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IN THE SUPREME COURT OF THE STATE OF DEEAWARE

RBC CAPITAL MARKETS, LLC,

Defendant Below,
Appellant/Cross-Appellee

v.

JOANNA JERVIS,

Plaintiff Below,
Appellee/Cross-Appellant.

PUBLIC VERSION
Filed on: July 22, 2015

No. 140, 2015
Court Below: Court of Chancery,
of the State of Delaware,
Consolidated C.A. No. 6350-VCL

APPFLLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPEEEANT'S OPENING BRIEF ON CROSS-APPEAE

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES

OTHER AUTHORITIES

NATURE OF THE PROCEEDINGS

This is an appeal from a final judgment against RBC Capital Markets, LLC ("RBC") for aiding and abetting breaches of fiduciary duty by former directors of Rural/Metro Corporation ("Rural" or the "Company") in connection with the sale of the Company to an affiliate of private equity firm Warburg Pincus LLP ("Warburg"). RBC was a key participant in four years of litigation in the Court of Chancery, originally as a third-party witness and later as the sole non-settling defendant. Throughout, this case received careful attention from the Court of Chancery. The Court issued many pre-trial rulings, and all parties filed pre-trial briefs. After a four-day trial, Lead Plaintiff Joanna Jervis ("Lead Plaintiff") and RBC served multiple rounds of post-trial briefs and motion papers. The Court of Chancery heard three post-trial oral arguments by Lead Plaintiff and RBC, issued three post-trial opinions, and delivered post-trial transcript rulings respecting attorneys' fees and approval of the partial settlements.

RBC was involved in this litigation from the outset. In 2011, during the pendency of the challenged transaction, original lead counsel for the putative class deposed Marc Daniel, who had just resigned from his position as RBC managing director. B526. Original lead counsel presented a proposed disclosure-only settlement. Jervis filed an objection supported by a 45-page brief and an expert affidavit that challenged RBC's valuation analyses. B497-98; B500-01; B443

¶¶ 15-16; B463-64. The Court of Chancery rejected the proposed disclosure-only settlement, designated Jervis as Lead Plaintiff, and designated Jervis's counsel as Co-Lead Counsel. B565-69.

When Lead Plaintiff served a subpoena on RBC, RBC refused to produce its internal documents and analyses. B570-86. The Court of Chancery rejected RBC's objection (and the parallel objection by co-financial advisor Moelis & Company LLC ("Moelis")), noting that investments banks "historically" produced internal documents, internal banker documents are "obviously relevant," and Lead Plaintiff was contending that RBC and Moelis had "selfishly manipulated" their discounted cash flow ("DCF") analyses. B587-90.

Lead Plaintiff served a Verified Second Amended Complaint on August 29, 2012, that asserted claims against RBC and Moelis for aiding and abetting breaches of fiduciary duty by Rural's former directors. A1672-1752; A1719.

On October 19, 2012, the Court of Chancery rejected defendants' proposed scheduling order, reasoning that Lead Plaintiff's proposed scheduling order "offers the more efficient approach." B602. The Court of Chancery entered an Order Governing Case Schedule containing a streamlined approach to summary judgment and setting trial for May 6-9, 2013. B604-05.

RBC was deeply involved in the defense of the litigation. Lead Plaintiff deposed two managing directors from the RBC deal team, Marc Daniel and Tony

Munoz. B1075-76. RBC's counsel took the lead for all defendants in deposing Lead Plaintiff's valuation expert. B735.

Following fact and expert discovery, RBC requested permission to brief a motion for summary judgment. Lead Plaintiff served a detailed opposition with citations to the discovery record, including testimony from Warburg's representative that RBC was "trying to find a way into the debt financing" even after Warburg submitted a final bid for Rural supported by a debt financing package that did not include staple financing from RBC. B746. The Court of Chancery denied all defendants' requests for leave to move for summary judgment, reasoning in part that "the claims against the financial advisors for aiding and abetting breaches of fiduciary duty by the director defendants may present novel issues where it will be important to have an adequate factual basis for applying the law, and the disclosure claims are best decided on a full record." B755.

On April 16, 2013, the Court of Chancery denied Lead Plaintiff's motion *in limine* and allowed defendants to present post-merger evidence at trial, though cautioning that the Court "will give less credence to information the further it is from the merger date." B845.

On April 17, 2013, all parties participated in mediation before former United States District Judge Layn Phillips. B1094 ¶ 21. On April 25, 2013, Lead Plaintiff advised the Court of Chancery of a proposed partial settlement with Moelis. B907.

On April 26, 2013, the Court of Chancery convened a telephonic conference to allow other defendants to object to severance of the claim against Moelis. B916-17. On April 29, 2013, Lead Plaintiff, Rural, and the director defendants advised the Court of Chancery of their own proposed partial settlement. B941-42; B932. RBC raised no objection to either partial settlement. On April 29 and May 2, 2013, the Court entered orders severing and staying the claims against the settling defendants. B955-56; B959-61.

On April 29, 2013, RBC orally moved for a continuance and proposed that trial be held after approval of the partial settlements. B945. On April 30, 2013, the Court of Chancery issued a letter opinion denying RBC's motion, observing that the "possibility that some defendants will settle is an ever-present reality in multi-party litigation, and RBC and its counsel doubtless contemplated that eventuality." B957.

On May 2, 2013, RBC filed a Cross-Claim for Determination of Apportionment of Relative Degrees of Fault against the other defendants, "solely for purposes of enabling the Court to make an appropriate determination of the relative degrees of fault as between RBC and the other defendants for the sole purpose of reducing the damages recoverable against RBC pursuant to 10 *Del. Ch.* § 6304 to the extent of the pro rata share of the other defendants based on relative degrees of fault." B1058 ¶ 4. "RBC represented that it was not contending that the

individual defendants breached their fiduciary duties or that Moelis had aided and abetted any breach." *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205 (Del. Ch. 2014) ("*Rural II*"), at 6.[1]

That same day, the Court entered the Pre-Trial Stipulation and Order. B962-76. RBC identified as an issue to be tried "[w]hether RBC is entitled to contribution" and also "request[ed] that the Court make a determination as to who among the parties to the action are liable to the Class for any such damages, and, to all such parties so determined, attribute relative fault as among those parties." B968-69 §§ III.B.20, IV.B.3.

The Pre-Trial Stipulation and Order expressly incorporated the pre-trial briefs of Lead Plaintiff and RBC "for a more complete recitation of their statements of the issues in this case, the facts they intend to establish at trial, and the statement of legal issues to be tried." B968 § III. Lead Plaintiff's opening brief presented evidence against all defendants. A1967-2022. A theme of RBC's pre-trial opening brief was that RBC was not "motivated either to favor Warburg or to find the Transaction fair." A1932. Lead Plaintiff's pre-trial answering brief detailed RBC's conflicts and RBC's self-serving manipulations of the sale process and its valuation analyses. A2057-69.

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[1] *Rural II* is cited herein to the version attached as Exhibit B to RBC's Opening Brief, which is itself cited as "OB _".

RBC used the week in advance of trial to complete briefing on its Motion to Compel Return of Inadvertently Produced Documents, which addressed supposedly "non-relevant, non-responsive" documents relating to RBC's financing of the acquisition of Emergency Medical Services Corporation ("EMS"), the parent of Rural's lone national competitor, when RBC was simultaneously leading Rural's sale process. B1064 ¶ 8. RBC chose not to press its motion to compel during trial or after trial.

Trial against RBC was held on May 6-9, 2013. "RBC had the opportunity during trial to introduce evidence and develop a record in support of its contribution claims." *Rural II* at 67. RBC called three director defendants as witnesses: (i) former Special Committee Chair and Chairman of the Board Christopher Shackelton; (ii) former CEO Michael DiMino; and (iii) former Special Committee member Henry Walker. RBC managing director Tony Munoz and former RBC managing director Marc Daniel testified at trial.

Lead Plaintiff's post-trial briefs contended that the director defendants were exculpated from monetary liability and that RBC was liable for the entirety of the claimed damages. A2520-21; A2638-39. Lead Plaintiff also argued that RBC's pervasive misrepresentations in its pre-trial papers, as revealed at trial, warranted fee-shifting against RBC. A2461-64; A2522-23; A2639-40. RBC's post-trial brief said little about judgment reduction under the Delaware Uniform

Contribution Among Tortfeasors Act ("DUCATA"), 10 *Del. C.* §§ 6301-08, and did not argue that any director defendant breached his duty of loyalty or that Moelis committed aiding and abetting. A2594-96. RBC offered no factual defense to fee-shifting. A2596.

On August 8, 2013, after the close of post-trial briefing, RBC advised the Court of Chancery of Rural's filing for bankruptcy protection days earlier, and asked the Court to take judicial notice of Rural's filing in U.S. Bankruptcy Court of a declaration from Rural's new Chief Financial Officer, Stephen Farber. A2641-863; A3074-77. Lead Plaintiff moved to bar consideration of the Farber declaration or, in the alternative, to give it no weight. A22 at D.I. 328.

Post-trial oral argument on all issues was held on September 26, 2013. A19 at D.I. 337.

On November 20, 2013, the Court of Chancery entered an Order and Partial Final Judgment approving Lead Plaintiff's partial settlements with Moelis, the director defendants, and Rural, which totaled $11.6 million. A3064-73. RBC did not object to entry of the Order and Partial Final Judgment.

On December 17, 2013, the Court of Chancery issued a Memorandum Opinion granting Lead Plaintiff's motion to bar consideration of the Farber declaration. A3038-59. RBC does not argue on appeal that it was error for the Court of Chancery not to re-open the trial record to consider that declaration.

On March 7, 2014, the Court of Chancery issued an opinion finding RBC liable for aiding and abetting breaches by Rural's Board of the duty of care and duty of disclosure. *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54 (Del. Ch. 2014) ("*Rural I*").[2] The Court of Chancery elected not to "parse[] whether the directors' conduct constituted a breach of the duty of loyalty," and ordered supplemental briefing on RBC's defense of contribution. *Id.* at 64, 88. The Court of Chancery also ordered the parties to submit "revised DCF valuations of Rural." *Id.* at 88. The Court of Chancery also suggested the future filing of an application for fee-shifting, given that RBC's pre-trial factual representations "contrasted sharply with the evidence at trial." *Id.* at 90. Essentially, the Court of Chancery gave RBC the opportunity to file new briefs on contribution and fee-shifting in light of the Court of Chancery's findings that Rural's directors had breached their fiduciary duties and RBC had aided and abetted those breaches of duty.

RBC moved for reargument respecting the Court of Chancery's prescription for calculating beta for purposes of a DCF-based damages analysis. A2865-75. On March 19, 2014, the Court of Chancery entered an Order Denying Motion for Reargument. A2900-02.

The parties filed supplemental briefs on RBC's defense of contribution. A2903-3037. Following a post-trial oral argument on June 24, 2014, the Court of

[2] *Rural I* is cited herein to the version attached as Exhibit A to RBC's Opening Brief.

Chancery issued an opinion establishing RBC's monetary liability of $75,798,550.33, plus pre- and post-judgment interest. In calculating damages, the Court of Chancery used the beta calculated by Lead Plaintiff's expert, rather than the higher beta calculated in the manner prescribed in *Rural I*. *Rural II* at 23. That decision granted a request RBC had made in its motion for reargument. A2874 ¶ 17. In arriving at RBC's monetary liability, the Court of Chancery determined that "17% of the responsibility for the damages suffered by the Class is attributable to Shackelton and DiMino, who were joint tortfeasors who received releases from contribution in the Settlement." *Rural II* at 94.

In particular, the Court of Chancery found that "Shackelton would not have been entitled to exculpation for his role in engineering a near-term sale of Rural," due to "his personal interests and those of his fund." *Id.* at 79. The Court of Chancery found that DiMino "support[ed] a near-term sale ... in deference to Shackelton and Davis and because it advanced his personal financial interests." *Id.* at 86. The Court of Chancery weighed the relative responsibility of Shackelton, DiMino and RBC for "initiat[ing] the sale process without Board authorization and in conjunction with the EMS sale," which wrongs accounted for 25% of the total damages. *Rural II* at 93. The Court of Chancery further determined that RBC was solely responsible for the 50% of the damages attributed to the disclosure violations, and that RBC's unclean hands prevented RBC from obtaining

settlement credit "for the breaches of duty that occurred during the final approval of the Merger," which accounted for an additional 25% share of the damages. *Id.*

Lead Plaintiff filed a fee application and sought fee shifting, which RBC opposed. A5 at D.I. 391; A3 at D.I.s 397-398. On February 12, 2015, the Court of Chancery denied Lead Plaintiff's request for shifting, reasoning that there was "some egregiousness" in how RBC "approached the pre-trial briefing and trial," but it did not rise "to the level of glaring egregiousness that our case law seems to require." B1458, B1462. The Court of Chancery noted, however, that fee-shifting of "approximately $1.1 million" would be appropriate if "this level of egregiousness was sufficient to warrant some [amount] of fee shifting," and further noted that "to the extent that there was a greater concern about the integrity of the litigation process, then a higher award would be warranted." B1465.

On February 19, 2015, the Court of Chancery entered a Final Order and Judgment. A3060-63. RBC appealed. Lead Plaintiff cross-appealed the Court of Chancery's denial of fee shifting.

