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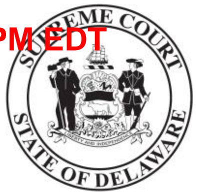

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT RBC CAPITAL MARKETS, LLC'S
CORRECTED REPLY BRIEF ON APPEAL AND
CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

If the opinion below is permitted to stand, it will result in a seismic shift in the law—significantly altering the level of scrutiny applied to directors engaged in an M&A process, imposing fiduciary-like obligations on financial advisors, and creating an entirely new standard for aiding and abetting. Plaintiff's Opposition largely parrots the purported "bad" facts found below, using heated rhetoric to try to distract this Court from the trial judge's numerous departures from the law.

But the fact-finding upon which Plaintiff relies is fraught with problems. The trial judge ignored or misconstrued evidence inconsistent with the legal theories espoused and never explained why he did so. This is evident in, *inter alia*, the decision to ignore the role of Moelis (Op. Br. 30-31), the fact that the emails supporting the EMS-conflict theory were written *before* RBC pitched for the Rural engagement (*id.* 23-24), the errors reading the analyst reports (*id*. 33-38), and the unsupportable justifications for ignoring the post-signing market check (*id.* 25-27).

Once the facts are analyzed in the appropriate framework, nothing in the record really suggests the Board or RBC did anything wrong. RBC disclosed its conflicts, and the Board responsibly engaged a second, unconflicted advisor. Rural and its advisors conducted a robust auction that generated an offer at a significant premium, and that offer was subjected to a three-month post-signing market check. This is simply not a case that justifies making wholesale changes to Delaware law.

SUMMARY OF CROSS-APPEAL ARGUMENT

1. Denied. The Court of Chancery applied the correct legal standard to determine whether to shift fees. Bad faith litigation conduct exists only if conduct is glaringly egregious. Plaintiff failed to prove by clear evidence—no matter what standard applies—that RBC's conduct justifies fee shifting, instead offering only conclusory allegations without attempting to explain the purported falsity of RBC's statements. RBC's advocacy in this hotly contested, complex litigation was entirely typical and cannot justify fee shifting.

ARGUMENT

I. THE TRIAL JUDGE APPLIED *REVLON* INCORRECTLY.

Plaintiff does not adequately defend the trial judge's conclusions that the Directors[1] violated *Revlon* by: (i) exploring strategic alternatives in December 2010 and (ii) accepting Warburg's offer of $17.25 per share. (Ex. A 52-64.)

A. There Was No *Revlon* Breach In Exploring Strategic Alternatives.

The trial judge held that "the decision to initiate a sale process fails the enhanced scrutiny test because 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." (Ex. A 53.) But according to the trial judge, "[a]bsent [RBC's] conflicts of interest, this decision [to initiate a sale process] would be one of the many debatable choices that fiduciaries and their advisors must make . . . and it would fall within the range of reasonableness." (*Id*. 52-53.) Putting aside how conflicts unknown to a board can transform a reasonable business decision into a *Revlon* violation, this conclusion was not supported by the law or the facts.

RBC argued in its Opening Brief that *Revlon*'s enhanced scrutiny does not apply to a board's decision to explore strategic alternatives. In response, Plaintiff argues that the Board did not actually explore strategic alternatives but, instead, initiated a sale process. (Ans. Br. 31-32.) This is a distinction without a

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[1] All defined terms and abbreviations have the same meanings given in RBC's Opening Brief.

difference. The Board approved Shackelton's plan to explore strategic alternatives, and one of those alternatives included a sale of the Company. (Ex. A 8-9.) And regardless of whether the Board explored strategic alternatives or initiated a sale process, *Revlon* scrutiny was not implicated here: enhanced scrutiny applies only when a board decides to sell or when a sale becomes inevitable. *See Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 241 (Del. 2009). Here, the sale was not inevitable in December 2010. Among other things, a lack of bidders or inadequate offers would have resulted in a decision to terminate the auction. *See In re NCS Healthcare, Inc. S'holders Litig.*, 825 A.2d 240, 255 (Del. Ch. 2002), *rev'd on other grounds*, *OmniCare Inc. v. NCS Healthcare, Inc.*, 822 A.2d 397. This is implicit in the trial judge's finding that *continuing* the sale process rather than terminating it fell within the range of reasonableness. (Op. Br. 57-58.)

Plaintiff also argues that "a corporation's initiation of an unreasonably conducted bidding process that leads to the sale of the company for cash is a violation of *Revlon*." (Ans. Br. 32.) But Plaintiff cites cases that are inapposite or support RBC's position. For example, the *Paramount* court *rejected* the *Revlon* claim because of "the absence of any substantial evidence to conclude that [the] board, in negotiating with Warner, made the dissolution or break-up of the corporate entity inevitable, as was the case in *Revlon*." *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989). Plaintiff's reliance on *Arnold v.*

Society for Savings Bancorp, Inc. is puzzling because neither this Court nor the Court of Chancery applied *Revlon*. 650 A.2d 1270, 1289 (Del. 1994).

Netsmart is also easily distinguished. In *Netsmart*, the Court of Chancery found the conduct of the auction "informal and haphazard," which prevented the board of directors from obtaining sufficient information. *In re Netsmart Tech., Inc. S'holder Litig.*, 924 A.2d 171, 184 (Del. Ch. 2007). But the auction here was robust and not the subject of a challenge at trial. And *Netsmart*, like *Arnold* and *Lyondell*, required a sale to be inevitable for *Revlon* to be triggered: "*[h]aving decided to sell the company for cash*, the Netsmart board assumed the fiduciary duty" to seek the highest price for the company. *Id.* at 192 (emphasis added).

Finally, Plaintiff contends that "[n]o case stands for the proposition '*Revlon* scrutiny does not apply' when a publicly controlled corporation 'initiat[es] an auction' *if the auction culminates in the sale of the corporation for cash.*" (Ans. Br. 33 (citation omitted).) But *Lyondell* involved just such a situation, and this Court held that "[t]he duty to seek the best available price applies only when a company embarks on a transaction . . . that *will* result in a change of control." *Lyondell*, 970 A.2d at 242 (emphasis added). In *Lyondell*, the directors' *Revlon* duties were not implicated until the board met to review a merger offer. *Id.* at 238, 242. Here, the trial judge did not find, and Plaintiff cannot argue, that a change of control was inevitable at the time the sale process was initiated.

RBC raised three other problems with the trial judge's ruling, none of which is addressed satisfactorily. *First*, given the timing, RBC could not have caused the Directors to initiate a sale process. The trial judge found that the exploration of strategic alternatives began on December 8, 2010, weeks before RBC pitched for the business. (*See* Ex. A 8.) Plaintiff's argument is non-responsive: "a true exploration of strategic alternatives led by an unconflicted bank might not have resulted in a near-term sale process." (Ans. Br. 35.) But Rural engaged Moelis to address the conflict of interest, and Plaintiff does not contest that an exploration of strategic alternatives was initiated well before RBC and Moelis were engaged.

Second, Plaintiff incorrectly contends there is no support for RBC's argument that the downsides of initiating a sale process in parallel with the EMS sale process were known to the Directors. (*See* Ans. Br. 34.) Notwithstanding the trial judge's characterization of the downsides as "obvious" (Ex. A 54), there was ample testimony that RBC raised this issue with the Directors. (*See* A2145-46.) And RBC's December 2010 presentation to the Special Committee noted that proceeding with a near-term sale could draw "[f]ew strategic buyers" and that the auction "could be cloaked by noise surrounding [EMS] process." (A416, A418.)

