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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

CORRECTED REPLY BRIEF ON CROSS-APPEAL OF DEFENDANT BELOW-APPELLEE/CROSS-APPELLANT PLX TECHNOLOGY INC.

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PRELIMINARY STATEMENT

Potomac's Opening Brief demonstrates that the trial court's key conclusions on liability are not supported by law, evidence, or logic. Plaintiffs make no effort to meaningfully address these arguments, instead quoting from the trial court's Opinion verbatim, without analysis or explanation.

The trial court's findings do not withstand scrutiny. The court concluded that Singer was conflicted, but it found none of the liquidity-based circumstances required to establish a conflict under Delaware law. Though it found that Singer wanted "a near-term sale," the court ignored that the nearly 70% of PLX's stockholders who voted for Potomac's slate also believed that, given PLX's uncertain future, a sale would maximize the value of their investments. The trial court also found that Singer was disloyal, but did so based on an unsupported and illogical conspiracy theory concocted by Plaintiffs on the last day of trial. The two emails upon which this entire "secret tip" theory is based do not support, and indeed contradict, that Singer received any "secret" information, and in any event this same information was recommunicated to the full Board later that day. Plaintiffs, moreover, do not explain why Singer, who supposedly only wanted an immediate sale, would abandon all efforts to sell PLX to another bidder and instead orchestrate a sale to the only buyer who could not engage for months. Nor do they explain why Singer would irrationally engineer a suboptimal price.

The trial court's findings with respect to the incumbent directors are equally unsupported. The trial court conceded that the Board conducted a thorough, impartial sale process that resulted in a deal price that "exceeded the standalone value of the Company." Op.5, 108-10, 132-134. Nevertheless, it found that the incumbent directors acted disloyally because they were "influenc[ed]" by Potomac and Singer to "favor a sale when they otherwise would have decided to remain independent." Op.110. The court, however, expressly found that PLX "faced an uncertain future," belying any claim that the Board acted unreasonably in deciding to sell PLX. Op.6. Indeed, the evidence confirms that these concerns prompted the Board to begin pursuing a sale long before the involvement of any activist. *Id.*

Finally, Plaintiffs are unable to explain how the trial court's finding of vicarious aider and abettor liability squares with Delaware law. Plaintiffs concede that Potomac did nothing after Singer joined the Board, and they cite no law that supports imputing Singer's actions as a director of PLX to Potomac.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT SINGER WAS CONFLICTED

Plaintiffs fail to explain how Singer's "interest in achieving a near-term sale" constituted a conflict of interest when nearly 70% of PLX's stockholder's elected Potomac's nominees *on this very platform.* AAB 30 (quoting Op.98). Recognizing that Potomac was aligned with a majority of PLX's stockholders, Plaintiffs instead argue that Potomac's interests "conflicted with the long-term goals of *the Board*."[1] (AAB 9) (emphasis added). The *sine qua non* of a conflict, however, is an interest that diverges from that of the corporation's stockholders – not a disagreement in the boardroom. *See Chen v. Howard-Anderson*, 87 A.3d 648, 670 (Del. Ch. 2014); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (directors' fiduciary duties include "acting to promote the value of the corporation *for the benefit of its stockholders.*") (emphasis added).

Plaintiffs offer no basis to conclude that Potomac's or Singer's interests diverged from those of the stockholders at large. They do not dispute that the trial court found none of the "narrow circumstances" required to rebut the presumption of stockholder alignment, and they make no effort to defend the trial court's erroneous conclusion that a director's affiliation with a "particular type[] of

[1] In fact, as set forth in Point III(B)(2) below, the Board was also aligned in believing that a sale was in the best interests of PLX and its stockholders.

investor[]" – absent evidence of an "urgent need for cash" – can by itself establish a conflict. Op.101-2; *In re Synthes, Inc. Shareholder Litig.*, 50 A.3d 1022, 1036 (Del. Ch. 2012); *see also In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 366 (Del. Ch. 2008).

