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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF MIAMI GENERAL EMPLOYEES' AND SANITATION EMPLOYEES' RETIREMENT TRUST, on behalf of itself and on behalf of all others similarly situated, Plaintiff-Below, Appellant, v. JERRY M. COMSTOCK, JR., as Independent Executor of the Estate of Joshua E. Comstock, RANDALL C. MCMULLEN, DARREN M. FRIEDMAN, ADRIANNA MA, MICHAEL ROEMER, C. JAMES STEWART, III, H.H. "TRIPP" WOMMACK, III, THEODORE "TED" MOORE, NABORS INDUSTRIES, LTD. and MORGAN STANLEY & CO. LLC Defendants-Below, Appellees.	No. 482, 2016 Court Below: Court of Chancery of the State of Delaware, C.A. No. 9980-CB [redacted] REDACTED PUBLIC VERSION FILED: December 22, 2016

ANSWERING BRIEF OF APPELLEE MORGAN STANLEY & CO. LLC

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NATURE OF PROCEEDINGS

This is the second appeal in this putative class action. In the first appeal, this Court reversed and vacated a mandatory preliminary injunction, obtained in the Court of Chancery by plaintiff City of Miami General Employees' and Sanitation Employees' Retirement Trust, under which the board of directors of defendant C&J Energy Services, Inc. ("C&J") was required to solicit proposals for alternatives to a then-pending inversion merger transaction between C&J and a subsidiary of Nabors Industries Ltd. ("Nabors").[1] On remand from that prior appeal, the case was reassigned to Chancellor Bouchard.

Defendant Morgan Stanley & Co. LLC ("Morgan Stanley") played no role in events leading up to C&J's merger agreement with Nabors in June 2014, which were the subject of the prior appeal. Instead, the firm was hired in late-November 2014 to act as financial advisor to a special committee of the C&J board of directors that was charged with conducting the post-agreement solicitation process required by the mandatory injunction. Morgan Stanley's engagement ended on December 19, 2014, when this Court vacated that injunction because the trial court had impermissibly "blue-penciled" the Nabors merger agreement.[2]

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[1] *C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Trust*, 107 A.3d 1049, 1071-74 (Del. 2014).

[2] *Id.* at 1072.

[redacted]

Following remand, C&J pursued recovery against plaintiff's bond for damages sustained as the result of the wrongful injunction, which included fees C&J paid to Morgan Stanley for its work as financial advisor to the special committee. Plaintiff conducted discovery in connection with that motion. In October 2015, plaintiff filed its amended complaint, which for the first time asserted a claim against Morgan Stanley for allegedly aiding and abetting breaches of fiduciary duty by C&J directors and officers during the court-ordered solicitation process.

Morgan Stanley moved to dismiss that claim for failure to state a claim upon which relief could be granted. All other defendants also filed motions to dismiss. In a memorandum opinion entered on August 24, 2016 (the "Opinion"),[3] the trial court correctly dismissed plaintiff's aiding and abetting claim against Morgan Stanley as well as its claims against all of the other defendants.[4] The court also granted C&J's motion to recover damages against plaintiff's bond.[5] This is plaintiff's appeal from those rulings.

[3] A copy of the Opinion ("Op.") is an exhibit to plaintiff's opening brief. The Opinion is available on Westlaw. *See City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Comstock*, 2016 WL 4464156 (Del. Ch. Aug. 24, 2016).

[4] Op. at 55-56.

[5] *Id.* at 66.

SUMMARY OF ARGUMENT

1. Denied.[6] The trial court correctly applied *Corwin v. KKR Financial Holdings, LLC*[7] to dismiss plaintiff's claims for breaches of fiduciary duty. Morgan Stanley refers to and incorporates by reference the arguments made by the C&J directors and officers for specific responses to plaintiff's arguments on these points. Given its dismissal of plaintiff's breach of fiduciary duty claims, the court also properly dismissed plaintiff's aiding and abetting claim against Morgan Stanley.

2. Plaintiff waived any argument for reversal of the trial court's dismissal of its aiding and abetting claim against Morgan Stanley except for its challenge to the court's application of *Corwin*. Plaintiff did not include any arguments concerning its claim against Morgan Stanley in the body of its opening brief as required by this Court's Rule 14(b)(vi)(A)(3) to preserve an issue on appeal.

3. Even if the Court concludes that *Corwin* does not apply, and plaintiff did not waive its arguments for reversal, the Court should affirm the dismissal of

[6] The summary of argument in plaintiff's opening brief does not state in separate numbered paragraphs the legal propositions on which it relies. Morgan Stanley denies all of the legal propositions set forth in plaintiff's summary of argument with respect to that portion of the Opinion in which the trial court granted defendants' motions to dismiss.

[7] 125 A.3d 304 (Del. 2015).

plaintiff's aiding and abetting claim against Morgan Stanley for reasons presented below but not reached by the trial court in the Opinion.

