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Case No. 6350-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE RURAL METRO CORPORATION	)	Consolidated
SHAREHOLDERS LITIGATION	)	C.A. No. 6350-VCL

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO RBC CAPITAL MARKETS, LLC'S POST-TRIAL CONTRIBUTION BRIEF

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PRELIMINARY STATEMENT

The partial settlements in this action left two principal claims for trial: (i) plaintiff's claim for aiding and abetting breach of fiduciary duty against RBC Capital Markets, LLC ("RBC"); and (ii) RBC's cross-claim for contribution against the settling defendants under the Delaware Uniform Contribution Among Tortfeasors Act ("DUCATA"). At trial, plaintiff proved its claim against RBC. The Court concluded that RBC, "for improper motives of its own, [misled] the directors into breaching their duty of care." (Opinion 69.) RBC made no effort to prove its cross-claim. RBC's main defense to aiding and abetting liability was that the director defendants committed no underlying breach of fiduciary duty.

Despite RBC's unwillingness at trial to prove its cross-claim, RBC now seeks a damages reduction of 87.5%. RBC argues that each of the eight defendants is liable to an equal extent, even if RBC is the only defendant whose conduct justifies a judgment for monetary liability. By RBC's logic, the monetary liability for a financial advisor that defrauds a board decreases in inverse proportion to the number of directors intentionally duped by the financial advisor. According to RBC, it is equitable for the plaintiff's recovery against a financial advisor to be reduced to a small fraction of the total damages if the co-defendant directors who breached their duty of care are all exculpated from monetary liability under 8 *Del. C.* § 102(b)(7) or fully protected under 8 *Del. C.* § 141(e).

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The law does not support RBC's arithmetic. Contribution is an equitable doctrine applicable to similarly situated defendants. It is not a mechanism by which the sole defendant answerable in damages for committing an intentional tort obtains automatic judgment reduction. RBC contends that DUCATA is designed "so that no one tortfeasor shoulders more than his fair share of the monetary liability." (RBC Br. 6.) Only RBC has monetary liability to the class.

The gravity of RBC's intentional wrongdoing prevents RBC from obtaining any judgment reduction. Tort law, DUCATA, the common law defense of *in pari delicto*, and the equitable defense of unclean hands all support the same result; they bar RBC's claim for judgment reduction. RBC's cross-claim also fails because no defendant shares "common liability" with RBC. Additionally, even if contribution were available to RBC, any judgment reduction must reflect RBC's disproportionate share of the liability. RBC has not established a factual basis for any principle of law that would support material judgment reduction.

STATEMENT OF FACTS

A. Findings of Fact Respecting RBC

RBC's brief on contribution omits mention of the factual findings made by the Court respecting RBC's conduct. Those findings are summarized below.

In putting Rural/Metro into play, "RBC was motivated by a desire to secure its place in the financing trees of the bidders in the EMS auction." (Opinion 56.) Tony Munoz and his colleagues at RBC "recognized that if Rural engaged in a sale process led by RBC, then RBC could use its position as sell-side advisor to secure buy-side roles with the private equity firms bidding for EMS…. RBC believed that with the Rural angle, it could get on all of the EMS bidders' financing trees." (*Id.* 7.)

"RBC's advice was overly biased by its financial interests." (*Id.* 56.) Unlike the other firms competing to be retained by Rural/Metro's Special Committee, "RBC devoted the bulk of its presentation to a sale and recommended coordinating the effort with the EMS process." (*Id.* 10.) "RBC did not disclose that it planned to use its engagement as Rural's advisor to capture financing work from the bidders for EMS." (*Id.*) "RBC did not disclose that proceeding in parallel with the EMS process served RBC's interest in gaining a role on the financing trees of bidders for EMS." (*Id.* 53.) "RBC hoped to generate up to $60.1 million in fees from the Rural and EMS deals." (*Id.* 13.)

"RBC designed a process that favored its own interest in gaining financing work from the bidders for EMS." (*Id.* 13.) "RBC did not discuss obvious and readily foreseeable disadvantages of [its proposed] schedule, such as the fact that standard M&A confidentiality agreements would restrict the bidders' ability to participate in both processes." (*Id.* 54.) Munoz admitted at trial that an obvious problem with RBC's plan for marketing Rural was that financial sponsors who participated in the EMS process "would be constrained by confidentiality agreements" and "be limited in their ability to consider Rural simultaneously." (*Id.* 14.) "RBC also planned to push its staple financing package for Rural" and stressed internally that it "had the inside track on financing because of Rural's confidentiality agreements." (*Id.* 13.) "Additionally, RBC's near-term process did not account for Rural's need to generate a track record with its acquisition strategy." (*Id.* 55.)

"RBC's faulty design prevented the emergence of the type of competitive dynamic among multiple bidders that is necessary for reliable price discovery." (*Id.* 76.) When sole final bidder Warburg chose not to use RBC's commitment papers in its final bid, "RBC re-doubled its efforts to win the business." (*Id.* 23.) RBC "delayed working on a fairness analysis because the firm still hoped to secure a buy-side financing role and did not want to render a fairness opinion under those circumstances." (*Id*. 24-25.)

When directed by the Special Committee to engage in final price negotiations with Warburg, "RBC did not disclose that it was continuing to seek a buy-side role providing financing to Warburg." (*Id.* 25-26.) "Rather than pushing for the best deal possible for Rural, RBC did everything it could to get a deal, secure its advisory fee, and further its chances for additional compensation from Warburg." (*Id.* 60.) "During the final negotiations over price, RBC took advantage of the informational vacuum it created to prime the directors to support a deal at $17.25." (*Id.* 62.)

