August 10, 2020

Via Email (shareholderproposals@sec.gov)

U.S. Securities and Exchange Commission
Office of Chief Counsel
Division of Corporation Finance
100 F Street, N.E.
Washington, D.C. 20549

Re: Bio-Path Holdings, Inc. – Request to Omit Stockholder Proposal from Richard Grant

Ladies and Gentlemen:

This letter is submitted on behalf of our client, Bio-Path Holdings, Inc., a Delaware corporation (the "Company"). Pursuant to Rule 14a-8(j) of the rules and regulations promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), the Company hereby gives notice of its intention to omit from the Company's 2020 proxy statement and form of proxy for the Company's 2020 Annual Meeting of Stockholders (together, the "Proxy Materials") a stockholder proposal (including its supporting statement, the "Proposal") received from Richard Grant (the "Proponent"). The full text of the Proposal is attached hereto as Exhibit A. A copy of the Proponent's supporting materials and correspondence from the Company regarding procedural defects to the Proposal are attached hereto as Exhibit B.

The Company believes it may properly omit the Proposal from the Proxy Materials for the reasons discussed below. On behalf of the Company, we respectfully requests confirmation that the staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") will not recommend enforcement action to the Commission if the Company excludes the Proposal from the Proxy Materials. To the extent that the bases for exclusion discussed herein are premised on matters of state law, this letter also represents the opinion of Winstead PC as to such matters, provided that we have assumed the conformity to the original documents of all documents submitted to us as copies and the authenticity of the originals of such documents.

I. The Proposal

The resolution included in the Proposal reads as follows:

"[I]t is requested that the shareholders approve the following resolutions

1. That's [sic] the salary and other cash compensation, including but not limited to bonus, of the current CEO be reduced by 90% effectively immediately and any future salary, including increases or bonuses be tied directly to the performance of the company's shares.

*** FISMA & OMB Memorandum M-07-16

> 2. That a compensation study be conducted using peers for the CEO of comparable sized company [sic]
>
> 3. That the company be directed as part of that study to make a determination as to whether the CEO should be retained based upon his performance and report back to the shareholders."

For purposes of this letter, the portion of the Proposal in the first numbered paragraph shall be referred to as Part 1 of the Proposal, the portion of the Proposal in the second numbered paragraph shall be referred to as Part 2 of the Proposal, and the portion of the Proposal in the third numbered paragraph shall be referred to as Part 3 of the Proposal.

II. Reasons for Omission

As described in more detail below, the Company believes that Part 1 of the Proposal may be excluded pursuant to Rule 14a-8(i)(1), Rule 14a-8(i)(2), Rule 14a-8(i)(3), Rule 14a-8(i)(10), and Rule 14a-8(c); Part 2 of the Proposal may be excluded pursuant to Rule 14a-8(i)(1), Rule 14a-8(i)(2), Rule 14a-8(i)(3), Rule 14a-8(i)(10), and Rule 14a-8(c); Part 3 of the Proposal may be excluded pursuant to Rule 14a-8(i)(1), Rule 14a-8(i)(2), Rule 14a-8(i)(3), Rule 14a-8(i)(10), Rule 14a-8(i)(7), and Rule 14a-8(c); and the entire Proposal may be excluded because the Proposal's supporting statement (the "Supporting Statement") violates rule 14a-8(i)(3).

III. Analysis

A. The Proposal may be excluded pursuant to Rule 14a-8(i)(1) because the Proposal is not a proper subject for action by stockholders under Delaware law.

The Proposal is not a proper subject for action by shareholders because the Proposal would require the Board of Directors of the Company (the "Board") to act contrary to Delaware law, the Company's First Amended and Restated Bylaws (the "Bylaws") and the Company's Certificate of Incorporation, as amended (the "Certificate" together with the Bylaws the "Organizational Documents"). Rule 14a-8(i)(1) provides that a company may exclude a proposal if the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization.

The Company is a Delaware corporation and is subject to the General Corporation Law of the State of Delaware (the "***DGCL***"). Section 141(a) of the DGCL, 8 Del. C. § 141(a), provides in pertinent part as follows:

> The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.

Neither the Company's Certificate nor the Bylaws grant stockholders of the Company the power to manage the Company with respect to any specific or any general class of matters, including, but not limited to, the employment and compensation of the Company's officers and employees.

To the contrary, Section 5.01 of the Certificate explicitly recognizes the principles set forth in the DGCL, providing:

> Except as otherwise expressly provided by the DGCL or this Certificate of Incorporation, the management of the business and the conduct of the affairs of the Corporation shall be vested in its Board of Directors.

Similarly, Sections 4.1 and 4.2 of the Bylaws grant the Board the following powers related to the election and termination of the Company's executives:

> The Board of Directors shall elect a Chairman of the Board from among its members and shall elect a President, Secretary and Treasurer or Chief Financial Officer. The Board of Directors may also elect a Chief Executive Officer, one or more Vice Presidents, one or more Assistant Secretaries or other officers as may be chosen by the Board of Directors.
>
> The Board of Directors may remove any officer with or without cause at any time.

