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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE RURAL METRO CORPORATION SHAREHOLDER LITIGATION.	C.A. No. 6350-VCL

RBC CAPITAL MARKETS, LLC'S POST-TRIAL CONTRIBUTION BRIEF

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Pursuant to the Court's instruction in its March 7, 2014 Opinion [D.I. 355] (the "Trial Opinion" or "Trial Op."), defendant RBC Capital Markets, LLC ("RBC") respectfully submits this brief in further support of its contribution defense. RBC respectfully requests that the Court reduce RBC's damages by the aggregate pro rata share of settling co-defendants Christopher S. Shackelton, Michael P. DiMino, Eugene I. Davis, Earl P. Holland, Conrad A. Conrad, and Henry G. Walker (the "Board" or the "Directors"), and Moelis & Company LLC ("Moelis").

PRELIMINARY STATEMENT

When Plaintiff chose to settle with the Directors and Moelis, she agreed to release those Defendants from, *inter alia*, all contribution claims by RBC. As required by Delaware law, she also agreed to reduce her recovery from RBC by the pro rata share of the Directors' and Moelis's liability in this action. This is a requirement of Delaware law because Delaware has made a policy decision that a non-released tortfeasor should be protected against having to bear the portion of the released tortfeasor's share that a plaintiff failed to collect in a settlement that grants a full release.

In her post-trial brief, Plaintiff resorted to a variety of arguments to try to recover from RBC damages that she gave away during settlement negotiations with the Directors and Moelis. Although Plaintiff expressly agreed to take the risk

that the Directors and Moelis were settling for less value than their respective share of the damages, Plaintiff now attempts to sidestep that agreement. As to the Directors' liability, Plaintiff argues that they could have been exculpated pursuant to 8 *Del. C.* § 102(b)(7) for breaches of duty of due care and further that RBC may not have been entitled to contribution from the Directors for exculpated conduct and should, therefore, be deprived of its contribution rights under Delaware law. This argument fails because the Court found that the Directors breached their fiduciary duty. Though the Directors asserted 8 *Del. C.* § 102(b)(7) exculpation as an affirmative defense, the Court made no finding that the Directors were entitled to exculpation. And Plaintiff, who argued that the Directors were not entitled to exculpation because of allegedly undisclosed conflicts, is estopped from taking a different position now. In any event, there is nothing in the Trial Opinion that supports the argument that the Directors would have established this affirmative defense at trial. Indeed, Plaintiff was ultimately able to extract millions of dollars of settlement consideration from the Directors by pressing her theory that the Directors engaged in conduct that was not subject to exculpation under Delaware law.

As to Moelis's liability, Plaintiff is also estopped from claiming that Moelis was not jointly liable for the conduct at issue. Moelis served as the joint advisor for the Rural/Metro sale. Moelis and RBC shaped the sale process the

Court found deficient, and Moelis participated in every one of the subsequent decisions the Court determined was inappropriate. In short, there is no principled way to separate RBC and Moelis—nor did Plaintiff attempt to do so at any point in this case before settling with Moelis. Indeed, before, during, and after trial, Plaintiff criticized Moelis's conduct. And ultimately the Court determined that the Directors breached their fiduciary duties. That finding is only possible if the Court also determined that the Directors should not have relied upon advice given by Moelis throughout the process.

The Court should not sanction Plaintiff's attempt to side-step the law and its own contractual obligations. RBC had a legal right to contribution from each of the Directors and Moelis. Delaware law permitted Plaintiff to compromise that right, but only to the extent she committed in her settlement agreement to reduce her damage claim against RBC on a pro rata basis. Having secured substantial settlement payments from the Directors and Moelis, Plaintiff should not now be permitted to walk away from her legal and contractual obligations.

Accordingly, RBC's damages must be reduced by the aggregate pro rata share of each of the Directors and Moelis regardless of RBC's aiding and abetting liability. Under Delaware law, the share of the settling defendant is determined in a straightforward predictable manner—the Court simply divides

responsibility equally among all settling defendants. Accordingly, RBC's damages should be reduced by 87.5% to reflect its 1/8 share of the liability in the case.

BACKGROUND

Co-defendants Rural/Metro Corporation ("Rural/Metro" or the "Company"), the Directors, RBC, and Moelis were scheduled to begin trial on May 6, 2013. Immediately before the trial began, Plaintiff settled with co-defendants Rural/Metro, the Directors (together with Rural/Metro, the "Rural/Metro Defendants") and Moelis (collectively, the "Settling Defendants"), leaving RBC to proceed to trial on its own.

The Rural/Metro Defendants and Moelis paid Plaintiff $6.6 million and $5 million, respectively, to release all Plaintiff's claims against them.[1] The Settlement Stipulation expressly provides that the damages amount recoverable against RBC must be reduced by the pro rata shares of the settling parties:

> Plaintiff and the Class agree, pursuant to 10 *Del. C.* § 6304(b), 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.[2]

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[1] Stipulation and Agreement of Compromise and Settlement Between Plaintiff, the Rural/Metro Defendants and Moelis & Company LLC, [D.I. 323], dated August 3, 2013 at ¶ 2 (the "Settlement Stipulation").

[2] *Id.* at ¶ 13.

The Settlement Stipulation also provides that the settling tortfeasors have the right to terminate the settlement if the Court declined to enter a final order barring contribution claims against them (excluding any claims arising out of the January 10, 2011 engagement letter between RBC, Moelis and Rural/Metro (the "Engagement Letter")).[3]

The Court approved the settlements on November 20, 2013 in an order that, *inter alia,* released all claims that were asserted or could have been asserted by Plaintiff against the Settling Defendants and bars RBC from asserting contribution claims against the Settling Defendants.[4] The Settlement Order also finds that, "[p]ursuant to 10 *Del. C.* § 6304(b) 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."[5]

ARGUMENT

I. UNDER DELAWARE LAW AND POLICY, A SETTLING PLAINTIFF BEARS THE CONTRIBUTION RISK

Contribution in Delaware is governed by the Delaware Uniform Contribution Among Tortfeasors Act (the "DUCATA"), 10 *Del. C*. §§ 6301-08,

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3 *Id.* at ¶¶ 12, 14, 16.

4 Order and Partial Final Judgment [D.I. 351] (the "Settlement Order"), dated Nov. 20, 2013, at ¶¶ 8, 16, 18.

5 *Id.* at ¶ 20.

which expressly provides for a right of contribution among joint tortfeasors. (10 *Del. C.* § 6302(a).)

DUCATA is based upon the Uniform Contribution Among Tortfeasors Act (the "Uniform Act"), a model contribution statute approved by the National Conference of Commissioners on Uniform State Laws in 1939 and adopted, in whole or in part, by a number of states. Delaware adopted the Uniform Act in 1949 in substantially the same form as that approved by the National Conference.[6] The DUCATA and the Uniform Act aim to promote "equity among wrongdoers."[7]

Both the DUCATA and the Uniform Act establish rules requiring joint tortfeasors to share the burden of joint liability so that no one tortfeasor shoulders more than his fair share of the monetary liability.[8] Section 6304(a) of the DUCATA allows a plaintiff to recover damages from a non-settling tortfeasor,

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[6] *Clark v. Brooks*, 377 A.2d 365, 368 (Del. Super. Ct. 1977) (the DUCATA "was patterned, with only slight modification" from the Uniform Act), *aff'd sub nom. Blackshear v. Clark,* 391 A.2d 747 (Del. 1978).

[7] *See* C. Douglas Floyd, *Settlement in Joint Tort Cases*, 18 Stan. L. Rev. 486, 490, 491 (1966); *see id.* at 490 (common-law doctrine that "place[d] the entire burden of liability on one wrongdoer when another was also responsible for the harm" was inequitable); *Farrall v. A.C. & S. Co.,* 586 A.2d 662, 663 (Del. Super. Ct. 1990) ("The [DUCATA] abolished the harsh common law rules [of contribution]").

[8] *See* 10 *Del. C.* § 6301; Charles O. Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 Ws. L. Rev. 365, 369 (1938) ("[contribution] is an equitable device to redistribute the common burden").

but requires that the damages be reduced by the greater of (i) the amount of consideration the settling tortfeasors paid the plaintiff to release their claims, or (ii) the amount stipulated in the settlement:

> A release by the injured person of 1 joint tort-feasor, whether before or after judgment, does not discharge the other tortfeasor unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

(10 *Del. C*. § 6304(a).)[9]

DUCATA § 6304(b) allows settling tortfeasors to include in the settlement agreement a provision barring non-settling joint tortfeasors from asserting contribution claims against settling tortfeasors. Such a bar, however, is only valid if the settlement explicitly provides for a reduction of the plaintiff's damages in an amount equal to the settlor's pro rata share:

> A release by the injured person of 1 joint tortfeasor does not relieve the 1 joint tortfeasor from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors.

