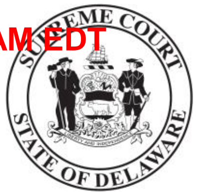
EFiled: Mar 15 2019 08:58AM EDT
Filing ID 63069920
Case Number 571,2018



IN THE SUPREME COURT OF THE STATE OF DELAWARE

In re PLX TECHNOLOGY INC. STOCKHOLDERS LITIGATION	:	No. 571, 2018
	:	
	:	Appeal from the Court of Chancery
	:	Consol. C.A. No. 9880-VCL
	:	

PLAINTIFFS-APPELLANTS' CORRECTED ANSWERING BRIEF ON CROSS APPEAL AND REPLY ON APPEAL

COOCH & TAYLOR
R. BRUCE McNEW (DE Bar 967)
1000 West Street, 10th Floor
Wilmington, DE 19801
Telephone: 302/984-3800

Delaware Liaison Counsel

ROBBINS GELLER RUDMAN & DOWD LLP
RANDALL J. BARON
DAVID A. KNOTTS
MAXWELL R. HUFFMAN
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

MILBERG TADLER PHILLIPS GROSSMAN LLP
KENT BRONSON
One Pennsylvania Plaza, Suite 1920
New York, NY 10119
Telephone: 212/594-5300
212/868-1229 (fax)

Co-Lead Counsel for Plaintiffs/Appellants

TABLE OF CONTENTS

Page

TABLE OF DEFINED TERMS vii

PRELIMINARY STATEMENT 1

SUMMARY OF ARGUMENTS CROSS-APPEAL 2

STATEMENT OF FACTS 3

ARGUMENT 4

I. The Findings of Fact Are Not Clearly Erroneous and Are the Product of a Logical and Deductive Reasoning Process 4

  A. Question Presented 4

  B. Scope of Review 4

  C. Merits of the Argument 4

    1. Potomac's Divergent Agenda for a Near-Term Sale 5

    2. The Board Yielded to Potomac's Agenda 9

    3. Singer Concealed Avago's Tip 14

    4. Singer's Demand for Reduced Financial Projections 17

    5. DB's May 2014 DCF Analysis 21

II. The Legal Analysis Follows Well-Established Precedent 25

  A. Question Presented 25

  B. Scope of Review 25

  C. Merits of the Argument 25

    1. Enhanced Judicial Scrutiny Applies (But it Does Not Matter) 25

    2. Singer's Conflict of Interest 27

Page

3. The Board Withheld Material Information and Made False Statements....31

4. Potomac's Knowing Participation 32

III. Potomac Fails to Address Issues Raised in Plaintiffs' Appeal....37

IV. Potomac's Counterfactual Arguments Do Not Provide Alternate Grounds to Affirm the Denial of Damages 40

CONCLUSION....45

TABLE OF AUTHORITIES

Page

CASES

Air Prods. & Chems., Inc. v. Airgas, Inc.,
16 A.3d 48 (Del. Ch. 2011) 29

Appel v. Berkman,
180 A.3d 1055 (Del. 2018) 31

Auriga Capital Corp. v. Gatz Properties,
40 A.3d 839 (Del. Ch. 2012) 38

Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.,
29 A.3d 225 (Del. 2011) 4

Bomarko, Inc. v. Int'l Telecharge, Inc.,
794 A.2d 1161 (Del. Ch. 1999) 27

Brinckerhoff v. Enbridge Energy Co., Inc.,
159 A.3d 242 (Del. 2017) 38

Carsanaro v. Bloodhound Techs., Inc.,
65 A.3d 618 (Del. Ch. 2013) 33

Cede & Co. Technicolor, Inc.,
634 A.2d 345 (Del. 1993) .... *passim*

Chen v. Howard-Anderson,
87 A.3d 648 (Del. 2014) 28, 32, 38

Corwin v. KKR Fin. Hldgs. LLC,
125 A.3d 304 (Del. 2015) 25, 26, 31

Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.,
177 A.3d 1 (Del. 2017) 39

DFC Glob. Corp. v. Muirfield Value P'rs,
172 A.3d 346 (Del. 2017) 39, 41

Emerson Radio Corp. v. Int'l Jensen Inc.,
1996 WL 483086 (Del. Ch. Aug. 20, 1996) 35, 36

Page

Forsythe v. ESC Fund Mgmt. Co.,
2007 WL 2982247 (Del. Ch. Oct. 9, 2007) 33

In re Dole Food Co., Inc. S'holder Litig.,
2015 WL 5052214 (Del. Ch. Aug. 27, 2015) 33

In re Lear Corp. S'holder Litig.,
967 A.2d 640 (Del. Ch. 2008) 29

In re Morton's Rest. Grp., Inc. S'holders Litig.,
74 A.3d 656 (Del. Ch. 2013) 28, 30

In re Orchard Enters., Inc. S'holder Litig,
88 A.3d 1 (Del. Ch. 2014) 32

In re Rural/Metro Corp. S'holders Litig.,
102 A.3d 205 (Del. 2014) 29

In re Saba Software, Inc. S'holder Litig.,
2017 WL 1201108 (Del. Ch. Mar. 31, 2017) 31

In re Synthes, Inc. S'holder Litig.,
50 A.3d 1022 (Del. Ch. 2012) 28, 30

In re Trados, Inc. S'holder Litig.,
73 A.3d 17 (Del. Ch. 2013) 29

In re Walt Disney Co. Deriv. Litig.,
906 A.2d 27 (Del. 2006) 27

Int'l Telecharge, Inc. v. Bomarko, Inc.,
766 A.2d 437 (Del. 2000) 25

Kahn v. Stern,
183 A.3d 715 (Del. 2018) 27

Khanna v. McMinn,
2006 WL 1388744 (Del. Ch. May 9, 2006) 35

Page

Malpiede v. Townson,
780 A.2d 1075 (Del. 2001) 26, 33, 35

McGovern v. Gen. Holding, Inc.,
2006 WL 1468850 (Del. Ch. May 18, 2006) 38

Mercier v. Inter-Tel (Del.), Inc.,
929 A.2d 786 (Del. Ch. 2007) 26

Merion Capital, L.P. v. 3M Cogent, Inc.,
2013 WL 3793896 (Del. Ch. July 8, 2013) 43

Paramount Commc'ns, Inc. v. QVC Network, Inc.,
637 A.2d 34 (Del. 1994) 37

Paramount Commc'ns, Inc. v. Time, Inc.,
571 A.2d 1140 (Del. 1990) 30

RBC Capital Markets, LLC v. Jervis,
129 A.3d 816 (Del. 2015) 4, 26, 31, 32

Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.,
506 A.2d 173 (Del. 1986) 26, 27

Smith v. Van Gorkom,
488 A.2d 858 (Del. 1985) 38

Stroud v. Grace,
606 A.2d 75 (Del. 1992) 31

Thorpe v. CERBCO, Inc.,
1993 WL 443406 (Del. Ch. Oct. 29, 1993) 38

TW Services, Inc. v. SWT Acquisition Corp.,
1989 WL 20290 (Del. Ch. Mar. 2, 1989) 29

Unitrin, Inc. v. Am. General Corp.,
651 A.2d 1361 (Del. 1995) 37

Page

Weinberger v. UOP, Inc.,
1985 WL 11546 (Del. Jan. 30, 1985) 38

Weinberger v. UOP, Inc.,
457 A.2d 701 (Del. 1983) 28

TABLE OF DEFINED TERMS

AAB:	Defendant-Appellee's Corrected Answering Brief on Appeal and Opening Brief on Cross-Appeal
AOB:	Plaintiffs-Appellants' Opening Brief on Appeal
Avago:	Avago Technologies Wireless (U.S.A.) Manufacturing Inc.
Board:	PLX Board of Directors
Chancery Court:	Delaware Court of Chancery
December 2013 Projections:	The financial projections adopted by the Board on December 13, 2013
Deutsche Bank or DB:	Deutsche Bank Securities, Inc.
Howell:	Adam Howell, Managing Director at Deutsche Bank
IDT:	Integrated Device Technology, Inc.
ISS:	Institutional Shareholder Services
June 2014 Projections:	The projections Art Whipple provided to Deutsche Bank on June 13, 2014
Krause:	Thomas Krause, Vice President of Corporate Development at Avago
LSI:	LSI Logic Corporation
Merger:	Avago's acquisition of PLX for cash consideration of $6.50 per share
Opinion or op.	Post-trial Memorandum Opinion
PLX or the Company:	PLX Technology, Inc.

