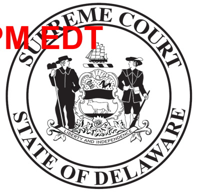
EFiled: Apr 16 2024 01:24PM EDT
Filing ID 72755032
Case Number 484,2023



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

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Dated: April 16, 2024

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SUMMARY OF ARGUMENT

Plaintiffs' answering brief ("AB") requests an upheaval of Delaware law, whereby approval by an unconflicted board is meaningless; plaintiffs can be awarded damages unconnected to any breach; arm's-length buyers must police the seller's disclosures; and defendants waive their setoff rights by not raising them pretrial, even though the settlement agreement expressly provided for setoff, the settlement was only approved after trial, and DUCATA does not require defendants to act earlier. This Court should reject Plaintiffs' radical arguments.

1. The supermajority-unconflicted Board unanimously approved the transaction, and Plaintiffs err in arguing that this approval should be treated as meaningless. Defendants explained that Stollmeyer's purported breach can support a claim, despite full Board approval, only if the Board lacked material information. Plaintiffs assert that this principle does not apply in the *Revlon* context, but the cases Plaintiffs cite only confirm that there must be material non-disclosures or a "supine" board that "materially contributed" to the breach, *Kahn v. Stern*, 2018 WL 1341719, at *1 & n.4 (Del. Mar. 15, 2018), or (similarly) that the *entire board* breached its duty of care while being "not 'well-informed' as to [the company's] value," *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 856-57 (Del. 2015)—and there is no finding or plausible argument that the Board acted as such here. As to the non-disclosures, Plaintiffs do not even attempt to argue they were material to the Board,

and that point is dispositive here: because the full Board approved the transaction with all material information, the court should have deferred to the Board's judgment. In any event, Stollmeyer was not conflicted. Even accepting the Court of Chancery's factual findings, those facts—Stollmeyer's desire for liquidity but no immediate need for cash, and Stollmeyer's affinity for Vista but no promise of future employment—do not constitute a disabling conflict as a matter of law.

Plaintiffs' claims also fail under *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015). Plaintiffs argue the stockholders lacked material information, but they fail to explain why further detail of interactions disclosed in the proxy would be important to a reasonable stockholder's vote—as opposed to the price and the fact that a "no" vote would scuttle the only potential deal when the market was worsening for Mindbody.

2. Plaintiffs do not even attempt to defend the Court of Chancery's reasoning for its $1 per share award for the purported sale-process breaches. The court speculated that, but for the breaches, the Board would have countered Vista's best-and-final offer of $36.50 and Vista then would have raised its offer to $37.50. Both assumptions are totally unsupported. Rather than defend the court's speculative theory, Plaintiffs propose a competing speculative theory that, but for the breaches, *other* potential buyers would have created more competition. However, Plaintiffs cite nothing to suggest anyone other than Vista would offer $36.50 (let alone more)

under any circumstances. Rather, all the evidence shows that other potential bidders would not reach that price. Regardless, the court correctly found that Vista *believed* when bidding that it did face competition. Thus, Plaintiffs' theory, which the court did not adopt and their own expert did not put forward, has no support in the record.

Plaintiffs barely defend the court's $1 per share "nominal" damages award for the disclosure breaches. They briefly mention *Weinberger v. UOP, Inc.*, 1985 WL 11546 (Del. Ch. Jan. 30, 1985), *aff'd*, 497 A.2d 792 (Del. 1985) (TABLE), while ignoring that *Weinberger* did not say its damages award was nominal and that this Court expressly limited *Weinberger*'s holding to one for compensatory damages. Nor do Plaintiffs respond to Defendants' simple point that the $35 million-plus award here is not "nominal" in any sense of that word. Instead, Plaintiffs argue that causation is not required at all, asking this Court to overturn *Dohmen v. Goodman*, 234 A.3d 1161 (Del. 2020). But *Dohmen*'s holding was based on decades of precedent and fundamental principles of law, whereby a plaintiff should be compensated for damages caused by a breach, not provided an arbitrary sum of tens of millions of dollars.

3. Plaintiffs fail to identify any precedent supporting aiding and abetting liability for disclosure breaches for an arm's-length buyer like Vista. Plaintiffs rely on *RBC*, which concerns liability for a financial advisor that intentionally misled the board, and even there the court emphasized the narrowness of its holding. It would

be a troubling change in Delaware law to require arm's-length buyers to micromanage sellers' disclosures, forcing them to second-guess the judgment of management and outside counsel on materiality. In any event, Plaintiffs fail to identify any supposed non-disclosure that Vista knew or should have known needed to be disclosed.

