IN THE SUPREME COURT OF THE STATE OF DELAWARE

RBC CAPITAL MARKETS, LLC, Defendant Below, Appellant/Cross-Appellee, vs. JOANNA JERVIS, Plaintiff Below, Appellee/Cross-Appellant.	No. 140, 2015 Court Below: Court of Chancery C.A. No. 6350-VCL

APPELLANT RBC CAPITAL MARKETS, LLC'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

On June 30, 2011, an affiliate of Warburg Pincus LLC ("Warburg") acquired Rural/Metro Corporation ("Rural" or the "Company") in an all-cash deal for $17.25 per share. This class action alleged that the six members of Rural's Board of Directors (the "Board") breached their fiduciary duties. RBC Capital Markets, LLC ("RBC") and Moelis & Co., LLC ("Moelis") acted as co-financial advisors to a Special Committee of the Board for the Rural transaction. RBC and Moelis were not added as defendants until sixteen months after suit was filed and only eight months before trial, after much discovery had already occurred. As of four days before trial, Plaintiff had settled with Moelis, the Company, and all six members of the Board. RBC requested a continuance, which the trial court denied, and went forward with the four-day trial. The trial court's eventual order approving the settlement expressly barred RBC from bringing contribution claims against any of the other defendants.

On March 7, 2014, the trial court issued an opinion (the "Liability Opinion" (Ex. A)) holding that RBC aided and abetted the Board's breaches of fiduciary duty. On October 10, 2014, the trial court issued an opinion (the "Damages Opinion" (Ex. B)) quantifying RBC's liability at roughly $76 million.

This appeal followed.

SUMMARY OF ARGUMENT

I. The trial court erred by holding that the Board breached its duty of care under the enhanced scrutiny standard enunciated in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). Enhanced scrutiny did not apply to the Board's decision to explore strategic alternatives, and the Board's actions in approving the sale to Warburg could not have failed *Revlon* scrutiny where the Company conducted a full and fair public auction and entered into an agreement with modest deal protections and a 90-day post-signing market check. Additionally, the trial court erred by finding a duty of care violation without finding gross negligence.

II. The trial court erred by holding that the Board violated its fiduciary duty of disclosure by making material misstatements in the May 26, 2011 proxy statement. The proxy statement accurately described RBC's valuation analysis, and RBC's purported conflicts of interest were adequately disclosed to stockholders. Even if the trial court were correct that the proxy statement contained misstatements, none of the purported misstatements were material.

III. The trial court erred by finding that RBC aided and abetted the Board's purported breaches of fiduciary duty because a party cannot "knowingly participate" in an exculpated breach of the duty of care. Moreover, the trial court ignored the requirement that the aided and abetted act be "inherently wrongful."

And the trial court incorrectly found that RBC aided and abetted a breach without finding concerted action by RBC and the Board.

IV. The trial court erred by finding that the Board's conduct proximately caused damages. The decision to explore strategic alternatives could not have caused any damage to stockholders, and the robust auction and 90-day post-signing market check ensured that the final sale price was the best value reasonably obtainable for the Company. Because none of the purported misstatements in the proxy statement was material, they could not have caused damages.

V. The trial court erred in calculating damages by ignoring the best evidence of the Company's value: the robust public auction and the lack of any topping bid. To the extent the trial court determined to derive its own valuation, it erred in accepting Plaintiff's unrealistic, mechanical extrapolation of management projections, and it adopted an unreasonably low beta.

VI. The trial court erred in applying DUCATA by engaging in a proportionate fault analysis based solely on the trial record and by permitting the equitable doctrine of unclean hands to trump the legislative policy underlying statutorily mandated contribution. The trial court's holding that the directors and Moelis were not joint tortfeasors is inconsistent with its factual findings, and the trial court improperly placed on RBC the burden to establish that the Rural directors were not exculpated for a breach of their duty of care.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff Joanna Jervis owned Rural common stock at the time of the merger. (A1935.) Defendant RBC is a Minnesota limited liability company. (A1936.) On January 10, 2011, RBC and Moelis were retained as co-financial advisors with respect to Rural's exploration of strategic alternatives. (A551-52)

Rural was a provider of private ambulance and fire protection services. (Ex. A at 2.) Rural is incorporated in Delaware and based in Scottsdale, Arizona. (*Id.*) Rural filed for bankruptcy on August 5, 2013, just two years after the merger. Defendant Michael DiMino was Rural's Chief Executive Officer and a director beginning on June 1, 2010. (A1935.) Defendant Christopher Shackelton joined Rural's Board in March 2008 and served as its Chairman. (*Id.*) Shackelton also served as Chairman of the Special Committee beginning in October 2010. (*Id.*) Defendants Eugene Davis, Earl Holland, Conrad Conrad, and Henry Walker served as Rural directors. Each was found to be independent and disinterested. (Ex. A at 2.)

B. The Board Decides To Explore Strategic Alternatives.

In August 2010, the Board formed a Special Committee to explore acquiring Rural's main competitor, American Medical Response, Inc. ("AMR"), a subsidiary of Emergency Medical Services Corporation ("EMS"). (*Id*.) Shackelton approached EMS but was rebuffed. (*Id.* at 3.) In October 2010, the Special Committee fielded an unsolicited indication of interest from Macquarie Capital and Irving Place Capital, although negotiations broke down over price. (*Id*.)

In December 2010, EMS was rumored to be in play. (*Id.* at 7.) The Board responded by authorizing the Special Committee to conduct "an in-depth analysis" of three strategic alternatives: (1) continuing Rural as a standalone entity; (2) a sale of Rural; or (3) a strategic business combination with AMR. (*Id.* at 8, 53.) The trial court identified a number of benefits to exploring strategic alternatives at this time. (*Id*. at 55-56.)

On December 23, 2010, the Special Committee interviewed three potential financial advisors: RBC, Moelis, and Houlihan Lokey. (*Id*. at 9.) Each potential advisor recommended that Rural explore a sale of the Company, among other options. (A412; A465; A489.) During that meeting, the Special Committee discussed the possibility that RBC would seek to provide financing to potential buyers, known as "staple financing." The Special Committee's counsel from Paul Hastings LLP explained that a financial advisor offering staple financing could create a potential appearance of conflict, but that RBC's "overall familiarity with the Company and its industry[] would be expected to significantly enhance a potential sale process through staple financing . . . ." (Ex. A at 11.) Counsel advised that if the Special Committee were to select RBC, it should consider "appointing a second firm which would not be in a position to provide staple financing, but that would be very close to the process to assure both the fact and the appearance of an appropriate and robust action process." (*Id.* (citing A407).) In a split 2-1 vote (Davis voted to retain Houlihan), the Special Committee decided to hire RBC, along with Moelis, which would not offer staple financing. (A407.)

On January 10, 2011, Rural entered into a joint engagement letter with RBC and Moelis (the "Engagement Letter"). The parties agreed that RBC could (1) offer staple financing to any purchaser of Rural and (2) "arrange and extend acquisition financing or other financing to . . . purchasers that may seek to acquire companies or businesses that offer products and services that may be substantially similar to those offered by the Company." (Ex. A at 71.) RBC's participation in the EMS process was publicly disclosed. A February 2011 press release announcing that Clayton, Dubilier & Rice, LLC ("CD&R") had purchased EMS listed RBC among the group of banks financing the transaction. (A589.)

C. The Auction Process

During December 2010 and January 2011, with the Special Committee's approval, RBC and Moelis contacted 28 potentially interested parties. (Ex. A at 15.) Rural, Paul Hastings, RBC, and Moelis jointly prepared a management presentation for interested bidders, built a financial model, and provided data to potential bidders. (A606.) Twenty-one parties requested Rural's Confidential Information Memorandum. (Ex. A at 15.) Six parties submitted indications of interest, ranging between $14.50 and $19 per share, with only one bid over $17.00. (*Id.* at 16; A579.) Although several EMS bidders did not participate in Rural's auction, the trial court found that continuing the auction process was reasonable, observing that Rural had received six indications of interest "at substantial premiums to where Rural's stock had traded before EMS announced its process." (Ex. A at 57.)

Shackelton, as a member of the Special Committee, periodically provided detailed updates to the Board about discussions with potential bidders during this period. (*Id.* at 12, 16; A549.) The Special Committee itself was actively involved in and informed of the auction's progress. (*See* A1670; A2316-17.) RBC and Moelis apprised the Special Committee of the reasons parties dropped out of the auction process, including, primarily, that they could not justify a price above the stock price. (*See, e.g.*, A570 ("Thoma Bravo . . . can't get to current stock price"); A569 ("[CCMP] struggled to come up with an angle that would justify a premium price").)

The Special Committee was sophisticated and close to the business. The Special Committee regularly had "in depth" discussions with RBC and Moelis about valuation. (A2331.) RBC's December 23, 2010 pitch book included preliminary valuation analyses based on management's latest projections. (A2329-30; Ex. A at 70.) Shackelton testified that additional analysis was unnecessary because of (a) "how close . . . the whole board was to the business" and (b) the Board's many discussions with RBC and Moelis. (A2331.)

D. Final Negotiations with Warburg

On March 22, 2011, Warburg made a firm bid at $17.00 per share, and CD&R submitted an indication of interest at $17.00 per share, subject to additional diligence. The next day, the Special Committee rejected both offers. (Ex. A at 25.) Two days later, Warburg increased its bid to $17.25 per share. (*Id.* at 26.) Despite several attempts, RBC and Moelis were unable to negotiate the price above $17.25. CD&R asked the Board to extend the bidding timeline so it could complete the EMS acquisition, but the Board refused. (*Id.* at 18, 20-21.)

On March 26, 2011, the Special Committee discussed Warburg's revised offer with RBC and Moelis. (A825.) The Special Committee asked RBC and Moelis to present their respective fairness opinions to the Board the following day. (*Id.*; Ex. A at 31.)

1. RBC Offered But Did Not Provide Financing To Warburg.

Before and during the auction process, the Special Committee knew that RBC was offering staple financing to all potential bidders. The Engagement Letter specifically contemplated this offer, *see supra* at 6, and RBC periodically sent the

Special Committee spreadsheets tracking its contacts with the bidders, including information on whether the bidders were interested in staple financing from RBC. (*See, e.g.*, A622.) On March 18, 2011, RBC sent Warburg executed commitment papers for staple financing, but Warburg did not respond. (*See* A2174.) Warburg's March 22 firm bid included three commitment letters providing up to 100% financing from Credit Suisse Securities LLC, Citigroup Global Markets Inc., and Jefferies Finance—not RBC. (A634-799.)

2. Moelis And RBC Each Issue Fairness Opinions.

On March 26, 2011, a day before RBC provided its fairness analysis, RBC's internal fairness committee (the "Fairness Committee") reviewed a preliminary draft of the analysis (the "Preliminary Fairness Draft"). (A827-57.) The Preliminary Fairness Draft used three valuation methodologies: a Discounted Cash Flow ("DCF") analysis; a precedent transactions analysis; and a comparable company analysis. The proposed price of $17.25 per share fell within the range of fairness in the Preliminary Fairness Draft.