(10 *Del. C.* § 6304(b).)[10]

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[9] *See also* Uniform Act § 4 (1939); *Farrall,* 586 A.2d at 663 (DUCATA "mandate[s]" reduction of a non-settling tortfeasor's damages).

DUCATA §§ 6304(a) and 6304(b) protect the settling tortfeasor from contribution claims; protect the non-settling tortfeasor from paying more than its fair share; and (importantly in this case) shift the contribution risk to the *plaintiff*. To effect a partial settlement with the release of contribution claims, a plaintiff must willingly contract to reduce her ultimate damage award to the extent of the pro rata share of the settling tortfeasors. Thus, the plaintiff is able to extract the highest possible settlement from a defendant because it is able to offer a release of all claims (including contribution claims). In return, the plaintiff then bears the risk the settling tortfeasor's payment is less (or substantially less) than her ultimate share might have been after trial. *See* 10 *Del. C.* § 6304(a)-(b); *Farrall,* 586 A.2d at 664. As the *Farrall* court explained:

> Section 6304(b) provides a mechanism whereby a released tortfeasor can be protected against contribution claims by non-released tortfeasors. Where a plaintiff has released a tortfeasor for an amount less than its pro rata share the non-released tortfeasor is protected against having to bear the portion of the released tortfeasor's share which plaintiff failed to collect in the settlement. It preserves the non-released tortfeasor's right to recover contribution from a settling tortfeasor unless plaintiff agrees to reduce his recovery against the non-released tortfeasor by that portion. To this end, § 6304(b) requires, as a condition for eliminating the released tortfeasor's liability for contribution, that the risk that the pro rata share of recovery attributable to the released tortfeasor is greater than the settlement amount must be

[10] *See also* Uniform Act § 5 (1939).

> assumed by the plaintiff by agreeing to reduce his recovery against the non-released tortfeasor in the amount of the released tortfeasor's pro rata share.

Farrall, 586 A.2d at 664.

To better encourage settlements, the Uniform Act was amended in 1955 to include a provision allowing the complete discharge of contribution claims by non-settling tortfeasors against settling tortfeasors even without a pro rata reduction provision in the settlement agreement. Notably, Delaware did *not* adopt the 1955 revision.[11] Instead, Delaware chose to continue to shift the contribution risk to a settling plaintiff willing to bear that risk in exchange for a partial settlement.

Here, Plaintiff expressly contracted[12] in the Settlement Stipulation to bear the contribution risk. The Settlement Stipulation and the Settlement Order preclude RBC from asserting any contribution claims against the Rural/Metro Defendants or Moelis. But to ensure that RBC does not unfairly pay more than its fair share as a result of an agreement to which it is not a party, Plaintiff agreed in the Settlement Stipulation—pursuant to DUCATA § 6304(b)— to take the risk that the Rural/Metro Defendants and Moelis were settling for less value than their

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[11] *See Clark*, 377 A.2d at 372 ("Delaware's statute was not modified after the 1955 Revision was promulgated. Hence, the language changes of the 1955 Revision do not affect the Delaware law.")

[12] *Settlement in Joint Tort Cases*, 18 Stan. L. Rev. at 491 ("A release or settlement of a tort claim is a matter of contract.").

ultimate pro rata shares of the damages. Accordingly, consistent with Delaware law, the Settlement Stipulation, and the Settlement Order, Plaintiff has assumed the contribution risk and RBC's damages must be reduced by the aggregate pro rata share of the Rural/Metro Defendants and Moelis.

II. PLAINTIFF IS ESTOPPED FROM ARGUING THAT THE DIRECTORS AND MOELIS ARE NOT JOINT TORTFEASORS

A party is entitled to contribution under the DUCATA if it can establish that it is a "joint tortfeasor" with another party. (10 *Del. C.* § 6302(a).) Parties are joint tortfeasors if they share a "common liability." *See, e.g., Builders & Managers, Inc. v. Dryvit Sys., Inc.*, 2004 WL 304357, at *2 (Del. Super. Ct. 2004). Here, to the extent RBC is liable, it is a "joint tortfeasor" with the Directors and Moelis.[13]

There can be no reasonable argument that the Directors and Moelis are not joint tortfeasors. RBC's liability is derivative of the conduct and liability of the Directors, as the standard for aiding and abetting establishes.[14] Plaintiff argued

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[13] The DUCATA applies to breach of fiduciary duty claims. *See Hampshire Grp. Ltd. v. Kuttner*, 2010 WL 2739995, at *54 (Del. Ch. July 12, 2010) ("I believe that Hampshire's argument that § [6304] of the Contribution Act does not apply to cases involving fiduciary misconduct is wrong.").

[14] *See Malpiede v. Townson*, 780 A.2d 1075 at 1096 (Del. 2001) (underlying breach required for an aiding and abetting a breach of fiduciary relationship claim); Trial Op. at 33; *DiRienzo v. Lichtenstein,* 2013 WL 5503034, at *36 (Del. Ch. Sept. 30, 2013) (aiding and abetting breach of fiduciary duty claim dismissed because court dismissed underlying claim of breach of fiduciary duty), *appeal refused,* 80 A.3d 959 (Del. 2013).

strenuously that the Directors' conduct warranted a finding that they were liable for breach, and the Court ultimately agreed. Moreover, Moelis was an integral part of the conduct that, according to Plaintiff and the Court, resulted in the Directors' breach.[15] The doctrine of judicial estoppel bars Plaintiff from now asserting the Directors and Moelis are not joint tortfeasors.

Judicial estoppel applies in Delaware when (i) "a litigant advances a position inconsistent with a position taken in the same or earlier legal proceeding" and (ii) "the court was persuaded to accept the previous argument as a basis for its earlier ruling." *VIII-Hotel II P Loan Portfolio Holdings, LLC v. Zimmerman*, 2013 WL 5785290, at *3 (Del. Super. Ct. Sept. 19, 2013). The party's prior position will be considered a "basis" for the court's ruling where (i) the prior position "contributed to the court's decision," *Julian v. E. States Const. Serv., Inc.*, 2009 WL 1211642, at *7 (Del. Ch. May 5, 2009); (ii) the court "relied" on the party's prior position, *Zimmerman*, 2013 WL 5785290, at *3; or (iii) the party's newly inconsistent position "contradicts" the court's ruling, *Banet v. Fonds de Regulation et de Controle Cafe Cacao*, 2010 WL 1066993, at *4 (Del. Ch. Mar. 12, 2010).

Judicial estoppel is "designed to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Lynch v. Thompson*, 2009 WL 1900464, at *4

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[15] *See infra* Part III.B.

(Del. Ch. June 29, 2009) (citation and internal quotation marks omitted).[16] As such, courts applying judicial estoppel often consider "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *In re Silver Leaf, L.L.C.*, 2004 WL 1517127, at *2 n.9 (Del. Ch. June 29, 2004)) (citation and internal quotation marks omitted).

Plaintiff claimed throughout this litigation that the Directors breached their duty of loyalty and acted in bad faith:

- "The director's decision to go forward with the sale of Rural/Metro in the face of a board presentation that cast doubt on the reliability of Moelis's fairness opinion was in breach of the director's duty of loyalty." (Second Am. Complaint ¶ 15.)

- "DiMino, Shackelton and the other directors raised no questions about Moelis's analysis of the acquisition strategy, or other red flags . . . ." (Pl. Ltr. in Opp. of Summary Judgment for Rural Metro at 8.)

- "The Director Defendants Are Individually Liable . . ." (Pl. Pre-Trial Br. at 37, 47.)

- "The failure of any of [the Directors] to follow up on red flags in the presentations of RBC and Moelis reflects more than a lack of due care." (Pl. Pre-Trial Br. at 41.)

- "The director defendants will not be able at trial to satisfy their burden of proof to establish exculpation." (Pl. Pre-Trial Br. at 47.)

[16] *See also Banet*, 2010 WL 1066993, at *4 (allowing a litigant to assert inconsistent positions "is the equivalent to committing a fraud on the Court") (citation and internal quotation marks omitted).

