EFiled: Apr 01 2024 03:13PM EDT
Filing ID 72557261
Case Number 484,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE MINDBODY, INC., STOCKHOLDER LITIGATION	No. 484, 2023 Court Below: Court of Chancery of the State of Delaware Consol. C.A. No. 2019-0442-KSJM

APPELLEES' ANSWERING BRIEF

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Dated: April 1, 2024

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NATURE OF PROCEEDING

This is an appeal from findings of liability and damages against a CEO and a buyer arising out of a *Revlon* transaction. The Chancellor found that Richard Stollmeyer, the former CEO of Mindbody, Inc. ("Mindbody"), breached his *Revlon* and disclosure duties, and determined that $1 per share was the appropriate amount of damages for both breaches. The Chancellor also found the buyer, Vista Equity Partners Management, LLC ("Vista"), jointly and severally liable with Stollmeyer for $1 per share for having aided and abetted Stollmeyer's disclosure breaches.

The law in this area is settled, and the findings of fact supporting the judgment are unchallenged. Perhaps for those reasons, Defendants-below Appellants Stollmeyer, Vista, and Mindbody ("Defendants") misrepresent the Chancellor's holdings on the first page of their opening brief ("DOB"), and misrepresent the relevant law.

According to Defendants, Stollmeyer's adjudicated wrongs were disclosure-related: "After trial, the Court of Chancery ruled that Mindbody CEO Richard Stollmeyer breached his fiduciary duties by (a) not informing the Board of details of various early meetings with Vista, his affinity for Vista, and his personal desire for liquidity; and (b) not disclosing these same facts to stockholders." (DOB 1.) Defendants then attack the materiality of the non-disclosures to the Board, as if that were a complete defense, given the Board's decision to sell Mindbody to Vista for

$36.50 per share. (DOB 3, 20-28.) According to Defendants, the Chancellor erred "by refusing to defer to the eight-member Mindbody Board." (DOB 3.)

The above characterizations feed into Defendants' lead legal argument that Plaintiffs failed "to rebut the presumption of the business judgment rule." (DOB 21.) Defendants prominently cite *City of Fort Myers General Employees' Pension Fund v. Haley*, 235 A.3d 702 (Del. 2020), even though *Haley* concerned a merger-of-equals, not a *Revlon* transaction. In *Haley*, the plaintiffs' task was to rebut the business judgment rule. That legal architecture has no bearing here.

Stollmeyer lacks a legal or factual basis to challenge on appeal the Chancellor's holdings that *Revlon* provides the appropriate lens through which to evaluate his misconduct or that he flouted his *Revlon* obligations. Stollmeyer urged the adoption of a *Revlon* framework: "Adopting Stollmeyer's approach, this decision finds that the conduct leading to the Merger fell outside of the range of reasonableness." Op. 84.

In *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015), this Court affirmed a holding that two members of a board of directors—the CEO and the Chairman—shared unexculpated common liability with a financial advisor for their respective roles in a sale process that did not comply with the board of directors' obligations under *Revlon*. In *Kahn v. Stern*, 183 A.3d 715, 2018 WL 1341719 (Del. Mar. 15, 2018) (ORDER), this Court reaffirmed that a single fiduciary may be held

liable for an unexculpated *Revlon* violation. The Chancellor discussed *Kahn v. Stern* when ruling in October 2020 on Stollmeyer's motion to dismiss, observing that a "plaintiff can state a *Revlon* claim by pleading that one conflicted fiduciary failed to provide material information to the board *or that the board failed to sufficiently oversee the conflicted fiduciary*." 10/2/20 Op. 34 (emphasis added); *see* Op. 86 (citing *Kahn v. Stern* and 10/2/20 Op.). Defendants ignore *RBC* and *Kahn v. Stern*.

Abundant fact-finding supports the Chancellor's conclusion that Plaintiffs proved that Stollmeyer was conflicted, disloyal, and insufficiently overseen by Mindbody's Board. "Stollmeyer wanted to sell for idiosyncratic reasons. He wanted to sell fast to a 'good home' sheltered from the pressures of being a public company. He wanted both near-term liquidity and a potential for post-closing upside. And Vista offered all of this. He said it best himself: He loved Vista, and they loved him." Op. 91-92. "Stollmeyer tilted the sale process by strategically driving down Mindbody's stock price and providing Vista with informational and timing advantages during the due-diligence and go-shop periods. And the Board failed to adequately oversee Stollmeyer." Op. 86-87. "Because [Stollmeyer] tilted the sale process in Vista's favor for personal reasons, the process did not achieve a result that falls within the range of reasonableness." Op. 4-5.

Stollmeyer and Vista lack any legal or factual basis to appeal the holdings that Stollmeyer, aided and abetted by Vista, breached his disclosure obligations.

Stollmeyer and Vista knew the underlying facts about their interactions and knew the significance of information omitted from the proxy. They each bore legal obligations respecting Mindbody's proxy materials. Yet, they chose to disclose a "false" and "sterilized" narrative about their interactions. Op. 100, 102.

The Chancellor's award of damages of $1 per share on a $36.50 per share transaction is supported by the record and the law, and is within the Chancellor's broad discretion to fashion appropriate relief.

Additionally, the Chancellor properly held that Stollmeyer and Vista waived their right to obtain judgment reduction under Delaware's Uniform Contribution Among Tortfeasors Act ("DUCATA"). Despite clear guidance from *RBC*, Stollmeyer and Vista chose not to provide notice before trial that an issue to be tried—on which Defendants would bear the burden of proof—was whether the two settling defendants bore common liability as joint tortfeasors. Defendants' choice was apparently tactical in nature. Plaintiffs cross-examined witnesses in reliance on Defendants' waiver of their rights under DUCATA.

SUMMARY OF ARGUMENT

1. Denied. The Chancellor properly applied the enhanced scrutiny of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), as reaffirmed by this Court in *RBC* and *Kahn v. Stern*, to the conduct of Stollmeyer and the Board during the sale process.

The Chancellor found abundant facts, unchallenged on appeal, about how Stollmeyer (i) was disloyally motivated by his personal circumstances and (ii) acted on his idiosyncratic interests by creating timing and informational advantages for Vista, unknown to the Board, which unreasonably left the Board confronted with a supposed "best and final" bid from Vista before other potential bidders had analyzed the information necessary to prepare a bid. The Chancellor's factual findings that Stollmeyer acted on his motivations to favor Vista are not appealable as an issue of law about what can constitute "a disabling conflict." (DOB 4.) And, "[g]iven the Board's lack of knowledge, Stollmeyer cannot rely on the Board's actions to support the reasonableness of the sale process or the ultimate outcome." Op. 97.

The Chancellor's finding that Mindbody's proxy statement materially misrepresented Stollmeyer's interactions with Vista comports with precedent about the materiality of undisclosed conflicts and facts suggesting the unreasonableness of a deal process.

2. Denied. The Chancellor's finding that Stollmeyer proximately caused damages of $1 per share is owed deference. That damages award is based on various facts, including Vista's timing and informational advantages when bidding, and that "[t]wo of Vista's most informed deal team members believed that the deal price was likely to be $37.50." Op. 114.

The Chancellor's award of $1 per share of disclosure damages is likewise owed deference and supported by factual findings and decisions of this Court. In *RBC*, which has not been overturned, this Court affirmed an award of class-wide damages for disclosure breaches. Nevertheless, the Chancellor felt constrained by recent precedent to award only nominal damages of $1 per share for the disclosure breaches, plus prejudgment interest. The Chancellor's reliance on record evidence in fashioning that award was consistent with *Weinberger* and other decisions awarding disclosure damages.

3. Denied. There is nothing "unprecedented" or "troubling" (DOB 6) about a finding of liability for aiding and abetting a disclosure breach against a buyer that used its contractual right to review proxy materials to engage in "scrubbing" of material, historical facts, resulting in the public disclosure of a "sterilized" and "false narrative." Op. 75-76, 100, 102. The Chancellor found that Vista knew the significance of the omitted information because Vista had "scrubbed the same incriminating information" from its official internal documents. Op. 107-08.