Plaintiffs cite *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 257 (Del. Ch. 2014) for the proposition that "a desire for liquidity … may lead directors to breach their fiduciary duties." AAB 28-29. However, as then-Chancellor Strine held in *Synthes*, "a fiduciary's financial interest in a transaction as a stockholder (such as receiving liquidity value for her shares) does not establish a disabling conflict of interest when the transaction treats all stockholders equally." 50 A.3d at 1035. Here, it is undisputed that Potomac received the same per-share consideration as all other stockholders, and neither Plaintiffs nor the trial court contend that Potomac faced an "idiosyncratic need for immediate cash." *Id.* at 1036. This case is thus nothing like *Rural/Metro*, where specific record evidence demonstrated that Shackelton's fund "was seeking to raise $150-$200 million of new capital, more than ever before," such that "[a] sale of Rural … could be used to market the fund to new investors." 102 A.3d at 255.

The sole evidence on which Plaintiffs rely are communications from the proxy contest, including a PLX press release in which the Company accused Potomac of wanting "'to realize a short-term gain on its investment to fulfill the

demands of its own investors.'" AAB 7 (quoting AR126). However, the uncontroverted evidence at trial confirmed that Potomac's sole investor, the Rainin Group, was "a long-term investor" focused on philanthropy that "[n]ever" pressured Potomac or Singer to liquidate capital. (B180-81). The Company's unfounded accusations – which the directors later admitted were wrong (*see* POB 47-48) – are not evidence of Potomac's actual needs or wants.

Plaintiffs also point to Potomac's letters from the proxy contest as purported evidence of Potomac's "divergent agenda." AAB 6-7. The letters, however, demonstrate only that Potomac believed a sale would maximize the value of its investment – a belief shared by the majority of PLX's stockholders. Moreover, once Singer became a director and learned "that [the Board] had run a process" without any viable offers (B1332-33), he did nothing to pursue a sale and instead concentrated on the pursuit of long-term initiatives such as issuing RSUs to incentivize management's long-term performance and making strategic acquisitions. POB 13-14. Further, when Avago resurfaced, Singer was willing to walk away rather than accept less than $6.50/share (B1529) – a price that "exceeded the standalone value of the Company." Op.5. These actions bely the notion of a conflicted director willing to sell "at any price." AAB 30 n. 10.

Absent a "liquidity-driven conflict," "the only reasonable inference is that [Potomac] viewed the transaction as the best value reasonably available for [its]

shares, and by extension for all stockholders." *Chen*, 87 A.3d at 672 (rejecting claim that director was conflicted by his affiliation "with a particular type of institution" and desire "to sell [the company] in the near term").

II. THE TRIAL COURT ERRED IN FINDING THAT SINGER ACTED DISLOYALLY

Plaintiffs insist that the trial court correctly adopted (and pinned its entire liability finding on) their "secret tip" theory, but make no effort to address the glaring logical fallacies pointed out by Potomac. AAB 17. According to Plaintiffs, on Singer's first day as a director, he hatched a plan to sell PLX to the only buyer he knew could not engage for months, forgoing negotiations with any other party (and the opportunity to leverage Avago's offer) in the intervening five months; he did so based entirely on an indirect communication about (at best) what Avago *might* do in the future; and, when Avago returned, he irrationally engineered a suboptimal price, devaluing Potomac's investment. AAB 14-16. The trial court erred in accepting a conspiracy theory that defies common sense. *See In re Toys "R" Us, Inc. S'holder Litig.*, 2005 WL 5756357, at *25-27 (Del. Ch. June 24, 2005) (dismissing complaint based on "logically inconsistent" and "implausible" allegations).