Third, Plaintiff does not deny that the Board was aware of RBC's interest in providing financing to the purchaser of EMS. (*See* Ans. Br. 34.) Instead, she argues a "sentence in an engagement letter is a far cry from knowing" that RBC

intended to use Rural's exploration of strategic alternatives in its attempt to participate in financing the EMS sale. (Ans. Br. 35.) She cites six internal emails that she contends "attest to . . . how getting retained by Rural to run a sell-side process was RBC's 'angle' to get a share of the EMS financing fees." (*Id.*) None of those emails are helpful to Plaintiff.[2] And there is nothing unusual about a professional services firm like RBC seeking to market its industry-specific expertise in the hopes of obtaining new business. The Board was advised that RBC had a potential conflict of interest, affirmed its awareness of that conflict through the Engagement Letter, and retained an additional unconflicted advisor.

B. The Decision To Accept Warburg's Bid Did Not Violate *Revlon*.

The trial judge found that the Directors breached their *Revlon* duties by accepting Warburg's bid. (Ex. A 58.) But Rural was exposed to the market in a full and fair auction, and the long post-signing market check allowed others to top the bid. (Op. Br. 25-27.) In *C & J*, this Court found that the board had fulfilled its duties to obtain the best available price in part because no bidder emerged after the transaction was announced. *C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Trust*, 107 A.3d 1049, 1070-71 (Del. 2014).

[2] In response to RBC's observation that the emails cited below were sent *before* RBC was engaged by Rural (Op. Br. 24), Plaintiff cited one additional email. This email, a December 8, 2010 exchange between Munoz and Shackelton, further undermines Plaintiff. The email shows that Shackelton was aware of—and wanted Rural to "be part of"—RBC's supposed EMS "angle" strategy. (*See* AR333.)

Here, Plaintiff relies on the trial judge's statement that a "confluence of factors" rendered the auction ineffective as a method of price discovery. The factors cited were: (i) "the company was just beginning to implement new growth strategies under a new CEO"; (ii) "the market did not understand Rural's prospects"; (iii) large private equity buyers like Warburg were tied up in the EMS process; and (iv) logical strategic bidders were tied up in their own change-of-control transactions. (Ex. A 74-77.) This "confluence of factors" rhetoric, plucked from Plaintiff's Post-Trial Reply Brief, is unsupported and indeed contradicted by the record. The market was aware of Rural's three-plank growth plan as a result of disclosures in its 2010 10-K and other securities filings and press releases. (*See* AR1-332; AR335-420; AR441-614.) Twenty-one potential bidders received the CIM, which contained optimistic growth projections and a detailed description of management's plans. (AR433-40.) The bidders who remained in the auction had extensive meetings with management in which Rural's prospects were discussed. (A622.) The Proxy also had extensive disclosure of Rural's prospects and growth plans. (A1089, A1111-13.) And the EMS process, which ended over four months before the Rural transaction closed, did not prevent CD&R, the winning bidder for EMS, or any other bidder from participating in the auction. Lastly, the internal operations of logical strategic bidders cannot dictate the timing of auctions; if they could, no auction would ever be considered a reliable indicator of value.

In arguing that the post-signing market check was ineffective, Plaintiff relies on *Netsmart*. The *Netsmart* court concluded that the post-signing market check at issue was insufficient to cure a defective sale process. *See Netsmart*, 924 A.2d at 197. But in *Netsmart*, the auction process was vastly inferior to the auction here. The Netsmart board approached only seven private equity firms and, despite counsel from an advisor to the contrary, did not seriously consider approaching strategic acquirers. *Netsmart*, 924 A.2d at 183-84. In addition, because of the small size of the target, the court concluded that the excluded strategic bidders were unlikely to know that Netsmart was for sale. The conduct of the auction in *Netsmart* stands in stark contrast to the auction here, where the advisors contacted 28 bidders. There were only two likely strategic bidders, one of which participated in the auction, and the other of which faced no impediment to bidding once the deal was announced. If one accepts as valid the trial judge's concerns about the timing of the auction, the post-signing market check directly addressed his timing concerns. Otherwise-interested bidders were, according to the trial judge, unable to participate in the bidding at the same time as the EMS sale process. But the EMS process ended on February 14, and with 90 additional days after the deal was announced, those bidders had four and a half months to gather information, approach Rural, and top Warburg's bid.

Recognizing that the law is unhelpful, Plaintiff raises questions of fact that are neither relevant nor supportable. According to Plaintiff, RBC's statement that the Directors understood the value of Rural had no support. (Ans. Br. 37.) But, as RBC noted, the Directors knew Rural's stock price had increased dramatically in the preceding months and had years of experience in the industry. (Op. Br. 31.) Finally, Plaintiff argues that because Shackelton's fund's model generated a base case of $18.86 per share, the auction was unfair. (Ans. Br. 38.) This is another example of a grossly misleading factual finding used to color the record. The $18.86 figure was only one part of a model (*i.e.*, the "base case") used to try to predict Rural's value. The model also contained a high case and a low case (notably, the low case was a value of $0, which is, in fact, what happened 18 months later). The model probability weighted all three cases and produced an estimated value of ***$16.47*** per share. Plaintiff's own expert stated that this model valued Rural at $16.47 per share (not $18.86). (B679.) Even if this Court does not wish to wade into this level of factual review, the argument is a red herring. Plaintiff does not connect the model (maintained privately by Shackelton's fund) to the Board's performance in selling Rural.

C. The Trial Judge Erred By Failing To Articulate An Analysis Supporting a Finding Of Gross Negligence.

RBC argued in its Opening Brief that a plaintiff seeking to establish a breach of the duty of care must demonstrate that directors acted with gross negligence.

(Op. Br. 27.) Plaintiff responds that "RBC does not cite any law" to support this contention. (Ans. Br. 38-39.) But RBC cited numerous cases standing for the proposition that gross negligence is required to establish a breach of a director's fiduciary duty of due care in determining liability in post-closing litigation, where the transaction would have been subject to *Revlon* scrutiny at the preliminary injunction stage. (*See* Op. Br. 27-29.) Plaintiff does not attempt to explain why these cases should not be followed here.

Instead, Plaintiff relies on three preliminary injunction cases—*Revlon*, *QVC*, and *Netsmart*—in which the ultimate liability of the defendant directors was not at issue. As the cases cited in the Opening Brief (at 27-29) make clear, and as explained elsewhere by the trial judge, failing *Revlon* scrutiny does not establish liability for damages purposes:

> The fact that a corporate board has decided to engage in a change of control transaction invoking so-called *Revlon* duties does not change the showing of culpability a plaintiff must make in order to hold the directors liable for monetary damages. . . . A transactional standard of review [*Revlon*] is, at its core, an inquiry designed to address whether the court should respect the *transaction itself* or whether, for equitable reasons, it should set it aside or impose an alternative remedy. The court's analysis of the transaction has only a crude and potentially misleading relationship to the liability of any particular fiduciary.

J. Travis Laster, *Revlon is a Standard of Review: Why it's True and What it Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 51-52 (2013) (footnote omitted). The cases

cited by Plaintiff also involved a lack of loyalty, *not* due care. As explained in *C & J*, "[i]t is too often forgotten that *Revlon*, and later cases like *QVC*, primarily involved board resistance to a competing bid after the board had agreed to a change of control, which threatened to impede the emergence of another higher-priced deal." 107 A.3d at 1053; *Netsmart*, 924 A.2d at 195-96 (process favored bidders more likely to retain management). Here, as in *C & J*, "[n]o hint of such a defensive, entrenching motive emerges from this record." 107 A.3d at 1053.

While the fourth case plaintiff relies upon, *Lyondell*, was a post-closing case, it involved an issue irrelevant to this appeal—whether the directors breached their duty of loyalty by failing to act in good faith. And the quoted language from *Lyondell* upon which Plaintiff relies (Ans. Br. 39) is *dicta* without context. *Lyondell* plainly acknowledges that the gross negligence standard determines whether directors breached their duty of care, 970 A.2d at 240 (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64-65 (Del. 2006)), and the passage cited by Plaintiff merely illustrates that the facts in *Lyondell* did not demonstrate that the Directors failed to act in good faith. *Id.* at 243.