The Fairness Committee requested certain revisions. (Ex. A at 28-30; A2407.) The Fairness Committee wanted the precedent transactions analysis to use the 2004 AMR transaction multiple because it was the most comparable transaction, albeit not the most recent. (A2405-06.) The Fairness Committee also asked the team to exclude fewer one-time expenses from one of the two methodologies used to compute the Adjusted EBITDA in the precedent transaction analysis. (A2406-07.) The Fairness Committee made this recommendation because after examining analyst reports covering Rural, it determined that Wall Street analysts did not account for such one-time expenses in their adjustments to EBITDA. (*Id.*) The Fairness Committee advised against using a comparable company analysis because there was only one company of limited comparability to Rural. (*Id.*) With these changes made, the Fairness Committee approved the fairness opinion, and RBC sent it to the Special Committee. (A2407; Ex. A at 31; A824.)

On March 27, 2011, RBC and Moelis delivered oral fairness opinions, later reduced to writing, to the Board. The DCF in RBC's finalized fairness analysis (the "Final Fairness Analysis") yielded an implied per share equity value range of $16.28 to $21.07, compared to a range of $16.49 to $21.35 in the Preliminary Fairness Draft. (A877; A849.) The $17.25 per share offer fell squarely within RBC's range of fairness, just as it had for every draft of RBC's fairness analysis. (A858.) Additionally, the final precedent transactions analysis yielded a per share value of $11.54 to $21.76 based on management's approach to calculating Adjusted EBITDA and $8.19 to $16.71 based on analysts' approach to calculating Adjusted EBITDA. (A877.) In both the Preliminary Fairness Draft and the Final

Fairness Analysis, the $17.25 per share offer fell within RBC's range of value based on precedent transactions. (A849; A877.)

E. Rural's Board Approves The Sale

On March 28, 2011, the Board and Special Committee accepted Warburg's $17.25 offer, which constituted a 37.3% premium over the March 25, 2011 closing share price. (A1004.) The merger agreement allowed the Board to receive and consider any subsequent unsolicited bids above $17.25 per share and permitted Warburg to submit a topping bid. (A1138-40.) The agreement contained a termination fee of $16.92 million, or 2.5%, payable to Warburg. (A1072; A1093.)

Rural filed preliminary and definitive proxy statements on April 18, 2011 and May 26, 2011, respectively, seeking stockholder approval of the sale. The definitive proxy statement (the "Proxy Statement") disclosed that RBC offered staple financing. (A1091 (noting that RBC "separately distributed a brief outline of the terms of buy-side financing RBC was willing to make available"); A1092 (noting that Warburg had rejected RBC's offer of buy-side financing).) The disclosures regarding RBC's fairness opinion also described the work RBC performed to analyze Rural's range of fair values. (A1098-A1103.)

No topping bid emerged during the 90 days between the public announcement of the Board's vote on March 28, 2011 and the special stockholder meeting to vote on the sale on June 27, 2011. Approximately 72% of the voting power of Rural voted to approve the sale of the Company to Warburg. (Ex. A at 32.) The merger closed on June 30, 2011.

II. THE PROCEEDINGS BELOW

A. Plaintiffs File Two Class Actions.

On April 6, 2011, Beatriz Llorens and Joanna Jervis each commenced separate class actions against Rural and certain members of the Board (the "Individual Defendants") in the Court of Chancery. On May 27, 2011, the trial court consolidated the two class actions and appointed Beatriz Llorens as Lead Plaintiff. On October 5, 2011, Llorens and the defendants presented a disclosure-only settlement to the trial court. On January 17, 2012, the trial court rejected that settlement, replaced Llorens with Jervis as lead plaintiff for the class, and appointed new lead counsel. (A1361.) RBC was not named as a defendant in the consolidated action until August 29, 2012—one year and four months after the initial class actions were filed, and only eight months before trial.

1. The Trial

Rural, Moelis, and the Individual Defendants settled only days before trial. Suddenly left alone to defend against all of Plaintiff's claims, when previously all defendants represented by three sets of counsel had planned to try the case jointly, RBC requested a brief continuance of the trial, which the trial court denied.

The four-day trial began on May 6, 2013, with each side having twelve hours of trial time. Plaintiff's trial presentation did not align with the theories presented in her operative complaint, explored during the discovery process, and disclosed in the pre-trial briefing and Pre-Trial Order. For example, much of Plaintiff's case at trial focused on her argument that discussions between RBC's acquisition financing team and Warburg after March 22, 2011 should have been disclosed to the Board by the M&A team. But because Plaintiff had not even identified these discussions as a basis for her claims until days before trial, Plaintiff failed to depose or call at trial the acquisition financing team witnesses who directly participated in these discussions. Indeed, Plaintiff had not even identified these discussions until after settling with the Individual Defendants and Moelis.

2. The Trial Court Excludes The Farber Declaration.

Less than three months after trial, on August 5, 2013, Rural filed for bankruptcy. RBC requested that the trial court take judicial notice of a declaration filed in Rural's bankruptcy by Stephen Farber (the "Farber Declaration"), Rural's Chief Financial Officer (A2641), and his statements that: (i) "the financial [management] projections used during the Rural/Metro sale process were 'significantly flawed and wildly optimistic'"; and (ii) "'the price received by the Company's shareholders was fair.'" (A3039.) On December 13, 2013, the trial court denied this request. (*Id*.)

B. The Trial Court Issues The Liability Opinion.

On March 7, 2014, the trial court issued its 91-page Liability Opinion, holding RBC liable for aiding and abetting the Board's breaches of its fiduciary duties of care and disclosure. Specifically, the trial court found that the Board had breached its duties by: (1) exploring a sale of Rural in December 2010; (2) approving Warburg's bid of $17.25 per share for Rural; and (3) disseminating false statements in the Proxy Statement about RBC's financial presentation to the Board and RBC's incentives. The trial court also found that RBC misled the Board by failing to: (1) provide sufficient valuation analysis at interim points in the process; and (2) disclose to the Board its ongoing efforts to be involved in the buy-side financing. Even though Rural filed bankruptcy just two years after the sale, the trial court concluded that Rural was not sold for fair value. The trial court largely ignored critical trial testimony and drew inferences from documents that had not been the subject of testimony.

C. The Trial Court Issues The Damages Opinion.

After the issuance of the Liability Opinion, RBC argued that its share of damages should be reduced under Section 6304(b) of the Delaware Uniform Contribution Among Tortfeasors Act ("DUCATA") because it was entitled to a settlement credit equal to the aggregate pro rata share of the settling defendants. Each of the eight joint tortfeasors (*i.e.*, RBC, Moelis, and the six Individual

Defendants) should have been allocated an equal 12.5% share, with RBC receiving a settlement credit of 87.5% of the total damages award. (Ex. B at 20.)

On October 10, 2014, without additional documentary evidence or testimony, the trial court issued its 95-page opinion holding that RBC was entitled to a settlement credit only with respect to Shackelton and DiMino, who the trial court concluded were the only joint tortfeasors. (*Id.* at 51, 58, 79, 84, 86, 87.) The trial court held that Moelis was not a joint tortfeasor because it was not "similarly situated" and did not give advice tainted by self-interest. (*Id.* at 88-90.)

Relying solely on a DCF valuation, the trial court held that the class members suffered damages of $4.17 per share. (Ex. B at 20.) The trial court considered no market-based indications of value, such as the Company's historical share price, the result of the auction, or the lack of a topping bid. This approach to valuation yielded a shortfall of an astonishing $105 million (almost 20% of the purchase price), adjusted to $93,323,554.61 to account for shares held by insiders.

The trial court analyzed comparative fault for three breaches. Despite finding that RBC aided and abetted the Board's disclosure breach, the trial court held that "RBC was solely responsible" for that breach and therefore liable for all damages flowing from it, which the trial court determined amounted to 50% of the total damages. (*Id.* at 92-93.) The trial court applied the unclean hands doctrine to deny RBC's contribution claim regarding the merger's final approval, to which the trial court arbitrarily attributed 25% of the damages. Concerning the claim that the Special Committee breached its duties by exploring strategic alternatives, the trial court acknowledged that its approach carried a "risk of . . . false precision," (*Id.* at 94), yet nevertheless capriciously attributed 10% of those damages to Shackelton, 8% to RBC, and 7% to DiMino. (*Id.* at 93-94.) Accordingly, RBC was responsible for 83% of the damages award, or $75,798,550.33. (*Id.* at 95.)

D. The Trial Court Issues The Fee-Shifting Opinion.

On October 29, 2014, Plaintiff filed a motion seeking, *inter alia*, to recover attorney's fees from RBC. On February 15, 2015, the trial court denied Plaintiff's motion. On February 19, 2015, the trial court issued its final order in the case. (A3060.) This appeal timely followed.

ARGUMENT

I. THE TRIAL COURT APPLIED *REVLON* INCORRECTLY.

A. QUESTION PRESENTED

Did the trial court err by: (a) applying *Revlon* scrutiny to a decision to explore alternatives (A1949-54); (b) finding that the Board's conduct failed *Revlon* scrutiny even in light of a 90-day post-signing market check (A2377-78; A2575); or (c) finding that the Board breached its duty of care without a finding of gross negligence (A2561)?

B. SCOPE OF REVIEW

De novo review applies to legal conclusions, and clear error review applies to factual findings. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998); *Ivanhoe Partners v. Newmont Mining Corp***,** 535 A.2d 1334, 1340-41 (Del. 1987). The trial court's misapplication of *Revlon* is a legal issue.

C. MERITS OF ARGUMENT

Various errors undermine the trial court's holdings that the Board violated its duty of care by exploring alternatives in December 2010 and by accepting Warburg's offer of $17.25 per share. (Ex. A at 55-58.)

1. The Trial Court Erred By Applying Enhanced Scrutiny To The Board's Decision To Explore Alternatives.

Under the facts as found, *Revlon* scrutiny could not possibly apply to the Board's actions during December 2010, when the Board determined that the

Special Committee should investigate strategic alternatives, including a sale of the company. The trial court held that Shackelton, without Board authorization and not acting as "an authorized corporate decisionmaker," pursued a sale and put Rural "in play" in December 2010. (Ex. A at 53.) But this Court need not review any factual findings to determine that the trial court erred by applying enhanced scrutiny to the Board's decision to explore alternatives because this Court has twice held that being in play does not trigger *Revlon.* Rather, *Revlon* scrutiny applies only when the Board makes a business judgment to sell control of the company in a near-term transaction. Shackelton's supposed unauthorized action could not have satisfied this test and so could not have triggered *Revlon* scrutiny. Under the more deferential business judgment rule, the Board's decision to explore strategic alternatives was rational.

a. *Revlon* Does Not Apply To The Directors' Decision To Explore Strategic Alternatives In December 2010.

Delaware courts generally review board decisions under the business judgment rule, the presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006) (quotation omitted). Under the business judgment rule, "the board's decision will be upheld unless it cannot be 'attributed to any rational business purpose.'" *Id.* at 74 (footnote omitted).

Revlon changes this general rule, but only when a board embarks on a change-of-control transaction. In the seminal case of *Lyondell Chemical Co. v. Ryan*, this Court squarely held that "*Revlon* duties do not arise simply because a company is 'in play.'" 970 A.2d 235, 242 (Del. 2009) (footnote omitted); *see also Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1151 (Del. 1989) (citations omitted) ("[W]e decline to extend *Revlon*'s application to corporate transactions simply because they might be construed as putting a corporation either 'in play' or 'up for sale.'"). Instead, *Revlon* scrutiny is triggered "only when a company embarks on a transaction—on its own initiative or in response to an unsolicited offer—that *will result* in a change of control." *Lyondell*, 970 A.2d at 242 (emphasis added) (footnote omitted) (holding that *Revlon* scrutiny did not apply until the board made a business judgment to commit to the negotiations, expecting to produce a change of control transaction). *See also In re Micromet S'holder Litig.*, 2012 WL 681785, at *6 (Del. Ch.) (*Revlon* applied only when the board resolved to enter into "serious merger negotiations" with an unsolicited bidder).