Further, though Plaintiffs insist that their "secret tip" theory is based on "substantial evidence" (AAB 17), they simply recite the trial court's findings without addressing the fact that this theory is based entirely upon two internal DB emails about which not a single witness testified and that on their face contradict the trial court's conclusions. The plain language of these emails confirms that the

court's findings are not "the product of an orderly and logical deductive process." *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

Undermining Singer's supposed master plan to orchestrate a future sale to Avago, DB's email states that Singer asked about "get[ting] a cash / stock or any offer out of Inphi" – another potential acquirer. A84. The email also contradicts that Singer learned of "Avago's interest in a deal for PLX at $300 million" (AAB 15 (quoting Op.37)); *at best*, it supports only that DB gave Singer "color"[2] about whether "Avago would do anything now" – *not* about price. A84. In any event, DB also stated that Avago had already "told PLX where we stand on" price. A77. Indeed, given the prior negotiations with Avago at share prices between $6 and $7/share – or deal prices of $275.4 to $321.3 million – it cannot seriously be said that this information was unknown to the Board. The Board likewise knew that Avago was "paying no attention whatsoever to PLX" due to its acquisition of LSI, which had been announced three days earlier. B840; B841.

DB's email also squarely contradicts a purported plot to withhold information from the Board, as it states that DB had "prepped a BoD update" to be sent to the Special Committee and Raun. A84. In fact, later that day, DB

[2] Plaintiffs presented no evidence to prove that Howell's reference to the "color from my Krause email" (A84) refers to the summary of his call with Krause, which was sent two hours *later* (A77). Plaintiffs' claim about the time zones is pure speculation. AAB 15 n. 5.

circulated a "Process Summary" reiterating that Avago was "[i]nterested and potentially willing to increase offer above $6/share" and that it was "[w]illing to wait" and did not want to participate in a "process" at that time.[3] A73. As just noted, the Board had learned three days earlier *why* Avago was "[w]illing to wait." *Id.*; B840; B841. Indeed, on the same day that the Avago-LSI transaction was announced, DB reached out to the Board to provide "further color on the deal." B840. Though Plaintiffs and the trial court note that this call took place three days before the purported "tip," they do not explain why the Board needed to be told this same information again just three days later. AAB 14-16; Op.39 n. 203.

Finally, Plaintiffs' claim that "Singer steered the Board to the $6.50 per-share price" is equally illogical and unsupported. AAB 15. There is no evidence that Singer puppeteered Avago's $6.25/share offer[4] or the Board's $6.75/share counteroffer and, again, there was no reason for Singer to deliberately seek to devalue Potomac's investment in PLX. Plaintiffs rely on a single piece of

[3] Plaintiffs misquote the Process Summary and falsely claim that Howell told his team not to include information about price. AAB 15-16. Plaintiffs also note that the Process Summary reiterated "the same information" from an earlier Board update (AAB 16), but the fact remains that the Board was told the same information that only Singer supposedly knew.

[4] Though Plaintiffs reference "private meetings" (AAB 15), the evidence confirms that Singer had a single meeting with Krause that was expressly directed by the Special Committee. B1009. As Singer testified, the only discussion about price consisted of Singer indicating that "the company was worth more than $6" and Krause responding "that he was not interested in anything close to $7." B132-33. Krause's testimony is consistent. B1622(Krause).

evidence – a May 22, 2014 email in which Singer asked DB "to prepare some pages … to support a counteroffer at $6.75 per share." AR 646. Plaintiffs ignore that Singer sent this email *the day after* the entire Special Committee and Raun discussed a $6.75/share counteroffer with DB, which DB memorialized in a draft letter. A280-82.

III. THE TRIAL COURT ERRED IN FINDING THAT PLX'S INCUMBENT DIRECTORS ACTED DISLOYALLY

A. Plaintiffs' Claim Fails Under Business Judgment Review

Plaintiffs argue that enhanced scrutiny applies to "directors' actions in a change-of control transaction." AAB 26. Plaintiffs ignore Potomac's arguments and miss the point. The trial court did not find that the incumbent directors breached their fiduciary duties in negotiating the sale of PLX; it found that their decision to pursue a sale was improperly motivated by Potomac's proxy contest. Op.110-11. Thus, at issue is the Board's decision to "put the company up for sale," which, under the controlling authority cited by Potomac, is governed by the business judgment rule.[5] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009); *see also In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *12 (Del. Ch. May 20, 2011), *as revised* (May 24, 2011) ("When a board leads its corporation into so-called *Revlon* territory, its *subsequent actions* will be reviewed by this Court not under the deferential BJR standard, but rather under the heightened standard of reasonableness.") (emphasis added).

