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Case No. 6350-VCL

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 REPLY BRIEF IN FURTHER SUPPORT OF ITS POST-TRIAL CONTRIBUTION BRIEF

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Defendant RBC Capital Markets, LLC ("RBC") respectfully submits this Reply Brief in Further Support of its Post-Trial Contribution Brief.

PRELIMINARY STATEMENT

RBC was entitled to contribution from each of the Directors[1] and Moelis before Plaintiff's settlement with those defendants. In that settlement, Plaintiff provided a release of not only her claims, but also a bar on all contribution claims by RBC against the Settling Defendants. DUCATA permits a plaintiff to compromise contribution claims in this manner, but only if the plaintiff agrees to a pro rata reduction of its claim against the non-settling defendant. In this way, Plaintiff was able to offer a complete and full release, thereby maximizing her settlement recovery. But in doing so, Plaintiff assumed the risk that she had not extracted full value for her claims in the settlement. This deliberate choice by Plaintiff was implemented by this Court in the order approving the settlement. While other states have made a policy decision not to impose contribution risk on a plaintiff in this manner, Delaware is different. DUCATA requires a pro rata reduction of the plaintiff's claim against the non-settling defendant. That is precisely what RBC is seeking here.

Rather than responding with statutory and case authority, Plaintiff's opposition is largely an exercise in attacking RBC by cutting and pasting sections

[1] All capitalized terms not defined herein have the same meanings as in RBC's Post Trial Contribution Brief (the "Opening Brief" or "Op. Br.").

of the Trial Opinion. But Plaintiff also attempts to reinvent her case, arguing—in stark contrast to all of her pre-settlement advocacy—that (i) none of the Directors' conduct was in bad faith or implicated the duty of loyalty and (ii) Moelis did not aid and abet the conduct at issue. This is nothing more than a cynical attempt to avoid the contribution obligation that Plaintiff willingly and knowingly undertook when she agreed to settle pursuant to DUCATA. Plaintiff was able to extract substantial value in doing so and should not now be permitted to walk away from her bargain.

Plaintiff also argues that DUCATA should not apply to intentional torts or, alternatively, that the Court should use the equitable doctrines of *in pari delicto* or unclean hands to deny RBC its right to contribution under DUCATA. But DUCATA applies, on its face, to all torts—intentional and unintentional. And there is nothing in DUCATA's statutory text or legislative history that supports Plaintiff's argument. Indeed, Delaware determined not to adopt a later revision to the Uniform Act that carved out intentional torts from its coverage. Moreover, the caselaw makes clear that neither doctrine is applicable to contribution claims, which necessarily involve claims between parties adjudged to be joint tortfeasors.

* * *

Plaintiff's post-trial effort to reinvent her case should be troubling to the Court. Plaintiff's theory about the conduct of the Directors and Moelis

completely undermines the theory of liability pleaded in her operative complaint, presented at trial, and ultimately accepted by the Court. Plaintiff now argues that the Board committed a simple breach of the fiduciary duty of care, which is subject to 102(b)(7) exculpation. Plaintiff further argues that Moelis did not engage in any tortious conduct. If Plaintiff had presented this theory at trial, the Court could not have reached the conclusions it did.

The Board began a sale process in late 2010. The Court found that in the absence of certain purported conflicts on the part of RBC, "whether the launch of an immediate sale process fell within the range of reasonableness would present a close call." (Trial Op. at 54.) The Court acknowledged that "there were identifiable benefits to initiating a sale process in December." (*Id.* at 55.) Indeed, by starting a sale process, Rural had not committed itself to do anything other than explore whether the Company could be sold at a price that was in the best interest of its stockholders. The Court nevertheless found that "Shackelton and RBC got too out in front of the Board, and RBC's advice was overly biased by its financial interests." (*Id.* at 56.)

Without any misconduct by Moelis, Plaintiff's theory simply does not make sense. Rural Metro retained Moelis, a completely unconflicted advisor, to act as co-advisor with RBC. Rural Metro did so to manage and protect against any conflict of interest. Moelis recommended that the Special Committee commence a

sale process, and in the absence of any bad faith or violations of the duty of loyalty, the Board cannot reasonably be accused of breaching its fiduciary duty of care in following advice untainted by conflict. It is also impossible to square Plaintiff's new argument that no member of the Board acted in bad faith with the Court's own finding that Mr. Shackelton (and Messrs. Davis and DiMino) engaged in self-interested conduct in determining to put the Company in play. If those independent directors acted in good faith relying on the advice of both of their expert advisors, it is difficult to understand how they could have committed a breach of the fiduciary duty of care in commencing a sale process.

The Board then engaged in a process with a full and fair auction that neither Plaintiff nor the Court criticized as a breach of fiduciary duty. Indeed, the Court explicitly found that the Special Committee's determination to continue with the sale process in February 2011 was within the range of reasonableness, notwithstanding "feedback that the strategy was not working." (Trial Op. at 57.)

At the end of that process, the Board made a decision to sell the Company. The Board did so in reliance upon fairness opinions from both RBC (whom the Court concluded was conflicted) and Moelis (whom Plaintiff now suggests did nothing actionable). The Board agreed to a transaction that provided fiduciary outs (with an appropriate breakup fee) that no party has criticized as deterring any bidder determined to bid more for the Company. No such bidder

emerged (even after the AMR transaction closed), and the Rural Metro transaction closed on June 30, 2011.

