Without that funding, the Company sought alternative sources of funds, but was stymied at every turn by the Controller. Not only did Controller refuse to provide any further funding, but it would also not allow the Company to get funding from other sources. Instead, the Controller had one goal in mind: force the Board into selling the Company so that the Controller could get paid out in a way that served the Controller's various interests.

41. In the Fall of 2020, having lost the financial support that Bioness had been forced, by the Controller, to depend upon, the Company began to seek alternative sources of capital. First, in September of 2020, Bioness received a funding proposal from a group led by Robert Kuhn involving loans and stock issuance, which would *not* have resulted in the sale of Bioness. In response, the Controller flatly rejected that proposal, and instead demanded a sale of the entire Company. At this early stage, it was already clear that the decisions of the Board would be guided by the whims of the Controller.

42. In fact, during an October 6, 2020, meeting of the Board, Lindon discussed the Trustees' rejection of the funding offer and noted that the Trustees' consent was necessary "as they are both the senior secured lender and a majority stockholder." Of course, the Trust was only the "senior secured lender" because it had—without notice to or the consent of the Board—filed paperwork that purported to take that action. In fact, that action was entirely null and void, and the Controller had no such claim or rights. But the Controller was not interested in such details. It needed to cash out its interest in the Company; it had a deadline; and neither legal details nor fiduciary duties were going to stop it.

43. Almost two months later, on November 26, 2020, the Company and Kuhn Global Capital LLC ("Kuhn") entered into a Preliminary Term Sheet, dated as of November 23, 2020 (the "Kuhn TS"), proposing a business combination

involving an initial bridge financing and an option for Kuhn to acquire the Company (the “Kuhn Proposal”). The Kuhn Proposal represented an immediate and significant potential solution to the Company’s cash crunch, and the Kuhn TS was approved by the Board and at least originally supported by the Trustees. But things went south from there.

44. Although the Kuhn Proposal presented a great outcome for the Company, and hence its stockholders, it was less of a home run for the Controller. Accordingly, while the Kuhn Proposal was still being negotiated, and unbeknownst to Kerbs (who was kept in the dark even though he was a director), Controller, with the assistance of Lindon, was working to find an alternative deal that could satisfy the Controller’s goal of a quick sale of the Company on terms that would suit Controller’s unique goal of liquidating its ownership.⁸ The rush to pursue an alternative transaction can likely be explained by the huge tax benefit to the Controller, and the unique structure of the Mann Trust and the corresponding tax considerations, which, based on information and belief, would have required the Mann Trust to have entered into an agreement to dispose of its shares by February

⁸ Further assisting in these efforts was Houlihan Lokey, Inc. (“Houlihan”). Houlihan had little incentive to push for the pre-arranged Kuhn deal, and instead was incentivized to seek an entirely new deal. This financial motivation closely mirrored the desire of Controller, who was also incentivized to seek a new deal that would provide the greatest benefit to them.

25, 2021.⁹ In short, with the clock ticking down, the Controller was strongly motivated by its own unique interests to push through the Transaction before the pending deadline. However, unsatisfied with simply forcing a sale, the Controller sought to orchestrate the rapid sale of the Company in a way that ignored potential suitors and instead favored the Controller and its priority for obtaining immediate liquidation of its interest at the expense of the Company and its other shareholders.

45. This secret parallel track was revealed to Kerbs for the first time during a meeting of the Board on December 24, 2020, at which time the Board was presented with a fully negotiated letter of intent with Bioventus (the “Bioventus LOI”). The Bioventus LOI, which was provided to the Board for the first time a mere hours before the Board meeting on December 24, 2020, and was promptly approved by a majority of the Board without substantive discussion. That the Board would approve of the Bioventus LOI under these circumstances is perplexing, to say the least. The Bioventus LOI contemplated an acquisition by Bioventus of all the stock of the Company, for only \$35 million in cash paid at closing, and potential earn-outs of up to \$65 million, *with the entire net proceeds of the purchase price to be paid to Mann LLC* as the supposedly secured creditor.

⁹ See FN #3.

46. Under the terms of the Bioventus LOI, no consideration whatsoever would have been paid to equity holders of Bioness. The Bioventus LOI also prohibited any solicitation, or even communication, regarding alternative acquisition proposals (the “No-Shop”). The No-Shop provision was so broad that it purported to prevent Bioness from even taking out any new loans—unless, that is, the loans came from the Controller. Terms such as that raise questions about which side asked for such coercive No-Shop terms.

47. In sum, the Bioventus LOI was approved by the Board without any substantive analysis or consideration, even though it improperly: (i) contemplated the sale of the Company with all net proceeds going to the Controller and no consideration to the minority stockholders; (ii) prohibited any consideration of a competing proposal, without any carve-out for the exercise of the Board’s fiduciary duties; (iii) prohibited Bioness from borrowing from any entity other than Controller; (iv) was negotiated by Controller and Lindon who, despite the conflict of interest, dominated the Board Meeting and voted in favor of moving forward with the LOI. Clearly, the only entity that stood to benefit from pursuing the Bioventus LOI was Controller, who had set in motion a self-dealing transaction that would benefit itself at the expense of Bioness’ other stockholders.

D. Controller Agrees to a Payoff Amount for the “Loans”

48. The Bioventus LOI contemplated an initial payment of only \$35 million. That \$35 million would likely have been distributed as follows: (i) \$14.5 million repay Company indebtedness for borrowed money (other than the Mann LLC loans) and certain debt-like items; and (ii) approximately \$6 million paid with respect to third party expenses of the transaction to the Company’s financial advisors, attorneys, accountants and a portion of the sale bonuses owing to four (4) senior executives of the Company. The remainder, approximately \$14.5 million, not including up to \$65 million of contingent consideration related to the achievement of certain key milestones, would be paid to Mann LLC in reduction of its loans to the Company. Accordingly, in agreeing to the terms detailed in the Bioventus LOI, Controller, as the Company’s creditor, unilaterally set its own payoff at an amount equal to the present value of the net proceeds that it would get in the Bioventus transaction, approximately \$14.5 million plus the present value of the contingent consideration (the “Payoff Amount”).¹⁰ The Controller’s unilateral determination to

¹⁰ In addition to an upfront payment, the Bioventus LOI also detailed up to \$65 million of contingent consideration related to the achievement of certain key milestones through 2024. However, these milestones were more aspirational than likely. In fact, the trigger for the 1st \$15 million milestone payment under the Bioventus LOI, required that Bioness’ TalisMann Pulse Generator and Receiver System be approved for use by December 31, 2021. However, as of today, that application has yet to be submitted.

obtain this nominal amount relative to the face amount of alleged “loans” is a clear indication that the Controller never expected these loans to be repaid. While forcefully pursuing the Bioventus transaction, the Controller repeatedly rejected offers that would have allowed the Controller to liquidate its interest in the Company for a significantly larger payoff, demonstrating that it was more interested in effecting a quick sale of the entire Company to achieve its own unique interests.

49. In fact, the same day the Bioventus LOI was executed, Dryer emailed Kerbs “I want you to know, the Trust is strongly supportive of the Bioventis [sic] deal. Anooosheh and I do not want to discuss any competing offers while we are under the exclusivity provisions. I am sorry if this is not what you want, but to the Trust the Bioventis [sic] offer is what we would like to pursue.” In other words, the interests of the stockholders simply did not matter.

50. As the email from Dryer indicates, the Company’s claimed creditor had unilaterally set its own payoff at an amount equal to the present value of the net proceeds that it would get in the Bioventus transaction, and intended to use its dominance over the Company to obtain it. In fact, as discussed in further detail below, this was only the first of many instances of the Company’s Controller, and largest creditor, expressing its commitment to pursue the deal with Bioventus as contemplated by the Bioventus LOI, and no other deal. However, it’s important to highlight that Controller stood in the position of the Company’s principal creditor—

or at least claimed creditor—here. As soon as Controller unilaterally agreed to wipe Bioness’ debts clean in return for payment of an amount equal to the present value of the net proceeds that it would get in the Bioventus transaction, that amount became the loans’ payoff amount. From that point forward, the Controller was entitled (if it was entitled to anything other than the value of its equity in the first place) to no more than the net present value of the amount it had agreed to for repayment. Any consideration paid for Bioness over that amount should have gone to the Company’s stockholders. That did not happen here.

51. As detailed below, instead of dealing at arms-length with a supposed creditor that had already contractually committed itself to a payoff amount, the Board elected to defer entirely to the creditor, as the Company’s Controller. By expressing a commitment to support a transaction contemplated by the Bioventus LOI and no other transaction besides, Mann LLC unilaterally valued its loans at an amount equal to the present value of the net proceeds that it would get in the Bioventus transaction. From that point forward, the Board was faced with, at most, an unsecured loan of approximately \$14.5 million plus the present value of an aspirational contingent payment. A director’s failure to understand the nature of his duties can be evidence of unfairness. Here, the job of the Board was to maximize the value of the corporation for the benefit of the common stockholders. Instead, they refused to recognize the conflicts they faced. As detailed below, instead of adhering

to Delaware law, and dealing at arms-length with a claimed creditor who had already delivered its effective payoff demand, the Board deferred entirely to Controller, incorrectly assuming that fiduciary duties were owed, either exclusively or primarily, to the creditor and not the Company's own stockholders.

E. The Unfair Sale Process

52. Following the vote to move forward with the Bioventus LOI on December 24, 2020, the Board also created the Special Negotiating Committee to negotiate and recommend the sale transaction under the Bioventus LOI. However, the Committee was not independent. Appointed to the Committee was the conflicted Chair of the Board, Lindon, who had just recently been working hand in hand with Controller to negotiate the Bioventus LOI. As detailed above, Lindon was hopelessly conflicted. Lindon had represented, and continued to represent, the Trust in a variety of matters. It was glaringly unreasonable that he would be selected to lead the Committee that was tasked with negotiating a strategic transaction where nearly the entirety of the Consideration would be going to Controller.

53. Even though the Mann Trust was the controlling stockholder, the Company's largest creditor, and stood to receive all the consideration flowing from the Merger Agreement, the Committee, which was specifically designed to exclude any director who would possibly represent the interests of minority stockholders, worked closely with the Controller without even attempting to simulate an arms-

length transaction to protect the minority stockholders' interests. In fact, the record clearly demonstrates that both the Committee and all dealings with Bioventus were dominated entirely by Lindon and the Trustees.

54. Specifically, the Committee's first revisions to the Merger Agreement, reduced the required Bioness stockholder consents so that the consents that Controller dominated would be sufficient to secure the approval of the Transaction. This guaranteed that the Controller's approval was all that was needed. Furthermore, the Committee inserted language that would require, "as far as practicable," for the parties to close "simultaneously" with signing of the Merger Agreement, thereby providing the Controller with even more deal certainty of a quick sale.