4. Plaintiffs also fail to justify the court's ruling that Defendants waived their statutory right to setoff despite the settlement agreement and Bar Order expressly providing for setoff. Plaintiffs again rely on *RBC*, where this Court found no waiver. And while Plaintiffs focus on supposed prejudice, they do not say they actually believed Defendants would not seek setoff, as the settlement expressly provided otherwise. In short, there is no basis to invent a new and draconian waiver rule to give Plaintiffs a windfall whereby they receive more than the damages awarded.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN REFUSING TO DEFER TO THE BOARD AND IN RULING THAT STOLLMEYER BREACHED HIS FIDUCIARY DUTY

Plaintiffs correctly recognize that only "findings of historical fact" receive deference under the clear-error standard. AB26. The ultimate questions of whether Stollmeyer was conflicted, non-disclosures were material, and there was a breach present "mixed question[s] of law and fact." *Id.*; *see also* OB19. Plaintiffs attempt to conflate these two standards by stating that Defendants "do not challenge the Chancellor's factual findings." AB29; *see also* AB32, AB36. While Defendants largely accept the court's findings of *historical* fact—*i.e.*, what meetings occurred, what was said, etc.—Defendants challenge the court's *conclusions* therefrom regarding whether there was a conflict, a material non-disclosure, and a breach. These conclusions concern "mixed questions of fact and law that are subject to de novo review," *Brody v. Zaucha*, 697 A.2d 749, 753 (Del. 1997), and they are legally unsupportable.

A. The Sale-Process Claim Fails As A Matter Of Law

1. Plaintiffs' attempt to disregard the Board's unanimous approval is legally erroneous.

Plaintiffs wrongly treat the supermajority-unconflicted Board's approval of the transaction as irrelevant. As Defendants explained (OB20-21), where the claims "focus on the conduct of a single director, … in order to rebut the presumption of

the business judgment rule, Plaintiffs must" show: "(i) the director was materially self-interested in the transaction, (ii) the director failed to disclose his interest in the transaction to the board, and (iii) a reasonable board member would have regarded the existence of the director's material interest as a significant fact in the evaluation of the proposed transaction." *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 717 (Del. 2020) (cleaned up).

Plaintiffs summarily dismiss *Haley* as a non-*Revlon* case, AB27, but this misunderstands the role of *Revlon*. "'[S]o-called *Revlon* duties do[] not change the showing of culpability a plaintiff must make' …. When assessing personal liability, a court must determine whether the fiduciary breached either the duty of loyalty, including its subsidiary element of good faith, or the duty of care." *Firefighters' Pension Sys. of City of Kan. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 253 (Del. Ch. 2021) (quoting *McMillan v. Intercargo Corp.*, 768 A.2d 492, 502 (Del. Ch. 2000)). Thus, even in the *Revlon* context, there must be the same showing of culpability, and there is no such showing if (as *Haley* explains) the Board was unconflicted, knew all material information, and approved the transaction. Indeed, there is no plausible rationale for overriding the Board's unconflicted and informed business judgment, simply because it is a change-of-control transaction.

Plaintiffs rely on *RBC*, AB27, 32, but *RBC* upheld a finding that a *board as a whole* breached its duty of care by failing to oversee a financial advisor that

orchestrated a transaction designed to provide economic benefits to the advisor, not to the company. *RBC*, 129 A.3d at 857. Here, there is no finding (or even allegation) that the board as a whole breached its duty of care. Moreover, the board in *RBC* was "operating on the basis of an informational vacuum" whereby it was "not 'well-informed' as to [the company's] value." *Id*. at 856. Here, in contrast, the supposed non-disclosures—details of meetings that the Board members uniformly testified were inconsequential—cannot remotely be characterized as an "informational vacuum" and had nothing to do with Mindbody's value. *See infra* Part I.A.2.

Plaintiffs' reliance on *Kahn* fares no better. According to Plaintiffs, there can be a breach based on a single director's conduct "if the independent board members did not receive 'critical information from conflicted fiduciaries'" or "'did not oversee conflicted members sufficiently.'" AB27-28 (quoting *Kahn*, 2018 WL 1341719, at *1 n.4). Regarding the first category, Plaintiffs cannot show the undisclosed information was "critical" (or material). *See infra* Part I.A.2. Regarding the second, *Kahn* did not suggest any supposed lack of oversight sufficed. Rather, *Kahn* said "there are also cases where impartial board members did not oversee conflicted members sufficiently," where the board was "'torpid, if not supine'" such that "'the board materially contributed to the unprincipled conduct of those upon whom it looked with a blind eye'" and where "'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.'" *Kahn*, 2018 WL 1341719, at *1 n.4 (quoting *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989) and *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1002 (Del. Ch. 2005)).