RBC's opening brief raises six grounds for appeal. *Amici curiae* Securities Industry and Financial Markets Association ("SIFMA") and National Association of Corporate Directors ("NACD") filed supporting briefs.

SIFMA says nothing about "the specific conduct [the Court of Chancery] found to be present in this case." SIFMA Br. at 14. SIFMA purports to urge

reversal, but does not oppose recognition of "a claim for aiding and abetting premised on an advisor's 'fraud on the Board' [that is] limited to prohibiting the advisor from engaging in conduct that intentionally causes, or intentionally misleads the board so as to cause, the board to breach its duty of care." *Id.* The Court of Chancery applied that standard. *Rural I* at 69. SIFMA favorably cites a leading practitioner who agrees with the finding of liability against RBC:

> ***Vice Chancellor J. Travis Laster's decision reached the right conclusion***.... Mr. Laster unequivocally found that the actions of the Rural/Metro directors and RBC, as the investment banker/financial adviser, to be repugnant.... ***The conduct of RBC was*** clearly less than exemplary. The lack of disclosure of conflicting interests, the adjustments to the valuation to benefit Warburg Pincus, and being complicit in holding back the valuation information from the full board until the night the board approved the sale were ***egregious***.[3]

NACD contends that the Court of Chancery's decision "is contrary to settled principles of Delaware law" and a board of directors "should not be required to perform due diligence on the financial advisor's ongoing activities." NACD Br. at 2,16.) Yet, NACD's outside counsel, Gibson, Dunn & Crutcher LLP, told its clients the exact opposite when *Rural I* was handed down:

> ... The decision ***reaffirms*** that boards should be attuned to potential conflicts involving their financial advisors at all stages of a transaction.
> ...
> The decision serves as ***an important reminder*** that boards must be vigilant in assessing all possible conflicts (especially financial advisor

[3] Harvey Miller, *The Examiners: Harvey Miller on the Rural/Metro Ruling*, WALL ST. J. L. BLOG (May 2, 2014) (emphasis added), *cited in* SIFMA Br. at 7 n.7.

> conflicts) throughout the life of a transaction, especially when a transaction changes course and new potential conflicts may emerge.[4]

Rural I and *Rural II* broke no new ground. The Final Order and Judgment is notable only because it shows the consequences of defending a case to judgment when egregious facts about the conduct of the sole non-settling defendant emerge from the crucible of trial and are subjected to the thoughtful application of Delaware law.

This is Lead Plaintiff/Appellee/Cross-Appellant's Answering Brief on Appeal and Opening Brief on Cross-Appeal.

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[4] GIBSON, DUNN & CRUTCHER LLP, 2014 MID-YEAR SECURITIES LITIGATION UPDATE 21-22 (July 15, 2014) (emphasis added). This report to clients by NACD's outside counsel is consistent with subsequent advice given by Chief Justice Strine to corporate directors and their advisors. *See* Leo E. Strine, Jr., *Documenting the Deal: How Quality and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679, 687 (2015) ("Why Conflicts Matter and Must Be Identified, Disclosed, Monitored, And Addressed"). This advice is also consistent with 8 *Del. C.* § 141(e), which provides that directors are "fully protected" only if they "rely[] in good faith" upon an expert "selected with reasonable care."

SUMMARY OF APPEAL ARGUMENT

I. Denied. The Court of Chancery properly applied the enhanced scrutiny of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), to the process by which the Board of Directors of Rural sold the Company for cash. The Court of Chancery's properly found that the directors' conduct failed *Revlon* scrutiny because there was no "full and fair public auction" and the Board breached its duty of care. The Court of Chancery was not required to use the words "gross negligence" to conclude that a breach of fiduciary duty occurred. The findings in *Rural I* and *Rural II* respecting Special Committee Chair and Chairman of the Board Shackelton would support a finding of breach of fiduciary duty on the alternative ground that the challenged transaction was subject to entire fairness scrutiny and was not entirely fair.

II. Denied. The Court of Chancery made well-supported factual findings that the Board breached its duty of disclosure by omitting facts that would identify RBC's conflicts of interest and by falsely and misleadingly describing a key input to RBC's "Consensus" precedent transaction range.

III. Denied. The Court of Chancery properly found that RBC was liable for aiding and abetting because RBC, for its own improper fee-driven reasons, intentionally duped Rural's directors into breaching their duty of care. While aiding and abetting liability need not depend on a finding of concerted action with

a fiduciary, RBC ignores how it acted in concert with DiMino and aided and abetted his breach of the duty of loyalty.

IV. Denied. The Court of Chancery's finding that RBC proximately caused damages is owed deference. The well-supported factual findings contradict RBC's assertions that there was a "robust auction." No conduct by any other defendants broke the causal link flowing from RBC's conduct.

V. Denied. The Court of Chancery's findings respecting valuation are owed deference. The well-supported factual findings contradict RBC's assertion that there was a "robust public auction," making it necessary to engage in valuation analyses. The Court of Chancery's evaluation of DCF inputs are entitled to deference and are supported by Delaware law.

VI. Denied. The Court of Chancery properly applied DUCATA. RBC bore the burden of establishing at trial that other defendants were monetarily liable for damages. RBC has waived any argument that it is entitled to a second trial respecting contribution, and the Court of Chancery generously afforded RBC the opportunity to file new briefs respecting contribution after losing on liability. There can be no judgment reduction for breaches of fiduciary duty committed by directors exculpated from monetary liability. DUCATA does not foreclose application of the doctrine of unclean hands.

STATEMENT OF FACTS

The well-supported factual findings of the Court of Chancery make clear that RBC, the Board's primary financial advisor, committed fraud upon the Board, defrauded Rural's stockholders, and attempted to commit fraud upon the Court of Chancery, all in an effort to hide how RBC skewed its advice and used its sell-side advisory role to Rural as a means to seek $60 million in fees, mostly from other potential clients.

A. Background

In late 2010 and early 2011, three of Rural's directors "had personal circumstances that inclined them towards a near-term sale." *Rural I* at 3. Shackelton was a managing director of a "young, activist hedge fund" he had co-founded, and for various reasons he was looking for an opportunity to exit its investment in Rural. *See Rural I* at 3-4; B6; A2360-61; B19-20. DiMino was a new CEO who "supported a sale and deferred to Shackelton" after receiving a scathing review in December 2010 for having preferred that Rural stay independent when responding to an acquisition offer. *Rural I* at 5-7; B82-83; B596-97. Outside director Eugene Davis needed to reduce his number of directorships, and a sale of Rural allowed him to cash out unvested equity he otherwise would forfeit if he resigned from the Board on his personal deadline of

April 1, 2011. *Rural I* at 5; B33-34; B345; B349; A2366-67; B614-16; B3; B10-13 §17(b)(5); A1053-251.

During the summer of 2010, "RBC had pitched Shackelton and DiMino on the possibility of Rural acquiring American Medical Response ("AMR"), Rural's lone national competitor in the ambulance business." *Rural I* at 2; A206-11; A2079; A2091-92. "AMR was a subsidiary of Emergency Medical Services Corporation ('EMS'), a publicly traded entity that seemed more interested in its higher margin medical services subsidiary." *Rural I* at 2. "EMS was not interested in selling AMR at Rural's price." *Rural I* at 3; B4.

As of December 2010, Rural "was just beginning to implement new growth strategies under a new CEO. Rural's strong operating metrics, solid balance sheet, and national footprint made it uniquely able to benefit from industry trends favoring consolidation and long-term growth in ambulance services." *Rural I* at 75; A365-88; B97-101; B84-86; B53. For various company-and industry-specific reasons, "the market did not understand Rural's prospects." *Rural I* at 75; B84-86.

"DiMino and his team prepared reliable projections based on the business plan that he developed and the Board adopted. DiMino testified at trial that he felt management's projections were realistic and that he used his best understanding of the Company's direction and the best information available at the time when developing them." *Rural I* at 85; A2201; A2204; A2223. "The evidence at trial

demonstrated that Rural's growth strategy was reasonable and achievable." *Rural I* at 85; B44; B62; B410-22.

B. RBC Acts Pursuant to Its Undisclosed Interest in Putting Rural Up for Sale in Conjunction with the Sale of EMS, Even Though That Timing Was Disadvantageous to Rural

"In early December 2010, the Wall Street rumor mill began buzzing that EMS was in play." *Rural I* at 7; A365-88; A2086. Munoz "and his RBC colleagues realized that a private equity firm that acquired EMS might decide to buy Rural rather than sell AMR." *Rural I* at 7; B91. They "recognized that if Rural engaged in a sale process led by RBC, then RBC could use its position as sell-side advisor to secure buy-side roles with the private equity firms bidding for EMS." *Rural I* at 7; A2091-92; A547-48. "RBC correctly perceived that the [private equity] firms would think they would have the inside track on Rural if they included RBC among the banks financing their bids for EMS, referred to in M&A argot as the 'financing trees.'" *Rural I* at 7; A2102; B274. "RBC believed that with the Rural angle, it could get on all of the EMS bidders' financing trees." *Rural I* at 7; A404.

On December 8, 2010, the Board reactivated the Special Committee to hire advisors and evaluate strategic alternatives. *Rural I* at 8; A392-95. "On December 23, 2010, the Special Committee interviewed Houlihan Lokey, Moelis, and RBC." *Rural I* at 9; B105; A406-07; A456-85; A486-540; A408-55. Houlihan Lokey

"commented on the wide range of alternatives available to Rural." *Rural I* at 10; A486-540. "The bulk of [Moelis's] presentation examined a potential combination with AMR." *Rural I* at 10; A456-85. "Unlike the other firms, RBC devoted the bulk of its presentation to a sale and recommended coordinating the effort with the EMS process." *Rural I* at 10; A412. "RBC claimed that … the time to sell 'is now.'" *Rural I* at 10; A413.

"RBC designed a process that favored its own interest in gaining financing work from the bidders for EMS." *Rural I* at 13; A365-88; A2086; A2088; A2090; A2095; A402-03; A404-05; B110-11; B177; A547-48. "RBC prioritized the EMS participants so they would include RBC in their financing trees." *Rural I* at 13; A402-03; A404-05; A2088. "RBC recommended an immediate sale on December 23, 2010, and scheduled first round bids for late January 2011 because that 'tracked with the EMS process and Rural's ability to act as an 'angle.'" *Rural I* at 54; A419. "Focusing exclusively on financial buyers and prioritizing the participants in the EMS process was the ideal strategy for RBC." *Rural I* at 53; A2088.

"RBC's advice was overly biased by its financial interests." *Rural I* at 56; A2102; B274. "RBC was motivated by a desire to secure its place in the financing trees of the bidders in the EMS auction." *Rural I* at 56; A547-48; A2088 "RBC hoped to generate up to $60.1 million in fees from the Rural and EMS deals,"

including "staple financing fees of $14-20 million from the Rural deal" and "$14-35 million by financing a share of an EMS deal." *Rural I* at 13; B177; A2095; B107-08. "The maximum financing fees of $55 million were more than ten times the advisory fee, giving RBC a powerful reason to take steps to promote itself as a financing source at the expense of its advisory role." *Rural I at* 13; A551-67; A2094-95.

"RBC did not disclose that it planned to use its engagement as Rural's advisor to capture financing work from the bidders for EMS." *Rural I.* at 10; A2091-92. "RBC did not disclose that proceeding in parallel with the EMS process served RBC's interest in gaining a role on the financing trees of bidders for EMS." *Rural I* at 53; A544-46; B124; A2089; A2091-92. "RBC did not disclose obvious and readily foreseeable disadvantages of [its proposed sale] schedule, such as the fact that standard M&A confidentiality agreements would restrict the bidders' ability to participate in both processes." *Rural I* at 54; B136-38; B142-43. Munoz admitted at trial that an obvious problem with RBC's plan for marketing Rural was that "financial sponsors who participated in the EMS process would be limited in their ability to consider Rural simultaneously because they would be constrained by confidentiality agreements[.]" *Rural I* at 14; A2099; A2100-01. "RBC also did not explain that a successful bidder for EMS would own a Rural competitor, making it difficult for Rural to provide the due diligence freely to that

bidder." *Rural I* at 54-55; B418; B611. "Additionally, RBC's near-term process did not account for Rural's need to generate a track record with its acquisition strategy." *Rural I* at 55; A2206; B21. "RBC ignored its [November 2010] advice [on that subject] and recommended a near-term sale." *Rural I* at 55; A277.

RBC "planned to push its staple financing package for Rural." *Rural I* at 13; A408-55. "Munoz stressed to his leveraged finance colleagues that RBC had the inside track on financing because of Rural's confidentiality agreements." *Rural I* at 13; B142-43.

"RBC's faulty [auction] design prevented the emergence of the type of competitive dynamic among multiple bidders that is necessary for reliable price discovery." *Rural I* at 76; B142-43; A2099; A2100-01. Rural "encountered the readily foreseeable problems associated with trying to induce financial buyers to engage in two parallel processes for targets who are direct competitors." *Rural I* at 14; A2099. "Warburg recognized that 'concurrent timing of the EMS process created a unique competitive dynamic' that gave Warburg the advantage." *Rural I* at 73; B418. Because Warburg had "withdrawn from the EMS process in the first round [it was] able to pursue [Rural] aggressively," while "some of [its] more typical competitors in healthcare service transactions [who were still involved in evaluating EMS] did not participate in the [Rural] auction." *Rural I* at 32; B418. "If RBC had not run the Rural process in parallel with the EMS process, other

private equity players with equally large funds [compared to Warburg] could have participated, forcing up the price." *Rural I* at 76; A405; A547; B136; A2099; A2100-01.