If the Board conducted itself in good faith and Moelis did nothing wrong, there is little, if any, basis to conclude that the Board committed a breach of the fiduciary duty of care. The Court found that RBC engaged in conduct tainted by conflict and submitted a "skewed valuation deck." (Trial Op. at 63.) From there, the Court concluded that 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.*) But the Board engaged Moelis to manage any conflict attendant to RBC. And Moelis provided a fairness opinion supporting the $17.25 price. Absent some misconduct on the part of Moelis, there simply could not logically have been any underlying breach of fiduciary duty by the Board. As the Court recognized (*see* Trial Op. at 46), the Board is entitled to rely on its advisors. And Moelis advised the Board that the transaction was fair. An independent Board acting in good faith should have been able to rely on that opinion.

Plaintiff presented a completely different theory in its operative complaint, all of its pre-trial filings, at trial, and in its post-trial advocacy. The Court's Trial Opinion (although carefully crafted as to the conduct of Moelis and the Board) accepted Plaintiff's theory of the case and found an underlying breach

by the Board. Plaintiff should not now be permitted to advance a new theory to avoid its contribution obligations under DUCATA.

ARGUMENT

I. RBC IS ENTITLED TO A PRO RATA REDUCTION IN DAMAGES

Plaintiff asserts that RBC is not entitled to a pro rata reduction in damages, and instead argues for a reduction based on relative degrees of fault—without ever explaining what the relative degrees of fault should be and why. Citing no supporting authority, Plaintiff simply asserts that DUCATA section 6302(d) "mandates that the Court consider [] 'relative degrees of fault.'" (Plaintiff's Answering Brief in Opposition to RBC's Post-Trial Contribution Brief ("Ans. Br.") [D.I. 376] at 30.) *First*, the Court has already issued an Order and Final Judgment expressly requiring a pro rata reduction in damages, and Plaintiff waived her right to assert that anything other than a pro rata reduction of damages is appropriate. *Second*, the statutory text of DUCATA and the commentary to the Uniform Contribution Among Tortfeasors Act (the "Uniform Act") are plainly at odds with Plaintiff's assertion.

In its Order and Partial Final Judgment approving the settlement between Plaintiff, Moelis, and the Directors, the Court ordered that "the damages recoverable against non-settling defendant RBC and any other alleged tortfeasor will be reduced to the extent of the pro rata shares, if any, of Moelis and the

Rural/Metro Defendants." (Order and Partial Final Judgment [D.I. 351] ¶ 20.) This decision is the law of the case, and Plaintiff has presented no reason to disturb the Court's judgment. *See Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990) ("[t]he law of the case is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation") (internal quotation marks omitted). Plaintiff submitted the Order and Partial Final Judgment (*see* Revised Order and Partial Final Judgment [D.I. 350]), and she does not dispute the well-established principle that pro rata apportionment requires an "equal distribution" of damages.

Moreover, having expressly agreed in the Settlement Stipulation to apply section 6304(b) and its equal distribution scheme, Plaintiff cannot now contend that a different provision and a different scheme (*i.e.*, relative degrees of fault) that was not preserved in the settlement agreement (or litigated at trial) should apply. *See Reliance Ins. Co. v. Doctors Co.*, 299 F. Supp. 2d 1131, 1155 (D. Haw. 2003) (objections "to an equal distribution among [the settling parties] for their common liability should have been raised at settlement" and are now "waived"), *aff'd sub nom. Reliance Ins. Co. v. Doctors' Co.*, 132 F. App'x 730, 730 (9th Cir. 2005) ("by settling, [the insurance company] could not overcome the presumption of equal fault established by Hawaii [contribution] law").

The DUCATA provision relevant here, where there has been a settlement and release of joint tortfeasors (*i.e.*, the Directors and Moelis), is section 6304, entitled "Release of 1 joint tortfeasor." Section 6304 provides for a reduction in damages "to the extent of the pro rata share of the released tortfeasor." 10 *Del. C.* § 6304(b). Plaintiff invoked this DUCATA provision in her settlement when she expressly agreed 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]

Neither section 6304(b) nor the Settlement Stipulation says anything about "relative degrees of fault." Despite her express agreement to reduce damages on a pro rata basis pursuant to section 6304(b), Plaintiff now tries to invoke section 6302(d). This provision requires consideration of "relative degrees of fault" only "[w]hen there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them." 10 *Del. C.* § 6302(d). The language of section 6302 plainly indicates that "equal distribution" is the baseline for determining pro rata shares, and relative degrees of fault need only be

[2] Settlement Stipulation ¶ 13.

considered when the issue is litigated and the court determines that an equal distribution would be inequitable.[3]

This plain reading of the statute is in accord with the intent of the Uniform Act, as expressed by the Committee on the Uniform Act (the "Committee"). The Committee explained that if a state adopts a provision similar to 6302(d), the provision should only apply when proportionate fault is raised between codefendants and actually litigated; otherwise, distribution must be on an equal, pro rata basis:

> If the principle set forth in this subsection [6302(d)] 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.[4] It

[3] Plaintiff notes that percentages of fault were apportioned in *Farrall v. A.C. & S. Co.*, 586 A.2d 662 (Del. Super. 1990). (Ans. Br. at 33.) Plaintiff fails to note, however, that in *Farrall* the issue of apportionment was litigated and expressly decided by a jury. Here, Plaintiff did not seek to have the factfinder make such a judgment. To the contrary, Plaintiff entered into a settlement requiring a pro rata allocation.