55. Section 1.8 of the Merger Agreement provided that Mann LLC would receive all of the initial "Merger Consideration" after the necessary escrow payments. Further, the balance of Mann LLC's loan would "be terminated and released" and "in consideration," Mann LLC would receive substantially all subsequent payments by Bioventus in the unlikely event that the milestone payments were achieved.¹¹ In short, Controller was getting an immediate cash payment and

¹¹ During the March 30, 2021 meeting of the Board, the Board expressed substantial doubt that these milestone payments would ever be achieved. Specifically, amongst other comments, during the meeting, "Mr. Terrafranca stated that the ability of Accelmed to achieve the milestones set forth in its proposal seemed difficult to achieve but that *at least* the first milestone set forth in the Bioventus proposal *seemed*

the prospect of additional cash down the line while minority stockholders would receive absolutely nothing.

56. The fact that the minority stockholders were utterly ignored in these conflicted negotiations was reinforced by the fact that the Committee failed to negotiate an increase in the Merger Consideration that was originally offered in the Bioventus LOI, it failed to even attempt to negotiate any benefit for the minority stockholders, and it failed to challenge the validity of the Mann LLC's loan or Mann LLC's alleged security interest.

57. Further, the Trustees and the Committee, acting through Lindon, effectively insulated the Transaction from any competition or potential dissent. During the negotiations between the Committee, Controller and Bioventus, every effort was made to hide the negotiations from Kerbs. As detailed herein, Lindon stated to Kerbs that the Committee would not consider any alternative to the Transaction, and sought repeatedly to stymie Kerbs' attempts to obtain information regarding the Transaction and its surrounding negotiations. Even more troubling, the Trustees threatened all the other members of the Board with personal liability if they

achievable.” (Emphases added.) Given the likelihood that these milestones would never be achieved, the “real value” provided by the Transaction was much lower than the notional value that assumed the subsequent payment of the dubious milestone payments.

did not approve a sale of the Company. Conversely, the entire Board was enticed with the promise of a financial bonus following the successful negotiation of a Merger Agreement.¹² Accordingly, the pressure to pursue a transaction in line with what the Controller desired was too strong to resist.

58. Finally, it is worth mentioning that the legal advice provided to the Board during this period perplexingly, and incorrectly, favored the Company's creditor. During a February 16, 2021 Board Meeting, the Board was incorrectly advised by counsel that directors' owed their fiduciary duties under Delaware law primarily to creditors where a company is in the zone of insolvency or actually insolvent. This is incorrect as a matter of law.¹³ Even more troubling, is that the full board record reflects that the Board considered only the interest of the creditor.

59. Under Delaware law, as corporations move along the spectrum from solvency toward insolvency—the so-called “zone of insolvency” (though that is an outdated term)—Delaware courts have firmly rejected the assertion that creditors are owed fiduciary duties. While a line of previous Delaware cases had advanced in

¹² In fact, as early as October of 2020, the Trustees were promising the Board a substantial financial incentive if the Board approved a sale.

¹³ This misguided interpretation of Delaware law was repeated during Board meetings on March 25, 2021. On that occasion, counsel “provide[d] an overview of the Board's fiduciary duties and the considerations that the Board needed to consider as a company with inadequate solvency, which was noted to be that the Company needed to consider the interests of creditors as well as stockholders.”

dicta the proposition that creditors essentially become the residual owners of the corporation at the point when the corporation first crosses from solvency into the zone of insolvency, this notion has long since been rejected. Moreover, even were that not the case, the circumstances that were supposedly causing the Company's insolvency were entirely the creation of Controller. As discussed herein, after forcing the Company to be entirely dependent on the Controller for future funding, in August 2020, the Controller informed the Company that it intended to discontinue funding Bioness and took efforts to block any alternative financing options and force a sale of the Company. As further described below, the Board was fully aware that the Company had received commitments for outside funding in amounts more than sufficient for its operations through the end of 2021, but that was promptly blocked by the Controller.

60. In addition, Counsel also oddly advised to the Board that the Board had no *Revlon* duties. Specifically, in a fiduciary duty memo delivered by counsel to the Board, Counsel wrote:

A board's *Revlon* duties are not triggered, however, when a corporation has a controlling stockholder, even if the controlling stockholder is proposing a "final stage" sale transaction for cash

....

Revlon duties also do not arise where the directors do not have the power to control the terms on which a sale of the company takes place. Where a majority stockholder can block proposed transactions involving a sale of control, the courts will not require a board of

directors to engage in a futile exercise, even though the board continues to owe requisite fiduciary duties to its stockholders.

However, almost contemporaneously, the Company was informing the Court that the Board was adhering to their *Revlon* duties. Specifically, during the March 29, 2021 TRO Hearing, Counsel to the Company informed the Court that the Board would examine any future proposals brought to them by Kerbs:

THE COURT: And if Mr. Kerbs does so and finds either a better proposal from Accelmed or some third-party offer, he can present that to the board, and the board will, pursuant to its *Revlon* duties, examine it. Is that what you're telling me?

COUNSEL: Yes, that's absolutely right, and that's what's occurred so far.

Clearly the statements made to the Court concerning the Board's intention to consider other proposals contrasted with the actions that the Board actually took, at the direction of the Trustees.

61. Controller desired only one outcome and was committed to securing it. As detailed herein, the Transaction was the product of an unfair process that was geared towards suiting the unique needs of the Controller, while forcing the minority stockholders out and at a demonstrably unfair price to the Company's minority stockholders.

F. Kerbs Attempts to Save the Company from a Self-Interested Transaction

i. Kerbs is Boxed Out of the Negotiations

62. During the negotiations between the Controller and Bioventus, every effort was made to hide the negotiations with Bioventus from Kerbs. For example, in an email dated, December 18, 2020, around the time that the Bioventus LOI was apparently first received, Mark Lindon instructed the Company's CEO, Todd Cushman, "[p]lease do not mention anything about this offer to...Avi." The email copied Jim McHargue and Robert Perry, two of the Company's other directors and, together with Lindon, the eventual members of the sham Committee. Similarly, ten days later, in an email dated December 28, 2020, Mark Lindon advised the Trustees to restrict their communications with Kerbs in order to discourage him from seeking a superior alternative to the Bioventus deal: "You cannot discuss the Kuhn deal as it might be seen as telling him how to better the Kuhn offer or some new offer, and therefore encouraging an offer from Avi, Kuhn or some new group."

63. As these emails show, there was a concerted effort to keep Avi Kerbs, a director, and the minority shareholders in the dark so as to protect the Controller's self-serving transaction. In order to correct this, Kerbs sent a demand for information

pursuant to Section 220(d) of the DGCL (the “220 Demand”) on January 19, 2021.¹⁴ However, even the 220 Demand was met with resistance, as the Company failed to comply with the Demand, thereby forcing Kerbs to take legal action. Even worse, from the time the Bioventus Proposal was first officially considered by the Board in December of 2020 until the date that the Merger closed in March of 2021, the Board met numerous times to discuss the proposed transaction, yet the Board refused to produce any minutes of these meetings, despite Kerbs’ repeated requests for minutes of those meetings. In fact, the Board majority deliberately failed to produce any minutes of these meetings until two weeks after the Transaction closed, after all the pre-Transaction directors had already left their roles. By deliberately withholding these documents until after the merger closed, the Board was able to conceal the true Board record from the Court, forcing the Court to rely instead on misleading representations made by counsel. Not only did this deprive Kerbs of the written record of Board meetings for use in pre-closing litigation, but it also calls into question the reliability of the minutes, which were clearly not kept contemporaneously with the respective meetings, and even more concerning, it permitted the self-serving manipulation of the minutes and record.

¹⁴ In addition to Kerbs’ own 220 Demand, Teuza also submitted a demand for information pursuant to Section 220 of the DGCL which was ignored by the Company.

64. While Kerbs, acting as director on behalf of the minority stockholders, was working on fulfilling his fiduciary duties, the Committee and the Controller were actively working to stop him. Immediately following the December 24 Board Meeting approving the Bioventus LOI and creating the Committee, Kerbs received an email, with a subject line reading “CEASE AND DESIST,” from Lindon, sent on behalf of the Company and the Committee, stating that the Company and its directors, as well as its stockholders, were bound by the No-Shop provisions of the LOI and threatening Kerbs with personal liability for any action taken by Kerbs in potential violation of the No-Shop. The email threatened Kerbs with potential liability to Bioventus and the Company’s Controller if he were to take any steps to seek a superior alternative to the Transaction.

65. The attacks against Kerbs were not limited to the December 24th email. In two letters dated January 22 and 24, 2021 addressed to Teuza’s counsel, counsel for the Controller itself demanded that Teuza and Kerbs stop opposing the Bioventus Proposal and attempted to establish the Bioventus deal as a *fait accompli*. The letters also expressed unequivocally that the Controller would support the Bioventus deal and only the Bioventus deal and would not consider any potential alternatives: “The Mann Estate is committed to allowing the sale process of Bioness to Bioventus to continue without interference, has no intention of breaching any of its obligations to support that sale process and will not engage with your clients about any transaction

that could facilitate potential alternatives to Bioventus acquiring Bioness or that otherwise interferes with the sale process [to Bioventus].”

66. Faced with this pattern of ostracization, threats, and hostility, Kerbs was compelled to take legal action in this Court to vindicate his rights and his duties as a director. Recognizing that the Committee was dominated by Lindon and serving mostly as a cover to allow the Controller to dominate the sale process, Kerbs challenged the committee’s designation in Court. During the first TRO hearing on February 24, 2021, the Court seemed to agree with Kerbs’ characterization and strongly suggested that the committee be dissolved. In advance of the second TRO hearing, counsel for the Committee members informed the Court by letter dated March 3:

First, following the February 24, 2021 hearing before the Court, the parties attempted to reach an agreement for the Special Negotiating Committee (the “Committee”) to remain in place with a modified structure to consider, inter alia, the Bioventus proposal and any proposal submitted by Mr. Kerbs/Teuza. As those efforts to reach an agreement were not successful and following guidance from the Court at the last hearing, the Committee will today take steps to formally dissolve so that any proposals can be considered by the full Board and each Board member.

Following the dissolution of the Committee, any proposals were supposed to be considered by the full Board. In subsequent filings and TRO hearings the defendants maintained that the board acted as a whole on all decisions. However, as a matter of fact, Kerbs was totally excluded from substantive deal discussions and negotiations,

and the record is very clear that while the Committee may have been formally dissolved, its members very much continued informally to control the deal and counsel. Individual directors had numerous side discussions with counsel, the Controller and Bioventus, and then provided limited, self-serving second-hand updates to Kerbs.

67. While this pattern of ostracization, threats, and hostility compelled Kerbs to take legal action in this Court to vindicate his rights and his duties as a director, it also pushed Kerbs to find a deal that would maintain the minority's interest in the Company or at the very least return or preserve any measure of value for minority stockholders.

ii. Accelmed's Clearly Superior Offers

68. As discussed above, on January 24, 2021, attorneys for the Trustees wrote in a letter to Teuza's counsel that "The Mann Estate is committed to allowing the sale process of Bioness to Bioventus to continue without interference, has no intention of breaching any of its obligations to support that sale process and will not engage with your clients about any transaction that could facilitate potential alternatives to Bioventus acquiring Bioness or that otherwise interferes with the sale process." There can be little doubt that Controller was committed to block any effort to either keep the Company as a going concern for the benefit of all its stockholders, or seek a value maximizing transaction for the Company in favor of a preordained

self-serving deal of its own choosing. This letter was sent to prevent Kerbs, as a director, from taking any action to find the best deal possible for the Company and its stockholders.