Plaintiffs:	Appellants-Plaintiffs Andrew Ellis and Boby Varghese
Potomac:	Defendant-Appellee Potomac Capital Partners II, L.P.
Raun:	David Raun, PLX Chief Executive Officer and Director
Riordan:	Thomas Riordan, Former PLX Director
Recommendation Statement:	The Schedule 14D-9 filed by PLX on July 8, 2014
Salameh:	Mike Salameh, PLX Chairman
Schmitt:	Ralph Schmitt, PLX Director
Semtech:	Semtech Corporation
Singer:	Co-Manager of Potomac Capital Management II, LLC
Whipple:	Arthur Whipple, PLX CFO

PRELIMINARY STATEMENT

Potomac raises factual disputes to which the Chancery Court is entitled to significant deference. In the face of a thorough and damning record, Potomac asserts that there is "no evidence" or the findings are "unsupported," while repeating the same counterfactual arguments made and rejected at trial. Potomac's legal arguments are inconsistent with well-established precedent and mischaracterize the Chancery Court's analyses. The Chancery Court recognized, discussed and applied the same legal authority that Potomac claims it failed to consider.

In responding to Plaintiffs' appeal of the decision not to provide a remedy to PLX stockholders, Potomac does not confront the legal touchstones of Plaintiffs' argument. Rather than defend the misapplied legal analyses, Potomac disputes the underlying factual findings and argues that there was no misconduct at all. In seeking to justify reliance on the deal price, Potomac fails to acknowledge that the Chancery Court expressly found that Singer induced a sale for self-interested reasons when the Board "otherwise would have decided to remain independent." Op. at 110. In short, "Potomac and Singer undermined the Board's process and led the Board into a deal that it otherwise would not have approved." *Id.* at 115. This conduct warrants a finding of damages.

SUMMARY OF ARGUMENTS CROSS-APPEAL

3. Denied. The Chancery Court made well-supported factual findings that Singer suffered from a conflict of interest. The Chancery Court applied the very same precedent in reaching its conclusion that Potomac contends was ignored.

4. Denied. Potomac cannot establish that the Chancery Court's factual findings supporting its conclusion that Singer breached his duty of loyalty are clearly erroneous or are not the product of a logical and deductive reasoning process. Potomac restates the same evidentiary arguments that were unpersuasive at trial.

5. Denied. The Chancery Court' conclusion that the Board was susceptible to and succumbed to Potomac's activist pressure is supported by voluminous evidence. Potomac's argument that the Chancery Court erroneously applied enhanced judicial scrutiny is contrary to clear precedent and, in any event, is irrelevant where (as here) plaintiff bore the burden of proof and proved predicate breaches of both duties of loyalty and care.

6. Denied. The Chancery Court made well-supported factual findings and followed established legal precedent in determining that Potomac knowingly participated in the Board's breaches of fiduciary duty.

7. Denied. The Chancery Court made well-supported factual findings that the Board breach its duty of disclosure. Potomac's waiver argument is contrary to Delaware law.

STATEMENT OF FACTS

Plaintiffs incorporate by reference the Statement of Facts in Appellants' Opening Brief. *See* AOB at 6-12.

ARGUMENT

I. The Findings of Fact Are Not Clearly Erroneous and Are the Product of a Logical and Deductive Reasoning Process

A. Question Presented

Did the Chancery Court make factual findings concerning Potomac's knowing participation in the Board's breaches of fiduciary duty that are clearly erroneous or not the product of a logical and deductive reasoning process?

B. Scope of Review

"[T]he trial court's findings upon application of the duty of loyalty or duty of care, being 'fact dominated,' are, on appeal, entitled to substantial deference unless clearly erroneous or not the product of a logical and deductive reasoning process." *Cede & Co. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).[1] The same deference applies to factual findings on an aiding and abetting claim. *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015). Even if "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

C. Merits of the Argument

The evidentiary record includes thousands of pages of contemporaneous documents, thousands more pages of deposition transcripts, and testimony from a

---

[1] Unless noted, all emphasis is added, and citations and footnotes are omitted.

three-day trial. Op. at 5. In finding that Potomac aided and abetted the Board's breaches of fiduciary duty, the Chancery Court provides sixty-five pages of factual findings and over 650 evidentiary citations. *Id.* at 5-70. Potomac cannot establish that any were "clearly erroneous or not the product of a logical and deductive reasoning process." *Cede*, 634 A.2d at 360.

1. Potomac's Divergent Agenda for a Near-Term Sale

Potomac contends that "no evidence was presented of any 'basis for conceiving that [Potomac] wanted or needed to get out of [PLX].'" AAB at 46. Untrue.

Potomac's agenda for a near-term sale was patent. Op. at 10-14, 16-19, 21-23, 28-30, 36, 103-05. Singer testified that "when the IDT deal fell apart, the stock declined precipitously, and in the company's [proxy], it indicated there was a competitive bidder for PLX" during the go-shop period. A528-29; Op. at 10. In Singer's view, "the Board already made a decision to sell the company," so "they should go back to the other party in the bidding process" and sell the Company. A529; Op. at 10. "Singer bought shares at depressed prices, believing that Potomac could achieve short-term profits if PLX was sold to the other bidder." Op. at 1; A36-37. Potomac "never prepared any valuation or other analysis of the fundamental value of PLX." Op. at 104; A529. Singer "lacked any ideas for generating value at PLX other than to sell it." Op. at 104; AR9; AR122.

After Potomac disclosed its stake in PLX, "Singer and Potomac argued vehemently that PLX should be sold quickly." Op. at 103; A24-26. In a letter to the PLX directors on January 25, 2013, Singer emphasized that PLX "**must immediately commence a process of a thorough review of all strategic alternatives available to the Company and we do not believe that PLX should remain an independent public company**." A24 (emphasis in original); Op. at 11. Singer added that "**it is imperative and urgent that the Board and management immediately engage a nationally recognized investment bank and commence a robust process of exploration and evaluation of all available strategic options and value-maximizing opportunities**." A25 (emphasis in original); Op. at 11.

Singer sent a second letter to the Board on February 13, 2013. Op. at 12-13; A55-56. Singer demanded that the Board "immediately commence a process of thorough review of all strategic alternatives available to PLX," stressing that "[a]ction must be taken decisively and urgently." A55; Op. at 12. Singer asserted that "shareholder value can best be created by capitalizing on the historic interest in PLX from potential acquirers, while leveraging the improved operating model of the Company." *Id.* Singer added that "the Company's strong fundamentals make it an attractive target of strategic interest." A55; Op. at 13.

During the ensuing months, PLX directors and management communicated regularly with Singer, including through in-person meetings, telephone calls, emails,

and letters. Op. at 12-14, 17-19, 21-23; AR32-34. "The Board correctly perceived that Singer wanted PLX sold." Op. at 12. "As the directors saw it, 'Eric Singer's position was that we should sell the company, and that was . . . his one and only agenda.'" *Id.*; B1555. As one director testified, "You don't have to be a mind reader. As we've talked about for hours now, that's what he said he wanted done. He wanted the company sold. He made no – he made no [a]llusions to anything other than that. I want you to sell the company." B1587. Potomac's agenda was "self-serving and transparent – its primary goal [was] to force a quick sale of the Company in order to realize a short-term gain on its investment to fulfill the demands of its own investors, and to transition capital to its next target, without regard for the best interests of all PLX Technology stockholders." AR126; Op. at 28-29.[2]

The agenda for Singer and Potomac was a departure from that of the other directors and PLX management, who believed that any sale was premature because PLX would have been more valuable if its businesses were allowed to continue to develop. *See* Op. at 111-12 & n.535; A501 (Whipple testifying that "[a] few years later, after PCI ExpressFabric had developed, we would have been worth a lot more money."); A481 (Riordan testifying that PLX was "at a low point in the company's

[2] The Chancery Court found that, on numerous issues, "Singer was not a credible witness." Op. at 14 n.60 (false testimony regarding threats to PLX directors and management); *id.* at 19 n.93 (claimed inability to recall threats); *id.* at 30 n.160 (false testimony regarding Potomac's lack of standalone plan for PLX); *id.* at 49 n.264 (false testimony regarding conversations with Deutsche Bank).

potential value"); A468 (Schmitt testifying: "Q. And you formed [the Special Committee], but, again, there was . . . nothing to indicate that you – that you folks believed that this was a good time to sell the company, correct? [Objection] A. I'll say that's correct.").