4. Denied. For apparent tactical reasons, Stollmeyer and Vista chose to forego the right to seek judgment reduction by choosing not to assert a pre-trial cross-claim against the settling defendants and not to state in their pre-trial brief or in the Pre-Trial Stipulation and Order that the common liability of the settling defendants was an issue to be tried. Plaintiffs tried the case in reliance on that tactical decision, and the Chancellor's finding of waiver comports with "fundamental fairness and the common sense notion that, to defend a claim or oppose a defense, the adverse party deserves sufficient notice of the claim or defense in the first instance." *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 6392906, at *2 (Del. Ch. Dec. 16, 2021).

STATEMENT OF FACTS ON LIABILITY AND DAMAGES

The Opinion is 119 pages. It makes abundant factual findings, as well as credibility findings, supported by copious citations to the voluminous trial record. Defendants' opening brief does not challenge any of the Chancellor's findings of historical fact. Indeed, Defendants' 9-page Statement of Facts (DOB 8-16) makes minimal reference to the Opinion. This answering brief, by contrast, recounts the Chancellor's factual findings bearing on liability and damages.

A. Stollmeyer is Confronted with Personal Peril and Opportunity

"The story begins in 2018, when Mindbody's visionary founder, Richard Stollmeyer, had grown frustrated with his inability to monetize his holdings of Mindbody stock, fearful of the volatility and fickleness of the public markets, and uncertain about his ability to lead Mindbody through its next stage of its growth. A sale of the Company would solve his problems, and Stollmeyer decided it was a good time to sell." Op. 1. "Plaintiffs proved that timing was an issue for Stollmeyer. In 2018, he needed liquidity, was tired of running a public company, and had a relatively limited window for effectuating a transaction." Op. 90.

"Plaintiffs proved at trial that, in 2018, Stollmeyer was subjectively motivated in large part by his need for liquidity." Op. 87 (citing, *e.g.*, B24; B336; B351). "Stollmeyer described his unhappiness with his pre-Merger financial situation in a post-Merger interview." Op. 9 (citing B342). "Stollmeyer described how '98% of

[his] net worth' was 'locked inside' Mindbody's 'extremely volatile' stock, while Stollmeyer could only sell 'tiny bits' of his stake in the public market under his 10b5-1 plan." Op. 9 (quoting B351). "Stollmeyer described those sales as 'kind of like sucking through a very small straw." *Id.* "Stollmeyer said it himself: He was tired. He was tired of 'sucking through a very small straw.' He was ready to sell." Op. 12.

"And 2018 seemed the time to do it. One reason was that Stollmeyer held shares of super-voting Class B stock that would automatically convert to shares of common stock in October 2021." *Id.* (citing A241 ¶70). "Another reason … was that Mindbody's largest stockholder—IVP—faced the same sunset provision and was looking to exit. If that happened, then the Board seat held by Liaw would likely transition to a representative from Luxor. Stollmeyer had spoken with both firms. He knew that IVP wanted a near-term sale, while Luxor did not. It behooved Stollmeyer to strike while his major ally also held a position of power." Op. 12 (citing A241 ¶70, A243 ¶77; A290). "Additionally, Stollmeyer was exhausted by the struggles that Mindbody faced during 2018." Op. 13. "Understandably, he wanted out." *Id.*

B. Stollmeyer Initiates the Process without Board Knowledge or Approval

"Stollmeyer set the sale process in motion largely without the involvement or knowledge of the Company's board of directors." Op. 1. "Although Defendants proved that the Board knew that Stollmeyer wanted to resign as CEO within two to

three years, the Board did not know that he wanted to sell the Company sooner or that IVP was in lockstep with Stollmeyer toward this goal. Stollmeyer did not disclose his need for liquidity to any Mindbody director at any time during the sale process. Neither Stollmeyer nor Liaw disclosed IVP's desire to exit. And Stollmeyer concealed many of his interactions with Vista from the Board." Op. 19-20.

"On September 4, 2018, Stollmeyer met with Saroya and another Vista representative, senior vice president Nicolas Stahl. Saroya and Stahl were the lead Vista representatives for the Mindbody deal." Op. 24 (citing A1342; B28). Stahl "prepared a contemporaneous summary of the meeting consistent with Vista's practices." Op. 24. It stated:

> We met with Rick Stollmeyer. Rick mentioned he would like to find a good home for his company. He is getting tired and expects to stay in his seat 2-3 more years. He has 2 folks (one from Booker acquisition) that he thinks could succeed him.

Id. (cleaned up) (quoting A1342). "The fact that Stollmeyer told Vista that he was looking for a 'good home' for Mindbody was a bad fact for Defendants." Op. 25. "So, at trial, Stollmeyer denied it." *Id.* Stollmeyer's testimony was "not credible." *Id.*

"After the September 4 meeting, Stollmeyer did not tell the Board that he had disclosed this information to Vista. Stollmeyer admitted that he did not provide this

information to any other potential acquirers in August, September, or October 2018." *Id.* (citing, *e.g.*, A356; A412-13).

C. Stollmeyer Attends the CXO and Falls in "Love" with Vista

"Stollmeyer accepted Saroya's invitation to attend the CXO Summit on October 9." Op. 28. At the CXO Summit, "Stollmeyer sent [Mindbody President Michael] Mansbach a series of screenshots, which Stollmeyer described as 'money shots,' from a presentation that [Vista President Brian] Sheth gave. Two of the screenshots focused on Vista's 2016 acquisition of Marketo for $1.8 billion and subsequent sale of Marketo in 2018 for $4.75 billion. At trial, Stollmeyer admitted that Marketo made an interesting parallel to Mindbody and that Marketo was 'purchased by Vista and then Vista sold them in a fairly short order . . . with a really strong return.' … Stollmeyer would later tell his financial advisor that, after a sale to Vista, 'he could make as much money over the next three years as he did the first go around.'" Op. 29 (citing A299-300; A414-15; B38-40; B341).

"Stahl set up a meeting between Stollmeyer and [Vista portfolio company CEO Reggie] Aggarwal. In a text to Aggarwal on October 9, Stahl explained that Stollmeyer wanted 'to know what it's like to sell to Vista as a founder.' Stahl's text [added] that Stollmeyer 'is hyper focused on maintaining culture and ensuring his business finds the right home that will accelerate growth, not cause it to falter.'" Op. 29-30 (quoting B41). "The Board was aware that Stollmeyer was attending the CXO

Summit, but Stollmeyer did not have Board authorization to tell Vista that he was focused on finding a home for Mindbody. Stollmeyer never told the Board that he had done so." Op. 30. "Stollmeyer conceded at trial that he did not have authorization to tell Vista in mid-October 2018 that he intended to explore a take-private for Mindbody." Op. 31 (citing A416).

"Stollmeyer became uniquely smitten with Vista before the formal sale process began." Op. 88. "Stollmeyer admitted at trial that he left the CXO Summit with the impression that Vista really loved him and he loved them. Vista felt the same[.]" Op. 30 (citing A415). "After the CXO Summit, Vista began drafting a memorandum about Mindbody for its Investment Committee …. The draft recounted Stollmeyer's attendance at the CXO Summit and noted that Stollmeyer 'mentioned to Nicolas how impressed he had been with [Vista founder] Robert [Smith] and Vista's vision, reiterating his intention to explore a take-private for Mindbody.'" Op. 31 (quoting B360).

"After the CXO Summit, Stollmeyer became laser focused on a sale to Vista." Op. 31. "Stollmeyer asked [Qatalyst's] Chang to provide references for Vista." *Id.* (citing B43). "Stollmeyer quickly came to believe that selling to Vista gave him the unique opportunity to both gain liquidity and remain as CEO in pursuit of post-acquisition equity-based upside." Op. 1. "After the Vista conference, Stollmeyer's

focus seemed to shift. He no longer was interested in just any sale of the Company. He wanted to sell to Vista. And Stollmeyer let Vista know what he wanted." Op. 2.

D. Vista Delivers an Expression of Interest That Stollmeyer Summarizes Only for His Management Team; Vista Begins to Act on its Head Start

"At least by October 11, Stollmeyer knew that Vista might attempt to move fast to gain a competitive advantage." Op. 93 (citing A418). Chang cautioned Stollmeyer not to allow Vista to get ahead "because it is at that juncture they will use their ability to move quickly to their advantage." Op. 31 (quoting A1349). "Rather than slowing Vista down, Stollmeyer helped Vista get ahead." Op. 93.