69. Undeterred by the Controller's efforts, Kerbs attempted to fulfill his fiduciary duties. Specifically, Kerbs, through his own efforts, began outreach to multiple interested parties. Several interested parties identified by Kerbs signed NDAs with Bioness and conducted due diligence on a potential deal. That process ultimately yielded serious indications of interest, including a clearly superior offer by Accelmed (the "Accelmed Offer").

70. The Accelmed Offer contemplated both a higher total purchase price and a higher upfront payment of \$60 million, and a series of milestones/earnout payments which Accelmed believed were highly achievable and presented the possibility that the total equity value could exceed \$200 million. The Accelmed Offer was clearly superior to the deal negotiated with Bioventus. It provided over \$25 million more in up-front cash and, more importantly, it allowed all of the minority stockholders to remain as shareholders and continue to participate in the growth of the Company, should they choose.¹⁵

¹⁵ Unlike the Bioventus proposal, which all but ignored the minority stockholders, Accelmed's proposal both contemplated the post-acquisition involvement of the minority stockholders and provided a superior consideration to ALL stakeholders – both the Controller on the other common stockholders.

71. After being informed of the Accelmed Offer, Bioventus responded by increasing the upfront cash component of its own offer by \$10 million, accompanied by a demand for a rushed closing, and new no-shop provision that was set to expire only after the targeted closing date. Upon information and belief, Bioventus had been advised of Accelmed's competing offer and knowingly acted in concert with Controller and its agents to stymie the efforts to obtain a value maximizing transaction.

72. While Accelmed articulated that it believed its own offer was still superior to the revised Bioventus offer, it also expressed an interest in immediately increasing its own offer. Throughout the month of March, Accelmed continued to unilaterally present revised improved proposals to the Bioventus board. However, as with its original offer, these subsequent efforts fell on deaf ears. In fact, in email communications to the Board, Accelmed's Managing Partner states that "while I will not keep 'negotiating against myself' and send offers without a [sic] feedback, we will be willing to top the upfront to \$60M assuming we are given a reasonable time (say a week) to complete this deal." As the email indicates, not only was Accelmed putting forward a superior proposal, but Accelmed was also willing to increase its offer and complete the deal on a compressed timeframe. Furthermore, Accelmed wasn't the only other interested party.

73. In fact, around this same time, a strategic party that had access to the data room communicated that it was considering whether to submit a letter of intent by Friday, April 2, 2021 and other interested parties were actively reviewing the data room material. In short, Kerbs successfully created an active bidding war for Bioness which resulted in Bioventus increasing its cash merger consideration by an additional \$10 million; a superior alternative offer from Accelmed, who was poised to increase the consideration being offered in their already superior proposal; and several other interested parties contemplating offers in the very near term.

iii. Controller Asserts Control Over the Company and Forces Through the Bioventus Deal

74. Directors are charged with the duty to operate Delaware corporations. They are required under Delaware law to strive in good faith and on an informed basis to maximize the value of the corporation for the benefit of its common stockholders, the ultimate beneficiaries of the firm's value, not for the benefit of its contractual claimants. Instead, the opposite happened here. From inception, the sale process was designed to ignore the interests of the minority shareholders and to instead achieve the Controller's goals. Despite the superior offer from Accelmed for the Company and the emergence of a bidding war for the Company, Controller was committed to blocking any effort to seek a value maximizing transaction for the Company as opposed to a preordained self-serving deal of its own choosing.

75. In addition to threats from its attorneys contained in the December 24th email and the two letters to Kerbs dated January 22 and 24, 2021, the Controller went to great lengths to ensure its desired outcome. For example, the Trustees proceeded to stack the Board with three new Trust-Appointed Directors, who were recruited by the Controller to fill out the Company's board after directors Jim McHargue and Mark Lindon abruptly resigned on February 21 and March 15 respectively.¹⁶

76. The reason behind Lindon's resignation is unclear. Until his resignation, Lindon had spearheaded Controller's efforts to push for the pre-ordained merger with Bioventus. However, by this time, those efforts were beginning to hit a wall. In addition to the legal proceedings brought by Kerbs, and fiduciary claims raised by Kerbs against Lindon and other members of the Board, Kerbs was also working tirelessly to identify other potential suitors for the Company. More importantly, Kerbs's efforts were bearing fruit and winning converts at the Company. In an email dated the day before Lindon's resignation, Bioness' CEO, Todd Cushman, emailed directors Perry, Lindon, and others, stating that the

¹⁶ In addition to McHargue and Lindon, the Company's other director, William Dearstyne ("Dearstyne"), resigned February 5, 2020 providing more evidence of the lack of support for the deal from the Company's original disinterested directors.

Bioventus proposal implied a worse outcome for stockholders than bankruptcy and detailing the merits of the alternative proposal from Accelmed:

Gentlemen,

Thank you for the Board meeting that we had yesterday. In follow-up to some of the conversations I want to make sure that my position is clarified and that I understand the direction going forward.

Currently, we have an offer on the table from Bioventus that is well below market, especially given the recent correspondence from the FDA, indicating a delay in approving the Talismann for commercial release. Since nearly the entire earnout cascades off the Talismann approval, Bioventus could end up acquiring the company for \$35 million. Accepting the risk of selling the company for \$35 million, I think we all agree, is rather ridiculous. The company is worth more than that in bankruptcy.

It is important that we recognize that there is another offer from Teuza that was sent directly to the Trustees. From what was communicated, not only is this offer higher than the Bioventus offer, it also takes the minority shareholders into consideration. This could be a viable back-up offer worth consideration since it reduces the risk should Bioventus walk away from the deal. That said, I find it unlikely that Bioventus will walk away from the deal because they recognize that their offer is significantly below the market value of the company.

As we discussed, management has been working to secure other offers and we anticipate that we will have an offer presented this Monday from Accelmed, a well-established investment fund with \$800 million in cash to finance medical device acquisitions/investment initiatives. In addition to Accelmed, we are currently in negotiations with three other companies - Medtronic, Nevro and 1315 Capital. All three of these companies are in our data room and have expressed significant interest. Follow-up meetings have been scheduled over the next few weeks.

It has been three weeks since we ended the exclusive/no-shop restrictions placed on the company by Bioventus. Once we were allowed to shop the company, I was directed to get Board approval and to identify/specify companies that I would be contacting by name. The process was delayed by the difficulties in getting a Board meeting scheduled for approval and I unsuccessfully distributed unanimous written consents in lieu of a Board vote, but getting acceptable UWC language further delayed the process. Today, we are in a squeeze to get financing and/or an acquisition offer in place and I think management has done an exemplary job to move as fast as we have to gain interest by other potential acquirers. Last week alone, we had meetings scheduled with multiple parties investigating the company and performing in excess of 40 hours of due diligence.

The Board has approved management to move forward to secure short-term lending of approximately \$10 million. Today, I feel comfortable that we have \$5 million secured and, with more time, I am optimistic that we can get an additional \$5 million, depending on the loan terms. It is my understanding that the Board is going to present management with highlights regarding approvable loan terms. Given the time constraints, is there a possibility to get the loan terms early this week?

We are working diligently to secure funding while moving forward with due diligence and discussions with potential acquirers.

77. As the email from Cushman indicates, he and others thought that accepting the Bioventus proposal was “ridiculous” and that there was both another offer for the Company (the Accelmed Offer), which was not only higher than the Bioventus offer, but also took the minority shareholders into consideration, and also available funding that would allow the Company to remain a going concern. Faced with this uprising, the Mann Trust simply stacked the Board with three new Trust-Appointed Directors and quickly coordinated with Bioventus to sign the new preclusive No-Shop agreement (the “New No-Shop”).

78. The circumstances of how the New No-Shop was created strongly indicates that the Board, acting at the direction of Controller, never intended to consider the Accelmed deal, and that there were back-channel communications between the Trust-Appointed Directors, the Trustees and Bioventus. In a letter to the Board dated March 21, 2021, Bioventus stated that it was increasing its offer by \$10 mil and extending the first earnout date. However, the letter makes no mention of a no-shop and instead sets a deadline for a response of March 23, 2021. Bioventus' purported interest in the New No-Shop wouldn't be revealed until almost two days later when, during a meeting of the Board, Scott informed the Board that, during the meeting, he had received correspondence from Bioventus asking to speak with the Board so as to receive confirmation of intent to close within the timeline, to have exclusivity, and to move forward with the transaction that day. It is difficult to reconcile Bioventus's March 21, 2021 letter setting a March 23, 2021 deadline with no reference to a no-shop, with Scott's report of a receipt of an email on the morning of the March 23 asserting Bioventus's sudden request for a new no-shop.

79. Indeed, while one would expect a no-shop draft to be conveyed via a formal demand, instead, it was provided by the Company's own counsel along with the material for the March 25 board meeting, strongly suggesting that it was prepared by or for the Controller. In an email on March 24, 2021, the Company's own counsel

attached a proposed timeline that detailed the path forward with Bioventus, *and only*

Bioventus:

1. Thursday, March 25 – Bioness Board meeting – Presentation of financial advisor opinions; review of Merger Agreement; Board vote re exclusivity and moving forward towards sign and close
2. Friday, March 26 – Sunday, March 28 – Finalize stockholder disclosure document and solicit stockholder consents in escrow; finalize closing spreadsheet and estimated working capital
3. Monday, March 29 – Board approval and signing of final Merger Agreement and Related Agreements; delivery of stockholder consents out of escrow; filing of certificate of merger; wire transfers initiated; closing; Bioventus public announcement and Form 8-K filing Post-Closing – Mailing of Notice of Merger and Appraisal Rights to non-consenting stockholders

Despite an active bidding war for the Company, the condensed timeline prepared by the Company’s own counsel leaves no doubt as to the Board’s commitment to close the Bioventus transaction. Furthermore, included with the timeline was a draft exclusivity letter. The draft exclusivity letter was *on Bioness letterhead and was presented as a “draft” prepared by counsel for its consideration.*

80. While the minutes from the March 25, 2021 meeting of the Board suggest that the New No-Shop was “proposed” by Bioventus, that is simply not credible. The exclusivity letter, drafted on Bioness letterhead, clearly indicates that it came from Bioness and not Bioventus. Furthermore, there is no record showing that the draft was negotiated during that meeting, and there was no input from

counsel. Instead, the minutes show that it was Scott who described its contents.¹⁷ Clearly there were back-channel communications between the Trust-Appointed Directors, the Trustees and Bioventus to create and impose the New No-Shop so as to limit the ability of the Board to consider the superior Accelmed proposal. With the New No-Shop in place, Controller's deal was, once again, a *fait accompli*.