On Saturday, March 26, 2011, the day before Rural/Metro's board approved the sale to Warburg, "RBC's most senior bankers … engaged in a full-court press to convince Warburg to include RBC." (*Id.* 27.) "There was no conceivable upside for Rural from RBC's last-minute lobbying of Warburg. The downside for Rural was to accentuate RBC's desire to generate goodwill with Warburg and close the deal." (*Id.* 61.)

"Munoz coordinated between the senior bankers pressing for a financing role and the deal team working on the fairness presentation." (*Id.* 27.) "At the same time that RBC's leveraged finance bankers were engaging in last-minute lobbying with Warburg, the RBC M&A team was working to lower the analyses in its fairness presentation to make Warburg's bid of $17.25 look more attractive." (*Id.* 61.)

RBC gave weight to an old transaction to lower the low end of its precedent transaction range in a manner that "was inconsistent with RBC's December 2010 pitch book" and "also was inconsistent with RBC's view, expressed throughout the sale process, that Rural's operating metrics were objectively superior to AMR's (which they were)." (*Id.* 29.) RBC also chose not to adjust EBITDA for one-time expenses and falsely stated in its presentation book that Wall Street analysts did not do so. (*Id.* 29-30.) These two changes had a "dramatic" effect on RBC's "consensus" precedent transaction range, rendering it "entirely below the deal price." (*Id.* 30.)

One of the two members of RBC's ad hoc fairness opinion committee approved the revised book "without reading it." (*Id.* 31.) The other member, who was serving on a fairness opinion committee for the first time, asked a single question by email before signing off. (*Id.* 28, 31.)

When the Board approved the merger on the night of March 27, the Board "was unaware of RBC's last-minute efforts to solicit a buy-side financing role from Warburg, had not received any valuation information until three hours before the meeting to approve the deal, and did not know about RBC's manipulation of its valuation metrics." (*Id.* 58.) "Aspects of the board materials conflicted with RBC's earlier advice, contravened the premises underlying the Board's business plan for Rural, and contained outright falsehoods." (*Id.* 62.)

"RBC *created* the unreasonable process and informational gaps that led to the Board's breach of duty." (*Id.* 69 (emphasis in original).) "RBC knew that it was not disclosing its interest in obtaining a role financing the acquisition of EMS or how it intended to use the Rural process to capture the EMS financing business." (*Id.*) "RBC similarly knew that the Board and the Special Committee were uninformed about Rural's value when making critical decisions." (*Id.* 70.) "Most egregiously, RBC never disclosed to the Board its continued interest in buy-side financing and plans to engage in last minute lobbying of Warburg." (*Id.*) "RBC knew that the Board was uninformed about these critical matters, but failed to disclose the relevant information to further its own opportunity to close a deal, get paid its contingent fee, and receive additional and far greater fees for buy-side financing work." (*Id.* 70-71.)

RBC knowingly participated in disclosure violations. "Information that RBC provided to the Board in connection with the precedent transaction analyses was false, and that false information was repeated in the Proxy Statement." (*Id.* 79.) "A stockholder reading the Proxy Statement would conclude, incorrectly, that RBC's precedent transaction range used the disclosed Adjusted EBITDA that added back one-time expenses and that the resulting figures were consistent with a Wall Street consensus." (*Id.* 80.) Additionally, "RBC did not use the comparable companies analysis for valuation purposes but misleadingly left the analysis in its

presentation." (*Id.* 80 n.27.) "A stockholder reading the Proxy Statement would conclude, incorrectly, that RBC disclosed all of its conflicts and led a pristine process." (*Id.* 83.)

B. Findings of Fact Respecting the Settling Defendants

The Court's post-trial decision did not parse "whether the directors' conduct constituted a breach of the duty of loyalty." (*Id.* 64.) Even so, the Court's extensive findings of fact did not suggest that any settling defendant was complicit in RBC's intentional wrongdoing, committed an intentional wrong, or that the directors did not rely in good faith on their advisors.

When Moelis made its pitch to the Special Committee on December 23, 2010, it "placed less emphasis [than did RBC] on a sale of Rural" and advised that it "would not seek to provide financing for any transaction that may be pursued." (*Id.* 10.) Moelis was hired as a "secondary" advisor. (*Id.* 12.)

Shackelton, Davis, and DiMino "had personal circumstances that inclined them towards a near-term sale." (*Id.* 3.) Their personal circumstances "helped shape the boardroom environment in which RBC operated." (*Id.* 7.)

The initiation of a sale process in December 2010 "fell outside the range of reasonableness," in part because "Shackelton and RBC got too far out in front of the Board." (*Id.* 56.) Additionally, RBC's advice to the Special Committee was overly biased by RBC's undisclosed financial interests. (*See id.*)

Moelis, along with RBC, received feedback from private equity firms that a parallel sale process with EMS posed problems. (*Id.* 14.) Shackelton, along with RBC, received a copy of a J.P. Morgan presentation recommending that Rural/Metro "execute on its growth plan over the next year." (*Id.* 15.) At a Special Committee meeting on February 6, 2011, Shackelton obtained the consent of Davis and Walker to include in the next phase of the sale process all six private equity firms that had expressed interest in Rural/Metro, even though the Special Committee had not yet received Board authorization to pursue a sale process. (*Id.*17.) Apart from Special Committee meetings on February 6 and February 22, "Davis was largely out of the picture because of his responsibilities at other companies, and Walker deferred to Shackelton." (*Id.* 20.) Their decision in February 2011 to continue the sale process "fell within a range of reasonableness." (*Id.* 58.)