The DGCL clearly contemplates a division between the role of stockholders and the role of the board of directors, and such division has repeatedly been enforced by Delaware courts. *See Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *see also McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000). In the frequently cited case of *Aronson v. Lewis*, the Delaware Supreme Court stated, "[a] cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." *See also Schwartz v. Perseon Corp.*, 175 F. Supp. 3d 390, 398 (D. Del. 2016); *see also CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d. 227, 232 (Del. 2008) ("[I]t is well-established that stockholders of a corporation subject to the DGCL may not *directly manage* the business and affairs of the corporation." (*emphasis added*).

Implicit in the management of the business and affairs of a Delaware corporation is the principle that the board of directors, or persons duly authorized by the board of directors to act on its behalf, directs the decision-making process with respect to the employment of a corporation's officers. Such decision-making certainly includes having the final say on the salary and continued employment of such officers. *See Seinfeld v. Slager*, 2012 WL 2501105, at *6 (Del. Ch. June 29, 2012) ("Employment compensation decisions are core functions of a board of directors").

Delaware courts have agreed with this interpretation stating the board of directors has "broad discretion to set executive compensation." *White v. Panic*, 783 A.2d 543, 553 n.35 (Del. 1991); *see also Friedman v, Dolan*, 2015 WL 4040806, at *5 (Del. Ch. June 30, 2015) (Delaware courts are hesitant to scrutinize executive compensation decisions, recognizing that "[i]t is the essence of business judgment for a board to determine if a particular individual warrants large amounts of money.") *see also Zucker v. Andreessen*, 2012 WL 2366448, at *8 (Del. Ch. June 21,

2012) ("While the discretion of directors in setting executive compensation is not unlimited, it is the essence of business judgment for a board to determine if a particular individual warrants large amounts of money, whether in the form of current salary or severance provisions."); *see also In re Walt Disney Co. Derivative Litigation*, 731 A.2d 342, 362 (Del. Ch. 1998) ("in the absence of fraud, this court's deference to directors' business judgment is particularly broad in matters of executive compensation."); *see also Haber v. Bell*, 465 A.2d 353, 359 (Del. Ch. 1983) ("[G]enerally directors have the *sole authority to determine compensation levels* [of corporate employees] and this determination is protected by the presumption of the business judgment rule in the absence of a showing that the business judgment rule does not apply because of a disabling factor") (*emphasis added*) (citations omitted).

The distinction between the powers of the stockholders and the board is similarly acknowledged in a comment to Rule 14a-8(i)(1) where the Staff states, "some proposals are not considered proper under state law if they would be binding on the company if approved by the shareholders." In fact, the Staff has warned shareholders against making binding proposals in its Staff Legal Bulletin No. 14 (July 13, 2001), stating, "[i]n our experience, we have found that proposals that are binding on the company face a much greater likelihood of being improper under state law and, therefore, excludable under Rule 14a-8(i)(1)."

The Staff has consistently concurred that a stockholder proposal mandating or directing a company's board of directors take certain action is inconsistent with the authority granted to a board of directors under state law and thus violates Rule 14a-8(i)(1). *See Kmart Corp*. (Mar. 27, 2000); *see also El Paso Energy Corporation* (March 8, 2001). In *El Paso,* the Staff determined that a proposal demanding no further salary increases be granted to any corporate officer, "until the corporation demonstrated the ability to return to a position of profitability," was an improper subject for shareholder action under Delaware law. Similarly, in *Kmart Corp,* the Staff stated that a shareholder proposal, which mandated that all bonuses be voted on by the shareholders and limited to 10% of the annual salaries of the executive officer's compensation, should be excluded unless the proposal was rewritten as a request.

The authorities discussed above make it clear that, under the DGCL and Delaware case law, the board of directors has the final say on determining the employment and compensation of executives of the company in the exercise of its powers and duties to manage the business and affairs of the company. This remains true as long as there are no provisions in the company's organizational documents stating something to the contrary.

In the instant case, the Board has chosen to exercise its rights granted to it under the Bylaws and to vest the Company's compensation committee (the "Compensation Committee") with the power to set executive compensation. *See* Section 3.10 of the Bylaws. Indeed, the Compensation Committee's Charter specifically states that the Compensation Committee shall be responsible for establishing the compensation of the CEO. *See* Compensation Committee Charter at http://www.biopathholdings.com/corporate-governance/. Similarly, the Bylaws provide that the

Board is responsible for electing and terminating company executives, including the CEO. *See* Section 4.1 and 4.2 of the Bylaws.

The Proposal requires that (1) the CEO's salary be reduced by 90% and that any increases be tied directly to the performance of the Company's shares; (2) the Company undertake a compensation study; and (3) the Company make a determination on whether the CEO should continue to be employed. Such requirements would preclude the Board from exercising the power granted to it under the DGCL. Similarly, such requirements are inconsistent with the Certificate, the Bylaws and the Compensation Committee Charter, which have vested such decision-making authority in the Board and the Compensation Committee. Therefore, because the Proposal is not stated in precatory language such that it suggests or recommends that the Board take certain actions, adopting and implementing the Proposal would violate Section 141(a) of the DGCL. As such, the Proposal is not a proper subject for action by the stockholders of the Company and may be excluded under Rule 14a-8(i)(1).