[4] Plaintiff argues a strained interpretation of this sentence in support of her assertion that equal distribution is not the DUCATA's mandated default rule. But aside from making little textual sense, Plaintiff's interpretation ignores the rest of the Committee's comment, set forth in full above, which makes clear that ***regardless of whether a state does or does not adopt section 6302(d)***, the default rule under the Uniform Act is equal distribution. Plaintiff notes that it is "remarkabl[e]" that RBC omitted from its compendium one page on which a portion of this quote appears. (Ans. Br. at 31 n.7.) RBC's omission (of a page that wholly supports RBC's argument) was an inadvertent administrative error, one that would have been promptly corrected had Plaintiff alerted RBC of this clerical mistake instead of needlessly disparaging RBC.

> may be noted that if this subsection is adopted, it is applied in specific cases only when the trial court concludes from the evidence that its application is warranted. Otherwise the contributive ratio will be determined by the number of tortfeasors commonly liable. The concluding sentence of this subsection is intended to preserve equal pro rata shares, as between joint and several judgment debtors, in the motion practice provided in section 5 of the Act [Contribution by Motion After Joint Judgment], unless the issue of proportionate fault is raised between the codefendants in the pleadings before trial and is litigated between them at that time.

Report of Comm. on Unif. Act Conferring Upon Joint Tortfeasors Discharging Liability the Right of Contribution From His Joint Tortfeasors, 394 (1938).

Plaintiff claims that she is aware of no Delaware case that does not "consider" proportionate fault, but then cites a Delaware case that does not apply proportionate fault. (Ans. Br. at 32 (citing *Necol v. Marriott Corp.*, 1991 WL 236931, at *1 (Del. Super. Nov. 12, 1991).) The *Necol* court found that no party proved at trial that a disproportion of fault among parties would render a pro rata distribution inequitable, and thus the court applied DUCATA's default equal distribution rule. Here, by the express terms of the Settlement Stipulation, Plaintiff agreed to bear the risk of contribution[5] and waived her rights to assert that a pro rata reduction should not apply. The Court accepted the Settlement and entered an

[5] If the Directors and Moelis had continued to be subject to contribution claims, Plaintiff would not have had the ability to extract over $10 million in settlement consideration.

Order and Judgment requiring a pro rata allocation of liability for contribution purposes.

II. THE DIRECTORS AND MOELIS SHARE A "COMMON LIABILITY" WITH RBC

Plaintiff argues that RBC may not avail itself of DUCATA because neither the Directors nor Moelis were shown to be joint tortfeasors. (*See* Op. Br. [D.I. 369] at 20-26.) 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 must share a "common liability." *See, e.g.*, *Nationwide Mut. Ins. Co. v. Kesterson*, 575 A.2d 1127, 1129-30 (Del. 1990). Having litigated the entire case arguing that all of the Defendants were liable, Plaintiff now asserts that no "common liability" exists.

A. The Directors Share a "Common Liability" with RBC

Plaintiff does not dispute there is a binding judicial determination establishing the Directors breached their fiduciary duty. Instead, Plaintiff argues that because RBC failed to show the Directors were not entitled to exculpation, there can be no common liability and the Directors cannot be considered joint tortfeasors. (Ans. Br. at 26-29.)

This argument fails for several reasons. *First*, Plaintiff does not have standing to raise exculpation. *Second*, even if Plaintiff is permitted to raise the Director Defendants' exculpation defense, Plaintiff, not RBC, had the burden to

prove the Directors breached only their duty of care. *Third*, by the logic of the Court's Opinion, the exculpatory provision does not extinguish the underlying claim (*i.e.*, breach of fiduciary duty) and thus does not preclude contribution.

Plaintiff does not dispute that exculpation is an affirmative defense. Nor does Plaintiff address RBC's argument that, as an affirmative defense, the exculpatory provision is a shield that may be used only by the *Directors* against *Plaintiff*. (*See* Op. Br. at 40-42.) Nevertheless, Plaintiff claims—without citing any authority—that she can use this affirmative defense against RBC to defeat its contribution claim. Plaintiff further claims—without citing any authority—that it is *RBC* who bears the burden of proving that the Directors were not entitled to assert this affirmative defense (now asserted by Plaintiff).

It is well established that "the exculpation afforded by a Section 102(b)(7) charter provision must be *affirmatively* raised by the director defendants." *See Emerald Partners v. Berlin*, 787 A.2d 85, 91 (Del. 2001) (citation omitted). Plaintiff cited no authority that would permit a plaintiff who agreed to a compromise that barred all contribution claims against a director defendant to then assert the director's exculpation defense to defeat a reduction in damages under DUCATA.

Even if Plaintiff is permitted to somehow step into the Directors' shoes and assert their affirmative defense against RBC, it would be Plaintiff's

burden, just as it would have been the Directors' burden, to establish that the exculpatory provision is applicable. Where "the standard of review places the burden of proof on the defendant [directors]" to prove that they did not breach their duty, the burden of establishing that they are entitled to exculpation also "'falls upon the [defendant] director[s].'" *Chen v. Howard-Anderson*, 87 A.3d 648, 676 (Del. Ch. 2014) (quoting *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *38-40 (Del. Ch. May 3, 2004)). Here, the Court found the sale to Warburg was subject to enhanced scrutiny and, as a result, that the burden would have shifted to the Directors (had they stayed in the litigation) to prove that the sale fell within the range of reasonableness. (Trial Op. at 38-39, 41.) Thus, the Directors would have had the burden of demonstrating that each Director acted in good faith. If Plaintiff now purports to assert that the Directors are not joint tortfeasors because the exculpation provision applies, Plaintiff must bear the burden. Plaintiff failed to make any such showing.