Plaintiff treats the trial judge's application of the incorrect legal standard as a triviality, but this error is grounds for reversal because the trial judge's factual findings do not come close to establishing gross negligence. Nowhere did the trial judge find the Directors acted recklessly. *See McPadden v. Sidhu*, 964 A.2d 1262,

1274 (Del. Ch. 2008) (gross negligence is "reckless indifference or actions that are without the bounds of reason"). Rather, the trial judge merely found that the Board acted unreasonably, and he made this finding only by ignoring facts demonstrating that the Board acted reasonably and on an informed basis. (*See* Op. Br. 29-31.)

D. The Transaction Was Entirely Fair.

Recognizing the errors in the *Revlon* analysis, Plaintiff argues that entire fairness review provides an independent basis for finding a breach of fiduciary duty. (Ans. Br. 40-41.) Because the trial judge did not conclude that a majority of the Board was interested, the entire fairness standard does not apply. *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013). Plaintiff suggests that the entire fairness standard should nevertheless apply because Shackelton had a "substantial" self-interest that he "failed to disclose . . . to the board."[3] (Ans. Br. 40 (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995).) But self-interest requires "classic self-dealing" where a director "is on both sides of a transaction." *Cinerama*, 663 A.2d at 1169. Shackelton was not on both sides of the transaction. Thus, his self-interest was merely "incidental" and insufficient to invoke entire fairness as a matter of law. *Id*. at 1168-70.

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[3] In essence, Plaintiff urges this Court to do what the trial judge expressly declined to do and find a breach of the duty of loyalty. (*See* Ex. A 3 (noting that "plaintiffs do not contend that any director breached his duty of loyalty"); Ex. A 49 (noting that "the parties did not ask for findings" on whether the Directors' conduct should be "categorize[d] . . . under the headings of loyalty or care").)

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

A. The Proxy Statement Accurately Described RBC's Analysis.

The trial judge held that the Directors violated their fiduciary duty because "[i]nformation that RBC provided to the Board in connection with its precedent transaction analyses was false, and that false information was repeated in the Proxy Statement." (Ex. A 79.) In its Opening Brief, RBC *first* argued that the trial judge erred by analyzing whether RBC's fairness analysis was flawed rather than whether the Proxy Statement fairly and accurately described that analysis. (Op. Br. 34-35.) Plaintiff concedes this is the case, but she attempts to respond by raising a new argument that was not addressed in the Liability Opinion. According to Plaintiff, analyzing the accuracy of the proxy description of RBC's analysis "is not the test." (Ans. Br. 48.) Instead, she argues that "'[k]ey inputs' to a fairness opinion analysis must be 'fairly disclosed'" and that RBC did not disclose its "key inputs" when it did not make one-time adjustments to Rural's Adjusted EBITDA. (*Id*. (quoting *Netsmart*, 924 A.2d at 204).) But, in fact, RBC did disclose the "key inputs" in its analysis. Plaintiff merely thinks one of the inputs should have been different. This is not a violation of the Board's duty to disclose.

Netsmart underscores this point. In *Netsmart*, the proxy statement contained two sets of non-public management projections but failed to discuss the advisor's use of later, more optimistic management projections in its fairness opinion.

Netsmart, 924 A.2d at 201-03. Here, in contrast, RBC performed its analysis using the latest, more optimistic management projections. That analysis yielded a precedent transaction range of $11.54 to $21.76, which was disclosed in the Proxy Statement. *Netsmart* does not stand for the proposition that plaintiffs can convert quibbles about the quality of the advisor's work into disclosure claims. *Netsmart*, 924 A.2d at 204. Indeed, the *Netsmart* court rejected that very argument, observing that "so long as what the investment banker did is fairly disclosed, there is no obligation to disclose what the investment banker did not do." *Id.*

Second, RBC demonstrated in its Opening Brief that the trial judge erred in concluding that RBC's underlying fairness analysis was false, attaching copies of the analyst reports highlighted to demonstrate the trial judge's error and illustrate that third-party analysts did not make one-time adjustments in their valuation models. (Op. Br. 35-37; Ex. D.) Plaintiff fails to respond to this analysis. The trial judge made an error, and that error infected his entire analysis on this issue.

Plaintiff resorts to arguing that Wall Street analysts *discussed* what Rural's Adjusted EBITDA might have been without one-time costs in the text of their reports. But Plaintiff does not suggest the models those analysts used made the one-time adjustments. The very report Plaintiff quotes makes this clear: "We estimate the [one-time] adjustments ***would have contributed*** $6.3M to Adj. EBITDA." (Ans. Br. at 50 (emphasis added) (quoting Ex. D 1).) Plaintiff also

tries to muddle the trial judge's factual error by misleadingly suggesting that he somehow made a credibility determination on this issue. (Ans. Br. 49.) But the text of the Liability Opinion Plaintiff cites on credibility is a general observation contained on page 1 and has nothing to do with the court's erroneous treatment of the evidence on pages 79-80. Nor is witness testimony important to whether the trial judge misread third-party analyst reports. Plaintiff is ultimately reduced to claiming (by citation to a valuation textbook) that making one-time adjustments "is what equity analysts do." (Ans. Br. 50.) Whatever the academic approach would be, none of the analysts here made one-time adjustments. (*See* Ex. D.)

Finally, as RBC argued, there is nothing material about the Adjusted EBITDA figure it used in conducting this portion of its precedent transaction analysis. Using this number resulted only in a decrease in the range of values using one of the valuation methods from $9.76-$19.22 to $8.19-$16.71. (Op. Br. 37.) Given the sale price of $17.25, this change did not significantly alter the total mix of information. This is particularly so here, where the Proxy Statement also contained an RBC precedent transaction range using the more optimistic management projections ($11.54-$21.76) and a description of Moelis's analysis, which used a considerably higher low-end of the range ($15.17) than RBC.

Plaintiff responds that "RBC offers no citation for the proposition that [it] is not material to misleadingly and artificially manipulate the low end of a valuation

range . . . and the high end of a valuation range . . . ." (Ans. Br. 51.) As demonstrated above, Plaintiff is wrong, and the value range was not "misleadingly and artificially manipulate[d]." Nor does this argument even attempt to deal with the legal test for materiality. Putting the rhetoric aside, relatively small changes in one of the ranges RBC used in its analysis that would have no impact on the underlying value judgment by an investor cannot meet the materiality threshold.

At bottom, it appears that the trial judge, at Plaintiff's urging, concluded that RBC manipulated the fairness analysis. But a careful review of the record shows there is no evidence RBC did so or that the fairness analysis was not the product of RBC's good-faith judgment. The trial judge was troubled by one email in which Munoz stated that he thought the DCF valuation would be lowered. Both the trial judge and Plaintiff describe this email in overheated rhetoric. But there is no evidence that the DCF was lowered, and if RBC intended to manipulate its analysis by not making one-time adjustments to Adjusted EBITDA in the Comparable Company analysis, its efforts were laughable: it would make no sense to attempt to manipulate the process by only lowering the bottom end of a fairness range by $1.50. The trial judge simply misread the evidence, and there is no evidence that the minor change would have affected any reader's opinion of the transaction.

B. The Directors Sufficiently Disclosed RBC's Purported Conflicts.

The trial judge held that the Directors' failure to disclose the precise details of RBC's purported conflicts constituted partial disclosures. (Ex. A 82.) In so holding, the trial judge focused on the following passage:

> **The special committee concluded**, however, that . . . RBC's willingness to offer buy-side financing could significantly enhance a potential sale process because such financing could be offered efficiently and could provide a source for financing on terms that might not otherwise be available to potential buyers of the Company and that could also serve as a starting point from which more favorable terms could potentially be negotiated by potential buyers . . . .