"The timing of the Rural process in parallel with the EMS process... also meant that Warburg did not have to worry about strategic bidders." *Rural I* at 76; A2099. J.P. Morgan gave DiMino a presentation not shared with anyone other than Shackelton and RBC that "cautioned against a near-term sale because 'logical strategic buyers' were 'focused internally on change of control transactions,' and because Rural's growth strategy had not yet played out sufficiently to justify a high multiple from private equity buyers." *Rural I* at 15; B149; A2100; A2209-10.

"Without competition to drive up the price, RBC's process succeeded only in discovering the amount Warburg could comfortably finance and was willing to pay when bidding against a 'motley group' of competitors and with the benefit of inside information about the seller's boardroom dynamics." *Rural I* at 77; B251; B290. "A disinterested board that benefitted from disinterested advice and actually obtained an analysis of potential alternatives likely would have concluded that Rural should wait before conducting a sale process." *Rural I* at 73; B150.

C. After Warburg Delivers a Fully Finaneed Final Bid, RBC Secretly Pushes Staple Financing to Warburg and Artificially Manipulates Its Valuation Analyses

On the bidding deadline of March 22, 2011, only Warburg submitted a final bid, at $17 per share. *Rural I* at 22; B280-83. Warburg's bid package did not include staple financing from RBC. *Rural I* at 23; A634-799. "Rather than accepting defeat, RBC re-doubled its efforts to win the business." *Rural I* at 23; B609-10; A2111; B289-90, A2371; B485. "There was no conceivable upside for Rural from RBC's last-minute lobbying of Warburg. The downside for Rural was to accentuate RBC's desire to generate goodwill with Warburg and close the deal." *Rural I* at 61; B329.

"[T]he 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 fees." *Rural I* at 61; A2318; A2127; A2212; A2410; A804-05; A825-26; A915-17. "RBC did not disclose that it was continuing to seek a buy-side role providing financing to Warburg." *Rural I* at 25-26; A2212; A2318; A2410; A804-05; A825-26; A915-17. "As a result it was natural for the Board to assume that Warburg's fully financed bid left RBC out of the picture and to send RBC to negotiate with Warburg." *Rural I* at 70.

"RBC had delayed working on a fairness analysis because the firm still hoped to secure a buy-side financing role and did not want to render a fairness opinion under those circumstances." *Rural I* at 24-25; B275-76. RBC "knew that the Board and the Special Committee were uninformed about Rural's value when making critical decisions. RBC had not provided any preliminary valuation analysis since December 23, 2010, and had only provided its December 23 book to the Special Committee." *Rural* at 70; A2107-08.

When directed by the Special Committee to engage in final price negotiations with Warburg, "RBC did not disclose that it was continuing to seek a buy-side role providing financing to Warburg." *Rural I* at 25-26; B326; A2212; A2318; A2410; A804-05; A825-26; A915-17. "During the final negotiations with Warburg, the Board failed to provide active and direct oversight of RBC." *Rural I* at 58; A2310-18 at 776. "Rather than pushing for the best deal possible for Rural, RBC did everything it could to get a deal, secure its advisory fee, and further its chances for additional compensation from Warburg." *Rural I* at 60; A408-55; A2091-92; B136-38; A547-48. "During the final negotiations over price, RBC took advantage of the informational vacuum it created to prime the directors to support a deal at $17.25." *Rural I* at 62; B286; B287-88.

"[O]n Saturday, March 26, 2011, senior bankers at RBC were engaged in a full-court press to convince Warburg to use RBC's staple financing or include

RBC in the financing package." *Rural I* at 70; A2192-93. "As an inducement, [RBC's Head of US Investment Banking] offered to have RBC fund a $65 million revolver for a different Warburg portfolio company." *Rural I* at 27; B326; B329; A2192; B257-58. "On the deal front, RBC worked to lower the analyses in its fairness presentation so Warburg's bid looked more attractive." *Rural I* at 27; A824; A2403; A2404; B317-19; B321; A2117; B327. "On Saturday morning, the 'consensus' precedent transaction range was $13.31 to $19.15. On Saturday afternoon, it was $8.19 to $16.71, entirely below the deal price." *Rural I* at 30; B317; A824. "Munoz coordinated between the [RBC senior bankers lobbying Warburg and the RBC deal team working on the fairness presentation] but did not disclose RBC's activities to the Board." *Rural I* at 70; A2409-10.

"The Board meeting [at which the sale of Rural was approved] started at 11:00 p.m. Eastern time on Sunday, March 27. The directors received written valuation analyses from RBC and Moelis at 9:42 p.m. Eastern time. This was the first valuation information that the Board ever received as part of the sale process." *Rural I* at 31; B330; B331-32; B333; A915-17. "Lacking any earlier valuation information, the Rural directors did not have a reasonably adequate understanding of the alternatives available to Rural, including the value of not engaging in a transaction at all." *Rural I* at 63; A858-81; A882-914.

RBC's board book was "designed to convince [the Board] to accept Warburg's price of $17.25 per share. Aspects of the board materials conflicted with RBC's earlier advice, contravened the premises underlying the Board's business plan for Rural, and contained outright falsehoods." *Rural I* at 62; A2105-06; A2194; B209-13. For example:

> RBC told the directors that it used "Wall Street research analyst consensus projections" to derive Rural's EBITDA for 2010. The "consensus projections" were neither analyst projections, nor did they represent a Wall Street consensus. The figures were actually Rural's reported results, not projections, and RBC used the reported figures without adjusting for one-time expenses, which was contrary to the Wall Street consensus.

Rural I at 79; A2194-96; B316-17; A2406-07; B327-28; A858-81; B214-44; B245-50; A2120-22.

RBC's DCF valuation was "artificially low." *Rural I* at 86; A824; B327-28; A2116-18. RBC inappropriately applied "a terminal value multiple to projected 2016 EBITDA that did not take into account the fact that the [projected] acquisitions would not yet be fully integrated." *Rural I* at 86; B209-13; A2105-06; A2194.

"When it approved the merger, the Board was unaware of RBC's last minute efforts to solicit a buy-side financing role from Warburg, had not received any valuation information until three hours before the meeting to approve the deal, and did not know about RBC's manipulation of its valuation metrics." *Rural I* at 58;

B326; A2406-07; B330; B331-32; B333; A915-17. "The combination of RBC's behind the scenes maneuvering, the absence of any disclosure to the Board regarding RBC's activities, and the belated and skewed valuation deck ... misled the Board[.]" *Rural I* at 63.

"RBC knew that the Board was uninformed about these critical matters, but failed to disclose the relevant information to further its own opportunity to close a deal, get paid its contingent fee, and receive additional and far greater fees for buy-side financing work." *Rural I* at 70-71; B252-55; B284-85; B177; B140; B429. "RBC's actions led to (i) an ill-timed sale of Rural that did not capture value attributable to its acquisition strategy; (ii) a mismanaged sale process that generated only one final bid by a bidder that knew it had the upper hand in bidding and price negotiations; and (iii) uninformed board approval based on manipulated valuation analyses." *Rural I* at 73; B147; B209-13; A2105-06; A2116-18; A2194; B609; B611; B418; B291; B290; B252-55; B284-85; B287-88; A824; B327-28. "[B]ut for RBC's actions, a fully-informed Board would have had numerous opportunities to achieve a superior result." *Rural I* at 73; B147; A2100; A2209-10.

D. RBC Disseminated a False Description of Its Valuation Analyses and Omitted Key Facts Bearing on Its Conflicts

"Information that RBC provided to the Board in connection with the precedent transaction analyses was false, and that false information was repeated in the Proxy Statement." *Rural I* at 79; A824; B327-28; A2116-18; A2126-27;

A1053-1251; B398-400. "A stockholder reading the Proxy Statement would conclude, incorrectly, that RBC's precedent transaction range used the disclosed Adjusted EBITDA [$76.8 million] that added back one-time expenses and that the resulting figures were consistent with a Wall Street consensus." *Rural I* at 80; A1053-1251. In fact, "[t]he resulting figure that RBC used in the precedent transaction analysis was $69.8 million." *Rural I* at 79; A2126-27; A858-81.

"Daniel testified that a stockholder looking at the 'consensus' range would say, 'This is an absolutely fair deal.'" *Rural I* at 80 (quoting A2195). "That is the problem. The 'consensus' range was artificial and misleading, as was the low end of the 'management' range. The information that RBC provided for the Proxy Statement about its precedent transaction analysis was material and false." *Rural I* at 80; A2126-27; A1053-1251.

"The Proxy Statement stated that RBC received the right to offer staple financing because it "could provide a source for financing on terms that might not otherwise be available to potential buyers of the Company ...." *Rural I* at 82; A1053-1251. "This statement was false. The Board never concluded that RBC could provide financing that might otherwise not be available, and no evidence to that effect was introduced at trial." *Rural I* at 82; A634-88; A689-744; A745-99.

"A stockholder reading the Proxy Statement would conclude, incorrectly, that RBC disclosed all of its conflicts and led a pristine process." *Rural I* at 83;

B398. "The Proxy Statement does not describe how RBC used the initiation of the Rural sale process to seek a role in the EMS acquisition financing, and it does not disclose RBC's receipt of more than $10 million for its part in financing the acquisition of EMS. The Proxy Statement says nothing about RBC's lobbying of Warburg after the delivery of Warburg's fully financed bid, while RBC was developing its fairness opinion." *Rural I* at 82-83; A2127.

E. RBC Misrepresented Critical Facts in Its Pre-Trial Papers

RBC's Munoz did not admit until redirect questioning on the second day of trial that RBC had been lobbying Warburg on Saturday, March 26, 2013, to take RBC's staple financing. A2127. That admission stood in stark contrast to RBC's pre-trial papers, in which RBC made various false factual representations about why RBC's authorization to offer staple financing to bidders could not have impacted RBC's M&A advice.

For example, RBC wrote:

> ***RBC did not provide staple financing***, and thus, it could not have been motivated either to favor Warburg or to find the Transaction fair. Warburg made clear that it would not use RBC's financing, hence RBC had no incentive to favor Warburg, and there is no record of RBC favoring any bidder.

A1932 (emphasis in original). The Court of Chancery found: "What those statements don't reveal, and what makes them partially misleading, is that after Warburg initially indicated that it wouldn't use RBC's financing, there was a press

to get Warburg to use RBC's financing. And RBC only did not provide staple financing after that effort failed." B1459.

Similarly, RBC wrote: "By March 23, 2011, RBC and the Special Committee were aware that RBC would not be providing staple financing for the Transaction." A1944. The Court of Chancery found: "That's not true, the statement that RBC was aware. RBC actually made a press to obtain a role in the financing. And this concept of RBC's knowledge appears regularly throughout the brief." B1460; A1959-60.

RBC also wrote: "The RBC team offering the staple financing was distinct and separate from the RBC team advising Rural/Metro on the sale of the Company." A1941 n.43. The Court of Chancery found: "Munoz was communicating with both teams.... That is a statement that is flatly wrong." B1460.

Additionally, RBC wrote: "Unlike *Del Monte*, RBC was not secretly meeting with Warburg without [Rural's] consent." A1963 at n.133. The Court of Chancery stated: "That one I find troubling.... I think the record at trial established that the board wasn't aware and was never told about the final full-court press." B1461.

APPEAL ARGUMENT

I. THE COURT OE CHANCERY PROPERLY DETERMINED THAT THF BOARD BREACHED THEIR *REVLON* DUTIES, AND THE BOARD OTHERWISE BREACHED THEIR FIDUCIARY DUTIES

A. Question Presented

Do the Court of Chancery's findings compel the conclusion that (i) the board breached its fiduciary duties under *Revlon*, (ii) the Board breached its duty of care; and/or (iii) the challenged transaction fails the test of entire fairness? (A2009-19; A2051-57; A2504-08)

B. Scope of Review

Findings of facts based on determinations of the credibility of live witness testimony will be upheld. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 50 (Del. 2006); *Hudak v. Procek*, 806 A.2d 140, 150 (Del. 2002). The deferential "clearly erroneous" standard applies to findings of historical fact, and legal conclusions are reviewed *de novo*. *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago*, 75 A.3d 101, 108-09 (Del. 2013). This Court may affirm on the basis of a different rationale than that which was articulated by the trial court, if the issue was fairly presented to the trial court. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

C. Merits of Argument

RBC argues that (i) the Court of Chancery should have applied business judgment review, rather than *Revlon*, to the initiation of the sale process for Rural, (ii) none of the directors' actions were outside the range of reasonableness for purposes of *Revlon*, (iii) the Court of Chancery could not have properly concluded that the Board breached its duty of care without using the words "gross negligence," and (iv) certain facts prelude a finding of a breach of the duty of eare. OB 17-31. As discussed below, these arguments are meritless. They also overlook an alternative basis for a ruling that the Board breached its fiduciary duties – that entire fairness applies and the transaction was not entirely fair.