Moreover, this Court found that exculpation does not extinguish the underlying breach of fiduciary duty, which logically means that a statutorily required contribution remedy should also survive. (*See* Op. Br. at 39-40.) In *Vroegh v. J & M Forklift*, 651 N.E.2d 121, 125-27 (Ill. 1995), the Illinois Supreme Court discussed the distinction between a legal rule that precludes liability *ab initio* (in *Vroegh*, the fireman's rule) and an affirmative defense that does not extinguish

the underlying claim but simply defeats the plaintiff's right to recovery (like the exculpatory provision here). It concluded that a contribution claim will survive the latter, but not the former. *See id.* 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"). Plaintiff incorrectly suggests this distinction is inapplicable.

Plaintiff cites *Sears, Roebuck & Co. v. Huang*, a parental immunity case, for the proposition that a person immune from liability cannot be a joint tortfeasor. (Ans. Br. at 20-21.) But immunity is not the same as exculpation. Immunity, like the fireman's rule in *Vroegh*, extinguishes all liability and bars any claim from being filed. *See Sears, Roebuck & Co. v. Huang*, 652 A.2d 568, 571 (Del. 1995) ("the doctrine of parental immunity [] bars children from suing their parents"); *see also Federal Statutes and Regulations*, 112 Harv. L. Rev. 303, 310 (1998) ("[u]nlike a defense, an immunity precedes and supersedes the case on the merits"). According to the Court's Opinion, however, an exculpation defense does not extinguish the underlying breach. It was on this basis the Court found aiding and abetting notwithstanding the potential for exculpation. If the Directors had been immune from suit for breaches of the fiduciary duty of care, no claim would have existed against them, and RBC could not have aided and abetted their non-tortious conduct.

Plaintiff also cites *Lutz v. Boltz*, 48 Del. 197 (Del. Super. 1953), and *Diamond State Telephone Co. v. University of Delaware*, 269 A.2d 52, 55-56 (Del. 1970), as examples of "scenarios" where contribution was barred because one of the parties was protected from liability. (Ans. Br. at 27 n.5.) Neither "scenario" is analogous. *Lutz* involves a motor vehicle guest statute, which confers immunity on certain parties. *See Shiles v. Reed Trucking Co.*, 1995 WL 790974, at *2 (Del. Super. Dec. 5, 1995) (guest statute provides "immun[ity] from suit by operation of law"). *Diamond* involves the Workmen's Compensation Law, which, like immunity, operates to extinguish (and thus bar) any claim based on conduct that falls within the parameters of the Workmen's Compensation Law. *See Diamond*, 269 A.2d at 55-56 (payment pursuant to Workmen's Compensation Law "precludes any assertion . . . of common law liability"). Contribution was not permitted in these cases because liability was precluded *ab initio* by operation of law.

In contrast, contribution is not precluded in cases where a party is liable, but, by virtue of some affirmative defense, the party may be able to defeat liability to the plaintiff. *See Shiles*, 1995 WL 790974, at *2 ("courts have found that the common obligation which is essential to the right of one to contribution is the showing that the fellow tortfeasor *at some time* was liable with him for damage" (citation and internal quotation marks omitted)). Here, according to the Court, the

Directors breached their fiduciary duties. It makes no difference to determining the appropriate reduction of damages that the Directors, had they remained in the litigation, would have attempted to defeat liability by establishing entitlement to exculpation.

Plaintiff, as a shareholder of the Company, obtained the benefits identified in the Trial Opinion associated with limiting the liability of the Directors for breaches of the duty of care. Nevertheless, she is seeking to avoid the cost of that benefit—*i.e.*, the limitation of the Directors' liability—by recovering full damages for the Board's breach of the duty of care from a third party. As noted in RBC's Opening Brief, Plaintiff's proposed approach would make third-party advisors and other corporate actors, *including officers*, guarantors of a board's duty of care and subject to vastly disproportionate liability. (*See* Op. Br. at 41-42.) The Delaware General Assembly has never expressed any intent to shift liability in the manner advocated by Plaintiff. Moreover, this policy would impermissibly undermine the legislative policy set forth in DUCATA, which contains no carveout for fiduciaries or those who benefit from 102(b)(7) exculpation.

B. The Logic of the Court's Opinion Requires that Moelis Shared a "Common Liability" with RBC

Plaintiff contends that Moelis cannot be a joint tortfeasor because "Moelis was not complicit in any of the conduct . . . that formed the basis for RBC's liability" (Ans. Br. at 23) and "[t]he trial record does not establish that

Moelis acted for a corrupt purpose in preparing its valuation analyses . . . ." (*Id.* at 25.) Plaintiff's argument is meritless because the Court must have found (albeit implicitly) that Moelis committed tortious conduct.

The Court found that the Directors breached their fiduciary duty to shareholders, which damaged Plaintiff by "causing the Company to be sold at a price below its fair value." (Trial Op. at 72.) According to the Court, the below-value sale likely would not have occurred had "[a] disinterested board . . . benefitted from disinterested advice," but "RBC's self-interested manipulations" resulted in a low sale price. (*See id.* at 73-75.) Applying the Court's logical construct, Moelis *must* also have been a joint tortfeasor. Moelis gave the Directors advice consistent with the advice given by RBC, and Moelis provided the Directors a valuation opinion that was more supportive of the sale price than the valuation provided to the Directors by RBC. If Moelis had committed no tortious conduct, the Directors would have, in fact, "benefitted from disinterested advice," and could not be said to have breached their fiduciary duty. (*See* Op. Br. at 25 (citing cases holding that reliance on a good faith fairness opinion is sufficient to fulfill directors' duty of care).)