As of March 23, 2011, "RBC knew that Shackelton wanted more than $17.00 per share, while RBC just wanted a deal." (*Id.* 23.) "DiMino became RBC's principal ally in the boardroom," as he "had an incentive to sell the Company and continue managing it for Warburg." (*Id.*)

The Board failed "to place meaningful restrictions on RBC." (*Id.* 61.) Nonetheless, "it was natural for the Board to assume that Warburg's fully financed bid left RBC out of the picture and to send RBC to negotiate with Warburg." (*Id.*

70.) In negotiations with Rural/Metro's bankers on March 23 and 24, Warburg learned "the various directors' competing views on price," but there is no clear record and no finding about whether that leak is attributable to RBC or Moelis. (*Id.* 60-61.)

As of March 27, due to the lack of "any earlier valuation information, the Rural directors did not have a reasonably adequate understanding of the alternatives available to Rural, including the value of not engaging in a transaction at all." (*Id.* 63.) The Board received last-minute valuation materials from both Moelis and RBC. Moelis "made debatable changes to its valuation materials that had the effect of lowering the range of fairness and making the merger price look more attractive," but the Court made no findings "as to why Moelis made the changes." (*Id.* 28 n.1.)

RBC, on the other hand, was found to have misled the Board to serve its self-interest. "Because RBC misled the Board, this is not a case where a Board's independent sense of the value of the company is sufficient to carry the day." (*Id.* 63.) "[B]ut for RBC's actions, a fully-informed Board would have had numerous opportunities to achieve a superior result." (*Id.* 73.) "A well-informed board assisted by disinterested advisors would have understood Rural's going concern value and been able to evaluate whether to continue to pursue the Company's business plan and preserve the opportunity for a sale at a more opportune time in

the future, rather than relying at the last minute on valuation materials that RBC manipulated while making a final push for a role in Warburg's buy-side financing." (*Id.* 74.)

ARGUMENT

I. RBC'S CONDUCT IS SUFFICIENTLY EGREGIOUS THAT IT CANNOT AVAIL ITSELF OF DUCATA

RBC committed a fraud on the Rural/Metro Board, "mislead[ing] the directors into breaching their duty of care," and caused Rural/Metro's stockholders to vote on a merger "based on a proxy statement that contained materially false disclosures and omissions about RBC's valuation analyses and conflicts." (Opinion 69, 84.) Given the bad faith nature of RBC's misconduct, various legal doctrines prevent RBC from availing itself of DUCATA to obtain a judgment reduction. RBC can no more reduce its monetary liability by invoking the judgment reduction provision in DUCATA than it could by asserting a cross-claim for contribution under DUCATA. The Court has no proper role in determining the "fair share" of monetary liability to be borne by a financial advisor adjudicated to have defrauded a client's board of directors and stockholders so that it could reap fees for itself.

A. DUCATA Does Not Overturn Tort Law Prohibiting an Intentional Tortfeasor from Obtaining Contribution

"There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm." Restatement (Second) of Torts § 886A(3) (1979).[1]

[1] "The Delaware Supreme Court often relies on the Restatement (Second) of Torts." (Opinion 67 (citations omitted).)

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The basis for this rule is that "no man can be permitted to found a cause of action on his own intentional tort." *Id.* cmt. j ("Intentional and reckless tortfeasors").

Courts have concluded that intentionally harmful and fraudulent actors cannot benefit from contribution claims under Delaware law. In *Eastridge v. Thomas*, 1987 WL 9605 (Del. Super. Apr. 13, 1987), the Superior Court dismissed a contribution cross-claim by a defendant (Thomas) who intentionally struck the plaintiff with a beer bottle at a bar owned by the co-defendant. The court did not mention DUCATA, but reasoned as follows:

> It is an elementary [tenet] of the law of indemnity and contribution that such a cause of action will not arise for an unlawful or illegal act by a party, not expressly approved or authorized by the party against whom relief is sought. *See* 41 Am. Jur. 2d, Indemnity, §§ 11, 19 et. seq. and 18 Am. Jur. 2d, Contribution §§ 35, 37 et seq. ***Thus, in a case such as this where the act complained of is an intentional tort by Thomas, no contribution or indemnification will lie***.

Id. at *2 (emphasis added).[2]

[2] *See also Pringle v. Scarberry*, 1981 Del. Super. LEXIS 721 (Aug. 12, 1981) (denying a motion for summary judgment against a contribution claim brought by a driver alleged to have wilfully *or* wantonly operated his vehicle). Because there was no post-trial finding in *Pringle* that the defendant had committed an intentional tort, *Pringle* is consistent with Section 886A of the Restatement (Second) of Torts, which notes: "if, for example, the automobile guest statute of a particular state has been interpreted in such a manner that 'wilful' or 'wanton' misconduct under its provisions has become no more than a high degree of ordinary negligence without the mental element of the deliberate and conscious, it does not follow that contribution is necessarily to be denied in the particular case."). Restatement (Second) of Torts § 886A cmt. k.