Revlon appropriately focuses on the period after the board determines to embark upon a change of control transaction because it requires the directors to secure the "best immediate value." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595 (Del. Ch. 2010). Outside the context of an inevitable sale of the company, a director's fiduciary duties are not so narrowly focused on achieving the best price reasonably (and immediately) available. *See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001) (emphasis added) (A "board's duties under *Revlon* and its progeny [are] not [] independent duties but the application *in a specific context* of the board's fiduciary duties of care, good faith, and loyalty."). In *Revlon*, the fact that a sale was "inevitable" transformed the board into "auctioneers charged with getting the best price for the stockholders at a sale of the company." 506 A.2d at 182.

Consistent with this emphasis, *Revlon* scrutiny does not apply even if a board's exploration takes the form of initiating an auction. "A *Revlon* analysis is not implicated solely by seeking to conduct an auction that, if successful, might end with a change in control."[1] After all, at the end of an auction, a board may decide to refuse all offers. *See NCS*, 825 A.2d at 255.

Here, the trial court repeated the error that *Lyondell* reversed. *Lyondell* sensibly requires that being "in play" is not enough: the board must embark upon a change of control transaction. This case demonstrates that *Lyondell*'s focus on the end of the process is the correct one.

[1] *In re NCS Healthcare, Inc. S'holders Litig.*, 825 A.2d 240, 255 (Del. Ch. 2002) (citing *Wells Fargo & Co. v. First Interstate Bancorp*, 1996 WL 32169, at *4 (Del. Ch.)), *rev'd on other grounds*, *Omni Care, Inc. v. NCS Healthcare, Inc.*, 822 A.2d 397 (Del. 2002) (TABLE); *see also In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1048 n.117 (Del. Ch. 2012) (emphasis in original) (suggesting that an auction process on its own should not trigger intermediate scrutiny because "why should an unconflicted board with *more* market knowledge [because of the auction] have less flexibility to choose the option that it believed was best?").

In addition, the trial court's factual finding that "Shackelton and RBC unilaterally put Rural into play" further undermines the conclusion that the Board violated its *Revlon* duties. (Ex. A at 56.) Not only is there a complete lack of support for this finding, the trial court held that the decision to initiate a sale process "was not made by an authorized corporate decisionmaker," and "neither the Board nor the Special Committee made such a decision [to pursue a near-term sale process]." (*Id.* at 53, 56.) Shackelton, of course, could not have sold Rural of his own accord or on his own authority, and it therefore does not matter if "Shackelton and RBC unilaterally put Rural into play," even if true. (*Id.* at 56.)

Under Delaware law, the Board's decision to explore strategic alternatives, even where one alternative was a sale process, is a pure business judgment that is entirely separate from the *Revlon* analysis. *See Lyondell*, 970 A.2d at 242; *see also Micromet*, 2012 WL 681785, at *6; *In re Paxson Commc'n Corp. S'holders Litig.*, 2001 WL 812028, at *7 (Del. Ch.). The trial court provided a litany of reasons to run a sale process in parallel with EMS's, each of which independently provides a "rational business purpose" sufficient to satisfy business judgment review. (Ex. A at 55-56; *Disney*, 906 A.2d at 52.)

b. RBC's Supposed Undisclosed Conflict Did Not Lead To A Decision Outside The Range of Reasonableness.

Even if this Court applies intermediate scrutiny to the decision to initiate a sales process, the trial court erred by finding that the Board "fail[ed] the enhanced scrutiny test" because RBC did not disclose to the Board "that proceeding in parallel with the EMS process served RBC's interest in gaining a role on the financing trees of bidders for EMS." (Ex. A at 53.) Three independent reasons demonstrate the trial court's errors.

First, the trial court's conclusion that RBC caused the alleged breach of duty makes no sense. RBC's purported failure to disclose its interest in EMS could not have logically led the Board to breach its fiduciary duties. The main disadvantage to beginning a sales process during the EMS process was that some bidders in the EMS sale would not be able to bid for Rural. But this impediment was readily apparent, whether or not RBC disclosed its plans. Indeed, the trial court found the downside "obvious." (*Id.* at 54.)

Further, the trial court fails to explain *how* disclosure of RBC's desire to provide financing on the EMS deal would have or could have affected the Board's decision about exploring strategic alternatives for Rural. It is difficult to understand how the Special Committee's knowledge of RBC's desire to provide financing in a different transaction would have materially changed Rural's approach, particularly given that Rural agreed to permit RBC to provide financing to the buyer in its own potential transaction and hired a second advisor, Moelis, who concurred with RBC's advice.

There is also no evidence that RBC designed the Rural auction with the purpose of furthering RBC's interest in participating in the EMS financing. Plaintiff did not argue, because no evidence supports the conclusion, that RBC or the Special Committee did anything to favor or advantage any bidder in any way during the auction, including CD&R, the purchaser of EMS and a bidder in the Rural sale process. In contrast to Plaintiff, the trial court did suggest (citing A544) that there may have been an effort to manipulate the sale process by reaching out to bidders in two stages. (*See* Ex. A at 13.) The email cited by the trial court is an innocuous planning email sent on December 28, in which RBC employees discussed strategically bifurcating the sales process between "Track 1" buyers, who were initially involved in the EMS process, and "Track 2" buyers, who dropped out of EMS bidding. There is nothing about this email to suggest any improper conduct. And in discussing this email, the trial court fails to explain that the bifurcation *never actually occurred*. Ultimately, the contacting of all the bidders "w[as] done simultaneously." (A2098; A622.)

Second, even if RBC had not informed the Board of its interest in participating in the EMS deal, that alleged non-disclosure could not have influenced the Board's decision to explore strategic alternatives because the Board made its decision on December 8, 2010, more than a month before it engaged RBC and Moelis. (*See* Ex. A at 8; A551; A392.) Therefore, the Board's decision could not possibly have resulted from the recommendation of or purported omission by RBC. Indeed, the evidence cited by Plaintiff supporting the trial court's finding consists of emails that were sent in December 2010—*before* RBC had made its December 23 pitch to the Special Committee. (*See* A389; A402; A404; *see also* A547 (sent after pitch but before Engagement Letter signed).)

Third, the trial court's theory fails because the Special Committee was, in fact, well aware that RBC had an interest in providing financing to EMS. The Engagement Letter expressly gave RBC the right to participate in the EMS financing. (*See* A558.) The parties agreed that RBC "may arrange and extend *acquisition financing* or other financing *to purchasers* . . . that may seek to acquire companies or businesses that offer products and services that may be substantially similar to those offered by [Rural]." (*Id.* (emphasis added).) Thus, the contract permitted the very activity that the trial court found to be a conflict.

In addition, RBC's role in the EMS purchase was publicly disclosed in February 2011—over a month before Rural received a bid from Warburg. There was no evidence that the Board was surprised or upset by news that RBC provided this financing. Rather, the testimony on this subject reflected that the Board was aware of RBC's desire to provide financing to EMS's buyer. (*See* A1760.)

2. The Trial Court Erred By Holding That The Board's Decision to Accept Warburg's Bid Failed *Revlon* Scrutiny.

The sale process included a robust auction that yielded six preliminary and two final bids. Moelis, as well as RBC, opined that the transaction was fair. The merger agreement included moderate deal protections with a modest break-up fee and a "no-shop" provision with a fiduciary out. (A1072; A1138-40.) After the merger agreement was signed, no third party offered to top Warburg's bid of $17.25 per share.

The process undertaken by the Board was fair and appropriate: the Company was exposed to the market twice, and no topping bidder emerged. The trial court had quibbles (albeit expressed with heated rhetoric) with the timing and manner of the sale process. But that does not render the process deficient under *Revlon*.[2]

a. The Merger Was Exposed To The Market, And No Other Bidder Emerged.

When analyzing the Board's decision to sell the Company, the trial court erred by focusing exclusively on RBC's and the Directors' conduct at or around the time of the decision to sell. But even if a board conducts an imperfect sale process or fails to conduct any shopping process at all, a board can still satisfy

[2] *See, e.g., In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005) ("Delaware courts have made clear that the enhanced judicial review *Revlon* requires is not a license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith."); *In re Pennaco Energy, Inc.*, 787 A.2d 691, 705 (Del. Ch. 2001) (holding that the court's "task is to examine whether the directors have undertaken reasonable efforts to fulfill their obligation to secure the best available price, not to determine whether the directors have performed flawlessly").

Revlon scrutiny if the proposed sale is exposed to the marketplace for a reasonable period and there is no impediment to a higher bid.[3]

In *C & J Energy*, the board pursued a single-bidder strategy, agreeing to merge with a division of a larger competitor. *C & J Energy*, 107 A.3d at 1052. Unlike the Rural board, the C & J board did not take any affirmative effort to shop the company before signing the merger agreement. Stockholders filed a class action challenging the C & J board's decision, alleging that the directors had breached their duty of care in failing to shop the company actively. The Court of Chancery enjoined the transaction and ordered C & J to shop the company for 30 days. On appeal, this Court reversed, holding that because there was no impediment to a higher bid succeeding, and because no other bidder emerged in the several months after the transaction had been announced, the board had fulfilled its duty to obtain the best price reasonably available. *Id.* at 1070-71.

There can therefore be no question the Rural board—which engaged in a far more robust process—satisfied *Revlon*. Twenty-eight parties were contacted, twenty-one signed non-disclosure agreements, six submitted indications of interest

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[3] *C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Trust*, 107 A.3d 1049, 1067 (Del. 2014) (holding that *Revlon* permits "a board to pursue the transaction it reasonably views as most valuable to stockholders, so long as the transaction is subject to an effective market check"); *see also Toys "R" Us*, 877 A.2d at 1000 (reiterating Delaware law that "the duty to take reasonable steps to secure the highest immediately available price does not invariably require a board to conduct an auction process" and that "there is 'no single blue-print' for fulfilling the duty to maximize value"); *In re MONY Grp. Inc. S'holder Litig.*, 852 A.2d 9, 23 (Del. Ch. 2004) (finding board acted reasonably despite not actively shopping the company because the board knew there was "a substantial opportunity for an effective market check").

at prices well above the market, and two submitted bids. Neither Plaintiff nor the trial court criticized the auction process in any specific way. Nor did Plaintiff challenge the merger agreement's standard deal protections. The merger agreement was signed on March 28, 2011, stockholders approved the merger on June 27, 2011, and the transaction closed on June 30, 2011. Despite this 90-day window, no higher bid emerged. *C & J Energy* demonstrates that a post-signing market check satisfies *Revlon* scrutiny in the context of a single-bidder strategy, *see C & J Energy*, 107 A.3d at 1065-66, and it follows that a post-signing market check should have the same effect here, after the conclusion of a robust auction.

b. The Trial Court Erred By Failing To Articulate An Analysis Supporting A Finding of Gross Negligence.