"On October 15, 2018, Saroya called Stollmeyer, and the two spoke for twenty-five minutes. During the call, Saroya delivered an oral expression of interest to acquire Mindbody. Saroya told Stollmeyer that Vista would pay a substantial premium to Mindbody's recent trading price, which closed at $33.27 on October 15. Stollmeyer understood that Vista saw Mindbody's recent stock correction as a buying opportunity." Op. 32 (citing A247 ¶¶97-98; A419).

On October 19, "Vista started requesting a market study—a third-party analysis of a particular market for an acquisition." Op. 34. "Vista retained Bain & Co. to conduct the study. A typical market study takes between two to five weeks to complete, so it was an advantage for Vista to request it before the Company launched its sale process. The study was expensive—the final price tag for the four-

week analysis was $960,000—so Vista would not have contracted for it without some confidence that Mindbody would be running a sale process." Op. 35 (citing A458; B223; B544).

"While Vista was revving up its internal process, Stollmeyer began dribbling out news about the expression of interest. Stollmeyer told his management team first. On October 17, 2018, Stollmeyer sent an email to [senior managers] Mansbach, White, and Lytikainen with the heading 'Highly Confidential – For Your Eyes and Ears Only. Do not forward or discuss outside this group without my permission[.]'" Op. 35 (citing A1348). Stollmeyer told his management team "that he believed that a private equity sale might be Mindbody's best option to achieve its long-term vision, but that a sale would not be an 'automatic 'exit'' for management." Op. 35-36 (quoting A1348).

"Stollmeyer did not adequately involve the Board or erect, much less adhere, to speed bumps to ensure a value-maximizing process. Rather, Vista-smitten Stollmeyer effectively greased the wheels for Vista by stalling the Board process." Op. 2.

"On October 19, before he had spoken with any Board member other than Liaw, Stollmeyer spoke for thirty-one minutes with Andre Durand, the founder and CEO of a company that sold to Vista." Op. 36-37. "Durand reported to Saroya that the conversation turned out to be a reference call for Vista." Op. 37 (citing B48).

"Stollmeyer did not tell the Board about his conversation with Durand." Op. 37 (citing A421).

"Stollmeyer waited until October 23—eight days after Vista's expression of interest—to begin contacting the remaining Board members." *Id.* (citing A425; A2033). "The directors' testimony … indicates that they did not know that Stollmeyer had already interacted with Vista on multiple occasions, had spoken with a portfolio company CEO about his experience selling to Vista, and had told Vista that he planned to step down in two to three years." Op. 38.

E. Mindbody's "Super Green" Board Belatedly Forms a Transaction Committee

"The Company's outside counsel described the Board as 'super green' and recommended thorough training regarding what a process would entail." Op. 19 (quoting B67). "Goodman was the lead independent director of Mindbody at the time of the sale process and the only director with experience selling a public company." Op. 16.

"At some point on or before October 26, Stollmeyer asked Liaw to serve as chair of the Transaction Committee, and Liaw agreed." Op. 38 (citing A425; A640). "Goodman testified that Liaw's role as chair was just 'assumed' at the October 26 board meeting. The Board did not know at that time that IVP was looking to exit and therefore did not discuss whether IVP's interest in selling would affect Liaw's ability to consider strategic alternatives independently." Op. 39.

F. Stollmeyer Strategically Drives Down Mindbody's Stock Price

"During late October and early November, the Company was preparing to release Q4 guidance. Investors watched the Company's guidance closely, and the stock price had a history of reacting to it." Op. 41. "On the morning of November 5, after digging into the forecast, Stollmeyer suggested guiding to $67–69 million." Op. 43 (citing B61). "The Audit Committee convened by phone the evening of November 5." Op. 44. "Stollmeyer and Liaw spoke immediately after the Audit Committee meeting for sixteen minutes." *Id.* (citing A665). "Stollmeyer led the November 6 earnings call during which Mindbody announced its Q3 revenue miss and issued Q4 guidance of $65–67 million." Op. 45. "After the earnings call, Mindbody stock fell 20%—from a November 6 close of $32.63 per share to a November 7 close of $26.18 per share." *Id.*

Liaw "knew that lowered guidance would make a sale more attractive. He and a colleague discussed that 'the PE [private equity] guys will drag it out if they think we will miss numbers.' Liaw later suggested to Goodman that lowering Q4 guidance would facilitate a sale, explaining that 'if we are missing [guidance] they will slow roll us. Hence good to guide down as far as we did." Op. 46 (quoting B6; B14). "In the end, the facts surrounding the Q4 guidance are murky." Op. 47. Stollmeyer "took Liaw's advice, but Plaintiffs failed to prove that Liaw's advice or Stollmeyer's

decision on this issue emanated from a malicious intent to cater to an acquirer." *Id.* n.265.

"After the [earnings] call, Saroya texted Stahl that 'Jeff [Chang is] all over it' and that '*[h]e wants 40 min.*'" Op. 48 (quoting B65). "The clear implication of this text is that the pronoun ('he') referred to Stollmeyer, and that Chang tipped Vista that Stollmeyer wanted a deal price of at least $40 per share." Op. 48-49. "Chang's pricing tip to Vista was a bad fact for Defendants" so "Defendants attempted to explain it away." Op. 49. The Chancellor rejected those efforts, finding that "[t]he text is clear. The text references a '40 min,' which was Stollmeyer's minimum." Op. 50.

G. The Transaction Committee Establishes Guidelines That Stollmeyer Violates to Favor Vista

"[T]he transaction committee established guidelines to cabin management's communications with potential bidders, but Stollmeyer ignored them and tipped Vista that a formal sale process was beginning." Op. 3; *see id.* 50-51 (citing B53). "Stollmeyer tipped Vista to the sales process on November 10." Op. 51. "On November 17, Saroya texted Stollmeyer about an invitation to a charity event in Miami. Stollmeyer replied, despite the prohibition in the Guidelines on outbound communications to potential acquirers, saying that it would be 'worth the trip' and asking if he could bring his wife." *Id.* (quoting B538-39). "Stollmeyer then asked Chang if he should attend…. Chang texted Stollmeyer, 'The more they

think or feel you're in their camp, the less $ they'll pay.' Stollmeyer was undaunted: 'On the other hand, I can show a little leg and get them frothing at the mouth to get me and MB in the portfolio.' Although Stollmeyer eventually declined the invitation, the communications speak volumes as to Stollmeyer's mindset at the time." Op. 51-52 (cleaned up) (quoting B66; B218).

"On November 14, 2018, the Transaction Committee convened to decide on hiring an investment banker." Op. 52. "Both Centerview and Qatalyst had provided advisory services to Mindbody in the past, and both were invited to pitch for the business." *Id.*

Centerview's presentation "showed the extent to which the downward changes in Mindbody's guidance negatively impacted the Company's stock price. According to Centerview, this 'Recent Noise' masked Mindbody's 'Strong Healthy Underlying Business.'" Op. 53 (citing B169; quoting B171). "Lytikainen's notes [of the Centerview presentation] suggest that Centerview saw no need for a near-term transaction and that for purposes of a sale, the 'time frame is two years.'" Op. 53-54 (quoting A1431). "The consensus view [of the Board] was that if Mindbody could weather a year or so of challenges, then the future was bright." Op. 18.

"Qatalyst's pitch emphasized its experience on deals with Vista." Op. 54 (citing B68). "Qatalyst envisioned a much quicker sale process and contemplated a closing as early as December 31 'if a party provides a pre-emptive bid that the Board

finds compelling and other parties indicate lower ranges of value.' That comment described Vista's preferred strategy." Op. 54 (quoting B109). Qatalyst advised the Board of the importance of slowing Vista down because otherwise Vista would use its ability to move fast "to truncate [the process] and reduce the ability for other potential acquirers to be able to complete diligence." (B115). "[T]he Transaction Committee authorized the Company to engage Qatalyst." Op. 54.

"Qatalyst planned to approach the strategic bidders beginning on November 19 and the financial sponsors beginning on November 30." Op. 56 (citing A1650). "Stollmeyer rejected one [strategic bidder identified by Qatalyst] because he didn't 'want to work for a payments company.'" Op. 55 (quoting B222). The Transaction Committee was not informed that Stollmeyer had done so, and Goodman testified that she would have wanted to know that. (A628-29.)