1. An Unreasonably Conducted, Target-Initiated Active Bidding Process Led to a Cash Sale, Violating *Revlon*

RBC argues that the business judgment rule, not *Revlon* scrutiny, applies to the "Board's decision to explore strategic alternatives" in December 2010. OB 21. That argument avoids, and does not rebut, the Court of Chancery's finding that Rural's Board and Special Committee did not conduct an exploration of strategic alternatives. Instead, the Special Committee, acting "without Board authorization," "hired RBC to sell the Company," and did so without knowledge of RBC's self-interest "in gaining a role on the financing trees of bidders for EMS," without appreciation of the "obvious and readily foreseeable disadvantages of"

running a sale process in parallel with EMS, and in disregard of "Rural's need to generate a track record with its acquisition strategy." *Rural I* at 53-55.

As a matter of law, a corporation's initiation of an unreasonably conducted active bidding process that leads to the sale of the company for cash is a violation of *Revlon*. In *Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994), this Court reaffirmed that directors "have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders" in the scenario "when a corporation initiates an active bidding process seeking to sell itself." *Id.* at 1289-90 (quoting *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 43 (Del. 1994) ("*Paramount v. QVC*"), and *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1990)). *See also Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009) (*Revlon* applies "when a company embarks on a transaction—on its own initiative or in response to an unsolicited offer—that will result in a change of control").

In re Netsmart Technologies Inc. Shareholders Litigation, 924 A.2d 171 (Del. Ch. 2007), exemplifies the scenario of an unreasonably conducted, target-initiated active bidding process. Netsmart authorized an investment bank to try to sell the company, and that process was conducted through an "informal and haphazard market canvass" that excluded any potential strategic buyers. *Id.* at 184. That approach reflected the incentives of management, who wanted to keep their

jobs, and of the contingently compensated financial advisor, because "dealing with a discrete set of private equity players was ... the quickest (and lowest cost) route to a definitive sales agreement." *Id.* at 199. Then-Vice Chancellor Strine concluded that the plaintiffs had "demonstrated a reasonable probability that they will later prove that the board's failure to engage in any logical efforts to examine the universe of possible strategic buyers and to identify a select group for targeted sales overtures was unreasonable and a breach of their *Revlon* duties." *Id.* Here, Lead Plaintiff proved a breach of *Revlon* duties in the same scenario.

No case stands for the proposition "*Revlon* scrutiny does not apply" when a publicly controlled corporation "initiat[es] an auction," OB 20, *if the auction culminates in the sale of the corporation for cash*. RBC's authorities do not discuss that scenario. Most of RBC's cases involve or discuss a scenario in which the ultimate transaction does not constitute a change of control.[5] RBC also cites *Lyondell*, in which the Board initially "decided to take a 'wait and see' approach" to a competitor's interest in acquiring the company. 970 A.2d at 237, 242. Here, Rural was not only "in play," Shackelton and the Special Committee, without

[5] *Arnold*, 650 A.2d at 1290; *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 148 n.117 (Del. Ch. 2012); *In re NCS Healthcare, Inc. S'holders Litig.*, 825 A.2d 240, 255-56 (Del. Ch. 2002), *rev'd Omnicare Inc., v. NCS Healthcare, Inc.*, 2002 WL 31767892 (Del. Dec. 10, 2002); *In re Paxson Commc'n Corp. S'holder Litig.*, 2001 WL 812028, at *7 (Del. Ch. July 10, 2001); *Wells Fargo & Co. v. First Interstate Bancorp*, 1996 WL 32169, at *4 (Del. Ch. Jan. 18, 1996). The case relied upon by NACD for the same argument, *In re Santa Fe Pacific Corp. Shareholder Litigation*, 669 A.2d 59 (Del. 1995), similarly involved a situation in which the board was "firmly committed to a stock-for-stock merger," not a change in control transaction. *Id.* at 71.

formal board authorization, initiated an active bidding process that led to a cash sale. *Rural I* at 11-13, 53; B106; B107-08; B117; B118; B135; A550.

RBC attacks the factual basis for the Court of Chancery's finding that it was unreasonable to proceed with a sale process in parallel with the EMS process in the absence of disclosure from RBC about its economic interest in doing so. OB 22-24. RBC's arguments are factually unsupported and cannot justify reversal on the ground that the fact findings of the Court of Chancery are clearly erroneous.

RBC argues that it was "readily apparent" that "some bidders in the EMS sale would not be able to bid for Rural." OB 22. But RBC's argument is based on the testimony of RBC's Munoz, who acknowledged that an information-sharing problem with EMS bidders was foreseeable. A2145-46. RBC does not point to any evidence that the Special Committee or Board recognized that it was problematic to ask EMS bidders to participate in a simultaneous sale process for Rural. Financial advisors are supposed to convey such advice about how to structure a sale process. *See* Strine, *supra* note 4, at 684 ("[T]he financial advisor has a breadth of deal and market experience it can draw upon to keep management honest and to help the independent directors make sure that the stockholders get treated fairly.").

RBC argues that it is "difficult to understand" how full disclosure by RBC of its interest in getting on the financing trees for EMS "would have materially

changed Rural's approach." OB 22. This argument assumes that Rural's Board did not want the services of a primary advisor without a massive self-interest in persuading Rural to initiate a near-term sale process. J.P. Morgan recommended to DiMino that Rural wait a year before putting itself up for sale. *Rural I* at 15; B147.

RBC argues that there is "no evidence" that RBC designed the Rural sale process to serve its interest in financing bidders for EMS. OB 23. A series of RBC internal emails attest to the huge fee opportunity presented by the EMS sale process and how getting retained by Rural to run a sell-side process was RBC's "angle" to get a share of the EMS financing fees. A389-90; B103-04.1; A403; A404; A547; B177.

RBC argues that the Board had already decided on December 8 to explore strategic alternatives. But a true exploration of strategic alternatives led by an unconflicted bank might not have resulted in a near-term sale process.

RBC points to the RBC engagement letter as making Rural "well aware" that RBC "had an interest" in providing financing to a buyer of EMS. A sentence in an engagement letter is a far cry from knowing that RBC saw Rural as an "angle" to "get on all [financing] trees" for EMS and make as much as $35.3 million from financing the purchase of EMS. A404; B177. On the subject of what Rural's directors knew, RBC resorts to citing deposition testimony from Davis that

he could not recall whether he learned that RBC was part of the financing group for the buyer of EMS. A1760.

RBC and NACD argue that applying this Court's recent precedent of *C & J Energy Services, Inc. v. City of Miami General Employees & Sanitation Employees' Retirement Trust*, 107 A.3d 1049 (Del. 2014), Rural's Board did not violate *Revlon*. RBC focuses on the language in *C & J* that the challenged transaction was "subject to an effective market check." *Id.* at 1067. NACD focuses on the language in *C & J* that one must look at whether the Board's "overall course of action was reasonable under the circumstances as a good faith attempt to secure the highest value reasonably available." *Id.* at 1066.

C & J does not aid RBC, because the Court of Chancery expressly found below that a "confluence of factors" meant that the "faulty [auction] design prevented the emergence of the type of competitive dynamic among multiple bidders that is necessary for reliable price discovery." *Rural I* at 74-77. Those factors included (i) "the Company was just beginning to implement new growth strategies under a new CEO," (ii) for various reasons "the market did not understand Rural's prospects," (iii) large private equity buyers similar to Warburg were tied up in the EMS process, and (iv) logical strategic bidders were tied up in their own change-in-control transactions. *Id.* at 75-76. RBC's contention that

there was a "robust auction" cannot be squared with the Court of Chancery's fact finding. OB 25, 27, 30.

C & J did not purport to change the law, and the following teaching of *Netsmart*, authored by the same jurist, remains applicable:

> Precisely because of the various problems Netsmart's management identified as making it difficult for it to attract market attention as a micro-cap public company, ***an inert, implicit post-signing market check does not, on this record, suffice as a reliable way to survey interest by strategic players***. Rather, to test the market for strategic buyers in a reliable fashion, one would expect a material effort at salesmanship to occur.

924 A.2d at 197 (emphasis added). RBC cites *Netsmart* as a case in which "bidders were excluded" due to "the design of the sale process." OB 30. That is what the Court of Chancery concluded here.

Finally, RBC points to supposed "indisputable facts in the record," such as that "the Board relied equally upon Moelis's fairness opinion" and "[m]ost of the directors keenly understood the value of the Company." OB 30-31. RBC offers no citations to the trial record for those contentions. In fact, the Board first received written valuation materials from RBC and Moelis at 9:42 p.m. Eastern time for an 11:00 p.m. Eastern time Board meeting at which the transaction was approved. *Rural I* at 31. Accordingly, "the directors did not have an opportunity to examine those materials critically and understand how the value of the merger compared to Rural's value as a going concern." *Rural I* at 63. 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." *Rural I* at 28 n.1. Aspects of RBC's board book "conflicted with RBC's earlier advice, contravened the premises underlying the Board's business plan for Rural, and contained outright falsehoods." *Rural I* at 62. RBC does not mention that Shackelton updated his fund's conservative valuation model of Rural on March 23, and generated a base case value of $18.86 per share. *Rural I* at 24; A2368-70.

2. The Findings Supporting the *Revlon* Breach Are Sufficient for a Finding of a Breach of Fiduciary Duty

The Court of Chancery expressly found in *Rural I* that the Board made decisions that "Fell Outside the Range of Reasonableness" for purpose of *Revlon* and the directors breached their "duty of care." *Rural I* at 49, 69. In *Rural II*, the Court of Chancery found that Shackelton and DiMino were not entitled to exculpation under 8 *Del. C.* § 102(b)(7), which is equivalent to finding that they breached their duty of loyalty. *Rural II* at 79-84, 86-87.

Despite these rulings, RBC argues that no breach of fiduciary duty was properly found that would support a claim against RBC for aiding and abetting, because the 91-page opinion in *Rural I* does not contain an express finding of "gross negligence." OB 27. RBC does not cite any law for the proposition that a breach of *Revlon* duties is not necessarily a breach of fiduciary duty or a breach of the duty of care. Nor does RBC cite any law for the proposition that a breach of

fiduciary duty under *Revlon* requires an express finding of "gross negligence," a concept unmentioned in *Revlon* itself, *Paramount v. QVC*, or *Netsmart*, all of which found *Revlon* violations.

This Court has held that *Revlon* imposes a context-specific requirement to act "reasonably." *Arnold*, 650 A.2d at 1289; *Paramount Commc'ns, Inc.*, 637 A.2d at 43. This Court clarified in *Lyondell*, a post-closing *Revlon* case, that "if the directors failed to do all that they should have under the circumstances, they breached their duty of care." 970 A.2d at 243. In the *Revlon* context, reasonableness is the standard for the operative question of whether a breach of fiduciary duty has been proven as a predicate for aiding and abetting liability against RBC.

Moreover, *Rural I* is replete with factual findings that are tantamount to a finding of gross negligence. For example:

- "Although a well-informed board might have considered these issues and reasonably decided to pursue a near term sale process, neither the Board nor the Special Committee made such a decision." *Rural I* at 56.

- "When it approved the merger, the Board was unaware of RBC's last minute efforts to solicit a buy-side financing role from Warburg, had not received any valuation information until three hours before the meeting to approve the deal, and did not know about RBC's manipulation of its valuation metrics." *Id.* at 58.

- "[T]he Rural directors did not provide any guidanee 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." *Id.* at 61.

- "[T]he Rural directors did not have a reasonably adequate understanding of the alternatives available to Rural, including the value of not engaging in a transaction at all." *Id.* at 63.

3. Alternatively, the Transaction Was Not Entirely Fair

There exists an independent basis for a finding of a breach of fiduciary that is not articulated in *Rural I*. Entire fairness review is appropriate if a director's self-interest is "sufficiently material to find the director to have breached his duty of loyalty and to have infected the board's decision." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 364 (Del. 1993). The standard is met if the director's interest is "substantial" and if the "the director *failed to disclose his interest* in the transaction to the board *and* a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed transaction." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995) (internal quotation marks omitted) (emphasis in original).

The factual findings regarding Shackelton's personal interest, due to various aspects of his hedge fund's business that inclined him to sell, meet that standard, given the findings about his influence over the sale process and the other directors. *Rural I* at 2-4, 6, 8-9, 12-13, 15-17; *Rural II* at 79-87. Shackelton did not disclose to his fellow directors those aspects of his hedge fund's business that inclined him to favor a near-term sale. Davis testified that even though he frequently

communicated directly with Shackelton, he had no idea about any aspects of Shackelton's hedge fund, and he did not know that the lawyer representing Rural's board also represented Shackelton's hedge fund. B593-94; B595; *see also* A2362-64. Since the transaction was found not to satisfy enhanced scrutiny under *Revlon*, it cannot withstand the more exacting entire fairness standard of review.

II. THE COURT OF CHANCERY PROPERLY FOUND THAT THE BOARD BREACHED ITS DUTY OF DISCLOSURE

A. Question Presented

Did the Court of Chancery correctly find that the proxy statement was materially misleading? A2060; A2068; A2073; B967 § III.B.7.

B. Scope of Review

"The issue of materiality of an alleged misstatement or omission in a prospectus is a mixed question of law and fact, but predominantly a question of fact." *Pfeffer v. Redstone*, 965 A.2d 676, 685 (Del. 2009). Findings of facts based on determinations of the credibility of live witness testimony will be upheld, the deferential "clearly erroneous" standard applies to findings of historical fact, and legal conclusions are reviewed *de novo*. *See supra* § I.B.