Plaintiffs further contend that the "application of enhanced judicial scrutiny did not have a determinative impact here" because Plaintiffs met their burden of

[5] Plaintiffs avoid addressing this argument by responding only to a footnote about whether, in light of this Court's comments in *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 314 (Del. 2015), *Revlon* should apply in a post-closing damages case. POB 52 n. 12.

proving fiduciary breaches. AAB 27. However, the standard of review is not outcome determinative only because Plaintiffs failed to meet their burden under either business judgment or enhanced scrutiny review. (*See* Point III.B, *infra*).

In the context of a duty of loyalty claim,[6] the business judgment rule can be rebutted only by proving "that (1) a majority of the directors had some material interest in the transaction, or (2) [an interested party] dominated or controlled the Board." *In re BioClinica, Inc. Shareholder Litig.*, 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013); *see also Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2002); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d at 1168 (Del. 1995). Here, the trial court did not find – and Plaintiffs do not argue – that the directors were materially interested in the transaction or that Singer dominated and controlled the Board. Nor do Plaintiffs contend that the Board's decision to sell the Company lacked "any rational business purpose" or constituted waste. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006) (citation omitted). There was thus no basis for a finding that the directors breached their duty of loyalty.

[6] Plaintiffs' contention that the trial court "found that Plaintiffs proved breaches of duty of loyalty and of due care" (AAB 27) is wrong: the trial court found that the directors' "otherwise reasonable" decisions were driven by improper motives – a classic duty of loyalty claim. Op.110-11.

B. Plaintiffs' Claim Fails Under Enhanced Scrutiny Review

1. The Board's Decision to Pursue a Sale Was Reasonable

In arguing that the Board's decision to sell was improperly motivated by "activist pressure," Plaintiffs address none of Potomac's arguments and instead simply regurgitate the trial court's findings. AAB 9 (quoting Op.111).

As established in Potomac's Opening Brief, the trial court was simply wrong in concluding that the Board would have remained independent if not for Potomac's proxy contest. POB 6-9. The trial court conceded that, by 2011, PLX was facing a "very uncertain future." B404; Op. 6. Prompted by these concerns, the Board met with potential acquirers, including Avago, in late 2011/early 2012 – long before the involvement of any activist. A406-07; B370-71. In January 2012 – also prior to any activist involvement – Schmitt sent an email to Raun and Whipple confirming that "the longer term solution here is to sell the Company," the sole question being whether to do so "as-is" or after first "shut[ting] down" the Teranetics business. B273. In April 2012, the Board agreed to a merger with IDT (A17-20) and, when the IDT deal fell through, the Board once again determined, at a time when no activist investor was in the picture, to pursue a sale "in the second half of the year" – which it did. B1326-27(Salameh). Ultimately, when "[a] trade bidder with access to synergies … offer[ed] a price for [PLX] beyond what its standalone value could support," the Board made the reasonable decision to sell.

Frederick Hsu Living Tr. v. ODN Holding Corp., 2017 WL 1437308, at *21 (Del. Ch. Apr. 14, 2017).

Plaintiffs also ignore the many examples of the Board bucking activist pressure. For example, Plaintiffs do not address the fact that the Board had at least two opportunities to sell the Company in response to activist demands, but refused to do so at prices it deemed "too low." B371; A61; POB 55-56. They likewise do not address that the Board refused to accept Potomac's settlement offers and decided against running a public sale process, even though either of these courses of action would have avoided a proxy contest and preserved the incumbent directors' Board seats and majority position. A940(UF); B427; B471; B564-68; B1426(Salameh); B1378(Schmitt).