Indeed, the Directors were aware of RBC's potential conflicts. (*See* JX 224 at 2 (stating that "if the Committee were to select RBC . . . it should consider appointing a second firm" that would not be conflicted).) After noting

that "Moelis would not seek to provide financing for any transaction that may be pursued (thereby reducing the potential for a conflict of interest in its activities on behalf of the Company)," the Directors chose to hire both RBC and Moelis. (*Id.* at 1-2.)

Plaintiff fails to address meaningfully the fact that Moelis rendered expert advice concerning all of the critical determinations that the Court criticized in its Trial Opinion. RBC and Moelis "worked side-by-side from start to finish to establish and execute the sales process, and to ultimately close the Warburg transaction." (*See* Op. Br. at 19-22.) The Court found that the sale process was initiated without proper consideration of alternatives to sale and that RBC was too focused. (Trial Op. at 56.) The December 23 presentations of RBC and Moelis were not materially different, and both provided information regarding strategic alternatives. (*See* Op. Br. at 18-19.) The Court also found that "the Board's financial advisors did not provide the directors with valuation materials until the final board meeting," depriving the Board of an opportunity to examine these materials critically. (Tr. Op. at 63.) Moelis provided the Board with a valuation analysis simultaneously with RBC. (*See* Op. Br. at 23.) The Court found fault with RBC's valuation, but Moelis presented an even lower valuation. (*Id.* at 24-25.) Although Plaintiff identifies a number of purported failures to disclose RBC's alleged conflict of interest, it does not and cannot identify any substantive

difference between the critical deal services and advice provided by RBC and Moelis.

C. Plaintiff is Estopped From Arguing that the Directors and Moelis Are Not Joint Tortfeasors

Plaintiff does not dispute that, throughout this case, she has consistently asserted a position regarding the conduct of the Directors and Moelis that contrasts sharply with the position she takes in her Answering Brief. Nor does Plaintiff contradict any of the law set forth in RBC's Opening Brief regarding judicial estoppel. Plaintiff argues only that *Medical Center of Delaware, Inc. v. Mullins*, 637 A.2d 6, 7 (Del. 1994), "forecloses" RBC from using estoppel to establish joint tortfeasor status. (Ans. Br. at 22.) But *Mullins* did not involve, or even discuss, judicial, equitable, or quasi-estoppel. And Plaintiff does not attempt to explain how *Mullins* supports her argument.

Plaintiff has consistently taken the position that the Directors engaged in misconduct that established more than a breach of the duty of care. (Op. Br. at 12-13.) For example, Plaintiff specifically argued 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.) Similarly, in the operative Complaint, Plaintiff alleged that the Directors breached their duty of loyalty by deciding 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." (Verified Second Amended Complaint [D.I. 119] ¶ 15.)

Plaintiff now argues exactly the opposite in her Answering Brief. (Ans. Br. at 26-29.) This is precisely the kind of situation where quasi-estoppel should be applied. *See Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008) (applying estoppel to prevent a defendant from changing its position because "to allow [the defendant], the first party to specifically invoke the DUAA, to now change its position to advance its litigation aims would offend equitable principles"). Indeed, RBC would have materially changed its approach at trial and its post-trial advocacy if Plaintiff had amended her Complaint or otherwise informed the Court that she had changed her theory of the case and no longer intended to argue the Directors did anything other than breach their fiduciary duty of care and that Moelis did not aid and abet the alleged breach.

Plaintiff's former position that the Directors breached more than their duty of care and that Moelis was liable for aiding and abetting, ultimately led to a substantial settlement with the Directors and Moelis. Plaintiff claims that her settlement cannot be considered a benefit, but provides no support for her assertion and does not address the cases cited in RBC's Opening Brief explaining that

judicial estoppel is appropriate when the party used an inconsistent position and benefited from that position by inducing a favorable settlement.[6]

III. RBC IS NOT BARRED FROM SEEKING CONTRIBUTION

Plaintiff argues that contribution is unavailable to RBC for three reasons. *First*, according to Plaintiff, intentional tortfeasors such as RBC are barred from seeking contribution under DUCATA. (*See* Ans. Br. at 12-16.) *Second*, the doctrine of *in pari delicto* prohibits the Court from reducing the judgment against RBC. (*See id*. at 16-18.) *Third*, the related doctrine of unclean hands also precludes a judgment reduction. (*See id.* at 18-20.)

A. Delaware Law Does Not Bar RBC From Seeking Contribution

As Plaintiff concedes, "DUCATA does not expressly preclude contribution claims by intentional tortfeasors . . . ." (Ans. Br. at 15 (citing *Rep. of Comm. on Uniform Act*, at 393).) Indeed, the plain language of DUCATA applies to all tortfeasors. If a statute is "'clear and unambiguous, then the plain meaning of the statutory language controls.'" *Anderson v. Krafft-Murphy Co.*, 82 A.3d 696, 702 (Del. 2013) (quoting *In re Krafft-Murphy Co.*, 62 A.3d 94, 100 (Del. Ch. 2013)). Moreover, the comments to the Uniform Act expressly state that the Act

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[6] *See Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604-05 (9th Cir. 1996) (estopping the plaintiff from taking inconsistent positions when her first position resulted in a favorable settlement); *Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993) (ruling "[p]ersons who triumph by inducing their opponents to surrender have 'prevailed' as surely as persons who induce the judge to grant summary judgment").