A. Quite apart from the *Corwin* analysis, plaintiff failed to allege any actionable breach of fiduciary duty that Morgan Stanley could have aided or abetted. Morgan Stanley had no involvement in events preceding the injunction, nor did plaintiff allege that Morgan Stanley played any role in alleged events after its engagement ended, including the challenged proxy statement disclosures. Morgan Stanley cannot have secondary liability for events in which it was not a participant.[8] Moreover, alleged breaches of duty relating to the solicitation process cannot be the basis for a claim against Morgan Stanley. The Nabors merger agreement prohibited C&J from soliciting alternative proposals, as this Court's prior decision vacating the injunction strongly reaffirmed. Given the appellate decision vacating the injunction, no offer solicited during the mandated solicitation process could have led to the permissible termination of the Nabors merger agreement or, by extension, could have given rise to an articulable claim for damages by C&J stockholders. Regardless, plaintiff's attempt to impugn the advice Morgan Stanley provided to the special committee is belied by plaintiff's

[8] *See Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001) ("knowing participation in [a] breach" is a required element for aiding and abetting claim); *Houseman v. Sagerman*, 2014 WL 1600724, at *9-10 (Del. Ch. Apr. 16, 2014) (dismissing claim against financial advisor not alleged to have played any role in preparing information statement).

own source for those allegations – minutes of a special committee meeting where that advice was presented – which are discussed in the complaint and, under well-settled law, can be considered in affirming dismissal of the aiding and abetting claim.

B. Plaintiff also failed to allege Morgan Stanley's knowing participation in any underlying breach of duty. The amended complaint contained no factual allegations that would support the inference that Morgan Stanley acted with the required "illicit state of mind."[9] For its scienter allegations, plaintiff cherry-picked portions of two email exchanges between C&J's chief executive officer Joshua Comstock and a Morgan Stanley banker that it mischaracterized. In one of those exchanges, Comstock informed the Morgan Stanley banker that agreeing to take on the special committee assignment would be a "solid in with the company," but the full exchange shows that the statement was made in the context of fee negotiations "to entice a well-qualified advisor to accept an unusually low fee for an assignment . . . under far less than ideal conditions," as the trial court correctly recognized[10] Read in full, the email exchange does not support the inference of conspiracy that plaintiff urged. In the other exchange, the same Morgan Stanley banker reassured Comstock that he remained supportive after

[9] *In re Oracle Corp. Deriv. Litig.*, 867 A.2d 904, 931 (Del. Ch. 2004).

[10] Op. at 40.

Comstock expressed frustration with the ongoing solicitation process. The same email explained that Morgan Stanley was "'going to run a tight objective go-shop process' to avoid giving the Court of Chancery any reason to doubt [its] assessment of what other bidders may be willing to offer."[11] Plaintiff quoted that sentence in its amended complaint but omitted it from its appellate brief, undoubtedly because the full text contradicts the negative inference that plaintiff wishes to draw.

C. This Court's decision reversing and vacating the mandatory injunction also stands in the way of any showing that Morgan Stanley was the proximate cause of any alleged damages sustained by plaintiff or the putative class. The Nabors merger agreement prohibited solicitation of other offers or negotiations with any possible bidder whose interest was solicited. The reversal reinstated those contractual restrictions and broke the chain of causation between any of Morgan Stanley's actions in connection with the solicitation process and any damages allegedly sustained by C&J stockholders.

The dismissal of plaintiff's claim against Morgan Stanley should be affirmed.

[11] Op. at 17 (quoting Compl. ¶ 125).

STATEMENT OF FACTS[12]

The claim against Morgan Stanley relates to a three-and-a-half week period between November 25, 2014, when the Court of Chancery entered an order requiring the C&J board of directors to run a solicitation process with respect to a transaction that was the subject of a definitive merger agreement with Nabors, and December 19, 2014, when this Court reversed and vacated that order.

A. Events Preceding Morgan Stanley's Involvement.

C&J was an oilfield services provider.[13] In January 2014, Citibank Global Markets, Inc. ("Citi") approached the company's founder, chairman and chief executive officer Joshua Comstock with the suggestion that C&J acquire Nabors's oilfield services business through an inversion merger.[14] Discussions and negotiations ensued between C&J and Nabors, with Citi acting as C&J's financial advisor.[15]

On June 25, 2014, C&J entered into the merger agreement with Nabors and a Nabors subsidiary under which C&J would merge into the Nabors subsidiary,

[12] Morgan Stanley assumes as true the well-pleaded factual allegations in the amended complaint solely for purposes of this appeal from a decision granting its motion to dismiss. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011).

[13] Compl. ¶ 39 (A145).

[14] *Id.* ¶ 45 (A147).

[15] *Id.* ¶¶ 46-91 (A147-64).

C&J stockholders would own 47% of a combined entity following a stock-for-stock transaction and Nabors would own 53% and receive roughly $940 million in cash. The merged entity would be a Bermudian corporation renamed C&J Energy Services, Ltd.[16] The transaction was subject to C&J stockholder approval.[17]

The merger agreement contained several standard deal protection measures, including a prohibition against soliciting alternative transaction proposals, a prohibition against discussions or negotiations with any person in response to an unsolicited acquisition proposal, and a break-up fee payable by C&J to Nabors in certain circumstances.[18] The "no-shop" and the "no-talk" provisions included a "fiduciary out."[19]

After the transaction was announced, plaintiff filed a lawsuit claiming that in entering into the Nabors merger agreement the C&J directors breached their fiduciary duties, failed to obtain the best price reasonably available for C&J, and put their personal interests ahead of the interests of the C&J stockholders. Having had no role in the transaction, Morgan Stanley was not mentioned or named in the complaint.