Unable to square this evidence with their theory, Plaintiffs pretend it doesn't exist and instead contend that – although the incumbent directors agreed in August 2013 that the "timing seemed optimal" to pursue a sale – they harbored a secret belief that "it was not a good time to sell." AAB 9 (quotations omitted). Plaintiffs, however, simply parrot the trial court's findings, without analysis or explanation. The only "new" evidence on which they rely is a blatant misrepresentation of Whipple's testimony that even the trial court did not credit. Whipple did *not* testify, as Plaintiffs claim, that "[t]he Board agreed" that "it was not a good time to sell." AAB 10 (quoting A501(Whipple)). Rather, he testified that "[t]he board

agreed *that the value of the company was … rising*" (A501) – a factor that the Board expressly cited as making it an "optimal" time to sell.[7] B533-34.

Plaintiffs' remaining "arguments" consist of nothing more than verbatim quotes from the Opinion. AAB 10-13. These findings are addressed at pages 56-59 of Potomac's Opening Brief, arguments to which Plaintiffs do not respond.

2. The Board Properly Requested Revised Projections

Plaintiffs spend many pages arguing that the Board improperly asked management to prepare "a lower set of revenue projections"[8] in order to justify the sale price. AAB 17-21 (citation omitted). There is no evidence, however, that the Board asked for "reduced" – as opposed to simply "updated" – projections. A305.

At his deposition, Salameh – PLX's co-founder and former Chairman and CEO, testified:

> Q. So you did instruct management to come up with a plan that assumed lower growth, right?
>
> A. No. We asked them to look at the situation as of May and what would be a reasonable forecast. Not – not aggressive forecast. It would be reasonable.

B1346.

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[7] There is no evidence that *anyone* shared Whipple's view that the Company should bet its entire existence on the possibility of striking gold with ExpressFabric. The trial court also lacked "confidence" in this endeavor. Op.126.

[8] Though the heading is titled "Singer's Demand for Reduced Financial Projections" (AAB 17), the trial court did not find – and there is no evidence to support – that Singer personally had anything to do with PLX's financial projections.

Contemporaneous documents support this testimony. On June 7, 2014, PLX's EVP of Sales emailed the sales team and conveyed the Board's request for "a deeper dive" on revenue projections. B1049. The email did not instruct the sales team to revise its estimates in any particular direction, and the sales team, which had no knowledge of the Board's confidential sales process, had no reason to engineer the outcome. *Id.*; *see also* A305 ("the Board requested that management prepare … updated five-year projections… [to] reflect events and trends since the [December Projections] were prepared and management's current expectations regarding the future performance of the Company.").

Indeed, far from a haphazard effort to justify a predetermined price, the evidence confirms that Raun and PLX's sales team prepared the June revenue estimates through the same "detailed, bottoms-up [], customer by customer, product by product" process it had used in December. B1416(Salameh); *see also* B1318(Raun) (confirming that "the June five-year analysis [was] very similar" to the analysis in December 2013); B1049 (requesting the same "bottoms up exercise" as from December); *compare* B819-20 *with* B1128-29. Likewise, the revisions to the expense estimates were not "formulaic" or "mechanical;" they showed that "someone actually look[ed] at these expenses" and was "thinking about what those margins are." A1013-14(Beaton).

Plaintiffs insist that the December Projections were reliable and that the June Projections "served no purpose other than to attempt to justify the price that the Board already accepted." AAB 23. Plaintiffs again ignore critical facts and cherry-pick quotes from the Opinion without analysis. For example, Plaintiffs fail to address the evidence cited by Potomac demonstrating that management and the Board *contemporaneously* labeled and described the December Projections as "aggressive." *See, e.g.,* B752, B761, B917 ("5 year plan was [] done for the market check and was a very aggressive plan."). They make no effort to address the fact that the December Projections unrealistically assumed that PLX would nearly triple its historical revenues by developing two new product lines, including a "TBD" systems product, and they ignore the trial court lack of "confidence" in these initiatives. Op.126-27; B658; B761; A92. And – most critically – they ignore that, as the trial court, PLX missed four prior sets of projections that likewise predicted explosive growth based on developing these same new products. Op.127; POB 16-18; B1966.