Plaintiffs seeking to establish a breach of the duty of care must demonstrate that directors acted with gross negligence. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds*, *Brehm v. Esner*, 746 A.2d 244 (Del. 2000); *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985), *overruled on other grounds*, *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009). *Revlon* scrutiny, at least in post-closing litigation, does not alter that minimum requirement. In *Malpiede*, this Court rejected the idea that failing *Revlon* scrutiny in and of itself establishes a breach of fiduciary duty: "Although the *Revlon* doctrine imposes enhanced judicial scrutiny of certain transactions involving a sale of control, it does not eliminate the requirement that plaintiffs plead sufficient facts to support the underlying claims for a breach of fiduciary duties in conducting the sale." 780 A.2d at 1083-84 (footnote omitted). *Malpiede* extends this logic into the aiding and abetting context, requiring a showing of gross negligence to establish a breach of the fiduciary duty of care for aiding and abetting purposes. *Id*. at 1096.

Intermediate scrutiny under *Revlon* exists to determine whether plaintiff stockholders should receive pre-closing injunctive relief, but it cannot be used to establish a breach of fiduciary duty that warrants post-closing damages. In *McMillan v. Intercargo Corp.*, then-Vice Chancellor Strine held: "The fact that a corporate board has decided to engage in a change of control transaction invoking so-called *Revlon* duties does not change the showing of culpability a plaintiff must make in order to hold the directors liable for monetary damages." 768 A.2d 492, 502 (Del. Ch. 2000); *see also In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 654 n.62 (Del. Ch. 2008) (quoting *Intercargo*). In both of these cases, despite *Revlon*'s applicability, the Court of Chancery held that proving a breach of the duty of care requires a showing of gross negligence. *Intercargo*, 768 A.2d at 505 n.56; *Lear*, 967 A.2d at 651-52. As then-Chancellor Strine explained in *In re Ancestry.com Inc. Shareholder Litigation*, "[T]here's a strong argument Revlon or Unicom [*sic*] were never designed to be damages standards of review . . . ." C.A. No. 7988, at 9 (Del. Ch. Sept. 27, 2013) (TRANSCRIPT). He then reiterated that *Malpiede* requires plaintiffs, even in the *Revlon* context, to "plead sufficient facts to support the underlying claims for . . . breach of fiduciary duties in conducting the sale." *Id*. at 72-73; *see also In re Comverge Inc. S'holder Litig*, 2014 WL 6686570, at *12 (Del. Ch.) ("Director liability for breaching the duty of care . . . is predicated upon concepts of gross negligence.").

Here, the trial court held that a breach of fiduciary duty occurred because some decisions were outside the range of reasonableness, then "assume[d] for purposes of the 'knowing participation' element that the directors breached only their duty of care." (Ex. A at 53, 63, 64.) That was error; a duty of care breach cannot exist unless the Court finds that the directors were grossly negligent.

c. The Board's Conduct Was Within The Range Of Reasonableness.

Instead of addressing the merger process as a whole, the trial court focused on the conduct of the Individual Defendants. But the trial court made no finding that any of the alleged conduct or lack of oversight by the Individual Defendants had any effect on the sale process or its outcome, as is required by the case law. In addition, in holding that the directors' conduct had failed *Revlon* scrutiny, the trial court wholly ignored facts known to the directors that demonstrate that they acted on an informed basis with respect to the decision to sell the Company.

A comprehensive survey of those cases in which directors were found, either preliminarily or definitively, to have failed to satisfy *Revlon* scrutiny demonstrates that an essential element is that the directors have engaged in activity that produces a negative effect on the process of selling the company. Most often, this effect is produced in one of two ways: either through the design of the sale process where bidders were excluded, as in *In re Topps Co. Shareholders Litigation*, 926 A.2d 58 (Del. Ch. 2007), or *In re Netsmart Technologies, Inc. Shareholders Litigation*, 924 A.2d 171 (Del. Ch. 2007), or through overt conduct that favors one bidder over another, as in *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989).

Here, the trial court held that the Board's decision to sell the Company was outside the range of reasonableness because it inadequately supervised RBC. (Ex. A at 50-52, 58.) The trial court found that the Board was unaware of RBC's last-minute efforts to solicit a buy-side financing role; had not received any valuation information until three hours before the meeting to approve the transaction; and was unaware of RBC's alleged misstatements in its fairness analysis. (*Id.* at 61-64.) These findings, even if true, do not logically have any effect on the sale process. The Company was actively shopped in an auction Plaintiff did not challenge, and the transaction was subject to a 90-day post-signing market check. Even if the Board was uninformed about the fact that one of its two bankers may have had a conflict of interest, and even if the Board was not given valuation information from its bankers until the final hours, a robust auction still occurred.

The trial court's finding that the Board breached its duty of care ignores indisputable facts in the record. First, the Board relied equally upon Moelis's fairness opinion, and the trial court did not make a finding of impropriety with respect to Moelis's fairness opinion. RBC's conduct could not have stripped the Board of its informed status as a result of Moelis's advice.

Second, it is undisputed that the Board had many other sources of information about Rural's value.[4] Rural's stock price was below $10 until the period leading up to December 2010, and even the EMS process only bumped the price to $13. Most of the directors keenly understood the value of the Company and the market in which it operated. Walker, for example, worked in the healthcare industry for over 38 years and had extensive M&A experience. (A2310-11.) And Davis performed M&A consulting as a corporate attorney and had completed a number of acquisitions as a corporate executive. (A1759.) Finally, the auction provided the Board with the best possible indication of Rural's market value.[5]

The trial court erred by holding that the Board's actions failed *Revlon* scrutiny; RBC cannot have aided and abetted a non-existent breach.

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[4] *Chesapeake Corp. v. Shore*, 771 A.2d 293, 331 (Del. Ch. 2000) ("There is no legal requirement that a board consult outside advisors, so long as the board has adequate information to make an informed judgment.")

[5] *Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Gp., Ltd*, 847 A.2d 340, 357 (Del. Ch. 2003) (holding that the merger price is "the best estimate of value" where a merger resulted from a "competitive and fair auction").

II. THE TRIAL COURT ERRED BY HOLDING THE BOARD LIABLE FOR MATERIALLY MISLEADING PROXY STATEMENTS.

A. QUESTION PRESENTED

Did the trial court err by holding that disclosures made in the Proxy Statement were materially misleading? (A1965; A2566-67.)

B. SCOPE OF REVIEW

Legal holdings are reviewed *de novo* and factual findings for clear error. *SI Mgmt.*, 707 A.2d at 40; *Ivanhoe Partners*, 535 A.2d at 1340-41. This is a mixed question of law and fact. *See Zirn v. VLI Corp.*, 621 A.2d 773, 777 (Del. 1993).

C. MERITS OF ARGUMENT

The trial court held that the directors violated their "fiduciary duty of disclosure" in the Proxy Statement. According to the trial court, RBC aided and abetted this breach by making misstatements regarding the valuation analysis it performed and by failing to disclose to the Board RBC's purported conflicts of interest. (Ex. A at 77-84.) The trial court erred by finding that the Proxy Statement was misleading and, independently, by finding the purported misstatements and omissions to be material.

The duty of disclosure "derives from the duties of care and loyalty," *Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009), and to establish a breach of this duty, a plaintiff must demonstrate "(1) a material statement or representation in a communication contemplating stockholder action (2) that is false." *Id.* at 685 (quotation marks omitted). For a statement to be material, "'[t]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Malpiede*, 780 A.2d at 1086 (quotation marks omitted). "Omitted facts are not material simply because they might be helpful." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).

1. The Proxy Statement Accurately Described RBC's Valuation Analysis.

RBC's Final Fairness Analysis presented the Calendar Year 2010 Adjusted EBITDA in two ways for purposes of the precedent transaction analysis: $69.8 million (derived from the Wall Street analyst approach) and $83.7 million (derived from management's case using one-time and other adjustments). (A873.) RBC then applied these Adjusted EBITDAs to the precedent transaction multiples of 6.3 and 9.5 to come up with ranges of values between $8.19 and $16.71 (using the analyst approach) and $11.54 and $21.76 (using management's approach). (A877.) In this way, RBC used both conservative and more aggressive approaches to understanding the business's ability to generate earnings.

The trial court found that the Proxy Statement was misleading because "[i]nformation that RBC provided to the Board in connection with its precedent transaction analyses was false, and that false information was repeated in the Proxy Statement." (Ex. A at 79.) According to the trial court, the description of RBC's analysis was "false" because it described the Company's actual, reported financial results as "Wall Street research analyst consensus projections" and because "RBC used the reported figures without adjusting for one-time expenses, which was contrary to the Wall Street consensus." (*Id.*) The trial court erred in three respects.

First, the trial court erred by analyzing whether RBC's analysis was flawed rather than whether the Proxy Statement fairly and accurately described RBC's analysis. Delaware law requires that a plaintiff raising a disclosure claim identify a "false" statement.[6] But Plaintiff did not argue and the trial court did not conclude that the Board falsely summarized RBC's Fairness Analysis. Rather, the trial court focused on whether RBC had properly performed its fairness analysis. That is very different from finding that the disclosure contained in the Proxy Statement was itself false. The disclosure at issue appeared in the section titled "Opinion of RBC Capital Markets, LLC." The Proxy Statement accurately described RBC's presentation to the Board. There was nothing "false" about the disclosure.

This error is underscored by the fact that the purported falsehood the trial court identified was not actually contained in the Proxy Statement. The trial court found RBC's statement to the Board that analysts do not make one-time adjustments to be materially false. (A873 ("Wall Street research analysts covering

[6] *Fisher v. United Techs. Corp.*, 1981 WL 7615 (Del. Ch.) (holding that accurate description of opinion letters did not constitute a disclosure violation); *see also Rosser v. New Valley Corp.*, 2005 WL 1364624, at *7 (Del. Ch.) (granting summary judgment for defendants where "case at hand [was] about disclosure and [did] not directly concern the adequacy" of a financial advisor's opinion or methodology).

[Rural] do not make pro forma adjustments").) But that statement is not contained in the Proxy Statement's summary of RBC's Fairness Opinion.

Perhaps recognizing that it could not identify a false statement in the Proxy Statement itself, the trial court tried to avoid this problem by reasoning that "[i]nformation that RBC provided to the Board in connection with its precedent transaction analysis was false, and that false information was repeated in the Proxy Statement."[7] (Ex. A at 79.) This, too, was error. The Proxy Statement merely summarized the opinion RBC provided to the Board. While the trial court may have disagreed with RBC's underlying analysis, it did not find that RBC's analysis was misstated in the Proxy Statement.

Second, even if Delaware law permitted a plaintiff to convert a claim that a fairness analysis was performed incorrectly into a disclosure claim, the trial court simply made a mistake in concluding that RBC's underlying fairness analysis was "false." A review of the analyst reports presented at trial demonstrated that the Rural analysts did not make one-time adjustments to EBITDA. The trial court found that Rural analysts used an Adjusted EBITDA that incorporated one-time adjustments made at the end of calendar year 2010 in their analysis. But the trial court either failed to read or understand the analyst reports at issue.

[7] In this vein, the trial court stated, in dicta, that financial advisors providing fairness opinions to corporate boards "function as gatekeepers." (Ex. A at 47.) This attempt to transform a contractual relationship between a company and its financial advisors finds no support in history or Delaware law. Moreover, imposing such a fiduciary duty may drive these advisors to stop offering their services to Delaware corporations, or result in significantly higher fees.