Like at trial, Potomac relies on testimony of certain outside directors for the proposition that Singer purportedly became more open-minded towards PLX after joining the Board. *See* AAB at 46-48. Even if Singer's tactics changed, Potomac's agenda never did. Op. at 35-43. On Singer's first full day as a director, "a development occurred that mitigated any need for Singer to push hard for a near-term sale." Op. at 36. Krause – having seen the "PLX BoD transition" – called Howell at Deutsche Bank to convey Avago's continued interest in acquiring PLX, that Avago would be "open for business" after the LSI transaction closed, and the price Avago was willing to pay to acquire PLX – "$300M" or roughly $6.50 per share. A77; Op. at 37. Howell conveyed this information to Singer, who kept it to himself. A84; Op. at 37-38.

"From January until April 2014, knowing that Avago was digesting the LSI acquisition, Singer did not push hard for a sale. He could afford to be more subtle." Op. at 39. In late April 2014, "Singer revealed his true focus when Salameh suggested that there might no longer be any need for the Special Committee." *Id.* at 42; AR428. In considering the disclosure and description of Board committees in the Company's

Form 10-K, Salameh suggested that the Board should: (1) "[t]erminate the special committee and re-form as needed"; (2) "[t]erminate the special committee" and let the Board take on its responsibilities; or (3) at least make "[n]o mention of [the] special committee," which had not been publicly disclosed. AR427; Op. at 42. Singer opposed stating: "[I] think it is essential the committee is maintained and mentioned in the [Form 10-K]." *Id.* "Two days later, PLX filed its Form 10-K and publicly disclosed, for the first time, the Special Committee's existence and Singer's role as Chairman." Op. at 43; AR439-41.

Thus, the Chancery Court's finding that Potomac and Singer had an agenda for a near-term sale, which conflicted with the long-term goals of the Board, is based on voluminous evidence, is not "clearly erroneous," and is "the product of a logical and deductive reasoning process." *Cede*, 634 A.2d at 360.

2. The Board Yielded to Potomac's Agenda

Potomac contends that the Chancery Court's findings that the PLX directors were susceptible to "activist pressure," believed it was not a "good time to sell," and would have "decided to remain independent" but for Potomac's conduct are "unsupported" by the record. *See* AAB at 53-57. Wrong again.

"This was a Board that was susceptible to activist pressure." Op. at 111. Potomac admitted this point. A56. In Potomac's letter to the Board on February 13, 2013, Singer wrote: "We note that historically the Board has taken difficult but

necessary steps to unlock value for shareholders only when faced with a proxy contest by a shareholder. The IDTI Transaction was provoked by the efforts of a fellow shareholder, Balch Hill Capital LLC, to effect change at the Company, including by its submission of formal nominations of director candidates for election at the 2012 annual meeting of shareholders." *Id.* Potomac repeated this position in the proxy statement filed in support of its director nominees. AR96.

The Chancery Court identified seven areas supporting its conclusion that "Potomac and Singer succeeded in influencing the directors to favor a sale when they otherwise would have decided to remain independent." Op. at 110.

"First, after Potomac launched its proxy contest, the incumbent directors decided to form the Special Committee and explore a possible sale." Op. at 110; AR12. "Deutsche Bank had warned against a sale process, opining that a sale at that point could 'leave[] value on the table as [PLX] continues to outperform.'" Op. at 110; B515. "Management believed that '[g]iven the recent changes in PLX, we do not think this is a good time to sell.'" Op. at 110; A60; A501 at 17. "The Board agreed." A501; A468; A481. The Board's decision to nonetheless actively pursue a sale "was prompted by Potomac's intervention." Op. at 111; B1568 (Riordan testifying: "Q. So do you believe that the authorization of the Special Committee was prompted by Potomac's interaction? A. Yes."); A468 (Schmitt testifying: "In a normal business

environment, we did not believe it was best to sell the company. Given the situation, that may have caused us to look at things a little differently.").

"Second, after Singer and Potomac's other nominees joined the Board, the incumbent directors found within themselves a new willingness to support a sale at prices below the values that they had previously rejected." Op. at 111. Before the proxy contest, "PLX had firmly turned down Avago's approaches and told Krause that any future proposal would have to 'start with a 7.'" *Id.*; A62. "During the ensuing year, PLX's business grew stronger and its market share increased." Op. at 111; AR142-44; A503 at 89-90. "Yet once Singer and Potomac's other nominees had joined the Board, the directors agreed to accept less than what they had rejected when PLX's business was weaker." Op. at 112.

"Third, the incumbent directors deferred to Singer when he sought to position himself to best achieve a sale." Op. at 112; A254. "After being elected to the Board, Singer asked to chair the Special Committee." *Id*. Although the Special Committee's charter also included developing strategies and responses with respect to "any proxy contest or other activist campaign," the Board appointed Singer as its Chairman. AR14; B1568; Op. at 112. "Later, when Salameh suggested that that the Special Committee was no longer needed, Singer resisted. The Special Committee remained in place, and its existence and Singer's status as Chair were disclosed in PLX's Form 10-K." Op. at 112; AR427; AR436-38.

"Fourth, the directors permitted Singer to take control of the sale process when it mattered most." Op. at 112; A502. After the LSI transaction closed and Avago reemerged, Singer "caucused privately with Deutsche Bank, and he had one-on-one meetings with Avago." Op. at 112-13; AR463; AR595; AR643; AR645; AR646; AR658; A268; A278; AR597.[3] "At trial, it became apparent that Krause signaled to Singer that Avago would propose acquiring PLX for $6.25 per share." Op. at 48-49; A278. "During a pivotal meeting on May 23, 2014, Singer guided the Special Committee to the counteroffer of $6.75 per share." Op. at 113; AR646; A470.[4] "On May 24, he obtained Board approval to make the counteroffer and to conclude a deal at a price of $6.50 or higher." Op. at 113; A306.

"Fifth, at the time [the Special Committee] approved the counteroffer and granted authority for a deal at $6.50, the directors lacked essential information. As in *Rural Metro*, they had not yet received a valuation of the Company on a standalone basis." Op. at 113; AR578-84. "Deutsche Bank had quickly pulled together some market information at Singer's request to support a counteroffer at $6.75 per share, but that was it." Op. at 113; AR646.

---

[3] "Singer maintained that he never had 'off-line conversations' with Deutsche Bank. [B231] The contemporaneous record demonstrates otherwise." Op. at 49 n.264.

[4] Contrary to the representations in the Recommendation Statement, the record supports that Singer directed Deutsche Bank to focus its presentation on the $6.75 per share price, and the counteroffer expressly came from "guidance from Eric." B1393; AR646.

"Sixth, Schmitt candidly recognized when the Special Committee decided on its counteroffer, it was engaging in the 'art of the possible.'" Op. at 114; A470. In contrast to directors' duties when evaluating a potential sale, "the art of the possible refers to 'the attainable . . . the next best.'" Op. at 114. When pressed about the Special Committee's sudden backtracking and quick counteroffer, Singer admitted that the focus was on "deal momentum." B136; Op. at 114.

"Seventh, consistent with a desire to get to a result, the Special Committee instructed management during its meeting on May 23, 2014, to generate a lower set of revenue projections, even though there had not been any new developments in PLX's business to warrant changing the December 2013 Projections." Op. at 114-15; B1024. In fact, PLX's Vice President of Sales represented to his sales team that "[w]e clearly have enough wins and momentum to drive the 2014-2018 numbers in the 5 year plan" reflected in the December 2013 Projections. B1049; Op. at 61.

Thus, the Chancery Court's conclusion that the Board was susceptible to and succumbed to Potomac's activist pressure is based on voluminous evidence, is not "clearly erroneous," and is "the product of a logical and deductive reasoning process." *Cede*, 634 A.2d at 360.

3. Singer Concealed Avago's Tip

Potomac contends the Chancery Court's finding that Singer received a "secret tip" regarding Avago's intentions with PLX is "wholly unsupported by the record." *See* AAB at 48. False.

On December 19, 2013 – Singer's first full day as a PLX director – "Krause contacted Adam Howell, a managing director at Deutsche Bank who was advising PLX." Op. at 36; A77. "A few days earlier, Avago had announced an agreement to acquire LSI[.]" *Id.* As the contemporaneous record shows, "Krause explained to Howell that he 'saw the PLX BoD transition' but that because of the LSI acquisition, Avago would be in the 'penalty box' until that deal closed. Once the LSI transaction was complete, Avago would be 'open for business on all topics,' including an acquisition of PLX." Op. at 37; A77. "Krause described buying PLX as 'an interesting little deal but only at the right price.' He also called the PLX acquisition a '$300M deal.'" *Id.* "With 45.9 million shares outstanding, this figure equated to $6.53 per share." Op. at 37.