(A1090 (emphasis added).) Although the trial judge determined that this statement was "false," no evidence was adduced at trial (or cited in the Liability Opinion or Plaintiff's brief) that the Special Committee had not so concluded. Other than disagreeing with RBC's argument, Plaintiff does not demonstrate how this statement was even tangentially related to RBC's purported conflicts, and she does not explain why "this partial disclosure imposed on the Rural directors a duty to speak completely on the subject of RBC's financing efforts." (Ex. A 82.) Accordingly, there was no partial statement "requir[ing] supplementation or clarification." *Pfeffer v. Redstone*, 965 A.2d 676, 688 (Del. 2009).

Recognizing that the partial disclosure identified by the trial judge could not support her disclosure claim, Plaintiff appears to recast the holding as a material omission rather than a partial disclosure. (*See* Ans. Br. 45.) But "[t]o prevail on a

claim of material omission, a plaintiff must demonstrate a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable stockholder." *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997).

Because stockholders were already on notice that RBC operated under potential conflicts of interest, the precise details of those conflicts cannot satisfy the demanding test for a material omission. Once stockholders were aware that RBC operated under a conflict, the details Plaintiff cites would not have affected the total mix of information available. Plaintiff's response is merely to repeat her unfounded assertion that RBC's conflicts were not disclosed and argue the omission was material because "the proxy advisors . . . mistakenly advised Rural's stockholders that RBC was 'independent' and that 'there are no concerning conflicts of interest.'"[4] (Ans. Br. 43.) But those reports explicitly acknowledged RBC's conflict of interest, noting that "as part of the solicitation process, [RBC] determined to offer buy-side financing to potential financial sponsors." (B398.) A

[4] A review of the proxy reports reveals that Glass Lewis did not "advise Rural's stockholders that RBC was 'independent,'" as Plaintiff claims: Glass Lewis noted "the board retained both [RBC] and [Moelis] as independent financial advisors, and, in such capacity, to render opinions as to the fairness of the proposed consideration to the Company and its shareholders. The board determined to seek multiple opinions given that RBC, as part of the solicitation process, determined to offer buy-side financing to potential financial sponsors." (B399.) Plaintiff's characterization of the report—which underscores RBC's point that investors were well aware of the purported conflict—is a gross distortion of the document.

fair reading reflects that the conflicts were prominently raised for investors and that the proxy advisors thought these conflicts were typical and not "concerning."

With respect to the EMS transaction, Plaintiff argues at length about "RBC's undisclosed efforts to provide financing to the bidders for EMS." (Ans. Br. 44.) But in February 2011, months before the Proxy Statement was issued, RBC's participation in the financing became public via press release. (A589.) Plaintiff's only response is that "[t]he press release . . . was not distributed to Rural's stockholders." (Ans. Br. 44.) But stockholders had access to the press release (and the EMS proxy dated April 22, 2011) in the unlikely event any stockholder thought the EMS financing was significant. This is sufficient under the law. *See, e.g.*, *In re MONY Grp., Inc. S'holder Litig.*, 853 A.2d 661, 683-84 (Del. Ch. 2004) (internal quotations omitted) ("Proxy statements need not disclose facts known or reasonably available to the stockholders.")

According to Plaintiff, RBC should have disclosed that "RBC used its status as Rural's primary sell-side advisor to get that financing work." (Ans. Br. 44.) As noted above, Plaintiff inappropriately relies on innocuous RBC emails (written before pitching for the Rural engagement) discussing the firm's experience in the ambulance sector. And, rhetoric aside, Plaintiff does not explain how RBC's decision to use its Rural experience to pitch for EMS-related business would have assumed "actual significance in the deliberations" of Rural's stockholders. This is

because the fact that RBC wanted to assist in the EMS financing does not logically relate to the Rural auction process or the fairness of the price.

Similarly, any conflict of interest with Warburg was adequately disclosed to stockholders. Plaintiff contends that the minute details of RBC's "end-stage lobbying" should have been disclosed because those details identify "the conflict RBC was operating under when it was advising Rural on end-stage negotiations and preparing its fairness opinion analysis." (Ans. Br. 44.) But, as demonstrated above, stockholders had knowledge of this conflict and no indication that the conflict had ever ceased to exist. Plaintiff states, with no support in logic or the evidence, that "the natural inference is that RBC did not engage in end-stage lobbying . . . ." (*Id.* 45.) There is no basis for this supposition. If it were true, there would be no need to disclose *any* earlier conflicts because the fairness opinion naturally would have been delivered without a conflict.

RBC also noted "[i]t 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 . . . to have updated its disclosure to include one or all of these conversations." (Op. Br. 41.) In response, Plaintiff selectively quotes a portion of the Engagement Letter that states that RBC would control "any description of or reference to RBC." (Ans. Br. 46 (citing A554).) Plaintiff fails to inform the Court that this contractual right was limited to the proxy disclosure describing RBC's

fairness opinion. (A554-55.) The remainder of this paragraph, which Plaintiff ignores, states "[n]either RBC nor Moelis shall have any responsibility for the form or content of any such disclosure document, other than the [fairness] opinion itself and the accuracy of any such description or references that RBC and/or Moelis . . . has expressly approved for inclusion in such disclosure document." (A555.)

There are prudential reasons to limit liability to the party that actually makes the misleading omission. Plaintiff adduced no evidence that RBC drafted the portion of the Proxy Statement discussing RBC's potential conflict. And there is no evidence that RBC's professionals were given the opportunity to fairly consider whether and how to disclose each and every one of RBC's interactions with Warburg about staple financing during the auction process. In this respect, RBC notes that Plaintiff failed to discuss FINRA Rule 5150, which is the only rule that governs disclosure of the relationship between a buyer and an advisor providing a fairness opinion to a seller. As Plaintiff implicitly concedes in failing to address it, Rule 5150 would not have required disclosure of the "last-minute" negotiations at issue. (*See* Op. Br. 41.) Thus, RBC's professionals reviewing a draft proxy in which Rural's professionals chose not to disclose every conversation between RBC and Warburg would have had no reason to insist upon such disclosure themselves.

Because the trial judge's findings with respect to the two disclosure violations are flawed as a matter of both law and fact, this Court should reverse.

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

Under Delaware law, to be liable for another's breach of fiduciary duty, an alleged aider and abettor must knowingly participate in joint conduct with the fiduciary. For conduct to be joint, the aider and abettor must agree to pursue concerted action with the primary actor. (Op. Br. 49.) The knowing participation requirement means that either the third party must possess actual knowledge that the fiduciary is endeavoring to breach duties, or that the fiduciary must act in an inherently wrongful way. (*Id.* 48.) To be inherently wrongful, an action must be wrongful in every circumstance. (*Id.* 45 n.12.) Consequently, no breach of the duty of care can lead to aiding and abetting liability.

Plaintiff does not refute this statement of the law. Indeed, she fails to offer a reasoned explanation of how aiding and abetting liability could attach to duty of care breaches. As a result, Plaintiff tacitly acknowledges the obvious: no fiduciary breach that is only uncovered after the application of *Revlon*, or even the necessarily contextual gross negligence analysis, can meet these requirements.

Plaintiff likewise fails to explain how this case satisfies the elements of aiding and abetting. Plaintiff does not assert that the Board intentionally breached its duties or engaged in any inherently wrongful conduct. Plaintiff does not explain how the trial judge's conclusion that RBC withheld information from the Board could demonstrate that RBC agreed to a joint course of conduct with the

Directors. Plaintiff offers no reasoned application of the law to these facts because these facts do not fit within the framework of an aiding and abetting claim.

