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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE COLUMBIA PIPELINE GROUP, INC. MERGER LITIGATION	Consolidated C.A. No. 2018-0484-JTL

ANSWERING BRIEF OF PLAINTIFFS-BELOW/APPELLEES

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NATURE OF PROCEEDING[1]

This appeal arises from unusual facts. The lower court held that Appellant—TC Energy Corporation ("TransCanada")—aided-and-abetted breaches of duty by directors and officers of Columbia Pipeline Group, Inc. ("Columbia") in connection with TransCanada's acquisition of Columbia (the "Merger"). For months, TransCanada identified and exploited conflicts on the part of Columbia's officers, including by persistently and knowingly breaching a standstill agreement (the "Standstill"). TransCanada and Columbia had a win-win transaction at $26/share, but—at the eleventh hour—TransCanada used its months-long exploitation to drop its price to $25.50/share and made a coercive threat it knew violated the Standstill. The Merger was a success for TransCanada, but Columbia's stockholders were harmed.

This appeal arises from an unusual posture as well. The trial court effectively tried the case twice: once as an appraisal case and again as a breach of fiduciary duty case. TransCanada objected to consolidating both cases for trial, and the appraisal proceeded first. TransCanada's strategy backfired. Discovery in the second case uncovered much that had been withheld in the first, and TransCanada belatedly waived privilege, leading to discovery of highly relevant new information.

[1] Unless otherwise noted, all emphasis is added; citations and quotations are omitted.

Thus, the trial court's extensive factual findings deserve deference and TransCanada's attempts to relitigate them should be rejected. The trial court not only heard and considered the evidence; on certain key issues it effectively heard from the same witnesses *twice*. It is particularly ironic that TransCanada—facing literally *hundreds* of pages of factual findings based on thousands of pages of deposition and trial testimony and thousands of exhibits—now relitigates those findings, as though the trials never happened and the witnesses never testified. Indeed, TransCanada neither cites nor attaches *any* trial testimony from its lead negotiator, François Poirier, in this action, although it was Poirier's testimony that drove many of the court's factual findings.

The policy arguments TransCanada and *amicus* advance fare no better. The decision below will not disturb, much less end, "the American model of capitalism" or "chill future transactions[.]" *Amicus* Brief ("AB") 16-17. Delaware law continues to protect third-party buyers that refrain from nefarious activity from aiding-and-abetting liability. *Id.* TransCanada does not appeal the conclusion that Columbia's officers faced conflicts and that Columbia's officers and directors breached their fiduciary duties by acting outside the range of reasonableness. The facts proven at trial demonstrated that TransCanada knowingly participating in those uncontested breaches with actual or constructive knowledge thereof. TransCanada received *written legal advice* that it could not legally threaten disclosure of deal

negotiations to coerce Columbia's fiduciaries and *then did precisely that*. TransCanada took that final step because of its months-long knowing, pervasive, and opportunistic standstill breaches and exploitation of Columbia management.

Likewise, the opinion below does not "leave[] prospective corporate buyers in an impossible position." AB 11. Although there may be an obligation to avoid wasting money on acquisitions, there is no "reverse *Revlon*" claim and the idea that buyers have an unlimited right to run amok in pursuit of the lowest price for their stockholders is a dangerous misstatement.

Aiding-and-abetting liability may be difficult to prove against a third-party buyer, but it is not impossible. That a buyer may not exploit sell-side fiduciary breaches "with gusto" is neither shocking nor new. Overturning the opinion below will give overzealous counterparties carte blanche to participate in breaches of duty by sell-side fiduciaries by repeatedly and knowingly violating standstill agreements and issuing threats in violation of standstills. "[E]verything is not a Hobbesian free for all." Op. 152.

The trial court's disclosure findings are sound and deserve deference. TransCanada was contractually obligated to review and notify Columbia if any issue in the proxy statement (the "Proxy") needed to be addressed for inclusion so the Proxy would not be materially misleading or omissive. TransCanada participated in drafting the Proxy and agreed to assure it was not misleading, but TransCanada

recklessly chose not to correct what it knew were material misstatements about events, communications, and meetings TransCanada's officers participated in, crossing the line into aiding-and-abetting liability.

Finally, the trial court did not abuse its discretion by exercising its equitable powers to award nominal damages for the disclosure breaches TransCanada aided-and-abetted. Nor did the trial court err in allocating liability. TransCanada's arguments misstate the court's rulings and ignore settled precedent.

This is a rare case. The trial court found "persistent and opportunistic breaches over an extended period" and that TransCanada had "zestfully exploit[ed]" breaches by the sell-side fiduciaries. Op. 152. The court noted that "[t]aking those violations seriously gives bidders an incentive to respect the boundaries that a board establishes, which in turn enables the board to manage the sale process." Op. 149. That is neither unwise nor unprecedented, but instead good policy and good sense. If the law is to play a role in the marketplace, surely that role should include empowering boards to effectively manage sale processes.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly held TransCanada knowingly participated in breaches of duty by Columbia's CEO, CFO, and Board during the sale process. The trial court applied settled law in ruling that TransCanada had actual or constructive knowledge of the breaches, which TransCanada exploited "with gusto." Op. 145. TransCanada's attempts to relitigate the extensive factual findings supporting that determination are unavailing; those findings are entitled to deference and are not the product of clear error.