B. The Company may exclude the Proposal Under Rule 14a-8(i)(2) because implementation of the proposal would require the Company to violate state law.

Under Rule 14a-8(i)(2), a company is permitted to exclude a proposal "[i]f the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." If adopted and implemented, the Proposal would violate Sections 141 and 122, of the DGCL. Therefore, the Proposal may be excluded based on Rule 14a-8(i)(2).

As discussed above Section 141(a) of the DGCL provides, unless a company's governing documents state otherwise, the business and affairs of the company shall be managed exclusively by or under the direction of the board of directors. The Proposal, if implemented, would violate Section 141(a) because it would limit the Board's ability to manage the business and affairs of the Company by requiring the Company to reduce the CEO's salary and make a determination on whether the CEO should be retained.

Similarly, the Proposal's attempt to limit the Board's authority to establish the compensation of the CEO violates Section 122 of the DGCL. Under Section 122(5) "...[e]very corporation created under this chapter shall have power to appoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation." Additionally, Section 122(15) of the DGCL authorizes the Company to pay and establish "compensation plans...for any or all of its directors, officers and employees." If adopted and implemented, the Proposal would restrict the Board's ability to compensate the CEO in a manner the Board has determined appropriate. As such the Proposal, if adopted and implemented, would violate Sections 122(5) and 122(15) of the DGCL.

Because the Proposal, if adopted and implemented, would violate Sections 141(a), 122(5), and 122(15) of the DGCL, the proposal may be excluded based on Rule 14a-8(i)(2).

C. The Proposal may be excluded under Rule 14a-8(i)(3) because it is vague and indefinite, and thus materially false and misleading in violation of Rule 14a-9.

The Proposal may be excluded under Rule 14a-8(i)(3) and Rule 14a-9 because each part of the Proposal and the Supporting Statement contains materially false and misleading statements. Pursuant to Rule 14a-8(i)(3), a proposal may be excluded if the proposal or the supporting statement is contrary to any of the proxy rules, including Rule 14a-9. Rule 14a-9 prohibits materially false or misleading statements in proxy soliciting materials. The Staff has previously taken the position that shareholder proposals that are vague and indefinite are excludable under Rule 14a-8(i)(3) as inherently misleading because neither the shareholders voting on the proposal nor the board of directors of the relevant company seeking to implement the proposal would be able to determine with any reasonable amount of certainty what action or measures would need to be taken if the proposal were implemented.

The Staff has consistently permitted the exclusion of shareholder proposals relating to executive compensation matters when such proposals have failed to define certain terms necessary to implement them. For example, in *Verizon Communications Inc.* (Feb. 21, 2008), the Staff concurred with the exclusion of a proposal prohibiting certain executive compensation unless Verizon's returns to shareholders exceeded those of its undefined "Industry Peer Group."

The Staff also permitted the exclusion of a proposal in *Prudential Financial, Inc.* (February 16, 2007), that urged the board to seek shareholder approval for "senior management incentive compensation programs which provide benefits only for earnings increases based only on management controlled programs." The proposal was excluded because the proposal failed to define critical terms and was subject to differing interpretations. Similarly, the Staff permitted an exclusion in *Eastman Kodak Company* (March 3, 2003) because a proposal seeking to cap executive salaries at $1 million "to include bonus, perks and stock options" failed to define various terms, and gave no indication of how options were to be valued.

Another example of the Staff permitting the exclusion of a proposal can be found in *General Electric Company* (February 5, 2003), where the proposal sought to "urge the [B]oard of Directors to seek shareholder approval for all compensation for Senior Executives and Board members not to exceed more than 25 times the average wage of hourly working employees." General Electric argued that the proposal was "vague and indefinite because neither the share owners nor the Company's Board would be able to determine, with any reasonable amount of certainty, what action or measures would be taken if the proposal were implemented." The Staff concluded that General Electric could omit the proposal from its proxy materials because it was vague and indefinite.

The Staff has also consistently concluded that a proposal may be excluded where the meaning and application of terms or the standards under the proposal "may be subject to differing interpretations." For example, in *PepsiCo Inc.* (Jan. 10, 2013), the Staff determined that a proposal requesting the adoption of a policy to limit the accelerated vesting of senior executives' equity awards following a change of control to vesting on "a pro rata basis," provided that any "performance goals must have been met" was excludable under Rule 14a-8(i)(3). The company successfully argued that it was unclear, among other things, what was meant by "pro rata basis," and for what period, and to what extent, the performance goals needed to be met. Similarly, in *Berkshire Hathaway Inc.* (March 2, 2007), the Staff permitted the exclusion a proposal restricting Berkshire from investing in securities of any foreign corporation that engages in activities prohibited for U.S. corporations by Executive Order, because the proposal did not adequately disclose to shareholders the extent to which the proposal would operate to bar investment in all foreign corporations.