81. The newly appointed Trust-Appointed Directors were handpicked by the Controller following the abrupt resignations of the directors who comprised a majority of the Committee. One of the Trust-Appointed Directors, Joe Ruble, was selected just hours following Lindon's resignation. The record demonstrates that the Trust-Appointed Directors were selected with the active involvement of Controller's counsel, the same counsel who throughout the negotiations also maintained ongoing direct communication with Bioventus' counsel. That the Trust-Appointed Directors acted as a unified group is evidenced by the fact that the Controller selected a counsel (at Bioness' expense) to advise the Trust-Appointed Directors jointly, and separately from the advice of the Board's own counsel. Any concern regarding their selection was therefore quickly swept under the rug. For example, during the March 23, 2021

¹⁷ In discussing the New No-Shop, Scott stated that Kerbs could bring another offer from Accelmed to the Board and the Mann Trust for discussion and the Board's decision to enter into exclusive negotiations with Bioventus would not impact Kerbs' ability to act as a stockholder of the Company with respect to any finalized transaction nor would it preclude engagement by Accelmed directly with the Mann Trust. However, as would be revealed just days later, this was entirely inaccurate.

Board meeting Terrafranca informed the Board of a potential conflict, however, there was no investigation into this potential conflict, or any other possible conflict, or as to any pre-existing relationships between the new directors and Controller or its counsel. The Trust-Appointed Directors were focused entirely on carrying out their role to rubber stamp the preordained self-serving deal, and they did just that only a few days later.

82. The Trust-Appointed Directors uniformly supported Mann Trust's improper positions, including: (i) the improper New No-Shop provision; (ii) the simultaneous sign-and-close; (iii) their refusal to even engage in any other negotiations; and (iv) their refusal to consider the interest of the minority stockholders in favor of the interest of Controller, and their surrendering to the dictates of the Controller. This support by the Trust-Appointed Directors was at the direction of the Mann Trust and served as an obvious detriment to Bioness and its minority stockholders. To justify their refusal to consider any deal other than the Bioventus Transaction, the Trust-Appointed Directors claimed that the superior Accelmed offer was too risky because Bioness was on the brink of bankruptcy and that Bioness' fiduciaries would face liability (*e.g.*, for unpaid wages) in any such bankruptcy proceeding. However, the Board knew that these claims were false and unfounded.

83. Were it not for the Controller's efforts to suffocate the Company's funding, and its unilateral imposition of a lien over the Company's assets, the Company was well situated financially. In fact, as recently as February 2021, Bioness' CEO had reported to the Board on two separate occasions that the Company expected to do more than \$50,000,000 in revenue for the fiscal year of 2021 and have Gross Profits of over \$30,000,000. Further included in this report was the expectation that they "expect revenues to continue to accelerate" and that the Company "anticipate[s] getting to cashflow breakeven in late Q3 at \$50M in revenues (-\$4.735 for the year)."

84. Even more importantly, Teuza had already committed to extending \$6 million in loans to give the Board sufficient time to consider the Accelmed proposal and/or any other superior offer, and Accelmed had offered to loan the Company millions of dollars to guarantee employee salaries pending closing. Clearly, this was a fabricated red herring. There was no immediate risk of insolvency. Instead, Controller's entire agenda, carried out by the Trust Appointed Directors, appears to have been driven by an intention to arrange a deal as soon as possible, apparently due to the Controller's need to immediately liquidate its interests in the Company.

85. Without ever engaging with Accelmed's on its superior offer, the Board informed Kerbs that it did not intend to pursue the Accelmed Offer, or any other competing offer, unless so directed by the Trustees. The Board then promptly

imposed on itself the New No Shop that prevented the Company’s fiduciaries from “solicit[ing], initiat[ing], knowingly encourage[ing] or actively assist[ing] in the submission of” any other acquisition proposals, and required the Company to “terminate” all existing negotiations regarding any competing offer. The New No-Shop was designed to expire the day after the Board intended to close the Bioventus Transaction, and thus was a blatant (and inequitable) tactic to foreclose any possible competing offer, and specifically the Accelmed Offer.

86. Both before and after the execution of the New No-Shop, Bioness received multiple transaction proposals and indications of interest from parties other than Bioventus. In fact, Accelmed made multiple proposals for a potential merger transaction between Accelmed and Bioness, including ones delivered to the Company on March 21, 23, 27, and 30, 2021. Any of those proposals would have provided a higher total purchase price and more upfront cash, and most critically would have maintained the minority shareholders’ interests in Bioness. The Board refused to consider these proposals and did not even once engage in direct negotiations with Accelmed regarding its proposals.

87. Two days after the Board’s entry into the New No-Shop, on March 27, 2021, Accelmed submitted to Bioness a revised offer which provided for increased merger consideration over the prior proposals and a commitment by Accelmed to sign “binding definitive agreements as negotiated between the Company and

[Bioventus] as soon as Monday the 29th (assuming Accelmed will receive copies of such agreement at least 24 hours ahead of signing).” Therefore, Accelmed was taking the extraordinary step of agreeing to commit to whatever deal terms Bioness had negotiated with Bioventus, without performing due diligence, as long as Accelmed was allowed to review the agreement for 24 hours before signing. This concession was in addition to Accelmed’s already superior financial offer.

88. The following day, on March 28, 2021, the Board met to discuss the Bioventus Transaction and the Accelmed offer. At the meeting, the Trust-Appointed Directors and director Robert Perry communicated to Kerbs that it was their position (and thus the position of a majority of the Board) that the New No-Shop prohibited Bioness from engaging with Accelmed regarding the Accelmed offer or even sharing with Accelmed the Bioventus Merger Agreement which Accelmed had agreed to sign after only 24 hours review.

89. While these negotiations were on-going, Kerbs was pursuing litigation to prevent the Company from pursuing the Bioventus Transaction. In fact, on March 26, 2021, following the execution of the New No-Shop, Kerbs and Teuza filed a motion for a temporary restraining order seeking, among other things, an order from the Court declaring the New No-Shop to be “invalid and of no effect on the Bioness Board of Director's ability to consider and negotiate alternative proposals” (the “TRO Motion”). During the hearing on the TRO Motion, the Court asked counsel

for the Trust-Appointed Directors whether “the directors are relying on the [New No Shop] as a pretext for failing to consider the terms of the offer.” Counsel for the Trust-Appointed Directors denied that that was the case. Counsel for director Perry went even further and represented to the Court the following:

[T]he way this exclusivity agreement works is that the board can consider it and make a decision on an offer that comes in and determine whether it’s superior or not. (*Id.* at 15:5-8).

...

As I’ve already said, there’s no preclusive no-shop. The board can consider any proposal that’s presented to it, which it has and will continue to do when it meets later today. (*Id.* at 19:7-10).

90. In submissions to the Court in connection with the TRO Motion, director Robert Perry and Bioness argued that Kerbs was “carved out from the exclusivity agreement in his capacity as a stockholder and, therefore, could and was encouraged to actively solicit competing proposals and/or improve the [Accelmed] Proposals” However, despite the claims made by Perry’s counsel and counsel for the Trust-Appointed Directors in Court, the Trust-Appointed Directors and Perry did claim that the New No-Shop prohibited the Board from engaging in discussions or negotiations with Accelmed. Specifically, on March 29, 2021, almost immediately following the conclusion of the TRO Hearing, when Accelmed’s most recent superior offer was presented to the Board, the Trust-Appointed Directors and Perry claimed that the Board was blocked by the New No-Shop from engaging with

Accelmed on that offer.¹⁸ Accordingly, the representations that were made by counsel for defendants in connection with the TRO Motion were seriously misleading, if not patently false, and while pretending otherwise, the Trust-Appointed Directors and Perry in fact did not pursue any alternative to the transaction dictated by the Controller. Instead, the Board orchestrated a rapid series of events that allowed the Company to close the deal with Bioventus in a way that both avoided any future bidders and the impact of any efforts surrounding the TRO

91. After refusing to engage with Accelmed's superior offer, the Board then determined that the Bioventus Transaction was a superior option to the proposal because it offered greater deal certainty. However, this explanation was outrageous. By this time, Accelmed had already committed to unconditionally closing the deal. Even were that not the case, according to the Board's interpretation, the Accelmed proposal was uncertain because the Board could not engage further with Accelmed due to the *self-imposed* New No-Shop. In short, the Board was claiming the exact opposite of what had been communicated to the Court during the hearing on the TRO Motion. Furthermore, the Board claimed that its own actions, executing the New No-Shop, were the reason that the Board could not engage further with Accelmed. In effect, the Board had carefully orchestrated a situation whereby the Company had

¹⁸ Based on this understanding, a majority of Board members also concluded that the Company could not share the Bioventus draft merger agreement with Accelmed.

no choice but to follow the scripted path and close the deal with Bioventus in a way that both avoided any future bidders and the impact of any efforts surrounding the TRO.

iv. The Board Rubber Stamps the Controller's Bioventus Deal and Compensates Themselves Handsomely

92. On March 30, 2021, Accelmed delivered one last proposal to the Company. Accelmed's latest offer contemplated an increase to its closing payment to \$60 million and a waiver of closing conditions. The Board rejected this offer outright in its entirety and voted to approve the Bioventus Transaction, with only Kerbs voting against. The refusal to even consider the Accelmed proposal contrasted with the statements that the Company had made in Court that it would fully consider any amendment to the Accelmed proposal. The Board majority reached this result without ever once communicating with Accelmed regarding its latest offer (or any of its prior offers).

93. Instead, on March 30, 2021, the Board, by a vote of 3-1 in favor, with Kerbs dissenting, approved and adopted resolutions, which, among other things, approved and declared advisable the Merger Agreement and the transactions contemplated by the Merger Agreement, including the merger. Interestingly, at this time, a number of issues in the Merger Agreement remained unresolved.

94. Even more glaring was the issue of the stockholder consents, which were signed, collected, and waiting in escrow prior to the submission of the revised offer from Bioventus. Having the consents executed prior to the final Merger Agreement being finalized, approved and recommended by the Board, and executed may have rendered the stockholder consents invalid. Even if they are valid, clearly the signing of these stockholder consents before both the finalized Merger Agreement and with full knowledge of the pending superior offers, leaves no doubt that the Board never intended to consider Accelmed's offers (or any other offer) when it represented otherwise to the Court. Accordingly, despite claims made to the Court and to Kerbs that the Board would seriously consider any alternative proposals, the Board majority and the Controller had already collected executed stockholder consents with the intent to move forward with Bioventus. It was, literally, a *fait accompli*, and the final TRO Hearing was merely a bump on the road that had to be navigated.

95. Despite the fact that there was an active bidding war for the Company, and more importantly a clearly superior offer, the Board acquiesced to the Controller's wishes and refused to even consider pushing for a better deal with Accelmed, and instead rushed to finalize the self-interested transaction with Bioventus that would benefit Controller.

96. Later that same day, Bioventus Inc., the majority member and sole managing member of Bioventus LLC, filed an 8-K with the SEC that detailed the merger and the relationship between Bioventus LLC and Bioventus Inc. as it pertained to the acquisition. Specifically, that “Bioventus Inc. (the “Company”), through its subsidiary, Bioventus LLC (“Bioventus LLC”), entered into an agreement and plan of merger (the “Merger Agreement”) with Bioness Inc., a Delaware corporation (“Bioness”)[.]” Accompanying the 8-k was a press release (the “Bioventus PR”) detailing the Transaction and announcing that Bioventus Inc. had acquired the Company. The fact that the Bioventus PR announcing the Transaction identified Bioventus Inc. as the acquirer demonstrates that, at all times, Bioventus LLC was acting on behalf of its parent company. The press release stated:

DURHAM, NC – March 30, 2021 – Bioventus Inc. (Nasdaq: BVS) (“Bioventus” or the “Company”), a global leader in innovations for active healing, has acquired Bioness, Inc. (“Bioness”), a global leader in neuromodulation and rehabilitation medical devices through its innovative peripheral nerve stimulation (“PNS”) therapy and premium rehabilitation solutions, for \$45 million in up-front consideration, with up to \$65 million of contingent consideration related to the achievement of certain key milestones. The acquisition includes the entire portfolio of Bioness products as well as its research and development pipeline. Under the merger agreement, Bioness has become a wholly-owned subsidiary of Bioventus, and all Bioness employees have become employees of Bioventus. The up-front consideration is being funded exclusively through the use of cash on hand.