Moreover, before settling with the Directors, Plaintiff's counsel focused the vast majority of their case on the conduct of the Directors. For example, most of the pre-trial opening brief focuses on the conduct of the Directors, and Plaintiff's counsel had not even identified most of the RBC emails that were the focus at trial until the pre-trial reply brief.[17]

Plaintiff's contentions regarding the Directors plainly "contributed to" the Court's finding that RBC was liable for aiding and abetting. *See Julian*, 2009 WL 1211642, at *7. Judicial estoppel thus bars Plaintiff from now asserting that the Directors are not joint tortfeasors and did not act in bad faith or breach their duties of loyalty.

Similarly, Plaintiff claimed throughout this litigation that Moelis aided and abetted the Directors' breaches:

- "Moelis and RBC aided and abetted th[e] breach of fiduciary duty. Moelis's presentation materials were a fraud on the Board . . . ." (Second Am. Complaint at ¶ 16.)
- "[P]laintiff has adduced evidence that Moelis manipulated its valuation analyses and their public disclosure to make an unfair deal look fair, obtain $2.9 million contingent fee, and obtain the commercial benefits of a consummated transaction for what might otherwise have been a busted auction in a non-public engagement." (Pl. Ltr. in Opp. of Summary Judgment for Moelis at 1.)

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[17] *Compare* Pl. Pre-Trial Br. at 37-47, 49 (devoting twelve pages to arguments relating to the Directors) *with id.* at 47-48 (devoting two pages to arguments relating to RBC and Moelis). *Compare* Pl. Pre-Trial Br. *with* Pl. Pre-Trial Ans. Br.

- "Evidence of Moelis's fee-driven, mercenary approach permeates the record." (Pl. Ltr. in Opp. of Summary Judgment for Moelis at 2.)

- "By presenting a manipulated fairness presentation on Sunday night, March 27, after midnight, Moelis knowingly participated in a breach of fiduciary duty." (Pl. Ltr. in Opp. of Summary Judgment for Moelis at 9.)

- "RBC And Moelis Are Liable For Aiding And Abetting" (Pl. Pre-Trial Br. at 47.)

- "We summarize Moelis' conflict and conduct to illustrate why the individual defendants could not rely in good faith on Moelis' midnight fairness presentation." (Pl. Pre-Trial Ans. Br. at 3 n.1.)

- "Moelis's manipulations of the numbers between Thursday and Sunday are highly questionable and, in certain respects, misleading and perhaps unprecedented." (Pl. Pre-Trial Br. at 25.)[18]

- "Moelis delivered a midnight Board presentation purporting to show that Rural/Metro's signature new strategy of serial acquisitions had no material value – a conclusion at odds with Rural/ Metro's projections and marketing materials, as well as the uniformly positive reception of the strategy by investors and analysts." (Pl. Pre-Trial Ans. Br. at 3.)

- "[W]e think Moelis did [the valuation] wrong." (Post-Trial Oral Argument Tr. [D.I. 341], dated September 26, 2013 ("Oral Argument Tr.") at 59:22-60:2.)

Although the Court did not make an express finding as to Moelis's liability (*see* Trial Op. at 28 n.1),[19] the Court "relied" on Plaintiff's arguments

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[18] *See also* Second Am. Complaint at ¶ 6 ("The Board did not know that Moelis had spent the last 48 hours revising its fairness presentation to make the transaction look fair."); *id.* at ¶¶ 105-116 (describing the actions and omissions by Moelis at the eleventh hour that produced an incorrect valuation analysis).

[19] The Court did find that 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." (Trial Op. at 28 n.1.)

about Moelis. *See Zimmerman*, 2013 WL 5785290, at *3; *Banet*, 2010 WL 1066993, at *4. As Part III.B describes, a finding that Moelis is *not* a joint tortfeasor would be squarely inconsistent with the Court's ruling that RBC is liable for aiding and abetting.

Even if the Court had not based its ruling on Plaintiff's arguments regarding the Directors and Moelis, quasi-estoppel would still apply. All that is required for quasi-estoppel is that Plaintiff gained some advantage through her prior position or produced some disadvantage to another. *See Personnel Decisions, Inc. v. Bus. Planning Sys.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008); *Barton v. Club Ventures Invs. LLC*, 2013 WL 6072249, at *6 (Del. Ch. Nov. 19, 2013). The doctrine of 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.*, 2008 WL 1932404, at *6 (internal citation and quotation marks omitted) (applying quasi-estoppel where a party's "self-interested 180 degree turn [was] graceless"). "To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another." *Id.* "A party does not need to show reliance for quasi-estoppel to apply." *Barton*,

2013 WL 6072249, at *6. Here, Plaintiff gained the advantage of winning the trial, not to mention settling with the Directors and Moelis for millions of dollars.[20]

In sum, Plaintiff should not be allowed to change her arguments based on the "exigencies of the moment"—*i.e.*, this contribution briefing. *See Lynch*, 2009 WL 1900464, at *4. Allowing Plaintiff to do so would surely afford her an "unfair advantage" and impose an "unfair detriment" on RBC. *See In re Silver Leaf, L.L.C.*, 2004 WL 1517127, at *2 n.9. RBC would be inequitably forced to bear almost 100% of the liability for claims for which the Plaintiff herself argued that others were liable.

III. RBC IS ENTITLED TO A REDUCTION OF DAMAGES BECAUSE, TO THE EXTENT RBC IS LIABLE, THE DIRECTORS AND MOELIS ARE "JOINT TORTFEASORS"

A. There Is a Binding Judicial Determination that Each of the Directors and RBC Are "Joint Tortfeasors"

As noted above, the Court has already determined that each of the Directors and RBC are joint tortfeasors. In its Trial Opinion, the Court found that the Directors breached their fiduciary duties to shareholders. (*See* Trial Op. at 64.)

[20] *See Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993) (explaining that judicial estoppel may be invoked where a party asserted an inconsistent position and subsequently settled, because "[p]ersons who triumph by inducing their opponents to surrender have 'prevailed' as surely as persons who induce the judge to grant summary judgment"); *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F. 3d 597, 604 (9th Cir. 1996) (estopping Plaintiff from taking inconsistent positions when her first position resulted in a favorable settlement).

Indeed, if there was no underlying breach by the Directors, there could have been no finding that RBC aided and abetted a breach. The Court's determination that the Directors breached their fiduciary duties is "dispositive" of the question of whether the Directors and RBC share a common liability—they now do. *See Medical Ctr. of Del., Inc. v. Mullins*, 637 A.2d 6, 9 (Del. 1994) (jury's exoneration of negligence allegations was a "dispositive" "judicially determined [finding] that [defendant] [wa]s *not* a joint tort-feasor within the meaning of [DUCATA]").[21] RBC and the Directors are, pursuant to the Trial Opinion, joint tortfeasors under the DUCATA.

B. Moelis is a Joint Tortfeasor Under the DUCATA

The Court made a number of findings concerning Moelis in the Trial Opinion and a number of additional findings about the Board and RBC's conduct that implicate Moelis (since Moelis served as the joint advisor in the sale process). This is consistent with Plaintiff's allegation that RBC and Moelis were both aiders and abettors who "conspired to manage the end-game."[22] Moelis was jointly retained with RBC and jointly rendered the advice on which the Directors relied in connection with the sales process leading up to the merger. Given that the

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[21] *See also Zirn v. VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch. Sept. 23, 1994) ("Once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.").

[22] Second Am. Complaint at ¶ 4; Pl. Pre-Trial Br. at 4 (same).

Directors relied jointly on RBC and Moelis, there could be no finding of breach of fiduciary duty by the Directors if Moelis's conduct here was not (in the Court's view) tortious. Otherwise, the Moelis advice would have had the effect of giving the Directors an independent, non-actionable basis for their actions. Thus, to the extent RBC is liable for aiding and abetting, Moelis is a joint tortfeasor.[23] Moelis's role in each of the decisions that form the basis of the Trial Opinion's conclusion on liability is analyzed below.

1. RBC and Moelis Presented Strategic Alternatives to the Sale Process to the Board

The Court found that the Board did not adequately consider alternatives to sale. (Trial Op. at 56.) In conjunction with this finding, the Court found that RBC focused too exclusively on the sale process and did not include sufficient advice to the Board about strategic alternatives, particularly during its December 23 presentation. (*Id.* at 53, 73.)

The evidence submitted at trial demonstrates that RBC's and Moelis's December 23 presentations were not materially different from each other (*See* JX 225; JX 226A)—and they *both* provided information regarding strategic alternatives, including maintaining the status quo. (JX 225 at 11; JX 226A at 10.)