H. Vista's Deal Team Scrubs Its Presentation Materials and Receives Investment Committee Approval to Bid Up to $40 Per Share

"Qatalyst wanted to contact the strategic bidders first because they often moved slower than the financial sponsors." Op. 56 (citing B219). "But Vista already knew and was ready to sprint." Op. 56. "Vista received Bain's final market study on December 13, 2018, two days before other financial sponsors gained access to Mindbody's data room. [Vista's] Klomhaus testified that the Bain study gave Vista 'more conviction that we knew more about the market than we otherwise would have.' Another Vista deal team member later wrote, '[w]e were able to conduct all

of our outside-in work before the process launched allowing us to gain conviction early that this is a must own business.'" Op. 57 (citing A459-60; B264; B325).

"The drafting of the Investment Committee materials corroborate that Vista knew in advance about the sale process." Op. 58. "An early draft contained a lengthy description of Vista's interactions with Stollmeyer," including that at the September meeting, "Rick mentioned that he would like to find a good home for his Company and expects to stay as the CEO for 2-3 more years" and that at the CXO, "Rick mentioned to Nicolas how impressed he has been with Robert and Vista's vision, reiterating his intention to explore a take-private for Mindbody." Op. 58-59 (quoting B360).

On December 14, "The Investment Committee approved a bidding range that went up to $40 per share." Op. 61.

I. Vista Capitalizes on its Timing Advantage

On December 17, "[a]fter processing the information from the data room, Saroya texted Sheth that 'our key finding is that if we fix the go to market engine we can accelerate growth meaningfully' and that 'we will be lined up to preempt after you and I discuss.'" Op. 62 (quoting B317). Vista had not only analyzed Mindbody's data room, it had met with Mindbody's sales team. Op. 62. "On December 18, 2018, three days after the data room opened, Vista submitted an offer to acquire the Company for $35 per share." Op. 63.

"The remaining potential bidders were much further behind in their diligence than Vista." Op. 63-64. A Qatalyst employee emailed Chang on December 19 that Thoma Bravo was "much further behind in their thinking… Level of questions is much more basic so far." Op. 64 (quoting B320). "Another bidder, Recruit, was also still early in diligence. Recruit's impression from the management presentation was that Stollmeyer seemed 'checked out.' Stollmeyer told Centerview that he was uncomfortable with Recruit because he did not want to work with a Japanese company, as they required a translator." Op. 64 (citing A300).

"Mindbody's Board convened on December 20 to discuss Vista's initial offer with Qatalyst. During the meeting, the Board authorized Qatalyst to make a counteroffer of $40 per share." Op. 65. "On December 20, Vista bumped to $36.50 per share. Vista described its bid as its 'best and final' offer, but the evidence shows that Vista could and would gone higher if it had been pressured to do so." *Id.* "Internal Vista communications show that Vista was prepared to increase its bid to $37.50 per share, and the most senior person on the deal team predicted that the bidding would end at that price." Op. 6; *see id.* 59-61, 63. "Vista's modeling demonstrates that a deal at that price remained profitable for Vista." Op. 6; *see id.* 57-58; 59-60, 65.

"At this point, the Transaction Committee seemed to discontinue meeting, and the full Board convened to discuss Vista's $36.50 per share bid on December 21.

Without other bidders, the Board had to decide whether or not to take Vista's bid of $36.50." Op. 66 (citing A1498). "On December 21, the Board directed management to accept the bid and negotiate a merger agreement." Op. 67 (citing A1498-99).

"Without competitive pressure, the Company had no leverage to extract a higher price. Vista ended up paying $36.50 per share, less than the midpoint of their range and below the predictions of the most knowledgeable deal-team members. Without Stollmeyer's help, Vista would not have gotten the Company for $36.50 per share." Op. 95. "The evidence demonstrates that Vista would have paid $37.50 had Stollmeyer not corrupted the process." Op. 114.

"Immediately after announcement, Stollmeyer texted his financial advisor: 'Vista's in love with me (and me with them). No retirement in my headlights.'" Op. 67 (quoting B323).

J. The Inutile Go Shop and Misleading Proxy

"The Merger Agreement authorized a 30-day go-shop," which commenced on Christmas Eve. Op. 68. "On January 6, halfway through the go-shop process, Stollmeyer went on vacation to Costa Rica. He instructed management in an email to decline go-shop presentations in his absence, '[u]nless it's urgent.' Stollmeyer was signaling his lack of interest in a competing offer." Op. 69 (quoting B410).

"The Merger Agreement granted Vista rights and obligations related to the preliminary proxy, the definitive proxy, and any subsequent supplemental

disclosures[.]" Op. 69. "The preliminary proxy omitted any references to Stollmeyer's meeting with [Vista] in [September], Stollmeyer's attendance at the CXO Summit in October, or Vista's expression of interest on October 15. Nevertheless, Stahl replied that the description 'makes sense to me,' and Saroya replied, 'This works.'" Op. 70 (quoting B331). The definitive proxy also omitted those facts. Op. 71-72.

"On January 4, 2019, Mindbody determined preliminarily that its Q4 revenue had come in around $68.3 million. Stollmeyer texted White that day, '$68.3M Q4. Awesome!' He advised his management team that this figure reflected … a 'massive beat against the Street's $66 million consensus midpoint.'" Op. 72 (quoting B326-27). "On January 6, Stollmeyer texted White again about the Q4 results: 'One question: should we plan one last Earnings Call? My script: 'here's our big beat. Adios muthaf******s.''" Op. 72 (quoting B330).

"On January 11, Luxor filed a Schedule 13D stating that the proposed Merger Agreement 'significantly undervalues' Mindbody. On January 14, [Luxor's] Friedman spoke to Stollmeyer and asked him why Mindbody had guided down for Q4. Stollmeyer responded that he had 'kitchen-sinked' the guidance." Op. 71 (quoting A302).

"On January 24, after Mindbody filed the definitive proxy, White emailed the Audit Committee to convey his belief that Mindbody should disclose the preliminary

Q4 results. White noted that Q4 revenue 'exceeded consensus pretty meaningfully' and that the information should be publicly released by February 7 'so the shareholders have the information before they vote' on February 14. Liaw agreed but expressed concern that Luxor 'may use this information to bolster their position[.]' Smith also expressed concern about the effect of the disclosure on the Merger vote: 'What happens (hypothetically) if the vote fails on Feb. 14th? Just want to understand that first.' By asking about the effect on the vote, they demonstrated that they thought the information could be important for the vote." Op. 72-73 (quoting B334).

"This is another issue on which Stollmeyer changed his testimony at trial. He had acknowledged in his deposition that [Mindbody's Q4 results] would be material to an investor, but he maintained at trial that the [Q4] information would not be material to a stockholder voting on the Merger." Op. 74.

"To moot the federal suits and aspects of the Section 225 Action, Mindbody issued supplemental disclosures[.]" Op. 75. "Vista's outside counsel said they were 'scrubbing one more time.'" Op. 75-76 (quoting B338).

"The Proxy Materials create a false narrative in which Stollmeyer met casually with Vista on September 4 and October 9, Vista expressed general interest in a transaction on October 15, and then Vista learned of the formal sale process with other potential acquirers on November 30." Op. 102. "Stollmeyer knowingly

withheld information from the stockholders by painting his interactions with Vista in a sterile light." Op. 100. "Vista participated in the drafting of the Proxy Materials." Op. 110. "Vista knew that the Proxy Materials omitted the pre-process disclosures." Op. 107. "Vista knew the significance of the information that was omitted the Proxy Materials," but never attempted to cause their disclosure. Op. 70-71, 107.

On February 14, 2019, Mindbody stockholders approved the Merger based on the false and misleading proxy materials. Op. 76.

ARGUMENT

I. THE CHANCELLOR PROPERLY HELD THAT STOLLMEYER COMMITTED UNEXCULPATED BREACHES OF FIDUCIARY DUTY

A. Question Presented

Did the Chancellor err as a matter of law in holding that Stollmeyer's conduct—which is conceded on appeal to have (i) provided Vista informational and timing advantages over other potential bidders, (ii) been motivated by his personal needs and circumstances, and (iii) been hidden from the Board and public stockholders—breached his *Revlon* and disclosure duties and is not exculpated? Op. 82-102.