C. Merits of Argument

A board "must fully and fairly disclose all material information within its control when seeking shareholder action." *Pfeffer*, 965 A.2d at 686. "To state a claim for breach by omission of any duty to disclose, a plaintiff must plead facts identifying (1) material, (2) reasonably available (3) information that (4) was omitted from the proxy materials." *Id.* (internal quotation marks omitted). Material information "reasonably available" to a board includes the conflicts of the

board's financial advisor[6] and the key inputs to, and the methodologies of, the financial advisor's fairness opinion analyses.[7]

1. The Directors Failed to Disclose RBC's Conflicts

The Court of Chancery held that Lead Plaintiff "proved at trial that the Proxy Statement contained false and misleading information about RBC's incentives." *Rural I* at 81. The Proxy Statement falsely stated that RBC received the right to offer staple financing because comparable financing "might not otherwise be available," and misleadingly omitted facts about RBC's efforts to provide financing in connection with the Rural sale process, whether to bidders for EMS or to Warburg after Warburg submitted a fully-financed bid. *Rural I* at 82-83.

RBC questions the materiality of the non-disclosures. OB 38-40. The materiality of the undisclosed conflicts is evidenced by the reports of the proxy advisors, who mistakenly advised Rural's stockholders that RBC was "independent" and that "there are no concerning conflicts of interest." *Rural I* at

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[6] *See In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011) ("Because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts.") (collecting cases discussed in *Rural I* at 81-82).

[7] *See In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 203-04 (Del. Ch. 2007) ("[W]hen a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed.").

83 (quoting B399 & B403). Full disclosure would have put Rural's stockholders and the proxy advisors on notice of RBC's troubling conflicts.

RBC's undisclosed efforts to provide financing to the bidders for EMS are material because they show the conflicted nature of RBC's advice that Rural initiate a sale process in parallel with EMS. RBC knew it could finance each bidder for EMS and earn large financing fees (up to $35 million) if RBC could convince Rural to put itself up for sale and hire RBC as its sell-side advisor. A403; A404; A547; B177. RBC's undisclosed $10 million financing fee from the buyer of EMS shows the magnitude of the conflict RBC operated under when it advised Rural to initiate a sale process. The press release issued by the acquirer of EMS identifying RBC's participation in the EMS acquisition financing was not distributed to Rural's stockholders and did not convey that RBC used its status as Rural's primary sell-side advisor to get that financing work. A589.

RBC's undisclosed end-stage lobbying of Warburg is material because it identifies the conflict RBC was operating under when it was advising Rural on end-stage negotiations and preparing its fairness opinion analysis. RBC argues that there was no need to disclose that RBC's lobbying efforts continued until the very end because "RBC never suggested to any party that it was ceasing these efforts" and "[s]tockholders reading the Proxy Statement knew that RBC operated with a potential conflict throughout the sale process." OB 40. But absent

disclosure, the natural inference is that RBC did not engage in end-stage lobbying of Warburg to replace its committed financing with staple financing from RBC. From Rural's perspective, allowing end-stage lobbying by RBC is irrational, since it creates "no conceivable upside for Rural" and it "accentuate[s] RBC's desire to generate goodwill with Warburg and close the deal." *Rural I* at 61. Stockholders would not assume that RBC would be so audacious as to secretly lobby Warburg to replace its committed financing. Indeed, RBC's pre-trial answering brief falsely asserted that the end-stage lobbying effort could not have happened, on the basis that it made no sense: "RBC knew that Warburg had 100% financing in place for the Transaction, and that it would not make sense for RBC to pursue Warburg regarding staple financing." A2034.

The facts concerning RBC's undisclosed conflicts needed to be disclosed under two theories: (i) financial advisor conflicts are material; and (ii) Rural misleadingly (and falsely) issued a partial disclosure that RBC was allowed to offer staple financing because financing might otherwise not be available. *Rural I* at 81-82. NACD writes that it is "unaware of any decision from this Court holding that a proxy statement must disclose every detail of a financial advisor's efforts to obtain business from other clients." NACD Br. at 17. *Rural I* does not so hold. Contemporaneous financial advisor activities are material to the extent they identify a conflict of interest. Here, it was not "enough to disclose RBC had

permission to seek to offer buy-side financing[.]" NACD Br. at 17. Such a disclosure did not inform Rural's stockholders that RBC acted on the knowledge that it stood to make as much as $35 million in financing fees from the buyer of EMS by convincing Rural to put itself up for sale. Nor did Rural's stockholders have any idea that on Saturday, March 26, 2011, Munoz was simultaneously (i) keeping tabs on RBC's effort to make as much as $20 million from Warburg, (ii) advising the Special Committee to accept Warburg's offer, and (iii) participating in the process by which RBC made Warburg's bid look more favorable by downwardly revising Rural's value in RBC's fairness opinion analysis. B326; A2192-93; A2116-17; A2409; B327; A825-26.

RBC offers an excuse that cannot succeed as a matter of law:

> Knowing that RBC was asking Warburg about staple financing, ***Rural and its counsel decided that the timing and substance of the lobbying efforts were not material*** and disclosed only that RBC sought to participate in the financing...
>
> ... ***It was the Company's decision not to disclose any of those conversations***, and there is no reason why RBC ought to be liable for not having caused Rural—if it were even possible—to have updated its disclosure to include one or all of those conversations.

OB 40-41 (emphasis added). RBC's engagement letter gave RBC contractual veto power over "any description of or reference to RBC" in the Proxy Statement. A554. Moreover, RBC cannot argue that *Rural's directors* were fully informed. The trial record reflects that Rural's CEO, Special Committee and Board were not informed about RBC's end-stage lobbying effort. A2127 (Munoz); A2212

(DiMino); A2318 (Walker); A804-05; A825-26; A915-17. But since the facts were reasonably available to Rural's directors, they (and RBC) have no defense for not disclosing them.

Finally, RBC argues that it cannot be held responsible for its undisclosed conflicts of interest because the only undisclosed conflict identified in Lead Plaintiff's pre-trial answering brief was RBC's "participation in Rural's revolver syndicate." OB 44 (citing A2068). RBC's argument of lack of fair notice is audacious, because the conflict identified in Lead Plaintiff's pre-trial answering brief reflected how Lead Plaintiff had been misled by RBC's false representations in its pre-trial opening brief. *See supra* pp. 28-29; *infra* pp. 81-82. It was not until the second day of trial that Munoz admitted that RBC had been lobbying Warburg to replace its committed financing, not to participate in Rural's revolver syndicate:

> Q. So the most senior people at RBC are trying to make a last effort to see whether RBC can get involved in the staple on Saturday, March 26th; correct?
>
> A. Yes.

A2192-93.

Moreover, Lead Plaintiff's answering pre-trial brief highlighted RBC's conflicts, the Pre-Trial Stipulation and Order incorporated the pre-trial briefing, RBC identified as an issue to be tried whether the Proxy Statement "omitted or misstated any material fact," and Lead Plaintiff questioned Munoz at trial about

RBC's undisclosed conflicts. A2057-62, A2127; B967 § III.B.7. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Ch. Ct. R. 15(b). RBC even acknowledged below that the duty of disclosure claim had been raised before trial. *See* A2566 ("The disclosure claim relating to RBC was not pleaded or disclosed by Plaintiff until her Pre-Trial Answering Brief ....").

2. The Directors Disclosed a False and Misleading Summary of RBC's Precedent Transaction Analysis

RBC argues that there was "nothing 'false' about" the Proxy Statement's disclosure of RBC's precedent transaction analysis. OB 34. That is not the test. "[K]ey inputs" to a fairness opinion analysis must be "fairly disclosed." *In re Netsmart Techs.*, 924 A.2d at 204. Regardless, a key input to an RBC precedent transaction analysis, Rural's EBITDA, was not accurately or fairly disclosed.

The Proxy Statement discloses that RBC applied multiples derived from precedent transactions to "the Company's Adjusted EBITDA for calendar year 2010, or CY 2010, based on Wall Street research analyst consensus projections, referred to as CY 2010 Adjusted EBITDA (Consensus)[.]" A1100-02. The Court of Chancery explained why this phraseology is false and misleading:

> The "consensus projections" were neither analyst projections, nor did they represent a Wall Street consensus. ***The figures were actually Rural's reported results, not projections, and RBC used the reported figures without adjusting for one-time expenses, which was contrary to the Wall Street consensus.*** The resulting figure that RBC used in

> the precedent transaction analysis was $69.8 million. The Proxy Statement elsewhere identified Rural's Adjusted EBITDA for 2010 as $76.8 million, which adjusted for one-time expenses .... The Proxy Statement also noted RBC adjusted the guideline target companies' EBITDA in its precedent transaction analysis "to account for ... certain one-time expenses."...
>
> ***A stockholder reading the Proxy Statement would conclude, incorrectly, that RBC's precedent transaction range used the disclosed Adjusted EBITDA that added back one-time expenses and that the resulting figures were consistent with a Wall Street consensus....***

Rural I at 79-80 (emphasis added).

RBC argues that the Court of Chancery "made a mistake," "either failed to read or understand" the underlying analyst reports, and "made no effort to analyze these reports or to reconcile the testimony explaining RBC's approach." OB 35-37. That criticism is unfounded. A major focus of the trial was the credibility of RBC's justifications for making downward adjustments to its metrics on Saturday, March 26, including the new calculation of Rural's EBITDA. B1068-74 (Daniel video clip); A2194-96 (Munoz live); A2403-11 (Daniel live). The Court of Chancery engaged in fact-finding on the subject of the downward adjustments, *Rural I* at 28-30, 79-80, and drew the following conclusion on witness credibility:

> In resolving factual disputes and drawing inferences, this decision has placed the greatest weight on the contemporaneous documents. This decision has placed the least weight on the testimony of the two RBC managing directors who appeared at trial. Their accounts at times strained credulity, and the plaintiffs successfully impeached their testimony on multiple occasions.

Rural I at 1.

The documents support the facts as found. RBC's opening brief attaches a contemporaneous analyst report from when Rural announced earnings that reflected significant one-time expenses. OB Ex. D JX 360 (A581-88). The analyst noted:

> **The market quickly read through one-time charges**.... We estimate the adjustments would have contributed $6.3M to Adj. EBITDA ....
>
> ...
>
> **Investors were initially spooked by RURL's F2Q11 headline results that showed Adj. EBITDA of $13.9M** .... However, we didn't need to dig far into the print to find that there were several one-time items that clearly needed to be added back to produce a "pure" operational Adj. EBITDA to match on an "apples-to-apples" basis with expectations....Excluding the combined $6.3 million in charges, Adj. EBITDA was $20.2 million ($2.4 million ahead of Street consensus of $17.9 million), vs. the $13.9 million reported....

OB Ex. D JX360 at 1-2 (emphasis in original). Adding back $6.3 million in one-time charges to Rural's Adjusted EBITDA was the Wall Street "consensus." B214-44; B245. That is what equity analysts do, and bankers are supposed to rely on their work when using multiples to value a company.[8] The Proxy Statement falsely and misleadingly stated that RBC had done so in its "Consensus" range. When RBC switched on March 26 to using unadjusted reported EBITDA without

[8] BRADFORD CORNELL, CORPORATE VALUATION: TOOLS FOR EFFECTIVE APPRAISAL AND DECISION MAKING 75, 86 (1993) ("[F]or the direct comparison approach to work properly, the ratios and the financial variables to which they are applied must not be based on aberrant data.... When dissecting a company's earnings record, analysts typically discuss whether or not earnings in a given year are abnormal.").

regard for analyst commentary, RBC was obliged to re-label its "Consensus" range.

RBC is reduced to arguing that there is "nothing material" about using EBITDA of $69.8 million instead of EBITDA of $76.5 million for purposes of its "Consensus" range. OB 37. RBC offers no citation for the proposition that is not material to misleadingly and artificially manipulate the low end of a valuation range by 19% ($9.76 versus $8.19) and the high end of a valuation range by 15% ($16.71 versus $19.22). *Id.* RBC offers no citation for its contention that it is not material to include an artificially low range in a Proxy Statement so long as a legitimate range is also included. *Id.* The testimony of RBC's Daniel about the artificial "Consensus" range that is entirely below the deal price crisply refutes RBC's arguments about materiality: "looking at that one line, a shareholder would look at this and say: This is an absolutely fair deal." A2195, *quoted in Rural I* at 80.

III. THE COURT OF CHANCERY PROPERLY HELD THAT RBC KNOWINGLY PARTICIPATED IN BREACHES OF THE DUTY OF CARE BY MISLEADING DIRECTORS FOR IMPROPER MOTIVES OF ITS OWN

A. Question Presented

Did the Court of Chancery properly hold that a claim for aiding and abetting can be maintained when a third party, for improper purposes of its own, misleads directors into breaching their duty of care? A2504-05; *Rural I* at 69.

B. Scope of Review

The review of a finding of "knowing participation" in a breach of fiduciary duty involves a mixed question of law and fact. Findings of facts based on determinations of the credibility of live witness testimony will be upheld, the deferential "clearly erroneous" standard applies to findings of historical fact, and legal conclusions are reviewed *de novo*. *See supra* § I.B.

C. Merits of Argument

The Court of Chancery's challenged holding in *Rural I* is as follows:

> For purposes of the aiding and abetting claim against RBC, this decision need hold only that a claim for aiding and abetting a breach of the duty of care can be maintained under the circumstances envisioned by Chief Justice Strine in *Goodwin* [*v. Live Entm't, Inc.*, 1999 WL 64265, at *28 (Del. Ch. Jan 25, 1999)]: when a third party, for improper motives of its own, misleads the directors into breaching their duty of care. That is precisely what RBC did.