Plaintiffs also quote the trial court's conclusion that there was "no new information" that would have necessitated adjustments to the December 2013 Projections, ignoring all of the developments that Potomac highlighted in its Opening Brief. AAB 44 n. 16 (quoting Op.52). In particular, by May 2014: (1) PLX had already missed the first two quarters of the December Projections (Op.

127; *see also* B1314(Raun); (2) PLX was experiencing "lower demand for PCIe switches" (B1049), undermining the December Projections' express assumption that "[t]he key will be getting our strong Gen 3 design pipe into production" (B761); and (3) there were serious delays in developing ExpressFabric, which in turn impacted the development of the system-level product. POB 18, 24-28; B1313(Raun); B1486(Raun).

Plaintiffs also falsely claim that the Board had "already accepted" a $6.50/share price before receiving the June Projections. AAB 23. But both Plaintiffs and the trial court place outsized significance on the fact that the Board approved a *non-binding* Exclusivity Agreement at the same meeting that DB presented its preliminary valuation analysis (as disclosed in the 14D-9). A303-6; A414-15; B1038-39. It is not disputed that the Board had DB's final valuation and fairness opinion when it approved the Merger Agreement on June 22, 2014, which is when it reached a definitive agreement on price. A947(UF); A374-75; A388; Op. 66-67. The Exclusivity Agreement contained no binding price terms and, if for some reason the June Projections did not support a $6.50/share price, the Board simply could have "walk[ed] away from the deal." B140. Further, contrary to Plaintiffs' claim, the evidence confirms that, "[p]rior to the [June 22, 2014] meeting, Mr. Raun had circulated to the Board a detailed description of the

assumptions used in calculating the June 2014 forecast and the differences between those assumptions and those used in the [December 2013 Projections]." B1160.

Finally, Plaintiffs raise a number of arguments related to DB's May 2014 preliminary DCF analyses. For example, they criticize the "sensitivity" analysis for assuming a 10% reduction in revenues (AAB 21-22), but ignore the wild optimism of the December Projections, which assumed that PLX would develop new products and nearly triple its historical revenues. (B761). As explained above, developments in the first half of 2014 underscored the need for more realistic estimates. Plaintiffs also note that DB's preliminary valuation labeled the DCF analysis based on the December Projections as the "Base" case, but that its final valuation labeled the DCF analysis based on the June Projections as the "Base Case." (AAB 21-24). Plaintiffs ignore that, when DB prepared its preliminary valuation, there was only one final set of projections – the December Projections. A295-96. Further, the evidence confirms that DB chose the final labels "based on Mr. Whipple's statements… regarding which of the two plans was more realistic." B1690; *see also* BR1 ("[U]se Base Case [for June Projections]. I believe these are more realistic, per conversation with Art [Whipple]. Upside includes systems revenues, which is very optimistic, per Dave [Raun].")).

IV. THE TRIAL COURT ERRED IN HOLDING POTOMAC VICARIOUSLY LIABLE FOR SINGER'S ACTIONS AS A PLX DIRECTOR

Plaintiffs, like the trial court, fail to identify anything that Potomac did to "participate" in the Board's purported breach of fiduciary duty. Plaintiffs point only to actions that Potomac took *before* Singer became a director – such as "fil[ing] Schedule 13Ds" and nominat[ing] the dissident director slate" – but do not dispute that Potomac did nothing after Singer joined the Board. AAB 34. Instead, they contend that the trial court was correct to find that Singer's "'knowledge and actions can be attributed to Potomac.'" AAB 35-36 (quoting Op.120).