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[23] *See Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 754 (Del. Ch. 2007) ("On this limited record, and solely for the purpose of reckoning [the non-settling party's] pro rata share of damages, it is appropriate to . . . count him among those potentially liable to the company.")

At trial, Shackelton testified that RBC "presented a very balanced approach to the three broad alternatives, strategic alternatives, that the board was considering." (Trial Tr. Vol. 3 at 818:21-819:9.) He further testified that Moelis also provided advice regarding the Company's strategic alternatives. (*Id*. at 821:2-10.) Because the Court apparently concluded that RBC's presentation did not present sufficient information about strategic alternatives, the Court must have also concluded that Moelis's presentation—which was not materially different from RBC's—was equally insufficient. Similarly, if, as the Court concluded, the Board should have further analyzed alternatives to a sale (Trial Op. at 73), both RBC *and* Moelis must have failed to provide the Board such analysis. Otherwise, the Board would have had adequate information regarding strategic alternatives to consider and would not have, according to the Court, breached its fiduciary duty.

2. RBC and Moelis Worked Side-By-Side Throughout the Sales Process

The Court found that "RBC created the unreasonable process and informational gaps that led to the Board's breach of duty." (Trial Op. at 69.) But RBC and Moelis were co-advisors who worked side-by-side from start to finish to establish and execute the sales process, and to ultimately close the Warburg transaction.[24] If the process had flaws or there were "informational gaps," as the

[24] *See, e.g.,* JX 258 (Email Regarding Process); JX 405 (Email Discussing Timing of Sales Process); JX 524 (Email Discussing CDR Bid).

Court found, Moelis must logically shoulder the problems found by the Court just as much as RBC.

First, RBC and Moelis were retained for the same purpose, at the same time, through the same letter of engagement.[25] The co-advisors worked collaboratively on all aspects of initiating the sales process. Together, they (i) structured the sales process,[26] (ii) set the strategy and the timing of the sales process,[27] and (iii) created a list of potential buyers to contact.[28]

Second, Moelis was actively involved in executing the plan that the co-advisors created. Moelis communicated with potential buyers both before and

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[25] *See, e.g.,* JX 224 (Dec. 23, 2010 Minutes); JX 280 (Engagement Letter); *see also* Second Am. Complaint at ¶ 73 ("RBC and Moelis were obliged under their engagement agreement, upon request, to 'confirm their understanding of the Company's acquisition criteria, and update this criteria as appropriate during the course of the assignment.'").

[26] *See, e.g.,* JX 224 (Dec. 23, 2010 Minutes) (Moelis "would be very close to the process to ensure both the fact and the appearance of an appropriate and robust auction process"); JX 243 (Email Proposing Structure of Sale Process); JX 249 & JX 250 (Email Attaching Moelis and RBC Board Presentation Regarding Sales Process and Timeline); JX 253 (Email Discussing Possible Sale Structure); JX 258 (Email Regarding Process); JX 280 (Engagement Letter).

[27] *See, e.g.,* JX 243 (Email Proposing Structure of Sale Process); JX 249 & JX 250 (Email Attaching Moelis and RBC Board Presentation Regarding Sales Process and Timeline); JX 258 (Email Regarding Process); JX 405 (Email Regarding Timing of Sales Process).

[28] *See, e.g.,* Trial Tr. III 822:2-17 [Shackelton] (Moelis and RBC created list of potential buyers and funds involved in the EMS process to contact); JX 258 (Email Regarding Process); JX 282 (Email Updating Sales Process Status) ("RBC/Moelis team has reached out to 24 private equity buyers"); JX 379 (Email Regarding "Next Steps" Call).

after the sales process began.[29] Moreover, Moelis and RBC constantly exchanged information about their communications with potential buyers, such that even if Moelis was not involved in a particular communication, Moelis was aware of when, and why, potential buyers declined to submit a bid.[30]

Third, the Board relied on both RBC and Moelis for information and advice throughout the sales process.[31] Moelis communicated directly with the Directors, offering updates and advice.[32] Both advisors participated in all of the

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[29] *See* Trial Tr. Vol. III 821:24-822:17 [Shackelton]; JX 179, JX 189, JX 190, JX 191, JX 192 (emails discussing outreach efforts). Moelis also helped prepare the "Confidential Information Memorandum" that provided potential buyers with information about Rural/Metro and its growth assumptions, and prepared presentations for Rural/Metro to use with bidders. Second Am. Complaint at ¶¶ 76, 81; Pl. Pre-Trial Br. at 16 ("RBC and Moelis worked with management to develop presentation materials for potential acquirers."); JX 258 (Email Regarding Comments to the CIM); JX 298 (CIM prepared by both Moelis and RBC); JX 328 (Email Chain Discussing Board Presentation); JX 331 (Board Presentation prepared by both Moelis and RBC).

[30] *See, e.g.,* JX 313 (Email Regarding Bidder Interest); JX 320 (Email Chain Referencing Harding Call to Munoz); JX 332 (Email Update Between RBC and Moelis); JX 257 (Email Regarding Possible Bid); JX 281 (Email Regarding Bidder Interest); JX 292 (Email Regarding Bidder Interest).

[31] *See* Trial Tr. Vol. III 765:12-766:6 [Walker]; 824:22-825:3 [Shackelton] (Directors were in constant contact with both Moelis and RBC); JX 309 (Email Requesting Meeting About Bids); JX 433, JX 434, JX 442 (Emails Seeking Advice About Requesting Higher Bid); JX 491 (Email Concerning Communications About Sales Process); see also Pl. Pre-Trial Br. at 3 ("[Directors], RBC, and Moelis orchestrated the prompt sale of the Company.").

[32] *See* JX 309 (Email Seeking Advice); JX 433 (Email Seeking Advice on Bid Amount).

same Board meetings and presentations relating to the sales process.[33] Those meetings featured presentations jointly created by Moelis and RBC that outlined the advisors' key timing and strategy points.[34] Plaintiff herself used this point in her complaint to support her argument that Moelis aided and abetted a breach of fiduciary duty: "Moelis and RBC aided and abetted th[e] breach of fiduciary duty. Moelis's presentation materials were a fraud on the Board, in which RBC willingly participated." (Second Am. Complaint at ¶ 16.)

Finally, Moelis was actively involved in the final negotiations with Warburg (including, as discussed below, Plaintiff's allegation that Moelis acted as the "tipper" of confidential negotiating information to Warburg).[35] And, after Warburg submitted its final bid, Moelis, like RBC, presented a fairness opinion to the Directors before they voted on the Warburg offer.[36]

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[33] *See* JX 331 (Email Chain Regarding Board Update Materials); JX 388 (Feb. 22, 2011 Minutes); JX 417 & JX 418 (Mar. 15, 2011 Minutes and Presentation); JX 472, JX 474 (Mar. 23, 2011 Minutes and Presentation); JX 522 (Mar. 26, 2011 Minutes); JX 554 (Mar. 27, 2011 Minutes).

[34] *See* JX 250 (RBC and Moelis Organizational Materials); JX 258 (Email Regarding Process); JX 331A (RBC and Moelis Summary of Initial Indications of Interest); JX 328 (Email Regarding Board Update Materials).

[35] *See* JX 491 (Email Regarding Sale Process); JX 405 (Email Chain Discussing Timing and Negotiations of Sale Process); JX 512 (Email Chain Discussing Negotiations with Warburg); JX 563 (Email Celebrating Sales Process).

[36] *See* JX 544 (Moelis Fairness Presentation to Board).

3. Moelis Did Not Provide the Directors with a Preliminary Valuation

The Court found that RBC knew that the Directors were uninformed about value because RBC provided only one preliminary valuation analysis, on December 23, 2010, and did not provide another valuation until the night of March 27, 2011. (Trial Op. at 70, 74.) It further found that because RBC did not provide the valuation presentation earlier, "RBC was not prepared to discuss valuation at critical meetings in March 2011." (Trial Op. at 62). The exact same analysis applies to Moelis. Moelis provided a preliminary financial analysis in its December 23, 2010 presentation to the Board, but did not provide a further valuation to the Board until, simultaneous with RBC, the night of March 27, 2011.[37] Moreover, on the issue of providing an interim assessment of value, we note that Moelis was hired, in part, to ensure that there were no conflict of interest issues should RBC provide staple financing.[38] Thus, on this issue, the position of RBC and Moelis is, at a minimum, the same.

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[37] JX 226A (Moelis Presentation Regarding Strategic Alternatives); JX 549 (Moelis Fairness Opinion Presentation); Harding Dep. II Tr. at 98:10-19; *See* Oral Argument Tr. at 58:17-24 (Plaintiff argued that both RBC and Moelis presented their valuations to the Board with too little time for the Board to fully consider them).