The trial court was troubled by RBC's decision to use $69.8 million as the CY 2010 Adjusted EBITDA, rather than a $76.5 million figure that added back certain one-time expenses. The higher number had been used in drafts of RBC's fairness presentation. (*See* A837; A848.) In reviewing the draft fairness analysis, RBC's Fairness Committee noted that analysts did not, in fact, make adjustments for one-time expenses in modeling Rural's performance. Accordingly, RBC used the $69.8 million figure in the final analysis. (A873.)

The uncontroverted documentary evidence demonstrated that while analysts noted one-time adjustments in text to explain Rural's poor performance in the last quarter of 2010, they did not actually make those one-time adjustments in their modeling of Rural's performance. Attached as Exhibit D are the analyst reports introduced at trial highlighted to reflect each analyst's approach to Adjusted EBITDA. The reports make clear that analysts did not make one-time adjustments in their models. Like the RBC fairness team, each of the reports uses Adjusted EBITDA figures that are not materially different from the $69.8 million figure. For example, the Avondale report used an Adjusted EBITDA figure of $69.6 million for CY 2010.[8] (A595.) JMP used $69.743 million (A814), and KBRO

[8] Because Rural's fiscal year ended June 30, calculating CY 2010 Adjusted EBITDA requires adding the third- and fourth-quarter fiscal 2010 Adjusted EBITDAs to the first- and second-quarter fiscal 2011 Adjusted EBITDA. (*See* A595.)

used $69.7 million. (A586.) The trial court made no effort to analyze these reports or to reconcile the testimony explaining RBC's approach. (A2408.)

Finally, there is nothing material about whether RBC used the $69.8 million or $76.5 million number in one of two ranges presented in the precedent transaction analysis. Using an Adjusted EBITDA of $76.5 million (rather than $69.8 million) would have only raised the (more conservative) analyst range from $8.19 and $16.71 to $9.76 and $19.22—still well within a range of values supporting the transaction price of $17.25.

To the extent that the trial court concluded that it was important for a stockholder to understand the effect on value in making one-time adjustments, that analysis was fully reflected in the management case. The $83.7 million management case added back the one-time expenses and other more speculative items (*i.e.*, the impact of an acquisition and a material contract). Applying the $83.7 million figure yielded a range of value between $11.54 and $21.76—still within the range of values supporting the transaction price of $17.25. And the total mix of information available to stockholders included Moelis's fairness range, which included a significantly higher low-end value of $15.17 per share.

In sum, RBC presented its analysis using the most conservative available methodology (making very few adjustments) and the most aggressive methodology (making all of the adjustments made in the management case) and reflected a range of values derived therefrom. There is nothing "false" about this approach. Moreover, no reasonable shareholder would find that a minimal increase in one of the two ranges from one of the two financial advisors "*significantly*" altered the total mix of information made available in the proxy.

2. The Proxy Statement's Omission Of RBC's Purported Conflicts Of Interest

In addition, the trial court erroneously found that the Proxy Statement should have disclosed RBC's participation in financing the EMS transaction and "RBC's lobbying of Warburg after the delivery of Warburg's fully financed bid, while RBC was developing its fairness opinion." (Ex. A at 82-83.)

a. RBC's Participation In The EMS Financing

The trial court erroneously found that the Proxy Statement should have "describe[d] how RBC used the initiation of the Rural sale process to seek a role in the EMS acquisition financing" and should have disclosed "RBC's receipt of more than $10 million for its part in financing the acquisition of EMS." (*Id.* at 82.)

As an initial matter, the trial court fails to explain how RBC's participation in the syndicated financing of CD&R's acquisition of EMS should have been material to Rural stockholders evaluating Warburg's bid to purchase Rural. As noted above, the Board decided to explore a sale before retaining RBC. Any alleged RBC conflict could not have affected that decision.

Moreover, there is no reason for the Board or any of the professionals engaged to review disclosure matters (on behalf of the Board or RBC) to have considered as material RBC's activity in seeking to participate in the financing of a different company. As noted above, both the Board and the public knew of RBC's participation in the EMS financing by February 2011. (A589.) There was nothing wrongful about this. RBC and Rural negotiated a term in the Engagement Letter that specifically permitted RBC to participate in financing the purchase of Rural's direct competitors, which included EMS. (*See* A558.)

Although not binding authority, the only disclosure rule that is conceivably relevant, FINRA Rule 5150, would not have required specific disclosure of RBC's relationship with CD&R unless CD&R had emerged as the successful bidder in the Rural process. *See* FINRA R. 5150(a)(3) (emphasis added) (requiring disclosure of "any material relationships . . . that are mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between the member and *any party to the transaction that is the subject of the fairness opinion*"). But CD&R was not the successful bidder. If anything, RBC's participation in the bank syndicate providing CD&R with the funding necessary to complete the EMS process (accepting the Court's conflict theory) would have made RBC more favorably inclined to CD&R. But there was no evidence of favoritism introduced at trial. Accordingly, it is difficult to understand how RBC's (contractually authorized and publicly disclosed) participation in a bank syndicate on another transaction could have "significantly altered the total mix of information" regarding the merger.

b. RBC's Negotiations With Warburg

RBC told the Special Committee about its efforts to participate in financing the acquisition of Rural. (Ex. A at 10.) The Engagement Letter specifically contemplated that RBC could offer financing to the purchaser of Rural, and the Board hired Moelis for precisely this reason. *See supra* at 6. The Proxy Statement itself said that "the special committee . . . gave permission to RBC to indicate that it would be willing to offer buy-side financing." (A1090-91;*id.* at 1091 ("RBC separately distributed a brief outline of the terms of buy-side financing RBC was willing to make available").) RBC never suggested to any party that it was ceasing these efforts. Stockholders knew about this potential conflict of interest, and they knew the Board received a fairness analysis from an unconflicted advisor.

The details of the so-called last-minute efforts were not material. Knowing that RBC was asking Warburg about staple financing, Rural and its counsel decided that the timing and substance of the lobbying efforts were not material and disclosed only that RBC sought to participate in the financing. Stockholders reading the Proxy Statement knew that RBC operated with a potential conflict throughout the sale process. That level of disclosure is sufficient.

The suggestion that RBC aided and abetted a disclosure violation is also unwarranted. Had the Proxy Statement disclosed the timing, circumstances, and substance of RBC's lobbying efforts, then the omission of last-minute discussions would have presented a different issue for the trial court. But it also would have given the professionals retained by RBC the opportunity to ensure that each of the conversations with Warburg was adequately described. It was the Company's decision not to disclose any of those conversations, and there is no reason why RBC ought to be liable for not having caused Rural—if it were even possible—to have updated its disclosure to include one or all of those conversations. Similarly, FINRA Rule 5150 would not have required disclosure. Moreover, the named Plaintiff in this case sued after reviewing the preliminary proxy disclosing RBC's efforts to obtain staple financing, and in identifying disclosure deficiencies, she did not demand disclosure regarding the specific circumstances of the negotiations between Warburg and RBC. (A1028-29; A1044-47.)

No evidence suggests that RBC sought to hide its potential conflict. The portion of the Proxy Statement summarizing RBC's fairness opinion contained robust disclosure of RBC's relationship with Warburg. (A1104.) As is customary with legal disclosures, this process was managed by reputable counsel from all parties. There would have been no reason for RBC (which was contractually authorized to provide staple financing) to conceal these efforts from the Board.

The only clear testimony at trial on this subject was from Walker, who testified that the Board "certainly knew that RBC was interested in being involved in staple financing," and that RBC's continued efforts to offer financing "wouldn't [have been seen] as an issue," because those efforts did not create "either a benefit or a detriment" for Rural. (A2318.)

c. The Purportedly "False" Statement

Recognizing these deficiencies, the trial court did attempt to identify a specific statement in the Proxy Statement that it found was rendered false by RBC's failure to disclose its purported conflicts of interest. The trial court found materially misleading the statement that "RBC received the right to offer staple financing because it 'could provide a source for financing on terms that might not otherwise be available to potential buyers of the Company . . . .'" (Ex. A at 82 (citing A1090).) But, according to the trial court, "[t]he Board never concluded that RBC could provide financing that might otherwise not be available, and no evidence to that effect was introduced at trial." (*Id.*) According to the trial court, this innocuous observation "imposed on the Rural directors a duty to speak completely on the subject of RBC's financing efforts."[9] (*Id.*)

[9] To establish a claim for partial disclosure, a plaintiff must prove a "'(1) perhaps voluntary, but (2) materially incomplete (3) statement (4) made in conjunction with solicitation of stockholder action that (5) requires supplementation or clarification through (6) corrective disclosure of perhaps otherwise material, but reasonably available information.'" *Pfeffer*, 965 A.2d at 688.

The trial court's treatment of this statement lays bare the weaknesses of the disclosure-related theories. *First*, the trial court impermissibly shifted the burden to RBC to defend the truth of the statement in finding that "no evidence to that effect was introduced at trial." (*Id.*) Plaintiff has the burden of proving a disclosure claim; a lack of evidence means she failed to meet her burden. *Second*, the trial court's finding that the statement was false lacks any evidentiary support. The statement—that the Special Committee came to a belief about RBC's offer of staple financing—is an opinion. RBC cannot have been expected to comment on or even correct a statement about what the Board believed (based on a portion of a meeting that RBC did not attend).[10] *Third*, the Board minutes reveal that the Special Committee *did* conclude that RBC could "significantly enhance a potential sale process through staple financing because such financing could be offered quickly . . . ." (A542.)

Moreover, neither of the purported omissions is even tangentially related to staple financing. Disclosing that RBC participated in the EMS financing and engaged in late talks with Warburg sheds no light on the reasons the Special Committee thought it wise to allow RBC to offer staple financing.

[10] As the Supreme Court recently held in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether an investor can ultimately prove the belief wrong." 135 S. Ct. 1318, 1327 (2015).

d. RBC Was Unduly Prejudiced By Plaintiff's Failure To Raise This Theory Before Trial.

The trial court's errors could have been avoided had this theory been subjected to appropriate scrutiny at trial and during discovery, but Plaintiff failed to raise the issue. The complaint makes no mention of RBC's purported failure to disclose conflicts of interest. Her pre-trial briefing asserted only that RBC "falsely describ[ed] its 'consensus' range in the proxy statement" and that RBC did not disclose its participation in Rural's revolver syndicate. (A2068; A2060.) The first mention of the theory adopted by the trial court occurs in Plaintiff's post-trial opening brief. Plaintiff's delay prevented RBC from calling other witnesses, introducing additional documentary evidence, or considering waiver of privilege so that its counsel could testify about the disclosure issues. Delaware courts have held that plaintiffs must present detailed factual allegations sufficient to put defendants on notice of the claims against them. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999). The trial court erred by holding RBC liable for a claim of which it had no notice.

III. THE TRIAL COURT ERRED BY HOLDING THAT RBC AIDED AND ABETTED THE BOARD'S DUTY OF CARE BREACHES.

A. QUESTION PRESENTED

Does a financial advisor knowingly participate in a board's breaches of the duty of care without notice that the board's conduct constitutes a breach and without engaging in concerted action with the board? (A1954-64; A2035-41; A2586-92.)

B. SCOPE OF REVIEW

This Court reviews claimed legal errors *de novo*. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund*, 75 A.3d 101, 109 (Del. 2013).