B. Scope of Review

This Court's review of the Court of Chancery's application of enhanced scrutiny or the duty of disclosure presents a mixed question of law and fact, with the deferential "clearly erroneous" standard applying to findings of historical fact and legal conclusions reviewed *de novo*. *RBC*, 129 A.3d at 849; *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996).

C. Merits of Argument

1. The *Revlon* Claim

Stollmeyer's lead argument on appeal ignores the fact-finding and holdings below respecting the *Revlon* claim, ignores *Revlon* case law, and ignores the two

occasions when this Court has explicated the bases for holding an individual fiduciary liable in damages for a *Revlon* violation. Defendants' lead argument (*see* DOB 20-21, 24) is drawn from a non-*Revlon* case in which the "business judgment rule presumptively applie[d] because Towers' stockholders exchanged their shares in one widely-held public company for shares in another widely-held public company." *Haley*, 235 A.3d at 717.

Two decisions by this Court frame the legal standard for a finding of unexculpated liability under *Revlon*. In *RBC*, this Court affirmed a finding of common liability for two directors—CEO Richard DiMino and Special Committee Chair Christopher Shackelton—under *Revlon*. 129 A.3d at 870-71. Each of them had "personal circumstances that inclined them towards a near-term sale," *id.* at 826, the special committee "engaged in a flawed and conflict-ridden sale process," *id.* at 854, and the entire board "breached their fiduciary duties by engaging in conduct that fell outside the range of reasonableness," *id.* at 857.

In *Kahn v. Stern*, this Court reaffirmed that pleading a post-closing *Revlon* claim for damages does not require pleading facts "suggesting that a majority of the board committed a non-exculpated breach of its fiduciary duties." 2018 WL 1341719, at *1. Individual conflicted directors may be liable in damages for a *Revlon* breach, with the remainder of the board exculpated, if the independent board members did not receive "critical information from conflicted fiduciaries" or "did

not oversee conflicted members sufficiently." *Id.* at *1 n.4. "[T]he paradigmatic context for a good *Revlon* claim ... is when a supine board under the sway of an overweening CEO bent on a certain direction, tilts the sales process for reasons inimical to the stockholders' desire for the best price." *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1002 (Del. Ch. 2005), *quoted in Kahn v. Stern*, at *1 n.4.

The Chancellor faithfully applied *Kahn v. Stern*, finding that "Plaintiffs proved that this case fits the paradigm." Op. 86. Over a span of ten pages, the Chancellor collected a wealth of factual findings supporting the following conclusions:

- "Plaintiffs proved at trial that, in 2018, Stollmeyer was subjectively motivated in large part by his need for liquidity." Op. 87.
- "Plaintiffs further proved that Stollmeyer became uniquely smitten with Vista before the formal sale process began." Op. 88.
- "Plaintiffs proved that timing was an issue for Stollmeyer." Op. 90.
- "Plaintiffs proved that Stollmeyer created advantages for Vista in the sale process." Op. 92.
- "The Mindbody Board did not know about the conflicts that infected the sale process. Not surprisingly, the Board did not manage them effectively…. Stollmeyer's actions deprived the Board of the

information needed to employ a reasonable decision-making process." Op. 96-97.

The ultimate consequence of Stollmeyer's breach is that Vista was able to present a winning bid at a lower price than was reasonably available. "Without competitive pressure, the Company had no leverage to extract a higher price." Op. 95. "Without Stollmeyer's help, Vista would not have gotten the Company for $36.50 per share." *Id.* These findings establish unexculpated *Revlon* liability under *RBC* and *Kahn v. Stern*.

Defendants do not challenge the Chancellor's factual findings. Instead, they argue that the Court "ignor[ed] the Board's efforts to ensure it would obtain the highest possible price." (DOB 23.) Defendants point to basic facts about the sale process, such as: (i) Qatalyst reached out to fifteen potential buyers; (ii) seven parties received data room access on December 15; (iii) only Recruit and H&F remained in the process at the time of Vista's opening bid on December 18; and (iv) the go-shop. (DOB 12-15, 23, 27-28.) These facts do not undermine the Chancellor's findings or establish compliance with *Revlon* as a matter of law.

The Chancellor thoroughly discussed the facts about how no other potential bidder was tipped in advance about the sale process or was ready to bid on Vista's timeline. Op. 63-64, 66, 94-95. For example, when the Board considered Vista's $35 bid on December 18, they were told that "Recruit remained in the process but

did not seem likely to produce an indication of value, concrete proposal or a timeline that would be competitive with Vista[.]" (A1462.) When Qatalyst reached out to H&F on December 21, the day after Vista's bid of $36.50, H&F advised that they "are processing, need 2 more weeks to sign." Op. 94 n.563 (quoting A1577). Vista bragged internally that it was "able to conduct all of our outside-in work before the process launched," allowing Vista to preempt the process by providing "the MINDBODY Board with a highly certain offer within 3 days of receiving data room access." Op. 95 (quoting B325).

The 30-day go-shop contemplated a termination fee of $28.584 million (approximately 1.5% of Mindbody's implied equity value) if the merger agreement was terminated by January 22, 2019, and a termination fee of $57.168 million (approximately 3% of Mindbody's implied equity value) if the merger agreement was terminated thereafter. (A1657.) A potential competing bidder would need to contemplate out-bidding Vista, despite Vista having the right to see any topping bid and match it (A1768), and paying the termination fee (likely $57 million, since a bidding contest could not be expected to conclude by January 22). (A911-12.) The fact that Recruit declined on January 3 to participate in the go-shop, saying it is "too expensive" (A1613), does not mean that Recruit would have declined to submit a competitive bid as part of reasonable sale process (*i.e.*, one in which Stollmeyer had not conferred informational and timing advantages on Vista and had not conveyed

to Recruit that he was "checked out" (Op. 64)). The fact that any other prospective acquiror declined to participate proves, at most, that they determined Mindbody was not worth the termination fee plus topping any amount above the deal price that Vista may pay.

Defendants argue that "the Board went far beyond what the law requires" because the Board "could have engaged exclusively with Vista in October following the expression of interest." (DOB 27.) If the Board determined that was the value-maximizing path, perhaps that would be correct. The problem for Defendants, however, is that the Board determined that an auction would maximize value, but Stollmeyer's undisclosed conflicts and undisclosed conversations with Vista prevented the Board from structuring an auction that created a realistic opportunity for other prospective acquirors:

> We agree with the trial court's suggestion that the reasonableness of initiating a sale process to run in tandem with the EMS auction, absent conflicts of interest, would be one of the many debatable choices that fiduciaries and their advisors must make and it would fall within the range of reasonableness. But where undisclosed conflicts of interest exist, such decisions must be viewed more skeptically.

RBC, 129 A.3d at 854–55 (cleaned up).

Defendants recycle the argument that "Stollmeyer suffered no conflict." (DOB 28.) Defendants characterize their argument as legal in nature. They cite cases to support the following contentions:

- "it was error to conclude that such commonplace incentives created a disabling conflict" (DOB 28);
- "a generalized desire for liquidity poses no disabling conflict" (DOB 29);
- "Stollmeyer's substantial holdings of Mindbody stock aligned his interests with all stockholders" (DOB 30);
- the Chancellor "erred in concluding nonetheless that Stollmeyer's belief he would receive post-merger employment and stock options rendered him conflicted" (DOB 31).

Defendants misconceive the question on appeal. The proper inquiry is whether record evidence supports the Chancellor's fact-finding about Stollmeyer's motivations or whether that fact-finding was clearly erroneous. *See RBC*, 129 A.3d at 828. Defendants make no effort to challenge the Chancellor's fact-finding about how "Stollmeyer wanted to sell for idiosyncratic reasons" or how "[h]e said it best himself: He loved Vista, and they loved him." Op. 91-92.

Additionally, there is no legally prescribed list or metric of what constitutes a disabling conflict. In the oft-quoted words of Chancellor Allen:

> Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or, as is here alleged, shame or pride. Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation. But if he were to be shown to have done so, how can the protection of the business judgment rule be available to him?

In re RJR Nabisco, Inc. S'holders Litig., 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989). Plaintiffs established at trial that Stollmeyer placed his idiosyncratic interests ahead of the interests of Mindbody's stockholders.