The acquisition of Bioness is directly aligned with Bioventus’ mission of helping patients regain active lifestyles, and the strategy of accretive revenue growth through acquisitions that leverage the Company’s

existing infrastructure. Bioness, based in Valencia, California, was founded by the Al Mann Foundation in 2004 with the mission of helping improve lives and restore function for those living with peripheral pain and neurological deficit. The total addressable market for medical devices currently marketed by Bioness is estimated to be more than \$8 billion.

“Bioness has developed groundbreaking and best in class technologies, and we are excited about the opportunity for Bioventus to further Bioness’ vision of improving the lives of patients,” said Ken Reali, CEO of Bioventus. “We aim to accelerate Bioness’ revenue growth by leveraging our existing global network of approximately 300 sales representatives calling on orthopedic, pain and podiatric physicians as well as expanding market access and reimbursement processing capabilities. Most importantly, we welcome the Bioness team of dedicated employees to Bioventus and look forward to working with them to further market adoption.”

Bioness is a category leader in rehabilitation solutions globally with the broadest portfolio of offerings, including proprietary electrical stimulation exoskeletal devices for both the upper and lower extremities, robotic gait and fall safety systems, and high-tech, interactive software learning and recovery assessment platforms. These products play an essential role in helping patients regain mobility due to stroke, traumatic brain injury, multiple sclerosis and osteoarthritis, and are used by physical or occupational therapists in a clinical setting or by the patient at home, with the guidance of a clinician through telemedicine.

Bioness’ StimRouter® PNS System is an emerging therapy for patients suffering from pain after surgery on an extremity, which affects over 16 million patients each year globally. The PNS market is experiencing significant growth, largely driven by a lack of effective alternatives and a desire to reduce opioid usage. StimRouter has been implanted in over 3,000 patients since 2017 and is sold in more than 10 countries, including the United States. Bioness’ patent protected PNS technology is ideally suited to treat pain in the periphery, and StimRouter is the only PNS device backed by a randomized control trial.

In 2020, Bioness generated approximately \$40 million in revenue and had loss from operations of approximately \$14.0 million. Bioventus expects the acquisition to be accretive to Bioventus' revenue, enhance its multi-year revenue growth profile, and have a positive contribution to net income (excluding purchase accounting and transaction costs) by the end of year one post-close. The Company expects full year net sales for the twelve months ending December 31, 2021 to be between \$390 to \$402 million, including Bioness' anticipated net sales from the date of the acquisition.

97. The Merger Agreement contains an exclusive Delaware venue provision that provides “in connection with any matter based upon, arising out of or relating to this Agreement, the Transactions or any other matters contemplated herein.” The express submission to such venue also includes the “Stockholders.”

98. As detailed in the Merger Agreement, the Transaction with Bioventus heavily favored the Controller. Almost the entirety of the consideration that Bioventus was paying in the Transaction was going directly to the Controller and affiliates. For example, Section 1.8 of the Merger Agreement provided the following:

1.8 Payments at Closing.

(a) **Parent to Pay Merger Consideration.** At the Closing, Parent will pay \$45,000,000, plus the Estimated Purchase Price Adjustment (which, for the avoidance of doubt, may be a negative number) (the “**Closing Purchase Price**”), to be distributed as follows and in the following order:

(i) Parent will pay all Company Debt (other than the Related Party Debt and the First PPP Loan) by wire transfer of immediately available funds to each of the applicable lenders (including one-half (1/2) of the amount of the Second PPP Loan,

which shall be placed in escrow with the PPP Lender according to the terms of **Section 4.8**);

(ii) Parent will pay the Third Party Expenses by wire transfer of immediately available funds to each of the applicable vendors or other parties (to the extent applicable); and

(iii) Parent will pay to the Paying Agent (or the Company on behalf of the holders of the Vested Option Shares) for further distribution according to the terms of this Agreement and the Paying Agent Agreement to the holders of the Fully Diluted Shares (for the avoidance of doubt, including holders of the Vested Option Shares) in cash equal to their pro rata share of \$5,000,000, which the Company has calculated to be \$0.146 per share of Company Capital Stock held by holders of the Fully Diluted Shares, less, in the case of Vested Option Shares, the exercise price thereof, in each case without interest thereon (and, together with the Contingent Common Consideration, the “**Common Merger Consideration**”); and (iv) Parent will disburse any remaining portion of the Closing Purchase Price (after the payment of the foregoing items) to reduce the Related Party Debt, by wire transfer of immediately available funds to each of the applicable lenders or other parties.

(b) The parties acknowledge and agree the amounts set forth in **Sections 1.8(a)(i)—(a)(iv)** plus the remaining amount of the Related Party Debt exceeds the balance of the Closing Purchase Price and the balance of the Merger Consideration. Furthermore, inasmuch as the Related Party Debt will not be paid in full, the unpaid portion of the Related Party Debt will be terminated and released in accordance with **Section 4.7**; and in consideration of such termination, the Mann Group, as the holder of the Related Party Debt, shall have the right to receive any amounts from the Milestone Payments payable, if any (the “**Contingent Payments**”), subject to reduction as set forth in **Section 1.8(c)** and **Section 5.4(i)**. The Contingent Payments, if any, shall be payable by Parent to the Mann Group and the other parties set forth in **Section 1.8(c)** according to the terms of this Agreement, and none of Parent, Bioventus, Bioventus Parent, Merger Sub, the Company or the Surviving Corporation shall have any obligation

whatsoever to the Mann Group, with respect to the Related Party Debt, other than to pay the Contingent Payments, if any, when due according to the terms of this Agreement. Additionally, the parties acknowledge that the Excluded Stockholders have or will agree to waive and forgo any amount of the Common Merger Consideration to which they would have been entitled on account of their ownership of shares of Company Capital Stock.

(c) All Contingent Payments made pursuant to this Agreement, after any reduction pursuant to **Section 5.4(i)**, shall be distributed as follows and in the following order (i) an amount equal to two and one-half percent (2.5%) of such amount to be distributed shall be paid to the Persons set forth in **Schedule 1.8(c)** in the respective percentages set forth therein (the “**Contingent Bonus Pool**”), (ii) an amount equal to two and one-half percent (2.5%) of such amount to be distributed shall be paid to the Paying Agent to be distributed on a pro rata basis to the holders of the Fully Diluted Shares (including the Vested Option Shares) according to the terms of this Agreement and the Paying Agent Agreement (the “**Contingent Common Consideration**”) and (iii) the remainder of any such Contingent Payment shall be paid to the Mann Group.

99. As detailed in Section 1.8, the majority of the consideration that was being paid in the Transaction was going to pay off the Related Party Debt, *i.e.*, the debt that the Company allegedly owed Mann LLC. After payments to the Company’s other debtors (Section 1.8a(i)), payments to advisor Houlihan Lokey (Section 1.8a(ii)), and a mere \$5 million to all minority stockholders (Section 1.8a(iii)), the remainder of the consideration being paid out in the Transaction would

go to Mann LLC.¹⁹ Furthermore, as detailed in Section 1.8b, the Controller stood to receive almost the entirety of the consideration that would be paid out under future conditions. Similar to the earn-out conditions contemplated by the Bioventus LOI, the conditions for these potential earn-outs of up to \$65 million were unlikely to be achieved. Plaintiff and other minority stockholders are entitled to an amount equal to just two and one-half percent (2.5%) of the potential \$65 million to be distributed on a pro rata basis to the holders of the Fully Diluted Shares (including the Vested Option Shares).²⁰

¹⁹ The circumstances of this \$5 million payment are revealing. After practically ignoring the minority stockholders and their interests for the entirety of the sale process, the emergence of Accelmed and the possibility of a better deal for **ALL** of Bioness' stockholders, forced Controller to concede this meager offering to the minority stockholders. However, as further evidence of the coercive nature of this arrangement, conversations between the Trustees and the Board indicate that any agreement to allocate some of the consideration to the minority stockholders would apply only to the Bioventus deal and not to any other deal. Accordingly, the Controller was only willing to let the minority stockholders receive some of the consideration in a potential strategic transaction if that transaction was with Bioventus. However, as detailed below, even this meager amount has been withheld.

²⁰ Included as recipients for both the \$5 million and the 2.5% of the contingent payment are holders of the Company's Vested Option Shares. The minority shareholders therefore would not receive the entirety of the \$5 million merger proceeds, as represented by the defendants to the Court, but their meager share of the earn-out proceeds was made subject to reduction for cost that may be incurred by the Controller, clearly intended to discourage Plaintiff and other minority shareholders from bringing claims relating to the Transaction, as any future lawsuit would be at the expense of the minority shareholders' potential earnout.

100. Shockingly, this was not the end of the self-dealing in this Transaction. After voting to approve the merger, the Board majority then voted to pay each of the directors \$75,000 for their “service.” This payment went to all directors, including the Trust-Appointed Directors, in spite of the fact that they had served for mere days and the extent of their labors had been to simply rubber stamp the deal that the Trustees had appointed them to approve. As the record clearly demonstrates, a mere 24 hours earlier, the Trust-Appointed Directors had represented to this Court that the directors had no financial interest in the deal and that no payments to them had been approved.

101. It strains credulity to believe that this plainly material compensation, which the Board majority was evidently prepared to approve immediately upon consummation of the Transaction, had not been discussed and was not expected in some form by those Directors that had been appointed by Controller. In fact, contemporaneous email correspondence indicates that the Directors appointed by the Mann Trust were offered (and therefore likely expected) compensation by the Trustees at the time that they joined the Board. Moreover, the timing and magnitude of this payment undercuts any argument that the board was entirely independent except for Kerbs. In reality, Kerbs had no interest in or involvement with the negotiations surrounding the final Bioventus proposal and he did not vote in favor of the Board’s self-directed financial bonus. Instead, it was the rest of the Board that

was pre-arranging an exorbitant fee for so-called “service” upon consummation of a sale to Bioventus.

102. At no time after the Bioventus LOI was approved by the Board did the Board even once consider the effect of Mann’s promise to forgive the loans, even though Kerbs raised the issue and the Controller and Lindon were fully aware of that promise. The issue was addressed for the first time in the Q&A section of the 262 Notice that was delivered *after* the closing by a *new* board.²¹

G. The Unfair Price

103. As detailed herein, the consideration agreed to by the Board was woefully inadequate, even after Bioventus had been forced to increase the consideration being offered to Bioness following the superior Accelmed proposal.