C. MERITS OF ARGUMENT

1. A Third Party Cannot "Knowingly Participate" In An Exculpated Breach Of The Duty Of Care.

The trial court erred in holding that a third party may knowingly participate in an exculpated breach of the duty of care. The "knowing participation" element requires proof that a third party joined with the fiduciary in action the third party knew to be a breach of the fiduciary's obligations.[11] Delaware courts have recognized that establishing knowledge on the part of the third party requires proof "that the fiduciary breached its duty in an 'inherently wrongful manner.'"[12]

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[11] *See, e.g.*, *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 170-71 (Del. 1976); *Greenfield v. Tele-Commc'ns, Inc.*, 1989 WL 48738, at *3 (Del. Ch.).

[12] *See, e.g.*, *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *24 (Del. Ch.) (dismissing aiding and abetting claim where plaintiff failed to allege "any inherently wrongful

It follows that "knowing participation" cannot be established where the underlying conduct breaches a board's duty of care (*i.e.*, engages in gross negligence). The trial court expressly noted that it had not "parsed whether the directors' conduct constituted a breach of the duty of loyalty" and that it therefore "assume[d] for purposes of the 'knowing participation' element that the directors breached only their duty of care." (Ex. A at 64.) But conduct that is merely grossly negligent—and therefore constitutes only a breach of the duty of care—cannot establish that a third party was on notice that the board was engaged in "inherently wrongful" conduct. We are not aware of any case from this Court that extends aiding and abetting liability to simple duty of care violations.

The trial court relied on a stray phrase from *Penn Mart Realty Co. v. Becker* to hold that a third party could knowingly participate in a breach of the duty of care that is not "inherently wrongful." *Penn Mart* is not analogous: the alleged aider and abettor purchased shares of stock owned by the corporation for $63 knowing that the board intended to make a tender offer for the same stock at $80 just a week later. 298 A.2d 349, 351 (Del. Ch. 1972).[13] The trial court's reliance on *Arnold v.*

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conduct that would put [the third party] on notice that GM's directors were violating their fiduciary duties"), *aff'd*, 897 A.2d 162 (Del. 2006); *see also Rand v. W. Airlines, Inc.*, 1989 WL 104933, at *5 (Del. Ch.) (finding no inference that a third party knew of the fiduciaries' wrongful conduct where the fiduciaries' conduct was not "illegal *per se*" and there was no "objective evidence that the transaction benefit[ed] the fiduciaries at the stockholders' expense").

[13] *In re Frederick's of Hollywood, Inc. S'holders Litig*, 1998 WL 398244, at *4 n.14 (Del. Ch.) (distinguishing *Penn Mart Realty Co.* as concerning the "improper use of insider information about the value of" corporate assets).

Society for Saving Bancorp., Inc., 678 A.2d 533, 534 (Del. 1996) ("*Arnold IV*"), is also misplaced. According to the trial court, "*Arnold IV* implies that a third party can aid and abet a violation of the duty of care." (Ex. A at 69.) But the *Arnold IV* Court expressly disclaimed making any statement on aiding and abetting liability. *Arnold IV*, 678 A.2d at 534. Similarly, although the Restatement (Second) of Torts § 876(b) suggests that a third party could knowingly participate in an exculpated breach, this Court noted that provision in *Malpiede* and declined to adopt it. 780 A.2d at 1097 n.78. In Delaware, the law requires "inherently wrongful" conduct. Exculpated breaches of the duty of care are not sufficient to meet this burden.

2. The Court Erred By Applying The Wrong Standard For Knowing Participation.

The knowing participation standard is stringent. Absent proof of a conspiracy, it is met only if the tortious act is "inherently wrongful." The trial court incorrectly held that knowing participation is met where "a third party, for improper motives of its own, misleads directors into breaching their duty of care." (Ex. A at 69.[14]) That standard, drawn from dicta in *Goodwin v. Live Entertainment, Inc.*, 1999 WL 64265 (Del. Ch.), ignores the "inherently wrongful" requirement and fails to address the relevant issue: whether the third party can be

[14] The trial court held: "It is not the fiduciary that must act with *scienter*, but rather the aider and abettor." (Ex. A at 65.) This statement is correct, but incomplete. The alleged aider and abettor must know that the fiduciary's conduct constitutes a breach of duty. *Greenfield*, 1989 WL 48738, at *3. That knowledge, in turn, is inferred from the fiduciary's conduct.

deemed to have known "that the fiduciary was endeavoring to breach his duty." *Greenfield*, 1989 WL 48738, at *3. This error justifies reversal.

Even if breaches of the duty of care were sufficient to support a claim for aiding and abetting, the breaches found cannot support the inference that RBC knew the Board was endeavoring to breach its duty of care. The trial court only deemed the Sales Process Claims to be breaches after applying *Revlon* to test the contextual reasonableness of the Board's actions. Here, RBC disclosed its desire to provide buy-side financing, RBC and Moelis conducted a market canvass for interested bidders, and the Board received a fairness opinion from both RBC and Moelis. Even accepting the Court's conclusions that RBC failed to provide adequate valuation information throughout the process and to make continuing disclosures to the Board regarding its interest in providing buy-side financing, the Board's conduct is not inherently wrongful. The Disclosure Claims also could not be inherently wrongful because the trial court merely found that the Board had failed to disclose information that was not known to it. (Ex. A at 79-80, 82-84.)

The erroneous legal standard used in assessing "knowing participation" permitted the stockholders to assert what amounts to a "direct negligence claim against [RBC]." *Goodwin*, 1999 WL 64265, at *28. This was the precise concern animating the *Goodwin* Court's conclusion that a third party should not be liable for knowingly participating in an exculpated breach of the duty of care. *Id.*

3. RBC Did Not Act In Concert With The Board.

Even if the breaches found could support an aiding and abetting claim, the claim fails because the trial court did not find that RBC acted in concert with the Board. Aiding and abetting is a subset of conspiracy and therefore rests on proof that the aider and abettor *agreed* to a joint course of conduct with the primary actor.[15] An aider and abettor must, therefore, participate in the tort through concerted action. As then-Vice Chancellor Strine noted in *Goodwin*, aiding and abetting "requires an understanding between the parties 'with respect to their complicity in any scheme to defraud or in any breach of fiduciary duties.'"[16]

To be found liable, RBC must have acted *with* the Board, yet none of the claims involved joint action. Indeed, the primary breaches found by the trial court amounted to mere negligence, not knowing or intentional conduct. As such, it is impossible for RBC and the Board to have had a meeting of the minds in this respect. Taken at face value, the trial court's findings establish that RBC did something *to* the Board and withheld information *from* the Board. But RBC did not act *with* the Board, and, therefore, the aiding and abetting claim cannot stand.

[15] *OptimisCorp v. Waite*, 2015 WL 357675, at *4 (Del. Ch.) (citations omitted); *see also Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007-08 (3d Cir. 1994) (citation omitted) ("[I]n assessing whether a [group] has taken concerted action, a court must . . . determine whether the action taken was the result of some agreement . . . .").

[16] 1999 WL 64265, at *28 (quoting *Carlton Invs., Inc. v. TLC Beatrice Int'l Holdings, Inc*, 1995 WL 694397, at *15 n.11 (Del. Ch.)); *see also Lee v. Pincus*, 2014 WL 6066108, at *14 (Del. Ch.) (dismissing aiding and abetting claim because defendants did not participate in joint action with directors).

IV. THE TRIAL COURT ERRED BY FINDING THAT THE BOARD'S CONDUCT PROXIMATELY CAUSED DAMAGES.

A. QUESTION PRESENTED

Did the trial court err by holding that the Board's purported breaches of fiduciary duty proximately caused damage? (A2591-92.)

B. SCOPE OF REVIEW

Proximate cause "is ordinarily a question of fact to be determined by the trier of fact." *Duphily v. Del. Elec. Co-op., Inc*., 662 A.2d 821, 830 (Del. 1995). Findings of fact are reviewed for clear error. *SI Mgmt.*, 707 A.2d at 40.

C. MERITS OF ARGUMENT

The trial court found that the Sale Process Claim demonstrated causation because, without the advice of a disinterested advisor, "[t]he near-term sale process that RBC and Shackelton drove prevented Rural" from generating a higher sale price. (Ex. A at 77.) With respect to the Disclosure Claim, the trial court engaged in a perfunctory, one-paragraph analysis, concluding without citation to anything that "[c]ausation is satisfied." (*Id.* at 84.) But the trial court's analysis does not demonstrate that the Directors' purported breaches caused injury.

Delaware courts "recognize[] the traditional 'but for' definition of proximate causation," defining proximate cause as "one which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred." *Reddy v. PMA Ins. Co*., 20

A.3d 1281, 1290-91 (Del. 2011) (quotation marks omitted)). "When seeking post-closing damages for breach of the duty of disclosure . . . the plaintiffs must prove quantifiable damages that are logically and reasonably related to the harm or injury for which compensation is being awarded." *In re Orchard Enters. Inc. S'holder Litig.*, 88 A.3d 1, 53 (Del. Ch. 2014) (quotation marks omitted)). "A failure to disclose material information in [a request for stockholder action] . . . will not provide a basis for damages from defendant directors absent proof of (i) a culpable state of mind or non-exculpated negligence, (ii) reliance by stockholders . . . , and (iii) damages proximately caused by that failure." *In re Wayport, Inc. Litig.*, 76 A.3d 296, 314-15 (Del. Ch. 2013) (citation omitted).

1. The Sales Process Claims

The trial court erroneously held that the Board breached its fiduciary duties by initiating a sale process in December 2010 and by accepting Warburg's bid of $17.25 per share.

But even if, as the trial court erroneously concluded, RBC convinced the Board to explore strategic alternatives, any connection between the beginning of that process and damage to stockholders is too attenuated to support an award of damages on that basis. Indeed, at that time, it was possible for bids to come in higher than even the trial court's assessment of Rural's value. In essence, the Board decided to seek more information about the Company's value, and it is difficult to conceive of how stockholders could be harmed by a board's decision to obtain more information.

With respect to the purported breach of fiduciary duty in accepting Warburg's bid, the trial court assumes that "[a] disinterested board that benefitted from disinterested advice would not have sent a conflicted agent to negotiate with Warburg from a position of weakness," and "would have received valuation materials periodically throughout the process," rather than shortly before the Board's vote on the merger agreement. (Ex. A at 73-74.) These assumptions cannot support a finding of proximate cause.[17]

The record is clear that the final price negotiations were conducted by Marc Daniel, an RBC banker, *and* by Richard Harding of Moelis, an unconflicted banker. The Board engaged Moelis for exactly this purpose. Moelis, who would not offer financing, served as co-advisor and participated in all of the final price negotiations. Moelis's presence in these negotiations logically cuts the causal link relied upon by the trial court.

Even if RBC's fairness analysis were incorrect, the trial court erred by holding that the Board's decision to sell the Company was uninformed. Far from being uninformed, the Board had years of experience as directors and knew the

[17] The trial court makes a sidelong reference to "Rural's bankers" tipping Warburg "about the Company's internal boardroom discussions on March 23 . . . ." (Ex. A at 74.) But as the trial court implicitly recognized, Plaintiff failed to meet her burden of demonstrating that RBC tipped Warburg. The only evidence in the record is to the contrary, and indeed Plaintiff argued throughout the case that it was Moelis who was responsible for the tip.