[38] *See* JX 224 (Dec. 23, 2010 Minutes) (Moelis "would be very close to the process to ensure both the fact and the appearance of an appropriate and robust auction process" and "should be in a position to deliver a customary fairness opinion'").

4. Moelis Changed its DCF Valuation To a Range That Was Lower than RBC's Range

The Court found that RBC "manipulated" its DCF valuation downward, resulting in a presentation to the Board that reflected an artificially low value of Rural/Metro. (Trial Op. at 70, 73-74.) The record shows that, here as well, RBC and Moelis were similarly situated.

On March 24, 2011, Moelis circulated a draft fairness opinion presentation that reflected a DCF valuation range of $18.53 to $23.42.[39] Three days later, Moelis's final DCF valuation range was $15.67 to $21.19, which was lower than RBC's DCF range of $16.28 to $21.07.[40] The Court found that Moelis's changes were "debatable" and "had the effect of lowering the range of fairness and making the merger price look more attractive." (Trial Op. at 28 n.1.)

Similarly, Plaintiff's expert, Kevin Dages, argued that Moelis's March 27 valuation was "fundamentally flawed" and did not accurately reflect Rural/Metro's true value.[41] And Plaintiff's counsel argued both before and after trial that Moelis's valuation was incorrect:

- "Moelis and RBC had no compunction about Moelis presenting an artificially lowered DCF range." (Second Am. Complaint at ¶ 9; *see also id.* at ¶¶ 105-116.)

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[39] JX 492A (Moelis Valuation Committee Presentation).

[40] JX 549 (Moelis Fairness Opinion Presentation); JX 548A (RBC Fairness Opinion Presentation).

[41] JX 718 (Revised Expert Report of Kevin F. Dages ("Dages Reports") at 3.

- “Moelis’s manipulations of the numbers between Thursday and Sunday are highly questionable and, in certain respects, misleading and perhaps unprecedented.” (Pl. Pre-Trial Br. at 25.)[42]

- “Moelis delivered a midnight Board presentation purporting to show that Rural/Metro’s signature new strategy of serial acquisitions had no material value – a conclusion at odds with Rural/ Metro’s projections and marketing materials, as well as the uniformly positive reception of the strategy by investors and analysts.” (Pl. Pre-Trial Ans. Br. at 3.)

- “[W]e think Moelis did [the valuation] wrong.” (Oral Argument Tr. at 59:22-60:2.)

This was, of course, a critical issue for Plaintiff in her trial presentation. If the Board had appropriately relied upon a good faith fairness opinion rendered by Moelis, it is difficult to see how the Court could have concluded that the Directors breached their fiduciary duties—regardless of any concerns about RBC’s conduct. This is because the receipt of a “reliable fairness opinion from a *sufficiently independent financial advisor* [is] . . . evidence upon which [a] [c]ourt may rely to determine whether the board was adequately informed about whether a particular offer was fair.” *Frank v. Elgamal*, 2014 WL 957550, at *21 (Del. Ch. Mar. 10, 2014) (emphasis added); *see also Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 985 (Del. Ch. 2000) (“the director defendants are not obligated to do anything more in order to fulfill their

[42] *See also* Second Am. Complaint at ¶ 6 (“The Board did not know that Moelis had spent the last 48 hours revising its fairness presentation to make the transaction look fair.”); *id.* at ¶¶ 105-116 (describing the actions and omissions by Moelis at the eleventh hour that produced an incorrect valuation analysis).

duty of care than rely on a fairness opinion prepared for and requested by the directors and fully disclose it to the stockholders").[43] Thus, if Moelis was "sufficiently independent," the Directors could not have breached their fiduciary duties because they relied on Moelis's fairness opinion.

Plaintiff herself recognized the importance of proving that Moelis was conflicted when, after Moelis had already settled, Plaintiff explained in her pre-trial reply brief that she had to "summarize Moelis' conflict and conduct to illustrate why the individual defendants could not rely in good faith on Moelis' midnight fairness presentation." (Pl. Pre-Trial Ans. Br. at 3 n.1.) The Court also recognized that the Board could not have breached its fiduciary duty if Moelis was a disinterested advisor when it described how the sales process should have played out *had the Board received disinterested advice*. (Trial Op. at 73-73.)

5. Moelis Had Some of the Same Incentives as RBC

The Court found that RBC "fell victim" to certain incentives that motivated it to push too hard to close the Warburg deal, and, consequently, motivated RBC to manipulate its valuation downward to make the $17.25 Warburg

[43] *See also* 8 *Del. C.* § 141(e) (a director "shall, in the performance of such [director's] duties, be fully protected in relying in good faith ... upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation").

offer look more attractive. (Trial Op. at 60, 71.) But again, the Court's reasoning applies with equal force to Moelis. Moelis, like RBC, had a contingent fee arrangement with Rural/Metro, and stood to earn its sales transaction fee only if the sale to Warburg closed.[44] Moelis also stood to gain a reputational boost for closing the Rural/Metro sale to Warburg.[45] Moelis was actively involved in working to close the sale in the final days, and pushed just as hard as RBC to get the deal done.[46]

6. Plaintiff Argued that Moelis Provided the "Tip" to Warburg, not RBC

The Court found that Rural/Metro's "bankers" provided Warburg with internal information from the Rural/Metro boardroom that helped Warburg in negotiations, and further found that failure to inform the Board of this "tip" contributed to the Board's breach of fiduciary duty. (Trial Op. at 61-62.)

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[44] JX 280 (Engagement Letter); *see also* Pl. Pre-Trial Br. at 43 ("Moelis was similarly conflicted by its contingent fee arrangement"); *id.* at 48 ("the evidence will show that RBC and Moelis were keenly aware of the fees . . . would accrue from a consummated transaction"); Pl. Pre-Trial Ans. Br. at 3 ("Moelis was incentivized throughout to earn a contingent fee of approximately $3 million").

[45] *See* JX 568 (Mar. 28, 2011 Email) ("hopefully we can ride this mojo to bag a few more this spring"); *see also* JX 566 (Mar. 28 2011 Email); JX 567 (Mar. 28, 2011 Email); JX 573 (Mar. 28, 2011 Email Chain); Pl. Pre-Trial Br. at 48 ("the evidence will show that RBC and Moelis were keenly aware of the . . . commercial benefits that would accrue from a consummated transaction"); Pl. Pre-Trial Ans. Br. at 3 ("Moelis was incentivized throughout to earn . . . professional credit for consummating a deal").

[46] *See* JX 484 (Mar. 23, 2011 Email; JX 490 (Mar. 24, 2011 Email); JX 491 (Mar. 24, 2011 Email); JX 512 (Mar. 25, 2011 Email); *infra* Part III.B.6.

Significantly, the Court chose not to make a finding about which of the "bankers" provided this information. At trial, there was no evidence whatsoever that RBC provided this information. Indeed, Plaintiff actually argued that Moelis—not RBC—was the "tipper."

First, Marc Daniel—the only RBC banker authorized to talk to Warburg at the time—testified that he did not provide the internal information at issue.[47] Plaintiff presented no evidence that Daniel did so. Plaintiff's counsel did not even attempt to cross-examine Mr. Daniel at trial on this subject.

Second, the Warburg email summarizing the internal Rural/Metro information was sent by Sean Carney (Warburg) to his boss only a few hours after Richard Harding (Moelis) told Director Chris Shackelton that he had a conversation with Mr. Carney that day regarding the sales process and Warburg's bid.[48] Plaintiff used this evidence to support its position, prior to trial, that the internal information was provided to Warburg by Moelis—not RBC. (Pl. Pre-Trial Br. at 20.)

Finally, post-trial, after settling with Moelis and without any evidence to support an argument that RBC provided Mr. Carney with the information,

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[47] Daniel Dep. Tr. at 254:8-255:19, 256:26-257:5.

[48] JX 494 (Mar. 24, 2011 Email); JX 491 (Mar. 24, 2011 Email); *see also* Harding Dep. II Tr. at 232:9-21 (discussing call with Mr. Carney relating to Warburg's bid price).

Plaintiff's counsel did not push their "tipping" argument, telling the Court that it was "not [their] theory of the case." (*See* Oral Argument Tr. at 111:13.) This is because there was nothing to suggest that RBC provided the "tip."