2. Denied. The trial court correctly held TransCanada knowingly participated in disclosure breaches by Columbia's fiduciaries. TransCanada knew the Proxy failed to disclose material information and was contractually obligated to provide Columbia with accurate information for the Proxy and inform Columbia if there were any issues in the Proxy that should be addressed so it would not be materially misleading or omissive. TransCanada recklessly chose to remain silent and failed to correct the Proxy's glaring omissions while dismissing the Proxy as Columbia's document.

3. Denied. The trial court's exercise of its equitable powers to award disclosure damages is supported by the record and consistent with Delaware law. After considering Delaware precedents and examining the record, the trial court

found a rational basis to award $0.50/share in disclosure damages to remedy the wrong to Columbia stockholders' voting rights.

4. Denied. The trial court's allocation decision is consistent with precedent and sufficiently supported by the record. The trial court correctly considered each joint tortfeasor's conduct and its causal connection to the harm Columbia's stockholders suffered when exercising equitable discretion to hold TransCanada responsible for 50% of the sale process damages and 42% of the disclosure damages based on relative degrees of fault. The court's decision was the product of an orderly and logical deductive process, not clear error.

STATEMENT OF FACTS

A. Factual Background

1. Columbia Management Seeks to Retire With Their Change-In-Control Benefits; TransCanada Learns of the Conflict

Columbia was a publicly traded pipeline corporation operating in the midstream space. Op. 13. Columbia was a wholly owned NiSource, Inc. ("NiSource") subsidiary; Robert Skaggs, Steven Smith, and Glenn Kettering were aging NiSource officers "who were planning for retirement" and saw a spinoff of Columbia "as a means to achieve that goal." *Id.* If NiSource spun off Columbia and they went with the new entity, a sale of Columbia would trigger their lucrative change-in-control payments. Op. 14. After "Skaggs and his management team recommended a spinoff," Skaggs, Smith, and Kettering joined Columbia as CEO, CFO, and President, respectively, and "received a comparable change-in-control agreement," which "gave [them] personal reasons to secure a deal" in the near-term. Op. 14-15.

They immediately engaged Goldman, Sachs & Co. ("Goldman") and Lazard Frères & Co. ("Lazard") to prepare to sell Columbia. Op. 15. Goldman understood that "Skaggs and Smith 'don't want to work forever'" and "believed that Skaggs and Smith were eyeing 'a sale in the near term.'" *Id.* In May 2015, "Lazard contacted TransCanada and conveyed that Columbia 'may be put into play' after the Spinoff and 'that social issues may not be a significant consideration.'" *Id.*

TransCanada understood Skaggs, Smith, and Kettering were motivated towards a near-term sale of Columbia for cash. TransCanada's lead negotiator, Poirier, knew "social issues" referred to the post-closing "composition of management." B0174 (175:2-13). TransCanada understood "Skaggs, Smith, and Kettering were not interested in sticking around" and "[a]ll of TransCanada's proposals assumed that they would leave with their change-in-control benefits." Op. 15.

TransCanada began pursuing Columbia in September 2015. Op. 18. Smith had known Poirier and Eric Fornell of Wells Fargo Securities, LLC ("Wells Fargo")—TransCanada's financial advisor—since 1999 and through their professional friendships the three had built a rapport. Op. 18-19. Fornell told Smith TransCanada was interested in Columbia; Poirier and Smith met on October 9. Op. 19. Poirier immediately had his team "calculate how much Skaggs, Smith, Kettering…would receive under their change-in-control agreements" and learned "a sale would put millions of dollars in their pockets." Op. 19-20. TransCanada quantified the "total value at risk" they faced—$45,386,051, $13,128,063, and $6,767,111, respectively—recognizing their unusually "large change of control provisions," which paid them three times their base salary and target bonus if they sold Columbia within three years of the spinoff, made them "motivated to sell." Op. 24; A173 ¶65; A177 ¶88; A182 ¶110.

2. The Board Initiates, Then Terminates, the Sale Process; TransCanada Begins Knowingly Violating the Standstill

At Skaggs' direction, Columbia's board of directors (the "Board") adopted a "two-track" approach in October 2015 in which Columbia would either raise capital or find an acquirer. Op. 17, 20. With Board authorization, Skaggs invited Dominion Energy Inc. ("Dominion") and Berkshire Hathaway Energy ("Berkshire") to engage on October 26 and Dominion proposed a joint acquisition with NextEra Energy Inc. ("NextEra"). PTO ¶¶200, 208, 219.

On November 9, Columbia and TransCanada executed an NDA containing the don't-ask-don't-waive Standstill.[2] The Standstill prohibited TransCanada from (i) acquiring or offering, seeking, proposing, or agreeing to acquire Columbia absent prior written Board authorization, (ii) requesting the Board amend or waive the standstill, or (iii) publicly disclosing negotiations. Op. 43-44; A825-26; A827-28 §3.