Company intimately. As recently as October 2010, the Board received a valuation analysis to evaluate the unsolicited indication of interest from Macquarie Capital and Irving Place Capital. In December 2010, the Special Committee received three presentations from three different banks, RBC, Moelis, and Houlihan. In February 2011, the EMS process ended, and the Board became aware of the multiple at which EMS sold. In the auction process, six parties performed due diligence and submitted indications of interest ranging from $14.75 to $19.00. The Board received a fairness analysis from RBC and another from Moelis, whom Plaintiff failed to show lacked independence or manipulated its analysis in any way. Thus, the Board had more than adequate information on which to base its decision to sell.

As discussed *supra*, there is no evidence that actually accepting the bid harmed stockholders. The Special Committee conducted a full and fair auction—the best indicator of a company's value—which was not criticized by Plaintiff. In the months following the announcement of the merger, no party submitted a higher bid for the Company. To the extent Plaintiff claims that RBC knowingly participated in the Board's purported breach by providing them with an inaccurate valuation, as demonstrated above, the trial court's findings merely suggest that one of the two ranges included in the precedent transaction analysis should have been between $9.76 and $19.22 instead of $8.19 and $16.71. None of this remotely supports a conclusion that a purported deficiency in the valuation information affected the ultimate result.

2. The Disclosure Claim

According to the trial court, "RBC's actions resulted in stockholders voting on the merger based on a proxy statement that contained materially false disclosures and omissions about RBC's valuation analyses and conflicts." (Ex. A at 84.) The Proxy Statement therefore "denied [stockholders] the information necessary to make an informed decision whether to seek appraisal." (*Id.*) But as noted *supra* at Part II.C, RBC did not materially misstate its valuation analysis or omit its purported conflicts of interest. Moreover, the trial court ignored the fact that Moelis, a wholly unconflicted advisor, also rendered an opinion that found the transaction was fair to stockholders. Indeed, Moelis's value range—$15.17 to $18.31 per share—included a substantially higher low-end estimate. The presence of an unconflicted report from Moelis destroys that causal link.

V. THE TRIAL COURT ERRED BY CONCLUDING THAT THE FAIR PRICE FOR RURAL WAS $21.42 PER SHARE.

A. QUESTION PRESENTED

Did the trial court err when it concluded that the fair price for Rural was $21.42 per share? (A2570-86.)

B. SCOPE OF REVIEW

Chancery Court findings regarding damages are reviewed for an abuse of discretion. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P*, 817 A.2d 160, 175 (Del. 2002).

C. MERITS OF ARGUMENT

The trial court found that Rural was worth $21.42 per share, or $4.17 per share (*i.e.*, 19.5%) more than the sale price. The trial court erred by (i) ignoring the results of a full auction and post-signing market check, which was the best evidence of the value, and (ii) accepting an unreasonably inflated DCF as the sole evidence of value.

It is well established that Delaware courts will defer to the market where, as here, there has been an auction aimed at determining value.[18] Although the trial court acknowledged the presumption in favor of the price produced by a well-run auction, it dismissed that presumption because of a "confluence of factors." (Ex. A at 74-75.) The trial court did so primarily because it concluded the market was not

[18] *Union Ill. 1995 Inv. Ltd. P'ship*, 847 A.2d at 357-58 (holding that the merger price is "the best estimate of value" where a merger resulted from a "competitive and fair auction").

aware of management's growth plans. (*Id.* at 75.) But that information was sent to 21 bidders in a Confidential Information Memorandum in January. (*Id.* at 15.) Thus, the indications of interest received in early February were all informed by a detailed examination of management's plans. In addition, no party came forward to submit a topping bid after the merger was signed and the management projections were published in the Proxy Statement.

If the trial court was right about the Company's value, then the most sophisticated funds on Wall Street left $4.17 per share, or over $105 million, on the table. RBC notes in this regard that Rural filed for bankruptcy by August 2013 because of the "wildly optimistic" projections provided in January 2011 (according to a sworn declaration submitted by its then-CFO in the bankruptcy and excluded by the trial court in this case). The financial realities associated with the Board's decision to sell and the market participants' decision not to pay even more underscores the folly of the trial court's approach to determining damages.

In place of the auction, the trial court erroneously relied only on a DCF valuation. In ignoring the best evidence of value and substituting its own judgment for that of the market, the trial court erred and generated an outsized valuation of the Company. The trial court made two fundamental errors in its DCF analysis.

First, the trial court accepted a valuation based on long-term projections that included an extrapolation (not prepared by management) implying a total of 10 years of substantial growth. Under Delaware law, extrapolations of projections in DCF analyses are inherently suspect due to their speculative nature.[19] Plaintiff's expert performed a DCF that used management's five-year growth projections, and then extrapolated those projections for an additional five years. Those extrapolations assumed the same level of acquisition activity and growth rate in the additional five out years, despite a complete lack of evidence that acquisitions would continue beyond five years. (A2298.) Plaintiff's expert—who had no expertise in the ambulance transport business—testified that he tried to be "as mechanical as possible" and did not examine the assumptions inherent in the extrapolated projections to see if they were valid or reasonable. (A2289.) The trial court's decision to adopt this unusual approach to value had a material impact in driving up the DCF value. Using Plaintiff's approach yielded a value of *at least* $2.06 per share higher than the more traditional approach of RBC's expert. (A1876.)

Second, the trial court applied an unreasonably low beta. The experts presented starkly different views of the beta to be applied. Plaintiff's expert calculated Rural's beta to be 1.199 (derived from weekly measurements and a two-

[19] *In re John Q. Hammons Hotels Inc. S'holder Litig*, 2011 WL 227634, at *4-5 (Del. Ch.) (rejecting projection that merely extrapolated from overly optimistic management projections); *Cede & Co. v. JRC Acquisition Corp*., 2004 WL 286963, at *5 (Del. Ch.) (rejecting expert's characterization of a 10-year projection as a "management projection" because the 10-year projection appeared to merely extrapolate from management's five-year projection); *Kleinwort Benson Ltd. v. Silgan Corp*., 1995 WL 376911, at *8 (Del. Ch.) (rejecting valuation because it "unrealistically extrapolate[d] [the company's] short run circumstances into perpetuity").

year look-back period), while RBC's expert used a beta of 1.454 (derived from monthly measurements and a five-year look-back period). (Ex. A at 87.) Although the trial court found both methods acceptable in the abstract, it found that *both* calculations were "problematic" because Rural's stock did not see average weekly trading of 1%, and therefore an efficient trading market did not exist for Rural stock "until the second week of September 2009." (*Id.* at 87-88.) The trial court then directed the parties to "recalculate beta using [Plaintiff's expert's] methodology and a measuring period from September 11, 2009, to March 25, 2011." (*Id.* at 88.) But because this method generated a beta of less than 1.2 and, therefore, yielded damages well in excess of what Plaintiff sought in the case, the trial court simply accepted Plaintiff's expert's beta of 1.2. (Ex. B at 23.)

The trial court erred because "there should be a presumption . . . that certain markets are developed and efficient for virtually all the securities traded there," including NASDAQ, where Rural shares were traded.[20] Failing to compute beta consistent with industry practice sharply increased the DCF value. For Rural, even small changes to the beta used in the calculations yields very large differences in value: using a five-year look-back with monthly measures generates a beta of 1.454, which would yield a value of $16.91 per share using the trial court's other

[20] 5 Bromberg et al., *Bromberg & Lowenfels on Securities Fraud* § 7.484 (2d ed. 2003); *see also In re Merck & Co. Secs., Derivative & ERISA Litig*, Nos. 05-1151, 05-2367, 2013 WL 396117, at *11-12 (D.N.J. Jan. 30, 2013) (declining to analyze market efficiency factors and finding an efficient market because the security traded on the NYSE).

inputs. (*See* A2897.) Instead, the trial court adopted Plaintiff's proposed beta, which yielded a value of $21.42 per share. In other words, this change in beta resulted in a swing in value in the DCF of over $100 million. And it is only by exclusively using the methodology advocated by Plaintiff's expert that Plaintiff was able to generate outsized damages.

More importantly, the sensitivity of these two factors (*i.e.*, the beta and growth projections) in the DCF analysis highlights the trial court's error in ignoring the results of the auction (and the subsequent bankruptcy). It is unfair to RBC and sends the wrong message to the markets for a Delaware court to conduct a valuation without reference to actual market forces (*e.g.*, an auction and a bankruptcy) that are easily observable. This is particularly true where, as here, the valuation is conducted by a single academic with no industry expertise and generates tens of millions of dollars in damages by changing a single input.

VI. THE TRIAL COURT ERRED BY MISINTERPRETING AND MISAPPLYING DUCATA.

A. QUESTIONS PRESENTED

Did the trial court err by: (1) engaging in a proportionate fault analysis based solely on the trial record (A2953-55); (2) permitting the doctrine of unclean hands to trump the legislative policy underlying contribution (A3031-37); (3) not finding all directors and Moelis to be joint tortfeasors (A3015-24); or (4) placing on RBC the burden to establish that the Rural directors were not exculpated for a breach of their duty of care (A3016-17)?

B. SCOPE OF REVIEW

These questions present issues of law and mixed issues of law and fact. This Court reviews legal issues *de novo, supra* Part III.B, and reviews factual findings for clear error. *SI Mgmt.*, 707 A.2d at 40; *Ivanhoe*, 535 A.2d at 1340-41.

C. MERITS OF ARGUMENT

Contribution in Delaware is governed by DUCATA, which provides for a right of contribution among tortfeasors. Under Section 6304(b), an injured party can provide a settling tortfeasor a bar against contribution claims. To do so, the injured party must agree that its damages will be reduced in an amount equal to the settlor's pro rata share. The injured party thereby assumes the risk that settling defendants should have paid more, but simultaneously benefits in settlement negotiations by having the ability to offer a complete resolution of all claims.

Plaintiffs struck such a bargain with the Individual Defendants and Moelis. The Settlement Order, by its terms, acted as a "bar" against any contribution claim brought by RBC against Moelis or the Directors, and reduced RBC's liability to its pro rata share of any judgment. (A3068-71 ¶¶ 12, 13, 16, 18, 20.)

The trial court erred in allocating damages beyond RBC's pro rata share. The trial court found damages of $91,323,554.61 and apportioned $75,798,550.33 to RBC. (Ex. B at 95.) The Damages Opinion was at odds with the law on contribution and the trial court's own Liability Opinion, suggesting that the award was intended more to penalize RBC for conduct the trial court found objectionable than to assess damages to which the class was entitled under DUCATA. To arrive at its conclusions, the trial court committed a number of critical procedural errors in applying DUCATA. The trial court then compounded its errors by concluding that RBC acted largely (but not completely) alone and was not entitled to most of the contribution credit contemplated by DUCATA and its own Settlement Order.

1. The Trial Court Committed Multiple Procedural Errors In Attempting To Apply DUCATA.

a. The Trial Court Erred By Failing To Allocate Fault On A Pro Rata Basis As Required By Section 6304.

In its Order approving the settlement between Plaintiff, Moelis, and the Directors, the trial court enjoined RBC from bringing contribution claims and ordered that "the damages recoverable against non-settling defendant RBC and any other alleged tortfeasor will be reduced to the extent of the *pro rata* shares, if any, of Moelis and the Rural/Metro Defendants." (A3071 ¶ 20.) The pro rata treatment was required by Section 6304(b), which provides that the liability of the non-settling tortfeasor (whose contribution claims are extinguished) will be reduced "to the extent of the pro rata share of the released tortfeasor . . . ."

