IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE COLUMBIA PIPELINE GROUP, INC. MERGER LITIGATION	)	No. 281, 2024 Court Below: Court of Chancery of the State of Delaware Consol. C.A. No. 2018-0484-JTL

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NATURE OF PROCEEDINGS

This is an appeal of a decision imposing aiding-and-abetting liability on a third-party buyer for a seller's fiduciary breaches, where the buyer had no actual knowledge of those breaches. TC Energy Corp. (TransCanada) acquired Columbia Pipeline Group, Inc. (Columbia) in an arm's-length transaction for fair value. But the Court of Chancery held TransCanada liable for aiding and abetting fiduciary breaches by Columbia's CEO, CFO, and board, and awarded hundreds of millions of dollars in damages. That decision is unprecedented – it is the first time a Delaware court has found a third-party buyer liable for damages for aiding and abetting sell-side fiduciary breaches during a sale process. If left uncorrected, the decision will dramatically expand liability for third-party buyers, effectively requiring buyers to supervise the sellers' officers and directors.

The Court of Chancery's decision is wrong. The standard for aiding-and-abetting liability under Delaware law is intentionally difficult to meet in cases involving a third-party buyer, which makes sense because the buyer is expected to negotiate vigorously for the best deal it can get. Unless the buyer induced the seller's breach, the buyer can be liable only in the rare case where the buyer knew of and culpably participated in the breach. Even taking all the facts as the Court of Chancery found them, the standard for aiding-and-abetting liability simply is not met here.

The Court of Chancery found that TransCanada aided and abetted two sets of fiduciary breaches by Columbia's CEO, CFO, and board: breaches related to the sale process, and breaches related to the disclosures in Columbia's proxy statement.

The court determined that Columbia's CEO and CFO breached their fiduciary duties with respect to the sale process by persuading Columbia's board to accept a fair but less-than-optimal deal because they wanted to obtain lucrative change-in-control benefits and retire, and that Columbia's board breached its duties by failing to supervise the sale process. But TransCanada did not know of any breach. It did not create the CEO's or CFO's supposed conflicts or offer them anything to favor TransCanada. TransCanada merely negotiated vigorously to achieve the best deal it could get.

The Court of Chancery acknowledged that TransCanada did not actually know of any breach. But it decided that TransCanada should have inferred from the CEO's and CFO's conduct that they were conflicted and that Columbia's board failed to supervise them. Nothing in that conduct gave TransCanada a clear indication that the CEO and CFO were disloyal or that the board was insufficiently involved. Instead, TransCanada saw the CEO and CFO reject multiple offers priced at a premium, and it saw Columbia's unconflicted board, advised by experienced and unconflicted advisors, be actively involved in the sale process. TransCanada cannot be expected to infer a fiduciary breach on those facts; Delaware law does not require clairvoyance.

Further, TransCanada did not culpably participate in any breach. The Court of Chancery faulted TransCanada for using common negotiating tactics. And the court drew the wrong legal conclusions from the undisputed evidence. It believed that TransCanada had reneged on a deal that it supposedly had reached with Columbia's CFO. But there was no deal: The CFO could not accept a deal; the board (which could accept the deal) had not yet met; the contingencies for TransCanada's offer had not been satisfied; and none of the key parties believed there was a deal. For that reason as well, the sale-process claim fails.

Separately, the Court of Chancery determined that Columbia breached its disclosure obligations because its proxy statement inadequately disclosed its actions and held TransCanada liable for aiding and abetting that breach. But under Delaware law, TransCanada cannot be liable for aiding and abetting unless it knew of the breaches and participated in drafting the proxy statement with the intent to mislead Columbia stockholders. TransCanada did not know of any breaches; it did not intend to mislead the stockholders; and it reasonably relied on Columbia's decisions about what to include in the robust proxy statement.

The Court of Chancery compounded its errors with its damages award. For the disclosure claim, it awarded \$0.50/share in "nominal" damages, amounting to

$199 million. That amount is compensatory, not nominal. Yet Plaintiffs provided no evidence of reliance, causation, or damages, as required for compensatory damages under Delaware law. The court also erred in allocating damages between Columbia's CEO, CFO, and TransCanada. It allocated to TransCanada 50% of the sale-process damages and 42% of the disclosure damages, which is contrary to the applicable statute and which makes no sense given the relative culpability of Columbia's CEO and CFO, who committed multiple fiduciary breaches, and TransCanada, which did not even know of any breach.

The Court of Chancery's judgment should be reversed.

SUMMARY OF ARGUMENT

1. TransCanada did not aid and abet any fiduciary breaches by Columbia's CEO, CFO, or board during the sale process. TransCanada did not know of or culpably participate in any breach. The Court of Chancery's contrary conclusion rests on legal and factual errors and should be reversed.

2. TransCanada did not aid and abet any fiduciary breaches by Columbia's CEO, CFO, or board in issuing the proxy statement. TransCanada did not know of or culpably participate in any breach. The Court of Chancery's contrary conclusion rests on legal and factual errors and should be reversed.

3. The Court of Chancery's award of $199 million in "nominal" damages for the disclosure claim should be reversed because it is contrary to Delaware law. These effectively are compensatory damages, but they cannot be awarded because Plaintiffs failed to present evidence of reliance, causation, or damages.

4. The Court of Chancery erred in holding TransCanada responsible for 50% of the sale-process damages and 42% of the disclosure damages. Those allocations should be reversed because they are inconsistent with Delaware law and unsupported by the record.

STATEMENT OF FACTS

A. Factual Background

Except where noted, these facts are drawn from the undisputed record evidence or the Court of Chancery's post-trial factual findings.

1. Columbia Approaches TransCanada About A Potential Sale

Columbia owned natural gas pipelines in the eastern United States. Ex. A, Post-Trial Op. on Aiding & Abetting Liability (Op.) 13. TransCanada owns oil and gas pipelines throughout North America. *See* A165 (¶ 43).

In 2015, Columbia struggled to finance its expansion plans because of a drop in natural gas prices. Op. 17. Columbia faced a choice – issue common equity to raise funds or sell the company. Op. 20.

Columbia's board decided to pursue both: It would explore a sale, but it would issue equity if it could not secure a satisfactory offer by the end of November 2015. Op. 20. Columbia's seven-member board was chaired by Robert Skaggs, its CEO and the only director in Columbia's management. *Id*. The other directors were independent and unconflicted, and each had significant business experience. A185-89 (¶¶ 112, 115).

Columbia's board hired Sullivan & Cromwell, Lazard, and Goldman Sachs to advise on the sale. Op. 15, 23; A190-91 (¶¶ 120-24). In May 2015, Lazard approached several potential buyers, including TransCanada. Op. 16. TransCanada did not know whether Columbia had contacted other companies. *See id*. Lazard conveyed that "social issues may not be a significant consideration," meaning that Columbia would not make the post-acquisition composition of its board or senior leadership a subject of negotiation. A294 (¶ 463).

Unbeknownst to TransCanada, Skaggs and Stephen Smith (Columbia's CFO) wanted to retire. Op. 15. Both had change-in-control agreements that would pay them significant amounts if Columbia were sold, and would be most lucrative if that happened by 2018. *Id*.

2. Columbia Rejects TransCanada's Initial Bids

In September 2015, TransCanada began negotiations with Columbia. Op. 18. Francois Poirier, TransCanada's then-Senior Vice President for Strategy and Corporate Development, led TransCanada's efforts. *Id*. He was advised by Eric Fornell from Wells Fargo, TransCanada's investment bank. *Id*.

On November 9, 2015, Columbia and TransCanada entered into a non-disclosure agreement (NDA) that included a standstill provision. A215 (¶ 211). Columbia drafted the NDA. *See* A833. It became effective when TransCanada received diligence materials (in November 2015). A827-28 (§ 3). It required TransCanada to send all requests and "questions regarding procedures" to Smith. A826 (§ 1(c)).

The standstill allowed Columbia's board to maintain control over the sale process and avoid hostile bidding. It stated that TransCanada could not "acquire or offer to acquire" Columbia for 12 months unless Columbia's board "request[ed]" the offer "in writing in advance." A827-28 (§ 3). Unbeknownst to TransCanada, Columbia entered into identical NDAs with three other prospective buyers, except those had 18-month standstills. A215 (¶ 212); A364-65 (539:7-540:1).

On November 25, 2015, TransCanada presented an all-cash proposal at $25-$26/share. Op. 21-26. Columbia rejected that proposal, and Skaggs rejected an invitation from TransCanada's CEO, Russ Girling, to "close[] the gap between $26 and $28." Op. 25-26; *see* A228-29 (¶¶ 249, 253). Columbia also rejected proposals from other prospective buyers. Op. 26. No prospective buyer received a written invitation from Columbia's board. *E.g.*, A210 (¶ 201).

On December 1, after negotiations with prospective buyers failed, Columbia announced a public equity offering. Op. 29. It raised $1.4 billion, effectively selling 25% of Columbia at $17.50/share – well below its market price. *Id.*

3. TransCanada And Columbia Renew Negotiations

The same day Columbia rejected TransCanada's proposals, Smith told Poirier that Columbia would want to resume acquisition talks "in a few months." Op. 27-28. TransCanada and Columbia remained in contact in December 2015: On December 2, Girling called Skaggs, Op. 29; on December 8, Fornell spoke with Smith at a conference, Op. 31; and on December 17, Poirier called Smith to propose a meeting in January, Op. 32. Before that meeting, Columbia's general counsel met with

TransCanada's in-house counsel and they agreed that Columbia could share diligence materials with TransCanada under the NDA. Op. 35.

Poirier and Smith met on January 7, 2016. Op. 36. Smith spoke frankly to Poirier, including sharing talking points prepared by Goldman Sachs. Op. 37. Smith told Poirier that Skaggs had informed Columbia's board of the reengagement with TransCanada; that Columbia had engaged Sullivan & Cromwell, Goldman Sachs, and Lazard as advisors; and that Columbia would want a proposal to present to its board at its end-of-January meeting. Op. 38; *see* A837. Smith encouraged TransCanada to "lean in on price as much as possible." A837. Smith also told Poirier that TransCanada was unlikely to face competition from other prospective buyers because those buyers were "distracted." Op. 36.