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Federal courts applying Delaware law have followed *Eastridge*. See *380544 Can., Inc. v. Aspen Tech., Inc.*, 544 F. Supp. 2d 199, 233 (S.D.N.Y. 2008); *Alten v. Ellin & Tucker, Chartered*, 854 F. Supp. 283, 289 n.5 (D. Del. 1994). *See also Hollinger Int'l, Inc. v. Hollinger Inc.*, 2006 U.S. Dist. LEXIS 35947, *10 (N.D. Ill. Jan. 25, 2006) (citing *Eastridge* and reaching the same conclusion under Illinois law of contribution). The Court in *Aspen Tech* rejected an intentional wrongdoer's cross-claim for contribution under DUCATA, reasoning:

> As the defendants correctly observe, it is a tenet of common tort law that "courts will not aid one who has deliberately done harm." Restat. (2d) Torts § 886A(3), cmt. j. The claims for which [the officers] seek contribution stem entirely from allegations of [the officers'] intentionally wrongful conduct. [The officers] are alleged to have intentionally withheld information about the Yukos transaction from their employer and used the undisclosed information for their benefit by attempting to extort Aspen's Board of Directors into furnishing cash for its disclosure. Whether styled as fraud or breach of fiduciary duty, this is intentional and willful conduct. ***Construing Delaware's contribution law in light of the state court's holding in Eastridge and the well-settled common law prohibition against permitting a tortfeasor to seek contribution on alleged intentionally tortious conduct, I find that Plaintiffs are barred from seeking contribution from the Individual Defendants on Aspen's Counterclaim***.

Aspen Tech, 544 Supp. 2d. at 234 (emphasis added).[3]

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[3] *Aspen Tech* declined to follow *McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979), which permitted contribution in a securities fraud case, because *McLean* pre-dated *Eastridge* and *Alten*. 544 F. Supp. 2d. at 234.

DUCATA does not expressly preclude contribution claims by intentional tortfeasors, consistent with the Uniform Contribution Among Tortfeasors Act (1939) (the "1939 Uniform Act").[4] *See* 1939 Uniform Act cmt. on Section 2 Subsection 1 ("Nor does it confine contribution to merely negligent tortfeasors or to those in any other way inadvertently harming others."). The statute's silence is not dispositive.

The drafters of the 1939 Uniform Act did not advance the policy that contribution should exist when the underlying tort is of an aggravated nature. Professor Gregory, the Reporter, stated that the drafters were inclined "to take the view that contribution should be confined to tortfeasors of inadvertence," but found it "utterly impossible to state such a view satisfactorily in statutory form[.]" *Discussion of Contribution Among Tortfeasors Act Tentative Draft No. 1*, 346, 347 (1938). Professor Gregory referred to his contemporaneous law review article, which discusses statutes in eight jurisdictions that permitted contribution without stipulating that the required common liability must rest on negligence or arise out of torts of inadvertence:

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[4] "Without clear statutory language or Delaware legislative history, we turn to the drafting history of the Uniform Act upon which DUCATA was based to determine its intended scope." J. Travis Laster & Michelle D. Morris, *Breaches of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 Del. L. Rev. 71, 79 (2010) [hereinafter, "Laster & Morris"].

> ***Whether the courts in these eight jurisdictions, therefore, will permit contribution among tortfeasors commonly liable for intentional infliction of harm is obviously a matter of some doubt***. In spite of the broad provisions in these acts, it is possible that they will be construed to apply only when the common liability arises from torts of inadvertence, usually negligence.
>
> …
>
> The only valid objection to this proposal is the time-honored one that wicked persons should not receive the assistance of the courts.... And presumably, ***if cases do arise under such statutes in which particular courts feel that it would be shocking to permit contribution, they can deny it on the particular facts presented*** without building up a body of precedent resting on some legal abstraction well-nigh impossible to define.

Charles O. Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 Wisc. Law Rev. 365, 366, 368 (1938) (emphasis added). This is such a case where it would be shocking to permit contribution.

B. *In Pari Delicto* Bars RBC's Claim for Judgment Reduction

DUCATA "was intended to apply equitable considerations in the relationships of injured parties and tortfeasors[.]" *Farrall v. A.C. & S. Co., Inc.*, 586 A.2d 662, 664 (Del. Super. 1990). "Most notably, in a case involving bad faith conduct by multiple defendants, the court could readily apply the doctrine of *in pari delicto* to decline to adjudicate the issue of contribution among the bad faith tortfeasors." Laster & Morris, *supra*, at 99.

"[T]he doctrine of *pari delicto* is a vital principle in equity[.]" *Schleiff v. Baltimore & O. R. Co.*, 130 A.2d 321, 328 (Del. Ch. 1955). "The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or

who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity." *In re Am. Int'l Group, Inc. Consol. Deriv. Litig.*, 976 A.2d 872, 882 n.21 (Del. Ch. 2009) ("*AIG II*") (quoting *Bein v. Heath*, 47 U.S. 228 (1848)).

"The doctrine of *in pari delicto* provides that a plaintiff may not assert a claim against a defendant if the plaintiff bears fault for the claim." *In re LJM2 Co-Investment, L.P.,* 866 A.2d 762, 775 (Del. Ch. 2004) (quoting *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 354 (3d Cir. 2001)). Thus, "under the *in pari delicto* doctrine, a party is barred from recovering damages if his losses are substantially caused by activities the law forbade him to engage in." *Id.*

AIG II provides an apt illustration of *in pari delicto*. AIG sought an accounting to recover from third-party companies and their employees who conspired with AIG's officers in a bid-rigging scheme. Then-Vice Chancellor Strine dismissed the claim, explaining that "[q]uestions of this sort have long been addressed by the venerable *in pari delicto* doctrine, one of the primary purposes of which is to prevent courts from having to engage in inefficient and socially unproductive accountings between wrongdoers. That purpose is directly implicated here." 976 A.2d at 877. *In pari delicto* applies whenever one

defendant bears "***at least*** substantially equal responsibility" to another defendant. *Id.* at 884 n.27 (emphasis added). RBC falls in that category.