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[16] *C&J Energy Servs.*, 107 A.3d at 1061-62.

[17] Compl. ¶ 146 (A190).

[18] Merger Agreement §§ 6.4, 8.2 (A327-31, A347-49).

[19] *Id*. § 6.4(b)(i) (A328).

In a November 24, 2014 bench ruling, the Court of Chancery (Noble, V.C.) granted plaintiff's motion for a preliminary injunction; an order was entered the next day.[20] The injunction required C&J directors who would not be continuing as directors to "solicit alternative proposals to purchase the Company . . . that are superior to the Proposed Transaction . . . for a period of 30 days."[21]

B. The Special Committee Is Formed and Retains its Own Advisors.

On November 26, 2014, in response to the order, the C&J board formed a special committee composed of the three directors who had not been named to serve as directors of the merged company: Darren M. Friedman, Adrianna Ma, and C. James Stewart III.[22] The board instructed the special committee to "assess any alternative proposals from a financial perspective" and to "present to the [b]oard any competing offer that the special committee determines is potentially superior to the Nabors transaction."[23]

The special committee retained its own legal advisor – the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP.[24] In addition, the special committee retained Morgan Stanley as its financial advisor. Plaintiff alleges that Comstock

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[20] Compl. ¶ 102.

[21] *Id.*

[22] Compl. ¶ 110 (A172); *see id.* ¶¶ 29, 30, 32 (A143).

[23] *Id.* ¶ 110 (A172).

[24] *Id.*¶ 117 (A175).

contacted Morgan Stanley to discuss the possibility of its retention "[o]n November 26, 2014 – before the [s]pecial [c]ommittee was formed . . ."[25] According to plaintiff, Comstock knew that Morgan Stanley investment banker John Bishop "supported the Nabors Deal and [Comstock's] personal vision to grow C&J through a strategic acquisition."[26] Plaintiff further alleged that Bishop "knew that Comstock opposed the solicitation process, and that Comstock, McMullen and [C&J general counsel Ted] Moore wanted to pursue the Nabors Deal."[27]

Before Morgan Stanley worked out the final terms of its engagement with the special committee, it negotiated certain of the financial terms with Comstock – "base fee, transaction fee [and] opinion fee" – that, in Comstock's words, strongly "incentivized Morgan Stanley to find a superior transaction that is better for shareholders, which is the goal."[28] In the course of those fee negotiations, Comstock wrote: "If y'all do this it is a solid in with the company."[29] Morgan Stanley ultimately agreed in the negotiations with Comstock to lower its "base fee" to $350,000.[30] The special committee knew that Comstock initially

[25] *Id.* ¶ 111 (A172-73).

[26] *Id.* ¶ 112 (A173).

[27] *Id.* ¶ 182 (A201).

[28] *Id.* ¶ 113 (A173); *see* (B230-33) (full email exchange).

[29] Compl. ¶ 114 (A174).

[30] *Id.*

negotiated the basic financial terms of Morgan Stanley's engagement, and plaintiff did not allege otherwise.

C. Morgan Stanley Assists the Special Committee in Conducting the Required Solicitation Process.

Soon after its formation, the special committee met with Morgan Stanley to discuss the steps for conducting the solicitation process during the 30-day period provided for in the mandatory injunction.[31] Under the process, the special committee would require indicative bids to be submitted by December 15 with the special committee to review any bids received on December 16 and the full board to review the process and any bids received at a meeting on December 18. This schedule would allow a week before the end of the solicitation period to "[n]egotiate superior/alternative proposals, if any, and/or consider further solicitations."[32]

After the ensuing weeks of efforts by Morgan Stanley to contact potential bidders, only three entities expressed interest in having further discussions. Cerberus Capital Management ("Cerberus") was the only one that submitted a written proposal, which it did on December 11, 2014.[33] In its non-binding proposal letter, Cerberus stated that it would [redacted]

[31] Compl. ¶ 119 (A176).

[32] *Id.*

[33] Compl. ¶ 123 (A178-79).

[redacted]

[redacted] a possible merger between C&J and its privately held portfolio company, Keane Group, under which C&J stockholders would receive 49% of the equity of the new entity and a cash dividend of $5.25 per share while Cerberus would contribute $175 million in cash and obtain 51% of the equity in the new entity. The Cerberus letter valued its proposal at $14.55 per share, much of which was attributable to the valuation Cerberus placed on its privately owned subsidiary.[34]

Morgan Stanley performed an extensive evaluation of the Cerberus proposal, which it reviewed at a meeting of the special committee on December 17, 2014.[35] Based on the minutes of that meeting, plaintiff alleged in the amended complaint that Morgan Stanley failed to directly compare the value of the Nabors transaction and the Cerberus proposal and committed other analytical mistakes.[36] As the Opinion recognized, however, the minutes themselves strongly contradicted that

[34] *Id.*; *see* A258-63 (Cerberus letter). The Cerberus letter is integral to the amended complaint and may be considered in reviewing an order granting defendants' motions to dismiss under Court of Chancery Rule 12(b)(6). *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004); *In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59, 68-70 (Del. 1995).