The Court of Chancery did not find Mindbody's Board was "supine" or turned a "blind eye," let alone that it "materially contributed" to any breach, nor do Plaintiffs argue that the *Board's conduct* falls within this category. AB27-28. Nor could they make such an argument, as the Board established a transaction committee that did not include Stollmeyer, conducted an extensive auction process with undisputedly qualified financial and legal advisors, and then negotiated the terms of the transaction with Vista with the full board approving each counteroffer. OB11-16.

Thus, Plaintiffs' argument boils down to the idea that any supposed imperfection in the sale process establishes a lack of oversight that renders Board approval meaningless. However, nothing in *RBC*, *Kahn*, or any other case supports this proposition. And Plaintiffs ignore the mountain of case law—in the *Revlon* context—refuting it. OB21-23. *Revlon* concerned a board "prevent[ing] market forces from surfacing the highest bid"; it does not permit second-guessing the board and awarding damages where "there is no apparent reason why the board would not be receptive to a transaction that was better for stockholders." *C&J Energy Servs.,*

Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1070 (Del. 2014). For instance, in *In re Lear Corp. Shareholder Litigation*, 926 A.2d 94 (Del. Ch. 2007), the court found no viable sale-process claim given board approval even where the CEO, who "had powerful interests to agree to a price and terms suboptimal for public investors," conducted single-bidder negotiations by himself in a manner that "deprived" the Special Committee "of important deliberative and tactical time," because a "less-than-ideal approach to the price negotiations" does not suffice "to demonstrate a *Revlon* breach." *Id.* at 117-18; *see also C&J*, 107 A.3d at 1067-68 (single-bidder process reasonable "so long as interested bidders have a fair opportunity" to bid). Indeed, Plaintiffs concede the Board "'could have engaged exclusively with Vista … [i]f the Board determined that was the value-maximizing path." AB31 (quoting OB27). Here, *a fortiori*, there is no claim under *Revlon* where the engaged Board pursued a sales process with outreach to over a dozen potential buyers and unquestionably pursued the highest price.

In any event, the only supposed lack of oversight the court found here was based on Stollmeyer's purported non-disclosures to the Board of granular details of his interactions with Vista. Op. 96-97. Because there is no plausible claim of a "supine" Board that "materially contributed" to any breach, *Mills*, 559 A.2d at 1280, there is a valid claim *only* if "a reasonable board member would have regarded" those non-disclosures "as a significant fact in the evaluation of the proposed

transaction." *Haley*, 235 A.3d at 717. As discussed below, Plaintiffs cannot (and do not even try to) satisfy this test.

2. Plaintiffs do not argue that any of the undisclosed information was material to the Board.

As Defendants explained, there was no material non-disclosure to the Board. OB24-28. Plaintiffs do not contest this point, nor do they mention the test, whereby a board is sufficiently informed, "[e]ven if the board was not aware of every 'blow by blow,'" where "the record suggests that the board was informed about the transaction they would eventually vote to approve, especially the final terms of the deal." *C&J*, 107 A.3d at 1060-61. Nor do they mention the substantial evidence of immateriality, including *all* of the testifying Board members stating that the non-disclosures were irrelevant to their decision-making process and explaining why: the non-disclosures were completely disconnected from whether the Board should accept Vista's best-and-final offer or counter again and risk scuttling the deal. OB26-27. That is dispositive. Because there was no material non-disclosure to the Board, and Plaintiffs do not argue otherwise, the Board's approval of the transaction is afforded the deference of the business judgment rule and any supposed pre-transaction breaches by Stollmeyer are not actionable.

3. Plaintiffs fail to identify any basis for treating Stollmeyer as conflicted.

Furthermore, as an independent basis for reversal, Stollmeyer suffered no legally cognizable conflict. OB28-32. Plaintiffs argue that "[t]he proper inquiry is whether record evidence supports the Chancellor's fact-finding about Stollmeyer's motivations," in particular that "'Stollmeyer wanted to sell for idiosyncratic reasons'" and "'[h]e loved Vista, and they loved him.'" AB32 (quoting Op. 91-92). But even taking these findings as true, there is a further *legal* inquiry whether these findings constitute a disabling conflict.