TransCanada focused on the Standstill and understood its prohibitions:

- Christine Johnston, TransCanada's Vice President of Law, negotiated the Standstill and reduced its term from eighteen to twelve months. Op. 22. Johnston understood the Standstill forbade TransCanada from "seeking" to acquire Columbia absent prior written Board authorization and testified TransCanada sought to acquire Columbia at all relevant times. A170 ¶58; B0307 (558:14-21); B0308 (564:13-16); B0310 (594:11-21); B0312-B0316 (596:14-600:19).

[2] Op. 22. Columbia entered eighteen month-long standstills with NextEra, Dominion, and Berkshire. Op. 22-23; *see also* A217, ¶220; A220 ¶229.

- By November 10, 2015, Poirier understood the Standstill precluded TransCanada from pursuing a transaction with Columbia for twelve months absent prior written Board authorization. Op. 22; B0001 ("standstill → 12 months can't make run at them"); B0196-B0197 (197:4-198:18).

- On December 1, Johnston summarized the Standstill for Poirier, emphasizing that TransCanada "cannot, unless Capricorn's board specifically requests in writing in advance…[a]cquire, offer or agree to acquire ownership of equity securities or material assets"; Poirier agreed and told Russ Girling, TransCanada's CEO, that TransCanada "must get Capricorn's acquiescence to pursue this transaction, or even to seek to influence them." Op. 30; A834.

- At TransCanada's request, its outside counsel—Mayer Brown LLP ("Mayer Brown")—advised TransCanada in writing that the Standstill forbade TransCanada from threatening public disclosure of negotiations as leverage. Johnston provided that advice to Poirier; they both understood threatening public disclosure was prohibited. Op. 79 n.13; B0015; B0021; B0185-B0186 (188:10-189:14); B0306 (573:2-9).

Nonetheless, "Poirier and TransCanada consistently and repeatedly breached the Standstill," which enabled TransCanada to exploit Skaggs' and Smith's breaches of duty. *See* Op. 146.

In November 2015, Columbia provided diligence to bidders. Op. 23. Skaggs and Smith invited TransCanada and Berkshire to bid by November 24, indicating Columbia would pursue an equity offering absent a satisfactory bid. Op. 23-24. Poirier recognized that Columbia management "appears to prefer a sale of the company and have indicated to us that there will be no social issues," had a "strong desire to conclude a transaction prior to late 2016," and "cannot afford for a sale process to fail in the near term." Op. 24.

After TransCanada and Berkshire bid below the Board's indicative range, "the Board terminated the sale process and instructed management to proceed with the equity offering" on November 25, 2015.[3] That same day, Columbia sent "pencils down" letters to bidders, informing them the NDA, including the Standstill, remained effective. Op. 26-27. TransCanada immediately breached the Standstill when Poirier called Smith later that day. Op. 27. Smith told Poirier—without Board authorization—that management "probably" would want to pick up merger talks again "in a few months." *Id.*

Through that breach, "TransCanada possessed unique information about Columbia's continuing interest in a deal and the timeline for further negotiations." Op. 28. Poirier also "doubted whether Columbia's directors shared management's enthusiasm for a deal," reporting internally that "[Columbia] management would be supportive of a sale" but "the board is not as wed to that path at the moment." *Id.* He recommended "reengaging in January, with an eye to concluding an agreement by March," emphasizing the need "to create some time pressure…to get [Columbia] to reengage in the near term." *Id.*

[3] Op. 25. TransCanada misleadingly claims "Skaggs rejected an invitation from TransCanada's CEO, Russ Girling, to 'close[] the gap between $26 and $28.'" Opening Brief ("OB") 8. "It was *Cornelius* who vetoed the idea and insisted that Skaggs say no." Op. 117.

"Poirier already knew that the Standstill prohibited any approaches to Columbia," but TransCanada representatives and Fornell continued communicating with Skaggs and Smith throughout late November and December. Op. 29-33. Each communication breached the Standstill. *See id.* When Fornell raised concerns, Poirier brushed them aside even though he "knew that TransCanada could not reengage without violating the Standstill." Op. 31. During a December 17 call to Smith, Poirier reiterated TransCanada's interest and proposed meeting with Smith in the first week of January. Op. 32. When Poirier made the call, he knew it violated the Standstill. *Id.*

"No one informed the Board about the call or that Smith had agreed to a January meeting." Op. 33. Instead, Columbia management "began planning for a possible deal with TransCanada in early 2016" and Skaggs scheduled separate one-on-one meetings with Board members "to prime the directors to support a sale[.]" Op. 33-34.

3. Smith Tells Poirier the Competition had Been "Eliminated"

On January 4, 2016, Poirier called and texted with Smith in anticipation of an in-person meeting on January 7. Op. 34. These communications and the meeting breached the Standstill. Op. 35-36, 41. During the meeting, Smith "literally" gave Poirier talking points Goldman had prepared, which explained how TransCanada could avoid an auction. Op. 35, 37; *see also* B0329 (1136:18-21), B0330-B0331

(1145:16-1146:7). This "signaled that [Smith] trusted Poirier and was open to a deal." Op. 37. Smith told Poirier that "TransCanada was unlikely to face competition," competitors were "distracted," and confirmed there was a "gap" between management and the Board, telling Poirier: "there was not a unanimous [Board] view on a sale." Op. 38. Poirier understood TransCanada's competition had been "eliminated"; Smith's reassurances indicated "that management wanted a deal and would not be seeking to drive up the price." Op. 38-40. Columbia management granted TransCanada data room access without prior Board approval, enabling TransCanada to "focus[] on the size of the change-in-control payments that management would receive," which Wells Fargo characterized as a "[n]ice little retirement plan." Op. 41-43.