"Singer spoke with Deutsche Bank later that day. Singer asked about Avago, and Deutsche Bank 'gave him the color' on the conversation with Krause." Op. at 37; A84. "Based on this call, Singer knew about (i) Avago's interest in a deal for PLX at $300 million and (ii) Avago's temporary inability to engage because of the LSI

acquisition." Op. at 37-38.[5] Although the Board met the next day and discussed the prior sale process, "[t]here is no evidence that Singer or Deutsche Bank reported on Krause's call, shared Avago's plan to return to PLX after completing the LSI acquisition, or mentioned the valuation of $300 million that Avago was contemplating." Op. at 39.

When Avago returned, Singer steered the Board to the $6.50 per-share price that he knew "Avago had planned to offer all along." Op. at 83. Through private meetings, Singer received advance notice that "Avago would propose acquiring PLX for approximately $6.25 per share." Op. at 49; B131-33; A278; AR643. Before the Special Committee ever met to consider Avago's offer, Singer discussed a counteroffer with Deutsche Bank, who then told Avago's advisors that PLX "would be coming back with a written counter either tomorrow or Saturday." A280. In advance of the Special Committee's next meeting, Singer directed Deutsche Bank "to prepare some pages of market analysis to support a counteroffer at $6.75 per share." AR646.

---

[5] Potomac argues that Howell's conversation with Singer preceded the email documenting Howell's conversation with Krause. AB at 49. Potomac's timing is wrong. The timestamp for Howell's email regarding his conversation Krause is for Central Time. *Compare* A77 *with* A84. This means Howell sent the Krause email two hours earlier than Potomac contends and thus before Howell's subsequent email regarding Singer.

Potomac makes the same arguments on appeal that the factfinder reviewed and rejected. *Compare* PTB at 41-42 *with* AAB at 48-51. Potomac contends that the entire Board received the same "color" that Howell provided to Singer, while directing the Court to emails involving PLX directors concerning the public announcement of Avago's acquisition of LSI. AAB at 49. As the Chancery Court explained, "Deutsche Bank did reach out to Raun, Schmidt, and Salameh to tell them about Avago's agreement to acquire LSI, but that call occurred *before* Krause contacted Deutsche Bank." Op. at 37 n.203 (emphasis in original); B840-41.

Potomac also reasserts its unfounded claim that Deutsche Bank provided the secret tip to the full Board in a presentation on December 19, 2013. *See* AAB at 50. In truth, however, Deutsche Bank's December 19 presentation simply restated the same information regarding Avago that was already contained in Deutsche Bank's earlier "Process Summary" from September 25, 2013 and falsely stated that Avago was "[n]ot willing to discuss price at that time." *Compare* A73 *with* B539; Op. at 38-39. Howell, in fact, expressly told the team at Deutsche that "we don't need to incl [that information] in the PLX BoD deck." A77.[6]

---

[6] Potomac objects to the evidence that memorializes these issues. *See* AAB at 48-51. The Chancery Court considered that objection and correctly ruled that Plaintiffs' final additions to the exhibit list were prompted by Singer's false denials at trial of the "off-line conversations" he had with DB and his knowledge of Avago's involvement with LSI. *See, e.g.*, B231; B232; B241. Singer also falsely denied that he was the source of DB's emphasis on $6.75 per share in its materials. B133; AR646. "[P]laintiffs sought to recall Singer to question him about the documents, . . .

Thus, the Chancery Court's finding that Singer received a "secret tip" regarding Avago's intentions, which he concealed from the Board, is based on substantial evidence, is not "clearly erroneous," and is "the product of a logical and deductive reasoning process." *Cede*, 634 A.2d at 360.

4. Singer's Demand for Reduced Financial Projections

Potomac contends that the December 2013 Projections were "unreliable" and prepared "for the sale process," and there is "nothing in the record" to support that Singer and the Special Committee's instructed management "to generate a lower set or revenue projections" in May 2014. *See* AAB at 16-49, 59. Also false.

"In late November and early December 2013, Whipple began the process of preparing the next update of the Company's business plan." Op. at 32; AR189; AR191. "The Company historically prepared a three-year plan and treated the first year as its annual operating plan." Op. at 32; A509. "Consistent with its standard practice, the team obtained information about year-one revenue from the sales organization." Op. at 32; AR189; AR191; A509. "For subsequent years, the team generated revenue estimates based on their internal views about PLX's products and pipeline as well as external industry reports about market trends." Op. at 32; B817-40; A509. "Once the revenue targets were established, the individual business units

---

but Potomac objected, and [the Chancery Court] sustained the objection." Op. at 37 n.198; A967-98.

developed spending plans to support those targets." Op. at 32; A509; AR196-219. PLX management reviewed and debated the resulting forecasts, then made adjustments "to get what . . . the company believes is the right number." A512; AR193-95; Op. at 32.

"During a Board meeting on December 12, 2013, management discussed the plan with the Board." Op. at 34; AR220-79; AR280. "The directors suggested minor changes, but otherwise endorsed the projections." Op. at 34; B1308-09. The following day, Raun provided an updated plan "based on the conversation yesterday at the Board meeting and further review with the management team." *Id.* "The revised plan included minor reductions to 2014 revenue and spending and 'slight' reductions to revenues in the projected years." Op. at 34; AR283. "At a meeting on December 13, the Board approved the plan." Op. at 34; B816.

"During subsequent months, the Company used the plan in the ordinary course of business as if the Board and management believed it represented the Company's best estimates of its future performance." Op. at 34; A257; AR424; AR255-57. "In April 2014, the Board signed off on a proposal for D&O insurance based on the December 2013 Projections." Op. at 34; A257; A260; AR424-25; AR255-57. "The Board also signed off on an executive compensation program based on the December 2013 Projections." Op. at 34-35; A260; AR424-25.

"PLX also provided the December 2013 Projections to Semtech in a due diligence presentation on May 6, 2014." Op. at 45 n.246; A263. During a meeting on May 21, 2014, PLX management provided Avago with "an updated presentation about PLX's business that included the December 2013 Projections." Op. at 45; AR471. "Whipple confirmed that PLX presented these figures because they represented management's 'best view of what the future held.'" Op. at 45; A507. "They were 'attainable' and 'the basis for the performance and the variable compensation that was awarded to the executive officers.'" Op. at 45; A508-12.

During a one-on-one meeting between Singer and Krause on May 21, 2014, "Krause signaled to Singer that Avago would propose acquiring PLX for approximately $6.25 per share," which Avago later did. Op. at 48-49; B131-33; A278; AR643. On May 23, 2014, the Special Committee approved a counteroffer of $6.75 per share, although it "had not received any valuation of the Company on a standalone basis." Op. at 54. "The Special Committee asked Deutsche Bank to prepare a revised valuation presentation that included a discounted cash flow analysis." Op. at 52; B1024. "According to the minutes, the committee members asked for a discounted cash flow analysis based on the December 2013 Projections 'as well as a separate DCF Analysis based on revised and more updated revenue projections, reflecting management's current thinking about what would be a reasonable forecast.'" Op. at 52; A388. "The minutes do not discuss, and the Special

Committee's materials do not identify, any new information that would have necessitated adjustments to the December 2013 Projections." *Id.* The Chancery Court found that the minutes were reflective of lawyers attempting to "paper a good process." Op. at 47. Whipple, however, represented in a private email to Raun that the Special Committee's request was for a "new haircut 5 year plan for DB." A308; Op. at 61.

Like at trial, Potomac tries to justify the Special Committee's directive for revised projections by arguing the December 2013 Projections were "aggressive" and "unreliable." AAB at 17-18, 29-30. The Chancery Court rejected this argument. Op. at 33-34. "During this litigation, the concept of an 'aggressive plan' became a mantra for the defense witnesses, most of whom were named defendants who had not yet settled when they testified by deposition." *Id*. at 33. Singer and the PLX directors "repeated those words frequently and volunteered them gratuitously as if they had been instructed to mention them as often as possible. Their coordinated, redundant, and excessively emphatic performances undermined their credibility." *Id*. at 33-34.[7]

Thus, the Chancery Court's finding that the Special Committee directed management to generate a lower set projections, as well as its rejection of Potomac's

---

[7] Potomac argues that "[b]y May 2014, the first two quarters of the December Projections had already proved inaccurate." AB at 18. This is not supported by the record. PLX ***exceeded*** its earnings estimate during the first quarter of 2014, and the second quarterly was just halfway complete by May 2014. *Compare* A295 *with* A375.

counterfactual arguments concerning the December 2013 Projections, is based on voluminous evidence, is not "clearly erroneous," and is "the product of a logical and deductive reasoning process." *Cede*, 634 A.2d at 360.