As a matter of law, they do not, and as a matter of simple logic, there is no reason to believe Stollmeyer was incentivized to do anything other than seek the highest price given his substantial holdings of Mindbody stock (worth $2.6 million for each $1 per share in transaction price).

First, Stollmeyer's purported desire for liquidity creates a disabling conflict only if there is an "*immediate* need for cash." *McMullin v. Beran*, 765 A.2d 910, 922 (Del. 2000) (emphasis added); *see* OB29 (citing cases). Plaintiffs do not present an argument on this point. And the undisputed facts disprove any immediate need for cash, as Stollmeyer's cash earnings (approximately $8.5 million in 2018 and $10 million in 2017) dwarfed his expenses. OB29-30. In fact, the entire theory is nonsensical because far from rushing to close at any price, Stollmeyer *opposed*

taking Vista's last offer because he wanted to hold out for more money until the Board counseled him down. OB30.

Second, the court relied on Stollmeyer's belief he would receive post-merger employment and stock options, but that creates a disabling conflict only where there was an actual employment offer with better terms than those currently in place or the executive's job was in jeopardy. OB30-31. Neither was true here. OB30. Once again, Plaintiffs ignore this legal principle and the undisputed facts, and make no argument as to why this constituted a conflict. Similarly, Plaintiffs provide no argument as to how Stollmeyer's general affinity for Vista constituted a conflict. Plaintiffs cite a case stating that "hatred, lust, envy, revenge, or, as is here alleged, shame or pride" can create a conflict. *In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989). But the court there did not conclude an allegation of shame or pride (or any other emotion) sufficed, but rather looked at whether the conduct actually exhibited bad faith and found it did not. *Id.* at *19. If the mere fact that an executive liked (or disliked) a potential buyer constituted a conflict, even in the absence of any side deal or promises, then virtually every executive would be conflicted. That is not and should not be the law of Delaware.

Finally, Plaintiffs' other arguments fail. Plaintiffs rely on the leak of a "'$40 min' price," AB17, but Plaintiffs ignore that this leak came from Qatalyst, not Stollmeyer, Op. 96. Nor do Plaintiffs attempt to explain how this leak affected the

outcome, other than perhaps encouraging a *higher* bid. OB32. Plaintiffs also suggest that Stollmeyer strategically drove down Mindbody's stock price by lowering Q4 guidance, AB16-17, but the court correctly rejected this theory, Op. 47 n.265.

B. The Disclosure Claim Fails As A Matter Of Law

Plaintiffs do not dispute that, under *Corwin*, there is no liability if the proxy gave stockholders sufficient information when they overwhelmingly approved the transaction. "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985).

Plaintiffs do not identify any particular omission that would satisfy this test, but instead refer broadly to Stollmeyer's interactions with Vista. AB33. However, Plaintiffs fail to explain how the *details* of these disclosed interactions would affect a reasonable stockholder's vote. If a stockholder knew Stollmeyer liked Vista or gave Vista early notice of the sales process, it would not significantly alter the total mix of information relevant to stockholders' decision: whether Mindbody could get a higher price or should forego a deal altogether. As Mindbody disclosed, the price was fair and provided a substantial premium, there were no other options even after outreach to over a dozen potential buyers, the unconflicted Board negotiated at arm's length, and there was a go-shop period if others needed more time. OB33-35. Given

these facts and serious questions about Mindbody's future prospects, a "no" vote would have been economically irrational, regardless of Stollmeyer's interactions with Vista. *Id*.

Plaintiffs' only response is that Vista's supposed head start might have affected the deal price. AB33. This theory is wrong for the reasons explained *infra* at 15-17. But even putting that aside, this theory is irrelevant to the question at issue here: Is there a "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote"? *Rosenblatt*, 493 A.2d at 944. Even if a stockholder knew about the non-disclosures, there were no other bidders and thus no reasonable prospect that a "no" vote would produce a higher price. Indeed, the court did *not* find a "no" vote would have led Vista to bid more or induced others to bid. The court's damages rationale was solely that the Board could have countered a second time. OB37-40. This rationale says nothing about why, once the Board's negotiations were complete and landed where they did, stockholders with full knowledge would have voted "no" to the best and only option.

Plaintiffs also fail to address the cases establishing that these meeting details are immaterial as a matter of law. *See* OB34-35. Plaintiffs cite *Morrison v. Berry*, 191 A.3d 268 (Del. 2018), but there the undisclosed information included the founder's *agreement* to work with and roll over equity with only Apollo, "effectively ruling out other" potential buyers. *Id.* at 284-86. Plaintiffs also cite *Lear*, but there

the seller's CEO had an undisclosed economic incentive—a worry about his unvested retirement benefits disappearing upon a potential bankruptcy—that were "powerful interests to agree to a price and terms suboptimal for public investors." 926 A.2d at 117. Here, in contrast, the non-disclosures did not concern an agreement or an economic incentive for the Board or Stollmeyer not to maximize the deal price. They were therefore immaterial to stockholders' approval of the transaction.