"permits contribution among *all tortfeasors* whom the injured person could hold liable for the same damage or injury to his person or property," and joint tortfeasors are not limited to "merely negligent tortfeasors." *Rep. of Comm. on Uniform Act* at 393 (emphasis added).

Plaintiff provides no reason to read into DUCATA a distinction between intentional and negligent tortfeasors. Although Delaware courts have held that "the common law is not repealed by statute unless the legislative intent to do so is plainly or clearly manifested," *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1122 (Del. 2009), Delaware common law did not distinguish between negligent and intentional tortfeasors with respect to contribution because contribution was not permitted at all in Delaware before the adoption of DUCATA. *See, e.g.*, *Cox v. Del. Elec. Coop., Inc.*, 823 F. Supp. 241, 246 (D. Del. 1993) ("[t]he general rule of common law, and that operable in Delaware prior to 1949, is that . . . one putative defendant is not entitled to contribution from the other").

Thus, there is no basis in the common law preceding DUCATA for excluding intentional torts from its coverage. And there is simply no basis to create a distinction between negligent and intentional tortfeasors where the Delaware General Assembly chose not to do so when drafting DUCATA. The Delaware Supreme Court has recognized that Delaware courts "may not assume that an omission 'was the result of an oversight on the part of the General

Assembly.'" *Gen. Motors Corp. v. Burgess*, 545 A.2d 1186, 1191 (Del. 1988) (quoting *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982)).

If the legislature intended for intentional torts to be excluded from DUCATA, it could have easily done so. The amendments to the 1955 Uniform Act added a provision providing that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally [willfully or wantonly] caused or contributed to the injury or wrongful death." Unlike many other states, the Delaware General Assembly chose not to adopt this provision. *See, e.g.*, N.C. Gen. Stat. § 1b-1(c); C.R.S. 13-50.5-102(3); 12 Okla. Stat. § 832(C); Tenn. Code Ann. § 29-11-102(c); Fla. Stat. § 768.31(2)(c); O.R.C. § 2307.25(A). By declining to adopt this provision, the Delaware General Assembly opted not to differentiate between different classes of tortfeasors. *See, e.g.*, *Donajkowski v. Alpena Power Co.*, 460 Mich. 243, 256-58 n.14 (Mich. 1999) ("[t]he fact that our Legislature did not include this restriction in adopting its version of the model contribution act is significant to any good-faith effort to give meaning to the Legislature's intent").)

The cases cited by Plaintiff are inapposite. In the only relevant Delaware case she cites, *Eastridge v. Thomas*, 1987 WL 9605 (Del. Super. Apr. 13, 1987), the defendant (Thomas) intentionally struck the plaintiff with a beer bottle at the co-defendant bar. *Id.* at *1. Thomas contended that the bar was negligent in serving him and failing to prevent the assault, and this negligence

"proximately caused Thomas' assault on plaintiff Eastridge." *Id.* at *1-2. The court held that "no reasonable jury could conclude that any negligence of [the bar] was the proximate cause of Thomas' intentional tort" and granted summary judgment for the bar. *Id.* at *3. The court was not asked to consider, and, therefore, did not address whether DUCATA allows contribution to intentional tortfeasors.[7]

This case bears no factual similarities to a case involving an assault in a bar with a beer bottle. Not surprisingly, there are significant differences in the logic of *Eastridge* and the arguments at play here. As the Restatement notes, "[a]n intentional tortfeasor seeking contribution from a negligent tortfeasor whose only negligence consists in failing to prevent the intentional tortfeasor from injuring the plaintiff presents a difficult issue. The negligent person might understandably

[7] Plaintiff cites a footnote from *Alten v. Ellin & Tucker, Chartered*, 854 F. Supp. 283 (D. Del. 1994), but *Alten* held that "plaintiff's action is essentially an action for indemnity and as such should be dismissed." *Id.* at 287-88. The *Alten* court cited *Eastridge* as an indication of how the Delaware Supreme Court would rule with respect to *indemnity* claims by intentional tortfeasors: "this Court predicts that the Delaware Supreme Court would bar a party whose actions go beyond negligence *from an indemnity action implied-in-contract*." *Alten*, 854 F. Supp. at 289 n.5. Under Delaware law, however, "[a]ctions for indemnification and contribution are not the same." *Shinault v. Nationwide Mut. Ins. Co.*, 1995 WL 270089, at *1 (Del. Super. Mar. 13, 1995). Likewise, a federal court in *380544 Canada, Inc. v. Aspen Technology, Inc.*, 544 F. Supp. 2d 199 (S.D.N.Y. 2008), relied on *Eastridge* in dismissing a contribution claim. *Id.* at 233-34. The court reasoned that, unlike this case, because plaintiffs were not "coparties" with the defendants from whom they sought contribution, they could not seek contribution under DUCATA. *Id.*

claim that the intentional person should bear the entire loss." (Restatement (Third) Torts, Apportionment of Liability, § 23, cmt. l.) The reason for this distinction is proximate causation: in *Eastridge*, the intentional tortfeasor's actions were the proximate cause of the plaintiff's injury (not the decision of the bar to serve alcohol to the intentional tortfeasor). In such a circumstance, it is reasonable to deny contribution to the intentional tortfeasor, who had control over whether the injury occurred. But here, it was the Directors' purportedly erroneous decision to accept Warburg's bid—not RBC's purported aiding and abetting—that is the proximate cause of Plaintiff's alleged injury. Thus, this is not the case that the Restatement abstractly identifies as the type of claim in which contribution to an intentional tortfeasor may be inappropriate.[8]

B. Neither *In Pari Delicto* nor Unclean Hands Bars RBC's Right for Contribution

Plaintiff claims that the equitable doctrines of *in pari delicto* and unclean hands preclude RBC from obtaining contribution. (*See* Ans. Br. at 16-18.)