On January 25, 2016, Girling provided Skaggs an indication of interest at \$25-\$28/share (subject to additional due diligence) and requested exclusivity. Op. 48. Columbia's general counsel, advised by Sullivan & Cromwell, confirmed that providing that indication did not violate the standstill. Op. 44-46.

At its end-of-January meeting, Columbia's board approved granting TransCanada exclusivity. Op. 49-50. On February 1, 2016, Columbia and TransCanada executed an exclusivity agreement, which provided that Columbia would accept or facilitate a proposal only from TransCanada until March 2, 2016 (later extended to March 8). Op. 52, 58. On March 4, Columbia's board formally granted TransCanada permission to bid. Op. 59-60.

Based on the companies' discussions, Columbia anticipated an offer of between $25 and $28/share. Op. 52. But Poirier thought Columbia might consider a deal below that range. Op. 60. On March 5, 2016, TransCanada made an offer of $24/share. *Id*. Skaggs and Smith rejected it outright: Smith reacted with "colorful language" and Skaggs "absolutely lost it." Op. 60-61. Smith countered that TransCanada would need to propose $26.50/share. Op. 61. TransCanada revised its offer to $25.25/share, which Columbia's board (on Skaggs's recommendation) rejected. Op. 61-62. Both Columbia and TransCanada believed negotiations had ended at that point. Op. 62.

4. TransCanada Presents A Conditional Mixed Cash-And-Stock Offer At $26/Share

On March 6, 2016, TransCanada's bankers at Wells Fargo contacted Columbia's bankers at Goldman Sachs to try to salvage the deal. Op. 62-63. Following that outreach, Smith asked Poirier to consider a bid at $26/share, which Smith presented as coming "[s]traight from [Columbia's] Board." Op. 63.

On March 9, 2016, TransCanada's board approved a conditional offer at $26/share, consisting of 90% cash and 10% TransCanada stock. Op. 65. Poirier notified Smith of the offer, explaining that it was conditioned on TransCanada's stock remaining above C$49/share and on favorable assessments from ratings agencies and TransCanada's underwriters. Op. 66.[1] Skaggs and Girling discussed the offer the next morning, and Skaggs informed Columbia's board that the offer was a "non-binding indication of interest" that may not ultimately "result in a firm offer." A811, 873. Because of the risks of the stock component, Columbia's bankers at Goldman Sachs valued the offer at between $25.58/share and $25.71/share. A881.

On March 10, 2016, before Columbia's board could meet to vote on the offer, the *Wall Street Journal* published news of the negotiations. Op. 68; *see* A869. The leak caused the New York and Toronto stock exchanges to halt trading in both companies' stock. A265 (¶ 375). Trading in TransCanada's stock remained halted until TransCanada released a press release. *Id.*[2] Poirier also asked Columbia to renew TransCanada's exclusivity by two weeks; Columbia's board agreed only to a one-week extension. A266, 269 (¶¶ 380, 387).

On March 11, 2016 – the day after the leak – TransCanada's stock dropped below C$49/share. Op. 78. As TransCanada, Columbia, and their advisors recognized, that meant the $26/share offer no longer was valid. A813-14, 882-83.

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[1] The Court of Chancery found that Smith accepted the $26/share offer on Columbia's behalf on March 9, 2016. Op. 66. That is clearly erroneous. *See* pp. 30-34, *infra*.

[2] There is no record evidence about the source of the leak. The Court of Chancery speculated that Poirier was the source, Op. 64-65, but no evidence supports that, and Plaintiffs never argued that Poirier was the source.

5. TransCanada Presents An All-Cash Offer Of $25.50/Share And Columbia Accepts It

On March 14, 2016, TransCanada's board approved a revised, all-cash offer at $25.50/share. Op. 77.[3] That same day, as required by the exclusivity agreement, Poirier presented that offer to Columbia's Executive Vice President Glenn Kettering, telling him it was TransCanada's "final" offer. A278 (¶ 412).[4]

Because news of the negotiations had become public, Toronto Stock Exchange rules required TransCanada to publicly disclose the end of negotiations. Op. 79. Poirier accordingly told Kettering that if Columbia did not accept the revised offer before TransCanada's exclusivity period expired, TransCanada would issue a press release "indicating its acquisition discussions had been terminated." A278 (¶ 412). Columbia understood that a disclosure would be needed if the talks failed. A359 (361:8-22); A371-72 (754:24-755:8). The disclosure would not violate the NDA, which permitted public disclosures required by stock exchange rules. A825-26 (¶ 1(b)).

[3] The Court of Chancery stated that Poirier suggested the revised offer. Op. 77-78. That is incorrect; after meeting with the underwriters, TransCanada's board made the decision to eliminate the stock component of TransCanada's offer due to the drop in its share price. A882-83.

[4] The Court of Chancery stated that $25.50/share was not actually TransCanada's best and final offer. Op. 79. That finding is clearly erroneous. *See* pp. 34-36, *infra*.

On March 14, 16, and 17, 2016, Columbia's board met to discuss the $25.50/share offer. Op. 81, 84. After receiving fairness opinions from Goldman Sachs and Lazard, Columbia's board voted to approve entry into a merger agreement with TransCanada and to recommend the agreement to Columbia stockholders. Op. 84; A279-84 (¶¶ 414-25). The offer represented a 43% premium on Columbia's 30-day volume-weighted share price before the leak. A997.

6. Columbia Prepares Its Proxy Statement

Ahead of the stockholders' vote, Columbia's management prepared a proxy statement about the $25.50/share offer. Op. 86. The merger agreement required TransCanada to provide any information about TransCanada that Columbia needed for the statement. A947 (§ 5.01(a)). TransCanada agreed that it would not supply any materially untrue information or omit any fact required to make its information not misleading, and would inform Columbia if there was any issue that needed to be addressed so that the statement would not contain materially untrue or misleading statements. A948 (§ 5.01(b)).

TransCanada provided Columbia with information about TransCanada that Columbia needed. Op. 87. TransCanada then reviewed and commented on the draft statement. *Id.* Skaggs and Smith also reviewed and commented on the statement. Op. 86.

Columbia's stockholders approved the merger on June 22, 2016, with holders of 73.9% of the outstanding shares voting in favor, and the merger closed on July 1, 2016. Op. 90.

B. Procedural History

1. Opposing Stockholders Bring The Appraisal Action

Stockholders opposed to the merger brought suit under 8 *Del. C.* § 262, which authorizes the Court of Chancery to perform an "appraisal" of "the fair value" of the stockholder's shares. The court concluded that the deal price represented the fair value of Columbia. *In re Appraisal of Columbia Pipeline Grp., Inc.*, 2019 WL 3778370, at *52 (Del. Ch. Aug. 12, 2019). It determined that the sale process was sufficiently reliable to use the deal price as fair value because "the [m]erger was an arm's-length transaction with a third party"; Columbia's board "did not labor under any conflicts of interest" and ran a robust sale process; and Columbia negotiated vigorously with TransCanada and "extracted multiple price increases." *Id.* at *25, *42.

2. Plaintiffs Bring This Lawsuit

Plaintiffs filed this consolidated action, alleging that Skaggs, Smith, and Columbia's board breached their duties to stockholders in the sale process and in preparing the proxy statement, and that TransCanada aided and abetted those breaches. Op. 93.

Skaggs and Smith settled the claims against them for $79 million. Op. 94. The case proceeded to trial against TransCanada. *Id.*

3. The Court Of Chancery Issues Its Liability Decision

On the sale-process claim, the Court of Chancery held that Skaggs and Smith breached their duty of loyalty by accepting a fair but less-than-best price in order to retire with full change-in-control benefits, Op. 112-27, and that Columbia's board breached its duty of care by failing to supervise Skaggs and Smith, Op. 127-32.

The court held that TransCanada aided and abetted those breaches because it had constructive knowledge of and culpably participated in the breaches. Op. 132-52. The court acknowledged that TransCanada had no actual knowledge of Skaggs's or Smith's conflicts. Op. 166. But it held that TransCanada had "constructive knowledge" of those conflicts because Skaggs and Smith did not act as would have been expected of unconflicted officers. Op. 143-45. The court then decided that TransCanada culpably participated in the breaches by "reneg[ing]" on the supposed deal at $26/share and "threaten[ing]" to disclose the negotiations if Columbia did not accept the $25.50/share offer. Op. 145. The court also stated that TransCanada breached the standstill by discussing a potential sale with Skaggs and Smith without written permission from Columbia's board and exploited Smith's inexperience – although the court stated those actions alone would not support liability. Op. 146-47. The court awarded $1 per share in damages, based on its valuation of what the

$26/share mixed offer would have been worth at the closing date, for a total of $398 million. Op. 153-56.

On the disclosure claim, the Court of Chancery held that Skaggs, Smith, and Columbia's board breached their fiduciary duties because the proxy statement did not adequately disclose Skaggs's and Smith's plans to retire, certain details of Columbia's and TransCanada's interactions, the other bidders' standstill provisions, and TransCanada's breaches of the standstill. Op. 161-65. The court held that TransCanada aided and abetted those breaches because it reviewed the statement, knew or should have known of the deficiencies, and did not correct them. Op. 165-68. The court determined that it could not award compensatory damages because Plaintiffs had not introduced evidence of reliance. Op. 169-78. The court instead awarded what it called "nominal" damages of $0.50/share – $199 million in total – based on what a deal might have been if stockholders had rejected the $25.50/share offer. Op. 178-88. These damages were an alternative to the sale-process damages and were not cumulative. Op. 188-91.