II. THE COURT OF CHANCERY ERRED IN ITS DAMAGES AWARD

A. Plaintiffs Abandon The Court's Theory Of Damages For The Sale-Process Breaches, And Their New Theory Lacks Any Evidentiary Support

Plaintiffs recognize there must be a causal link between the supposed sales-process breaches and the damages award. OB36; AB39. Plaintiffs abandon the Court of Chancery's "fairer price" analysis, instead insisting that the "damages award is a standard measure of *Revlon* damages," *i.e.*, damages from loss of a higher price that would have been achieved but for the breach. AB42.

Plaintiffs do not attempt to defend the causal link that the court posited. According to the court, but for the breaches, the Board could have countered a second time after Vista bid $36.50, and Vista then would have moved to $37.50. Op. 114. There is no evidence to support either of these assumptions. OB37-40. And it is contrary to the Board members' own testimony (which the court did not mention) that additional disclosures would have been irrelevant to them. Plaintiffs not only ignore this testimony, but they fail even to argue that the Board would have negotiated differently but for the supposed breaches.

Plaintiffs also fail to defend the court's reliance on a Post-it note by Vista employees (none on the Investment Committee), which was the *only* evidence the court cited for the idea that Vista would have bid $37.50 had the Board countered a second time. Plaintiffs note that two Vista employees said $37.50 was a "good guess"

on December 19, AB41, but do not explain how a "guess," made *before* Vista submitted its best-and-final offer on December 20, can become dispositive evidence of what Vista would have done if the Board refused that offer. Nor do Plaintiffs respond to the fact that Vista had never gone above its best-and-final offer in the previous nine years. OB39.

In short, Plaintiffs abandon any argument for either of the two assumptions the court relied on for its causation theory, making their request for deference to the court's reasoning illusory. Plaintiffs propose a competing theory, equally speculative, whereby other bidders would have emerged to drive up the price if the process had been different. AB40-41. But the court did not adopt and the evidence does not remotely support such a theory.

First, Plaintiffs wrongly suggest that the court adopted its theory. According to Plaintiffs, "[t]he 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." AB40. But no such finding exists. To the contrary, the court found that Vista believed it was part of a competitive auction: "At trial, Defendants stressed that when the [Vista] Investment Committee met, Vista still believed that it faced competition for Mindbody. That was true." Op. 57. Thus, even if Stollmeyer had told the Board everything or gave other interested

parties more time, it would not have mattered because Vista believed it was competing with other potential bidders and its response to that perceived competition was to make a $36.50 best-and-final offer. Indeed, the only supposedly "privileged access," AB42, was that "Vista had expected to learn after 3:00 p.m. Pacific Time that day whether Thoma Bravo had submitted a bid," Op. 64, *i.e.*, *after* Vista had submitted its own best-and-final offer. Regardless, Vista did not in fact learn that day whether Thoma Bravo had submitted a competing bid. A2045 at G675-76.

Plaintiffs also suggest that the court "properly based [its] damages analysis on the hypothetical, alternative scenario in which 'Mindbody had been able to introduce competition.'" AB40 (quoting Op. 113). But the court said no such thing. It said: "If Mindbody had been able to introduce competition, then Vista might have stretched to reach $40 per share, but Vista also could have declined to go that high." Op. 113.

Second, there is no finding that other bidders would have emerged because there is no evidence that any buyer was willing to bid more than $36.50 (or even close to it) under any circumstances. Not one of the dozen-plus potential buyers in the pre-signing auction submitted a bid; many were uninterested from the start, and others dropped out after receiving presentations and access to the data room. OB11-15. Plaintiffs suggest that H&F (who they falsely claim was a "bidder") might have submitted a competing bid if given "2 more weeks." AB42 (quoting Op. 66).