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[8] Plaintiff's citation to *Pringle v. Scarberry*, 1981 WL 383062 (Del. Super. Aug. 12, 1981) is of no assistance. In *Pringle*, a defendant accused of "willful or wanton" conduct in operating an automobile was permitted by the court to maintain a third-party contribution action based on negligence. *Id*. at *1. And in *Hollinger Int'l, Inc. v. Hollinger Inc.*, 2006 WL 1444916 (N.D. Ill. Jan. 25, 2006), also cited by Plaintiff, the district court applied Illinois law, which does not allow contribution for breach of fiduciary duty or intentional torts, in dismissing a third-party complaint for contribution. *Id*. at *2.

First, Plaintiff argues that the doctrines of *in pari delicto* and unclean hands apply because RBC engaged in "fraud." Plaintiff never pleaded that RBC engaged in fraud. The Court never found that RBC engaged in fraud, and no facts support such a finding. Second, the courts that have considered this argument have found that *in pari delicto* and unclean hands do not apply to contribution claims between joint tortfeasors under DUCATA as a matter of law. Third, even if *in pari delicto* and unclean hands could be applied, public policy considerations override Plaintiff's interests in barring contribution.

1. RBC Did Not Commit Fraud, Plaintiff Did Not Allege Fraud, and the Court Made No Adjudication of Fraud

Plaintiff's primary contention is that the doctrines of *in pari delicto* and unclean hands apply because RBC engaged in "fraud." (*See* Ans. Br. at 16-18.) As a threshold matter, Plaintiff waived the argument that RBC engaged in fraud. Plaintiff never alleged that RBC engaged in fraud even though she had ample opportunity to do so. Plaintiff took extensive discovery, amended her complaint twice, participated in pre-trial briefing and a four-day trial. At no point did Plaintiff allege fraud against RBC. Notably, the word "fraud" does appear in the Verified Second Amended Complaint. But Plaintiff alleged that ***Moelis committed a fraud*** upon the Board through their "presentations materials." In contrast, Plaintiff described RBC's materials only as "misleading." (*See* Verified Second Amended Complaint ¶ 16.) Indeed, even a casual reading of the operative

Complaint reflects that Plaintiff was primarily concerned with Moelis's conduct—not RBC's.

Now, for the first time in her Answering Brief, Plaintiff claims that RBC engaged in "fraud" and erroneously contends that the Court rendered a formal adjudication that RBC committed fraud. This argument is untimely and should be deemed improper and waived. *See Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, at *16 (Del. Ch. May 23, 2008) (finding that a party who raised an argument for the first time in the post-trial brief waived any right to assert the argument, reasoning that "[r]aising this argument in the post-trial briefs is unfair, too late, and does not preserve this argument. It is waived.").[9]

This is simply a transparent, after-the-fact attempt to manufacture a basis for end-running DUCATA and denying RBC its statutory right to contribution.

2. Neither *In Pari Delicto* nor Unclean Hands Bars Contribution

Notwithstanding the issue of fraud, Plaintiff is wrong that the doctrines of *in pari delicto* and/or unclean hands bar RBC's contribution claim. These doctrines do not apply to contribution claims between joint tortfeasors under

[9] *See also In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *22 n.117 (Del. Ch. Aug. 18, 2006) (finding that an argument first asserted in a **pre-trial brief** was waived due to the fact that discovery had already closed and the parties had formed their trial plans by the time the argument was first raised).

DUCATA as a matter of law. Other courts have considered and rejected the exact argument Plaintiff makes here.

In *In re Computer Personalities Systems, Inc*., 284 B.R. 415, 425-26 (Bankr. E.D. Pa. 2002), the court, interpreting Delaware law, held that the *in pari delicto* doctrine does not bar a contribution claim among joint tortfeasors that is authorized by DUCATA. The court noted that Delaware law provides for a right to contribution among joint tortfeasors through DUCATA. The court then held that a party's wrongdoing cannot bar a claim for contribution under the statute. It reasoned:

> Clearly any party's entitlement to invoke the right of contribution is premised on that party being liable for some wrongdoing. To apply the *in pari delicto* defense as [defendant] demands would amount to judicial abrogation of a legislative enactment. Since the statutes are specifically designed to allow one wrongdoer to recover from another, it would be counterintuitive to apply the *in pari delicto* doctrine to bar such claims . . . .

Id.

Similarly, in *Rosenbach v. Diversified Group, Inc.*, the New York Appellate Division held that *in pari delicto* did not bar a contribution claim under New York CPLR Article 14, which authorizes contribution between joint tortfeasors. 85 A.D.3d 569, 570-71 (N.Y. App. Div. 2011). The court reasoned that *in pari delicto* applies where the party seeks recovery for the wrongdoer's *own* injuries. It does not apply, however, to statutorily authorized contribution claims

"that seek reimbursement for the wrongdoer's payment of more than its alleged equitable share of the damages suffered by third parties." *Id.*

The reasoning in these cases applies equally here. Because DUCATA is designed to allow one wrongdoer to recover from another, it would be illogical to apply the doctrines of *in pari delicto* or unclean hands to bar such claims. Indeed, accepting Plaintiff's argument would effectively nullify DUCATA and "amount to judicial abrogation of a legislative enactment."