Rural I at 69 (footnote omitted). The Court of Chancery faithfully discussed Delaware law on the subject of aiding and abetting a breach of the duty of care,

Rural I at 64-69, while RBC does not. To summarize, no Delaware case rejects the notion that a third party can aid and abet a breach of the duty of care, while numerous cases presume such a claim exists. This Court declined to express a view on the subject in *Malpiede v. Townson*, 780 A.2d 1075, 1097 n.78 (Del. 2001), but recognized the claim in *Arnold v. Society for Savings Bancorp, Inc.*, 678 A.2d 533 (Del. 1996), and in *In re Celera Corp. Shareholder Litigation*, 59 A.3d 418 (Del. 2012). In *Arnold*, this Court affirmed the Court of Chancery respecting the availability of a claim for aiding and abetting an exculpated breach of the duty of disclosure and remanded for further proceedings on the claim. 678 A.2d at 534, 542. In *In re Celera*, this Court characterized an aiding and abetting claim against a financial advisor as "clearly identified and supportable." 59 A.3d at 436. RBC contends that *Goodwin* supports its position, OB at 48-49, but in that case then-Vice Chancellor Strine identified a factual scenario that would be sufficient:

> Accepting this contention without evidence that the third-parties ***purposely induced the breach of the duty of care*** by a Live director ***for illicit reasons*** would in essence permit Goodwin to assert a direct negligence claim against them. Here, the record does not support a finding that the third-parties, ***for improper motives of their own, intentionally duped*** the Live directors ***into breaching*** their duty of care.

1999 WL 64265, at *28 (emphasis added).

RBC declines to explain why as a matter of policy this Court should reject a claim for aiding and abetting against a financial advisor in circumstances where the

financial advisor, for its own mercenary, fee-driven reasons, has "intentionally duped" its client representatives on the board of directors into breaching their duty of care in connection with the sale of the company. If that position became the law, the Court would be creating a wrong without a remedy. Financial advisors would be incentivized to mislead their clients and thereby injure stockholders of Delaware corporations, while directors would be incentivized not to work closely with their financial advisors, so that they can better argue that any breach of duty was only an exculpated breach of the duty of care. Even the trade association to which RBC belongs makes clear that it does not oppose recognition of "a claim for aiding and abetting premised on an advisor's 'fraud on the Board' [that is] limited to prohibiting the advisor from engaging in conduct that intentionally causes, or intentionally misleads the board so as to cause, the board to breach its duty of care." SIFMA Br. at 14. That is the precise basis for the Court of Chancery's above-quoted holding in *Rural I*.

Moreover, the Court of Chancery's holding in *Rural I* was implicitly modified by its rulings in *Rural II* that Shackelton and DiMino are not entitled to exculpation, given their self-interest in seeking a near-term sale of Rural. *Rural II* at 79-84, 86-87. RBC did not only act with improper motives to mislead directors into breaching their duty of care; they collaborated to a limited extent with DiMino, who breached his duty of loyalty.

RBC played on DiMino's self-interest in a sale. At the very beginning of the process, DiMino wrote to Munoz, "let's get this baby sold." *Rural I* at 11 (quoting B106). Near the end of the process, after Warburg made its fully financed bid, Munoz told DiMino to "start working the board" and offered him valuation-related "tidbits" that were only persuasive "because the full Board had never received a valuation presentation from RBC." *Rural I* at 26, 62 (quoting B286 & B287-88). The Court of Chancery found that once a fully financed bid was in hand, "RBC just wanted a deal" and "DiMino became RBC's principal ally in the boardroom," since his prospect of getting a new compensation package from Warburg meant that he, like RBC, had "an incentive to sell the Company" without regard for the price at which it was sold. *Rural I* at 23.

DiMino's adjudicated disloyalty and cooperation with RBC means that the legal issue framed by RBC in its opening brief is not clearly presented by the record. RBC's focus on the Board's adjudicated breach of the duty of care in *Rural I* ignores the duty of loyalty violations found in *Rural II*. That gap undermines RBC's argument, since RBC concedes that knowing participation is satisfied if a "third party joined with the fiduciary in action the third party knew to be a breach of the fiduciary's obligations." OB at 45.

IV. THE COURT OF CHANCERY'S FACTUAL FINDINGS SUPPORT PROXIMATE CAUSATION OF DAMAGES BY THE BOARD'S BREACHES OF FIDUCIARY DUTY

A. Question Presented

Is proximate causation supported by factual findings? A2508-09.

B. Scope of Review

Proximate cause is ordinarily a question of fact to be determined by the trier of fact. *Duphily v. Del. Elec. Co-op.*, 662 A.2d 821, 830 (Del. 1995). The deferential "clearly erroneous" standard applies to findings of historical fact. *See supra* § I.B.

C. Merits of Argument

One element of a claim for aiding and abetting a breach of fiduciary duty is "damages proximately caused by the breach." *Malpiede*, 780 A.2d at 1096. "Delaware recognizes the traditional 'but for' definition of proximate causation.... In other words, a proximate cause is one which in natural and continuous sequence, *unbroken by any efficient intervening cause*, produces the injury and without which the result would not have occurred." *Duphily*, 662 A.2d at 828-29 (citations omitted) (internal quotation marks omitted). "In order to break the causal chain, the intervening cause must also be a superseding cause, that is, the intervening act or event itself must have been neither anticipated nor reasonably foreseeable by the original tortfeasor." *Id.* at 829.

RBC does not engage the Court of Chancery's abundant factual findings supporting its conclusion that "RBC's actions led to (i) an ill-timed sale of Rural that did not capture the value attributable to its acquisition strategy; (ii) a mismanaged sale process that generated only one final bid by a bidder that knew it had the upper hand in bidding and price negotiations; and (iii) uninformed board approval based on manipulated valuation analyses." *Rural I* at 73; *see id.* at 13-32, 53-56, 58-63, 69-71, 74-77. Case law refutes RBC's suggestion that *Revlon* violations are "too attenuated to support an award of damages."[9] OB 51. RBC makes no effort to articulate how Moelis's conduct satisfies the test for an intervening and superseding cause that "logically cuts the causal link," OB at 52, given that Moelis was involved from the outset as a contingently compensated "secondary" advisor. *Rural I* at 12; A543. RBC also cannot avoid a finding of proximate cause by pointing to the directors – since the question is whether damages were proximately caused by their breach of fiduciary duty.

Respecting proximate causation of damages from breach of the duty of disclosure, RBC relies on the legally flawed contention that "Moelis destroys that causal link." OB at 54. Moelis does not meet the definition of an intervening, superseding cause.

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[9] "[M]oney damages can provide a sufficient remedy for a board's *Revlon* violations." *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *25 (Del. Ch. May 20, 2011) (citing *Norberg v. Young's Mkt. Co.*, 1989 WL 155462, at *3 (Del. Ch. Dec. 19, 1989)).

V. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN EVALUATING EXPERT TESTIMONY ABOUT RURAL'S VALUE

A. Question Presented

Did the Court of Chancery abuse its discretion in evaluating expert testimony and record evidence about Rural's value? A2510-20; A2625-38.

B. Scope of Review

The Court of Chancery's award of damages is reviewed on appeal for abuse of discretion, and "the Court of Chancery has greater discretion when making an award of damages in an action for breach of duty of loyalty than it would when assessing fair value in an appraisal action." *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2012).

C. Merits of Argument

1. The Court of Chancery Did Not Ignore the Sale Process or the Bankruptcy

RBC argues that the Court of Chancery erred by "conduct[ing] a valuation without reference to actual market forces (*e.g.*, an auction and a bankruptcy) that are easily observable." OB at 59. The argument is disingenuous.

The Court of Chancery made abundant fact-finding about the "confluence of factors" that rendered reliance on the negotiated deal price "inappropriate," including how "RBC's faulty [auction] design prevented the emergence of the type

of competitive dynamic among multiple bidders that is necessary for reliable price discovery." *Rural I* at 74-77; *see id.* at 14-18, 53-56.

RBC does not identify any error in the Court of Chancery's 21-page opinion barring consideration of the first-day declaration filed in bankruptcy court by Rural's newly hired CFO, more than two years after Warburg purchased Rural. OB Ex. C at 1. That opinion discusses how Warburg "took two aggressive steps to enhance post-closing returns" that "had the ineluctable consequence of altering the Company's risk profile," and how the "performance and fate" of the "post-merger, more highly leveraged, and more aggressively managed Rural/Metro Mark II" "has at best tangential relevance to the pre-merger, less highly leveraged, and less aggressively managed Rural/Metro Mark I." OB Ex. C at 3-4, 10.

2. The Court of Chancery Used Appropriate DCF Inputs

RBC attacks only two of the many inputs to the Court of Chancery's DCF valuation: (i) the use of "extrapolations of projections"; and (ii) the measuring period for computing beta. Both inputs are well supported, and the Court of Chancery appropriately exercised its discretion.

Because management's five-year projections contemplated an acquisition program, and because management projected that it would take five years to fully integrate each acquisition, "[t]he parties' experts agreed that it would be inappropriate to apply a terminal value multiple to projected 2016 EBITDA that

did not take into account the fact that the acquisitions would not yet be fully integrated." *Rural I* at 85-86. Indeed, *both parties' experts* advanced at trial DCF models that extrapolated management projections.[10] As RBC stated in its post-trial answering brief, its expert, Professor Lys, "extended management's projections through 2020 to include the five-year revenue and EBITDA contributions for the projected 2013 to 2016 acquisitions, and estimated cash flows through the end of 2020 using certain growth and profitability assumptions." A2574-75. The difference between the experts is that Professor Lys extrapolated management projections "at the nominal GDP growth rate," while Lead Plaintiff's expert, Kevin Dages, projected that revenues would grow during the five-year extension period at "the same growth rate projected by management for fiscal year 2016," taking into account "estimates of increasing annual growth rates in healthcare spending through 2021." A2515; A2575; B645. The Court of Chancery properly exercised its discretion in using an extension period and incorporating assumptions from projections it found to be "reliable" and "realistic." *Rural I* at 85.

As for the supposedly "unreasonably low beta," OB at 57, the Court of Chancery accepted the beta propounded by Dages, who derived it using a standard

[10] This is unsurprising, given that prior precedent accepted the technique of adding an extension period to management projections, and thus creating a "three-step" or "three-stage" DCF that includes the projection period, the extension period, and the terminal period. *Andalaro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *12 n.46 (Del. Ch. Aug. 15, 2005); *Prescott Grp. Small Cap, L.P. v. Coleman Co., Inc.*, 2004 WL 2059515, at *29-30 (Del. Ch. Sept. 8, 2004).

data source – "from Bloomberg weekly data measured against the S&P 500 for two years." *Rural I* at 87. Professor Lys favored monthly data over a span of five years. The Court of Chancery observed: "In the abstract, both are acceptable methods." *Rural I* at 87 (citing *Andalaro*, 2005 WL 2045640, at *15 & n.61). The Court of Chancery initially favored use of a shorter eighteen-month measurement period, *id.* at 87-88, but since that shorter period produced a lower beta (and thus a higher valuation) than Lead Plaintiff had advocated, the Court of Chancery selected Dages' beta, based on "the supplemental submissions and the evidence presented at trial." *Rural II* at 23.

Dages favored a two-year measurement period because it "provides a sufficient length of time while limiting the chance that the compan[y's] risk characteristics have changed significantly over time," and because the alternative of a five-year measurement period unreasonably includes "the significant changes in the stock market and the Company's business model over the five year period leading up to March 25, 2011." B650 at n.118. A prior case similarly used a measuring period short enough to avoid the "significant noise associated with ... the Global Financial Crisis [of] late 2007 through early 2009." *Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013 WL 3793896, *16 (Del. Ch. July 8, 2013). RBC offers no support for its suggestion that Dages computed beta in a manner that was not "consistent with industry practice." OB 58.

VI. THE COURT OF CHANCERY PROPERLY APPLIED DUCATA

A. Question Presented

Did the Court of Chancery properly apply DUCATA in determining that RBC was disproportionately at fault, that two of the non-settling defendants were joint tortfeasors, that RBC was afforded a fair opportunity to establish the joint tortfeasor status of the other non-settling defendants, that exculpated directors are not joint tortfeasors, that RBC's unclean hands barred it from establishing judgment reduction relating to its fraud on the Board, and that joint tortfeasor status could not be established by quasi-estoppel? A2974-96. RBC did not timely raise below its argument that judgment reduction should not have been decided based on the trial record.

B. Scope of Review

Findings of facts based on determinations of the credibility of live witness testimony will be upheld, the deferential "clearly erroneous" standard applies to findings of historical fact, and legal conclusions are reviewed *de novo*. *See supra* § I.B. In reviewing the applicability of the doctrine of unclean hands, "the function of an appellate tribunal in reviewing a bench trial is to determine whether the trial judge's factual findings are clearly erroneous." *Homestore Inc. v. Tafeen*, 888 A.2d 204, 217 (Del. 2005). This Court generally declines to review contentions not raised below and not fairly presented to the trial court for decision unless it

finds that the trial court committed plain error requiring review in the interests of justice. *Turner v. State*, 5 A.3d 612, 615 (Del. 2010).