However, Plaintiffs ignore the undisputed evidence that H&F had been in contact with Mindbody for years and expressed general interest in an acquisition to Stollmeyer after a meeting in November 2018. OB 9, 12-14. After Vista made its initial bid, H&F told Qatalyst that it could only potentially bid in the range of "$30-35." OB14 (quoting A1577). This was later corroborated by internal H&F documents, which confirm that H&F was "tapped out in the low 30s." OB14 (quoting A1577, A1572). Simply put, no additional amount of time would have changed the fact that H&F would not compete on price. H&F remained free to bid above $36.50 during the go-shop, but never did. Nor did the dozens of other parties who were solicited post-signing. The only other potential bidder Plaintiffs mention is Recruit, AB30, but Recruit never bid because it deemed $36.50 "too expensive" and "quite good for the [Mindbody] shareholders." OB14; A1613; A1608. In sum, there is not a scintilla of evidence that any party other than Vista, with any amount of time, would have bid $36.50 or more.

Plaintiffs argue that the go-shop was insufficient because of the termination fee. AB30. But the termination fee was only 1.5% for the first 30 days and 3% thereafter. *See In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *4 n.52 (Del. Ch. Apr. 11, 2011) (a "break-up fee, at 4.4%" is acceptable). While Plaintiffs suggest that 30 days was not enough, there is no finding or evidence to support that

suggestion, and Plaintiffs themselves rely on the idea that H&F needed only two more weeks. AB42.

Finally, Plaintiffs again rely on *RBC* and again its facts and reasoning are not remotely on point. In *RBC*, the court calculated "in great detail" the fair value of the company, based on a discounted cash flow valuation, and compared that calculation to the deal price. 129 A.3d at 867-68. Here, there was no analysis of fair value, and the court expressly disclaimed any such determination. Nov. Op. 19. Unlike in *RBC*, its determination of fair price was based entirely on a hypothetical negotiation—which, as discussed above, was so unsupported that Plaintiffs do not defend it.

B. Plaintiffs Err In Arguing That Causation Is Not Required For Damages From The Disclosure Breaches

Plaintiffs largely abandon the Court of Chancery's theory of nominal damages for awarding $1 per share for the supposed disclosure breaches. As Defendants explained, nominal damages are allowed only for trivial amounts, not the award of over $35 million here, or else they would become an improper means of awarding any amount even in the absence of causation. OB41-43. Plaintiffs cite *Weinberger*, but they ignore that *Weinberger* did not say its award was "nominal"; rather, it awarded "compensation," 1985 WL 11546, at *10, and was expressly limited to this holding, *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 476 (Del. 1992).

Given the total lack of support for a nominal damages award of over $35 million, Plaintiffs raise two arguments the Court of Chancery did not adopt. AB43-45. Both are baseless.

First, Plaintiffs argue that this Court erred in holding in *Dohmen v. Goodman*, 234 A.3d 1161, 1175 (Del. 2020) that "an investor who proves a breach of the fiduciary duty of disclosure must prove reliance, causation, and damages." *See* AB43. According to Plaintiffs, *Dohmen* was the product of bad lawyering. AB43. In fact, it was the product of this Court's careful review of its "precedent—from *Tri-Star* and *Loudon* through *Malone* and *J.P. Morgan Chase*," which establish that "the per se damages rule does not apply to damages other than nominal damages." 234 A.3d at 1174-75. Plaintiffs call this "dicta," AB43, but it was this Court's holding, as it was the exact legal basis for answering the certified question. *Id.* at 1175. Plaintiffs' reliance on *RBC* is again misplaced, as the Court did not reject a causation requirement, but instead found causation. *See RBC*, 129 A.3d at 865. Thus, Plaintiffs present no basis to discard this Court's holding in *Dohmen*, based on decades of precedent and the fundamental principle that plaintiffs should not be able to recover a random amount of damages untethered to a breach.

Second, Plaintiffs suggest that the supposed disclosure breaches might have caused $1 per share in damages because Vista might have paid $1 more had the stockholders voted down the transaction. AB45. However, the Court of Chancery

made no such finding. And for good reason: Plaintiffs did not argue this theory below or introduce any evidence to support it. The *only* evidence Plaintiffs cite now is that in another transaction, Vista paid 11% more after ISS recommended against a deal. AB45. But that deal did not involve a "no" vote by stockholders, nor did it follow Vista's best-and-final offer, and there is no suggestion that the increased offer was due to ISS's recommendation. Instead, Vista increased its offer because the founders of the company waived valuable contractual rights. B357. This wildly different circumstance obviously does not constitute proof that Vista would have paid more here. In short, there is no evidence to refute the court's finding that Plaintiffs failed to show any causal link between the supposed disclosure breaches and any damages. Op. 114-16.