4. TransCanada Offers to Acquire Columbia, Violating the Standstill

On January 25, 2016, Girling contacted Skaggs, expressing interest in acquiring Columbia for $25-$28/share in cash and seeking exclusivity. Op. 48. Girling claimed "the proposal should not be viewed as an offer," but this made no difference; the Standstill prohibited *all* expressions of interest—not just formal offers—without prior written Board approval. Op. 43, 48.

Girling made this disclaimer because TransCanada understood what the Standstill forbade. *Supra* 9-10. Johnston had previously asked her Columbia counterpart (Robert Smith) for "confirmation that TransCanada would not breach

the [S]tandstill 'in the event a verbal or written offer or proposal is made by [TransCanada] to the [Columbia] CEO," noting "specifically that the [Columbia] board of directors is to 'specifically request in writing in advance' any of the matters covered in Section 3."[4] Notwithstanding his contrary assurances, "Johnston *knew* that an offer to acquire Columbia would violate the Standstill without a written Board invitation[,]" but went along with it. Op. 3, 46; A839.

Skaggs pitched the Board on a TransCanada deal during a January 28-29, 2016 meeting, never raising the Standstill or TransCanada's repeated breaches. Op. 50. The Board authorized exclusivity, which would continue through March 2, unless TransCanada submitted an offer below its $25-$28/share range. Op. 50, 52. TransCanada drafted the exclusivity agreement and sought to control whether bidders were released from their standstills, showing "TransCanada was fully aware of how the Standstill worked" and that any bidders were bound by similar terms. Op. 51.

5. After Securing and Renewing Exclusivity, TransCanada Lowers its Offer

In early February 2016, Poirier asked Wells Fargo why Smith was behaving so strangely; Wells Fargo told Poirier that Smith was "signaling [Skaggs and Smith] would do a deal below their range" and "want[ed] an exit regardless of price." Op.

[4] Op. 45 (quoting A839). Johnston's request breached the Standstill. *Id.*

54. On February 10, Smith reiterated Columbia's $25-$28/share range, and emphasized senior management was happy to leave and trigger their massive change-in-control payments, stressing that "[i]importantly, and unusually for this industry, this opportunity is being presented to [TransCanada] in a way that is unburdened by the 'typical' social issues." Op. 55. Poirier and Smith spoke on February 24; Poirier "raised the spectre [sic] of a lower price in a roundabout way multiple times with [him] and was met with 'crickets.'" Op. 56. Poirier understood "management wants to get this done and that, if TransCanada made an offer below [Columbia's] range, then Skaggs and Smith will take a lower price to the board and dare them to turn it down." Op. 56-57 (cleaned up).

With exclusivity expiring, TransCanada met with Columbia management on March 1, 2016 and requested Columbia extend exclusivity through March 14. Op. 58. Rather than using this to introduce (or threaten) competition, the Board extended exclusivity through March 8 at management's recommendation. *Id.*

On March 2, 2016, Skaggs emailed the Board that he expected a proposal on March 5. Op. 58. Robert Smith asked Johnston whether she still had concerns about the Standstill and she "ask[ed] him to confirm that the Board consents to discussion," which breached the Standstill. Op. 58-59.

During a March 4, 2016 meeting, the Board's outside counsel advised that the Standstill "prohibited [TransCanada] from making a proposal absent an invitation

do so from the Board." Op. 59. "In reality, TransCanada was prohibited from making any effort, directly or indirectly, to 'seek…to acquire' Columbia or 'seek or propose to influence the management, board of directors…or…affairs' of Columbia, 'including by means of…contacting any person relating to any of the matters set forth in this Agreement.'" *Id.* TransCanada had been seeking to acquire Columbia—without Board approval—since December 2015, violating the Standstill. *Id.* The Board authorized management to request a proposal from TransCanada and instructed management to waive standstills with other bidders once exclusivity expired on March 8, meaning waivers should have gone out on the morning of March 9. Op. 59-60.

On March 5, 2016, Poirier called Smith and floated a $24/share offer. Op. 60. After consulting with Skaggs, Smith nonetheless told Poirier—again without Board authorization—that TransCanada needed to get to the midpoint of Columbia's range ($26.50/share) to get the Board's attention. Op. 61. Girling raised TransCanada's offer to $25.25/share, which the Board rejected. Op. 61-62.