C. Merits of Argument

1. DUCATA and RBC Authorized the Court of Chancery to Find that RBC Was Disproportionately at Fault

Upon court approval of the partial settlements, the settling defendants were released from contribution claims by RBC. Those releases were made pursuant to Section 6304(b) of DUCATA, in that they provided "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). The Court of Chancery determined that two of the released defendants, Shackelton and DiMino, were joint tortfeasors who were responsible for a combined 17% of the damages. The Court of Chancery therefore reduced the judgment against RBC by 17% of the total damages suffered by the Class. *Rural II* at 94-95.

RBC argues that pro rata judgment reduction as to RBC requires an equal allocation of damages among the adjudicated joint tortfeasors. OB at 61-62. Yet RBC acknowledges, as it must, that Section 6302(d) of DUCATA allows for the consideration of disproportion of fault among joint tortfeasors:

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

10 *Del. C.* § 6302(d). RBC argues, however, that disproportion of fault could not be considered because the procedures of Section 6306(d) were not satisfied:

> As among joint tortfeasors against whom a judgment has been entered in a single action, [subseetion] (d) of § 6302(d) of this title applies only if the issue of proportionate fault is litigated between them by eross-complaint in that action.

10 *Del. C.* § 6306(d).

Section 6306(d) is inapplicable. It creates no barrier to a finding of disproportionate fault as to RBC because the litigation below did not involve "joint tortfeasors against whom a judgment has been entered in a single action." *Id.* RBC was the sole defendant against whom judgment was entered. By its terms, Section 6306(d) only requires litigation of proportionate fault by cross-complaint between joint tortfeasors if judgment respecting proportionate fault is to be entered against those joint tortfeasors. *See Global Link Logistics, Inc. v. Olympus Growth Fund III, L.P.*, 2010 WL 338214, at *6 (Del. Ch. Jan. 29, 2010) (dismissing post-arbitration cross-claim for disproportionate fault because it was not filed until after entry of arbitral award against joint tortfeasors). The third-party practice procedures of Section 6306(d) do not apply to judgment reduction under Seetion 6304(b).[11]

[11] *Cf. Farrall v. A.C. & S. Co.*, 586 A.2d 662, 666 (Del. 1990) ("What is sought here is not contribution from a joint tortfeasor but a reduction of plaintiffs' claims. That is provided under § 6304(a) and is not required to be accomplished through the procedures described in § 6306(b).").

RBC has also waived any argument that it is immune from a finding of disproportionate fault. RBC not only filed a cross-claim against the settling defendants; RBC agreed in the Pre-Trial Stipulation and Order to try the issue of "relative fault." B969 § IV.B.3.

RBC misses the point of *Ikeda v. Molock*, 603 A.2d 785 (Del. 1991), the only case it cites. In *Ikeda*, the non-settling defendant was improperly denied permission to file a cross-claim against the settling defendants and therefore "was unable to reduce the judgment by the potential damages which the jury could attribute to the negligence of [the settling defendants]." *Id.* at 787. The Court observed in that context that Section 6306(d) "requires a cross-claim to be filed before a jury may determine relative degrees of fault" because "[a] jury may not properly fulfill its role as trier of fact unless the questions to be decided by the jury are litigated at trial." *Id.*

Here, RBC filed a cross-claim against the settling defendants and agreed in the Pre-Trial Stipulation and Order that the Court of Chancery could consider the relative fault of RBC and the settling defendants. The fact-finder properly determined relative fault based on a trial record created by parties who agreed to try that issue and reduced the judgment against RBC accordingly. Nothing in *Ikeda* or DUCATA suggests that RBC can avoid a determination that it was disproportionately at fault.

2. The Court of Chancery Provided RBC a Full and Fair Opportunity to Prove That Other Defendants Were Joint Tortfeasors

RBC argues that it was denied "an opportunity to prove its entitlement to contribution" because it was required "to prove contribution based on the trial record." OB 62-63. RBC suggests that it was entitled to two trials – a first trial in which all defendants argue that none of them are liable and assert the common interest privilege to protect their communications, and, if liability is nonetheless found, a second trial among the liable defendants in which RBC attacks its co-defendants and argues that they are disproportionately at fault based on documents no longer subject to the common interest privilege. OB 63-64.

RBC waived any right to multiple trials by never requesting the procedure it now proposes. As noted above, RBC filed a cross-claim against the settling defendants and RBC agreed in the Pre-Trial Stipulation and Order to try both liability and the issue of "relative fault." B969 § IV.B.3. No second trial was contemplated. If RBC believed that privileged documents existed that might limit or eliminate its own liability, then RBC should have lobbied its co-defendants during the discovery phase of the litigation to waive privilege,[12] contracted with

[12] Tactical decisions by defendants respecting waiver of privilege must be made at the discovery phase, since by blocking discovery on the basis of privilege, defendants "thereby preclude[] themselves from arguing or placing into evidence the content of the legal advice they received or of the collective deliberations into which discovery was blocked." *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, C.A. No. 16584, tr. at 505, Jacobs, V.C. (Del. Ch. Oct. 23, 1998), *quoted in Chesapeake Corp. v. Shore*, 771 A.2d 293, 301 n.8 (Del. Ch. 2000).

other defendants to defer resolution of contribution cross-claims,[13] or argued for some other procedure. Having suffered an adverse ruling on an issue it agreed to try, RBC cannot invoke hypothetical documents on appeal to claim prejudice from a trial at which it stipulated to the issues to be tried and the evidence to be introduced.

The proceedings below are indistinguishable from *Medical Center of Delaware, Inc. v. Mullins*, 637 A.2d 6 (Del. 1994), in which this Court held that a non-settling defendant had "a full and fair opportunity to judicially establish" that the settling defendant "was a joint tort-feasor," because that question was presented to the finder of fact at the trial on liability. *Id.* at 10. Here, too, the "settling defendants' liability" was "presented to the fact-finder." OB 64.

RBC called three of the settling defendants as trial witnesses, including DiMino and Shackelton, who were determined to be joint tortfeasors. "RBC could have issued trial subpoenas to compel the other individual defendants to appear or to cause Moelis to appear through specified directors, officers, or managing agents." *Rural II* at 67. The trial record included the trial exhibits identified by

[13] Defendants in complex tort litigation can contract among themselves to defer until after resolution of the plaintiff's claims (i) any claims for contribution and (ii) the presentation of evidence relating to such intra-defendant disputes. Mark P. Fitzsimmons and Theresa A. Queen, *Maintaining Healthy Relationships with Co-Counsel in Complex Tort Litigation*, THE PRACTICAL LITIGATOR 25, at 39 (Nov. 2006). *See also In re TeleCorp PCS, Inc. S'holders Litig.*, 2003 WL 22901025, at *2 (Del. Ch. Nov. 19, 2003) ("I do not doubt that defendants often strike tolling and other claim-preserving agreements in cases like these that never find their way into the court docket[.]").

Plaintiff, whose opening pre-trial brief articulated bases for finding liability against all defendants, A1968-2022, and whose answering pre-trial brief further argued in favor of liability against the director defendants, A2070-74. RBC had the benefit of Plaintiff's pre-trial briefs and trial exhibits and was afforded an opportunity it had not even requested – supplemental briefing on contribution after the Court of Chancery ruled in *Rural I* that RBC was liable for aiding and abetting. *Rural I* at 88-89; *Rural II* at 59-61. RBC used that opportunity to argue that the settling defendants were joint tortfeasors. A2925-52. By virtue of that second round of post-trial briefing and a second post-trial oral argument, RBC was *not* put in the position of having to "simultaneously argue both that the Directors did not breach their fiduciary duty *and* that the Directors and Moelis bore the fault for any breach." OB at 63 (emphasis in original). After the finding of liability, RBC could and did argue that the directors and Moelis were joint tortfeasors.

3. The Court of Chancery Properly Found that Individual Defendants Exculpated From Monetary Liability Were Not Joint Tortfeasors

Joint tortfeasor status is predicated on whether persons are "jointly or severally liable in tort for the same injury ...." 10 *Del. C.* § 6301. Joint tortfeasors share a "common liability" to the injured person. 10 *Del. C.* § 6302(b). The release of a "joint tortfeasor" by the injured person can provide for judgment

reduction "to the extent of the pro rata share of the released tortfeasor, of the injured person's damages ...." 10 *Del. C.* § 6304(b).

The Court of Chancery cited "[n]umerous decisions" for the proposition that "joint tortfeasor" status and "common liability" refer to "an obligation to pay money damages." *Rural II* at 52-53. Following *Medical Center of Delaware, Inc. v. Mullins*, the Court of Chancery held that RBC bore the burden of establishing by reliable means the joint tortfeasor status of the settling defendants in order to obtain pro rata judgment reduction. *Rural II* at 53-58. Following a series of cases involving statutory immunity from damages liability, the Court of Chancery held that an individual defendant exculpated from monetary liability pursuant to 8 *Del. C.* § 102(b)(7) cannot be a joint tortfeasor. *Rural II* at 68-74.

As to the respective individual defendants, the Court of Chancery found that (i) the "evidence convinces" that both Shackelton and DiMino would not have been entitled to exculpation; (ii) Davis "presents a close case" but RBC "failed to meet" its burden to show that Davis was not entitled to entitled to exculpation, (iii) Walker "acted in good faith" and; (iv) "there is no evidence that either of [Holland and Conrad] acted disloyally." *Rural II* at 79, 84, 85, 87. Disregarding those individualized findings, RBC argues globally that the Court of Chancery erred by considering exculpation under Section 102(b)(7) for purposes of determining joint tortfeasor status. OB at 65-66.

RBC's arguments are not based on DUCATA or the case law interpreting it discussed by the Court of Chancery. RBC argues instead that under Section 102(b)(7) jurisprudence only a director defendant can invoke that defense and that it somehow undermines the public policies underlying Section 102(b)(7) if a financial advisor's monetary liability is not reduced when exculpated directors breach their duty of care. Both arguments are untenable.

This Court's recent decision in *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, ___ A.3d ___, 2015 WL 2394045 (Del. May 14, 2015), confirms that "'in actions against the directors of Delaware corporations with a Section 102(b)(7) charter provision, a shareholder's complaint must allege well-pled facts that, if true, implicate breaches of loyalty or good faith.'" *Id.* at *9 (quoting *Emerald Partners v. Berlin*, 787 A.2d 85, 92 (Del. 2001)). This rule serves the purpose of Section 102(b)(7), which "was to 'free[] up directors to take business risks without worrying about negligence lawsuits.'" *Id.* (quoting *Malpiede v. Townson*,780 A.2d 1075, 1095 (Del. 2001)). That public policy applies in this action. The directors invoked the defense in their pre-trial briefs, and Lead Plaintiff necessarily took the possibility of exculpation into account when settling with the director defendants. MNAT Br. 4/8/13 at 32; MNAT Br. 4/25/13 at 43, 45.

The Court of Chancery's decision in *Rural II* properly recognizes that directors are protected from monetary liability by statutory pleading and proof requirements. Unless those requirements are satisfied, the directors cannot be joint tortfeasors. No defendant monetarily liable to the stockholders can have its judgment reduced based on a meritless claim for contribution against exculpated directors. RBC makes no reasoned argument that it possessed a "right to contribution" against director defendants Davis, Walker, Holland and Conrad, who each were found not to be disloyal. OB at 66.

4. The Court of Chancery Properly Applied the Doctrine of Unclean Hands in Finding that RBC Cannot Obtain Settlement Credit Relating to its Fraud on the Board

RBC contends that "[a]pplying unclean hands would result in disproportionate liability in direct contravention of the statute." OB at 67. That is not the case. DUCATA allows consideration of "relative degrees of fault," 10 *Del. C.* § 6302(d), and no statutory command entitles a financial advisor who committed fraud on a board to obtain contribution from directors who relied in good faith upon the financial advisor but are nonetheless joint tortfeasors. As discussed at length by the Court of Chancery, Professor Gregory, "the intellectual father of DUCATA," "believed that contribution need not automatically be available in every case and that a court could exercise discretion to deny contribution based on the facts." *Rural II* at 31; *see id.* at 28-31, 44.

The Court of Chancery applied that insight from the drafting history and also applied the doctrine of unclean hands, which "provides that a litigant who engages in reprehensible conduct in relation to the matter in controversy ... forfeits his right to have the court hear his claim, regardless of its merit." *Portnoy v. Cryo-Cell, Int'l, Inc.*, 940 A.2d 43, 80-81 (Del. Ch. 2008) (internal quotation marks omitted), *quoted in Rural II* at 46. The Court of Chancery also reasoned that the "full[] protect[ion]" afforded directors under 8 *Del. C.* § 141(e) runs counter to RBC's claim that it is entitled to obtain contribution from "directors who relied on the false and materially incomplete information that RBC provided." *Rural II* at 49. Applying its post-trial fact findings, the Court of Chancery properly held that "the doctrine of unclean hands bars RBC from claiming the settlement credit to the extent RBC perpetrated what the Delaware Supreme Court has described as a 'fraud upon the board.'" *Rural II* at 47 (quoting *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1988)). "RBC forfeited its right to have a court consider contribution for [certain] matters by committing fraud against the very directors from whom RBC would seek contribution." *Rural II* at 49.