C. Plaintiffs Identify No Support For The Award Of Prejudgment Interest On Nominal Damages

The Court of Chancery wrongly ignored the requirement that prejudgment interest cannot be awarded where damages were not calculable before judgment. OB44. Plaintiffs cite no case to the contrary and falsely claim that "Delaware courts rejected as overbroad the argument that prejudgment interest is awarded only when damages are quantifiable prior to judgment." AB46. Those cases hold that the amount need not have been fixed before judgment, but they indeed must have been "calculable." *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 487 (Del. 2011); *see also Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403

(Del. 1988). The "nominal" damages number was not calculable here because there was no calculation at all; it was a figure drawn from the air that the court conceded had no causal connection to any breach. Op. 116. Accordingly, there can be no pre-judgment interest on this amount. OB44.

III. THE COURT OF CHANCERY ERRED IN RULING THAT VISTA AIDED AND ABETTED BREACHES OF FIDUCIARY DUTY

Plaintiffs cite no case holding an arm's-length buyer, like Vista, liable for aiding and abetting disclosure breaches. They ignore the cases casting doubt on such a theory. *See Buttonwood Tree Value P'rs, L.P. v. R. L. Polk & Co.*, 2017 WL 3172722, at *10 (Del. Ch. July 24, 2017); *In re Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *15 (Del. Ch. Dec. 10, 2018). And they likewise ignore the troubling consequences of such a radical change in Delaware law, which would require arm's-length buyers to micromanage the seller's disclosures to its own stockholders and second-guess materiality judgments by seller fiduciaries and their advisors.

Plaintiffs rely on *RBC*, AB36, but that case involved a financial advisor, not an arm's-length buyer, and even there, this Court stressed that the "holding is a narrow one." *RBC*, 129 A.3d at 865; *see also id.* at 865 n.191. Plaintiffs claim that this case, like *RBC*, involves "unusual facts." AB36 (quoting *RBC*, 129 A.3d at 865). But Plaintiffs fail to mention the "unusual facts" in *RBC* that alleviated any concern about "an anomalous imbalance of responsibilities" for non-fiduciaries: the financial advisor "'intentionally duped' the [seller's] directors into breaching their duty of care," *RBC*, 129 A.3d at 865, because it wished to secure lucrative financing work both for the "buy side" in a transaction *and* for a competing transaction, *id.* at 862-63. There is no finding or evidence of any such intentional misconduct by Vista.

Plaintiffs do not dispute that failure to "prevent" a breach, *id.* at 865 n.191, or "passive awareness" of omitted facts that are supposedly material, *Buttonwood*, 2017 WL 3172722, at *10, does not suffice. OB46-48. But that is, at most, what occurred here: The disclosures were drafted and approved by Mindbody. Vista reviewed those disclosures, but there is no finding that Vista took action to cause the supposedly misleading disclosures to be issued.

Plaintiffs rely on the Merger Agreement, AB36, but they ignore the numerous reasons why that agreement does not create aiding and abetting liability, OB47-48. First, there is no breach of contract claim, and so any supposed violation of contractual duties is irrelevant. Second, contrary to Plaintiffs' suggestion that "Vista was obliged 'to correct any material omissions in the Proxy Materials,'" AB36 (quoting Op. 109), the Merger Agreement did not give Vista the ability to change Mindbody's proxy, only to review it and make suggestions. A1771 § 6.3(b). Third, nothing about the Merger Agreement can or purports to change the legal requirements for substantial assistance for purposes of aiding and abetting liability.

Finally, even putting aside the legal errors, Plaintiffs concede there is a scienter requirement, AB35-36, and there is no evidence Vista knew or should have known the proxy materials were materially misleading, OB47-48. Plaintiffs misleadingly quote the word "scrubbing" as though the Court found Vista took things out of the proxy materials. AB36-37. The Court found, however, Vista did

not take *anything* out of the definitive proxy, but merely reviewed the document and did not make changes. Op. 109-10. Plaintiffs argue Vista was required to "verify whether Mindbody's board and counsel knew the actual facts about Stollmeyer's interactions with Vista." AB37. But there is no evidence that Vista believed the details of its interactions with Stollmeyer were unknown to the Board, and no basis to require a buyer to inquire into an independent board's justification for not disclosing certain facts. And, notably, Plaintiffs do not specify what undisclosed facts Vista should have known were material. That is because there was no reason for Vista to believe the picayune details of meetings were required disclosures.