Plaintiffs contend that, in holding Potomac liable by attribution, the trial court "followed well-established legal precedent." AAB 32. However, the cases Plaintiffs cite provide no support for imputing Singer's *actions* as a PLX director to Potomac; they support only that an individual's *knowledge* can be imputed to an affiliated organization – a proposition not in dispute. For example, Plaintiffs rely on *Carsanaro v. Bloodhound Techs., Inc.*, where the defendant directors allegedly orchestrated a series of "self-interested financing transactions" to dilute the founders' equity. 65 A.3d 618, 629 (Del. Ch. 2013). In sustaining an aiding and abetting claim against two directors' venture capital funds, the court explained that the funds "participated in the conspiracy as the purchasers of the preferred stock, and knew of [] the conspiracy … because [their director-representatives']

knowledge is imputed to them." *Id.* at 636, 642-43; *see also Forsythe v. ESC Fund Mgmt. Co.*, 2007 WL 2982247, at *13 (Del. Ch. Oct. 9, 2007) ("the court may infer CIBC's *knowledge* of the… breaches of fiduciary duty.") (emphasis added). Unlike here, the defendants in these cases were alleged to have actually *done something* to aid and abet the purported breach, with only knowledge subject to imputation. *Id.*

Plaintiffs cite no case in which a Delaware court has held a stockholder vicariously liable solely based on the acts of its representative on a corporate board. In fact, as noted in Potomac's Opening Brief, Delaware courts have expressly rejected this expanded view of stockholder liability, concluding that to hold a stockholder liable "by attribution" simply because it is "affiliated" with a disloyal director "would work an unprecedented, revolutionary change in our law." *Emerson Radio Corp. v. International Jensen Inc.*, 1996 WL 483086, at *20 n. 18 (Del. Ch. Aug. 20, 1996); *see also Khanna v. McMinn*, 2006 WL 1388744, at *28 (Del. Ch. May 9, 2006); *Fried v. LVI Servs., Inc.*, 2011 WL 2119748, at *5 (S.D.N.Y. May 23, 2011) ("courts applying Delaware law … have squarely rejected attempts to hold shareholders liable on a *respondeat superior* theory.").

Plaintiffs contend that the trial court considered this "legal authority" and rightly limited its holding to *affiliated* director-nominees. AAB 35. But the cases cited by Potomac each involved *affiliated* director-representatives. *See, e.g.*,

Khanna, 2006 WL 1388744, at *3 (director "serves as [defendant fund's] General and Managing Partner"); *Emerson*, 1996 WL 483086, at *20 n.18 (director was "one of the three general partners" of the fund's general partner). Indeed, Justice Jacobs expressly warned that holding stockholders liable "by reason of [their] *affiliation*" with a director "would give investors … second thoughts about seeking representation on the corporation's board of directors." *Emerson*, 1996 WL 483086, at *20 n. 18 (emphasis added). Plaintiffs offer no justification for undermining the bedrock principle of stockholder representation, and do not explain why it is appropriate for courts – as opposed to stockholders – to decide whether owner affiliation is a disqualifying attribute.

Further underscoring the trial court's error is Plaintiffs' inability to identify anything that Singer did "within the scope of [his] employment with" Potomac, rather than as a fiduciary to PLX's stockholders. *In re Glob. Crossing, Ltd. Sec. Litig.*, 2005 WL 1907005, at *3 (S.D.N.Y. Aug. 8, 2005); *see also Fried*, 2011 WL 2119748, at *5. Though the trial court found that everything Singer did as a PLX director was "on Potomac's behalf" (Op.119) – effectively finding that Singer aided and abetted himself – Plaintiffs do not defend this conclusion and instead argue that Singer "exceeded his authority as a PLX director" by having "private discussions and meetings with Avago and Deutsche Bank," and that "those actions should be attributed to his role as a principal of Potomac." AAB 34 n. 12. But

such actions would at best[9] give rise to a disloyalty claim against Singer, not an aiding and abetting claim against Potomac. *See RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 850 (Del. 2015) (affirming predicate fiduciary breach based on, *inter alia*, director's decision to act "without Board authorization").