As discussed below, the Company believes that each part of the Proposal may be excluded under Rule 14a-8(i)(3) and Rule 14a-9 because each part contains a number of materially false and misleading statements. Additionally, the Company believes the entire Proposal may be excluded under Rule 14a-8(i)(3) and Rule 14a-9 because the Supporting Statement also contains a number of materially false and misleading statements. However, if the Staff feels that only certain aspects of the Proposal are false and misleading, then, on behalf of the Company, we request that those portions of the Proposal be excluded.

1. Part 1 of the Proposal may be excluded because "performance of the company's shares" is ambiguous.

Part 1 of the Proposal is subject to differing interpretation and highly subjective, providing only a vague requirement with respect to the implementation of its key element. Specifically, the portion of Part 1 that calls for "any future [CEO] salary, including increases or bonuses be tied directly to the performance of the company's shares," is subject to any number of interpretations.

The language in Part 1 of the Proposal provides no guidance as to what level of "performance of the company's shares" would be required for an increase or decrease in the CEO's salary. Nor does it provide for any factor of increase or adjustment, so the Company is incapable of knowing how much of an increase would be permitted or required. This is analogous to *Eastman Kodak Company*, where the Staff did not recommend enforcement action for the exclusion of the proposal because the proposal failed to explain a number of terms, including how "stock options" were to be valued. Parallels can also be drawn with *Berkshire Hathaway Inc.* because the stockholders have not been properly made aware of the effect such a requirement would have on the CEO's overall compensation.

Because of the ambiguity, neither the stockholders in voting, nor the Board in implementing, could reasonably be expected to determine with any reasonable amount of certainty what action or measures would be required to be taken. Therefore, Part 1 of the Proposal may be excluded under Rule 14a-8(i)(3) and Rule 14a-9.

2. Part 2 of the Proposal may be excluded because key terms are undefined.

Part 2 of the Proposal does not adequately define key terms and may therefore be excluded based on Rule 14a-8(i)(3). The first term that needs further definition is "compensation." It is unclear as to whether the Proponent is requesting a study of the CEO's base salary, his salary including bonuses or his total compensation including the equity grants, benefits and other elements of compensation.

Similarly unclear is whom the proponent is requesting the Company compare itself to. This issue is nearly identical to the one addressed in *Verizon Communications Inc.* where the Staff concurred that the phrase "Peer Group" needed further definition. As it currently reads, the comparison should be made between the Company and a "comparable sized company." However, it is unclear how the Proponent intends for the Company to measure whether a company is comparably sized to the Company. For example, reasonable measurements could include market capitalization, number of employees, number of drug candidates under development or amount of revenue, among other measurements. It is also not clear whether the comparable sized company must be within the same industry as the Company. The inclusion or exclusion of specific companies could significantly affect the outcome of the study.

Without additional clarity, including Part 2 of the Proposal risks misleading stockholders as to what the Company intends to do if the Proposal is passed. Because of this, Part 2 of the Proposal is excludable under Rule 14a-8(i)(3) and Rule 14a-9.

3. Part 3 of the Proposal may be excluded because it lacks reasonable guidance and boundaries.

Part 3 of the Proposal should be excluded under Rule 14a-8(i)(3) because it provides no guidance as to how the CEO's performance should be judged or what level of underperformance would justify removal of the CEO. Similar to the issue addressed in *PepsiCo Inc.*, it is unclear as to how long, and to what extent, the Board is to assess the CEO's "performance." Additional ambiguity comes from the Proponent's failure to identify any performance goals by which the CEO should be judged. Instead, Part 3 of the Proposal merely states that as part of the study required by Part 2 of the Proposal, the Company should determine whether to retain the CEO based on undefined performance goals. Part 3 of the Proposal is also similar to *General Electric*, because neither the stockholders, nor the Board will be able to determine what actions or measures would need to be taken if the Proposal were implemented. Therefore, because the Board would have no way of knowing the intent of the stockholders voting on the Proposal, Part 3 may be excluded under Rule 14a-8(i)(3) and Rule 14a-9.

4. The Supporting Statement may be excluded because it contains a number of materially false and misleading statements.

As discussed above, a proposal may be excluded under Rule 14a-8(i)(3) if "the proposal *or supporting statement*" contains materially false or misleading statements. Rule 14a-8(i)(3) permits the exclusion of all or part of a shareholder proposal or the supporting statement if, among other things, the company demonstrates objectively that a factual statement is materially false or misleading. The Staff has consistently permitted the exclusion of proposals where there have been violations of Rule 14a-8(i)(3) in the proposals' supporting statements. *See Ferro Corporation* (March 17, 2015); *see also Energy East Corp.* (Feb. 12, 2007).