IV. THE COURT OF CHANCERY ERRED IN RULING DEFENDANTS WAIVED THEIR RIGHT TO SEEK A SETTLEMENT CREDIT

Defendants did not waive their right under DUCATA to a credit for the $27 million settlement between Plaintiffs and Defendants Liaw and IVP. OB49-52. Plaintiffs recognize that waiver requires "intentional relinquishment of a known right." AB48. But they ignore what this standard means: "the facts relied upon to prove waiver must be unequivocal." *Bantum v. New Castle Cty. Vo-Tech Educ. Ass'n*, 21 A.3d 44, 50 (Del. 2011) (cleaned up). Neither Plaintiffs nor the Court of Chancery cited any facts, let alone unequivocal facts, showing Defendants intended to relinquish their rights under DUCATA.

Plaintiffs also ignore the two most critical facts here. First, the settlement agreement (and the Bar Order in the court's approval of the settlement) stated that Plaintiffs' recovery against joint-tortfeasors "will be reduced" by a settlement credit. Nov. Op. 4; A1067-68. Thus, far from Defendants intentionally relinquishing their rights and "not putting Plaintiffs on notice" of setoff, AB48, Plaintiffs knew and agreed to setoff when entering into the settlement. Second, while Plaintiffs assert (citing nothing) that Defendants did not raise setoff before trial as a "tactical gambit," AB51, Defendants could not have sought setoff before trial because the court did not approve the settlement until months after trial. OB50.

Plaintiffs cite no case, ever, finding a party waived setoff rights by not raising setoff pre-trial. Plaintiffs cite three cases, AB49, concerning waiver of issues that

had to be determined at trial or before; they have nothing to do with setoff, which is determined post-trial, OB51-52. Plaintiffs also cite *Advanced Fluid Systems, Inc. v. Huber*, 958 F.3d 168 (3d Cir. 2020), but defendants there did not "squarely raise [the setoff] issue before judgment was rendered." 958 F.3d at 185. Here, Defendants did. OB52.

Plaintiffs further rely on *In re Rural/Metro Corp. Stockholders Litigation*, 102 A.3d 205 (Del. Ch. 2014), which held DUCATA rights were *not* waived when raised post-trial. *Id.* at 244-45; *RBC*, 129 A.3d at 870; OB51. Plaintiffs note that in *Rural/Metro*, the defendant made a cross-claim for contribution and raised the issue in the pre-trial stipulation and order, AB50, but as Defendants explained (OB51-52) and Plaintiffs ignore, neither *Rural/Metro* nor DUCATA suggested these steps were important, let alone necessary, to avoid waiver. Indeed, in *Rural/Metro*, RBC "disavowed" the assertion that "the Settling Defendants were joint tortfeasors" in the cross-claim and pre-trial stipulation, and did not even raise the issue in post-trial briefs. *Rural/Metro*, 102 A.3d at 244. It cannot be that a party *does not* waive setoff when it disavows a settling defendant's joint tortfeasor status and does not raise the issue in post-trial briefing, but *does* waive when the settlement agreement contains a Bar Order expressly providing for a settlement credit, and Defendants never disavow joint tortfeasor status and raise the issue in post-trial briefing. OB50.

Plaintiffs' prejudice argument is equally meritless. Plaintiffs' speculation about how they may have tried the case differently had they known about setoff ignores the critical point that Plaintiffs *did* know about setoff because it was highlighted in the settlement agreement they signed. Plaintiffs assert that they "had reason to believe" Defendants waived their DUCATA rights, AB51, but they carefully avoid saying that they actually believed Defendants would not seek a setoff, presumably because that would be false.

Moreover, even if Plaintiffs had believed there was a waiver, it would not have changed anything. Defendants are not seeking a finding on proportional liability, such that the court would have to decide the comparative fault of the settling and non-settling Defendants. Rather, Defendants are seeking only (as the settlement provides) setoff of the settlement amount. The question, then, is whether Liaw and IVP were joint tortfeasors. Given Plaintiffs' own pleadings and theory of the case, there was no strategy for Plaintiffs to do an about-face and try to show that Liaw was not liable at all. OB51-52.

In any event, the supposed prejudice amounts to the idea that Plaintiffs did not receive *more* than the total damages from the supposed breaches. Absent the setoff, Plaintiffs would receive the total damages *plus* the settlement amount; with the setoff, they still would receive all damages from the breaches. Plaintiffs cite no legal or logical principle whereby failure to receive a windfall is cognizable prejudice. That

is especially true where the waiver itself would be a novel expansion of the law that Defendants could not have known in advance. Thus, application of waiver here would punish Defendants for breaking a rule that did not exist so that Plaintiffs could receive a windfall they do not deserve. This Court should reject such a misuse of the waiver doctrine.

CONCLUSION

The Court should reverse the judgment.

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Dated: April 16, 2024