4. The Court Of Chancery Issues Its Allocation Decision

The Court of Chancery determined how to allocate Plaintiffs' damages among Skaggs, Smith, and TransCanada under the Delaware Uniform Contribution Among Tortfeasors Act (DUCATA), 10 *Del. C.* § 6301 *et seq*. Ex. B, Opinion Resolving

Post-Trial Issues (Allocation Op.). The court allocated to TransCanada 50% of the sale-process damages and 42% of the disclosure damages. Allocation Op. 2-4.

On the sale-process damages, rather than allocate fault equally between Skaggs, Smith, and TransCanada, the court decided that Skaggs and Smith acted as a "unit" and so TransCanada should bear 50% responsibility. Allocation Op. 3. On the disclosure damages, the court allocated 25% to 100% fault to TransCanada for each proxy-statement deficiency based on TransCanada's supposed knowledge of the deficiency, and then averaged those amounts. Allocation Op. 73-75.

ARGUMENT

I. TRANSCANADA DID NOT AID OR ABET ANY SALE-PROCESS BREACH BY SKAGGS, SMITH, OR COLUMBIA'S BOARD

A. Question Presented

Whether TransCanada aided and abetted fiduciary breaches by Skaggs, Smith, or Columbia's board related to the sale process. This question was raised below, A474-98, 560-97, 634-63, and considered by the Court of Chancery, Op. 132-52.

B. Scope Of Review

The Court reviews questions of law *de novo*. *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 502 (Del. 2019). The Court reviews the Court of Chancery's application of law to facts *de novo*, *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004), and its factual findings for clear error, *Ocean Bay Mart, Inc. v. City of Rehoboth Beach*, 285 A.3d 125, 136 (Del. 2022).

C. Merits Of Argument

Under Delaware law, proving that a third-party buyer aided and abetted a sell-side fiduciary breach is exceptionally difficult.

An aiding-and-abetting claim has four elements: (1) a fiduciary relationship; (2) a fiduciary breach; (3) the defendant's knowing participation in that breach; and (4) resulting damages. *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001). For the sale-process claim, only the knowing-participation element is at issue. To prove knowing participation, the plaintiff must show that the buyer knew of the seller's breach and culpably participated in that breach. *Id.* at 1097 n.79; *see Firefighters' Pension Sys. of Kan. City v. Presidio, Inc.*, 251 A.3d 212, 275 (Del. Ch. 2021).

Proving knowing participation is particularly demanding when the claim is that a third-party buyer – as opposed to a sell-side participant – aided and abetted a sell-side breach. *Morgan v. Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010). Arm's-length bargaining has a "privileged" status under Delaware law, because buyers are expected to negotiate vigorously to achieve the best price for their stockholders, including by taking advantage of any sell-side missteps. *Id.*; *see In re Comverge, Inc.*, 2014 WL 6686570, at *19 (Del. Ch. Nov. 25, 2014); *In re Lukens Inc.*, 757 A.2d 720, 735 (Del. Ch. 1999). And Delaware law "presumes" directors' and officers' "fidelity to their fiduciary duties." *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2023 WL 6399095, at *18 (Del. Ch. Oct. 3, 2023).

Indeed, this Court has held that "a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting." *Malpiede*, 780 A.2d at 1097. The bidder must do something more, such as deliberately "create or exploit conflicts of interest in the board" or "conspire in or agree to the fiduciary breach." *Id.* at 1097-98. Anything less would undermine "the bargaining that is central to the American model of capitalism." *Morgan*, 2010 WL 2803746, at *8. It would "deter[]" potential bidders from attempting to acquire other companies by increasing the risks and potential liability "on top of the considerable risk that already accompanies" any acquisition, resulting in fewer strategic deals and deals at lower prices, ultimately harming both the potential buyers' and sellers' stockholders. *Id.*

1. TransCanada Did Not Know Of Any Breach

The Court of Chancery erred as a matter of law in holding that TransCanada knowingly participated in Skaggs's, Smith's, and the Columbia board's fiduciary breaches. Under established Delaware law, the buyer must "act with the knowledge that the conduct advocated or assisted constitute[d] [a fiduciary] breach." *Malpiede*, 780 A.2d at 1097. Here, TransCanada lacked actual knowledge of Skaggs's, Smith's, or the Columbia board's supposed breaches.

The Court of Chancery found that Skaggs and Smith elevated their interest in retiring above the interests of Columbia's stockholders, and that Columbia's board failed to supervise them. Op. 144. But the court acknowledged that TransCanada "did not actually know of Skaggs' and Smith's plans" to retire. Op. 166. TransCanada also did not know what information Skaggs and Smith were sharing with Columbia's board, or how closely the board was monitoring the sale process. Op. 144. TransCanada thus had no actual knowledge of any fiduciary breach.

The Court of Chancery relied on constructive knowledge, holding that TransCanada should have inferred that Skaggs and Smith were acting disloyally and that Columbia's board was failing to supervise them. Op. 144. But this Court has never squarely held that constructive knowledge of a breach is sufficient for aiding-and-abetting liability in a case involving a third-party buyer.[5] Decisions from the Court of Chancery have stated that, at the pleading stage, a plaintiff can rely on constructive knowledge of a breach to hold a third-party buyer liable for aiding and abetting a sell-side breach only when the breach was so inherently wrongful that it would be obvious to any observer. *See Jacobs v. Meghji*, 2020 WL 5951410, at *7 (Del. Ch. Oct. 8, 2020) ("[A] court can infer a non-fiduciary's knowing participation only if a fiduciary breaches its duty in an inherently wrongful manner." (internal quotation marks omitted)); *Katell v. Morgan Stanley Grp., Inc.*, 1993 WL 106067, at *1 (Del. Ch. Mar. 29, 1993) ("While this Court will infer knowledge in appropriate circumstances, it will not infer knowledge of a breach of fiduciary duty unless the

5 The Court of Chancery cited (Op. 133) *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015), which explained – in the context of a claim against a sell-side advisor – that the knowing-participation element requires that the defendant have had "actual or constructive knowledge that [its] conduct was legally improper." *Id.* at 862 (internal quotation marks omitted). That language was describing the requirement for the defendant's conduct (the "participation" part of "knowing participation"), not whether constructive knowledge *of the breach* is sufficient. *Id.* The constructive-knowledge issue was not presented because the plaintiff proved that the sell-side advisor "knowingly induced" the breach by "creating an informational vacuum." *Id.* Further, the Court indicated that an advisor that owes duties to the seller's board can be liable only if it "knowingly induces" the board's breach, which suggests that the standard for knowledge is more stringent for a third-party buyer that does not owe any duty to the seller's board. *Id.* at 875.

action comprising the purported breach is inherently wrongful." (internal quotation marks omitted)).

That demanding constructive-knowledge standard protects a buyer's right to engage in vigorous, arm's-length bargaining by making it liable only when it recklessly disregards an obvious sell-side breach. A lesser standard, that depends on the buyer inferring a breach from ambiguous conduct, would place the buyer in an impossible situation. If the buyer incorrectly guesses that there is no breach, it risks aiding-and-abetting liability. But if the buyer incorrectly guesses that there is a breach and negotiates less vigorously to avoid liability, it risks losing out on a better deal that it legally could have obtained – thereby breaching its duty to its own stockholders. Adopting that standard thus would chill corporate acquisitions.

a. Skaggs's and Smith's conduct did not signal any breach

The high standard for constructive knowledge is not met here. The Court of Chancery identified "a series of signals" that Skaggs and Smith sent that it thought should have put TransCanada on notice of their fiduciary breaches. Op. 143-44; *see* A394 (1337:7-17) (court's suggestion that "TransCanada's spidey-senses should have been tingling"). None of those signals, individually or together, unambiguously showed a breach.

The court cited "[Skaggs's and Smith's] message that there would be no social issues in the deal" and TransCanada's knowledge of their change-in-control benefits.

Op. 143-44. But a lack of social issues means that the seller would not make the post-acquisition composition of its board or senior management a point of contention during negotiations; it does not mean that the seller's management inevitably will leave the company after the deal, much less that they will retire. Op. 55. Further, telling potential bidders there will be no social issues is not wrongful; it is a way to entice bidders that are not interested in retaining existing management (like TransCanada here, Op. 20).

As for the change-in-control benefits, those are commonplace and help stockholders by aligning management's incentives to pursue a sale that would benefit the stockholders. *See* Op. 118. Critically, TransCanada did not know that Skaggs and Smith planned to retire. Op. 166.

The Court of Chancery next cited "[Skaggs's and Smith's] lack of interest in enforcing the Standstill." Op. 143. But the standstill was a contractual mechanism Columbia's board could choose to enforce to gain control over the sale process or to repel a hostile bid. *See* A827-28. As the court acknowledged (Op. 47), the board was not *obligated* to enforce the standstill, particularly where it welcomed the potential buyer's interest. Thus, even if TransCanada believed it violated the standstill, there was nothing suspicious – let alone inherently wrongful – about Columbia's lack of enforcement of the standstill.

That said, neither TransCanada nor Columbia believed that TransCanada violated the standstill. Although the Court of Chancery determined that *any* contact with Columbia about a potential sale without the board's written invitation violated the standstill, Op. 46-47, everyone involved (including the standstill's drafter at Sullivan & Cromwell) understood the standstill to require a written invitation only to present a *formal* offer, A841. TransCanada and other potential buyers submitted expressions of interest in October and November 2015 without written invitations. Op. 17, 24.[6] Columbia's general counsel told TransCanada that discussing a sale with Columbia's management did not violate the standstill, Op. 123; *see* A844, and TransCanada received a written invitation before presenting its formal offer, Op. 59-60.[7] Thus, TransCanada did not believe (and did not have reason to believe) that it was violating the standstill, let alone that Skaggs and Smith were breaching fiduciary duties by tolerating violations of the standstill.

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[6] The Court of Chancery believed that the standstills went into effect in December 2015, when Columbia rejected the proposals and proceeded with its equity offering. Op. 26. That is incorrect: Each standstill went into effect when the prospective buyer received diligence materials, A827-28 (§ 3), and thus was in effect when each submitted its proposal, *see* A834.