5. DB's May 2014 DCF Analysis

Potomac contends that Deutsche Bank's DCF analysis from May 24 was "inaccurate," merely "preliminary," and "neither the Board nor DB" relied upon it. AB at 67. Not true.

"On the morning of May 24, 2014, the Board met to consider Avago's proposal." Op. at 56; A302; A283. "Deutsche Bank's presentation next provided the discounted cash flow analyses that the Special Committee had requested." Op. at 57; A305. Using the December 2013 Projections, which were labeled as the "base management projections," Deutsche Bank's model yielded a range of $6.90 to $9.78 per share, with $8.27 at the midpoint." *Id.* "The low-end of the range exceeded Avago's bid and the Special Committee's recommended counteroffer." *Id.*

"Deutsche Bank's materials included a second discounted cash flow valuation that used what Deutsche Bank had labeled the 'Preliminary Management sensitivity case.'" Op. at 58; A296. "According to the minutes, Deutsche Bank reported that the Preliminary Sensitivity Case was 'intended to reflect events and trends since the December 2013 Plan was prepared' and 'reflected lower spending in response to the projected reduction in revenue during these periods.'" *Id.* "In reality, this case

decreased all of the revenue projections in the December 2013 Projections by 10% and cut the annual increase in operating expense by half." *Id.*; B1506 (Raun testifying that "10 percent, as I recall, was just a quick, you know, kind of what if 10 percent. Oh, yeah, looks good."). "Using the resulting numbers, Deutsche Bank's model yielded a range of $5.48 to $7.67 per share, with $6.52 at the midpoint." Op. at 58; A296. "The new projections generated a valuation result that perfectly framed the anticipated transaction value of $300 million." Op. at 58.

"At this point, the Special Committee recommended that the Company counter at $6.75 per share." Op. at 59; A306. "The Board unanimously agreed and gave the Special Committee authority to accept any price of $6.50 or higher." *Id.* "On May 28, 2014, Singer spoke with Krause." Op. at 60; AR587; B225; B1612. "That evening, Avago sent over its 'best and final proposal' of $6.50 per share." Op. at 60; B1045-46. On May 29, 2014, without receiving any further valuations from Deutsche Bank, "[t]he Special Committee reviewed and approved draft confidentiality and exclusivity agreements and resolved to recommend that the Board authorize the Company to enter into them." Op. at 60; AR589-90. On May 30, 2014, without any further valuations from Deutsche Bank, the Board "approved the execution of an

exclusivity agreement and confidentiality agreement at a price of $6.50 per share." B1048; Op. at 60-61.[8]

In seeking to minimize the Board's approval of a deal price that was unsupported by Deutsche Bank's contemporaneous valuations, Potomac points to Deutsche Bank's subsequent DCF models presented to the Board on June 20, 2014. *See* AB at 21. Those valuations served no purpose other than to attempt to justify the price that the Board already accepted.

First, the Board received a DCF analysis of the June 2014 Projections that produced a range of $5.07 to $6.99 per share. Op. at 66-67. Although Whipple viewed the June 2014 Projections as a "sensitivity case," Deutsche Bank changed the title in its presentation to the "Management Case." Op. at 64; *compare* AR594 *with* AR617. PLX management finalized the June 2014 Projections only after it provided multiple drafts to Deutsche Bank, which internally prepared preliminary DCF models to see if the projections yielded a result that supported the agreed-upon price. Op. at 63; AR592-93. The Board never received "an explanation of the assumptions used in calculating the June 2014 forecast and the differences between those assumptions and the ones used in the December 2013 plan," but the Board, nonetheless, "instructed DB

---

[8] Potomac attempts to downplay the Board's approval by arguing that "the only 'authority' granted was for non-binding exclusivity agreement." *See* AB at 58. However, as Singer conceded at trial that PLX had no ability to negotiate for a higher price from Avago thereafter, and no further price negotiations took place. B140.

to rely on the [June 2014 Projections] as the primary basis of its analyses." A388; B233; Op. at 67.

Second, Deutsche Bank presented an adjusted DCF analysis of the December 2013 Projections, which purportedly included revised forecasts for 2014 that incorporated the Company's first quarter results. Op. at 93; A388. With PLX exceeding its earnings estimates during the first quarter, cash flow forecasts increased for 2014, and the out years remained unchanged. *Compare* A295 *with* A375. However, the low end of Deutsche Bank's DCF analysis inexplicably dropped from $6.90 per share down to $6.39 per share. Op. at 93; A375. "Under the revised analysis, the directors' counteroffer and the final deal price fell within the range." Op. at 93.[9]

Thus, Potomac's argument that Deutsche Bank's May 24 DCF analysis was "inaccurate," "preliminary," and not "relied upon" is unsupported by the record, AAB 16-49, 59, as it was the only standalone, reliable valuation the Board had when approving the deal price.

---

[9] In seeking to justify the sudden reduction to the valuation range under Deutsche Bank's DCF model of the December 2013 Projections, "Potomac has argued that the later valuation more accurately accounted for the Company's options and restricted stock units and used a more appropriate tax rate." Op. at 93 n.474; *compare* A375 *with* A295. There is no support for that justification in the record, and the Chancery Court found this argument unavailing, particularly given that "[a] description of the two ranges [in Deutsche Bank's presentation] could easily have made those points" if that were true. Op. at 93 n.474.

II. The Legal Analysis Follows Well-Established Precedent

A. Question Presented

Did the Chancery Court misapply the law in finding that Potomac knowingly participated in the Board's breaches of fiduciary duty?

B. Scope of Review

The Court's "review of legal issues is *de novo*." *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439-41 (Del. 2000).

C. Merits of the Argument

Potomac argues that the Chancery Court erred by: (1) applying enhanced judicial scrutiny when determining whether the Board breached its fiduciary duties; (2) concluding that Singer suffered from a conflict of interest due to Potomac's divergent interest in a near-term sale of PLX; (3) finding that material information was withheld from PLX stockholders; and (4) concluding that Potomac knowingly participated in the Board's breaches of fiduciary duty. As discussed below, the Chancery Court followed well-established precedent and properly applied the law.

1. Enhanced Judicial Scrutiny Applies (But it Does Not Matter)

Potomac argues that the Chancery Court erred because it applied enhanced judicial scrutiny as the standard of review instead of the business judgment rule. AAB at 52-54. Potomac, apparently, is relying on the Court's comment in *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 312 (Del. 2015), regarding the origins of enhanced

judicial scrutiny. AAB at 52 n.12. Potomac's position is contrary to both long-standing precedent and recent decisions, and, in any event, it is irrelevant where (as here) plaintiff bore the burden of proof and actually ***proved*** predicate breaches of both duties of loyalty and care.

It is well-settled that directors' actions in a change-of-control transaction are subject to enhanced judicial scrutiny. *See Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986). Enhanced judicial scrutiny requires that the defendant fiduciaries "bear the burden of persuasion to show that their motivations were proper and not selfish" and that "their actions were reasonable in relation to their legitimate objective." *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 810 (Del. Ch. 2007). This standard "does not change the nature of the fiduciary duties owed by directors." *RBC*, 129 A.3d at 849; *Malpiede v. Townson*, 780 A.2d 1075, 1083-84 (Del. 2001).

Even after *Corwin,* enhanced judicial scrutiny remains the proper standard of review for post-closing claims for money damages, including claims for aiding and abetting a breach of fiduciary duty. *See, e.g.*, *RBC*, 129 A.3d at 857 ("RBC argues that intermediate scrutiny under *Revlon* exists to determine whether plaintiff stockholders should receive pre-closing injunctive relief, but it cannot be used to establish a breach of fiduciary duty that warrants post-closing damages. . . . We agree with the trial court that the individual defendants breached their fiduciary duties by

engaging in conduct that fell outside the range of reasonableness, and that this was a sufficient predicate for its finding of aiding and abetting liability against RBC.")*;* *Kahn v. Stern*, 183 A.3d 715 (Del. 2018) (TABLE) (applying *Revlon* when "the transaction has closed and the plaintiff seeks post-closing damages").