Looking at the Supporting Statement, there are a number of materially false statements. For example, the second and third sentences contain figures relating to the Company's share price and CEO's 2017 compensation that are incorrect. Additionally, the final sentence of the Supporting Statement contains a false statement where the Proponent states that the request to eliminate the

CEO's salary was rejected "based upon a 2015 proxy statement." The Proponent previously sent email correspondence directed at the Board demanding that the Board eliminate all cash compensation to the CEO and to the Board. After further discussion among the Board, the Board decided it would be appropriate for the chair of the Compensation Committee to respond to the Proponent. Although the Company's correspondence did reference the Company's 2015 Proxy Statement in passing, numerous reasons were provided, including that "[p]ursuant to the Committee's charter, and as disclosed in the Company's Proxy Statement filed with the U.S. Securities and Exchange Commission (the "SEC") on November 2, 2018, all decisions with respect to the compensation of the Company's CEO are determined and approved either solely by the Committee or together with other independent directors, as directed by the Board."

The Supporting Statement also contains misleading statements. For example, the Proponent states that the Company's 2019 Proxy Statement states, "[w]e expect to continue to incur significant operating expenses in connection with our ongoing activities" and that "[w]e have not generated significant revenues to date. Our ability to generate revenues from our drug candidates, which we do not expect will occur for many years." Not only are these statements included in the Company's applicable Annual Report on Form 10-K and Quarterly Reports on Form 10-Q (not the proxy statement), but these statements are also incomplete and out of context. The first statement comes from risk factors that explain the risks associated with investments in the Company. It leaves out important additional information contained in the risk factors that provide context about the nature of the Company's business and operations. The second quoted statement is also incomplete and misleading, as it is not even the complete sentence. This statement is found in the recent Management's Discussions & Analysis sections and is introductory language to a discussion of how revenues are or may be generated in the future. Again, it leaves out important context about the nature of the Company's operations.

Similarly misleading is the statement that "[t]he Board has chosen in addition to not replacing the CEO based upon the Company's poor performance to not reduce the CEO's salary, or at a minimum base it directly on the Company's performance." This statement is misleading because the Proponent does not clarify what measurements he is using to state that the Company has been performing poorly. This is an entirely subjective standard. For example, as a drug development Company, some might find that it is more accurate to judge the Company's performance on drug development efforts. Based on this standard, it can be argued the Company is performing well because, as noted in the Company's periodic reports, the Company currently has a number of drugs that are in development and that are progressing.

The final issue with the Supporting Statement is the contention that the CEO "continued to receive his full salary while shareholders holding were destroyed." Specifically, the statement that "shareholder's holdings were destroyed" is misleading. Such a statement is entirely subjective and ignores the timing of any given stockholder's investment.

Because, as highlighted in this section, the Supporting Statement contains a number of false and misleading statements, the Proposal may, as currently written, be excluded from the Company's Proxy Materials under Rule 14a-8(i)(3) and Rule 14a-9.

D. The Proposal may be excluded under Rule 14a-8(i)(10) because the requested actions have been substantially implemented by the Company.

The Proposal is properly excludable from the Proxy Materials under Rule 14a-8(i)(10) because each portion of the Proposal has been substantially implemented by the Company.

Rule 14a-8(i)(10) permits the exclusion of a proposal if the company has already substantially implemented the proposal. To demonstrate substantial implementation pursuant to Rule 14a-8(i)(10), a company must show that its actions compare favorably with the guidelines and essential purpose of the proposal. The Staff has stated that the Rule 14a-8(i)(10)'s purpose is to "avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." *See* 1983 Release and Exchange Act Release No. 34-12598 (July 7, 1976). Accordingly, the actions requested by a proposal need not be "fully effected," provided that they have been "substantially implemented" by the company. *See* 1983 Release.

The Staff has regularly allowed companies to exclude proposals under Rule 14a-8(i)(10) when they have determined that the company's policies, practices and procedures compare favorably with the guidelines of the proposal. For Example, in *Visa, Inc.* (Oct. 11, 2019), the Staff permitted Visa to exclude a proposal that recommended Visa's compensation philosophy and program "include social factors, such as CEO pay ratio, to enhance the Company's social responsibility." The Staff came to this conclusion because, although the company's then-current program did not go into "detail about the role of "social factors" in the Company's executive compensation philosophy and program," portions of the company's Compensation Discussion & Analysis did. The Staff felt that these other disclosures compared favorably with the ones requested.

Additionally, the Staff has permitted an exclusion under Rule 14a-8(i)(10) where a company has addressed the underlying concerns and satisfied the essential objectives of the proposal. This remains true even where the proposal had not been implemented exactly as proposed. Such a policy can be seen in *Hess Corporation* (Apr. 11, 2019), where the Staff concluded a policy should be considered substantially implemented when it "[c]ompared favorably with the guidelines of the [p]roposal." *See also, e.g., Exxon Mobil Corp.* (Apr. 3, 2019). The Staff reached a similar conclusion in *Exelon Corp.* (Feb. 26, 2010), where it was determined that substantial implementation requires only that the actions of the company satisfactorily address both the proposal's guidelines and its essential objective.