6. The $26 Deal

On March 6, 2016, Wells Fargo told Goldman that TransCanada might increase its price if Columbia would come below $26.50/share. Op. 62-63. Goldman responded that the Board would "do 26. Not a penny less. Straight from

[the] Board." Op. 63. That was false. *Id.* Smith then undercut the message, asking Poirier to consider $26/share and noting the Board had not approved that price. *Id.*

On March 8, 2016, exclusivity again expired[5] and news surfaced that negotiations had been leaked to the *Wall Street Journal* ("*WSJ*"). Op. 64, 67. On March 9, TransCanada's board met to consider making a $26/share offer. Op. 65. Contemporaneous notes reflect strong support for the transaction and Wells Fargo confirmed it could render a fairness opinion at $26/share. *Id.* TransCanada's board unanimously authorized a $26/share offer, comprising 90% cash and 10% stock (the "$26 Offer"). *Id.* Poirier relayed the $26 Offer to Smith, identifying three things that could jeopardize it: (i) if ratings agencies did not view the transaction favorably; (ii) if TransCanada's stock fell below $49/share Canadian; and (iii) if TransCanada's underwriters did not support a "bought deal" on an equity issuance to finance the offer. Op. 66.

Later that day, Smith called Poirier back. *Id.* A "preponderance of the evidence supports a finding that, at the conclusion of his call with Poirier, Smith orally accepted the $26 Offer. Thereafter, both sides acted as if they had agreement in principle" (the "$26 Deal"). *Id.* The $26 Deal "was a win-win for both sides." Op. 150.

[5] Exclusivity actually expired on March 5 when TransCanada made an offer below the $25-28/share range. *See* Op. 52.

Extensive contemporaneous evidence supports the trial court's finding that there was a $26 Deal. Internal Wells Fargo communications confirmed Columbia "accepted $26 with 10% stock." Op. 66. TransCanada executives described TransCanada as having a "done deal" in contemporaneous texts. Op. 62; A855. Skaggs likewise treated the price as settled, describing the remaining issues as "negotiation of the break free and fixed share conversion ratio." Op. 67.

7. Columbia Renews Exclusivity After the *WSJ* Leak

After Smith agreed to the $26 Deal, Skaggs arranged a Board meeting for March 10, 2016. Op. 68. Before the meeting, however, the *WSJ* reported on the potential transaction. *Id.* Later that day, TransCanada announced it was in discussions regarding a potential transaction with an unidentified third-party. *Id.* At the meeting, Skaggs recommended the Board accept the $26 Offer. *Id.* Exclusivity had expired on March 8, but Columbia management had not waived other bidders' standstills; they believed they had a deal with TransCanada. *Id.*

Smith called Poirier, who sought another two weeks of exclusivity. *Id.* Smith told him that should not be a problem because the Board "[wa]s freaking out and told the management team to get a deal done with [TransCanada] 'whatever it takes.'" Op. 68-69. Fornell found this bizarre. Op. 69; B0139-B0140 (60:6-61:3) ("It struck me as odd that a counterparty would tell you that their board is freaking

out"). Wells Fargo surmised that "Turmoil provides opportunity" and TransCanada was "well positioned." Op. 69.

Smith's message and the leak enabled TransCanada to re-trade the $26 Deal. Op. 70. That same day, Alex Pourbaix, TransCanada's COO, and Karl Johannson, TransCanada's President, lamented that "**we had a deal as offered** but now it is all [expletive] with the leak. What a cluster [expletive]." *Id.* (emphasis in original). Each recognized, however, that the leak benefited TransCanada because "**it may be an opp[ortunity] to go back to [Columbia] with a lower price**." *Id.* (same).

On March 11, 2016, Spectra Energy Corp. ("Spectra"), another potential bidder, emailed Skaggs. Op. 70. Skaggs recommended the Board renew exclusivity and downplayed Spectra's inquiry because Columbia management had no interest in Spectra. Op. 71. The Board approved another week of exclusivity with TransCanada and Columbia management finally waived the other standstills that evening—two days after the Board had directed. *Id.*

Believing they had the $26 Deal, Columbia management developed a script for Spectra and other inbounds, which Columbia ran by TransCanada. Op. 72, 75. The script stated Columbia "w[ould] not respond to anything other than serious written proposals." Op. 72. Smith reassured Poirier that a "serious written proposal" meant a fully-financed bid with "No outs. No anything…." Op. 75-76 & n.12. Smith "told [Poirier] we wanted to get *this deal* done with them and this would help us

achieve that goal." Op. 75 (cleaned up). "[T]his deal" meant the $26 Deal. *Id.* Poirier understood Smith had made a "commitment to do a deal with TransCanada." *Id.*

8. TransCanada's $25.50 Offer and Threat to Go Public

TransCanada's board met on March 14, 2016; the underwriters stood by their commitment to execute on the $26 Deal. Op. 77; A882-83; B0262-B0264 (263:21-265:21), B0295-B0296 (296:5-297:1); B0321-B0322 (648:10-649:8). TransCanada had other financing levers it could pull, including "selling a TransCanada asset, which TransCanada's current CFO testified was achievable." Op. 65. Poirier also spoke privately with a Canadian pension fund about participating in the deal, violating the NDA. *Id.*; B0028-B0029; B0249-B0251 (250:11-252:22). But Poirier and his colleagues seized the opportunity to re-trade the $26 Deal for $25.50/share in cash (the "$25.50 Offer"). Op. 77-78.