Because the Court found that the "tip" to Warburg contributed to the Directors' breach of fiduciary duty, and because Plaintiff claimed that Moelis—not RBC—was responsible for the "tip" (as the Court must have recognized when it named the "bankers" as the tippers, and not "RBC"), Plaintiff cannot reasonably assert that Moelis is not a joint tortfeasor with respect to the allegations of "tipping."

IV. RURAL/METRO'S EXCULPATORY PROVISION DOES NOT AFFECT THE DIRECTORS' STATUS AS JOINT TORTFEASORS

Plaintiff incorrectly asserted in her post-trial briefs that the exculpatory provision in Rural/Metro's Certificate of Incorporation (JX 163), which limits the monetary liability of directors in certain circumstances, precludes a finding that the Directors are joint tortfeasors.[49] The exculpatory provision protects the Directors only from personal monetary liability *to the corporation or its stockholders*, and only if the Directors breached their duty of care.

First, there has been no finding that the Directors breached only their duty of care and acted in good faith and are therefore entitled to exculpation. *Second*, Plaintiff is estopped from invoking Rural/Metro's exculpatory provision,

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[49] *See* Pl. Post-Trial Br. at 62-63; Pl. Post-Trial Reply Br. at 35-36.

having repeatedly argued that the Directors' conduct constitutes bad faith and, for certain Directors, a breach of the duty of loyalty. Plaintiff argued that the Board should not be permitted to use the exculpatory provision to shield itself from monetary liability, stating emphatically in her pre-trial brief that the Directors "will not be able at trial to satisfy their burden of proof to establish exculpation." (Pl. Pre-Trial Br. at 47.) Plaintiff asserted throughout the litigation that the Directors were self-interested and/or engaged in bad faith conduct, both of which prevent (as Plaintiff argued pre-trial) application of an exculpation defense. Plaintiff was then able—presumably on the strength of these allegations—to extract a multi-million dollar monetary settlement from the Directors. The Court relied upon and adopted certain of those arguments in rendering its decision. Plaintiff should be estopped from taking a contrary position now. (See *infra* Part II.) Finally, there is nothing in section 102(b)(7) that permits a plaintiff shareholder to enforce the exculpatory provision in defense of a contribution claim brought by a purported joint tortfeasor. Indeed, such a result would contravene the policy of allocating liability among joint tortfeasors set forth in the DUCATA.

A. The Court Has Made No Findings that the Directors Would Have Carried their Burden and Prevailed on their Exculpation Defense

The Court has found that exculpatory provisions provide directors only with an affirmative defense, which, if successful, defeats a plaintiff's bid for monetary recovery from the directors. (*See* Trial Op. at 43 (characterizing

exculpatory provision as an affirmative defense).)[50] Here, the Court did not find that the Directors would have been able to assert the exculpatory provision as an affirmative defense had they stayed in the litigation. On the contrary, the Court found (at Plaintiff's urging) that certain of the Directors engaged in self-interested conduct.

The exculpatory provision only protects the Directors if they breached their duty of care and acted in good faith. (8 *Del. C.* § 102(b)(7).)[51] The Court declined to determine whether the Directors' conduct involved only a breach of the duty of care, or if their conduct involved a breach of the duty of loyalty or some other wrongdoing (*e.g.,* bad faith) that would have precluded the Directors from asserting the exculpatory provision to shield them from monetary liability. (Trial Op. at 49, 64.) And without a finding that the Directors breached only their duty of care, there are absolutely no grounds for applying the exculpatory provision to find that the Directors are not joint tortfeasors.

B. Plaintiff Is Estopped From Arguing that the Directors' Conduct Permits Application of the Exculpatory Provision

Any suggestion that the Directors could have successfully asserted the exculpatory provision would be at odds with Plaintiff's pre-trial argument and the

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[50] *See also Malpiede,* 780 A.2d at 1092 (exculpatory provision "is in the nature of an affirmative defense") (citations and internal quotation marks omitted).

[51] *See also* JX 163 (Certificate of Incorporation); *Malpiede*, 780 A.2d at 1093.

Trial Opinion itself, which is replete with findings about the Board's conduct. There is no unfairness to Plaintiff in using these findings in the contribution analysis—these were factual arguments that the Plaintiff successfully asserted at trial (notwithstanding RBC's presentation of legal and factual arguments aimed at defending the conduct of the Directors).

Bad faith conduct is not subject to exculpation under Delaware law. Bad faith conduct exists (although not exclusively) if a director "intentionally acts with a purpose other than that of advancing the best interests of the corporation . . . or [the director] intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) (internal quotation omitted). Such director "misconduct is properly treated as a non-exculpable, non-indemnifiable violation of the fiduciary duty to act in good faith." *Id.* at 66. The duty of loyalty requires that a director put the interests of the shareholders above his own self-interests. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361-62 (Del. 1993), *decision modified on reargument*, 636 A.2d 956 (Del. 1994). A "[c]lassic example[] of director self-interest in a business transaction involve[s] a director . . . receiving a personal benefit from a transaction not received by the shareholders generally." *Id.* at 362.

Here, the Court found that, because there were "undisclosed conflicts of interest . . . the [Directors'] decision to initiate a sale process in December 2010 fell outside the range of reasonableness." (Trial Op. at 52.) There are no findings in the Trial Opinion that suggest the Directors did or would have met their burden of demonstrating that they were entitled to assert an exculpatory provision to shield themselves from monetary liability had they remained in the litigation. The Court's findings about the conduct of the individual directors, which were the subject of vigorous dispute at trial, are summarized below.

1. Board and Special Committee Chairman Chris Shackelton

Plaintiff argued that Shackelton had an "agenda that reflected the unique, undisclosed interests of Coliseum." (Pre-Trial Br. at 2.) According to Plaintiff, this "agenda" caused Shackelton to inappropriately wield his significant influence with the Directors to push for a sale of the Company. (*Id.*) The Court agreed with Plaintiff, finding that Shackelton's "personal circumstances [] inclined [him] towards a near-term sale" of the Company. (Trial Op. at 3.) The Court found that, as argued by Plaintiff, Shackelton's undisclosed personal interest arose as a result of his connection to Coliseum Capital Management ("Coliseum"), a hedge fund that Shackelton co-founded and managed and that had a 12% ownership stake in Rural/Metro. (*See* Pre-Trial Br. at 2; Trial Op. at 3; JX 611 (Proxy Statement) at 94.) The Court found that Coliseum (and by extension,

Shackelton) strongly favored a sale of the Company for several self-interested reasons. (Trial Op. at 3-4.)

The Court further adopted Plaintiff's argument that Shackelton, motivated by Coliseum's undisclosed interests, used his considerable influence on the Board to manipulate the sales process and push hard to sell the Company. (*See* Trial Op. at 23, 8-12, 14, 15, 53[52]). The Court also adopted Plaintiff's argument that, as part of his push to sell the Company, Shackelton misrepresented to the Special Committee his views on the value of the Company. (*See* Trial Op. at 32-34.)

The Court's findings—many of which were contrary to Shackelton's sworn testimony at trial—plainly indicate that the Court believed Shackelton had undisclosed self-interests that he placed above the interests of the shareholders. There can be no suggestion that the Court's findings actually support an exculpation affirmative defense for the purpose of preventing a reduction in RBC's damages.

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[52] The Trial Opinion's heading titles alone are clear indicators of the Court's belief that Shackelton was a major player in what the Court perceived as an inappropriate and ill-timed push for the sale of the Company. (*See* Trial Op. at 8 ("Shackelton Takes Control"); *id.* at 12 ("Without Board Approval, Shackelton and RBC Put the Company in Play"); *id.* at 15 ("Shackelton and RBC Receive First Round Bids").)

2. Director Eugene Davis

Plaintiff also alleged that Director Eugene Davis had an "undisclosed personal interest in selling Rural/Metro." (Pre-Trial Br. at 2, 5.) The Court agreed with Plaintiff. (Trial Op. at 3 (Davis had "personal circumstances that inclined [him] towards a near-term sale").) Specifically, the Court found that Davis planned to exit the Rural/Metro Board by April 2011, and that a sale of the Company before he exited would (i) allow him to "exit on a professional high note" and (ii) keep over $200,000 of Rural equity that would vest on a change of control, but which he would lose if he resigned voluntarily." (*Id.* at 5; Pre-Trial Br. at 13-14.)