5. Finding Joint Tortfeasor Status Based on Quasi-estoppel Would Defy *Mullins* and the Reality of Litigation

RBC argues that all of the defendants must be deemed joint tortfeasors because Plaintiff sued them and argued that they were each monetarily liable until reaching partial settlements on the eve of trial. OB 67-68. The Court of Chancery

properly held that "*Mullins* forecloses RBC's estoppel theories." *Rural II* at 64. "If principles of estoppel barred the settling plaintiff from settling defendants' status as joint tortfeasors, that analysis would, as a practical matter, overrule *Mullins*. Instead, *Mullins* holds that a settlement is not enough unless it contains an admission of liability." *Rural II* at 65.

Quasi-estoppel also fails on its own terms. In the one case cited by RBC, a party was not allowed to disclaim the applicability of the Delaware Uniform Arbitration Act years after first invoking it and inducing its opponent to file suit based on that statute. *Personnel Decisions, Inc. v. Bus. Planning Sys.*, 2008 WL 1932404, at *6-7 (Del. Ch. May 5, 2008). Here, there is no "unconscionable" change in position or detriment to the opposing party. *Id.* at *6. There is not even any inconsistency in arguing at an early stage in litigation that allegations against a defendant state a claim for relief, or that evidence exists to defeat summary judgment and proceed to trial, and later arguing that the joint tortfeasor status of the defendant was not proven at trial by a preponderance of the evidence.

6. There Is No Inconsistency Between *Rural I* and *Rural II*

RBC contends that determinations made in *Rural I* should have compelled findings in *Rural II* that Moelis and the director defendants were joint tortfeasors. OB at 68-70. No such inconsistency exists. RBC cannot so easily evade the Court of Chancery's post-trial fact finding.

Rural I refers to what a "disinterested board that benefitted from disinterested advice" would have or would not have done. *Rural I* at 73. That locution is not a veiled finding that Moelis rendered self-interested advice. Nor does it imply that the Board benefited from disinterested advice by Moelis. It simply reflects that "RBC's self-interested manipulations caused the Rural process to unfold differently than it otherwise would have." *Id.* We do not know what advice Moelis would have given or what steps Rural's Board would have taken absent the weight of RBC's self-interested advice and conduct. After all, RBC was the "primary" advisor. *Rural I* at 12 (quoting A543).

RBC's second argument is that all of the director defendants must be joint tortfeasors because they breached their fiduciary duties under *Revlon*, failed to provide active and direct oversight of RBC, and breached their duty of disclosure. OB at 69-70. RBC simply ignores the Court of Chancery's analysis about how joint tortfeasor status requires a finding that a director committed an unexculpated breach of fiduciary duty that renders the director monetarily liable. *Rural II* at 51-58, 68-74.

SUMMARY OF CROSS-APPEAL ARGUMENT

I. The Court of Chancery erred in holding that fee-shifting requires a finding of "glaring egregiousness." The appropriate question is whether RBC engaged in bad faith litigation conduct. That standard is met in light of the Court of Chancery's factual findings respecting RBC's knowingly false factual representations in its pre-trial papers that covered up a severe conflict of interest – RBC's lead witness and managing director Munoz had known that RBC was engaged in end-stage lobbying to replace Warburg's committed financing with staple financing while he was simultaneously negotiating the deal, advising the directors to approve the deal, and internally advocating downward adjustments to Rural's valuation in RBC's fairness opinion analyses. The integrity of the judicial process requires the award of a stiff sanction. Otherwise, litigants will be incentivized to resolve litigation before trial on favorable terms by lying about facts under their control.

CROSS-APPEAL ARGUMENT

I. THE COURT OF CHANCERY ERRED IN REQUIRING "GLARING EGREGIOUSNESS" TO SHIFT EEES

A. Question Presented

Did the Court of Chancery err in declining to shift fees despite finding that RBC's knowingly false factual misrepresentations in its pre-trial papers reflected "some egregiousness" in how RBC "approached the pre-trial briefing and trial"? Exhibit A at 68, 72.

B. Scope of Review

This Court "review[s] an application for counsel fees and costs for abuse of discretion.... Where it is in issue, we review the [trial court's] formulation of the appropriate legal standard *de novo*." *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006) (footnotes omitted).

C. Merits of Argument

1. The Court of Chancery Applied a "Glaring Egregiousness" Standard

The Court of Chancery denied Plaintiff's application for fee shifting on the ground that the applicable standard is "glaring egregiousness," a standard that the Court of Chancery described as "a little troubling":

> The cases speak of bad faith being reserved for rare situations involving cases of "glaring egregiousness." I asked Mr. Stone about that, because I do think it's a little troubling. It implies that we're comfortable with some egregiousness, we're even comfortable with

relatively considerable egregiousness. We're just not comfortable with "glaring egregiousness."

Here, I think there's glimmers of egregiousness. ***I think there's some egregiousness. The RBC folks***, at least as I interpret the record – and that is, of course, all I can offer, is my interpretation of the record – ***approached the pretrial briefing and trial as if the issue wasn't what actually happened and what was true as to the facts within their control but, rather, whether the plaintiff had generated discovery that could prove something different.*** So there are, indeed, statements in the pretrial brief that I did find and do find quite problematic.

...

It's those statements that essentially deny the existence of the final push for financing that I think could potentially warrant some type of fee shifting award. And I think that because it does address a fundamental issue in the case. It relates to matters that were within RBC's knowledge. RBC knew that there, in fact, was a final push. And it's the type of thing where it's not unfair to expect a party to accurately present facts within its control.

Now, the real story we only figured out, it seems, through trial. ***... I do think that as to factual averments like this, a party has some obligation to get it right. I don't think a party can simply say that because there is not discovery, because there was not a specific e-mail, or because there is not a specific person who has contradicted what we're going to put in our pretrial brief, we can say something that is different than what is the real state of facts.***

But is this "glaringly egregious"? I think one can call this aggressive. I think one can call this problematic. But I don't think it rises to the level of glaring egregiousness that our case law seems to require. So I will not shift fees on that basis.

Exhibit A at 67-72 (emphasis added).

Anticipating a potential appeal on this issue, the Court of Chancery continued its analysis by "say[ing] what I would do if the standard were not glaring egregiousness." *Id.* at 73. The Court of Chancery articulated a *quantum meruit* rationale for "award[ing] a sanction of approximately $1.1 million, to the extent

that this level of egregiousness was sufficient to warrant some term of fee shifting.... And I think to the extent that there was greater concern about the integrity of the litigation process, then a higher award would be warranted." *Id.* at 74-75.

2. Bad Faith Litigation Conduct, Not "Glaring Egregiousness," Is the Correct Standard

This Court has had numerous occasions to set forth the applicable standard for fee shifting under the bad faith exception to the American Rule, and this Court has never used the phrase "glaring egregiousness." Instead, this Court's touchstone for fee shifting has been a finding of bad faith litigation conduct. *See, e.g.*, *Blue Hen Mech., Inc. v. Christian Bros. Risk Pooling Trust*, ___ A.3d ___, 2015 WL 3745640, at *7 (Del. June 15, 2015) ("[T]here are many decisions of this Court affirming trial judges' exercises of discretion to award attorneys' fees and costs to the prevailing party, when that party has been harmed by bad faith conduct by its litigating adversary."); *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014) ("The bad faith exception applies only in extraordinary cases, and the party seeking to invoke that exception must demonstrate by clear evidence that the party from whom fees are sought ... acted in subjective bad faith.") (footnotes omitted) (internal quotation marks omitted); *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1222 (Del. 2012) ("[T]he Court of Chancery made specific findings that detailed Gatz's bad faith conduct throughout the course of the trial."); *Dover*

Historical Soc'y, 902 A.2d at 1094 ("[T]hat behavior … constitutes bad faith that manifestly warrants a fee-shifting award"); *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005) ("[T]he record fully supports the Court of Chancery's conclusion that Kaung's actions in the course of this litigation constitute bad faith conduct sufficient to justify an award of attorneys' fees.") (internal quotation marks omitted); *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005) ("[T]he Court of Chancery's factual findings … compel the conclusion that MCHC's conduct … rose to the level of bad faith that both this Court and the Court of Chancery have found justifies an award of attorneys' fees."); *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 546 (Del. 1998) ("The Court of Chancery, after careful deliberation, found that the conduct of the Defendants rose to the level of bad faith because they had no valid defense and knew it."); *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989) ("[U]nder the 'equity' exception a litigant may secure an award of counsel fees upon a showing of bad faith by an opposing party."); *Slawik v. State*, 480 A.2d 636, 639 n.5 (Del. 1984) ("We recognize the inherent power in the courts to allow attorneys' fees … when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'") (quoting *F.D. Rich Co. v. U.S. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)) (citation omitted).

Montgomery Cellular is instructive on the applicable standard. The Court of Chancery denied an application for fee shifting in an appraisal proceeding, reasoning that "petitioners have highlighted disturbing behavior on the part of the respondents, but that they have failed to demonstrate the glaring egregiousness that would compel this court to award fees and costs." *Dobler v. Montgomery Cellular Hldg. Co.*, 2004 WL 5382074, at *19 (Del. Ch. Sept. 30, 2004), *rev'd*, 880 A.2d 206 (Del. 2005). This Court reversed, finding that the denial of fee shifting was an abuse of discretion, "[g]iven the overwhelming evidence that the respondents repeatedly acted in bad faith to obstruct if not prevent a fair valuation of MCHC." 880 A.2d at 228. Although the appeal did not address the Court of Chancery's formulation of the legal standard, this Court articulated and applied a standard that focused on the respondents' state of mind. This Court noted that "there is no single, comprehensive definition of 'bad faith' that will justify a fee-shifting award," ruled that the litigation conduct in question was "demonstrative of bad faith," and observed that "evidence of a party's pre-litigation conduct can be relevant to show the motive or intent driving that party's conduct during that appraisal litigation." *Id.* at 227-28.

The Court of Chancery did not apply that bad-faith standard in denying Lead Plaintiff's application for fee shifting.

3. Fee Shifting Is Warranted Under the Bad Faith Standard

RBC's litigation misconduct was an attempted fraud on the Court to cover up an audacious and disabling conflict of interest that RBC had hidden from Rural's Board and stockholders.[14] The key underlying facts are a focus of the finding of liability against RBC in *Rural I*. During the final stage of the merger negotiation and fairness opinion process, RBC's most senior bankers secretly tried to convince Warburg to replace its committed financing with staple financing from RBC. RBC's Anthony Munoz knew about that secret effort in real time and simultaneously intervened in the fairness opinion process to revise RBC's valuation of Rural downward, making the merger price appear more favorable. Munoz did not tell any Rural director about RBC's end-stage lobbying effort, and he did not cause Rural to disclose it in the proxy statement. *Rural I* at 23-31, 58-63, 70-71, 74, 82-84; *see also* A824; A825-26; B326; B327-28; A2117-18; A2409.

RBC's cover up of its conflict of interest extended through pre-trial briefing and through Munoz's testimony on the first day of trial. RBC's insisted in its pre-trial papers that any conflict of interest disappeared once Warburg presented its formal bid with committed financing from other banks:

- "RBC was not asked to provide a fairness opinion until after it was clear that there would be no staple financing."

[14] Lead Plaintiff does not suggest that RBC's litigation counsel participated in an attempted fraud on the Court. We assume RBC's counsel was not informed of RBC's secret lobbying effort.

- "Warburg made clear that it would not use RBC's financing, hence RBC had no incentive to favor Warburg ...."
- "By March 23, 2011, RBC and the Special Committee were aware that RBC would not be providing staple financing for the Transaction."
- "RBC could not have been motivated to find the Transaction fair, as it knew it would not be providing staple financing to Warburg before Rural/Metro requested a fairness opinion."
- "[T]he record makes clear that RBC did not start on its fairness analysis until it was clear that RBC would not be financing the Warburg deal and it was thus likely that Rural/Metro would be requesting a fairness opinion."
- "RBC knew that Warburg had 100% financing in place for the Transaction, and that it would not make sense for RBC to pursue Warburg regarding staple financing."
- "The RBC team offering the staple financing was distinct and separate from the RBC team advising [Rural/Metro] on the sale of the Company."
- "Unlike *Del Monte*, RBC was not secretly meeting with Warburg without Rural/Metro's consent."

Rural I at 90 (citing B737 at n.1; A1932, A1944, A1960, A2033-34, A1941, A1963).

RBC's presentation of its case in advance of trial was tantamount to an attempted fraud on the Court. RBC had no license to file papers making factual contentions known to be false. *See* Ch. Ct. R. 11(b)(3). It is only because Lead Plaintiff persevered in litigating against RBC that the truth came to light and

serious harm and prejudice were avoided. Had Lead Plaintiff settled with RBC on the eve of trial, RBC would have obtained by fraud a global release at a discounted price, and no one would have later uncovered the truth. *See E.I. duPont de Nemours and Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 461 (Del. 1999) (recognizing the "rare and exceptional" claim of fraudulent procurement of a release, which "represents a wrong not only as to the releasing party but to the court as well"). Given the gravity and intentional nature of RBC's litigation misconduct, fee shifting is appropriate "to deter abusive litigation and to protect the integrity of the judicial process." *Montgomery Cellular*, 880 A.2d at 227.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully request that the Court affirm the final judgment of the Court of Chancery respecting liability and damages, and reverse the Court of Chancery respecting fee-shifting.

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DATED: July 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2015, I caused a copy of the **Public Version of Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal** to be served on the following counsel via File and Serve Xpress:

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