[35] *See* Compl. ¶¶ 131-140 (A182-87); Minutes (B235-76). The minutes of the special committee meeting were discussed in, and integral to, the amended complaint. *See* Compl. ¶¶ 21,141 (A140, A188).

[36] *See* Compl. ¶¶ 21, 141 (A140, A188).

[redacted]

line of attack and suggested "that Morgan Stanley and the Special Committee closely examined the financial benefits of both *potential* transactions . . . ."[37]

After discussion, the special committee concluded at the December 17 meeting that the Cerberus proposal "[did] not represent superior financial or strategic value for [C&J's] shareholders as compared to the Nabors transaction and, moreover, that the proposal [was] not likely to lead to a superior offer."[38] The next day, the special committee reported its conclusion at a meeting of the full C&J board of directors and recommended that Morgan Stanley be authorized "to explain to Cerberus that its bid did not offer enough value to C&J stockholders."[39]

On December 19, 2014, this Court issued its decision reversing the injunction, in which it held that to "blue-pencil an agreement to excise a provision beneficial to a third party like Nabors on the basis of a provisional record . . . involves an exercise of judicial power inconsistent with the standards that govern the award of mandatory injunctions under Delaware law."[40] Morgan Stanley's retention as financial advisor for the special committee therefore came to an end.

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[37] Op. at 65 (emphasis in original) (discussing ruling on bond damages motion).

[38] Minutes at 3 (B237).

[39] Compl. ¶ 142 (A188).

[40] *C&J Energy Servs.*, 107 A.3d at 1072.

D. C&J Stockholders Approve the Nabors Transaction.

On February 13, 2015, C&J issued a definitive proxy statement soliciting stockholder votes in favor of the Nabors transaction.[41] Plaintiff does not allege that Morgan Stanley played any role in preparing that document.[42] At a special meeting held on March 20, 2015, C&J stockholders approved the merger, and the transaction closed thereafter.[43]

E. The Dismissal Opinion.

In connection with C&J's motion to recover damages against plaintiff's bond, plaintiff conducted discovery including third-party discovery from Morgan Stanley. On October 29, 2015, plaintiff filed its amended complaint, which for the first time added a claim against Morgan Stanley for aiding and abetting alleged breaches of fiduciary duty by C&J officers and directors in connection with the judicially mandated solicitation process.[44] Morgan Stanley filed a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6), as did all other defendants. On August 24, 2016, the court issued its Opinion granting all

[41] *Id.* ¶ 146 (A191-92).

[42] *See id.*

[43] Compl. ¶ 22 (A140-41); Op. at 19 & n.23 (taking judicial notice of publicly filed result of stockholder vote).

[44] Compl. ¶¶ 180-83 (A201-02).

defendants' motions. The court also granted C&J's motion to recover damages against plaintiff's injunction bond.[45]

[45] Op. at 56-66.

ARGUMENT

I. The Trial Court Correctly Concluded That Plaintiff Had Not Alleged an Underlying Breach of Fiduciary Duty.

A. Question Presented

Did the trial court correctly dismiss plaintiff's aiding and abetting claim against Morgan Stanley based on plaintiff's failure to allege an underlying breach of fiduciary duty? Morgan Stanley preserved this argument below. (B422-37).

B. Standard of Review

This Court reviews trial court decisions granting motions to dismiss *de novo*.[46]

C. Merits of the Argument

In *Corwin v. KKR Financial Holdings, LLC*, this Court recognized that "when a transaction is not subject to the entire fairness standard, the long-standing policy of [Delaware] law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves."[47] In those circumstances, "the business judgment rule standard of review is the presumptively correct one . . . ."[48]

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[46] *Cent. Mortg. Co.*, 27 A.3d at 535.

[47] 125 A.3d at 313 & n.28 (collecting citations).

[48] *Id.* at 314.

The trial court correctly applied this established doctrine in concluding that plaintiff had failed to plead an actionable breach of fiduciary duty in the amended complaint. For these points, Morgan Stanley refers to and incorporates by reference the specific responses to plaintiff's arguments that are set forth in the brief filed on behalf of the C&J directors and officers in this appeal.

Plaintiff's failure to allege any actionable breach of fiduciary duty by the C&J board of directors, its special committee, or any other C&J insider was a sufficient ground for the trial court to dismiss plaintiff's aiding and abetting claim against Morgan Stanley.[49] The dismissal can and should be affirmed on that basis alone.

[49] Op. at 55-56; *see RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015) (reciting elements of aiding and abetting claim) (citing *Malpiede*, 780 A.2d at 1096); *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *28 (Del. Ch. Jan. 25, 1999) (where "there was no breach of fiduciary duty . . . [the] aiding and abetting claims also fail") (citation omitted).