Poirier attempted to call Smith, who was on vacation because he thought the parties had a deal and directed Kettering to field it. Op. 78; B0337. Poirier—joined by Pourbaix—falsely told Kettering that TransCanada's underwriters thought stock consideration would make the transaction challenging. Op. 78. Next, Poirier told Kettering that TransCanada's stock price had dipped below $49/share. *Id.* That was temporarily true, but TransCanada's stock price recovered and surpassed $49/share

in a matter of days. *Id.* Poirier was unconcerned and believed TransCanada's stock was "hanging in nicely." Op 83.

Poirier then sprung the $25.50 Offer. Op. 78. Poirier did not tell Kettering that the $25.50 Offer was "best-and-final" or that the $26 Deal was off the table. Op. 79; B0273 (274:6-17). Rather, Poirier testified that he "did not formally say no" to the $26 Deal and, had Columbia rejected the $25.50 Offer, TransCanada still would have considered "issuing stock as consideration along with the cash component of the transaction." *Id.*; B0046 (419:9-421:7); B0272 (273:10-17).

Poirier told Kettering that, absent acceptance, TransCanada would issue a press release in 72 hours indicating discussions had been terminated. Op. 79. Poirier intended the press release to create a sense of urgency for Columbia to accept the $25.50 Offer. *Id.*; B0048 (426:21-427:1). It was a threat. Op. 80-81. Goldman previously advised Skaggs and Smith that a leak would put pressure on the Board to take an offer at a premium to market and a public announcement by TransCanada could suggest that TransCanada had uncovered problems, turning Columbia into damaged goods. Op. 22, 80. The threat also violated the Standstill, which prohibited TransCanada from threatening public disclosure to increase leverage in negotiations. Op. 79. Poirier *knew* that based on Mayer Brown's advice. *Supra* 9-10.

9. Columbia Accepts the $25.50 Offer, Negotiates the Merger Agreement, and Issues the Proxy

Skaggs, Smith, and Kettering caucused to determine how to respond. Op. 81. They texted about TransCanada's improved stock price and Kettering suggested pushing for another $0.25/share, but Skaggs and Smith waived him off. Op. 83. On March 16, 2016, , at management's recommendation, the Board approved the Merger. *Id.*

On March 17, 2016, the parties executed an agreement and plan of merger (the "Merger Agreement"). Op. 84. The Merger Agreement gave TransCanada the right to participate in drafting the Proxy and review it before dissemination. Op. 87. TransCanada committed to "furnish all information concerning themselves and their Affiliates that is required to be included in the Proxy Statement." *Id.*. TransCanada committed that none of the information it supplied would be materially misleading or omissive; and to inform Columbia if there was any issue in the Proxy that needed to be addressed for inclusion so the Proxy would not be materially misleading or omissive. *Id.*; A947-48 5.01§§(a)-(b).

TransCanada management—including Poirier, Johnston, and Girling—and Mayer Brown reviewed and commented on the Proxy. Op. 87-88. Each shirked their obligations under the Merger Agreement. When Johnston raised issues with the Proxy, Girling told her and others, "I am not that worried about it, it is

[Columbia's] document." Op. 88. The Proxy omitted material information of which TransCanada had actual or constructive knowledge. *Infra* 24-25, 27.

10. TransCanada Benefits from a Transformative Acquisition

The Merger closed on July 1, 2016. Op. 90. Skaggs, Smith, and Kettering promptly retired, securing lucrative payments while TransCanada secured a windfall by acquiring Columbia "at a low point in the cycle." *Id.* Poirier viewed the deal as "strong success" for TransCanada and was rewarded by being named CEO. Op. 91-92.

TransCanada knew it secured its windfall because Poirier had co-opted Smith, noting in a post-Merger self-assessment that "[t]he acquisition analysis and subsequent negotiations were significantly enhanced by previous strong relationships between TransCanada and Columbia management[.]" Op. 91; B0051; B0100 ("Leaned more on the relationship between Francois and CPG counterpart than the banks. Improved the access to information and smoothed the process considerably. Avoided an auction process[.]"); B0285 (286:5-13). TransCanada management recommended cultivating and exploiting similar relationships in future transactions, but cautioned against creating a paper trail. Op. 91; B0105 ("Minimize email conversations; note taking should be limited to deliverables and action items."). In sum, "TransCanada implicitly acknowledged that it had taken advantage

of Columbia's fiduciaries and hoped to repeat the strategy, albeit without creating a similar evidentiary record." Op. 147.

B. Procedural Background

1. The Appraisal Action

In September 2017, certain Columbia stockholders filed an appraisal action (the "Appraisal Action"). Op. 92. In the Appraisal Action, TransCanada and its counsel insisted the Standstill was not a "Don't Ask; Don't Wave" standstill despite knowing that assertion to be false.[6] TransCanada and its counsel also failed to produce, *inter alia*, highly relevant texts between Skaggs, Smith, Kettering, and Robert Smith discussing the $26 Deal and a potential counter to the $25.50 Offer (among other issues)[7] as well as factual notes from Johnston (*e.g.*, B0023-B0025) whom TransCanada failed to identify as a custodian. *See* B0118-B0119.