Unable to shoehorn the facts into the elements of aiding and abetting law, Plaintiff asserts that Delaware cases "presume" a claim exists for aiding and abetting breaches of the duty of care. (Ans. Br. 53.) Not so. Of the cases Plaintiff cites from this Court, only *Malpiede* directly confronted the issue, and it expressly refrained from ruling on it. *Malpiede v. Townson*, 780 A.2d 1075, 1079 n.78 (Del. 2001). Plaintiff mischaracterizes *Arnold IV*, in which this Court did not "affirm[] . . . the availability of a claim for aiding and abetting an exculpated breach of the duty of disclosure" (Ans. Br. 53), but instead held: "Since the aiding and abetting claim against the acquiring corporation is still pending in the Court of Chancery, we express no view as to its merit." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 534 (Del. 1996). Plaintiff also mischaracterizes *Celera* by saying that "this Court characterized an aiding and abetting claim against a financial advisor as 'clearly identified and supportable.'" (Ans. Br. 53 (citing *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 436 (Del. 2012)).) The Supreme Court, however, was addressing all the claims that BVF wanted to pursue (not just aiding and abetting), were it permitted to opt out of a class action settlement. Moreover, in *Celera*, this Court stated that it was not deciding the viability of the aiding and

abetting claim: "We do not decide the merits of BVF's claims in this opinion." *In re Celera*, 59 A.3d at 427 n.5.

Plaintiff's attempt to manufacture a rule of law from outdated *dicta* in *Goodwin v. Live Entertainment, Inc.*, 1999 WL 64265 (Del. Ch.), is unavailing. Applying that *dicta* as the trial judge did ignores that either the third party must know "that the fiduciary was endeavoring to breach his duty" or the fiduciary's action must be "inherently wrongful." Moreover, *Goodwin* was decided to ensure that stockholders could not use aiding and abetting law to bring a "direct negligence claim against" a third party. (Op. Br. 48 (quoting *Goodwin*, 1999 WL 64265, at *28).) In a later opinion, then-Chancellor Strine held that (1) no non-exculpated claim for breach of fiduciary duty existed and therefore (2) no aiding and abetting liability could exist. *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 663, 673-74, 766 n.113 (Del. Ch. 2013). *Morton's* proves that Plaintiff states the law exactly backwards. Delaware courts presume that no claim exists for aiding and abetting a breach of the duty of care.

Contrary to Plaintiff's protests, this statement of the law does not create a wrong without a remedy. A claim exists, but it belongs to the corporation. If a corporation hires an advisor and the advisor commits a tort against the corporation, the corporation may sue the advisor, either at the board's direction or through a derivative claim. That Plaintiff failed to pursue the appropriate avenue to bring the

correct claim does not mean that this Court should do violence to the well-settled requirements of aiding and abetting law. The inherently wrongful element ensures that a third party receives "notice that [the] directors were violating their fiduciary duties" before being subjected to liability based on the tortious nature of the directors' conduct. (Op. Br. 45 (quoting *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *24 (Del. Ch.), *aff'd*, 897 A.2d 162 (Del. 2006)).) Aiding and abetting should not be transformed into a way to bring a "direct negligence claim against [RBC]." *Goodwin*, 1999 WL 64265, at *28.

Plaintiff offers a fallback argument that RBC acted in concert with DiMino. This theory is a non-starter. If the trial judge thought that RBC and DiMino acted together, he would have so found. The trial judge held that DiMino was a joint tortfeasor because his internal motivation was selfish, not because he took any inherently wrongful action. (*See* Ex. B 86 (DiMino acted to "advance[] his personal financial interests" instead of acting "in the best interests of Rural's stockholders . . . .").) But no findings suggest that RBC knew the inner workings of DiMino's heart. RBC did not know what DiMino did was wrongful and so did not aid and abet any breach by DiMino if it acted with him. Besides, the trial judge imposed aiding and abetting liability on RBC based on breaches of the duty of care by the entire board. (*See* Ex. A 69-70, 83-84.) Any improperly motivated action by DiMino cannot lead to RBC bearing liability based on the whole transaction.

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

The Directors' purported breaches of their duties do not satisfy the "but for" test. As to the decision to explore strategic alternatives, the trial judge held that "[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." (Ex. A 73.) But the trial judge never connected this purported misstep to any injury. (Op. Br. 51-52.) Plaintiff does not defend the trial judge's analysis except to quote a portion of the Liability Opinion unrelated to the decision to explore strategic alternatives. (Ans. Br. 57 (citing Ex. A 73).) Rather, Plaintiff misstates RBC's argument, claiming that "[c]ase law refutes RBC's suggestion that *Revlon* violations are 'too attenuated to support an award of damages.'" (*Id.*) RBC made no such argument. RBC argued that *the decision to explore strategic alternatives*—not *Revlon* violations generally—is too removed from any damage to stockholders. (Op. Br. 51.)

Plaintiff focuses more on the trial judge's finding that "[a] disinterested board that benefitted from disinterested advice would not have sent a conflicted agent to negotiate with Warburg from a position of weakness" and "would have received valuation materials periodically throughout the process," rather than shortly before the Board's vote on the sale. (Ex. A 73-74.) In its Opening Brief, RBC demonstrated that the trial judge erred because Moelis, a disinterested

advisor, also negotiated with Warburg, and the Board was well informed about Rural's value. Moreover, the trial judge ignored the fact that Moelis gave the disinterested advice the trial judge found was missing.

Plaintiff's response is a non sequitur: she argues RBC does not demonstrate that "Moelis's conduct satisfies the test for an intervening and superseding cause that 'logically cuts the causal link' . . . ." (Ans. Br. 57 (quoting Op. Br. 52).) But RBC never argued that Moelis was an intervening and superseding cause. Instead, Moelis's presence demonstrates the error below: RBC's conduct could not have caused the Board to breach its duties (without Moelis being found to be a joint tortfeasor). The trial judge held that "RBC's actions resulted in stockholders voting on the merger based on a proxy statement that contained materially false disclosures and omissions about RBC's valuation analyses and conflicts." (Ex. A 84.) But stockholders had access to fairness opinions from both Moelis and RBC. And even if RBC's opinion did not describe the precise details of a conflict, stockholders were also presented with an opinion without those purported infirmities. Moelis "cuts the causal link" because its disinterested opinion cured the purported deficiencies of RBC's opinion. Indeed, this is why the Board retained an unconflicted advisor. Even if RBC's fairness opinion had been excised from the Proxy Statement, a stockholder would still have concluded the transaction was fair, and therefore the disclosure claim fails the "but for" test.

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

The trial judge abandoned Delaware's traditional presumption that an auction is the most reliable method of determining a company's fair value, instead relying on a DCF analysis that yielded almost $100 million in damages by moving only two highly sensitive inputs. DCF inputs are often imprecise and unreliable, and small changes can yield widely different values. *See Longpath Capital, LLC v. Ramtron Int'l Corp.*, 2015 WL 4540443, at *1 (Del. Ch.); *Huff Fund Inv. P'ship v. CKx, Inc.*, 2013 WL 5878807, at *8 (Del. Ch.). In contrast, the auction produced a price "forged in the crucible of objective market reality." *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch.).[5]

A. Rural's Competitive Auction Generated A Fair Price.

In holding that Rural's value was $21.42 (24.2% higher than the sale price), the trial judge disregarded Delaware's presumption that auctions produce more reliable prices than judicial appraisals. *See, e.g.*, *In re Ancestry.com, Inc.*, 2015 WL 399726, at *23 (Del. Ch.) ("[b]ecause the [DCF] inputs . . . are problematic . . . and because the sales process here was robust . . . fair value [is] best represented

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[5] Revealingly, Plaintiff seeks a standard of review more lenient than abuse of discretion. Abuse of discretion governs review of damage awards. *See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002). Plaintiff claims a trial court "has greater discretion when making an award of damages [] for breach of duty of loyalty than [] assessing fair value in an appraisal action." (Ans. Br. 58.) Yet Plaintiff never asserted a breach of loyalty claim.

by the market price"). The trial judge held that a "confluence of factors"—primarily that the market "did not understand Rural's [growth plan]"—rendered the auction ineffective. (Ex. A 74-75.) As noted above, the market was aware of management's growth plans, whether through public filings, the CIM, or the Proxy Statement. (Op. Br. 55-56.) Plaintiff's response is that RBC's argument is "disingenuous" because it ignores the "abundant fact-finding about the 'confluence of factors' that rendered reliance on the negotiated deal price 'inappropriate' . . . ." (Ans. Br. 58.) As set forth above, this rhetoric cannot withstand review.