II. Plaintiff Has Waived Any Other Argument for Reversal of the Dismissal of Its Claim Against Morgan Stanley.

A. Question Presented

Did plaintiff waive any argument for reversal of the trial court's decision dismissing the aiding and abetting claim against Morgan Stanley by failing to include such arguments in the body of its opening brief?

B. Standard of Review

Whether plaintiff has preserved an issue on appeal is a question of law under this Court's Rule 14(b)(vi)(A)(3). This Court reviews questions of law *de novo*.[50]

C. Merits of the Argument

An appellant is entitled to frame the issues on appeal, but its "failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal."[51] This principle is incorporated in Rule 14(b)(vi) governing briefs on appeal.[52] In its opening brief, plaintiff did not include any argument for reversal of the trial court's dismissal of the aiding and abetting claim against Morgan Stanley other than its argument that the court improperly applied *Corwin* to dismiss the underlying fiduciary duty claims. All other arguments for reversal therefore have been waived.

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[50] *See Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006).

[51] *Roca v. E.I. du Pont de Nemours*, 842 A.2d 1238, (Del. 2004) (citations and internal quotation omitted).

[52] *See* Del. Supr. Ct. R. 14(b)(vi)(A)(3).

III. Alternatively, the Dismissal of Plaintiff's Claim Against Morgan Stanley Should Be Affirmed on Other Grounds.

A. Question Presented

If the *Corwin* analysis does not apply, and plaintiff did not waive its arguments for reversal, should this Court nevertheless affirm the dismissal of plaintiff's aiding and abetting claim against Morgan Stanley for failure to state a claim because plaintiff failed to plead the necessary elements of such a claim? Morgan Stanley preserved below each of the alternative arguments in this section. (B437-45; B553-65; B792-807, 856-58).

B. Standard of Review

This Court "may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court."[53] The affirmance on alternate grounds of a decision dismissing a complaint does not require determinations of fact by the appellate court and furthers the "interest of orderly procedure and early termination of litigation."[54]

C. Merits of the Argument

A complaint asserting an aiding and abetting claim must allege: "'(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, . . .

[53] *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (citation omitted).

[54] *Santa Fe*, 669 A.2d at 72 (citations omitted) (affirming dismissal of aiding and abetting claim on alternative grounds that had been presented to, but not reached by, trial court).

(3) knowing participation in that breach by the defendants,' and (4) damages proximately caused by the breach."[55] Plaintiff failed to meet these requirements in its claim against Morgan Stanley for several reasons not reached in the Opinion.

1. Plaintiff Alleged No Actionable Breach of Fiduciary Duty Involving Morgan Stanley.

It is undisputed that Morgan Stanley had no involvement in events leading up to the injunction that required C&J's board to solicit alternative proposals for a period of thirty days. Instead, it was hired to assist a special committee of C&J's board of directors charged with conducting that judicially mandated solicitation process.[56] The firm's role ended when this Court reversed the injunction as "an exercise of judicial power inconsistent with the standards that govern the award of mandatory injunctions under Delaware law."[57] Plaintiff does not allege that Morgan Stanley had any continuing role thereafter, including any role in preparing or reviewing the February 2015 C&J proxy statement that is the subject of plaintiff's disclosure claims.[58] Morgan Stanley could not have been a

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[55] *Malpiede*, 780 A.2d at 1096 (quoting *Penn Mart Realty Co. v. Becker*, 298 A.2d 349, 351 (Del. Ch. 1972)); *see also RBC Capital Mkts.,* 129 A.3d at 861.

[56] Plaintiff inaccurately portrays Morgan Stanley as the party running the solicitation process and disregards the fact that Morgan Stanley was working for, and taking direction from, a special committee that also was advised by highly qualified independent lawyers.

[57] *C&J Energy Servs.*, 107 A.3d at 1072.

[58] Compl. ¶ 146 (A190); *see Houseman v. Sagerman*, 2014 WL 1600724, at *9-10 (rejecting claim that financial advisor aided and abetted alleged failure to

"participant," much less a knowing one, in any alleged breach of fiduciary duty by C&J directors or officers except, theoretically, if it arose in connection with the solicitation process.[59]

Further, Morgan Stanley cannot be liable for alleged breaches relating to the solicitation process. Plaintiff cannot contend that this is a case where "[n]o one can tell what would have happened" if Morgan Stanley had not been involved.[60] To the contrary, without the injunction that led to Morgan Stanley's retention, the discretion that was afforded C&J's directors and officers to consider other offers was strictly limited by contract.[61] No offer for an alternative transaction could be "solicit[ed], knowingly encourage[d] or knowingly facilitate[d]," and no one could have "any discussions with or provide confidential data" about C&J unless strict criteria in the Nabors merger agreement were met.[62] Delaware law does not permit plaintiff to pursue an aiding and abetting claim that is predicated on an alternative

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disclose to stockholders its status as creditor of merged company where advisor was not alleged to have played any role in preparing the information statement).