[7] TransCanada's in-house counsel initially took a more restrictive view of the standstill, but ultimately agreed with Columbia's interpretation of the provision it had drafted and was responsible for enforcing. Op. 35, 45-46.

The court also cited Smith's communications with TransCanada between January and February 2016, focusing on "Smith's behavior during the January 7 meeting, including his statement that TransCanada would not face competition." Op. 143-44. The court thought those communications showed an uncommon eagerness to make a deal. *Id.* But as the court elsewhere recognized, Smith's behavior also could reflect Skaggs's and Smith's inexperience at negotiating a public-company sale. Op. 144 (calling Skaggs and Smith "a bunch of noobs who didn't know how to play the game"). Or it could reflect Smith's calculated decision that speaking frankly and enthusiastically pushing a deal was the best way to reignite TransCanada's interest after Columbia rejected two previous proposals. *See* Op. 38. Smith was presumed to faithfully discharge his duties, and his conduct did not necessarily signal a fiduciary breach.[8]

Further, TransCanada also saw Skaggs and Smith act consistent with unconflicted officers trying to get the best value reasonably available. Most notably, Skaggs and Smith rejected four of TransCanada's proposals, each at a significant premium to Columbia's share price. *See* A807. Skaggs and Smith also

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[8] Indeed, as the court recognized, TransCanada incorrectly interpreted Skaggs's and Smith's actions on several occasions. For example, Poirier incorrectly thought that Skaggs and Smith would consider an offer below $25/share. Op. 124-25. That TransCanada needed to decipher Skaggs's and Smith's motivations, and sometimes got it wrong, reinforces that their conduct did not necessarily signal any fiduciary breach.

demonstrated a willingness to walk away with no deal as late as March 5, 2016. *See* A846; A848. The Court of Chancery acknowledged that Skaggs and Smith "were not going to arrange a fire sale for below Columbia's standalone value," and described Skaggs and Smith as "professionals who took pride in their jobs and wanted to do the right thing" and who were not "so desperate for a sale that they would take any deal." Op. 115. So the "signals" that the court thought showed Skaggs's and Smith's conflict were, at most, ambiguous. Op. 143.

At bottom, the Court of Chancery wanted TransCanada to have divined that Skaggs and Smith were *just* conflicted enough that they would accept a "defensible" but less-than-optimal price so they could "retir[e] with their change-in-control benefits," instead of chasing the highest price they could achieve. Op. 143. That is a degree of prescience no buyer could possess and Delaware law does not require.

b. Columbia's board did not signal any breach

Even if TransCanada should have recognized that Skaggs and Smith breached their fiduciary duties, that does not mean that TransCanada should have recognized that Columbia's unconflicted board breached its duty to supervise them. Plaintiffs needed to show both to prevail.

Under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), the ultimate responsibility for any sale-process deficiencies on the Columbia side rests with its board. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 368 (Del. 1993). Thus, it is not enough for TransCanada to have known of Skaggs's or Smith's breaches; TransCanada also needed to have known that Columbia's board failed to adequately supervise them. That is a difficult standard, particularly because board members are presumed to fulfill their fiduciary duties. *See Straight Path*, 2023 WL 6399095, at *18.

Here, nothing evidenced to TransCanada a fiduciary breach by Columbia's board. It is undisputed that six of the seven board members were independent and unconflicted. Op. 16. As the Court of Chancery recognized, TransCanada had no insight into Skaggs's and Smiths' dealings with Columbia's board. Op. 144 ("TransCanada did not have direct interaction with any Board members and was not inside the boardroom for any meetings."). All TransCanada knew was what Skaggs and Smith chose to share – and they consistently told TransCanada that Columbia's board was closely supervising the sale process. *E.g.*, Op. 25-26 (Skaggs told Girling that Columbia would pursue an equity offering because "the Board did not support a transaction" at the proposed prices); Op. 48 (Skaggs told Girling that "the Board would push for the top of [TransCanada's proposed] range"). TransCanada could not have known whether Skaggs and Smith were acting inconsistently with what Columbia's board had authorized.

The court decided that TransCanada should have inferred from Skaggs's and Smith's conduct that Columbia's board was asleep at the wheel. It likened

TransCanada to "a driver who could not see inside the car ahead but witnessed it weaving across the centerline, then onto the shoulder, then back across the centerline." Op. 144. That analogy fails for two reasons. First, Skaggs and Smith were not driving erratically; nothing in their conduct showed an obvious fiduciary breach. *See* pp. 22-25, *supra*. Second, TransCanada could not see into the car, and so could not have known who was responsible if the car had swerved (and it never did).

Indeed, the Court of Chancery went so far as to suggest that TransCanada should have affirmatively contacted Columbia's board to let it know that its management was acting unusually. *See* Op. 150-51 (suggesting that TransCanada should have prompted Columbia's board to enforce the standstill). There is no precedent in Delaware law for such a paternalistic approach to negotiations. *See In re Dole Food Co. S'holder Litig.*, 2015 WL 5052214, at *42 & n.34 (Del. Ch. Aug. 27, 2015) (rejecting aiding-and-abetting liability for third party who did not reach out to the seller's board to determine whether its fiduciaries were acting loyally). Adopting that approach would result in buyers engaging in less-than-fulsome negotiations to the detriment of their stockholders and the market at large. It is not the buyer's job to actively search for conflicts or supervise sell-side fiduciaries when none is apparent. That is and should remain the sole responsibility of the seller's board.

The bottom line is that TransCanada had no knowledge of any fiduciary breach on Columbia's side, and that alone warrants reversal.

2. TransCanada Did Not Culpably Participate In Any Breach

Plaintiffs' sale-process claim independently fails because TransCanada did not culpably participate in any breach.

To prove culpable participation, the plaintiff must show that the buyer "create[d] or exploit[ed]" the fiduciary breach by "extracting terms which require the opposite party to prefer its interests at the expense of its shareholders," *Malpiede*, 780 A.2d at 1097 & n.81 (internal quotation marks omitted), and that the buyer did so "knowingly, intentionally, or with reckless indifference" to its wrongdoing, *RBC*, 129 A.3d at 862 (internal quotation marks omitted). The prototypical examples of culpable participation are the buyer "buying off the board in a side deal," or "actively exploiting conflicts in the [target's] board." *Morgan*, 2010 WL 2803746, at *8; *see, e.g.*, *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 835 (Del. Ch. 2011). Mere "attempts to reduce the sale price through arm's-length negotiations" are not enough. *Malpiede*, 780 A.2d at 1097.

Here, TransCanada behaved as any reasonable third-party buyer would have behaved. It bargained firmly to secure the best deal it could. *See In re Frederick's of Hollywood, Inc. S'holders Litig.*, 1998 WL 398244, at *3 n.8 (Del. Ch. July 9, 1998) ("[E]vidence of arm's-length negotiation with fiduciaries negates a claim of aiding and abetting, because such evidence precludes a showing [of knowing participation].”). That included having Poirier keep in close touch with Smith, his designated counterpart; seeking exclusivity; making the lowest offer it thought Columbia might accept (which Skaggs and Smith rejected outright); and revising a higher offer when that offer no longer was viable.

The Court of Chancery identified three sets of actions by TransCanada that, in its view, constituted culpable participation: (1) TransCanada reneging on a supposed $26/share deal and threatening Columbia with public disclosure if it did not accept the $25.50/share offer; (2) Poirier exploiting Smith’s inexperience at negotiating a public-company sale; and (3) TransCanada violating the standstill. Op. 146-48. The court was wrong on all three.

a. TransCanada did not renege on the supposed $26/share deal or threaten Columbia with disclosure

The court stated that TransCanada “definitively crossed the line” by reneging on the $26/share “deal” and then threatening Columbia with disclosure if it did not accept the $25.50/share all-cash offer. Op. 145. In the court’s view, this was the key action by TransCanada, and TransCanada would not have been liable otherwise. Op. 148. But there was no deal on which TransCanada reneged.

i. There was no $26/share deal

The court stated that TransCanada and Columbia had a deal at $26/share because Smith "orally accepted" TransCanada's offer on March 9, 2016. Op. 66. But the parties did not have a deal as a matter of law, based on four undisputed facts.

First, Smith had no authority to accept the offer and bind Columbia to a deal without the approval of Columbia's board. *See W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 311 A.3d 809, 843 (Del. Ch. 2024).

Second, Columbia's board never voted to accept the offer. Op. 68. It did not meet until March 10, and at that meeting, Skaggs told Columbia's board that the $26/share offer was "only a non-binding indication of interest, and there could be no certainty that it would result in a firm offer by TransCanada." A810-11. There was no vote. *See id.*

Third, TransCanada's offer was subject to three contingencies that were not met. Those were TransCanada's stock remaining above C$49/share; TransCanada's underwriters supporting the issuance of the additional equity required by the offer; and the rating agencies viewing the transaction favorably. Op. 66. On March 10, 2016 – the day after TransCanada made the $26/share offer – its share price dropped below C$49/share because of the *Wall Street Journal* leak. Op. 78. The offer thus failed by its terms. Further, following the leak, TransCanada's underwriters expressed discomfort with a deal involving stock consideration. A378-88

(1111:22-1121:4); *see* A883 (underwriters conveying that a "larger bought deal with a smaller over-allotment option would be supported by the markets").[9] And TransCanada never approached the rating agencies about the $26/share offer before its board withdrew the offer.

Fourth, neither Columbia nor TransCanada acted as though they had a deal at $26/share. On March 10, 2016 – the day *after* making the offer – TransCanada sought another two weeks of exclusivity. Op. 68. Columbia's board responded by extending exclusivity for only one week and instructing that other potential bidders be released from their standstills, in the hope that would solicit other offers. Op. 71. The renewed exclusivity agreement expressly contemplated that TransCanada could "ma[k]e an offer less favorable than the $26 Offer." Op. 81; *see* A877. And Skaggs and Girling discussed the $26/share offer on March 10, during which Skaggs gave no indication that Smith (or anyone else) had already accepted that offer. A871.