Plaintiff then attempts to shift focus to its contention that the auction's design "'prevented the emergence of the type of competitive dynamic among multiple bidders that is necessary for reliable price discovery.'"[6] (Ans. Br. 58-59 (quoting Ex. A 74-77).) But even the trial judge found a number of reasons the auction's timing was reasonable. (Ex. A 55-56.) The trial judge also found that the auction's six initial indications of interest—five of which were less than the merger price—unequivocally justified the Board's decision to continue the auction. (*Id.* 16, 57-58.) And the trial judge further found that it was appropriate to continue the auction "[e]ven after CD&R dropped out." (*Id.* 57.)

B. The Trial Judge Used Improper Inputs In Performing The DCF.

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[6] RBC notes again the trial judge's erroneous suggestion that Rural divided the process into "Track 1" and "Track 2" buyers; no such division occurred. (*See* Op. Br. 23.)

In performing its DCF analysis, the trial judge erred by selecting inputs that inflated Rural's value. To account for management's acquisition program beyond 2016, the trial judge accepted Plaintiff's approach, which derived Rural's value based on extrapolating management projections out to *ten years*. (Ex. A 85-86.)

The trial judge performed no analysis on Rural's projections before declaring them reasonable. (*See* Ex. A 85.) Plaintiff's expert, who had no experience in this industry, applied his DCF inputs "as mechanical[ly] as possible" and did not consider the validity of the projections before extending and extrapolating them. (Op. Br. 57 (quoting A2289).) Delaware law frowns upon using extrapolated projections. (*Id.*) This approach inflated Rural's value by *at least* $2.06 per share. (*Id.*)

Plaintiff makes no attempt to address these arguments. Instead, she argues "*both parties' experts* advanced at trial DCF models that extrapolated management projections" and the only difference between the models was the growth rate: RBC extrapolated management projections "using the nominal GDP growth rate," while Plaintiff used "the same growth rate projected by [Rural] for fiscal year 2016." (Ans. Br. 60.) This argument obscures the critical fact that RBC's expert disagreed with extrapolating projected growth for an additional five years and only engaged in this analysis to demonstrate that—using a normalized growth rate for years 6-10—the transaction price was still fair. (A1798-1800; A2379; A2381.)

After accepting Plaintiff's extended ten-year management projections, the trial judge disregarded both experts in favor of a hornbook to create a beta of 1.147. (Ex. B 23.) The trial judge noted that "the reliability of an observed beta depends on an efficient trading market"—a proposition that is unsupported by any authority. (Ex. A 87.) The trial judge cited the hornbook for the proposition that "average weekly trading [turnover] of . . . 1%" is sufficient to presume market efficiency. (*Id.*) He then calculated the period Rural's stock was "efficient," resulting in an 18-month sample period. (*Id.*) This yielded a beta of 1.147—and a value up to 23% higher than Plaintiff sought—so the trial judge selected Plaintiff's beta of 1.199 "to avoid awarding value beyond what the plaintiffs sought." (Ex. B 23.) The trial judge misunderstood the hornbook in calculating beta, and this error shows why auctions are more reliable than DCF valuations. (Op. Br. 57-59.)

Plaintiff responds by distorting *why* the trial judge selected Plaintiff's beta, arguing that the trial judge chose his beta "based on the supplemental submissions and the evidence presented at trial." (Ans. Br. 61 (quotations omitted).) That is not accurate. The trial judge abandoned his beta because it was "lower than the figure advocated by [Plaintiff's expert]." (Ex. B 23.) The result was astonishing. Using RBC's expert's beta of 1.454 would have yielded a value of $16.91 per share. The trial judge's approach resulted in a swing of over $100 million. (*See* Op. Br. 58-59.) This constitutes an extraordinary abuse of discretion.

VI. THE TRIAL JUDGE ERRED BY MISAPPLYING DUCATA.

A. It Was Error Not To Allocate Fault On An Equal Pro Rata Basis.

Disproportionate fault applies only if "the issue of proportionate fault [is] litigated between [the joint tortfeasors] by *cross-complaint* in that action." *Ikeda v. Molock*, 603 A.2d 785, 786-87 (Del. 1996). Because no party litigated proportionate fault here, RBC had no opportunity to defend itself against the imposition of disproportionate liability. Plaintiff points to RBC's cross-claim and a passage in the Pre-Trial Stipulation referencing disproportionate fault. (Ans. Br. 65.) The trial judge, however, understood that evidence regarding those issues was not presented. And even if RBC injected those issues into the trial, the trial judge erroneously imposed disproportionate liability *against RBC*, without giving RBC an opportunity to present a defense. That Section 6302(d) authorizes disproportionate liability does not mean the trial judge can impose it without allowing a defendant to litigate the issue.

Plaintiff argues that "Section 6302(d) of DUCATA allows for the consideration of disproportion of fault among joint tortfeasors" (Ans. Br. 63) but omits that 6302(d) applies only to claims for contribution. 10 *Del. C.* § 6302(d) ("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 . . . ."). RBC, having been barred by the Settlement Order from

pursuing contribution claims, seeks only Section 6304(b) judgment reduction. Section 6304(b) does not authorize the trial judge to consider disproportionate fault. Rather, Section 6304(b) requires the trial judge to reduce the damages for which a non-settling defendant is liable "to the extent of the pro rata share of the released tortfeasor . . . ." "Pro rata" means "proportionately," BLACK'S LAW DICTIONARY 1340 (9th ed. 2009), *i.e.*, based on the number of joint tortfeasors. Thus, disproportionate fault may not be considered under Section 6304(b).

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

Plaintiff misses the point of *Ikeda*. *Ikeda* relied on "the proposition that juries should not determine matters which are not litigated before them. 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." 603 A.2d at 787. In *Ikeda*, this meant the trial judge erred by failing to allow the defendant to amend and add claims against the settling defendants. *Id.* In this case, the trial judge, as fact-finder, should not have ruled who was a joint tortfeasor without first granting RBC a full and fair opportunity to establish the joint tortfeasor status of the Settling Defendants.

Plaintiff's waiver argument is formalistic and inconsistent with what occurred during the litigation. The trial judge understood that RBC had not put on evidence of the Directors' and Moelis's culpability, acknowledging that doing so would have made for an "awkward, weird trial." (Ex. B 60 (quotations omitted).)

Having barred contribution claims and released the Directors and Moelis from further liability, the trial judge allowed RBC to argue for judgment reduction after trial. (*Id.* 59-61.) But he did not hear evidence regarding the other defendants' joint tortfeasor status. (*Id.* 61 (holding RBC did not waive right to argue contribution issues, but "[t]hey simply had to do so based on the record created at trial").) That was error, especially because the trial judge expressly resolved these issues against RBC due in part to the record's lack of evidence against the other defendants. (Ex. B 84-85 (Davis), 87 (Holland and Conrad), 90 (Moelis).)

C. By Not Proving At Trial The Affirmative Defense Of Section 102(b)(7) Exculpation, The Directors Are Joint Tortfeasors.

Plaintiff's legal argument ignores black-letter Delaware law that the Directors had the burden of proving their entitlement to exculpation under Rural's Section 102(b)(7) provision. Because the Directors settled before trial, they did not satisfy their burden. By raising *sua sponte* the Directors' affirmative defense at trial and shifting the burden of proof to RBC to show that the Directors were not entitled to exculpation, the trial judge committed reversible error. *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, 115 A.3d 1173 (Del. 2015), does not affect this result. *Cornerstone* addressed only the impact of a Section 102(b)(7) provision on a plaintiff's pleading burden to survive a motion to dismiss; it did not address a defendant director's burden at trial to prove the affirmative defense.