Having released RBC's contribution claims, the trial court should not have allocated damages on anything other than a pro rata basis, as required under DUCATA and the trial court's own Settlement Order. The trial court appears to have relied upon § 6302(d) in imposing a higher degree of fault on RBC than it imposed on other joint tortfeasors. (Ex. B at 90-95.) This was error. Section 6306(d) only authorizes a court to impose disparate levels of liability on joint tortfeasors under Section 6302(d) if the defendants litigate the issue of fault against one another: "[a]s among joint tortfeasors against whom a judgment has been entered in a single action, § 6302(d) of this title applies only if the issue of proportionate fault is litigated between them by cross-complaint in that action."[21]

b. The Trial Court Erred By Denying RBC A Fair Chance To Prove Others Were Joint Tortfeasors.

The trial court compounded its error by denying RBC an opportunity to prove its entitlement to contribution. First, as the trial court recognized, a

[21] *Ikeda v. Molock*, 603 A.2d 785, 786-87 (Del. 1992) (Section 6306(d) "provides that even if a judgment has been entered against joint tort-feasors in a single action, the relative degrees of fault shall not be considered in determining their pro rata liability unless 'the issue of proportionate fault [was] litigated between them by cross-complaint in that action.'").

defendant should not be forced to argue for contribution during trial. This regime would create an "awkward, weird trial." (Ex. B at 60 (quotation omitted).) And DUCATA permits a defendant to move for contribution *after* trial. 10 *Del. C.* § 6306(b)(1). The trial court, therefore, correctly held that RBC "did not lose its right to assert that the Settling Defendants were joint tortfeasors." (Ex. B at 59.)

But the trial court eviscerated this rule of any practical significance by requiring RBC to prove contribution based on the trial record. (*Id.* at 61.) This was error. Section 6306(d) requires actual litigation between the joint tortfeasors before proceeding on anything other than a pro rata basis. By limiting RBC to the trial record, the trial court afforded RBC only the appearance of a fair process. The trial court in effect required RBC to do exactly what it held RBC should not be forced to do: simultaneously argue both that the Directors did not breach their fiduciary duty *and* that the Directors and Moelis bore the fault for any breach.

This process was particularly unfair here, where the co-defendants asserted a common interest privilege in the litigation. Because the matters (*e.g.*, end-stage sale negotiations, proxy disclosure, etc.) on which the trial court found a breach of fiduciary duty are typically the subject of robust legal advice, the assertion of the common interest privilege deprived the trial court of a basis upon which to allocate fault proportionately. For example, documents subject to the common interest privilege may have included legal advice reflecting that the Company was aware of and participated in RBC's last-minute attempts to provide financing to Warburg. Such evidence could have greatly affected (or eliminated) RBC's liability for the purported failure to disclose these negotiations.

None of the cases the trial court relied upon required it to limit RBC to the trial record. The fundamental underpinning of the holding in *Medical Center of Delaware, Inc. v. Mullins* was that the defendant had a "full and fair opportunity" to litigate the issue of contribution. 637 A.2d 6, 10 (Del. 1994). Despite the partial settlement in that case, both defendants appeared at trial and a jury determined that the settling defendant was not liable. *Id*. at 7. Saying that a settlement agreement does not render a settling defendant a joint tortfeasor *because a jury found the settling defendant not liable* is much different than this case, where the issue of the settling defendants' liability was never presented to the fact-finder.

Also, the practical realities of corporate litigation—and this aiding and abetting claim in particular—differ significantly from medical malpractice litigation, as discussed in *Mullins.* In that setting, trials typically determine which of the many defendants (if any) bear responsibility in tort for actions they took, independently of one another, that allegedly harmed the plaintiff. It is appropriate in that setting for a fact-finder to consider simultaneously both whether a tort occurred and who bears responsibility for it. In contrast, here, RBC could *only* be liable if the directors breached their fiduciary duty, and so could not defend itself by simultaneously arguing on the one hand that no breach occurred because the process was proper, and on the other hand attributing injuries to the other defendants because they acted improperly. In requiring this process, the trial court did not afford RBC a "full and fair opportunity" to litigate contribution.

c. It Was Not RBC's Burden To Demonstrate The Other Defendants Were Joint Tortfeasors.

The trial court further erred by finding it was RBC's burden to prove that the Section 102(b)(7) affirmative defense did not bar contribution. The trial court's consideration of a Section 102(b)(7) provision in determining whether the directors were joint tortfeasors was error for two independent reasons. First, the trial court erred by effectively asserting *sua sponte* an affirmative defense on the directors' behalf to defeat contribution. A Section 102(b)(7) charter provision provides a defense that "must be *affirmatively* raised by the director defendants." *Emerald Partners v. Berlin*, 787 A.2d 85, 91 (Del. 2001) (emphasis in original). Thus, where a company has adopted a Section 102(b)(7) charter provision, a director who has breached his duties is liable unless he carries the burden to prove that his breach was "exclusively attributable to" a duty of care breach. *Id.* at 98. Here, none of the directors even attempted to meet that burden at trial. The trial court erred by invoking the Section 102(b)(7) charter provision for the Directors and by requiring RBC to demonstrate that exculpation was not available.

Second, the trial court's invocation of the exculpatory provision to defeat RBC's right to contribution undermines the policy objectives Section 102(b)(7) was intended to serve. Section 102(b)(7) provisions are intended to eliminate liability, not to shift it.[22] By buying stock in a corporation with a Section 102(b)(7) provision, stockholders secure benefits in exchange for surrendering the right to recover money damages for breaches of the duty of care.[23] Under the trial court's approach, stockholders would no longer be able to enjoy the benefits of the corporate risk-taking encouraged by an exculpatory charter provision. Advisors will refuse to advise any board that even appears to be at risk of breaching its duty of care since they can be held solely liable for that breach (the director would be exculpated with no contribution obligation). This regime would undermine the public policy underlying Section 102(b)(7).

d. The Trial Court Erred By Applying Unclean Hands.

The trial court also erroneously held that the equitable defense of unclean hands precluded RBC from claiming any contribution "for the Disclosure Claim or

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[22] A. Thompson Bayliss & Sarah E. Hickie, *Buck-Passing Under 102(b)(7): The (Unanticipated?) Liability-Shifting Impact of Director Exculpation*, 28 INSIGHTS: THE CORP. & SEC. L. ADVISOR 11, at 7 & n.43 (Nov. 2014) (collecting authority).

[23] *Goodwin*, 1999 WL 64265, at *24 n.7 (A board adopts an exculpatory charter provision "because the board's insulation from negligence claims may lead it to undertake potentially profitable but riskier transactions that it might otherwise eschew or because the company will be able to attract better directors to serve on the board."); *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 777 (Del. Ch. 2004) (A "primary purpose" of Section 102(b)(7) is "to encourage directors to undertake risky, but potentially value-maximizing, business strategies, so long as they do so in good faith.").

for the aspect of the Sale Process Claim relating to the final approval of the Merger." (Ex. B at 49.) By enacting DUCATA, the legislature reconciled competing equitable principles to allow joint tortfeasors to obtain contribution. *Farrall v. A.C. & S. Co.*, 586 A.2d 662, 664 (Del. Super. Ct. 1990). DUCATA grants contribution even in favor of intentional tortfeasors. (Ex. B at 17 ("Section 6302 of DUCATA overrules the common law ban on contribution in tort actions . . . .").) Applying unclean hands would result in disproportionate liability in direct contravention of the statute.

e. Quasi-Estoppel Should Apply.

The trial court additionally erred by holding that quasi-estoppel did not bar Plaintiff from asserting that neither the Directors nor Moelis were joint tortfeasors. Quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken. Quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Personnel Decisions, Inc. v. Bus. Planning Sys. Inc*., 2008 WL 1932404, at *7 (Del. Ch.).

Through most of this litigation, Plaintiff argued that all of the Directors were liable for non-exculpated breaches of their fiduciary duties and that Moelis aided and abetted their breaches. (A1678 ¶ 15 (directors breached duty of loyalty);*Id*. ¶

16 (Moelis committed fraud on the Board); A2019 (directors failed in duty of oversight); A1919 (Moelis manipulated fairness presentation).)

On the strength of those arguments, Plaintiff secured settlements with the Individual Defendants and Moelis. With the settlements and the Liability Opinion in hand, Plaintiff then disclaimed those same arguments to avoid any reduction of the judgment against RBC. But quasi-estoppel bars this sort of "self-interested 180 degree turn." *Personnel Decisions*, 2008 WL 1932404, at *7. All that is required for quasi-estoppel is that Plaintiff gained some advantage through her prior position or produced some disadvantage to another. *Id.* at *6.

When rejecting RBC's quasi-estoppel argument, the trial court did not analyze quasi-estoppel or Plaintiff's prior inconsistent arguments. Instead, the trial court held that *Mullins* forecloses application of quasi-estoppel. It does not. This Court did not even mention quasi-estoppel in *Mullins*. *See Mullins*, 637 A.2d 6. And there is no suggestion that the parties in *Mullins* even raised quasi-estoppel.

2. The Trial Court's "Joint Tortfeasor" Analysis Cannot Be Reconciled With Its Determinations On The Merits.

DUCATA defines a joint tortfeasor as one who bears a common liability. *See* 10 *Del. C.* § 6301. The trial court's conclusions that the Directors breached their fiduciary duties and that RBC—but not Moelis—was liable for aiding and abetting are inconsistent and irreconcilable. (Ex. B at 90.)

In the Liability Opinion, the trial court held that the Directors breached their fiduciary duty by "causing the Company to be sold at a price below its fair value." (Ex. A at 72.) According to the trial court, the below-value sale would not have occurred had "[a] disinterested board … benefitted from disinterested advice," but "RBC's self-interested manipulations" resulted in a sale price below fair value. (*Id.* at 73.) Applying the trial court's legal construct, either the Board appropriately relied upon disinterested advice from Moelis (which requires reversal since the Board could not have breached its fiduciary duties in this circumstance) or Moelis was necessarily a joint tortfeasor. There is no logical alternative. If Moelis had committed no tort, the directors would have "benefitted from disinterested advice," and could not have breached their fiduciary duty.

The logic of the trial court's Liability and Damages Opinions similarly demands a finding that the Directors were joint tortfeasors. The trial court found RBC liable on an aiding-and-abetting theory, which necessarily requires a finding of primary liability. The trial court expressly found that the Board's decision to sell the company violated *Revlon* because "the Board failed to provide active and direct oversight of RBC." (*Id.* at 58.) Likewise, the trial court found that the Directors breached their fiduciary duty of disclosure by making material misrepresentations in the Proxy Statement. (*Id.* at 78-83.) Indeed, the trial court noted that the Directors had "a duty to speak completely on the subject of RBC's financing efforts," a duty the Directors violated. (*Id.* at 82.) In the Damages Opinion, however, the trial court found that RBC was "the party solely responsible" for the disclosure violation contained in Rural's proxy. (Ex. B at 93.) Having expressly found that the Board violated its duty of disclosure, the trial court cannot then disclaim that finding to deny contribution to RBC. The logic of the trial court's opinion demands that either the Directors were joint tortfeasors or that RBC did not aid and abet any breach of fiduciary duty.

CONCLUSION

For the reasons set forth above, RBC respectfully requests that this Court reverse the judgment of the trial court in its entirety.

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CERTIFICATE OF SERVICE

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