The *in pari delicto* doctrine is subject to an exception "when another public policy is perceived to trump the policy basis for the doctrine itself." *Id.* at 888. No public policy outweighs the class's interest in a full recovery against a financial advisor that defrauded the board of directors and stockholders of its client, misleading them to initiate and approve an ill-timed, value-destroying sale process and sale so that the financial advisor could reap fees from other potential clients. Nor is there any public policy favoring a judgment reduction on behalf of a primary financial advisor if a secondary financial advisor, unaware of the fraud and underlying wrongs, is also advising the board. Any lesser misconduct by co-defendants is no basis for allowing RBC to avoid making full compensation to the class.

C. RBC's Unclean Hands Bars Its Claim for Judgment Reduction

"Equity requires that 'when a party who seeks relief in this Court has violated conscience or good faith or other equitable principles in his conduct, then the doors of the Court of Equity should be shut against him." *Healy v. Healy*, 2006 WL 3289623, at *2 (Del. Ch. Oct. 31, 2006) (quoting *Monsanto Co. v. Rohm & Haas Co.*, 456 F.2d 592, 598 (3d Cir. 1971)). The doctrine of unclean hands "need not apply only in a defensive posture, but may be used to save the Court from

using its powers to benefit an undeserving party." *In re Trust for Grandchildren of Gore*, 2010 WL 3565489, *5 (Del. Ch. Sept. 1, 2010). *See also Patel v. Dimple, Inc.*, 2007 Del. Ch. LEXIS 121, *35-36 (Aug. 16, 2007) ("The unclean hands doctrine … is designed primarily to protect courts of equity from being misused by a party who has not acted fairly and without fraud or deceit as to the controversy in issue.").

"Fraud will typically suffice to hold a party ineligible for relief under the unclean hands doctrine." *Healy*, 2006 WL 3289623, at *2. The Court "has the latitude to apply the doctrine to avoid becoming complicit in a plaintiff's fraudulent act." *Morente v. Morente*, 2000 WL 264329, *3 (Del. Ch. Feb. 29, 2000). Then-Vice Chancellor Strine expanded:

> ***Under this rule, a person thinking about entering into a fraudulent transaction knows that he will be at the mercy of his co-conspirator and unable to call upon the aid of the court***. Thus he should think twice before acting dishonestly and making himself vulnerable to other persons with a professed willingness to engage in deception. But when he does not, goes on to commit fraud, and later feels aggrieved when one of his co-conspirators does not live up to her end of an illicit bargain, public resources should not be expended and the integrity of our courts should not be sullied in proceedings analogous to enforcing the code of "honor among thieves."

Id. at *3 (emphasis added).

It is a famous principle of corporate law that fiduciaries "may not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations" and that "those who join in such misconduct are equally

tainted." *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1988). The doctrine of unclean hands prevents one defendant adjudicated to have defrauded a board from obtaining an allocation of its joint and several liability. The doctrine applies with greater force here, as only one defendant committed fraud on the Board of Rural/Metro, and on Rural/Metro's stockholders.

II. EVEN IF RBC MAY AVAIL ITSELF OF DUCATA, RBC CANNOT OBTAIN JUDGMENT REDUCTION

RBC faces two statutory impediments to judgment reduction. First, RBC cannot establish that it has a "common liability" with any other defendant, because no other defendant was shown at trial to be answerable in damages. 10 *Del. C.* § 6302(b). Second, even if there is such a joint tortfeasor, the Court must consider their "relative degrees of fault," as no other defendant committed wrongdoing in a magnitude approaching that of RBC. 10 *Del. C.* § 6302(d).

A. RBC Has Not Proven the Joint Tortfeasor Status of Any Settling Defendant

Section 6301 of DUCATA defines "joint tortfeasors" as "2 or more persons jointly or severally liable in tort for the same injury to person or property ...." 10 *Del. C.* § 6301. Joint tortfeasors share a "common liability." 10 *Del. C.* § 6302(b). DUCATA "comes into play only when the proposed contributor shares with the defendant a common liability to the plaintiff. Absent such liability, no contribution may be enforced." *Sears Roebuck & Co. v. Huang,* 652 A.2d 568, 574 n.6 (Del.

1995) (en banc) (internal quotations omitted). A person immune from liability "by definition … cannot be a joint tortfeasor." *Id.* at 573-74.

As a non-settling defendant, RBC was "required to demonstrate [the settling defendants'] joint tortfeasor status (i.e., that he was jointly liable in tort for the [plaintiff's] injuries), as a prerequisite to claiming the credit provided for by Section 6304(a)." *Med. Ctr. of Delaware v. Mullins*, 637 A.2d 6, 8 (Del. 1994). *See also Junge v. Smyrna Rental & Repair, Inc.*, 1998 WL 960716, at *3 (Del. Super. June 2, 1998) ("Thus, to receive a credit under Section 6304(a), the non-settling defendant must demonstrate that both the non-settling defendant and the settling defendant were joint tort-feasors."); 18 Am. Jur. 2d *Contribution* § 118 (2004) ("In a suit in which contribution is sought from a joint tortfeasor, . . . [i]t is incumbent upon the contribution claimant to prove a common liability for the wrongful act, neglect, or default which is made the basis of the action . . . . she cannot prevail unless he or she also proves that the injured person had a cause of action against the contribution defendant for the tortious injury."). RBC made no effort at trial to prove the joint liability of any settling defendant, and RBC has not done so in its opening brief.