The cases on which Plaintiff relies are inapposite. Not a single case cited by Plaintiff involves the application of *in pari delicto* or unclean hands to a contribution claim or a claim brought under DUCATA. Furthermore, the overwhelming majority of cases involve circumstances where the plaintiff engaged in fraud or other criminal activities.[10] Moreover, in two of the cases cited by Plaintiff, the court expressly declined to apply the doctrine of *in pari delicto*.[11]

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[10] *See In re Am. Int'l Grp., Inc. Consol. Deriv. Litig.,* 976 A2.d 872 (Del. Ch. 2009) ("AIG II") (criminal co-conspirators who pleaded guilty or were convicted of crimes relating to illegal insurance schemes); *Patel v. Dimple, Inc.*, 2007 WL 2353155 (Del. Ch. Aug. 16, 2007) (an illegal business scheme where each party pleaded guilty to violations of Delaware's liquor law arising from their role in the scheme); *Morente v. Morente,* 2000 WL 264329, at *3 (Del. Ch. Feb. 29, 2000) (fraudulent transaction for an illicit purpose).

[11] *See In re LJM2 Co-Investment, L.P.*, 866 A.2d 762, 775-77 (Del. Ch. 2004) (refusing to apply *in pari delicto* where the "claim does not concern some activity that is per se forbidden by law, like . . . Ponzi schemes"); *Schleiff v. Balt. & Ohio R.R. Co.*, 130 A.2d 321, 328 (Del. Ch. 1955) (declining to apply *in pari delicto* due to the applicability of public policy exception).

The only case Plaintiff discusses in detail in her opposition actually supports RBC's position that *in pari delicto* and unclean hands do not apply. In *AIG II*, stockholders initiated a derivative suit on behalf of AIG to recover damages incurred by AIG in connection with a criminal bid rigging conspiracy between AIG and parties outside the AIG corporate family. The court applied *in pari delicto* and dismissed the suit noting that "there is no societal interest in making sure that each party gets its 'fair' share of the conspirators' societally unfair bargain." *AIG II*, 976 A.2d at 877.

In contrast, RBC is not a criminal conspirator whose agents have pleaded guilty or been convicted of a crime. RBC's right to contribution is a statutory right under DUCATA, whereas in *AIG II* no statutory relief was sought nor was DUCATA invoked. Instead, AIG (through its stockholders) sought to bring affirmative conspiracy and related claims against its criminal co-conspirators to recover damages arising out of their collective criminal conduct. This is far different from a party seeking post-trial contribution pursuant to a statutory right created by the Delaware General Assembly. Moreover, as discussed below, the court in *AIG II* found that other policy interests can outweigh those of public stockholders. Here, there are compelling public policy interests (like those embodied in DUCATA) that outweigh Plaintiff's interest.

3. RBC's Right of Contribution Is Not Barred Because Compelling Public Interests Outweigh Application of *In Pari Delicto* and/or Unclean Hands

Plaintiff claims that *in pari delicto* is not subject to the public policy exception because there can be no public policy interest that outweighs the class's interest in a full recovery. (Ans. Br. at. 17-18.)[12] Plaintiff is wrong. There are at least two public policy exceptions present here.

First, there is a public policy interest in applying statutes enacted by the legislature.[13] The State and persons subject to Delaware law have a continuing interest in maintaining the integrity of statutes. The Delaware General Assembly articulated the State's interest in this area by enacting DUCATA, which transformed the common law prohibition on contribution and provided fair apportionment of liability among joint tortfeasors. Applying *in pari delicto* in this case would substantially undermine DUCATA in cases involving alleged fiduciary misconduct in a Delaware corporation. This is because a court could always refuse to consider a contribution claim brought under DUCATA under some equitable

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[12] As Plaintiff notes, courts will not apply *in pari delicto* "when another public policy is perceived to trump the policy basis for the doctrine itself." (*See* Ans. Br. at 18.) However, Plaintiff fails to note that the unclean hands doctrine is subject to the same public policy exception. *See Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 523 (Del. Ch. 1998).

[13] *See, e.g.*, *Schleiff*, 130 A.2d at 328 (declining to apply *in pari delicto* because "to do so would be to override the public policy reflected in the Interstate Commerce Act").

principal. But as noted above, the Delaware General Assembly has not sought to limit this right in any way.

Second, there is a public policy interest in upholding the integrity of settlement agreements between private parties. Settlement agreements embody the finality of a dispute and serve important goals including the self-determination of outcomes, the perception of fairness from crafting flexible customized resolutions, and encouraging efficient use of judicial and economic resources. Here, Plaintiff voluntarily negotiated a settlement agreement that expressly limited the class's recovery in specific ways, and which has been approved and ordered by the Court.[14] Plaintiff negotiated this agreement with the understanding that the damages attributable to the settling defendants may be worth more than the agreed upon settlement.[15] Now, Plaintiff requests two bites at the apple by asking this Court to ignore the terms of that agreement and to bar RBC's right to contribution which is expressly preserved in the agreement. This would be a windfall for Plaintiff. Plaintiff provided the settling defendants with a bar on all contribution claims from RBC, thereby increasing their ability to demand maximum settlement value. In return, Plaintiff agreed to limitations on her recovery. It would

[14] *See* Settlement Stipulation.

[15] *See* Settlement Stipulation at ¶ 13.

undermine public policy interest in enforcing the terms of settlement agreements to permit a plaintiff to negotiate in this manner.

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%.

Dated: June 9, 2014

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