The Company believes that each part of the Proposal may be excluded under Rule 14(a)-8(i)(10) because each part has been substantially implemented by the Company. However, on behalf of the Company, we request that if the Staff determines only certain parts of the Proposal have been substantially implemented, that those parts be excluded.

1. Part 1 of the Proposal has been substantially implemented because the stockholders have recently voted in support of the CEO's salary.

Part 1 of the Proposal demands that the stockholders vote to reduce the CEO's compensation by ninety percent and that any future increases in salary be based on the performance of the Company's shares. The essential objective of this resolution has already been substantially implemented because of the Company's "say-on-pay" vote. The last such vote occurred in December 2019 and asked the stockholders whether they approved of the CEO's proposed salary. Over 85% of the voted shares (which does not include broker non-votes) expressed approval for the CEO's compensation. It is also important to note that the CEO is the only named executive officer of the Company. This means that, unlike in the majority of say-on-pay votes, the stockholders are actually given the opportunity to vote on the CEO's specific compensation. Additionally, as part of the say-on-pay vote, the stockholders voted to review the CEO's compensation once every three years.

As discussed above, the purpose of the Rule 14a-8(i)(10)'s is to "avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." *See* 1983 Release. In this instance, the stockholders have already considered the CEO's compensation and determined that the current level is appropriate. Moreover, they have voted to only be asked to consider the matter once every three years. Accordingly, because the Company has addressed the "essential objective" of Part 1 of the Proposal, namely that the stockholders have an opportunity to vote on the CEO's compensation, it may be excluded from the Proxy Materials under Rule 14a-8(i)(10).

2. Part 2 of the Proposal has been substantially implemented because the Company already conducts an annual compensation study.

Part 2 of the Proposal demands that the Company conduct a compensation study comparing the CEO's of similarly sized companies. The Compensation Committee, which is comprised solely of independent directors as required by Nasdaq rules, already conducts an annual compensation study by comparing the compensation of other CEOs in the Company's peer group. This is consistent with the Compensation Committee's charter, which states the Compensation Committee shall be responsible for "assess[ing] compensation of executive officers in relation to companies of comparable size, industry and complexity, taking the performance of the Company and such other companies into consideration."

Most recently, in March 2020, the study included an analysis of CEO compensation for eleven companies within the same industry group with market caps in a range deemed appropriate by the Compensation Committee. After reviewing the study, the Compensation Committee set the CEO's compensation as it deemed appropriate. Because the Company already conducts an annual compensation review, it has substantially implemented Part 2 of the Proposal, and Part 2 of the Proposal may therefore be properly excluded from the Proxy Materials under Rule 14a-8(i)(10).

3. Part 3 of the Proposal has been substantially implemented because the Company conducts an annual performance review and the stockholders have already effectively expressed their opinion as to the CEO's performance.

Part 3 of the Proposal demands the Company make a determination as to whether the CEO should be retained based upon his performance. The Compensation Committee is charged with reviewing and approving corporate goals and objectives relevant to the compensation of the CEO and evaluating the CEO's performance in light of such goals. The Compensation Committee conducts this review and approval during its annual compensation review process described above.

Additionally, the stockholders of the Company have already expressed their opinion as to the CEO's compensation in the latest say-on-pay vote that occurred at the most recent Annual Meeting of Stockholders in December 2019. During this vote, the shareholders were provided with information regarding the CEO's compensation, as contained in the proxy materials. As discussed above, a majority of stockholders expressed approval for the CEO's compensation. Based on this vote, it is reasonable to conclude that the stockholders are satisfied with both the performance and compensation of the CEO. This vote also serves to satisfy the Proposal's demand that the Company report back to the stockholders based on the findings of the compensation study.

As stated above, substantial implementation does not require the proposal to be implemented exactly as proposed. The fact that the Company has not "reported back to," the stockholders based explicitly on the results of the compensation study should not be determinative in this analysis. Rather, because the Company has satisfied the essential objectives of Part 3 of the Proposal, namely that the Company make a determination as to whether the CEO should be retained and that the stockholders be made aware of the compensation and performance of the CEO, Part 3 may be excluded from the Proxy Materials under Rule 14a-8(i)(10).

E. Part 3 of the Proposal may be excluded under Rule 14a-8(i)(7) because it relates to the Company's ordinary business operations.

Part 3 of the Proposal may properly be excluded because the Proposal demands the Board make a determination on the continued employment of the CEO of the Company, which relates to the Company's ordinary business operations. The Staff has indicated Rule 14a-8(i)(7) is interpreted under two central considerations. The first consideration is that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." Staff Legal Bulletin No. 14E (Oct. 27, 2009). The second consideration relates to the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." *Id.* The second consideration becomes relevant when the proposal involves 'intricate detail,' or seeks to impose specific time-frames or methods for implementing complex policies." *Id.*

The Staff has consistently held that proposals relating to the dismissal, termination or hiring of executive officers, including the CEO, may be properly omitted because they relate to ordinary business operations. See *The Walt Disney Company* (December 16, 2002); *Wachovia Corporation* (February 17, 2002); *Merrill Lynch & Co., Inc.*(February 8, 2002); *Spartan Motors, Inc.*(March 13, 2001); *Wisconsin Energy Corporation* (January 30, 2001); *U.S. Bancorp* (February 27, 2000).