Plaintiff's policy argument is also misguided. Section 102(b)(7) only authorizes a corporation to include a charter provision "eliminating or limiting the personal liability of a director to the corporation or its stockholders[.]" 8 *Del. C.* § 102(b)(7). Section 102(b)(7) thus does not apply to contribution claims under DUCATA from joint tortfeasors. Even if Section 102(b)(7) were to apply, RBC is seeking a reduction in damages, not a monetary payment from the Directors. Application of DUCATA to reduce RBC's damages therefore would not deprive the Directors of the benefit of Rural's exculpatory charter provision. In contrast, declining to apply DUCATA because of the exculpatory provision would undermine the policy objectives of both DUCATA and Section 102(b)(7) by shifting liability for a board's breach to its advisors. This result not only undermines the purpose of DUCATA, but it bizarrely makes advisors and corporate officers guarantors for the same corporate risk-taking Section 102(b)(7) encourages—without the legislature ever having expressed an intent to do so.

D. The Trial Judge Erred By Applying Unclean Hands.

The trial judge's application of unclean hands reveals a misunderstanding of DUCATA. At common law, courts refused contribution to avoid aiding wrongdoers. *See* RESTATEMENT (SECOND) OF TORTS § 886A cmt. a (1979). DUCATA displaced this rule so that joint tortfeasors could obtain contribution or a contribution credit. Applying unclean hands here would undo the statutory

enactment because the common law rule is functionally identical to unclean hands: "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." (Ans. Br. 72 (quotation omitted).) The text of DUCATA mandates a contribution credit for joint tortfeasors and thus precludes application of unclean hands. 10 *Del. C.* § 6304(b); Ex. B 25. That one drafter of the Uniform Act of 1939 "appears to have thought that denying contribution was most appropriate for conduct intentionally designed to cause physical injury, such as the hypothetical involving mob violence" (Ex. B 31), has no bearing on this case.

E. Quasi-Estoppel Should Apply.

Plaintiff suggests that for quasi-estoppel to apply, the change must be "unconscionable." (Ans. Br. 73.) But that is not the law. As set forth in *Personnel Decisions*: "To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another." *Personnel Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 (Del. Ch.). That is exactly what happened here. Plaintiff argues that *Mullins* prevents application of quasi-estoppel in analyzing the joint tortfeasor status of the settling defendants. (Ans. Br. 72-73 (citing *Med. Ctr. of Del., Inc. v. Mullins*, 637 A.2d 6 (Del. 1994).) But *Mullins* did not even mention the issue of quasi-estoppel.

Plaintiff also makes the surprising argument that there is no inconsistency between her earlier arguments and her current argument that the settling defendants bear no liability. (Ans. Br. 73.) That argument is false. Plaintiff changed from arguing that the Directors and Moelis would bear liability to arguing that they did not. But even if the Court accepts Plaintiff's hyper-technical suggestion that her earlier arguments must be understood in the context of the then-existing procedural posture, Plaintiff still contradicted herself. In her Pretrial Opening Brief, Plaintiff summarized "the evidence she will present at trial to establish" that "The Director Defendants are Individually Liable" and that "RBC and Moelis are Liable for Aiding and Abetting." (A1973; A2009; A2019.) Plaintiff now claims the trial failed to establish the joint tortfeasor status of most of the Directors and of Moelis. (Ans. Br. 73-74.) This opportunistic change in position should not be permitted.

F. The Trial Judge's Joint Tortfeasor Analysis Contradicts His Merits Determinations.

The trial judge's treatment of Moelis is inconsistent. If Moelis gave disinterested advice, then by operation of 8 *Del. C.* § 141(e), the Directors could not have breached their duties. If Moelis failed to give disinterested advice, it would be in the same position as RBC and must be a joint tortfeasor. But the trial judge held both that the Directors breached their duties and Moelis was not a joint tortfeasor. Plaintiff argues that the trial judge held only that "RBC's self-interested manipulations caused the process to unfold differently than it otherwise would

have done." (Ans. Br. 74 (citing Ex. A 73).) But there is no evidence or factual finding that suggests that Moelis's valuation work was altered based on RBC's work. Moelis valued Rural at *less* than did RBC. (*Compare* A877 *with* A899.)

* * *

RBC notes that Plaintiff completely failed to respond to the important policy arguments raised in briefs filed by SIFMA and the NACD as *amici*. With respect to the brief filed by the NACD, Plaintiff is reduced to mischaracterizing a law firm alert issued by the firm that drafted NACD's brief. (Ans. Br. 11-12.) And Plaintiff wholly ignores SIFMA's sound policy arguments regarding the trial judge's misapplication of DUCATA, an application that, without any directive from the General Assembly, shifts the costs of exculpating directors from stockholders to financial advisors. Plaintiff likewise does not address SIFMA's concern that the trial judge's opinion "creates an ambiguous standard of conduct to which financial advisors would be unable to conform with any reasonable degree of certainty." (SIFMA Br. 2.)

VII. THE COURT OF CHANCERY PROPERLY DENIED PLAINTIFF'S FEE-SHIFTING APPLICATION.

A. Question Presented

Did the trial judge properly deny Plaintiff's fee-shifting request because she failed to present evidence of bad faith rising to the level of glaring egregiousness?

B. Scope of Review

This Court "review[s] the Court of Chancery's denial of attorneys' fees under the bad faith exception to the American Rule for abuse of discretion." *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010).

C. Merits of Argument

1. The Trial Judge Correctly Applied The "Glaring Egregiousness" Standard In Refusing To Shift Fees to RBC.

The trial judge refused to shift fees under the bad faith exception to the American Rule because Plaintiff failed to show that RBC's conduct rose "to the level of glaring egregiousness that our case law seems to require." (AR633.) Plaintiff inaccurately asserts that "bad faith litigation conduct," not glaring egregiousness, is the operative standard. (Ans. Br. 78.)

As an initial matter, Plaintiff's contention that "bad faith litigation conduct" and "glaring egregiousness" are two distinct standards is incorrect: the case law demonstrates that glaring egregiousness is the level to which the bad faith conduct must rise for a court to consider shifting fees. *See eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 47 (Del. Ch. 2010) ("The Court typically will not find a

litigant acted in bad faith for purposes of shifting attorneys' fees unless the litigant's conduct rose to the level of 'glaring egregiousness.'").[7] And even where Delaware courts do not use the phrase "glaring egregiousness," they require what amounts to glaringly egregious conduct. *See, e.g.*, *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1093-94 (Del. 2006) (conduct was "abusive and disrespectful of the judicial process": defendant intentionally destroyed the buildings that were "the very subject matter that the lawsuit [sought] to protect and preserve"); *Marra v. Brandywine Sch. Dist.*, 2012 WL 4847083, at *4-5 (Del. Ch.).

Indeed, two of this Court's cases Plaintiff cites—*Johnston* and *Kaung*—affirmed fee awards based on the Court of Chancery's application of the glaring egregiousness standard. In *Arbitrium (Cayman Islands) Handels AG v. Johnston*, the Court of Chancery awarded attorney's fees in part because there were "[t]hree *egregious* examples of such bad faith conduct" that occurred during and after trial. 705 A.2d 225, 235 (Del. Ch. 1997) (emphasis added), *aff'd*, *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542 (Del. 1998). But the court also noted that fees were awarded not because the defendant's bad faith conduct was simply egregious, but because it rose to the level of being "*sufficiently* egregious." *Id.* at 228 (emphasis added). And, in *Kaung v. Cole National Corp.*, the Court of

[7] *See also Williams v. Spanagel*, 2000 WL 1336728, at *8 (Del. Ch.); *In re Carver Bancorp, Inc.*, 2000 WL 1336722, at *2 (Del. Ch.).