A finding of tortfeasor status can be made (i) judicially or (ii) by "a prior specific admission of liability" by the settling defendant. *Mullins*, 637 A.2d at 9; *see Saienni v. Anderson*, 669 A.2d 23, 25 (Del. 1995) (non-settling tortfeasor

"failed to establish, either through a judicial determination or otherwise, that the payor of the [settlement] consideration … was a 'joint tortfeasor'"). Neither basis for such a finding has occurred here.

Mullins forecloses RBC's argument that it can avoid its burden of proof by invoking quasi-estoppel or judicial estoppel and citing to plaintiff's pleading or pre-trial contentions. (RBC Br. 10-16.) Quasi-estoppel must be inapt, because, by definition, a plaintiff always obtains a benefit when settling with a defendant accused of misconduct by the plaintiff. In *Mullins*, the Delaware Supreme Court determined that no judgment reduction was appropriate as to a co-defendant who settled by paying $100,000 on the first day of trial, because the non-settling defendant "failed to carry its burden of proof" against the settling defendant. 637 A.2d at 10. RBC stands in no better position as to the settling defendants. As for judicial estoppel, it requires reliance, and the Court issued no pre-trial ruling that any settling defendant committed misconduct justifying joint tortfeasor status.

There is no basis now for any finding of common liability as to Moelis or any director defendant. The elements of aiding and abetting have not been satisfied as to Moelis, and RBC did not establish at trial that any claim against the director defendants withstood the defenses against monetary liability afforded by 8 *Del. C.* § 102(b)(7) and 8 *Del. C.* § 141(e).

B. Moelis Was Not Shown To Be an Aider and Abettor

RBC devotes several pages to discussing Moelis's involvement in the sale process, including its joint interaction with RBC and with the Board and Special Committee at various meetings after their separate pitches to the Special Committee on December 23, 2010, and before the final Board meeting of March 27, 2011, when RBC and Moelis provided separate valuation analyses. (RBC Br. 17-23.) The problem for RBC is that Moelis was not complicit in any of the conduct summarized below (and in the Statement of Facts above) that formed the basis for RBC's liability:

- RBC was motivated by a desire to secure its place in the financing trees of the bidders in the EMS auction and the buyer of Rural/Metro and hoped to generate up to $60.1 million in fees from the Rural/Metro and EMS deals;
- RBC recommended a sale coordinated with the EMS process without disclosing how its recommendation served its planned use of its engagement as Rural/Metro's advisor to capture financing work for the bidders from EMS;
- RBC secretly redoubled efforts to provide staple financing to Warburg, the sole final bidder, when RBC was directed by the Special Committee to engage in final price negotiations with Warburg and provide a fairness opinion presentation;

- RBC took advantage of the informational vacuum it created to prime the directors to support a deal at $17.25;
- RBC's Munoz coordinated between the senior bankers pressing for a financing role with Warburg and the deal team working to lower the analyses in its fairness presentation to make Warburg's bid of $17.25 look more attractive;
- RBC gave weight to an old transaction involving AMR to lower the low end of its precedent transaction range in a manner that was inconsistent with both RBC's December 2010 pitch book and RBC's expressed view that Rural's operating metrics were objectively superior to AMR's;
- RBC chose not to adjust EBITDA for one-time expenses, falsely stated in its presentation book that Wall Street analysts did not do so, and allowed the Proxy Statement to suggest, incorrectly, that RBC's precedent transaction range used the disclosed Adjusted EBITDA that added back one-time expenses and that the resulting figures were consistent with the Wall Street consensus; and
- RBC did not disclose the facts about (i) its successful effort to design a sale process for Rural/Metro that allowed RBC to obtain over $10 million in financing fees from the sale of EMS or (ii) its unsuccessful lobbying of Warburg for a staple financing role after Warburg submitted its final bid.

RBC does not contend that Moelis intentionally manipulated its valuation ranges to serve its business interests. RBC merely states that it and Moelis "were similarly situated" in having lowered a valuation range. (RBC Br. 24.) On the critical subject of "why Moelis made the changes" (Opinion 28 n.1.), RBC points to little more than a post-announcement email in which the lead Moelis banker wrote that he hoped to "ride this mojo to bag a few more this spring." (RBC Br. 27 n.45.) Plaintiff deposed four managing directors of Moelis, including all three members of the fairness opinion committee. The trial record does not establish that Moelis acted for a corrupt purpose in preparing its valuation analyses, and that its conduct sank to the level of intentionally duping the Board into breaching its duty of care.

RBC argues that because the Court concluded that the directors breached their duty of care, the Court must have implicitly found that Moelis did not act independently – notwithstanding the Court's disavowal of having made any such finding. (*Compare* RBC Br. 17-18, 25-26 *with* Opinion 28 n.1.) The finding that the directors were not adequately informed does not imply that both financial advisors knowingly participated in a breach of fiduciary duty. The Court found that the directors were misled by RBC and its valuation analysis. RBC did not try to prove at trial that the directors ignored what their primary advisor had to say and

listened only to Moelis. Absent such a finding, the integrity of Moelis's analysis was not at issue.