2. The Disclosure Claim

The Chancellor found that Stollmeyer "knowingly withheld information from the stockholders by painting his interactions with Vista in a sterile light." Op. 100. The Chancellor further concluded that the proxy materials "create a false narrative in which Stollmeyer met casually with Vista on September 4 and October 9, Vista expressed general interest in a transaction on October 15, and then Vista learned of the formal sale process with other potential acquirers on November 30. This is not an 'accurate, full, and fair characterization' of those events." Op. 102 (quoting *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994)).

Defendants argue that the disclosure claim fails as a matter of law. (DOB 32.) The premise of the argument is that Mindbody stockholders would not care if the $36.50 was the product of a sale process in which Stollmeyer gave Vista a head start and no other bidder had time to put together a competing bid. According to Defendants, Vista's head start "had no bearing on the deal price." (DOB 34.) But the Chancellor found expressly to the contrary: "Without Stollmeyer's help, Vista would not have gotten the Company for $36.50 per share." Op. 95. As discussed below in Argument III, *infra*, the Chancellor concluded that a sale process free of

conflict and reasonably calculated to generate reliable price discovery would likely have yielded a deal price of $37.50. Disclosures going to CEO conflicts or the unreasonableness of a deal process that yielded a lower price are material. *See Morrison v. Berry*, 191 A.3d 268, 283-84 (Del. 2018) ("We believe a reasonable stockholder likely would find such information important because it would have helped the stockholder to reach a materially more accurate assessment of the probative value of the sale process."); *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114 (Del. Ch. 2007) ("[A] reasonable stockholder would want to know an important economic motivation of the negotiator singularly employed by a board to obtain the best price for the stockholders….").

II. THE CHANCELLOR PROPERLY HELD THAT VISTA KNOWINGLY PARTICIPATED IN STOLLMEYER'S BREACH OF HIS DISCLOSURE DUTIES

A. Question Presented

Did the Chancellor err as a matter of law in holding that Vista knowingly participated in Stollmeyer's unexculpated breach of his duty of disclosure, given: (i) Vista's knowledge of the underlying, undisclosed facts; (ii) Vista's knowledge of the significance of the undisclosed facts; (iii) Vista having contractually obligated itself to notify Mindbody of omissions that rendered the proxy materials materially misleading; and (iv) Vista having reviewed and approved proxy materials that presented a "sterilized" and "false" narrative of Vista's interactions with Stollmeyer? Op. 100, 102, 106-10.

B. Scope of Review

For a claim of aiding and abetting, this Court reviews the Court of Chancery's conclusions of law *de novo and* affords the Court of Chancery's factual findings a high level of deference. *RBC*, 129 A.3d at 861. "[T]he question of whether a defendant acted with *scienter* is a factual determination." *Id.* at 862.

C. Merits of Argument

Defendants argue that there is "no claim for aiding and abetting based solely on a buyer's failure to correct the seller's proxy statement." (DOB 46.) No case so holds.

The Chancellor followed settled law that the "knowing participation" element of aiding and abetting liability "requires that the secondary actor have provided substantial assistance to the primary violator." Op. 109 (citations omitted). In *RBC*, this Court observed that the required element of *scienter* "was satisfied by the unusual facts proven at trial and which have not been seriously challenged on appeal." 129 A.3d at 865-66. The same is true here.

The merger agreement prohibited the filing of a "false or misleading" proxy statement, it prohibited Mindbody from filing a proxy statement "without first providing [Vista] and its counsel a reasonable opportunity to review and comment thereon," and it required Mindbody to "give due consideration to all reasonable additions, deletions, or changes suggested thereto by [Vista] or its counsel." (A1771 § 6.3(b), *quoted in* Op. 109.) The merger agreement also obligated Vista to "promptly notify" Mindbody upon discovery of any information that needs to be disclosed so that the proxy materials are not materially misleading. (A1772 § 6.3(d); Op. 109.) In short, Vista was obliged "to correct any material omissions in the Proxy Materials." Op. 109.

Vista knew the undisclosed facts identified by the Chancellor respecting its interactions with Stollmeyer. Op. 100-02, 107. Members of the Vista deal team reviewed and approved the preliminary and definitive proxy statements. Op. 109-10. As for the supplemental disclosures, "Vista's outside counsel said they were

'scrubbing one more time.'" Op. 75-76 (quoting B338). Additionally, "Vista knew the significance of the information that was omitted from the Proxy Materials" because "Vista scrubbed the same incriminating information from the Investment Committee materials." Op. 107-08. "Vista hid these details precisely because they did not reflect well on them. This all sheds light on Vista's knowledge." Op. 108.

Vista is not an innocent bystander. Vista benefited from Stollmeyer's tips, and then actively concealed the underlying facts respecting the content and timing of its interactions with Stollmeyer, despite bearing a contractual obligation to take actions so that the proxy materials were not materially misleading. Vista could have avoided liability by providing Mindbody's counsel "in writing with specific disclosures about those meetings or communications." *In re Columbia Pipeline Group, Merger Litig.*, 299 A.3d 393, 488 (Del. Ch. 2023). Having chosen not to verify whether Mindbody's board and counsel knew the actual facts about Stollmeyer's interactions with Vista, Vista is ill-positioned to argue that its liability will require future buyers "to second-guess the business judgment of a target company board, advised by counsel, regarding what should and should not be disclosed." (DOB 46.)

III. THE CHANCELLOR PROPERLY EXERCISED HER DISCRETION IN AWARDING DAMAGES OF $1 PER SHARE PLUS PREJUDGMENT INTEREST FOR THE *REVLON* BREACH AND THE DISCLOSURE BREACH

A. Question Presented

Did the Chancellor's award of damages of $1 per share plus prejudgment interest (i) have a sufficient evidentiary basis in the trial record for a determination that Stollmeyer's *Revlon* breach proximately caused damages; (ii) have a sufficient evidentiary basis in the trial record as an award of nominal damages of $1 per share for the disclosure breach; and (iii) comport with case law stating that prejudgment interest may only be awarded if the damages award is calculable? Op. 110-18.

B. Scope of Review

"On appeal, this Court reviews the issue of proximate cause for clear error, as the question is ordinarily a question of fact to be determined by the trier of fact." *RBC*, 129 A.3d at 864 (internal quotation omitted). This Court "review[s] findings as to damages by the Court of Chancery for an abuse of discretion. The Court of Chancery has the power to grant such relief as the facts of a particular case may dictate." *Id.* at 866 (cleaned up). This Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy—in this case the damages—to be awarded for a found violation of the duty of loyalty by a corporate fiduciary." *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000). "The Court of

Chancery has broad equitable authority to award pre-judgment interest[.]" *Manti Holdings, LLC v. Authentix Acq. Co., Inc.*, 261 A.3d 1199, 1228 (Del. 2021).

C. Merits of Argument

"To establish proximate cause, a plaintiff must show that the result would not have occurred but for the defendant's action." *RBC*, 129 A.3d at 864 (internal quotation omitted). "[T]he injured party need not establish the amount of damages with precise certainty where the wrong has been proven and injury established." *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1131 (Del. 2015) (internal quotation omitted). "[O]nce a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer." *Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 1993), *aff'd in pertinent part, rev'd in part on other grounds*, 676 A.2d 436 (Del. 1996). "Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly.... The strict imposition of penalties under Delaware law are designed to discourage disloyalty." *Bomarko*, 766 A.2d at 441 (internal quotation omitted).

1. The Record Supports Proximate Causation of $1 Per Share in Damages for Stollmeyer's *Revlon* Breach

Defendants describe as "sheer conjecture" the Chancellor's finding that "Vista would have paid $37.50 had Stollmeyer not corrupted the process." (DOB 37.) Defendants assert that the Chancellor "simply assumes" that Mindbody would have

countered Vista's bid of $36.50 "but for the breaches" (DOB 37), and they argue that "there is no evidence to support the idea that Vista would have offered more but for the breaches." (DOB 39.)