Chancery awarded fees because the plaintiff's actions during the litigation rose "to the level of 'glaring egregiousness' . . . ." 2004 WL 1921249, at *6 (Del. Ch.), *aff'd in part & rev'd in part*, 884 A.2d 500 (Del. 2005).

Plaintiff's reliance on *Montgomery Cellular* does not aid her.[8] *Montgomery Cellular* merely confirms the glaring egregiousness standard. In *Dobler v. Montgomery Cellular Holding Co.*, the Court of Chancery denied a fee award because plaintiffs "failed to demonstrate [] glaring egregiousness. . . ." 2004 WL 5382074, at *19 (Del. Ch.), *rev'd*, *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206 (Del. 2005). This Court held that the defendant engaged in bad faith conduct similar to that in *Johnston* and *Kaung* and awarded fees based in part on "[t]he most egregious instance" of that bad faith conduct, *Montgomery Cellular*, 880 A.2d at 227-28, contrary to Plaintiff's claim that "the appeal did not address the [trial court's] formulation of the legal standard[.]" (Ans. Br. 80.) Ultimately, no case Plaintiff cites stands for a lower standard than glaring egregiousness.

2. Plaintiff Has Not Set Forth Clear Evidence That RBC's Conduct Constituted Bad Faith.

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[8] She also cites three cases that do not address the bad faith standard. *See Slawik v. State*, 480 A.2d 636, 639 n.5 (Del. 1984) (reviewing the applicability of a federal fee-shifting statute because bad faith exception was inapposite); *Blue Hen Mech., Inc. v. Christian Bros. Risk Pooling Trust*, 117 A.3d 549, 560 (Del. 2015) (declining to extend tort of malicious prosecution in part because of existence of bad faith exception); *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162 (Del. 1989) (analyzing fee shifting under common fund exception).

Whether fee shifting requires glaring egregiousness or mere bad faith, Plaintiff fails to meet either extraordinarily high burden.

The standard of proof for fee shifting is stringent, requiring the requesting party to produce "clear evidence" of bad faith conduct. *See Lawson v. State*, 91 A.3d 544, 552 (Del. 2014) ("[T]he party seeking to invoke [the bad faith] exception must demonstrate by 'clear evidence' that the party from whom fees are sought . . . acted in subjective bad faith."); *Carver*, 2000 WL 1336722, at *2 (the clear evidence standard is "more stringent" and sets a "daunting threshold" that has only been overcome by "Olympian-like" feats of bad faith).

Plaintiff does not establish by clear evidence that RBC's litigation conduct constituted bad faith. The crux of her claim is that RBC's inclusion of certain statements in its pre-trial papers "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." (Ans. Br. 81.) Plaintiff asserts that this purported conflict arose because RBC was secretly lobbying Warburg at the last minute to provide staple financing while "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 analysis." (*Id.* at 75, 81.) But Plaintiff sets forth only conclusory allegations that RBC acted in bad faith (*see id.* 81-82) without attempting to explain the purported falsity of RBC's statements.

For example, Plaintiff alleges that RBC engaged in secret last-minute lobbying of Warburg and that Munoz was aware of this effort but did not inform the Board or cause Rural to disclose this information in the Proxy Statement. (*Id.* 81.) Plaintiff then contends that RBC falsely stated in its pre-trial papers that RBC had no incentive to favor Warburg and find the sale price fair because RBC knew it would not be providing staple financing to Warburg. (*Id.* 81-82.) But Plaintiff fails to provide any evidence, let alone clear evidence, to support her contention that RBC intentionally made any false statements.

The only two pieces of "support" Plaintiff appears to offer are Munoz's trial testimony that he knew RBC had tried to persuade Warburg to include RBC in the staple financing on March 26, 2011, and a brief March 26, 2011 email exchange between Munoz and Fleming, in which Fleming expresses his displeasure that Warburg did not include RBC in the staple financing. (*See* A2192-93; B326.) While Plaintiff makes much of Munoz's trial testimony, she fails to deal with the fact that the record about this last-minute lobbying issue was not developed at all because of her counsel's tactical decisions. Plaintiff never raised this issue in the litigation until her pre-trial reply brief. Accordingly, she failed to ask Munoz about this issue during discovery and chose not to depose any RBC individuals who actually participated in these discussions with Warburg. She did not depose Rural's or RBC's counsel to determine whether the professionals charged with

disclosure responsibilities discussed the March 26 phone calls. In any event, Warburg's March 22, 2011 bid (B280) demonstrated that Warburg had committed staple financing from other sources, and Munoz testified truthfully at trial that, at the time of this email exchange, "it was clear" to RBC that Warburg would not use RBC's full staple financing commitment. (*See* A2114.)

Plaintiff also alleges that RBC engaged in bad faith litigation conduct because Munoz internally advocated downward adjustments to Rural's DCF valuation in RBC's fairness opinion analysis in order to make the sale price appear more favorable. (*See* Ans. Br. 75, 81.) Plaintiff purports to rely on a March 26, 2011 email from Munoz stating that he thought they "were going to try to reduce DCF." (B327.) But Plaintiff fails to identify any statement by RBC in its briefing that was made false by this email. And she fails to apprise this Court that *RBC did not actually lower the DCF*. In any event, Plaintiff has not argued (and cannot argue) for fee shifting based on pre-litigation conduct. (*See* Ans. Br. 75.)[9]

RBC's advocacy was typical and cannot possibly support a fee award. *See Amer v. NVF Co.*, 1995 WL 54411, at *3 (Del. Ch.) (The American Rule is "intended, in part, to prevent chilling either the good faith assertion of legal claims

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[9] Plaintiff never requested fee shifting on this basis below. She made only the conclusory (now abandoned) allegation that an RBC witness—Daniel, *not* Munoz—"lied" at trial when he testified there were no discussions at the March 26 fairness opinion committee meeting about whether to lower the DCF range. (B1301-02.) Daniel testified he thought Munoz may have misheard the discussion, which makes more sense given that the DCF was not lowered. (*See* A2409.)

or defenses or vigorous creative advocacy on behalf of such claims.”). Indeed, the trial judge’s hypothetical award of sanctions is unsupported by the record because there were no findings that RBC’s conduct prolonged, complicated, or otherwise affected the course of the litigation. *See Dover*, 902 A.2d 1084. The trial judge’s decisions further emphasize that fee shifting is inappropriate here, where the factual issues presented in the brief four-day trial were so complex and hotly contested that they required more than 180 pages to resolve them. If Plaintiff seeks to shift fees on the basis of credibility, Delaware law is clear that “a simple credibility determination alone is not enough to shift fees.” (AR632.)[10]

For these reasons, this Court should affirm the trial judge’s decision not to shift Plaintiff’s attorney’s fees to RBC.

CONCLUSION

For the reasons set forth above, RBC respectfully requests that this Court reverse the trial judge’s holding in its entirety except for its holding denying Plaintiff’s fee shifting application.

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[10] *See also Dweck v. Nasser*, 2012 WL 161590, at *1, *23 (Del. Ch.) (denying fee shifting despite credibility issues, including a party-witness who “repeatedly contradicted her deposition testimony, responded evasively, [] suffered convenient failures of memory[,] . . . [and] [o]n several occasions, [] appeared to have invented entirely new accounts for trial”); *Gen. Video Corp. v. Kertesz*, 2009 WL 106509, at *1 (Del. Ch.) (“[E]ven though the court was ultimately incredulous as to [a witness’] account . . . this [was] not equivalent to a finding based upon clear evidence that the document was forged” and thus insufficient to support a finding of bad faith).

Dated: September 3, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2015, a true and correct copy of the within document was served by *File & ServeXpress* on the following attorneys of record:

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