In *Walt Disney Company* the Staff concluded a proposal calling for the removal of Disney's CEO and management team was properly excludable under Rule 14a-8(i)(7) because such a proposal related to the termination, hiring, or promotion of employees. The Staff again agreed with the registrant in *Wachovia Corporation* where a proposal calling for the hiring of a new CEO and firing of the then-current CEO was properly excluded. Similarly, in *Spartan Motors, Inc.*, the Staff concluded that a proposal requesting the board to remove the company's CEO and begin an immediate search for a replacement was excludable because it related to ordinary business operations.

Part 3 of the Proposal demands the company "make a determination as to whether the CEO should be retained based upon his performance." The Proponent's statements relating to the Proposal clearly indicate his displeasure with the current CEO and the Proponent's belief that he should be replaced. Accordingly, Part 3 of the Proposal is precisely the type of proposal that the Staff has permitted to be excluded because it interferes with the Company's ability to control decisions related to the hiring, promotion or termination of employees, and accordingly, deals with the Company's ordinary business operations and matters that are more appropriately addressed by the board of directors.

Because Part 3 the Proposal relates to the conduct of the Company's ordinary business operations, in seeking the termination of the CEO, it may be properly omitted pursuant to Rule 14a-8(i)(7).

F. The Proposal may be excluded under Rule 14a-8(c) because it constitutes more than one proposal.

Each part of the Proposal should be excluded from the Proxy Materials because each part constitutes a separate proposal. Rule 14a-8(c) states, "[e]ach shareholder may submit no more than one proposal to a company for a particular shareholders' meeting."

The Staff has consistently relied on Rule 14a-8(c) to permit the exclusion of a proposal containing multiple elements. For example, in *Textron Inc.* (December 23, 2011), the Staff recognized that Rule 14a-8(c) permits the exclusion of proposals combining separate and distinct elements that lack a single well-defined unifying concept, even if the elements are presented as part of a single program and relate to the same general subject matter. Similarly, in *Compuware Corporation* (July 3, 2003) the Staff supported the exclusion of a proposal which would have required the company to take multiple steps that were each individually different.

The current Proposal contains three separate demands, each of which should be considered its own proposal. The first proposal is that the Company update its executive compensation policy by reducing the CEO's salary by 90% and link any increases to the CEO's compensation to the performance of the Company's shares. The second proposal is that the Company conduct an executive compensation study by comparing similarly sized companies. The third proposal is that the Company make a determination on whether the CEO should remain employed.

Although each of these proposals has a general focus on the CEO, there is no "well-defined unifying concept." This is similar to *Textron* where the Staff concurred that simply relating multiple requests to the same general subject matter is not enough to be considered a single proposal. Because of this, the Company is permitted to exclude the Proposal under Rule 14a-8(c).

IV. Conclusion

For the foregoing reasons, the Company believes it may properly exclude the Proposal from the Proxy Materials.

* * * * *

This letter, including all attachments, is being submitted electronically to the Staff at shareholderproposals@sec.gov. Pursuant to Rule 14a-8(j), we have filed this letter with the Commission no later than 80 calendar days before the Company intends to file its definitive Proxy Materials with the Commission. A copy of this letter is being sent to the Proponent at *** as notification of the Company's intention to omit the Proposal from the Proxy Materials.

Pursuant to the guidance provided in Section F of Staff Legal Bulletin 14F (October 18, 2011), we ask that the Staff provide its response to this request to William Rohrlich, on behalf of the Company, via email at wrohrlich@winstead.com or via telephone at (281) 681-5912. If you have any comments or questions concerning this matter, please contact the undersigned directly at (281) 681-5912 or wrohrlich@winstead.com.

We take this opportunity to remind the Proponent that if he elects to submit additional correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company in accordance with Rule 14a-8(k) and SLB 14D.

Respectfully submitted,

William R. Rohrlich, II, Winstead PC

Enclosures

cc: Peter H. Nielsen
Bio-Path Holdings, Inc.

Richard Grant

Exhibit A
The Proposal

[See Attached]