The Court of Chancery nonetheless erroneously concluded that TransCanada and Columbia had a deal at $26/share. The court cited communications from TransCanada's bankers at Wells Fargo and text messages between TransCanada

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[9] The Court of Chancery noted (Op. 77) that two underwriters said they "stood by their commitment to execute on the underwritten offering," A883, which the court took to mean they supported the $26/share offer. That was wrong; TransCanada already had concluded that the offer no longer was tenable. *Id.* The underwriters were expressing support for acquiring Columbia generally, not for the $26/share offer in particular. *See id.*

executives that appeared to treat the $26/share offer as a "done deal." Op. 66-67 (quoting A858). But those third-hand accounts of the negotiations do not establish that Columbia had accepted the $26/share offer.[10] The court also cited (Op. 67) an email Skaggs sent to Columbia's board on March 10, 2016, following his call with Girling. *See* A871-72. But in the email, Skaggs called TransCanada's offer an "Indicative/Provisional Proposition," set out its contingencies, and did not suggest that anyone at Columbia had accepted it. *Id.*

The court also cited the fact that Skaggs and Smith did not waive the other potential buyers' standstills on March 9, 2016. Op. 67. The court reasoned that this showed there was a deal because it thought that Columbia's board had "instructed Skaggs and Smith" to waive those standstills "as soon as exclusivity with TransCanada expired" on March 8, Op. 60 (citing A256 (¶ 347)), and that if Skaggs and Smith had not done so it was because they thought they had a deal with TransCanada, Op. 67. The court was wrong about what the board had told Skaggs and Smith: The board previously had decided only that, "if feasible," the standstills "should be waived before entry into a merger agreement with TransCanada," not

[10] One of the documents directly contradicts the notion that *Smith* accepted the $26/share offer on *March 9* – in it, Wells Fargo's bankers stated that *Columbia's board* "accepted [the $26/share offer] on the morning of *March 10*." A889 (emphasis added). That also was incorrect; as explained, the board did not accept the $26/share offer at the March 10 meeting. A810-11.

that the standstills should be waived as soon as TransCanada's exclusivity expired on March 8. A256 (¶ 347). It was not until March 11 that the board expressly authorized Skaggs and Smith to waive the other standstills, A812-13, which they promptly did, A271-72 (¶¶ 391-93) – showing that Skaggs, Smith, and Columbia's board did not think they had a deal at that point. The failure to waive the standstills on March 9 thus does not establish a $26/share deal.

In sum, the undisputed facts showed that there was no deal at $26/share. TransCanada thus did not "renege" on that deal.

ii. There was no threat

The Court of Chancery also erred legally and factually in finding that TransCanada exploited Skaggs's and Smith's conflict because Poirier "threatened" Columbia with public disclosure of the end of negotiations if Columbia did not accept TransCanada's $25.50/share all-cash offer. Op. 145. The court's theory was that Poirier falsely told Columbia that that offer was TransCanada's best and final offer, when it was not. Op. 80.

Even assuming that TransCanada's offer was not its best and final offer and thus that it had threatened Columbia, that was legally insufficient for culpable exploitation. A prospective bidder is allowed to say that an offer is final even if it would consider a counteroffer; it is not required to lay all of its cards on the table. *See Morgan*, 2010 WL 2803746, at *7. Indeed, both this Court and the Court of

Chancery have recognized that far more aggressive negotiation tactics are permissible. *See Malpiede*, 780 A.2d at 1096, 1098 & n.85 (affirming dismissal of an aiding-and-abetting claim against acquiror whose alleged "suspect" and "borderline" tactics included misrepresenting the nature of its interest in a block of target company shares, threatening to sue the target board, and demanding "a hasty consummation" of the merger); *Comverge*, 2014 WL 6686570, at *19 (dismissing an aiding-and-abetting claim against an acquiror who purchased a target company note, arguably in violation of a standstill, then exploited that note to obtain negotiating leverage and acquire the target for a lower price than it had offered earlier). So even if Poirier's statement was a threat, it did not create or exploit any fiduciary breach.

In any event, the Court of Chancery clearly erred in finding that there was a threat. Because the negotiations were public knowledge due to the *Wall Street Journal* leak, Toronto Stock Exchange rules required TransCanada to disclose the end of negotiations. A851-52. Thus, if Columbia rejected the $25.50/share all-cash offer and negotiations had ended, TransCanada would have to publicly announce that fact. Op. 80, 146. Columbia and its counsel had the same understanding of the rules, A867-68, and accordingly did not view Poirier's statement as a threat, A359 (361:8-22).

The Court of Chancery acknowledged the stock exchange rules, but concluded they did not apply because the \$25.50/share offer was not TransCanada's "best and final" offer. Op. 80. That was clearly erroneous. Poirier told Kettering that the \$25.50/share offer was TransCanada's "final" offer, A278 (¶ 412), and Skaggs reported to Columbia's board that the offer was "TransCanada's final proposal," A813. TransCanada's bankers at Wells Fargo also concluded that \$25.50/share was TransCanada's "best and final" offer. A884. Similarly, Columbia's bankers at Goldman Sachs recognized that "the basic choice is [\$]25.50 or no deal." A886. Everyone thought the \$25.50/share offer was TransCanada's final offer.

The court focused on Poirier's testimony that, had Columbia hypothetically rejected the \$25.50/share all-cash offer and asked TransCanada to reconsider the \$26/share mixed offer, TransCanada would have considered it. Op. 79. The court thought this meant the \$25.50/share offer was not "best and final." *Id.* But Poirier's statement simply reflected his obligation to report any counterproposal to TransCanada's management and board, even if TransCanada otherwise had decided the \$25.50/share offer was final. Poirier explained that TransCanada would have promptly rejected returning to the \$26/share mixed offer, A1215 (423:1-424:1) – unsurprising given that the contingencies on that offer had failed, *see* pp. 31-32, *supra*.

b. TransCanada did not otherwise culpably participate in any breach

Since the Court of Chancery premised its culpable-participation finding on TransCanada's supposed reneging of a $26/share deal, and the court was wrong about that, this Court can reverse without addressing the other two actions the court cited for culpable participation. That said, the court also was wrong about those actions.

i. TransCanada did not culpably participate in any breach by exploiting Smith's inexperience

The Court of Chancery concluded that Poirier knew of and exploited Smith's inexperience at negotiating a public-company sale. Op. 147. That does not support liability for two reasons.

First, there is a mismatch here with the asserted fiduciary breach. Plaintiffs contended that Smith breached his duty of loyalty by acting on his supposed desire to retire by mid-2016, Op. 5, and the Court of Chancery found accordingly, Op. 119. Plaintiffs did not claim that Smith breached his duty of care by being a bad negotiator, and the court did not make that finding. *See* Op. 113-27. So TransCanada could not have aided and abetted any breach relating to Smith's inexperience.

Second, a third-party buyer cannot be liable for aiding and abetting merely by recognizing and attempting to benefit from its counterparty's inexperience. That is particularly true here, where that counterparty had an unconflicted board and unconflicted advisors. *See* Op. 15, 28. The Court of Chancery essentially demanded that TransCanada give concessions during negotiations once it realized that Smith was out of his depth or report him to Columbia's board. Nothing in Delaware law requires that; on the contrary, the buyer has a duty to "seek the best deal terms" for its stockholders, including by leveraging its relative experience. *Morgan*, 2010 WL 2803746, at *8.

ii. TransCanada did not culpably participate in any breach by violating the standstill

The Court of Chancery faulted TransCanada for violating the standstill by discussing a potential sale with Skaggs and Smith in December 2015 and January 2016, which the court thought exploited Skaggs's and Smith's willingness to broker a less-than-optimal deal. Op. 146. That is incorrect for two reasons.

First, TransCanada lacked *scienter* because it did not know that it was violating the standstill. As noted, although the court interpreted the standstill to prohibit TransCanada from making any contact with Columbia without the board's written invitation, that is not how the parties to the agreement understood the standstill. *See* pp. 23-24, *supra*. Columbia's unconflicted general counsel, on the advice of its unconflicted outside counsel, told TransCanada that talking to Columbia's management would not violate the standstill, A237 (¶ 284); A835, 839-40, and that the standstill prevented TransCanada only from making a formal offer without the board's written invitation, A841. TransCanada did not knowingly violate the standstill when it was just doing what Columbia said it could do.

Second, even if TransCanada knew it had violated the standstill, it still lacked *scienter* because it did not know it was exploiting any wrongdoing by Columbia. The standstill's purpose was to prevent a hostile takeover or unwanted bid by giving Columbia's board the power to control the sale process. *See* A827-28 (§ 3). Columbia's board could choose to enforce the standstill if it thought necessary but was not required to do so if it welcomed the buyer's interest. Here, TransCanada had no reason to believe that Columbia's board did not welcome TransCanada's interest – to the contrary, the board granted TransCanada exclusivity and extended it twice. *E.g.*, Op. 42. Then, when TransCanada was ready to make a formal offer, Columbia's board invited it to do so. Op. 59-60.

The Court of Chancery reasoned that placing the obligation to enforce a standstill entirely on a seller's board might force the board to choose between putting a deal at risk or losing negotiating leverage. Op. 149-50. But that type of tradeoff could arise in any negotiation. *See Comverge*, 2014 WL 6686570, at *19. Further, here Columbia did not think that TransCanada violated the standstill, so Columbia's board was not put to a choice between risking a deal or losing leverage. In any event, any technical violation of the standstill would not have amounted to culpable participation in a fiduciary breach.

3. This Court's Precedents Do Not Support The Court Of Chancery's Broad Theory Of Liability

The Court of Chancery's decision has no support in Delaware precedent. It is the first time a Delaware court has held a buyer liable for damages for aiding and abetting a sell-side fiduciary breach during a sale process – and it did so based entirely on constructive knowledge of the breach.