[59] *See In re Dole Food Co. S'holder Litig.*, 2015 WL 5052214, at *41 (Del. Ch. Aug. 27, 2015) (financial advisor could not be liable for aiding and abetting when it "did not know about or participate in" defendants' wrongful acts).

[60] *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 101 (Del. Ch. 2014), *aff'd sub nom. RBC Capital Mkts. LLC v. Jervis*, 129 A.3d 816 (Del. 2015); *see also In re El Paso Corp. S'holders Litig.*, 41 A.3d 432, 447 (Del. Ch. 2012).

[61] *See In re Family Dollar Stores, Inc. S'holder Litig.*, 2014 WL 7246436, at *16 (Del. Ch. Dec. 19, 2014).

[62] *See* Merger Agreement, § 6.4(a) (A327-28).

reality in which these contractual limitations did not exist and the appellate reversal never occurred.[63]

In its aiding and abetting claim, plaintiff contended that Morgan Stanley helped to "skew[]" the solicitation process resulting in "the lost opportunity of a shareholder maximizing transaction with Cerberus."[64] But the non-binding Cerberus proposal – regardless of its terms – never could have been a "Superior Proposal," as the Nabors merger agreement defined that term, because it was *solicited* in the "go shop" process. Only an "*unsolicited* . . . bona fide, written Acquisition Proposal" could ever be a "Superior Proposal,"[65] and C&J could only terminate the Nabors merger agreement to sign up another transaction if that other transaction was a "Superior Proposal."[66]

After the injunction was vacated, these provisions precluded C&J from negotiating or entering into an alternative transaction with Cerberus or any other potential bidder that had been contacted during the judicially mandated solicitation

[63] *See Frankel v. Satterfield*, 19 A. 898, 900 (Del. Super. 1890) (a judgment, "[b]eing worthless in itself, all proceedings founded upon it are equally worthless. . . . All acts performed under it, and all claims flowing out of it, are void.").

[64] Compl. ¶¶ 178-79 (A200-01).

[65] Merger Agreement, §§ 6.4(b), 6.4(b)(i) (emphasis added) (A328-29).

[66] Merger Agreement, § 8.1(h) (A346).

process – regardless of the terms those entities might have been willing to offer.[67] It was plaintiff itself, therefore, that ensured there could be no claim against Morgan Stanley here when it obtained the injunction that effectively sidelined Cerberus (and potentially others) once that order was reversed.

2. The Special Committee Did Not Breach a Fiduciary Duty in Evaluating the Cerberus Proposal.

Plaintiff's allegations concerning the special committee's evaluation of the non-binding Cerberus proposal, and its determination that it was not reasonably likely to lead to a "Superior Proposal," do not support an aiding and abetting claim against Morgan Stanley even if such a claim were actionable.

Cerberus proposed a transaction in which C&J would be merged with Keane Group, a privately held Cerberus portfolio company, and C&J stockholders would receive a 49% interest in the combined company and a cash dividend of $5.25 per share. Cerberus valued its proposal at $14.55 per share.[68] Morgan Stanley's financial analysis disagreed with that valuation.

Based on minutes of a special committee meeting held on December 17, 2014, plaintiff alleged that "the Special Committee never discussed the present value per share of the Cerberus Bid compared to the present value of the Nabors

[67] *See* Op. at 37-38 ("the reversal of the injunction reinstated the no-shop provision and thus prevented the board from pursuing the Cerberus transaction further in any case.").

[68] Compl. ¶ 123 (A178).

Deal."[69] The trial court correctly recognized that this attack was "one of semantics."[70] As the full minutes show, the special committee conducted a careful review of the relative values provided under both alternatives.[71] Among other points, the minutes state that:

- Using the "high end" of its estimates, Morgan Stanley believed the Keane Group would contribute at most $420 million in value to a merged entity rather than the [redacted] claimed by Cerberus in its proposal;
- In contrast with Cerberus's assertion that the proposal would offer an 11.9% premium to the trading price of C&J common stock, Morgan Stanley concluded that the proposal reflected a *discount* of 9.4% to that trading price; and
- Comparing the financial value of the Cerberus proposal to the financial value of the Nabors transaction on a *pro forma* basis, Morgan Stanley believed the Nabors transaction would create more value to C&J's stockholders from a financial point of view than would the Cerberus proposal.[72]

Even before the Morgan Stanley presentation, the members of the Special Committee were "familiar[] with Cerberus and Keane Group" and Morgan Stanley's analysis "was consistent with their independent evaluation of the

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[69] Compl. ¶ 141 (A188); *see also id.* ¶ 21 ("As the minutes make clear . . .") (A140).

[70] Op. at 64.

[71] The minutes are "integral" to the amended complaint because plaintiff affirmatively mischaracterized them in its allegations. *In re Morton's Rest. Gp., Inc. S'holders Litig.*, 74 A.3d 656, 658 n.3 (Del. Ch. 2013); *see Wal-Mart Stores*, 860 A.2d at 320; *Santa Fe*, 669 A.2d at 68-70.

[72] (B237) (minutes).