Defendants' assertions ignore the basic reality that if Stollmeyer had not secretly granted informational and timing advantages to Vista, the entire sale process would have unfolded differently. The Board could have overseen a sale process that proceeded at a slower, even-handed pace in which Vista faced real-time bidding competition from strategic buyers and other financial sponsors. The Chancellor properly based her damages analysis on the hypothetical, alternative scenario in which "Mindbody had been able to introduce competition." Op. 113. Due to Stollmeyer's disloyal conduct, Vista did not face "competitive pressure," and "the Company had no leverage to extract a higher price." Op. 95. The Chancellor properly found that, absent Stollmeyer's breaches, Vista likely would have faced (or perceived that it faced) real-time price competition from other bidders, which likely would have provided Mindbody with the negotiating leverage to extract a higher price.

In *RBC*, this Court affirmed a finding of proximate causation of damages in an amount 24% above the deal price for aiding and abetting a *Revlon* violation (and a disclosure violation) based on similar findings that the flawed manner and timing of a sale process prevented competing bids from emerging:

> The Court of Chancery … determined that ***RBC's faulty sale process design prevented the emergence of the type of competitive dynamic among multiple bidders that is necessary for reliable price discovery***.... If RBC had not run the Rural process in parallel with the EMS process, other private equity players with large funds equal to that of Warburg could have participated, forcing up the price. Similarly, ***the competitive dynamic was inhibited*** by the fact that potential strategic bidders for Rural were themselves tied up in change of change of control transactions at the time the Company was exploring a sale.
>
> …
>
> The record reflects that the Court of Chancery properly exercised its broad discretionary powers in fashioning a remedy and making its award of damages.

RBC, 129 A.3d at 868 (cleaned up) (footnotes omitted). Stollmeyer's self-interested freelancing with Vista similarly impeded a "competitive dynamic" and "reliable price discovery." The only difference between this case and *RBC* is that the Chancellor found proximate causation of a different (and lesser) measure of damages. Stollmeyer's disloyal conduct impeded price competition, which prevented the Board from securing an incrementally higher bid from Vista.

A sufficient evidentiary basis exists for the Chancellor's finding that Vista would have been willing to bid $37.50 if Mindbody's Board had overseen a reasonable sale process untainted by Stollmeyer's disloyal favoritism of Vista. Vista's Investment Committee "approved a bidding range that went up to $40 per share." Op. 61. On December 18, after completing substantially all due diligence, Vista bid $35. Op. 60. On the evening of December 19, Saroya texted: "37.5 is a good guess …" Op. 61 (quoting A1456). Stahl responded: "I thought so too."

Op. 61 (quoting A1458). But Vista then received "privileged access to what was happening in the deal process" and stopped at $36.50 per share. Op. 64. On December 21, when confronted with the question whether to accept Vista's December 20 bid of $36.50, the Board knew that the only other bidder in the process at that time needed "2 more weeks to sign" up a transaction, but had "no path to $40." Op. 66. Liaw wrote that he "personally thought Vista would get up to $38." Op. 66 (quoting B322). The Chancellor did not abuse her broad discretionary powers in concluding that the bidding "likely" would have ended at $37.50 "had Stollmeyer not corrupted the process." Op. 114. That holding was consistent with Stollmeyer's, Chang's, and Vista's real-time expectations that allowing Vista to get ahead would impact the price. Op. 31-33; A418.

Defendants are simply wrong in asserting that the award of $1 per share in damages—whether characterized as a "lost transaction price" or a "fairer price" within a range of fairness (Op. 112)—absent a finding of "egregious misconduct or clear causation," entails the Chancellor implementing her "own belief for how the Board should have acted." (DOB 40.) The damages award is a standard measure of *Revlon* damages,[1] and an appropriate exercise of discretion, grounded in the record, that logically and reasonably follows from the liability finding that Stollmeyer disloyally corrupted a sales process for his own benefit.

[1] *See Columbia Pipeline*, 299 A.3d at 481 & n.39 (collecting cases).

2. The Record Supports Damages of $1 Per Share for the Misleading Proxy Materials

In *RBC*, this Court affirmed the award of class-wide damages against RBC on a claim of aiding and abetting a board's breach of its duty of disclosure. *RBC*, 129 A.3d at 870-71.

Five years later, this Court answered a certified question of law in a federal case concerning a $500,000 capital contribution by the sole outside investor in an investment fund that was worthless at the time of the litigation. In addressing the certified question, this Court lacked the input of counsel steeped in M&A litigation practice or the benefit of a Court of Chancery opinion on the question. Without citing *RBC*, this Court issued an opinion stating that compensatory damages for the non-existent duty of disclosure claim would require proof of reliance and causation. *Dohmen v. Goodman*, 234 A.3d 1161, 1175 (Del. 2020). Nonetheless, *Dohmen* discussed approvingly *In re Tri-Star Pictures, Inc., Litigation*, 634 A.2d 319 (Del. 1993), which endorsed the availability of compensatory class-wide damages for a disclosure breach. *Id.* at 334 n.18, *discussed in Dohmen*, 234 A.3d at 1172.

Below, the Chancellor followed the dicta in *Dohmen*, rather than the holding in *RBC*, and held that class-wide disclosure damages were unavailable against either Stollmeyer or Vista in the absence of proof of class-wide reliance and causation. Op. 114. The Chancellor held that Plaintiffs were "only entitled to nominal damages." *Id.* The Chancellor followed *Weinberger v. UOP, Inc.*, 1985 WL 11546 (Del. Ch.

Jan. 30, 1985), *aff'd*, 497 A.2d 792 (Del. 1985), and awarded nominal damages of $1 per share, noting that "there is ample evidence to support the $1-per-share award" and that a deal price increased by that amount (2.7%) "would not have rendered the deal undesirable for Vista, nor would it represent a windfall to the class." Op. 116 & n.652.[2]

In a subsequent opinion on the form of Order, the Chancellor expressed agreement with the analysis of disclosure damages expressed by Vice Chancellor Laster in *Columbia Pipeline*. Nov. Op. 22-24. Vice Chancellor Laster examined various precedents and concluded that they collectively establish a rebuttable presumption of class-wide reliance where, as here, the disclosure document distributed in connection with a request for stockholder action contains a material misstatement or omission. 299 A.3d at 492. Such a rule would be consistent with this Court's holding in *RBC* and the *Corwin* doctrine. "Stockholder approval based on full disclosure only warrants [cleansing] if the stockholders have considered the disclosures, relied on them, and made a judgment to approve the transaction based

[2] *See also Oliver v. Bos. Univ.*, 2006 WL 1064169, at *35 (Del. Ch. Apr. 14, 2006) ("Nominal damages of $1.00 per share have been awarded in certain circumstances in which a rational basis can be found in the record for the award."); *Smith v. Shell Petroleum, Inc.*, 1990 WL 186446, at *5 (Del. Ch. Nov. 26, 1990) (awarding disclosure damages based on record evidence despite lack of "clearly discernible financial injury"), *aff'd*, 606 A.2d 112, 117 (Del. 1992) (award fell within trial court's "broad discretion").

on those disclosures." *Id.* at 493. "For *Corwin* to operate, both reliance and causation must be presumed." *Id.*

Defendants argue that the $1 per share nominal damages award for the disclosure breach is a "blatant end-run around the reliance, causation, and damages requirements" of *Dohmen*. (DOB 43.) Defendants' argument assumes that the dicta in *Dohmen* is binding law respecting the supposed unavailability of class-wide compensatory damages for a disclosure violation, and it further assumes that *RBC*, *Tri-Star*, and *Columbia Pipeline* must be ignored, as must the precedent supporting nominal damages of $1 per share.

For present purposes, it is sufficient that the Chancellor did not abuse her discretion in finding a rational basis in the record to follow *Weinberger* and award damages of $1 per share. The process-based disclosures created a materially "false narrative" about Stollmeyer's direct and indirect interactions with Vista. Op. 102. Had stockholders voted down the acquisition, it is reasonable to conclude that Vista likely would have been willing to increase the merger consideration by $1 per share, the same magnitude as the impact of Stollmeyer's *Revlon* breaches. In a similar circumstance in which ISS recommended against a deal, Vista increased its offer by 11%. (B357.) This much smaller redistribution of the "merger consideration surplus retained due to wrongdoing" is "the compensatory and disgorgement nature of *Weinberger* damages." Nov. Op. 25.