The decision is far out of step with Delaware law. Delaware courts do not micromanage boards' decisions. When (as here) a plaintiff brings a *Revlon* claim, courts verify only that the seller's board established and followed a robust sale process to achieve the best price reasonably available for stockholders; a *Revlon* claim "is not a license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith." *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005). Notably, in the appraisal action, the court found after a full trial that the deal process was sufficiently reliable to use the $25.50/share deal price as fair value. *Columbia Pipeline*, 2019 WL 3778370, at *52.

But then, under the guise of an aiding-and-abetting claim, the court faulted Columbia's board for not pursuing an additional $0.25/share (1% of the deal value). *See* Op. 81. That is a level of scrutiny well beyond what *Revlon* permits; boards are not required to risk a deal to chase such a marginal amount. *See, e.g.*, *In re TIBCO Software Inc. S'holders Litig.*, 2015 WL 6155894, at *22 (Del. Ch. Oct. 20, 2015) (declining to second-guess a board's decision not to chase an additional 2.5% value). Columbia's board had in hand an all-cash offer that could close within days at a substantial premium to Columbia's stock price. The board acted well within the range of reasonableness permitted by *Revlon* by not jeopardizing the deal to seek a $0.25/share price increase. And if Columbia's board could not have been liable for failing to pursue that extra twenty-five cents, it makes no sense for TransCanada to be liable as an aider-and-abettor. The Court of Chancery stated that the "different trial record" between this action and the appraisal action resulted in "different factual findings," Op. 12, but the court did not actually identify any differences (and there were no significant differences).

No Delaware court has found a third-party buyer liable for aiding and abetting in anything like these circumstances, for good reason. The Court of Chancery cited decisions that, in its view, showed that a buyer could aid and abet a sell-side breach by "obtain[ing] privileged access to a disloyal sell-side actor, then us[ing] the resulting relationship to ignore guardrails or violate boundaries that the sell-side board established." Op. 135-42. None is like this case.

The court first cited *Revlon* and *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989). Op. 136-39. Neither involved aiding-and-abetting liability. Rather, in both, this Court held that the seller's fiduciaries acted disloyally, without addressing the buyer's liability. *See Revlon*, 506 A.2d at 184; *Mills*, 559 A.2d at

1279. The Court of Chancery reasoned that this Court must have believed that the buyers aided and abetted the sellers' breaches because the Court affirmed preliminary injunctions barring the buyers from enforcing their merger agreements, and the Court held in *C&J Energy Services, Inc. v. Miami General Employees Retirement Trust*, 107 A.3d 1049 (Del. 2014), that it would not enjoin the buyer from enforcing its merger agreement without a finding that the buyer aided and abetted a fiduciary breach. Op. 136. In other words, the court believed that *C&J Energy* set out a rigid rule that a court must find that the buyer aided and abetted a breach before enjoining the buyer, which it applied retroactively to *Revlon* and *Mills*.

The Court of Chancery's reimagining of *Revlon* and *Mills* was incorrect. *Revlon* and *Mills* did not say anything about the buyers' liability, and the Court of Chancery should not have imputed holdings this Court did not make on issues this Court did not address. The court's reliance on *C&J Energy* was particularly misplaced; not only did that decision come nearly three decades after *Revlon* and *Mills*, it involved a completely different circumstance, where the buyer was the *only* bidder, so enjoining the buyer could harm the seller's stockholders by foreclosing the only possible deal. 107 A.3d at 1055. In contrast, in *Revlon* and *Mills*, there were multiple bidders – indeed, the cases were brought by other bidders – so there was no concern that enjoining the buyers would harm the sellers' stockholders. 506 A.2d at 182-84; 559 A.2d at 1275. Thus, this Court's willingness to enjoin the buyers in *Revlon* and *Mills* does not suggest that the Court implicitly concluded that the buyers had aided and abetted any sell-side fiduciary breaches.

In any event, the buyers' conduct in *Revlon* and *Mills* was far afield from TransCanada's conduct here. In each case the buyer worked with the seller to thwart a higher offer from a different bidder. 506 A.2d at 177; 559 A.2d at 1277-78. There is no such allegation here. *See* pp. 29-39, *supra*. So even if *Revlon* or *Mills* shed light on aiding-and-abetting liability, they are distinguishable.

The Court of Chancery also cited *In re Mindbody, Inc. Stockholder Litigation*, 2023 WL 2518149 (Del. Ch. Mar. 15, 2023), which is now on appeal to this Court. The *Mindbody* plaintiffs only brought a claim against the buyer for aiding and abetting disclosure breaches, and not for aiding and abetting sale-process breaches. *Id.* at *41-43. The case thus is not relevant to the sale-process claim here. *Mindbody* also is distinguishable on the facts of the sales process. There, the buyer (a private-equity firm) courted the seller's CEO by telling him he could profit twice if the buyer bought the company (first from the sale to the buyer, and then when the buyer resold the company). *Id.* at *12-13. The CEO saw the buyer as "his solution" and stacked the sale process to ensure that it would be the only viable bidder. *Id.* at *37-38. Even if that is enough to prove knowing participation in a sale-process breach – which the *Mindbody* court did not decide – it is a far cry from this case. TransCanada did not promise anything to Skaggs or Smith, and did not know if Skaggs and Smith manipulated the process to favor TransCanada at the expense of other bidders.

Of the decisions the court cited that addressed aiding-and-abetting sale-process claims, each plainly is distinguishable because it involved the buyer creating the sell-side conflict or knowing that it was receiving illicit information. In *Del Monte*, the buyer created the conflict by buying off the sell-side advisor with financing fees double what the advisor stood to earn. 25 A.3d at 835. In *Chester County Employees' Retirement Fund v. KCG Holdings, Inc.*, 2019 WL 2564093, at *19 (Del. Ch. June 21, 2019), the buyer allegedly created the conflicts by taking advantage of confidential information provided to it by the sell-side banker and proposing additional compensation to the seller's CEO. And in *Presidio*, the buyer allegedly acted on a tip from a sell-side financial advisor that the buyer knew it was not entitled to receive. 251 A.3d at 280-81. The court denied the buyer's motion to dismiss, but cautioned that discovery might reveal that the buyer "negotiated at arm's-length and that there is no basis for any claim against it." *Id*. at 282. Here, TransCanada did not create any conflicts or knowingly receive illicit information. It thus did not aid or abet any breach relating to the sale process.

II. TRANSCANADA DID NOT AID OR ABET ANY DISCLOSURE BREACH BY SKAGGS, SMITH, OR COLUMBIA'S BOARD

A. Question Presented

Whether the Court of Chancery erred in holding that TransCanada aided and abetted Skaggs's, Smith's, and the Columbia board's disclosure breaches. This question was raised below, A498-501, 601-06, 663-68, and considered by the Court of Chancery, Op. 165-68.

B. Scope Of Review

The Court reviews questions of law *de novo*. *Oxbow Carbon*, 202 A.3d at 502. The Court reviews the Court of Chancery's application of law to facts *de novo*, *Scharf*, 864 A.2d at 916, and its factual findings for clear error, *Ocean Bay*, 285 A.3d at 136.

C. Merits Of Argument

As explained, an aiding-and-abetting claim requires the defendant's knowing participation in the breach. *Malpiede*, 780 A.2d at 1096. In the context of a disclosure violation, proving knowing participation requires showing that (1) the defendant knew that the proxy statement was deficient, in that it failed to fully and fairly disclose all material information to stockholders, *In re Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *15 (Del. Ch. Dec. 10, 2018); and (2) the defendant "participated in [] drafting" the statement "with the intent to mislead," *Morrison v. Berry*, 2020 WL 2843514, *12 (Del. Ch. June 1, 2020).

This is a difficult standard to meet, which makes sense because a third party generally has no duty to ensure that a fiduciary makes adequate disclosures to its stockholders. *Buttonwood Tree Value P'rs, L.P. v. R. L. Polk & Co*., 2017 WL 3172722, at *10 (Del. Ch. July 24, 2017); *see Xura*, 2018 WL 6498677, at *15 (aiding-and-abetting claim based on a third party's failure "to *prevent* a board from providing misleading disclosures to stockholders rests on thin ice"). The standard is not met here.

1. TransCanada Did Not Know Of Any Disclosure Breach

The Court of Chancery identified five categories of disclosures in the proxy statement that, in its view, TransCanada should have known were materially misleading or incomplete. *See* Op. 166-67. None supports liability: Nothing in the statement was so obviously wrong that TransCanada knew that Columbia's board was breaching its disclosure obligations.

First, the court held that the statement failed to expressly state that Skaggs and Smith planned to retire in 2016. Op. 166. The court recognized that TransCanada "did not actually know of Skaggs and Smith's [retirement] plans," but thought that TransCanada had "constructive" knowledge because it had been told "there would be no social issues in the deal" and "Skaggs and Smith behaved like executives who wanted to call it a day." *Id.*

Delaware law does not require that level of insight. "No social issues" meant only that Columbia's senior executives would not insist on remaining with the company after the acquisition. Op. 16. TransCanada did not know of Skaggs's or Smith's plans after the merger, including their plans to retire. Op. 166. Further, the proxy statement accurately disclosed Skaggs's and Smith's change-in-control benefits; noted that Columbia's executives could have had interests different from stockholders; and stated that Columbia's board considered those interests in recommending the transaction. A1057, 1077-83. TransCanada had no reason to believe more was needed.

Further, nothing TransCanada saw unambiguously demonstrated that Skaggs or Smith wanted to cut a quick deal and retire. *See* pp. 22-25, *supra*. Indeed, the Court of Chancery relied on behavior TransCanada could not see. The court faulted Skaggs for not recommending that Columbia's board make a counteroffer at $25.75/share, which it attributed to his desire "to take the $25.50 Offer and retire." Op. 82. But all TransCanada saw was that there was no counteroffer. TransCanada did not know whether Skaggs had pushed for a counteroffer and was rebuffed by his board, or whether he had never suggested one. As the court acknowledged, TransCanada "was not inside [Columbia's] boardroom." Op. 144. The court thus was wrong to hold TransCanada liable based on the fact that the proxy statement did not state that Skaggs and Smith intended to retire.