[redacted]

Cerberus proposal and their previous understanding of the value of Keane Group."[73] The special committee also concluded that a transaction with Nabors offered better long-term strategic value than the Cerberus alternative.[74] On the basis of all of the foregoing, the special committee determined that "the proposal by Cerberus and Keane Group does not represent superior financial or strategic value for [C&J's] shareholders as compared to the Nabors transaction and, moreover, that the proposal is not likely to lead to a superior offer."[75]

In attacking the special committee process, the amended complaint included various criticisms of Morgan Stanley's financial analysis, but "this sort of sidewalk superintending of [a] banker's advice does not sustain a complaint."[76] Instead, "[t]o establish a non-exculpated breach of fiduciary duty claim based on an independent and disinterested board's reliance on its advisors' financial analysis, [a plaintiff] must plead non-conclusory facts creating the reasonable inference that the board purposely relied on analyses that were inaccurate for some improper reason."[77]

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[73] *Id.* at 1, 2.

[74] *Id.*

[75] *Id.*

[76] *Morton's*, 74 A.3d at 674.

[77] *Id.* at 673.

Plaintiff did not make such allegations here, nor could it have done so. The three members of the special committee (Friedman, Ma and Stewart) were selected because they were the C&J directors "who had not been offered seats on the New C&J board,"[78] and Ma represented "a private equity firm that owned 10% of C&J's stock and was therefore unlikely to support a transaction that would compromise the value of its large equity position."[79] Plaintiff did not include any allegations calling into question the special committee's independence or good faith, and its conclusion that the Cerberus proposal was neither a "Superior Proposal" nor reasonably likely to lead to one fell squarely within the range of business judgment that Delaware law allows under the circumstances.[80]

3. The Amended Complaint Did Not Allege Morgan Stanley's Knowing Participation in a Breach of Fiduciary Duty.

Plaintiff also failed to allege Morgan Stanley's "knowing participation" in any breach of fiduciary duty. "[K]nowing participation in a board's fiduciary

[78] Op. at 14.

[79] *C&J Energy Servs.*, 107 A.3d at 1068-69.

[80] *See In re Family Dollar Stores*, 2014 WL 7246436, at *16 (board decision not to engage in discussions with post-agreement competing bidder even though its offer was "a financially superior offer on paper" was reasonable given antitrust risks embodied in its proposal); *see also In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 500-01 (Del. Ch. 2010) (board decision to accept a firm offer of less money instead of a "nonbinding expression of intent" which was "contingent on the completion of due diligence" was reasonable); *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 118-19 (Del. Ch. 2007) (board consideration of factors other than price in deciding to accept a current bid rather than take the risk of an auction process was reasonable).

breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach."[81] The standard for such claims "is a stringent one."[82] "[P]laintiffs must prove that the advisor acted with *scienter*," meaning "'knowingly, intentionally, or with reckless indifference . . . [;]' that is, with an 'illicit state of mind.'" [83] This requirement "makes an aiding and abetting claim among the most difficult to prove."[84]

"[I]t must be reasonably conceivable from well-pled allegations that 'the third party act[ed]'" (i) "'with the knowledge that the conduct advocated or assisted constitute[d] . . . a breach [of fiduciary duty],'"[85] or (ii) "know[ing] that the board is breaching its duty of care and participat[ing] in the breach by misleading the board or creating [an] informational vacuum."[86]

Plaintiff alleged that Morgan Stanley "knew that Comstock opposed the solicitation process, and that Comstock, McMullen and Moore wanted to pursue

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[81] *RBC Capital Mkts.*, 129 A.3d at 861-62 (quoting *Malpiede*, 780 A.2d at 1097).

[82] *El Paso Corp.*, 41 A.3d at 448 & n.53.

[83] *RBC Capital Mkts.*, 129 A.3d at 862 (quotation and citations omitted).

[84] *Id.* at 865-66.

[85] *Lee v. Pincus*, 2014 WL 6066108, at *13 (Del. Ch. Nov. 14, 2014) (alterations in original) (quoting *Malpiede*, 780 A.2d at 1097).

[86] *RBC Capital Mkts.*, 129 A.3d at 862 (internal quotation marks omitted); *see Malpiede*, 780 A.2d at 1098 (third party must "participate[] in the board's decisions, conspire[] with [the] board, or otherwise cause[] the board to make the decisions at issue").

the Nabors Deal."[87] But even if all of those assertions were true, it would not be a breach of fiduciary duty for Comstock to oppose the ill-conceived solicitation process, nor would it be a breach for Comstock and other C&J officers to want to pursue the Nabors deal, which it was reasonable for them to believe "would generate valuable benefits for C&J's stockholders."[88]

Plaintiff's knowing participation allegations therefore boil down to its contentions that Morgan Stanley banker John Bishop was friends with Comstock and that Morgan Stanley was interested in securing future business from the merged entity after the transaction was concluded.[89] Neither of these allegations support plaintiff's contention that Morgan Stanley had a conflict of interest.[90]

Plaintiff focuses great attention on an email in which Comstock wrote to Bishop that "[i]f y'all do this it is a solid in with the company."[91] But that

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[87] Compl. ¶ 182 (A201).