After trial in October 2018, the trial court issued a post-trial decision finding that the fair value of Columbia's stock at the time of the Merger was $25.50/share and that "the Proxy contained material misstatements and omissions." Op. 92-93

[6] *Compare* B0038 ¶19 ("The standstill is not a 'Don't Ask / Don't Waive.'") *with* B0130 (111:9-13) ("Q. You would agree with me that's commonly referred to as a 'Don't Ask, Don't Waive' provision? A. I believe something along those lines usually is, yes.") *and* B0126 (61:15-20) ("Q. … Do you know what a 'Don't Ask, Don't Waive' provision is? A. Yes. Q. Did this particular standstill include one? A. It did.").

[7] *E.g.*, B0337-B0338; B0339; B0340-B0416.

(citing *In re Appraisal of Columbia Pipeline Grp., Inc.*, 2019 WL 3778370, at *36 (Del. Ch. Aug. 12, 2019) (the "*Appraisal Decision*")). The *Appraisal Decision* identified the three "most significant" disclosure omissions: (i) "Smith invited a bid and told Poirier that TransCanada did not face competition" at the January 7 meeting; (ii) bidders, including TransCanada, were subject to standstills, TransCanada breached its standstill, and that Columbia ignored TransCanada's breach; and (iii) Skaggs and Smith were planning to retire in 2016. Op. 161-62. TransCanada never appealed the *Appraisal Decision*.

2. The Trial Court Issues the Liability and Allocation Decisions

In July 2018, the action below was filed. A1. The plaintiff sought to consolidate this action with the Appraisal Action, which motion TransCanada opposed and the trial court denied. Op. 93.

"Discovery in this proceeding unfolded differently and in a manner sufficient to raise questions about the reliability of the factual record created in the appraisal action." B0120-B0121; B0137 ("Th[e] evidentiary record differed in material ways from the record that had been developed in the appraisal action because of differences in how discovery in this case unfolded."). Columbia management—now separately represented—produced texts TransCanada previously withheld and TransCanada produced Johnston's notes. *Supra* 24. Before their depositions,

Skaggs and Smith agreed to a settlement, which the trial court approved on June 1, 2022. Op. 94.

Trial took place in July 2022. Op. 94. On June 30, 2013, the trial court issued a Post-Trial Opinion Addressing Liability for Aiding and Abetting (the "*Liability Decision*" or "Op."), holding that (i) Skaggs and Smith breached their duty of loyalty because "they were motivated by self-interest tied to their change-in-control agreements and their desire to retire in 2016," leading them to take actions that fell outside the range of reasonableness and (ii) the Board breached its duty of care by failing to provide oversight of the sale process. Op. 112. TransCanada did not appeal this aspect of the *Liability Decision*.

The trial court further held that TransCanada aided-and-abetted the aforementioned "Sale Process Claim," finding that TransCanada "knew that Skaggs and Smith stood to receive lucrative change-in-control payments and that there would be no social issues in the deal, meaning that Skaggs and Smith had no plans to stick around" and "had reason to know that Skaggs and Smith were pursuing their own interests in securing a deal and that the Board was not providing sufficient oversight." Op. 6. The court found that, "[a]fter determining that the sell-side fiduciaries were breaching their duties, TransCanada exploited them with the $25.50 Offer." Op. 147. The trial court granted TransCanada ample leeway, recognizing bidders may negotiate aggressively, and holding that "[w]ithout the final act of

reneging on the $26 Deal, making the $25.50 Offer, and adding a coercive threat that violated the NDA, TransCanada's accumulated actions would not have toppled over the line into liability." Op. 147-48.

The *Liability Decision* also held that Skaggs, Smith, and the Board breached their duty of disclosure. Op. 156. In addition to the three disclosure violations the *Appraisal Decision* identified, the court ruled Plaintiffs proved four additional violations, namely the Proxy's:

- Omission and mischaracterization of the nature and extent of interactions between TransCanada and Columbia between November 25, 2015 and February 9, 2016;
- Failure to disclose that, from November 25, 2015, through March 4, 2016, TransCanada's contacts with Columbia breached the Standstill, that Columbia management chose not to enforce the Standstill, and that Columbia management did not bring those breaches to the Board's attention;
- "[P]artial and misleading description of the $26 Offer" as an "indicative offer" rather than an offer that TransCanada made and Columbia accepted; and
- "[M]isleading description of TransCanada's reasons for lowering its bid[.]"

Op. 163-65. TransCanada does not appeal these aspects of the *Liability Decision*. The court held that TransCanada aided-and-abetted the disclosure violations (the "Disclosure Claim") by recklessly choosing not to correct these material misstatements or omissions. Op. 166.

The trial court awarded non-cumulative damages for the Sale Process and Disclosure Claims. As to the former, the trial court held Plaintiffs proved damages based on the lost $26 Deal, which would have been worth $26.50 at closing, and awarded $1.00/share. Op. 153-55. TransCanada does not appeal this aspect of the *Liability Decision*. As to the latter, the court acknowledged Plaintiffs had not proven reliance but exercised its broad equitable powers to craft a $0.50/share damages remedy. Op. 178.

On May 15, 2024, the trial court issued an Opinion Resolving Post-Trial Issues (the "Allocation Op.") allocating fault under the Delaware Uniform Contribution Among Tortfeasors Act ("DUCATA"). The trial court allocated TransCanada 50% and 42% of the fault for the Sale Process and Disclosure Claims, respectively. Allocation Op. 3-4.