Second, the Court of Chancery held that the proxy statement failed to include additional detail about meetings between TransCanada and Columbia between November 2015 and February 2016. Op. 163, 166. In particular, the court thought that the statement needed to disclose that at the January 7, 2016, meeting, Smith told Poirier that "TransCanada did not face competition" and invited TransCanada to make a bid. Op. 161-62.

A proxy statement does not need to list every detail of every meeting that took place during months of negotiations. A fiduciary "ha[s] an obligation to provide shareholders with an accurate, full, and fair characterization" of the negotiations, but does not need to "give a 'play-by-play' recitation." *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *12 (Del. Ch. June 27, 2008) (internal quotation marks omitted). Instead, the fiduciary should "balanc[e] the benefits of additional disclosures against the risk that insignificant information may dilute potentially valuable information." *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 749 (Del. Ch. 2016). Thus, how much detail to include is a matter of judgment – and Columbia made that real-time judgment after consulting with its expert advisers.

Here, TransCanada believed that Columbia made reasonable decisions about what to include. Columbia knew the details of its interactions with TransCanada and it drafted the statement with the assistance of experienced counsel. *See* Op. 28. The statement included 18 pages cataloging in detail those interactions, A1035-53, including a paragraph about the January 7, 2016, meeting, which explained that Poirier initiated the meeting and described the topics discussed. A1041. Even if the Court of Chancery was correct that additional details should have been included, there is no evidence that TransCanada knew that Columbia was breaching its disclosure obligations by omitting those details, instead of making a reasonable determination about what information to include.

Third, the Court of Chancery held that the proxy statement did not state that TransCanada had violated the standstill. Op. 164, 166. But neither TransCanada nor Columbia believed TransCanada had violated the standstill, so TransCanada did not think that Columbia was omitting any material fact. *See* pp. 23-24, *supra*. And even if TransCanada believed it was violating the standstill, Delaware law does not require "self-flagellation" – that is, it does not require a company to "draw legal conclusions implicating itself in a breach of fiduciary duty" before a court has made that determination. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997) (internal quotation marks omitted).

Fourth, the Court of Chancery held that the proxy statement failed to disclose that other bidders also were bound by standstills. Op. 167. But TransCanada was never privy to other bidders' NDAs. *See id.* The court noted that TransCanada had "surmised" that other bidders might be bound by standstills, *id.*, but supposition is not constructive knowledge, let alone actual knowledge.

Even if TransCanada should have known that other bidders also had standstills, it had no reason to believe that omitting that fact was a disclosure breach. The court reasoned that omitting the standstills was material because stockholders would have wanted to know that all potential bidders were subject to standstills but that Columbia allowed only TransCanada to breach its standstill. Op. 88. Again, that assumes that TransCanada knew that it breached the standstill and that Columbia chose to overlook the breach – which is incorrect. *See* pp. 23-24, *supra*.

Finally, the Court of Chancery held that the proxy statement did not disclose that TransCanada reneged on the supposed $26/share deal. Op. 164-66. The court's determinations are wholly unsupported; there was no deal on which TransCanada reneged. *See* pp. 30-36, *supra*. Even if TransCanada reneged on a deal, TransCanada had no obligation to self-flagellate. The statement needed only to disclose that TransCanada had made and withdrawn the $26/share offer (which it did, *see* A1051); it did not need to disclose TransCanada's motivations or its negotiating strategy. *See Loudon*, 700 A.2d at 143. Delaware law does not require a buyer to show all its cards to the seller's stockholders.

The bottom line is that TransCanada had no knowledge of any disclosure breach. In holding otherwise, the Court of Chancery significantly and unjustifiably lowered the standard for buy-side aiding-and-abetting liability. Affirming that standard effectively would make buyers the insurers of sellers' disclosures. Buyers would be wary of pursuing acquisitions out of concern for liability for proxy statements they do not control, because of deficiencies they did not even know about. And if buyers continue to pursue acquisitions, they would try to reduce their potential liability in ways that ultimately will harm stockholders. Buyers could refuse to be involved in sellers' disclosure statements, reducing the information provided to stockholders. Or buyers could insist that sellers over-disclose, causing proxy statements to contain unnecessary and unhelpful information. Either way, stockholders would be worse off.

2. TransCanada Did Not Participate In Drafting Any Deficient Proxy Disclosures With An Intent To Mislead

TransCanada also did not culpably participate in Columbia's disclosure breaches, for two reasons. It did not participate in drafting the portions of the proxy statement that the Court of Chancery found inadequate, and it certainly did not do so with the intent to mislead Columbia's stockholders.

TransCanada was required to provide input only on TransCanada's information, and then it could review the statement to see if it contained materially untrue or misleading statements. *See* A947-48 (§ 5.01(a)-(b)). TransCanada fulfilled its obligations: It provided the required information about itself and then carefully reviewed the draft and proposed edits to the sections that used that information. Op. 87-88. Columbia was solely responsible for drafting the other sections of the statement, which contained the supposed deficiencies. Each supposed deficiency involved information that Columbia knew just as well as, if not better than, TransCanada. And TransCanada did not propose any edits or deletions to hide any information from Columbia's stockholders. Merely reviewing a statement and then failing to offer corrections on sections that relate to another company's actions does not amount to affirmatively participating in drafting a deficient statement.

Further, culpable participation requires *scienter*: that is, acting knowingly, intentionally, or with reckless disregard of wrongdoing. *Malpiede*, 780 A.2d at 1079-98. The Court of Chancery did not address TransCanada's intent, *see* Op. 165-68, and there is no evidence that TransCanada intended to mislead Columbia's stockholders on any point.

The Court of Chancery relied on *Mindbody*, but that decision is distinguishable from this case. There, the buyer was a private-equity fund that had courted the seller's CEO and knew that he had stacked the sale process in its favor. 2023 WL 2518149, at *36-38. The court concluded that the seller's proxy statement downplayed, misrepresented, and otherwise failed to adequately disclose the close relationship between the CEO and the buyer, including that the CEO had tipped the buyer off about a potential sale before he had board authorization. *Id.* at *40-41. The court found that the buyer knew that the information had been omitted, knew the information's significance, and "scrubbed" the information from other materials to prevent it from getting out. *Id.* at *43-44.

Here, TransCanada did not know much of the information that supposedly was omitted from the proxy or its significance, and certainly did not seek to erase or exclude that information. It also did not introduce or exacerbate any supposed deficiency. Nor did it withhold or attempt to conceal any information that Columbia did not know. The fact that a court might later disagree with Columbia's judgment calls about the proxy statement does not amount to knowing participation in a disclosure breach.

III. THE COURT OF CHANCERY ERRED IN AWARDING $199 MILLION IN NOMINAL DAMAGES

A. Question Presented

Whether the Court of Chancery erred by awarding $199 million in "nominal" damages for the disclosure claim. This question was raised below, A506-09, 606-12, 670-73, and considered by the Court of Chancery, Op. 178-88.

B. Scope Of Review

The Court reviews the Court of Chancery's legal determinations about whether a remedy is available and the legal standard for awarding that remedy *de novo*. *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 95 (Del. 2021).

C. Merits Of Argument

The Court should reverse the damages award on the disclosure claim. To recover compensatory damages for a disclosure breach, a plaintiff "must prove reliance, causation, and damages." *Dohmen v. Goodman*, 234 A.3d 1161, 1175 (Del. 2020). If the plaintiff does not prove those elements, then only "nominal" damages are available. *Id.* at 1174-75.

1. The Nominal Damages Award Is Prohibited As A Matter Of Law

Nominal damages are "trivial" amounts "selected simply for the purpose of declaring an infraction of the [p]laintiff's rights." *Ravenswood Inv. Co. v. Est. of Winmill*, 2018 WL 1410860, at *25 (Del. Ch. Mar. 21, 2018) (quotation marks and brackets omitted), *aff'd*, 210 A.3d 705 (Del. 2019); *see, e.g.*, *Uzuegbunam v.*

Preczewski, 592 U.S. 279, 285-86 (2021). Nominal damages are *not* meant to reflect the plaintiff's actual losses, and thus do not serve a compensatory function. *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 714 (Del. 1967).

Here, Plaintiffs offered no evidence of reliance, causation, or damages for the disclosure claim, so the Court of Chancery correctly recognized that they are eligible only for nominal damages. Op. 169, 179. But, citing *Mindbody*, the court awarded the class $0.50/share, or $199 million in total, in so-called "nominal" damages. Op. 188. Those were not nominal damages as a matter of law, because they were not trivial amounts awarded to send a message and instead served a compensatory purpose.

The Court of Chancery expressly ascribed a compensatory function to those damages. The court stated that the award "corresponds roughly to where a deal might have ended up had [Columbia's] stockholders voted down the transaction at $25.50 per share." Op. 183-85. That is, even though Plaintiffs provided no evidence that any disclosure breach caused them injury, and had never tried to prove that stockholders would have rejected the $25.50/share offer or what an alternative deal would have been, the court attempted to value the class's but-for damages. Op. 180. That confirms that the damages are compensatory, not nominal.

2. This Court's Precedents Do Not Support The Nominal Damages Award

Other than *Mindbody*, there is no Delaware precedent for this type of massive award of "nominal" damages. The Court of Chancery cited *Weinberger v. UOP, Inc.*, 1985 WL 11546 (Del. Ch. Jan. 30, 1985), *aff'd*, 497 A.2d 792 (Del. 1985), *Gaffin v. Teledyne, Inc.*, 1990 WL 195914 (Del. Ch. Dec. 4, 1990), *aff'd in part, rev'd in part on other grounds*, 611 A.2d 467 (Del. 1992), and *Smith v. Shell Petroleum, Inc.*, 1990 WL 186446 (Del. Ch. Nov. 26, 1990), in which the courts awarded damages on a per-share basis.