Moreover, the Chancery Court's application of enhanced judicial scrutiny did not have a determinative impact here. Because the PLX directors were no longer defendants, the Chancery Court held that "plaintiffs bear the burden" to prove a breach of the Board's fiduciary duties. Op. at 96. The presumptions of the business judgment rule are rebutted when "the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith." *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 52 (Del. 2006); *see also Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1178 (Del. Ch. 1999) ("business judgment rule is rebutted if there is . . . fraud upon . . . the board or the corporation's stockholders"). The Chancery Court found that Plaintiffs proved breaches of duty of loyalty and of due care, as well as conduct that included fraud on the Board by Singer. *See generally* Op. at 80-116. Accordingly, Potomac's argument regarding the standard of review cannot support a reversal of the Chancery Court's finding of liability.

2. Singer's Conflict of Interest

Potomac argues that the Chancery Court erred in finding that Singer suffered from a conflict of interest because PLX stockholders purportedly "supported

Potomac's stated platform of pursuing strategic alternatives" by virtue of voting its nominees onto the Board. AB at 43-44. As an analog to this argument, Potomac contends that the Chancery Court misapplied the law by disregarding "the presumption that large stockholders are incentivized to maximize the value of their shares." AAB 44-46 (citing *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1037 (Del. Ch. 2012) and *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 662 (Del. Ch. 2013)). Potomac not only misstates Delaware law and how the Chancery Court applied the very same precedent it contends was ignored, but its positions are also unsupported by the factual record.

As a starting point, corporate directors owe the company's stockholders "an uncompromising duty of loyalty." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983). There is "no dilution" of the duty of loyalty when a director "holds dual or multiple" fiduciary obligations, and there is "no 'safe harbor' for such divided loyalties in Delaware." *Id.* "If the interests of the beneficiaries to whom the dual fiduciary owes duties diverge, the fiduciary faces an inherent conflict of interest." *Chen v. Howard-Anderson*, 87 A.3d 648, 670 (Del. 2014).

Although a director with a significant equity stake in the company will often have interests that align with stockholders at large, there are scenarios when their interests diverge. "Delaware cases recognize that a desire for liquidity is one 'benefit that may lead directors to breach their fiduciary duties,' and stockholder directors may

be found to have breached their duty of loyalty if a 'desire to gain liquidity . . . caused them to manipulate the sales process' and subordinate the best interests of the corporation and the stockholders as a whole." *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 257 (Del. 2014).

"The duty to act for the ultimate benefit of stockholders does not require that directors fulfill the wishes of a particular subset of the stockholder base." *In re Trados, Inc. S'holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013). "[A] corporation is not a New England town meeting; directors, not shareholders, have responsibilities to manage the business and affairs of the corporation, subject however to a fiduciary obligation." *TW Services, Inc. v. SWT Acquisition Corp.*, 1989 WL 20290, at *8 n.14 (Del. Ch. Mar. 2, 1989). "Directors are expected to use their own business judgment to advance the interests of the corporation and its stockholders. During their term of office, directors may take good faith actions that they believe will benefit stockholders, even if they realize that the stockholders do not agree with them." *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 655 (Del. Ch. 2008). The target's directors may in good faith choose to '"follow a course designed to achieve long-term value even at the cost of immediate value maximization.'" *Air Prods. & Chems., Inc. v.*

Airgas, Inc., 16 A.3d 48, 124-25 (Del. Ch. 2011) (citing *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1149-50 (Del. 1990)).[10]

Here, the Chancery Court found, and the record supports, that "[t]he divergent interest that led to a predicate breach of duty in this case was Singer's interest in achieving a near-term sale." Op. at 98. PLX's other directors expressly recognized that Potomac's agenda presented a conflict of interest for Singer. Op. at 111-12; A67; AR126; B1477. In making this finding, the Chancery Court recognized, discussed and applied the very same decisions for the same exact propositions that Potomac asserts were ignored. *See* Op. at 102-03 n.500 (discussing *Synthes* and *Morton's*). As the Opinion states, "[o]rdinarily, the fact that Potomac held a large block of common stock would be helpful to Singer and undermine any concern about divergent interest." Op. at 99-100. Nonetheless, there are circumstances where divergent financial interests can "constitute a disabling conflict of interest irrespective of *pro rata* treatment," such as a when the blockholder demands a "fire sale" to serve its own investment purposes. *Synthes*, 50 A.3d at 1036.[11] The facts of this case show that

---

[10] Not only does Potomac's notion of a stockholder mandate for a sale of the Company at any price conflict with Delaware law, but Singer expressly rejected this proposition at trial. *See* B104 ("Q. The other part of this statement was that your main message was that the company should be sold quickly. Do you still disagree that that is not what your main message was? A. Absolutely.").

[11] Potomac attempts to rely on an exchange between the Chancery Court and Plaintiffs' counsel during an early motion to dismiss hearing, before Potomac ever produced documents, sat for deposition, or testified at trial, regarding the

Potomac had a short-term interest different from the Board and the Company's shareholders. Op. at. 99-100.

3. The Board Withheld Material Information and Made False Statements

Potomac argues that Plaintiffs' "post-closing disclosure claim is waived" because they did not seek injunctive relief before the closing of the merger. *See* AAB at 66. This position is contrary to well-settled Delaware law.

Directors have a "fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action." *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992). Disclosure violations may serve as a predicate breach in a claim for aiding and abetting. *RBC*, 129 A.3d at 855-61. When "troubling facts" are withheld, the stockholder vote will not cleanse any misconduct. *Corwin*, 125 A.3d at 312.

The decision not to pursue injunctive relief "does not deprive the Plaintiff[s] of a right to press disclosure claims post-closing." *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *8 n.36 (Del. Ch. Mar. 31, 2017); *Appel v. Berkman*, 180 A.3d 1055 (Del. 2018) (allowing such claims to proceed post-close without first

---

aforementioned "presumption" of blockholder value maximization. AB at 44-46. Potomac's reliance on that exchange is unavailing for the same reason. After the evidence came in, including at trial, Plaintiffs successfully rebutted the presumption and proved "Singer's thesis for investing in PLX depended entirely on a short-term sale to [Avago]." Op. at 103.

requiring attempted motion for preliminary injunction). Disclosure claims may properly serve as a basis for awarding money damages post-closing, including on claims for aiding and abetting breaches of fiduciary duty. *RBC*, 129 A.3d at 868 (affirming post-close damages award based on disclosure violations as independent basis for liability); *Chen*, 87 A.3d at 691-92 (denying summary judgment on post-close disclosure claims); *In re Orchard Enters., Inc. S'holder Litig*, 88 A.3d 1, 47 (Del. Ch. 2014) (same).

Moreover, the Chancery Court's factual findings are founded on evidence that was gathered through years of litigation, including post-closing discovery that was not in Plaintiffs' possession prior to the stockholder vote. A928. Consequently, Potomac's arguments concerning waiver are unsupported by both Delaware law and the procedural history of this action.

4. Potomac's Knowing Participation

Potomac portrays the Chancery Court as having made a sweeping conclusion that stockholders will ***always*** be liable "for the acts of their representatives on corporate boards" under a purported theory of *respondeat superior*. AAB at 61. Not so. Rather, the Chancery Court followed well-established legal precedent in determining that Potomac – while acting through its Co-Managing Member, Singer – knowingly participated in predicate breaches by the Board. Op. at 118-19.

Knowing participation is established if a third party "participated in the board's decisions, conspired with [the] board, or otherwise caused the board to make the decisions at issue." *Malpiede*, 780 A.2d at 1098. When the claim is against unrelated third party, "[a] court's analysis of whether a secondary actor 'knowingly' provided 'substantial assistance' is necessarily fact intensive." *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *42 (Del. Ch. Aug. 27, 2015) (citing such factors as "the nature of the tortious act," the "amount, kind, and duration of the assistance given," the "nature of the relationship between the secondary and primary actors," and the "secondary actor's statement of mind").

As the Chancery Court explained, "[w]hen the fiduciary and the primary wrongdoer is also a representative of the secondary actor who either controls the actor or who occupies a sufficiently high position that his knowledge is imputed to the secondary actor, then the test is easier to satisfy." Op. at 118-19. For example, an investment fund can be liable for aiding and abetting when "the same individuals who have made the Fund's investment decisions" are also the fiduciaries who engaged in misconduct. *Forsythe v. ESC Fund Mgmt. Co.*, 2007 WL 2982247, at *13 (Del. Ch. Oct. 9, 2007) ("These investment decisions form the basis of the plaintiffs' breach of fiduciary duty claims. Therefore, the court may infer CIBC's knowledge of the Special Limited Partner's and Investment Advisor's breaches of fiduciary duty claims."); *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 642-43 (Del. Ch.

2013) (imputing knowledge of fund principals to investment funds for purposes of "knowing participation").