104. While the Company’s financial advisor, Houlihan, ultimately furnished a fairness opinion, the inputs and assumptions made therein are difficult to reconcile. Specifically, the fairness opinion assumed that future milestone payments will be achieved as a matter of certainty. However, during a March 30, 2021 meeting of the Board to vote on the Transaction, the Board members universally expressed substantial doubt that these milestone payments would ever be achieved. Given the likelihood that these milestones would never be achieved, the “real value” paid by

²¹ See Paragraph #26.

Bioventus in the merger failed to accurately reflect these doubts. Instead, the record shows that these future milestone payments were included to skew the fairness opinion and make the Bioventus deal appear better than it was.

105. Despite the Controller's sabotage, Bioness was well situated financially. As noted during a February 2021 report to the Board, Bioness' CEO represented that the Company expected to exceed \$50,000,000 in revenue for the fiscal year of 2021. Furthermore, included in this report was the expectation that revenue would accelerate. Clearly, the CEO's report showed that Bioness was undervalued when compared to the consideration being offered by Bioventus. In fact, for its own financial reporting, Plaintiff had obtained valuation from an independent valuation firm that opined that Bioness' enterprise value at time of the closing was \$444 million.²² This value is consistent with the CEO's own reports to the Board and reflects the fact that Bioness was worth significantly more than the

²² Conversely, in a highly inaccurate financial analysis conducted by the Committee's financial advisor, **the Company was valued at a mere \$76 million.** However, a closer examination of the analyses calls into question the valuation methods that were utilized. For example, the Discounted Cash Flow Analysis ("DCF") indicated a value of **\$165 million pre debt and even \$263 million in some scenarios.** In the Revenue/EBITA multiple method, the comparables that were chosen seem out of place and intentionally selected to provide a lower valuation. However, even in that analysis, **the Company's valuation came up to \$159 million pre-debt.**

consideration that was paid by Bioventus. More importantly, there was another company – Accelmed – that was willing to offer far more than Bioventus.

106. On March 30, Accelmed agreed to an upfront payment of \$60 million, expressed a willingness to go even higher, and expected to need a mere week to complete the transaction. However, the Board never sought to pursue this superior offer even after repeated indications from Accelmed’s Managing Partner that Accelmed would be willing to increase the up-front consideration being offered. Furthermore, Accelmed wasn’t the only other interested Party. In fact, around this same time, a strategic party that had access to the data room communicated that it was considering whether to submit a letter of intent by Friday, April 2, 2021, and other significant potential strategic partners were in the process of reviewing the data room material. In short, there was an active bidding war for the Company. However, after first imposing a draconian no-shop with no fiduciary-out in the LOI, when later faced with an active bidding war for the Company, the Board refused to even consider pushing for a better deal with Accelmed, or waiting for other interested strategic parties, and instead rushed to impose on itself a new no-shop to protect and finalize the self-interested transaction with Bioventus that would benefit Controller.

107. Complicating matters even further is the fact that the Bioventus Transaction undervalued Bioness because it failed to adequately value the enduring legal claims that Kerbs and Teuza raised. As alleged in detail herein, after taking

control of the Company following Mr. Mann's passing, the Controller took actions relating to certain liens on the Company that made the Company entirely dependent on it for funding, then withdrew that funding and placed the Company in a helpless position that necessitated a fire sale.

108. Unsatisfied with simply forcing a sale, the Controller utilized its control of the Board, and the liens that it unlawfully imposed on the Company, to orchestrate the sale of the Company in a way that ignored potential suitors and instead favored the Controller and its priority for obtaining immediate liquidity at the expense of the Company and its other shareholders. These actions destroyed Bioness' stockholder value, giving rise to valuable corporate claims on behalf of Bioness.

109. These Derivative Claims were still pending at the time that the Board voted to approve the Transaction and survive to this day. However, these Derivative Claims remain unresolved and were not adequately considered by the Board when the Board agreed to enter into the Bioventus Transaction. As detailed herein, the final Bioventus proposal undervalued Bioness on its face. Just as importantly, however, is the fact that it also undervalued the value to the Company of the Derivative Claims themselves.

110. The Derivative Claims stem from actions taken by the Trustees that caused Bioness to grant Mann LLC a lien on all of Bioness' assets in 2017 and ignored the repeated promises made by Mann (as agent for Mann LLC) to forgive

the loans prior to an exit. Prior to the imposition of the lien, Bioness' assets were free of all liens. After Mr. Mann's death, the Controller, and specifically Messrs. Dreyer and Bostani, intervened directly and repeatedly in the Board's affairs and wielded their control over Bioness and its Board by leveraging their position as controlling at the same time the Company's controlling stockholder and largest creditor, Mann LLC. On August 15, 2017—after the Trustees installed Lindon as Chairman—the Trustees and Lindon caused Bioness and Mann LLC, without Board knowledge or approval, to execute the June 2017 Mann LLC Note and an all-assets security agreement. The June 2017 Mann LLC Note purported to incorporate the cumulative loans provided by Mann LLC to Bioness since 2008.

111. On August 30 2017, Mann LLC filed the Second Mann LLC UCC-1, a new UCC-1 purporting to cover all of Bioness' assets, including its IP. These steps were taken without the Board voting to grant Mann LLC this security interest or approve the June 2017 Mann LLC Note, nor the filing of the new UCC-1. Instead, this was all unilaterally orchestrated by Lindon at the behest of the Mann Trust and the Trustees, and without the knowledge or consent of the Board. The execution and delivery by Bioness to Mann LLC of the security agreement and the June 2017 Mann LLC Note, and the purported grant thereunder to Mann LLC of a lien over all of Bioness' assets, effected a self-dealing action by the Controller with the aid of Lindon, lacking any valid consideration. After securing for themselves control of the

Company and claimed rights over Bioness' assets, the Controller rejected multiple opportunities identified by the Board to raise funds from outside sources in the form of stock offerings and strategic transactions.

112. These claims were first identified in the 220 Action filed by Kerbs, and later expanded upon by Plaintiff in the Teuza Complaint that was filed on February 23, 2021, and were left unresolved at the time that the Board voted to approve the Transaction. These claims have and continue to cast a shadow over this transaction. Almost the entirety of the Merger Consideration is being steered towards the Mann Trust to satisfy the loans that stem from the lien over all of Bioness' assets. Effectively, the self-dealing actions by the Controller, with the aid of Lindon, lacking any valid consideration, effectively destroyed Bioness' stockholder value, giving rise to valuable corporate claims on behalf of Bioness. Almost the entirety of the Merger Consideration is devoted to the satisfaction of the loans and liens that stemmed from these self-dealing actions, accordingly the value of the Derivative Claims is material in the context of the merger.

113. Finally, having received the benefits of acquiring Bioness, Bioventus was disincentivized to assert the underlying derivative claim and did not provide value for it in the merger price. As a result of these actions, the Board was forced into the Bioventus Transaction at a price per share that undervalued Bioness, including the Derivative Claims.

H. Bioness Completes the Unfair Transaction with Bioventus

114. On March 31, 2021, the Transaction with Bioventus was consummated. In circumstances where the interests of the common stockholders diverge from those of a creditor-stockholder, directors breach their duty of loyalty by improperly favoring the interests of the creditor over those of the common stockholders. Here, the Transaction was the product of an unfair process that resulted in an unfair price to the Company's minority stockholders and instead enriched and served the interests of the Company's creditor while depriving the minority stockholders of either the benefits of a clearly superior transaction and/or the opportunity of the Company remaining a stand-alone entity.

115. At all stages of the negotiation, steps were taken to freeze out Kerbs from the negotiations and keep the minority shareholders in the dark until after closing. The Bioventus Transaction was the product of a conflicted and corrupt sale process that was initiated after the Controller strategically halted its funding arrangement with Bioness and stonewalled the Company's efforts to seek an alternative funding source in order to achieve its desire for an immediate liquidation.

116. Despite the fact that the Mann Trust was a stockholder, the Company's largest creditor, a party to the Merger Agreement, and its affiliate stood to receive nearly all of the consideration flowing from the Merger Agreement, the Board allowed the Controller and its agents to dominate the process entirely instead of even

attempting to simulate an arms-length transaction to protect the minority stockholders' interests.

117. Clearly, the Board's actions in refusing to engage with Accelmed's superior proposal was not the result of sound business judgment exercised in good faith to maximize returns for the Company's shareholders or in the interest of the shareholders. Rather, the Board, under the Controller's direction, rejected without consideration every superior offer or other alternative that would have offered greater benefits to the stockholders (without any reduction in payments to creditors), and instead accepted a far inferior Bioventus Transaction to the detriment of the shareholders so that Controller could achieve its immediate goal of a fast liquidation. Assisting them in this effort was Bioventus itself, which coordinated with the Board to put impediments in place during the sale process to shut down the ongoing bidding process in order to deliver Bioness at a fraction of its real value.

118. There can be no doubt that Bioventus was acutely aware of the claims being raised by Plaintiff. The fear that Teuza would continue their well-known efforts to challenge the unfair Transaction was a real concern of Bioventus. So much so in fact, that Section 5.2 of the Merger Agreement provided that Controller itself would indemnify Bioventus with regard to "any Losses arising after the Effective Time or the unpaid portion of any fees or expenses . . . with respect to *Avi Kerbs and Teuza – A Fairchild Technology Venture Ltd., directly on its own behalf and*

derivatively on behalf of Bioness Inc. v. Mark Lindon et al. (C.A. No. 2021-0100-SG), and any other Action by the plaintiffs in the current lawsuit or their representatives arising out of or relating to the same or substantially similar facts and circumstances upon which the current lawsuit is based.” Clearly, Bioventus was aware of the claims being raised by both Kerbs and Plaintiff.

119. When Kerbs, in spite of opposition from the Board, secured a superior proposal for the Company, Bioventus coordinated with the Board majority and the Controller to take a series of actions to block any consideration of alternative options, including: (i) denying Kerbs his rights to information and Company documents in violation of his rights as a director;²³ (ii) adding new Board members that were loyal to Controller and financially incentivized to approve the transaction; (iii) implementing a New No-Shop agreement at the eleventh hour that shut down an active bidding war and prevented the Company from considering other alternatives; and (iv) blocking any negotiations or even engaging with Accelmed or any other interested parties.²⁴

120. The Controller sought and obtained substantial and unique benefits for itself, and the Transaction was neither negotiated nor recommended by a

²³ In addition to denying Kerbs 220 Demand, the Board also refused to respond to Teuza’s own 220 Demand.

²⁴ At this time, there were three other interested entities in the Company’s data room that were exploring a potential transaction.

disinterested Board committee, nor conditioned on approval by a majority of the minority stockholders. Accordingly, the standard of review for this matter is that of entire fairness.

I. Controller Seeks to Exclude the Minority Stockholders from the Consideration in the Merger Unless/Until Minority Stockholders Agree to Waive Their Rights

121. Pursuant to the Merger Agreement, Teuza and other minority shareholders are entitled to their portion of the Merger Consideration. However, as of February 8, 2022, such money has not been distributed to most of the stockholders. Specifically, while some of the Merger Consideration has already gone to former Bioness executives and directors,²⁵ Plaintiff and most of the other minority stockholders have not received a single cent. Incredibly, the Controller has conditioned the disbursement of the funds on the minority stockholders agreeing to waive any claims that they might have against the Controller.