RBC also has not shown that Moelis was responsible for tipping Warburg about the directors' view on price. (RBC Br. 27-29.) Carney's email did not say, and Carney could not recall who told him, but Carney testified that he spoke to RBC's Munoz and Daniel during the critical time period. (Carney 231-32.) Any denial or lack of recollection by Munoz or Daniel is insufficient to put blame on Moelis, given the Court's finding that the testimony of Munoz and Daniel was undeserving of much weight, as it "at times strained credulity, and the plaintiffs successfully impeached their testimony on multiple occasions." (Opinion 1.)

C. RBC Failed Show that Any Director Was Not Exculpated and Not Fully Protected

RBC's burden of proof in establishing a common liability with a director as a joint tortfeasor necessarily requires RBC to demonstrate that the directors were not protected from joint and several liability. If any director defendant is exculpated under 8 *Del. C.* § 102(b)(7) or fully protected under 8 *Del. C.* § 141(e), then he could not be liable for damages, could not have a common liability with RBC, and any settlement payment on such person's behalf could not be a basis for judgment reduction. *See* Laster & Morris, *supra*, at 98 ("[I]f the corporation has a Section 102(b)(7) provision, it is unlikely that the directors who merely breached their duty of care could be subject to contribution claims, given the absence of any

underlying basis for a monetary judgment against those directors.”). Such a result does not make financial advisors or officers “guarantors of a board’s duty of care.” (RBC Br. 42.) It allows for a complete recovery against the financial advisor or officer if it is shown that the person, for improper motives, intentionally duped directors into breaching their duty of care and caused damage to the stockholders.

In arguing that exculpation is irrelevant, RBC relies exclusively on dicta in *Vroegh v. J & M Forklift*, 651 N.E.2d 121 (Ill. 1995). (RBC Br. 39-40.) The holding in *Vroegh* is that a defendant dismissed from an underlying tort action by operation of Illinois’ “fireman’s rule” was not subject to a claim for contribution, because there was “no point at which a defendant subject to the ‘fireman’s rule’ can be said to have been even potentially liable for the injury or wrongful death.” 651 N.E.2d at 126. The dicta on which RBC relies suggests that the outcome might have been different if the “fireman’s rule” was likened to a “possible affirmative defense” that must be properly invoked and established to defeat potential tort liability. *Id.*

The Illinois dicta articulating this distinction has no application here. DUCATA bars contribution in multiple scenarios of protection from liability.[5]

[5] *See Sears Roebuck & Co.*, 652 A.2d at 573-574 (no contribution since parent was immune from direct liability); *Diamond State Telephone Co. v. Univ. of Del.,* 269 A.2d 52, 55-56 (Del. 1970) (no contribution claim against negligent employer that paid compensation under Workmen’s Compensation Law); *Lutz v. Boltz*, 100 A.2d 647 (Del. Super. 1953) (no contribution against a driver who was protected from

Moreover, the dicta from Illinois has no persuasive force as a rationale for reducing RBC's liability, and the class's recovery, to a small fraction, based on the number of duped, exculpated, and fully protected directors from whom damages cannot be obtained. Exculpation from duty of care liability and full protection for good faith reliance on experts are statutory defenses expressing the public policy of the State of Delaware that can both be raised on a motion to dismiss. *Malpiede v. Townson*, 780 A.2d 1075, 1091-92 (Del. 2001); *Brehm v. Eisner*, 746 A.2d 244, 261-62 (Del. 2000). The integrity of both defenses depends on the availability of full compensation from a gatekeeper if the strict standards for aiding and abetting a breach of the duty of care are satisfied at trial. (*See* Opinion 47-49.)

RBC's director-by-director arguments do not dispel the availability of one or both statutory defenses. RBC argues that Shackelton's undisclosed interests favoring a prompt sale and his influence toward that end weigh against exculpation. (RBC Br. 33-34.) But RBC cannot point to evidence that Shackelton acted with subjective bad faith. Bad faith is not seen, for example, in the internal Coliseum email he wrote upon embarking on a sale process, that he was "putting in a lot of effort to manage communication so we can continue pushing gameplan [sic] forward aggressively without having to take a step back." (Opinion 13.)

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liability by statute that barred recovery "by a nonpaying guest from the operator of a vehicle, unless the accident was intentional on the part of the operator, or was caused by his wilful or wanton disregard of the rights of others").

Importantly, the trial record does not rebut the presumption that Shackelton relied in good faith on RBC's advice about how and when to sell Rural/Metro and that the price was within a range of fairness. No evidence suggests that he was complicit in RBC's bad-faith misconduct.

Eugene Davis had an undisclosed interest in a prompt sale and supported that end. He was not shown, however, to have acted in bad faith, or not to have relied in good faith on the advice of the financial advisors, or to be complicit in RBC's bad-faith misconduct. The same can be said of DiMino, and his personal circumstances favoring a sale were known to the Board.[6] As for directors Holland, Conrad and Walker, RBC does not attempt to show that they acted with bad faith or did not rely in good faith on their expert advisors. (RBC Br. 37-38.) Indeed, RBC does not address the directors' defense under Section 141(e), which requires that the directors "actually knew that the analysis resulted in an incorrect fairness opinion" and a finding that the Board "did not rely upon [the financial advisor] in good faith or that it did not exercise reasonable care in selecting … the financial advisor." *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *12 & n.107 (Del. Ch. Jan. 31, 2013).