3. Prejudgment Interest on Disclosure Damages Is Proper

Defendants acknowledge that prejudgment interest "is available as a matter of right where the damages are of a pecuniary nature and are capable of calculation prior to judgment." (DOB 44 (quoting *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403 (Del. 1988).) According to Defendants, nominal damages of $1 per share for breach of the duty disclosure "were not calculable before judgment." (DOB 44.)

In cases cited by Defendants, Delaware courts rejected as overbroad the argument that prejudgment interest is awarded only when damages are quantifiable prior to judgment: "[I]t is undeniable that the value of the injury is calculable. Simply because the precise amount of the damage was not ultimately fixed until the award was rendered, does not diminish its pecuniary nature." *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 487 (Del. 2011) (quoting *Janas v. Biedrzycki*, 2000 WL 33114354, at *5 (Del. Super. Oct. 26, 2000)). *Brandywine Smyrna* involved consequential damages for breach of contract; *Janas* involved fraudulent concealment of termite damage; *TWA* involved a controlling stockholder's breach of fiduciary duty that delayed delivery of a fleet of jets. Defendants nowhere explain why an award of nominal damages of $1 per share is less "calculable" than an award of $1 per share of *Revlon* damages, or less calculable

than the damages awards in the cases they cite. Logically, the reverse would seem true.

Below, Defendants relied on a wrongful death case, *Kunstek v. Alpha-X Corp.*, 1986 WL 5875 (Del. Super. May 15, 1986). (A1244-45; A1280-81; Nov. Op. 22.) The Chancellor explained at length why the "antiquated reasoning on which *Kunstek* rests" is inconsistent with the modern rationale for prejudgment interest (*i.e.*, as a "form of compensation") and how disclosure damages can be justified as a division of the merger surplus representing "a relatively small percentage of the equity value of each share." Nov. Op. 23-24. The Chancellor did not abuse her discretion in awarding prejudgment interest on the award of disclosure damages.

IV. THE CHANCELLOR PROPERLY HELD THAT STOLLMEYER AND VISTA, BY THEIR PRE-TRIAL SILENCE, WAIVED THE RIGHT TO ESTABLISH POST-TRIAL THAT THE SETTLING DEFENDANTS WERE JOINT TORTFEASORS

A. Question Presented

Was the Chancellor correct in holding that Defendants waived the right to obtain judgment reduction under DUCATA by not putting Plaintiffs on notice before trial that an issue to be decided post-trial was whether the settling defendants bore common liability as joint tortfeasors? A223; Nov. Op. 6-13.

B. Scope of Review

Review of the equitable defense of waiver, the intentional relinquishment of a known right, presents a mixed question of fact and law. *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014) ("A trial court's application of equitable defenses presents a mixed question of law and fact.").

C. Merits of Argument

The question on appeal is whether a party potentially liable in damages waives its right to seek judgment reduction under DUCATA by not stating in a pre-trial stipulation and order (or in any other pre-trial filing such as a pleading or a pre-trial brief) that judgment reduction under DUCATA is a potential issue to be adjudicated. The Chancellor followed the "general rule" that "a party waives any argument it fails properly to raise"—a rule that "shows deference to fundamental fairness and the common sense notion that, to defend a claim or oppose a defense, the adverse party

deserves sufficient notice of the claim or defense in the first instance." *SIGA*, 2011 WL 6392906, at *2. *See also Advanced Fluid Sys., Inc. v. Huber*, 958 F.3d 168, 186-87 (3d Cir. 2020) ("In belatedly raising the issue [of set off under Pennsylvania's analogue to DUCATA] for the first time after trial and judgment, Appellants, without justification, unreasonably deprived AFS of a fair opportunity to address it at trial or any time prior thereto."); *Jung v. El Tinieblo Int'l, Inc.*, 2022 WL 16557663, at *9 (Del. Ch. Oct. 31, 2022) ("Waiver is fundamentally an issue of fairness: the belated presentation of an argument can deprive the opposing party of notice and the opportunity to respond."); *W. Am. Ins. Co. v. Bogush*, 2006 WL 1064069, at *3 n.13 (Del. Super. Apr. 12, 2006) ("We have … pretrial stipulations … for a reason: to avoid 'trial by ambush' and to promote the interests of fairness and justice for the benefit of the parties and the Court."). Defendants cite no case for the proposition that a party's failure to identify in a pre-trial stipulation and order an issue to be adjudicated on which it bears the burden of proof lacks legal significance.

RBC created a road map for how a non-settling defendant can avoid waiving DUCATA rights. This Court affirmed the Court of Chancery in finding no waiver as to non-settling defendant RBC. The plaintiff argued waiver because RBC had not "assert[ed] at trial that the Settling Defendants were joint tortfeasors." *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 244 (Del. Ch. 2014). However,

RBC had "filed a cross-claim against the settling defendants, who remained parties to the action for purposes of trial after the agreements in principle were reached." *RBC*, 129 A.3d at 871 (internal quotation omitted). Additionally, RBC had stated in the Pre-Trial Stipulation and Order that its entitlement to contribution was an issue to be tried, and that RBC sought a determination of relative fault among persons liable for damages if it was held liable for damages. (B874-75.) In other words, RBC put the plaintiff on notice pre-trial that it was preserving the argument under DUCATA that if RBC was determined to be a tortfeasor, RBC would argue that the judgment against it should be reduced if any settling defendant was determined to bear common liability as a joint tortfeasor. The plaintiff therefore had the opportunity to develop a defense to RBC's claim for settlement credit.

Stollmeyer and Vista were identically situated with RBC. In both cases, all other defendants settled shortly before trial, and in both cases those settlements were pending during trial. Yet, there is no dispute that, as the Chancellor observed, Stollmeyer and Vista chose not to take any of the "relatively ministerial" "minimal steps" pre-trial that RBC took. Nov. Op. 10, 13.

There is also no dispute that for Stollmeyer or Vista to obtain judgment reduction under DUCATA, they each bore the burden of proof by a preponderance of the evidence, based on the factual findings in any post-trial opinion, that settling defendants Liaw and IVP were, in fact, joint tortfeasors. 10 *Del. C.* §§ 6304(a), (b);

RBC, 129 A.3d at 871; *Rural/Metro*, 102 A.3d at 245. Judgment reduction under DUCATA turns on joint tortfeasor status, 10 *Del. C.* § 6302(a), and Liaw and IVP did not admit liability in their settlement agreement, B579-80.

Defendants are coy about why, upon learning about Plaintiffs' pre-trial settlement with Liaw/IVP, Defendants chose to remain silent about judgment reduction while moving expeditiously for permission to present at trial the expert retained by Liaw/IVP. (B914; B922-23; B944.) The apparent reason was to bolster Mindbody's defense in its indemnification dispute with Liaw that Liaw faced no real risk of liability and overpaid to settle Plaintiffs' claims against him. As the Chancellor noted when approving the Liaw/IVP settlement: "Mindbody and Vista refused to indemnify Liaw for funding as part of this settlement, at least." (B756.) Defendants' apparent tactical gambit was to vigorously defend the conduct of Liaw/IVP at trial, risk waiver of Defendants' rights under DUCATA, and, in the event that they lost at trial, see if Plaintiffs elicited testimony that might establish the common liability of Liaw/IVP, which Defendants might later use in support of a belated argument under DUCATA.

When eliciting testimony at trial, however, Plaintiffs had reason to believe that Defendants, through their pre-trial conduct, had chosen to waive their rights under DUCATA in favor of bolstering Mindbody's indemnification defense against Liaw. Had Stollmeyer and Vista raised a potential offset under DUCATA as an

issue to be tried, Plaintiffs could have planned their cross examinations to take that into account. Instead, Plaintiffs tried the case based on Defendants' decision to forego a potential offset by aggressively cross-examining Liaw, Stollmeyer and their expert about Liaw's conflict and his role in the sale process and the non-disclosures. The Chancellor's reasoning respecting Plaintiffs' unpleaded claim against Vista for aiding and abetting Stollmeyer's sale process violations applies equally against Stollmeyer and Vista respecting judgment reduction: "Allowing an amendment at this stage would impose substantial prejudice on [Plaintiffs]. Neither party raised the claim in their pre-trial briefs. [Plaintiffs] had no reason to mount a defense to the claim at trial." Op. 105.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court affirm the Chancellor's Final Order and Judgment.

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DATED: April 1, 2024