Finally, after arguing for several pages that the trial court rightly found Potomac liable by attribution, Plaintiffs switch gears, arguing that the court "did not find knowing participation under a vague theory of *respondeat superior*" and instead based its holding on "the specific facts at hand." AAB 35. The undisputed facts, however, are that Potomac ran a successful proxy context and then did nothing after Singer joined the Board, which is precisely why the trial court resorted to finding that Singer's "actions can be attributed to Potomac." Op.120. Regardless of the nomenclature, holding a stockholder liable by attribution has no support in Delaware law.

[9] It cannot seriously be disputed that a director's discussions with the company's banker and a potential acquirer are squarely within the scope of a director's duties. In fact, Plaintiffs assert that Singer did these things in "his role as Special Committee Chairman." AAB 34. Moreover, Singer's interactions with Avago were expressly directed by the Special Committee (B1009; A276) and his communication with DB took place at the urging of the Chairman of the Board. B904.

V. THE TRIAL COURT ERRED IN CONCLUDING THE STOCKHOLDER VOTE WAS NOT FULLY INFORMED.

The evidence confirms that the Merger was ratified "by a fully-informed, uncoerced majority of the disinterested stockholders." *Corwin*, 125 A.3d at 305-6.

First, the Board was not required to disclose DB's "[p]reliminary" DCF analysis (A295), which was used solely as an "internal tool" while DB awaited the June Projections to be finalized, and which was "not relied upon … in [DB's] fairness opinion." *Micromet, Inc. Shareholders Litig.*, 2012 WL 681785, at *13 (Del. Ch. Feb. 29, 2012). Indeed, because this valuation was based on an inaccurate share count and inaccurate "SBC" (stock-based compensation) information (*compare* A295-96 *with* A374-75; *see* POB 67),[10] it constitutes precisely the type of information that Delaware courts have held *should not be disclosed* so as not to "confuse stockholders or inundate them with an overload of information." *Id.* Notably, the 14D-9 also did not include DB's other preliminary valuation – the management "sensitivity" case – which *supported* a price of $6.50/share. A296.

Second, the Board was not required to disclose events that did not happen. It thus had no obligation to disclose a "secret tip" that Singer did not receive; or price negotiations that did not occur. (*See* Point II, *supra*).

[10] Plaintiffs ignore this evidence and instead again blithely assert that DB's final valuation "inexplicably dropped." AAB 24.

Third, Plaintiffs do not defend the trial court's erroneous conclusion that the 14D-9 inaccurately stated that the June Projections were prepared "in the ordinary course of business." Op.125. In fact, the 14D-9 fully disclosed when and in what context the June Projections were prepared. A414-19; POB 66-68. Plaintiffs' remaining claims about the June Projections also fail. (*See* Point III(B)(2), *supra*).

Finally, Plaintiffs do not dispute that "[t]he preferred method for vindicating truly material disclosure claims is to bring them pre-close, at a time when the Court can insure an informed vote." *Nguyen v. Barrett*, 2016 WL 5404095, at *7 (Del. Ch. Sept. 28, 2016). Even in the case Plaintiffs cite, the court noted that the "preferred means to address serious disclosure claims" is to "seek to enjoin the Merger" rather than "press disclosure claims post-closing." *In re Saba Software, Inc. Stockholder Litig.,* 2017 WL 1201108, at *8 n. 36 (Del. Ch. Mar. 31, 2017). "Because of this interest, a salutary incentive could be provided by considering claims based on disclosure, pled but not pursued pre-close, to be waived." *Nguyen*, 2016 WL 5404095, at *7.

CONCLUSION

Potomac respectfully request that the Court grant Potomac's cross-appeal, reversing the trial court's findings on liability; and deny Plaintiffs' appeal, affirming the entry of judgment in favor of Potomac.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, the foregoing was caused to be served by File & Serve*Xpress* on the following attorneys of record:

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