Here, "Potomac owned PLX stock, filed Schedule 13Ds, served books and records demands, nominated the dissident director slate, filed the proxy materials, and stood to collect the short-term gains from a quick sale." Op. at 119. Singer was "a co-managing member of Potomac and its agent," "led Potomac's activist campaign at PLX," and "directed Potomac's activities." *Id.*

Once on the Board, Singer "sought to position himself to best achieve a sale" by serving as the Special Committee Chairman and thereby effectuate Potomac's agenda for a near-term sale. *Id.* at 113. Although Singer testified that his role as Special Committee Chairman was purely "administrative" with "no special powers," Singer repeatedly had private discussions and meetings with Avago and Deutsche Bank during critical points leading to the Merger. B123; AR463; AR595; AR643; AR645-46; AR585; AR597; B1009; A268; A278.[12] "Because of Singer's relationship with Potomac and his role in directing and implementing Potomac's strategy, Singer's knowledge and actions can be attributed to Potomac." Op. at 120. When "the conduct advocated" by Potomac – with Singer as a direct participant – is exactly what occurred

---

[12] Accepting Singer's testimony as true, he vastly exceeded the bounds of his chartered authority as a PLX director and misled the Board regarding the full extent of his conflicted price negotiations with Avago. When Singer exceeded his authority as a PLX director, those actions should be attributed to his role as a principal of Potomac. Op. at 120-21.

and caused the predicate breaches for Plaintiffs' claims, the element of knowing participation is thereby satisfied. *See Malpiede*, 780 A.2d at 1097.

The Chancery Court did not find knowing participation under a vague theory of *respondeat superior* or simply because Potomac had director-nominees on the Board. *See* Op. at 116-21. At the pleading stage, the Chancery Court granted the motion to dismiss with respect to Potomac's other two director nominees because there were no particularized allegations of a conflict of interest or disloyal conduct like those found against Singer. B53. In the Opinion, the Chancery Court explained that "[t]his holding does not stand for the proposition that the actions of the director-representative of a stockholder can always be attributed to a stockholder," while discussing the same legal authority relied upon by Potomac. *Compare* Op. at 120 n.567 (citing *Khanna v. McMinn*, 2006 WL 1388744, at *28 (Del. Ch. May 9, 2006) and *Emerson Radio Corp. v. Int'l Jensen Inc.*, 1996 WL 483086, at *20 n.18 (Del. Ch. Aug. 20, 1996)) *with* AAB at 61-62 (citing *Khanna* and *Emerson Radio*). The Chancery Court here analyzed the specific facts at hand and determined: "In this case, the combination of Singer's position with, ties to, and actions on behalf of Potomac . . . warrants a finding that Potomac knowingly participated in the steps Singer took to

breach his fiduciary duties and induce a breach by the Company's other directors."

Op. at 120-21.[13]

[13] In *Emerson Radio*, the Chancery Court considered whether the blockholder was a controlling stockholder and found that "there is no claim or evidence that the Fund has in any way controlled Jensen's affairs." 1996 WL 483086, at *20 & n.18. Conversely, Singer was not only an agent of Potomac and acting on its behalf, but Singer was also the face of Potomac and the only Potomac principal with any active involvement in PLX. *See* A1477.

III. Potomac Fails to Address Issues Raised in Plaintiffs' Appeal

Potomac ignores the core issues raised in Plaintiffs' appeal. Potomac does not address whether the Chancery Court erred by (i) "giving the same deference to deal price that would only arise from a conflict-free, fully informed, arm's-length transaction between a willing buyer and a willing seller operating under no compulsion," or (ii) by concluding that the "passive, post-signing market check" was sufficient – even with material misrepresentations in the Recommendation Statement – to overcome the damage caused by a fatally flawed pre-signing process. *See* AOB at 11.

Potomac does ***not*** argue that, even if (1) Singer induced a transaction for self-interested reasons, (2) the Board believed it was the wrong time sell PLX and would have otherwise decided to remain independent, and (3) potential bidders were misled about the value of PLX during the post-signing period, the Chancery Court's reliance on the deal price was nonetheless appropriate. Potomac fails to distinguish, discuss or even cite to key legal authority set forth in the Opening Brief.

As Plaintiffs explained, "[t]his Court has recognized 'the prerogative of a board of directors to resist a third party's unsolicited acquisition proposal or offer.'" *Unitrin, Inc. v. Am. General Corp.*, 651 A.2d 1361, 1383 (Del. 1995) (citing *Paramount Commc'ns, Inc. v. QVC Network, Inc*., 637 A.2d 34, 43 n.13 (Del. 1994)). Consistent with their situational duties to maximize stockholder value, directors

should reject undervalued offers in favor of "remaining independent and not engaging in any transaction at all." *Chen*, 87 A.3d at 672. Potomac disregards that the existence of a market-clearing price is insufficient, on its own, to override a fatally undermined sales process. *See Smith v. Van Gorkom*, 488 A.2d 858, 875 (Del. 1985) (explaining "the fact of a premium alone does not provide an adequate basis upon which to assess the fairness of an offering price").

Plaintiffs further discussed – and Potomac ignored – the maxim that "equity will not suffer a wrong without a remedy." *Weinberger v. UOP, Inc.*, 1985 WL 11546, at *9 (Del. Jan. 30, 1985). "Once liability has been found, and the court's powers shift to the appropriate remedy, the Court of Chancery has broad discretion to craft a remedy to address the wrong." *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 262-63 (Del. 2017). Although Potomac suggests that resolving any uncertainties regarding damages "against the wrongdoer" would establish a new and dangerous precedent, Delaware courts have followed this principal for decades. *Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 1993); *McGovern v. Gen. Holding, Inc.*, 2006 WL 1468850, at *24 (Del. Ch. May 18, 2006) ("The Supreme Court has emphasized the capacious remedial discretion of this court to address inequity."); *Auriga Capital Corp. v. Gatz Properties*, 40 A.3d 839, 875

(Del. Ch. 2012) (finding that "[t]he fact that we do not have concrete evidence of what a fully negotiated third-party deal would have produced is [defendant's] own fault").[14]

Rather than address this precedent, Potomac's arguments are based on the premise that there was no wrongdoing at all, and that the same deference to deal price that was factually appropriate in *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017) and *DFC Glob. Corp. v. Muirfield Value P'rs*, 172 A.3d 346, 362 (Del. 2017) is warranted here. AAB at 34-39. As set forth in detail above, Potomac's premise is not supported by the record and the Chancery Court's factual findings.

[14] Plaintiffs raised this issue below. A1180-81; A1305.

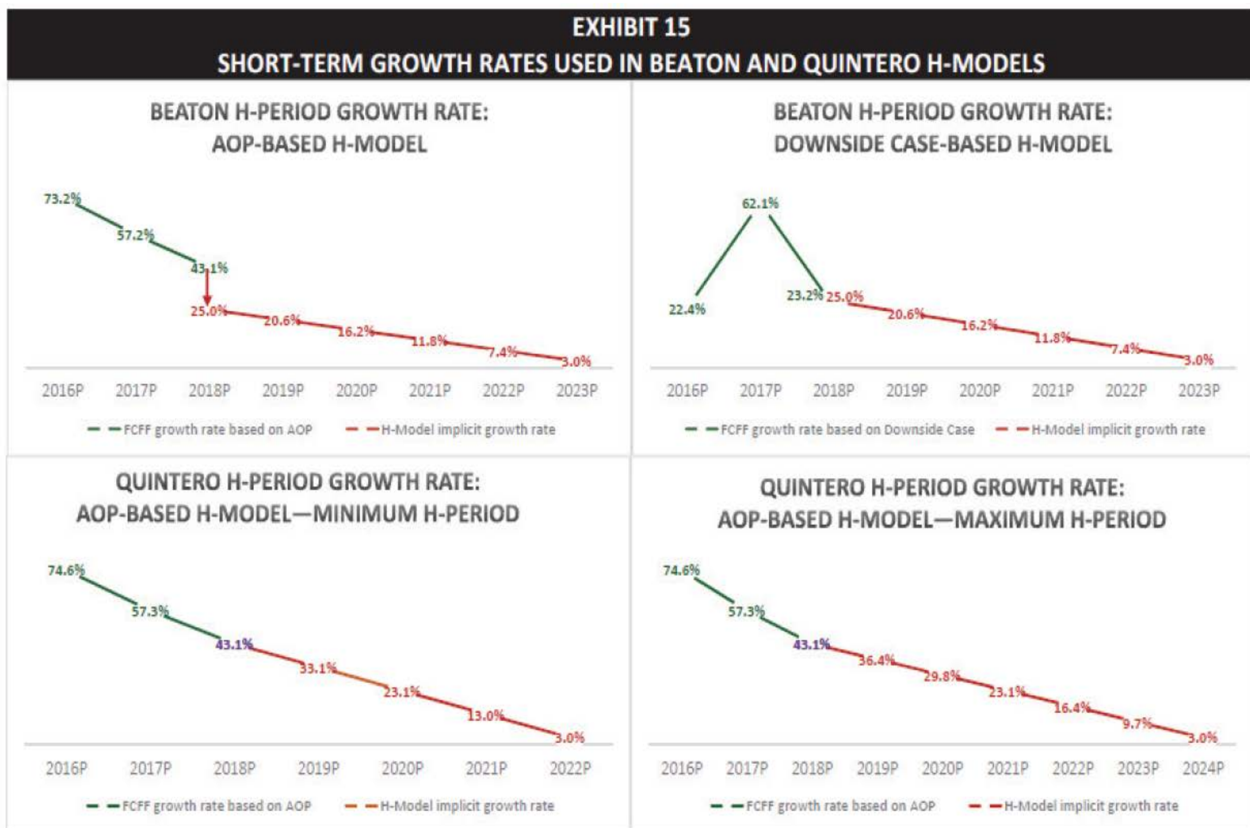
IV. Potomac's Counterfactual Arguments Do Not Provide Alternate Grounds to Affirm the Denial of Damages