According to the Court, these undisclosed interests motivated Davis to push for a sale. (Trial Op. at 5, 7, 76-77.) For example, the Court found that it was Davis who pushed the Special Committee to stick to its original sales process timeline. (Trial Op. at 76-77.) The Special Committee decided not to change its sale timeline to accommodate potential bidder CD&R—a decision that the Court found contributed to the unreasonableness of the sale process. (*Id.*) There can be no suggestion that the Court's findings actually support an exculpation affirmative defense for the purpose of preventing a reduction in RBC's damages.

3. Director, CEO, and President Michael DiMino

With respect to Director, CEO, and President Michael DiMino, the Court found, consistent with Plaintiff's allegations, that DiMino had "personal circumstances that inclined [him] towards a near-term sale," namely, that he wanted to continue managing the Company for its eventual buyer. (Trial Op. at 3; Pre-Trial Br. at 3.) The Court found that DiMino began pushing hard for a sale of the Company after realizing that his relationship with the Board, and thus his job security, was in jeopardy. (Trial Op. at 6-7 (quoting Davis Dep. Tr. at 144-45).)

The Court made a number of other findings about DiMino tied to its conclusions about the sale process. For example:

- The Court found that DiMino "became RBC's principal ally in the boardroom." (Trial Op. at 23.)
- The Court determined that it was inappropriate to focus on initiating a sale process without further examining other strategic alternatives (Trial Op. at 53, 71), but the day that RBC was orally retained as the Company's advisor, DiMino sent an email to RBC encouraging them to "get this baby sold!" (*Id.* at 11 (quoting JX 230).)
- The Court also found fault with DiMino's failure to provide to the full Board a presentation from J.P. Morgan, which recommended that Rural/Metro execute its growth strategy for at least a year before selling. (Trial Op. at 15, 57, 73.)

There can be no suggestion that the Court's findings actually support an exculpation affirmative defense for the purpose of preventing a reduction in RBC's damages.

4. The Board

The Court concluded that all six Directors made decisions that fell outside the range of reasonableness. (*See* Trial Op. at 49-64.) The Court found that three of the Directors—Shackelton, Davis, and DiMino—improperly "orchestrated the prompt sale of the Company" in their own self-interest. (Pre-Trial Br. at 3; *see also* Trial Op. at 7 ("The personal circumstances that confronted Shackelton, Davis, and DiMino [] helped shape the board room environment in which RBC operated."); *supra* Part IV.B.1-3.) The Court chose not to credit any of the testimony or contemporaneous documentary evidence that placed the conduct of these three Directors in context and would have supported a finding that they acted in conformance with their fiduciary obligations. Accordingly, there is no basis in the findings of the Trial Opinion for Plaintiff to argue that the conduct of these three Directors is subject to exculpation for the purpose of preventing a reduction in RBC's damages.

The same is true of the remaining three Directors—Earl P. Holland, Conrad A. Conrad, and Henry G. Walker.[53] The Court found that the *entire* Board

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[53] *See* Plaintiff's Pre-Trial Br. at 41 ("[t]he failure of [the Board] to follow up on red flags in the presentations of RBC and Moelis reflects more than a lack of due care"); *id.* at 6 ("the directors defaulted on their affirmative obligation to obtain timely information about the value of the Company and did not follow up on red flags in the bankers' eleventh-hour analysis").

"failed to provide active and direct oversight of RBC." (Trial Op. at 58.) It also found that the *entire* Board failed "to place meaningful restrictions on RBC." (*Id.* at 61.) This was despite explicit instructions from counsel Barry Brooks. As the Court explained:

> Although the Special Committee's counsel advised the committee on December 23 "that, if the Committee were to select RBC, the Committee would need to be especially active and vigilant in assuring the integrity of the [process]," JX 224 at 2, the Rural directors did not provide any guidance about when staple financing discussions should start or cease, made no inquiries on that subject, and imposed no practical check on RBC's interest in maximizing its fees.

(*See Id.* at 11, 61.) In other words, the Court found that the Directors failed "to act in the face of a known duty to act." *See*, *e.g.*, *In re Walt Disney Co. Derivative Litig.*, 906 A.2d at 67 (citation and internal quotation marks omitted). While different in character from the findings related to Directors Shackelton, DiMino, and Davis, there are no findings that would support the exculpation affirmative defense for the purpose of preventing a reduction in RBC's damages.

C. The Plaintiff Cannot Invoke Exculpatory Protection Bestowed upon the Directors by Delaware Law

Even assuming the Court had explicitly found the Directors breached only their duty of care, Plaintiff is incorrect that the exculpatory provision precludes a finding that the Directors and RBC are joint tortfeasors for contribution purposes.

First, an exculpatory provision provides directors with an affirmative defense, which, if successful, defeats a plaintiff's bid for monetary recovery from the directors for breach of their fiduciary duty. (*See* Trial Op. at 43 (characterizing exculpatory provision as an affirmative defense).)[54] Assertion of such an affirmative defense does not extinguish the underlying cause of action. *See Vroegh v. J & M Forklift*, 651 N.E.2d 121, 125-26 (Ill. 1995) ("[a]n affirmative defense does not negate the essential elements of the plaintiff's cause of action. To the contrary, it admits the legal sufficiency of that cause of action . . . .").

Indeed, the Court found here that the existence of an exculpatory provision did not extinguish the Directors' breach of fiduciary duty. (*See* Trial Op. at 42-49.)[55] Had the Court found that the exculpatory provision extinguished the breach, RBC could not have been found liable for aiding and abetting.[56] Because a successful exculpatory provision defense does not extinguish the underlying cause

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[54] *See also Malpiede*, 780 A.2d at 1092 (exculpatory provision "is in the nature of an affirmative defense").

[55] *See also* Trial Op. at 43 ("The presence of an exculpatory provision does not eliminate the underlying duty of care or the potential for fiduciaries to breach that duty."); *id* at 44 (a ruling that directors are not liable because of an exculpatory provision "does not equate to an implicit finding that the directors did not breach their duties"); *id.* ("Directors whose actions fail to pass muster under the applicable standard of review have breached their fiduciary duties, even though they are not liable for damages when exculpation applies.").

[56] The existence of an underlying breach of fiduciary duty is an essential element of an aiding and abetting a breach of fiduciary relationship claim. *See Malpiede*, 780 A.2d at 1096; Trial Op. at 33.

of action, it also does not extinguish the right to contribution. *See Vroegh*, 651 N.E.2d at 125 ("the fact that the defendant may ultimately be able to assert an affirmative defense fatal to plaintiff's action will not defeat a codefendant's contribution claim against him").

Second, the exculpatory provision provides the *Directors* with an affirmative defense to assert *against Plaintiff*. Section 102(b)(7) does not apply to contribution claims from joint tortfeasors. Instead, it authorizes a corporation to include in its certificate of incorporation a "provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages . . . . (8 *Del. C.* § 102(b)(7).) Rural/Metro's certificate of incorporation included this protection.[57] But Plaintiff provides no authority indicating that she may wield the Directors' affirmative defense to avoid an equitable reduction in damages. Nor did Plaintiff seek to preserve this claim in her settlement with the Directors.

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[57] Rural/Metro's Certificate of Incorporation (JX 163) provides that a director "shall not be liable to the Corporation or its stockholders for monetary damages" in certain circumstances. The text of this provision does not permit an interpretation that would allow shareholders to use the provision against a third party (*i.e.*, RBC) in a situation where the directors are already protected from monetary liability. *See Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990) ("A certificate of incorporation is viewed as a contract among shareholders, and general rules of contract interpretation apply to its terms."); *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) ("Delaware courts interpret contract terms according to their plain, ordinary meaning.").

The Court found that exculpatory provisions are intended to be used as a shield to protect directors from personal monetary liability to ensure that they do not become "overly risk-averse" out of fear that potentially risky business decisions might result in lawsuits subjecting them to payments. (Trial Op. at 46-47.)[58] RBC is seeking a reduction in damages; it is not seeking a payment from the Directors.[59] Application of the DUCATA here to reduce RBC's damages will not deprive the Directors of their shield—they are already shielded by the Settlement Stipulation. Declining to apply the DUCATA because of the exculpatory provision will, however, force upon RBC a grossly inequitable allocation of damages. Application of the DUCATA here is the only result that is consistent with the language and purpose of the statute, which requires that a joint tortfeasor have the ability to seek an allocation of fault and reduction of damages from another joint tortfeasor, or from the plaintiff (where the plaintiff has chosen to settle and release the joint tortfeasor from all claims, including contribution).

This result is consistent with the policy determinations made by the Delaware legislature in enacting the DUCATA and avoids larger, unanticipated consequences for the corporate law in this state. Applying the exculpatory

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[58] *See also Malpiede*, 780 A.2d at 1095 n.67 (8 *Del. C.* § 102(b)(7) was intended to protect a "director's personal wealth" and prevent risk averse behavior).