[88] *C&J Energy Servs.*, 107 A.3d at 1060.

[89] *See* Compl. ¶¶ 111-14, 181-82 (A172-74, A201).

[90] *See* Op. at 39 ("Friendship alone has been rejected by this Court as a basis to impugn the independence of a financial advisor."); *id.* ("Potential fees or other business with the company does not itself constitute a material conflict of interest"); *see In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716 at *11 (Del. Ch. Oct. 13, 2011) ("possibility" of future investments "at some indefinite time" insufficient to establish financial advisor conflict); *Solomon v. Armstrong*, 747 A.2d 1098, 1119 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000) ("relationship histories" of two financial advisors did not support inference that banks were "willing to opine, or lean toward, better terms for GM").

[91] Compl. ¶ 114 (B231).

comment was made in the course of negotiating fees, "after Bishop opined that the fees Comstock was offering were low," as the trial court observed.[92] In the same email exchange, Comstock encouraged Bishop to structure Morgan Stanley's fees with a higher payment for a superior proposal, explaining: "That way there's no question that you guys are incentivized to find a superior transaction that is better for shareholders, which is the goal."[93] Ultimately, Comstock was successful in obtaining a reduction in Morgan Stanley's "base fee" to $350,000, far below its starting point, which benefitted C&J and its stockholders rather than causing them harm. None of this comports with plaintiff's suggestion of an inappropriate "*quid pro quo*" between Morgan Stanley and Comstock.

Plaintiff's final argument for Morgan Stanley's alleged *scienter* is drawn from another Bishop email, in which he told Comstock he understood the go-shop process was frustrating and reassured him that Bishop and the Morgan Stanley team remained supportive.[94] But as the trial court observed in the Opinion, in the same email Bishop pledged "'to run a tight objective go-shop process' to avoid giving the Court of Chancery any reason to doubt their assessment of what other

[92] Op. at 39.

[93] B232.

[94] Compl. ¶ 125 (A179-80).

bidders may be willing to offer."[95] Plaintiff omitted that excerpt from its appellate brief, but it is included in the amended complaint and defeats the negative inference that plaintiff would like to draw.[96]

Plaintiff's other allegations show that Morgan Stanley did help the special committee run "a tight objective go-shop process," just as Bishop told Comstock it would do. The allegations against Morgan Stanley here bear no resemblance to the facts or allegations in other recent cases where aiding and abetting claims have been allowed to proceed.[97]

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[95] Op. at 17.

[96] *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 619 (Del. Ch. 2005) ("a trial court need not blindly accept as true allegations, nor must it draw all inferences from them in the plaintiffs' favor unless they are reasonable inferences"), *aff'd in part, rev'd in part on other grounds*, 901 A.2d 106 (Del. 2006).

[97] *See, e.g.*, *RBC Capital Mkts.*, 129 A.3d at 862-63 (financial advisor failed to disclose interest in obtaining role in separate transaction involving likely buyer, knew that board and special committee were uninformed about value of their company, and failed to disclose its own interest in providing winning bidder with buy-side financing); *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 819, 817 (Del. Ch. 2011) (financial advisor "selfishly manipulated the sale process . . . to obtain buy-side financing fees" and "protected its own interests by withholding information from the Board that could have led [the company] to retain a different bank, pursue a different alternative, or deny [the advisor] a buy-side role"); *El Paso Corp.*, 41 A.3d at 441-47 (expressing concern that financial advisor with 19% interest in potential buyer remained involved in providing advice and undermined independence of second financial advisor while member of its deal team failed to disclose sizeable personal interest in buyer); *In re Zale Corp. S'holders Litig.*, 2015 WL 5853693, at *22 (Del. Ch. Oct. 1, 2015) (financial advisor allegedly failed to disclose prior work for acquiror and fact that it had

4. Morgan Stanley's Actions Were Not the Proximate Cause of Any Alleged Damages.

An aiding and abetting plaintiff also must establish "damages proximately caused by the breach" that the defendant allegedly aided and abetted.[98] 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."[99] Here, plaintiff cannot establish proximate cause because of the intervening decision of this Court, which vacated the mandatory injunction. As the trial court recognized, "the reversal of the preliminary injunction reinstated the no-shop provision and thus prevented the [C&J] board from pursuing the Cerberus transaction further in any case."[100] Because of that intervening decision, no actions in which Morgan Stanley might have been involved as financial advisor to the special committee could have caused or contributed to any damages allegedly sustained by plaintiff or the members of the putative class.

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previously pitched to acquiror the idea of acquiring the target), *rev'd on reconsideration*, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015).

[98] *Malpiede*, 780 A.2d at 1096 (citation omitted).

[99] *RBC Capital Mkts.*, 129 A.3d at 864 (quoting *Russell v. K-Mart Corp.*, 761 A.2d 1, 5 (Del. 2000)).

[100] Op. at 37-38.

CONCLUSION

This Court should affirm the dismissal of plaintiff's claim against Morgan Stanley for aiding and abetting alleged breaches of fiduciary duty.

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