But those decisions did not involve nominal damages. Instead, each involved equitable awards designed to "compensate[]" the plaintiffs for the "wrong done to them" when they had proved causation but not the exact amount of harm. *Weinberger*, 1985 WL 11546, at *9; *see Gaffin*, 1990 WL 195914, at *18 (determining award "appropriate" to remedy the plaintiffs' harm); *Smith*, 1990 WL 186446, at *5 (basing award on value of undisclosed asset). This Court has made clear that *any* compensatory award for a disclosure claim requires proof of "reliance and causation," as well as of "actual damages." *Dohmen*, 234 A.3d at 1172. Because there was no evidence of reliance or causation here, *Weinberger*, *Gaffin*, and *Smith* shed no light on the damages available.

The Court of Chancery also cited *Mindbody*, where the court awarded $1/share in supposedly nominal damages for a disclosure claim. *See* 2023 WL

2518149, at *47. As noted, that decision is currently on appeal. This Court should reverse the award of nominal damages in that case as well, because the *Mindbody* court used the same incorrect standard as the Court of Chancery in this case. *See id.* Even if it affirms *Mindbody*, the Court should reverse the nominal damages here, because the amount of nominal damages ($199 million) is much larger than in *Mindbody* ($35 million), *see id.* – even though the evidence of culpability is far weaker, *see* pp. 46-53, *supra*.

Affirming the nominal damages award would massively expand the scope of potential liability for buyers and sellers. By requiring plaintiffs to prove reliance, causation, and damages to receive compensatory damages, *Dohmen* ensures that defendants are liable only for the actual harm they caused. *See* 234 A.3d at 1168 n.27. The Court of Chancery's approach, in contrast, allows plaintiffs to go to trial and receive enormous sums as "nominal" damages that effectively function as compensatory damages without pleading or proving that any plaintiff even was harmed. That would provide plaintiffs an easy path to making an end-run around *Dohmen*, where this Court sought to *narrow* the damages available without proof of reliance, causation, or actual damages. *See id. at* 1175-76. This Court should not endorse that approach.

IV. THE COURT OF CHANCERY ERRED IN ALLOCATING FAULT

A. Question Presented

Whether TransCanada is responsible for 50% of the sale-process damages and 42% of the disclosure damages. This question was raised below, A683-99, 736-54, 778-88, and considered by the Court of Chancery, Allocation Op. 24.

B. Scope Of Review

The Court reviews the Court of Chancery's legal determinations about the standards for allocating fault *de novo* and its allocation for clear error. *RBC*, 129 A.3d at 869.

C. Merits Of Argument

Because Skaggs and Smith were jointly liable with TransCanada, the Court of Chancery had to allocate the damages award between Skaggs, Smith, and TransCanada under DUCATA. The court decided that TransCanada was 50% responsible for the sale-process damages and 42% responsible for the disclosure damages. Allocation Op. 38. But the court did not correctly apply the statutory framework, and its factual determinations are not supported by the record.

1. The Court Of Chancery Misapplied Delaware Law

Under DUCATA, a Delaware court starts by equally allocating fault among the responsible parties. 10 *Del. C.* § 6302(d); *see In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 261 (Del. Ch. 2014). Only if the court determines that an "equal distribution" would be "inequitable" can the court adjust each party's "pro rata share[]" based on its "relative degree[] of fault." 10 *Del. C.* § 6302(d).

The Court of Chancery did not follow the path set out in the statute. DUCATA requires equal allocation between the "joint tortfeasors," 10 *Del. C.* § 6302(d) – meaning the "persons jointly or severally liable," *id.* § 6301 – not between groupings of tortfeasors. The court recognized that; it stated that DUCATA "presumptively envisions" an "equal allocation" – here, "one-third for TransCanada, one-third for Skaggs, and one-third for Smith." Allocation Op. 64-65. But instead of starting there, the court grouped Skaggs and Smith as "a unit," and started with a 50% allocation of fault to TransCanada. Allocation Op. 66, 73.

The Court of Chancery thought its grouping was justified because "it took two sides to negotiate and enter into the deal that gave rise to liability," "Columbia" and "TransCanada." Allocation Op. 66. But Skaggs and Smith were defendants in this case, not Columbia, and the court found that Skaggs and Smith separately breached their fiduciary obligations. *See* Op. 119-32. Indeed, in most post-acquisition cases, there will be only one buy-side defendant (the buyer) and multiple sell-side defendants (the seller's fiduciaries). So the Court of Chancery's approach would make DUCATA's framework meaningless in practically all cases involving mergers or acquisitions.

Further, the Court of Chancery's simplistic reduction of this case to "two sides" is clearly erroneous because it ignored that it had previously found that Skaggs and Smith contributed to the deal in different ways. For example, the court castigated Smith for "hand[ing] over his talking points to Poirier" during the January 7, 2016, meeting. Op. 121-22. Skaggs was not involved in that meeting. Instead, the court blamed Skaggs for not recommending that Columbia's board make a counteroffer to TransCanada's $25.50/share all-cash offer. Op. 126. Skaggs and Smith were not a monolithic bloc that could be lumped together for allocation purposes, and so for that reason too the court was wrong to allocate 50% of the fault to TransCanada as a baseline.

2. The Court Of Chancery Clearly Erred In Its Allocations Of Fault

Even if the Court of Chancery could start by allocating 50% of the fault to TransCanada, its ultimate determinations of TransCanada's shares of fault were clearly erroneous. To determine a party's share of fault, Delaware courts look to the *Restatement of Torts* for guidance. *See Rural/Metro Corp.*, 102 A.3d at 261. The Restatement directs courts to consider two factors: (1) "the nature of the [party's] risk-creating conduct," including the party's "awareness or indifference with respect to the risks" of its conduct and its "intent"; and (2) "the strength of the causal connection between the [party's] risk-creating conduct and the harm." *Restatement*

(Third) of Torts: Apportionment Liab. § 8 (2000). The Court of Chancery identified these factors, Allocation Op. 65, but clearly erred in applying them.

a. TransCanada is not 50% at fault for the sale-process damages

The Court of Chancery held that the nature of TransCanada's conduct and its causal connection to the sale-process breaches justified a 50% allocation. Allocation Op. 65-70. It was wrong.

With respect to TransCanada's conduct, the court thought TransCanada's conduct equally as culpable as Skaggs's and Smith's conduct. Allocation Op. 67-69. The court found that although Skaggs and Smith breached their duty of loyalty by acting on their desires to retire, their intent was not malign – they were "professionals who took pride in their jobs and wanted to do the right thing." Allocation Op. 68-69. In contrast, the court viewed TransCanada as "more sophisticated" than Skaggs and Smith and as more "resolutely scheming and opportunistic," particularly in violating the standstill. Allocation Op. 67-68.

The Court of Chancery's analysis was clearly erroneous, for two reasons. First, it entirely ignored that TransCanada did not believe that it was violating the standstill, and that Columbia's general counsel *told it* that it was not violating the standstill. *See* pp. 23-24, *supra.* TransCanada thus lacked culpable intent.

Second, the court ignored that TransCanada lacked actual knowledge of Skaggs's or Smith's supposed conflicts. In its liability decision, the court recognized that TransCanada "did not actually know of Skaggs and Smith's plans" to retire. Op. 166. But in its allocation decision, the court flatly stated that "TransCanada knew that Skaggs and Smith were conflicted" and judged TransCanada's conduct as though it had actual knowledge. Allocation Op. 39, 67. That approach had no record support. And as the court recognized, a party without actual knowledge is much less culpable than one with that knowledge. Allocation Op. 72. The court thus overallocated fault to TransCanada.

With respect to causation, the Court of Chancery concluded that TransCanada and Skaggs and Smith equally contributed to the sale-process damages. Allocation Op. 69-70. The court reasoned that Skaggs and Smith should have countered at \$26/share, and that TransCanada would have accepted a deal at \$25.75/share. *Id.* Those findings are clearly erroneous: The \$26/share offer failed by its terms, and the \$25.50/share offer was TransCanada's "final" offer. *See* pp. 30-36, *supra*. The court's belief that there would have been a deal at \$25.75/share is pure speculation and insufficient to uphold its allocation decision.

b. TransCanada is not 42% at fault for the disclosure damages

The Court of Chancery allocated TransCanada 42% of the fault for the disclosure damages by allocating fault for each supposed omission from the proxy statement and then taking the average across all omissions. Allocation Op. 73-76. To allocate fault for each omission, the court compared TransCanada's knowledge with Skaggs's and Smith's knowledge. *Id.* For example, where both TransCanada and Skaggs and Smith had actual knowledge, the court allocated TransCanada 50% of the fault. Allocation Op. 73. There are two problems with this approach.

The first problem is that it did not account for the omissions for which TransCanada was not required to self-flagellate (the omissions related to the standstill and the $25.50/share mixed offer). *See* pp. 49-50, *supra*. The Court of Chancery allocated fault to TransCanada for those omissions, but under Delaware law TransCanada cannot be required to tell Columbia's stockholders of its own wrongdoing to avoid liability.

The second problem is that it assumed that TransCanada and Columbia "played an equal role" in creating the proxy statement. *See* Allocation Op. 72. That was clear error; it is undisputed that Columbia had the actual ability to draft, finalize, and publish the statement whereas TransCanada could only review the draft and make suggestions. *See* pp. 51-52, *supra.* TransCanada's causal connection to the statement thus necessarily was less than Columbia's.

Given the significant legal and factual problems with the allocation decision, even if this Court affirms the Court of Chancery's other determinations, this Court should vacate the allocations of fault and remand with instructions to redetermine the allocations using the correct standard.

CONCLUSION

The Court should reverse the judgment of the Court of Chancery.

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