122. Conditioning the payment of the minority stockholders' portion of the Transaction Consideration upon receipt of a full waiver to the Controller is an absurd breach of fiduciary duty. As detailed in Section 1.8(a)(iii), the Merger Agreement simply states:

(iii) Parent will pay to the Paying Agent (or the Company on behalf of the holders of the Vested Option Shares) for further distribution

²⁵ In addition to the significant transaction bonus that some of these officeholders received.

according to the terms of this Agreement and the Paying Agent Agreement to the holders of the Fully Diluted Shares (for the avoidance of doubt, including holders of the Vested Option Shares) in cash equal to their pro rata share of \$5,000,000, which the Company has calculated to be \$0.146 per share of Company Capital Stock held by holders of the Fully Diluted Shares, less, in the case of Vested Option Shares, the exercise price thereof, in each case without interest thereon (and, together with the Contingent Common Consideration, the “Common Merger Consideration”);

Nowhere in the Merger Agreement is it stated that this payment is conditioned on a waiver. Nor was this condition ever detailed to the Court during the TRO Hearing. To the contrary, the Company expressed that there were no conditions on this payment.²⁶

123. The belated conditioning of the payment to the minority stockholders on receipt of a waiver was never agreed to by stockholders, nor was it stated in the Merger Agreement. Its only purpose here is to serve as an impermissible shield on future claims against the Controller and/or Bioventus.

COUNT I
PROMISSORY ESTOPPEL
(AGAINST MANN LLC)

124. Plaintiff repeats all previous allegations as if set forth in full herein.

125. Alfred Mann served as active Chairman of Bioness until 2013, and thereafter until his death in February 2016, he served as director of Bioness and

²⁶ The Accelmed proposal had no similar conditions.

continued to be actively engaged in its business. Alfred Mann contributed significant funds to Bioness in the form of “loans” provided by Mann LLC, an investment vehicle controlled by Mr. Mann.

126. Alfred Mann was acting as an authorized agent of Mann LLC when he repeatedly confirmed, through his statements and course of dealing, which included repeated statements to the Company’s Board and management, that his loans to the Company were not subject to repayment when the Company was eventually sold. All parties understood that Alfred Mann was making these efforts gratuitously and that Mann LLC had no expectation that these loans would not be forgiven.

127. Alfred Mann made and reiterated all of the clear and continuous representations and promises to Plaintiff described above, to the effect that Plaintiff refused to accept the Mann Put/Call Proposal, relying on Mann’s promise that Plaintiff and the other minority stockholders would be rewarded once Mann LLC forgave these loans when the Company was eventually sold.

128. Mann LLC reasonably expected and was aware that the representations and promises made by Mr. Mann would induce, and did induce, Plaintiff, and the Board, to approve the continuing funding of the Company by Mann LLC rather than seeking other business opportunities that would not dilute minority shareholders value, and inducing shareholders not to divest their shares and induced Teuza to forego Mr. Mann’s put/call proposal in 2015.

129. Mann LLC refused to forgive the loans in accordance with the representations and promises made by Mr. Mann, and instead weaponized these loans to ensure that Mann LLC, and its affiliates, received almost the entirety of the Merger Consideration.

130. It would be inequitable for Mann LLC and its affiliates to enjoy the benefits of the loan, while failing and refusing to compensate Plaintiff and the other minority stockholders for their actions to their detriment in reliance on these promises, which directly resulted in the Plaintiff and the Class failing to realize the promised value for their shares.

131. As the direct and proximate result of Mann LLC's actions, Plaintiff and the Class have been damaged.

COUNT II
BREACH OF FIDUCIARY DUTY
(AGAINST SCOTT, TERRAFRANCA, AND RUBLE)

132. Plaintiff repeats all previous allegations as if set forth in full herein.

133. The Trust-Appointed Directors have breached the fiduciary duties owed to the stockholders of Bioness because, among other reasons:

(a) They allowed themselves to be dominated by the Controller and surrendered the Company's sale process to the dictates of the Controller, in order to rush through a sales process that favored Bioventus over other superior proposals;

(b) They knowingly and purposefully refused to take steps reasonably available to conduct a fair, and conflict-free, sale process that would maximize stockholder value, and concealed their actions from Kerbs and the minority stockholders, and instead imposed the debilitating no-shop undertakings on the Company, which prevented the Company from considering superior proposals for the sole purpose of delivering to the Controller its desired outcome, while repeatedly representing to the Court otherwise;

(c) They refused and utterly failed to consider the interests of the minority stockholders and instead favored a deal that was dictated by the Controller, and almost-exclusively benefitted the Controller; and

(d) They favored their own interests and those of the Controller over those of the unaffiliated stockholders in agreeing to the Transaction at an inadequate price per share and by awarding themselves substantial financial payments.

134. By the acts, transactions, and courses of conduct alleged herein, these defendants, individually and acting as a part of a common plan, breached their fiduciary duties, including their duties of loyalty and good faith, owed to Plaintiff and the other stockholders of the Company.

135. As a result of these defendants' actions, Plaintiff and the Class have been damaged in an amount to be determined at trial.

COUNT III
BREACH OF FIDUCIARY DUTY
(AGAINST LINDON)

136. Plaintiff repeats all previous allegations as if set forth in full herein.

137. Lindon breached his fiduciary duties owed to the stockholders of Bioness because, among other reasons:

- a. orchestrating the agreements and securitization of Mann LLC's loans to Bioness without Board or other valid Company approval and for the purpose of increasing the Controller's leverage over the Company;
- b. failing to take all steps reasonably available to conduct a fair, and conflict-free, sale process that would maximize stockholder value;
- c. improperly engineering (and then shepherding) the Transaction through a conflicted process to specifically advance the Controller's wishes at the expense of the interests of the Company's minority stockholders; and
- d. favoring his own interests and those of the Controller over those of the unaffiliated stockholders in agreeing to the Transaction at an inadequate price per share, and thereby breached his duties of good faith and loyalty, and displayed consistent bad faith by misrepresenting the process and the Transaction to Kerbs and to this Court.

138. Lindon engaged in wrongdoing despite knowing of his own obvious personal, professional and financial conflicts arising from his past and ongoing legal representation of the Mann Trust.

139. By the acts, transactions, and courses of conduct alleged herein, this defendant, individually and acting as a part of a common plan, breached his fiduciary duties, including his duties of loyalty and good faith, owed to Plaintiff and the other stockholders of the Company.

140. As a result of Lindon's actions, Plaintiff and the Class have been damaged in an amount to be determined at trial.

COUNT IV

BREACH OF FIDUCIARY DUTY

(AGAINST DREYER, BOSTANI, AND THE MANN TRUST)

141. Plaintiff repeats all previous allegations as if set forth in full herein.

142. Michael Dreyer and Anoosheh Bostani are the Trustees of the Mann Trust. Dreyer and Bostani are also the managers of Mann LLC. As such, Bostani and Dreyer are both the actual and the ultimate controllers of the Company.

143. The Mann Trust owed Bioness, Teuza, and other minority stockholders fiduciary duties because it: (i) owned a majority of the Company's equity stock, and (ii) through its controlling stake of the Company's stock and its leverage as the Company's largest stockholder Mann LLC's leverage as the Company's largest creditor, took actual control over the Board to effect the Transaction it favored, and

affirmatively blocked consideration by the Board of any other alternative. As a result of this control, the Board surrendered its decision making to the Trustees.

144. As Bostani and Dreyer individually and directly controlled the actions of the Mann Trust, as its trustees, and Mann LLC as its managers. Bostani and Dreyer leveraged their personal control over both Mann Trust and Mann LLC in order to directly intervene in the Company's affairs, effectively dominating and directing its Board. Bostani and Dreyer, weaponized that control over Mann Trust, Mann LLC and the Board to, among other things:

- a. causing the Controller to renege on Mr. Mann's promise that the loans were not subject to repayment when the Company is sold;
- b. orchestrating, through Lindon, a claim of security interest over all of the Company's assets, for the purpose of transforming its loans from unsecured loans to secured loans, without any additional and valid consideration being given to the Company and without first obtaining the valid approval of the Board or the Company;
- c. forcing the Company to rely entirely on funding in the form of new loans from Mann LLC;
- d. using the control of the Board to force a sale through an unfair process and for an unfair price that favored Bioventus LLC over other superior proposals, and affirmatively blocking the Board from considering other

- bidders or alternative financing proposal that would have kept the Company as a going concern, in order to enrich itself and serve its own unique interests in liquidating its controlling stake in Bioness; and
- e. using the control of the Board to harm the Company's minority stockholders by blocking the Board from considering alternative financing proposal that would have permitted the Company to continue as a standalone entity and instead dominating the Board and forcing the Company into the Transaction for an unfair price, and pursuant to an unfair process, when superior alternatives were available.

145. By the acts, transactions, and courses of conduct alleged herein, these defendants, individually and acting as a part of a common plan, breached the fiduciary duties owed to Plaintiff and the other stockholders of the Company.

146. As a result of these actions, Plaintiff has been damaged in an amount to be determined at trial.

COUNT V

BREACH OF FIDUCIARY DUTY

(DIRECT CLAIM AGAINST DREYER, BOSTANI, AND THE MANN TRUST)

147. Plaintiff repeats all previous allegations as if set forth in full herein.

148. The Mann Trust owed Bioness, Teuza, and other minority stockholders fiduciary duties because it: (i) owned a majority of the Company's equity stock, and

(ii) through its controlling stake of the Company's stock and its leverage as the Company's largest stockholder, took actual control over the Board to effect the Transaction it favored.

149. As alleged in detail herein, after taking control of the Company following Mr. Mann's passing, the Controller acted with regard to certain liens on the Company that made the Company entirely dependent on the Controller for funding, then withdrew that funding and placed the Company in a helpless position that necessitated a fire sale. The execution and delivery by Bioness to Mann LLC of the security agreement and the June 2017 Mann LLC Note, and the purported grant thereunder to Mann LLC of a lien over all of Bioness' assets, effected a self-dealing action by the Controller with the aid of Lindon, lacking any valid consideration. Unsatisfied with simply forcing a sale, these liens were then utilized by the Controller to block all other funding, and ultimately to orchestrate the sale of the Company in a way that ignored potential suitors and instead favored the Controller and its priority for obtaining unique benefits not shared with, and at the expense of, the other shareholders. These actions destroyed Bioness' stockholder value, giving rise to valuable corporate claims on behalf of Bioness.

150. As a result of this unfair process, the Board agreed to enter the Bioventus LOI at a price per share that undervalued Bioness, including the Derivative Claims, and took action to ensure that the Board, and specifically Kerbs,

could not maximize the value of the Company for its unaffiliated stockholders. Almost the entirety of the Merger Consideration is devoted to the satisfaction of these loans, accordingly the value of the Derivative Claims are material in the context of the Transaction. The Mann Trust determined to seize that value for itself by exerting its control to coerce the Board into an unfair sale process that resulted in a sale of the Company to Bioventus at an unfair price. Having received the benefits of acquiring Bioness on the cheap, Bioventus was disincentivized to assert the underlying derivative claim and ultimately did not provide value for it in the Merger Consideration.