In attempting to justify a finding of no damages, Potomac largely departs from traditional appellate-style arguments focused on the findings of fact and conclusions of law set forth in the disputed ruling. Instead, Potomac's arguments are more akin to trial advocacy and are premised on the Court taking on the role of a trial court and making its own factual findings. *Compare* AAB at 22-41 *with* PTB at 57-66.

Nonetheless, Potomac's fact-intensive arguments do not support a denial of damages. First, Potomac argues that PLX's "unaffected stock price" supports the Chancery Court's deference to the deal price. AAB at 39-41. Potomac's own expert witness however, conceded at trial that he "really just can't find an unaffected stock price." A1027. As Beaton conceded, the stock price was "affected" by years of conflict with activists, stock price movement due to a merger being signed then terminated, and speculation over whether the Company would eventually be sold or would pursue a long-term strategy as a near monopoly. A976-77; A1027. Thus, the stock price alone is no basis to support a finding of no damages.

Second, Potomac appears to argue that a finding of no damages is justified because Quintero used overstated growth for purposes of his H-Model application in his DCF analysis. AAB at 32-33. Both parties' experts utilized an H-Model when valuing the perpetuity period, but only Quintero used it properly. The H-Model, by

definition, is intended to reduce a company's long-term growth rate over time, as opposed to applying a perpetuity growth rate immediately following the end of the forecast period. AR1-8. Rather than subjectively and arbitrarily constructing growth rates after the explicit forecast period, the key aspect of the H-Model is applying a linear, objective reduction in growth during the H-Period "requiring only simple arithmetic." *Id.* Here, Quintero properly followed the H-Model and employed a linear reduction in growth, while Beaton skewed his model by applying a downward adjustment to the actual growth rates forecasted by PLX management:



A852.

Third, Potomac appears to argue that a no-damages determination is justified because Quintero added back PLX's cash on hand to his DCF analysis. Again, both experts recognized that excess cash should be added back to a DCF. A1018; A1033. Beaton only declined to do so because he purportedly believed that management's projections were wrong for undefined reasons: "To me, it just seemed low and I believed that they would need more cash." A1018. Moreover, Potomac actually contradicts Beaton's report by contesting the amount of PLX's cash on hand. Potomac asserts that "Quintero mistakenly believed that PLX had $25 million cash (it had only $11 million)," AAB at 33; but Beaton's rebuttal report states: "Cash: As of June 30, 2014, PLX had approximately $25.7 million of cash and short-term investments on its balance sheet." B1927.

Fourth, Potomac appears to argue that a no-damages determination is justified because Quintero used a "manipulated" beta for purposes of his DCF analysis. AAB at 30-31. This claim is not supported by the record or Quintero's methodologies. Quintero's observed beta for PLX and resulting WACC under CAPM is consistent with other observations of PLX and the semiconductor industry. AR649-50. Further, because beta is a forward-looking concept, Quintero observed that PLX's beta was declining over time and thus used a one-year period. A976; AR648. A longer period beta would look too far backward, as PLX had recently undergone significant change – including substantial divestitures of unprofitable businesses – and emerged a

profitable, debt-free company with a "pristine balance sheet" and a near monopoly in PCIe. A976-77. *See* Shannon Pratt & Roger Grabowski, Cost of Capital: Applications and Examples 315 (5th ed. 2010) (shorter beta recommended in these circumstances); *Merion Capital, L.P. v. 3M Cogent, Inc*., 2013 WL 3793896, at *18 (Del. Ch. July 8, 2013) (one-year company beta). Even though the Court declined to adopt Quintero's beta, there is no finding that any aspect of his beta analysis was "manipulated," as Potomac contends. To the contrary, Quintero demonstrated that the dispute over beta was not outcome determinative to a finding of damages. A840-41.

Fifth, Potomac argues that the passive, post-signing market check was a sufficient basis to find no damages because Plaintiffs did not identify "any information that potential buyers – including the nine who received management presentations – lacked." AAB at 35. However, Plaintiffs did prove that ***all*** potential buyers were misled by the Recommendation Statement, which falsely represented that the Company was appropriately valued based on the June 2014 Projections. Op. at 87-94. This finding – along with the fact that a passive post-signing market check cannot cleanse a fatally flawed and ill-timed pre-signing process – undermines Potomac's argument, regardless of any information a potential buyer may have previously received.[15]

---

[15] Potomac argues that the Chancery Court relied on an unstated and implicit "*combination*" of both pre- and post-signing market checks when attempting to support the damages determination. AAB at 38. Such a finding would be highly

Lastly, in attempting to justify the Chancery Court's deference to deal price, Potomac contends that the only conflict of interest at issue concerned Potomac's agenda for a short-term sale – not whether Singer influenced the Board's ability to get the highest price. AAB at 36. This position conflicts with the Chancery Court's findings. *See* Op. at 115-16. The Opinion states, "Had the directors been armed with the knowledge that Avago expected to pay $300 million, ***they could have negotiated more effectively for a higher price***. Most important, the Board could have taken more time to consider the Company's alternatives in depth, rather than agreeing in principle to a deal at Avago's preferred price after nine busy days in May." *Id.* at 115-16.[16]

Consequently, Potomac provides no valid justification for the decision not to award damages to remedy the harm that Potomac caused to PLX stockholders.

---

problematic because the Chancery Court also found that Potomac "fatally undermined the sale process." Op. at 115.

[16] In support of the decision on damages, Potomac also argues that the December 2013 Projections were "[s]peculative and [u]nreliable." *See* AAB at 24-30. These arguments are refuted by the Chancery Court's findings of fact, and Potomac's counterfactual arguments are addressed above. *See supra* at §I.C.4. Moreover, while Potomac identifies purported concerns about viability of the Company's ExpressFabric and outside-the-box products, each of those risks – such as customer base and competing technologies – were present when the Board approved the December 2013 Projections and used them in the ordinary course of business, including at times when they were duty-bound to provide reliable information. Op. at 89 n.457. As the Chancery Court found, no new information emerged "that would have necessitated adjustments to the December 2013 Projections." Op. at 52.

CONCLUSION

Plaintiffs respectfully request that the Court reverse the judgment with respect to the Chancery Court's determination of damages and affirm the finding of Potomac's aiding and abetting of the Board's breaches of fiduciary duty.

DATED: March 15, 2019

Respectfully submitted,

COOCH & TAYLOR
R. BRUCE McNEW (DE Bar 967)

/s/ R. Bruce McNew

R. BRUCE McNEW

1000 West Street, 10th Floor
Wilmington, DE 19801
Telephone: 302/984-3800

Delaware Liaison Counsel

ROBBINS GELLER RUDMAN
& DOWD LLP
RANDALL J. BARON
DAVID A. KNOTTS
MAXWELL R. HUFFMAN
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

MILBERG TADLER PHILLIPS
GROSSMAN LLP
KENT BRONSON
One Pennsylvania Plaza, Suite 1920
New York, NY 10119
Telephone: 212/594-5300
212/868-1229 (fax)

Co-Lead Counsel for Plaintiffs/Appellants