PROPOSAL: VOTE ON COMPENSATION AND RETENTION OF CHIEF EXECUTIVE OFFICER

As of June 30, 2020, the Company's market capitalization was less than $20 million dollars based upon a share price of approximately $5. On July 1 ,2016 the Company share price (adjusted for the reverse splits) was $358 per the NASDAQ website, representing a per share loss of approximately 98%. Per the Company's filings, Peter H. Nielsen, the Company CEO received Salary of $456,250 and a bonus of $140,000 in 2016, a salary of $475,000 and a bonus of $118,000 in 2017, a salary of $490,000 in 2018 and a salary of $490,000 in 2019. Per the Company's 2019 proxy, "We expect to continue to incur significant operating expenses in connection with our ongoing activities" and "We have not generated significant revenues to date. Our ability to generate revenues from our drug candidates, which we do not expect will occur for many years". It appears the company intends to fund expenses through capital raises, which will dilute existing shareholders and therefore expense management and reduction in particular G&A must be managed. G &A expenses have increased from $3.014 million in 2016 to $4,108 million in 2019. The Board has chosen in addition to not replacing the CEO based upon the Company's poor performance to not reduce the CEO's salary, or at a minimum base it directly on the Company's performance. The CEO's salary represents 12% of the company G&A expense. One year ago a request was made to preserve cash by reducing or eliminating the CEO's salary but it was rejected by the head of the compensation committee based upon a 2015 proxy statement and that "Mr. Nielsen's holdings have been impacted ..by the reverse stock splits just as all shareholders" ignoring the fact that Neilson continued to receive his full salary while shareholders holdings were destroyed

Therefore, it is requested that the shareholders approve the following resolutions

1. That's the salary and other cash compensation, including but not limited to bonus, of the current CEO be reduced by 90% effectively immediately and any future salary, including increases or bonuses be tied directly to the performance of the company's shares.

2. That a compensation study be conducted using peers for the CEO of comparable sized company

3. That the company be directed as part of that study to make a determination as to whether the CEO should be retained based upon his performance and report back to the shareholders.

Exhibit B
Proponent Correspondence

[See Attached]

From: Rick Grant ***
Sent: Wednesday, July 1, 2020 11:20 AM
To: Doug Morris <dmorris@biopathholdings.com>
Subject: Re: Is Bio-Path Holdings, Inc. (NASDAQ:BPTH) Excessively Paying Its CEO? - Simply Wall St News

Dear Doug
In accordance with the SEC requirements, I certify that I have over 2300 shares of Biopath stock (in three different brokerage houses) and that I am submitting this shareholder resolution to be included in the company's proxy. The resolution is less than the 500 word maximum and contains facts from the company's SEC filings and I've also attached the letter referenced in the resolution.
This is being submitted is timely
This is being submitted based upon the Company's continued failure to address the issues and destruction of shareholder value.

Please acknowledge your receipt of this on behalf of the company.

Sincerely
Richard Grant

.
On Thursday, July 9, 2020, 01:00:34 PM EDT, Doug Morris <dmorris@biopathholdings.com> wrote:

Mr. Grant,

Thank you for your email. Upon review of your submission, we noted deficiencies in your submission. First, we were not able to verify that you are the record holder of shares of common stock of Bio-Path. Because it does not appear that you are the record holder of the shares, we suspect that you may hold your shares in "street name" with your broker or bank. Second, your submission did not confirm that you intend to continue holding the securities through the date of the company's annual meeting.

In order to correct the deficiencies in your submission, please provide: (i) your written statement that you intend to continue holding the securities through the date of Bio-Path's annual meeting; and (ii) a written statement from the record holder of the securities (for example, your broker or bank where the shares are held) verifying that, at the time you submitted the proposal, you continuously held the securities for at least one year.

If Bio-Path does not receive this confirmation within 14 days of your receipt of this email, your proposal will not be included in the proxy statement.

Please note, if you obtain a written statement from the record holder of the securities, the SEC suggests the record holder use the following language:

> "As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities]."

If you have any other questions please see the attached Rule 14a-8.

Regards,

Doug

From: Rick Grant ***
Sent: Monday, July 13, 2020 10:02 AM
To: Doug Morris <dmorris@biopathholdings.com>
Cc: Rohrlich, Billy <wrohrlich@winstead.com>; Daniel Gifford ***
Subject: Re: Response to your email Re: Proxy Resolution(s) Submission

Dear Mr. Morris
Attached is a letter form TDAmeritrade, which shows I hold the requisite number of shares and have held them prior to July 1, 2019, i.e. one year before my submission. In fact I have held these shares for at least several years, in addition to the shares I hold at Fidelity and E*TRADE

Further as you requested "your written statement that you intend to continue holding the securities through the date of Bio-Path's annual meeting" **this is to confirm in writing that I intend to continue to hold the securities through the date of Bio-Paths annual meeting.**

Please confirm that you have received this email and that I have complied with Rule 14a-8., as I have provided the information you requested, well within the time frame you stated.

Sincerely
Richard Grant

TD Ameritrade

07/11/2020

Richard Grant
***

Dear Richard Grant,

Per our records, you have held a total of 904 shares of BPTH - Bio-Path Holdings Inc between your two accounts from 7/01/2019 to 7/01/2020. Your Individual account ending in *** currently holds 404 of BPTH. Your Traditional IRA ending in *** currently holds 500 shares of BPTH. Both accounts had the shares purchased prior to 7/01/2019.

If we can be of any further assistance, please let us know. Just log in to your account and go to the Message Center to write us. You can also call Client Services at 800-669-3900. We're available 24 hours a day, seven days a week.

Sincerely,

Akbar Chughtai
Resource Specialist
TD Ameritrade