151. Plaintiffs and the other former unaffiliated Bioness stockholders have no adequate remedy at law.

152. As a result of Controller's actions, Plaintiff and the Class have been damaged in an amount to be determined at trial.

COUNT VI

AIDING AND ABETTING

(AGAINST MANN LLC, DREYER, AND BOSTANI)

153. Plaintiff repeats all previous allegations as if set forth in full herein.

154. The Mann Trust owed Bioness, Teuza, and other minority stockholders fiduciary duties because it: (i) owned a majority of the Company's equity stock, and (ii) through its controlling stake of the Company's stock and its leverage as the Company's largest stockholder, took actual control over the Board to effect the

Transaction it favored. Michael Dreyer and Anoosheh Bostani are the Trustees of the Mann Trust.

155. The Mann Trust breached its fiduciary duties by effectively weaponizing Mann LLC's loans to the Company by, among other things:

- a. renegeing on Mr. Mann's promise that the loans were not subject to repayment when the Company is sold;
- b. orchestrating, through Lindon, a claim of security interest over all of the Company's assets, for the purpose of transforming its loans from unsecured loans to secured loans, without any additional and valid consideration being given to the Company and without first obtaining the valid approval of the Board or the Company; and
- c. using its control of the Board to force a sale through an unfair process and for an unfair price that favored Bioventus LLC over other superior proposals, and affirmatively blocking the Board from considering other bidders or alternative financing proposal that would have kept the Company as a going concern, in order to enrich itself and serve its own unique interests in liquidating its controlling stake in Bioness; and
- d. using its control of the Board to harm the Company's minority stockholders by blocking the Board from considering alternative financing proposal that would have permitted the Company to continue

as a standalone entity and instead dominating the Board and forcing the Company into the Transaction for an unfair price when superior alternatives were available.

156. Bostani and Dreyer not only directed the actions of the Mann Trust as its trustees, but individually leveraged their personal control over both Mann Trust and Mann LLC to directly intervene in the Company's affairs, effectively dominating and directing its Board, and therefore knowingly and affirmatively participated with the Mann Trust in a course of conduct that was intended to, and did, aid and abet the Trust's Breaches of Fiduciary Duties.

157. The Mann LLC was the provider of loans to the Company. Mann LLC knowingly and affirmatively participated with the Mann Trust in a course of conduct that was intended to, and did, aid and abet the Trust's Breaches of Fiduciary Duties. Defendants knew that their aiding and abetting of the breaches of fiduciary duties would cause substantial injury to Bioventus and its stockholders, and such harm was a direct and foreseeable result of Defendants' actions.

COUNT VII
UNJUST ENRICHMENT
(AGAINST MANN LLC)

158. Plaintiff repeats all previous allegations as if set forth in full herein.

159. As alleged in detail herein, the Controller caused the Company to enter into the LOI with Bioventus to serve their own interests. Controller was a creditor

of Bioness. Having agreed to the initial Bioventus LOI, and claimed that they would fight any other deal, Mann LLC, as Bioness' largest creditor, agreed to the satisfaction of its loans for the consideration contemplated in the Bioventus LOI, and the additional \$10 million in consideration obtained by Kerbs' efforts should therefore go to equity holders. In addition, the Merger Agreement provided a full satisfaction and release of the loan obligations. To the extent that this Action is successful, any additional value should go to Bioness' minority stockholders since the Merger Agreement by its terms satisfies all claims by Mann LLC as creditor.

160. As a result of their actions, Mann LLC has received benefits from the Transaction and received such benefits solely as a result of its position and its conduct described herein. Accordingly, Mann LLC has been unjustly enriched as a result of its misconduct as detailed above. It would be unconscionable and against the fundamental principles of justice, equity, and good conscience for Mann LLC to retain the improper benefits it received as a result of this misconduct. Such benefits should be ordered to be returned to Bioness' minority stockholders.

COUNT VIII

AIDING AND ABETTING

(AGAINST BIOVENTUS INC., AND BIOVENTUS LLC)

161. Plaintiff repeats all previous allegations as if set forth in full herein.

162. The Mann Trust owed Bioness, Teuza, and other minority stockholders fiduciary duties because it: (i) owned a majority of the Company's equity stock, and

(ii) through its controlling stake of the Company's stock and its leverage as the Company's largest stockholder, took actual control over the Board to effect the Transaction it favored.

163. The Mann Trust breached its fiduciary duties by effectively weaponizing Mann LLC's loans to the Company by, among other things:

- a. conspiring with Mann LLC to renege on Mr. Mann's promise that the loans were not subject to repayment when the Company is sold;
- b. orchestrating, through Lindon, a claim of security interest over all of the Company's assets, for the purpose of transforming its loans from unsecured loans to secured loans, without any additional and valid consideration being given to the Company and without first obtaining the valid approval of the Board or the Company; and
- c. using its control of the Board to force a sale through an unfair process and for an unfair price that favored Bioventus LLC over other superior proposals, and affirmatively blocking the Board from considering other bidders or alternative financing proposal that would have kept the Company as a going concern, in order to enrich itself and serve its own unique interests in liquidating its controlling stake in Bioness; and
- d. using its control of the Board to harm the Company's minority stockholders by blocking the Board from considering alternative

financing proposal that would have permitted the Company to continue as a standalone entity and instead dominating the Board and forcing the Company into the Transaction for an unfair price when superior alternatives were available.

164. Bioventus Inc., through its subsidiary Bioventus LLC, knowingly and affirmatively participated with the Mann Trust, Lindon, Bostani, Dryer and the Trust Appointed Directors in a course of conduct that was intended to, and did, aid and abet their breaches of fiduciary duties owed to Bioness and the stockholders. Bioventus was fully aware of the ongoing legal proceedings and the fiduciary claims brought by both Kerbs and Teuza. In fact, Bioventus LLC specifically demanded and received the inclusion of a provision in the Merger Agreement that explicitly indemnified it from any future or ongoing legal proceedings and the fiduciary claims brought by either Kerbs and Teuza.

165. Even though Bioventus LLC was fully aware of the ongoing legal proceedings and the fiduciary claims brought by both Kerbs and Teuza, Bioventus LLC continued to engage in back-channel discussions with both the Controller and certain directors to conspire to block competing offers by wrongfully imposing the New No-Shop in order to block the pending superior offer and to promptly close the Bioventus deal. Finally, Bioventus LLC further took steps to effectuate the merger by filing a UCC-1 with the Delaware Secretary of State to effect a lien over all the

Company's assets, and then using that lien to block any alternative funding for the Company. Additionally, Bioventus LLC formed Perseus Merger Sub Inc. as a Delaware-based acquisition vehicle to effect the merger.

166. Bioventus Inc. and Bioventus LLC knew that their aiding and abetting of the Mann Trust's and the Board's breaches of fiduciary duties would cause substantial injury to Bioness and its stockholders, and such harm was a direct and foreseeable result of Defendants' actions.

167. As a result of the actions of Bioventus LLC and Bioventus Inc., Plaintiff has been damaged in an amount to be determined at trial.

COUNT IX

UNJUST ENRICHMENT

(AGAINST BIOVENTUS INC., AND BIOVENTUS LLC)

168. Plaintiff repeats all previous allegations as if set forth in full herein.

169. As alleged in detail herein, the Controller caused the Company to enter into the Transaction to serve their own interests. Bioventus Inc., through its subsidiary Bioventus LLC, knowingly and affirmatively participated with the Controller, Lindon and the Trust Appointed Directors in a course of conduct that was intended to, and did, aid and abet their Breaches of Fiduciary Duties to Bioness and the stockholders.

170. As a result of their actions, the sale process was cut short, no alternative bids were actually considered, the Company was sold for less than its valuation, and

Bioventus Inc. and Bioventus LLC received benefits from the Transaction and received such benefits solely as a result of their position.

171. Accordingly, Bioventus Inc. and Bioventus LLC have been unjustly enriched as a result of their misconduct as detailed above. It would be unconscionable and against the fundamental principles of justice, equity, and good conscience for Bioventus Inc. and Bioventus LLC to retain the improper benefits they received as a result of this misconduct. Such benefits should be ordered to be returned to Bioness' minority stockholders.

COUNT X
BREACH OF CONTRACT
(AGAINST MANN TRUST, MANN LLC, BIOVENTUS INC., AND
BIOVENTUS LLC)

172. Plaintiff repeats all previous allegations as if set forth in full herein.

173. Plaintiff, the Mann Trust, Mann LLC, and Bioventus Inc., through its subsidiary, Bioventus LLC, entered into the Merger Agreement in March of 2021.

174. By the express terms of Section 1.8(a)(iii) of the Merger Agreement, Plaintiff and other minority stockholders are owed to them pursuant to the Merger Agreement:

Parent will pay to the Paying Agent (or the Company on behalf of the holders of the Vested Option Shares) for further distribution according to the terms of this Agreement and the Paying Agent Agreement to the holders of the Fully Diluted Shares (for the avoidance of doubt,

including holders of the Vested Option Shares) in cash equal to their pro rata share of \$5,000,000, which the Company has calculated to be \$0.146 per share of Company Capital Stock held by holders of the Fully Diluted Shares, less, in the case of Vested Option Shares, the exercise price thereof, in each case without interest thereon (and, together with the Contingent Common Consideration, the “Common Merger Consideration”)

175. Plaintiff and the Class are holders of the Fully Diluted Shares and are owed cash equal to their pro rata share of \$5,000,000, which the Company has calculated to be \$0.146 per share of Company Capital Stock held by holders of the Fully Diluted Shares, less, in the case of Vested Option Shares, the exercise price thereof, in each case without interest thereon;

176. The Mann Trust, Mann LLC, Bioventus Inc., and Bioventus LLC have breached their contractual obligation to Plaintiff and the Class by refusing to permit the release of cash equal to their pro rata share of \$5,000,000.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendants jointly and severally, as follows:

- (A) Certifying this case as a class action, certifying Plaintiff as Class representative and his counsel as Class counsel;
- (B) Awarding rescissory and compensatory damages to Plaintiff and the Class, including pre-judgment and post-judgment interest;

(C) Finding that the Mann Trust, Bostani, Dryer, Lindon and the Trust Appointed Directors are liable for breaching their fiduciary duties owed to Plaintiff and the Class;

(D) Finding that Mann LLC, Bostani, Dryer, Bioventus Inc., and Bioventus LLC are liable for aiding and abetting the Defendants' breach of fiduciary duties owed to Plaintiff and the Class;

(E) Directing Defendants to account to Plaintiff and the Class for all damages suffered by them as a result of Defendants' wrongful conduct alleged herein;

(F) Awarding Plaintiff the costs of this action, including reasonable allowance for Plaintiff's attorneys' and experts' fees; and

(G) Awarding Plaintiff and the Class such other relief as this Court deems just, equitable, and proper.

ASHBY & GEDDES

/s/ Stephen E. Jenkins

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Dated: May 6, 2022

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2022, a copy of the public version of the *Amended Verified Class Action Complaint for Breach of Fiduciary Duty* was caused to be served upon the following counsel of record via File & ServeXpress:

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