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[6] RBC incorrectly states that the Court "found fault with DiMino's failure to provide [a J.P. Morgan presentation] to the full Board[.]" (RBC Br. 36.) In fact, the Court observed that "DiMino forwarded the presentation to Shackelton and RBC, but no one shared it with the rest of the Special Committee or the Board." (Opinion 15.)

D. DUCATA Mandates Consideration of "Relative Degrees of Fault" Among Joint Tortfeasors

Even if another defendant is found to be a joint tortfeasor with RBC, Section 302(d) of DUCATA mandates that the Court consider their "relative degrees of fault," so as to avoid the inequity that would follow from an equal distribution of common liability in a case of "disproportion of fault among joint tortfeasors":

> When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares.

10 *Del. C.* § 6302(d). Notwithstanding this clear statutory mandate, RBC claims entitlement to a judgment reduction of 87.5%, based on equal apportionment of liability among all eight defendants. (RBC Br. 45-46.) RBC's arguments in favor equal apportionment are legally unsupportable.

RBC miscomprehends the procedural posture. RBC contends that relative fault may only be considered when it is actually litigated, and that "relative fault has not been litigated in this matter." (RBC Br. 45.) RBC overlooks that the Court's invitation of supplemental briefing on contribution allows for consideration of relative fault and RBC's pro rata share prior to entry of judgment. The two cases cited by RBC do not bar consideration of relative fault at the present juncture. *See Ikeda v. Molock*, 603 A.2d 785, 787 (Del. 1991) (requiring "the filing of a cross-claim between parties to the litigation before a jury may prorate

liability based upon proportionate fault"); *Global Link Logistics, Inc. v. Olympus Growth Fund III, L.P.*, 2010 WL 338214, at *6 (Del. Ch. Jan 29, 2010) (dismissing proportionate fault cross-claim asserted in litigation over confirmation of arbitration award when issue of proportionate fault was not litigated in the arbitration proceeding).

RBC quotes legislative history of the 1939 Uniform Act for the notion that "DUCATA mandates contribution among tortfeasors on an equal pro rata share basis." (RBC Br. 44 (internal quotation of legislative history omitted).) RBC overlooks that the 1939 Uniform Act did not contain an analogue to Section 6302(d) of DUCATA. Instead, the analogue was an optional provision.[7]

Equal allocation of liability is not a "default rule," and consideration of relative fault is not "narrowly circumscribed." (RBC Br. 45.) Section 6302(d) of DUCATA requires consideration of relative degrees of fault when equal

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[7] Remarkably, the page RBC quoted from the legislative history of the 1939 Act – page 394 – is omitted from RBC's compendium, and it makes clear that equal pro rata shares would be mandated *if the optional subsection is not adopted*:

> This subsection is bracketed as optional. If the principle set forth in this subsection is not desired, the whole subsection may be eliminated without in any way affecting the rest of the Act as a statute effecting contribution among tortfeasors on an equal pro rata share basis as the contributive ratio.

Handbook of the 1938 National Conference of Commissioners on Uniform State Laws and Proceedings, *Report of Committee on Uniform Act Conferring Upon Joint Tortfeasor Discharging Liability The Right of Contribution From His Joint Tortfeasors* 394 (1938).

distribution of liability would be inequitable due to "disproportion of fault." 10 *Del. C.* § 6302(d). *See also FDIC v. Deloitte & Touche*, 834 F. Supp. 1155, 1160 (E.D. Ark. 1993) ("The optional provision of the 1939 uniform Act, which permitted proportionate assessment of fault, has been uniformly approved by commentators and in recent years has received almost universal acceptance. Proportionate assessment of fault among defendants more accurately reflects the reality of wrongdoing.") (citation omitted).

RBC suggests that *Valeant Pharms. Int'l v. Jerney*, 921 A.2d 732, 753-54 (Del. Ch. 2007), stands for the proposition that under DUCATA, "[e]ach tortfeasor's pro rata share is determined by dividing the total damage award by the total number of tortfeasors." (RBC Br. 44.) DUCATA was held to be inapplicable in *Valeant*, in part because the company was only seeking to recover from the defendant his equal pro rata share of certain costs and bonuses. 921 A.2d at 753 n.48. The issue discussed on the cited pages was whether the defendant should be considered one-eleventh or one-twelfth liable, based on whether an outside director who did not attend a critical board meeting was also liable. *Id.* at 753-54.

We are not aware of any Delaware case in which a court did not consider relative degree of fault. In one case, after a trial in which the issue of comparative degree of fault was "fully and adequately explored," the Court determined that the two defendants were "equally responsible for plaintiff's injury," as one defendant's

liability "derive[d] from either its direct involvement in or participation with [the other defendant] in the design, construction, maintenance and activities of the parking lot area where plaintiff's injury occurred." *Necol v. Marriott Corp.*, 1991 Del. Super. LEXIS 427, at *2 (Nov. 12, 1991). No such finding is possible here as to any of the defendants, much less all eight of them, given the high standards for liability for each of the defendants. In *Farrall v. A.C. & S. Co.*, a case cited throughout RBC's brief, some released joint tortfeasors were found to be 2% or 3% liable, while the non-settling defendant was found to be 37% liable. 586 A.2d at 669. If any settling defendant here is determined to have a common liability with RBC, the relative degree of fault must reflect the fact that, due to advice and actions unique to RBC, motivated by RBC's massive, undisclosed conflicts of interest, RBC corrupted a sale process and fairness opinion analysis that appeared unremarkable to Moelis, the director defendants, and their outside counsel.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court render a judgment making RBC responsible for the total damages incurred by the Class.

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