[59] *See Farrall,* 586 A.2d at 666, 668 (distinguishing between a claim for contribution and a reduction in damages).

provision in situations like this one would (contrary to the DUCATA or any other established Delaware law) make third-party advisors and other corporate actors, *including officers*, the guarantors of a board's duty of care. For example, if a court found a director and an officer liable for breach of the duty of loyalty, and awarded $10 million in damages, the officer would only have to bear half of the damages—$5 million. But, applying Plaintiff's argument, if that director and officer were instead found liable for breach of the duty of care, the same officer (having engaged in the same conduct that made him liable for only $5 million before) would have to bear the entire $10 million. Thus, the officer will act as a guarantor of the director's negligent or grossly negligent conduct—without the Delaware legislature ever having expressed an intent to institute this policy. Moreover, the officer would be denied the protection against having to bear more than his proportionate share of the liability under the DUCATA. This approach has nothing to recommend itself as a matter of public policy and impermissibly violates protections granted by the Delaware legislature in enacting the DUCATA.

Finally, Plaintiff cites to an article in support of its argument that the Directors are not joint tortfeasors because of the exculpatory provision. The article simply suggests that directors who breach their duty of care might not be "subject to contribution claims, given the absence of any underlying basis for a *monetary*

judgment against those directors."[60] Again, RBC is not seeking a monetary judgment against the Directors.[61] In fact, pursuant to the terms of the Settlement Stipulation and DUCATA § 6304(b), RBC cannot seek a monetary judgment for contribution from either the Directors or Moelis. Instead, RBC seeks, as is its right under the DUCATA, a fair and equitable reduction in damages, which requires no monetary contribution from the Directors.

V. RBC IS ENTITLED TO AN 87.5% REDUCTION OF ITS DAMAGES PURSUANT TO THE DUCATA

The DUCATA "mandate[s]" reduction of a non-settling tortfeasor's damages when a plaintiff releases another tortfeasor of liability. *Farrall*, 586 A.2d at 663. Here, Plaintiff released each of the Directors and Moelis from liability.[62] Plaintiff agreed in the release that she would reduce RBC's damages "to the extent of the pro rata share of [the Settling Defendants]."[63] As a result, RBC is entitled to a reduction of damages equal to the total pro rata share of each of the Directors and Moelis. *See* 10 *Del. C.* § 6304(b).

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[60] J. Travis Laster & Michelle D. Morris, *Breaches of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 Del. L. Rev. 71, 98 (2010) (emphasis added).

[61] *See Farrall,* 586 A.2d at 666, 668 (distinguishing between a claim for contribution and a reduction in damages).

[62] *See* Settlement Stipulation.

[63] *Id.* at ¶ 13.

The DUCATA mandates "contribution among tortfeasors on an equal pro rata share basis."[64] Thus, the contributive ratio for each tortfeasor is "determined by the number of tortfeasors commonly liable."[65] Each tortfeasor's pro rata share is determined by dividing the total damage award by the total number of tortfeasors. *See Valeant Pharm. Int'l*, 921 A.2d at 753-54 (where 11 of 12 directors settled, the non-settling director's pro rata share of liability was determined to be one-twelfth of the damages).[66] It is well-settled that "[t]he *pro*

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[64] Handbook of the 1938 National Conference of Commissioners on Uniform State Laws and Proceedings, *Report of Committee on Uniform Act Conferring Upon Joint Tortfeasors Discharging Liability the Right of Contribution From His Joint Tortfeasors*, 394 (1938); *Clark,* 377 A.2d at 368 (the DUCATA "was patterned, with only slight modification" from the Uniform Act); *see also* Charles O. Gregory, *Contribution Among Tortfeasors*, Ws. L. Rev. at 372 ("common liability among tortfeasors [is] usually determined by the number of parties to the claim for contribution. In other words, the pro rata shares of common liability are usually equal"); *Chilcote v. Von Der Ahe Van Lines*, 462 A.2d 536, 539 (Md. Ct. Spec. App. 1983) (pro rata share refers to numerical shares based on the number of tortfeasors).

[65] *Id.*

[66] *See also Global Link Logistics, Inc. v. Olympus Growth Fund III, L.P.,* 2010 WL 338214, at *6-7 (Del. Ch. Jan. 29, 2010) (finding that parties could not seek to apportion damage award based upon proportionate fault, but instead must seek, at an appropriate time, a pro rata, equal contribution from other tortfeasors); *Askanase v. Fatjo*, 148 F.R.D. 570, 575 (S.D. Tex. 1993) ("Title 10, § 6302 of the Delaware Code provides a right of contribution among joint tortfeasors, determined either by calculating equal pro rata shares or by taking into consideration the relative degrees of fault of the tortfeasors."); *Settlement in Joint Tort Cases*, 18 Stan. L. Rev. at 493 ("If the plaintiff has a cause of action for $10,000 dollars against two tortfeasors, the pro rata reduction rule merely puts him for settlement purposes in the same position as a plaintiff with two separate 5000-dollar causes of action, each against one of two separate tortfeasors.").

rata rule apportions an equal share of the liability to each defendant in a lawsuit." *In re Masters Mates & Pilots Pension Plan & IRAP Litig.,* 957 F.2d 1020, 1028 (2d Cir. 1992).[67] Indeed, "relative culpability is irrelevant" under the pro rata approach. *Id.* For example, when "a plaintiff settles with one defendant in a two defendant case, a judgment against the nonsettling defendant is reduced by one-half, regardless of whether the settling defendant was primarily or only minimally culpable." *Id.*

Delaware law does permit the finder of fact to deviate from this default rule where "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." (10 *Del. C.* § 6302(d).) But this procedure is narrowly circumscribed by 10 *Del. C*. § 6306(d) and limited to cases where a cross-complaint is filed and the parties actually litigate the issue of relative fault. *See Ikeda v. Molock,* 603 A.2d 785, 786-87 (Del. 1991).[68] Since relative fault has not been litigated in this matter[69], Delaware law requires the Court to apply the default

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[67] *See also Miller v. Apts. & Homes of N.J., Inc.*, 646 F.2d 101, 109 (3d Cir. 1981) ("tort-feasors whose conduct has caused a plaintiff a single injury should be equally liable . . . A rule of pro rata reduction achieves the goal of equality . . .").

[68] *See also Global Link Logistics, Inc.*, 2010 WL 338214, at *6 (where parties failed to litigate the issue of proportionate fault before entry of judgment, defendant could not later seek to apportion damage award based on proportionate fault).

[69] In fact, the Court specifically declined to allocate proportionate

rule set forth in the DUCATA and find liability on an equal basis among all tortfeasors.

Here, there are eight joint tortfeasors: Moelis, RBC, and Directors Christopher S. Shackelton, Michael P. DiMino, Eugene I. Davis, Earl P. Holland, Conrad A. Conrad, and Henry G. Walker.[70] Each tortfeasors' pro rata share equals 12.5%, and the aggregate share of the seven Settling Defendants equals 87.5%. Consequently, RBC's damages should be reduced by 87.5%—the total pro rata share of all settling joint tortfeasors.

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responsibility on an individual basis. (*See* Trial Op. at 49.)

[70] *See Valeant Pharm. Int'l*, 921 A.2d at 754. The Directors must be considered as six separate tortfeasors; they cannot be considered together as one entity. *See* 2 Treatise on the Law of Corporations § 9:5 n.2 (3d) ("Although directors can be sued individually for their misfeasance in office, it is not possible to sue the board as an entity."); *Flarey v. Youngstown Osteopathic Hosp.*, 783 N.E.2d 582, 584 (Ohio Ct. App. 2002) (A "corporation's board of directors is not an entity, separate from the corporation, that is capable of being sued. It cannot own property or sue in its own name. It is made up of individuals who can be held liable for corporate torts in their individual capacities only if they participated in the tortious conduct. . . . The law does not consider the body known as a corporation's board of directors to be its own corporate entity."); *Heslep v. Ams. for African Adoption, Inc.*, 890 F. Supp. 2d 671, 678-79 (N.D. W. Va. 2012) (it is a "well-settled principle that the corporate entity does not exist separate from its board of directors") (board is not a legal entity and "should not be named as a separate party").

CONCLUSION

For the foregoing reasons, RBC respectfully requests that, pursuant to the DUCATA, the Settlement Stipulation, and the Settlement Order, the Court reduce RBC's damages by 87.5%.

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