On June 20, 2024, the trial court entered final judgment against TransCanada. A150. On July 18, TransCanada appealed. A151.

ARGUMENT

I. THE TRIAL COURT PROPERLY HELD THAT TRANSCANADA AIDED-AND-ABETTED BREACHES OF DUTY BY SKAGGS AND SMITH AS WELL AS THE BOARD

A. Question Presented

Did TransCanada knowingly participate in the fiduciary breaches by Skaggs, Smith or the Board regarding the sale process? Op. 132-52.

B. Scope of Review

For an aiding-and-abetting claim, this Court reviews the trial court's conclusions of law *de novo* and affords its factual findings a high level of deference. *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015). "[W]hether a defendant acted with *scienter* is a factual determination." *Id.* at 862.

C. Merits of Argument

Knowing participation "requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach." *See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001). This standard is met by showing the third-party had "actual or constructive knowledge that their conduct was legally improper." *RBC*, 129 A.3d at 862. Although "a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting," "a bidder may be liable to the target's stockholders if the bidder attempts to create or exploit conflicts of interest in [the target's fiduciaries]." *Malpiede*, 780 A.2d at 1097.

The trial court correctly found that TransCanada knowingly participated in breaches of duty by Skaggs, Smith and the Board. TransCanada knew, based on its month's long exploitation of Smith and serial Standstill breaches, that Skaggs and Smith "were focused on selling at a defensible price and retiring with their change-in-control benefits, rather than seeking the best transaction reasonably available" and the Board was not adequately overseeing them. Op. 143. After determining that the sell-side fiduciaries were breaching their duties and wedded to a deal with TransCanada, Poirier exploited their conflicts with the $25.50 Offer and a threat he knew violated the NDA. Op. 6; 147. TransCanada touted its exploitation and committed to using the same playbook in future transactions, albeit without creating a record. Op. 147; *supra* 23-24.

1. TransCanada Knew of the Breaches

The trial court correctly ruled that TransCanada had, at a minimum, constructive knowledge of the breaches of duty by Skaggs, Smith, and the Board. *See* Op. 143-45.

a. TransCanada Had Actual Knowledge of the Breaches

The trial court, after hearing witness testimony and weighing evidence, correctly found that TransCanada had actual knowledge of the sell-side breaches when it intentionally exploited Skaggs and Smith's conflicts. The trial court explicitly held "*[a]fter determining that the sell-side fiduciaries were breaching*

their duties, TransCanada exploited them with the $25.50 Offer." Op. 118. "TransCanada took that step because Poirier and his colleagues *believed* that they could exploit the conflicted counterparties on the other side." Op. 152.

TransCanada distorts the *Liability Decision*, arguing the court found that TransCanada acted with, at most, constructive knowledge of the sell-side breaches. For example, TransCanada points to factual findings concerning the Disclosure Claim—*not the Sale Process Claim*—that TransCanada lacked actual knowledge that Skaggs and Smith planned to retire. OB 20 (citing Op. 166). But a finding that TransCanada lacked actual knowledge of a *particular fact* relating to Skaggs' and Smith's conflict (*i.e.*, their actual plan to retire) does not undermine its conclusion—based on the totality of the record—that TransCanada had actual knowledge through Poirier's co-opting of Smith that Skaggs and Smith were prioritizing their personal interests.

TransCanada had actual knowledge that "Skaggs and Smith stood to receive lucrative change-in-control payments and that there would be no social issues in the deal, meaning that Skaggs and Smith had no plans to stick around"—be it retirement or otherwise. Op. 6; *see also* Op. 15. TransCanada was repeatedly told that Columbia management preferred a sale and that there would be no social issues with a deal. Op. 24. TransCanada had actual knowledge of Skaggs' and Smith's

"powerful financial motivations to sell."[8] TransCanada's contrary arguments relitigate the factual findings below. OB 22-23. *Amicus's* argument that "a personal interest" on the sell-side "is not enough to put a buyer on notice" (AB 13) ignores these factual findings and misunderstands the law. *Morgan v. Cash*, 2010 WL 2803746, at *7 (Del. Ch. July 16, 2010) (dismissing aiding-and-abetting claims where plaintiff pled no facts "indicating why accepting a lower offer was clearly in the [sell-side] directors' self-interest, much less that it was known by [the buyer]").

TransCanada also had actual knowledge that it breached the Standstill, that Columbia management was not enforcing it and the Board had not authorized TransCanada's outreach. TransCanada asserts it did not know anyone was breaching the Standstill and "there was nothing suspicious…about Columbia's lack of enforcement" (OB 23) but ignores the trial court's factual finding that TransCanada knew exactly how the Standstill worked and that it violated the Standstill. Op. 29-30, 143. "Poirier understood that the Standstill precluded TransCanada from pursuing a transaction with Columbia for twelve months *absent prior written Board authorization*." Op. 22; *supra* 9-10. TransCanada knowingly violated the Standstill by pursuing transaction discussions with Columbia management for months without written Board authorization.[9] With each unpunished breach, "Skaggs and Smith

[8] Op. 144; *see also* Op. 19-20, 24; *supra* 8, 13.

[9] Johnston did not take a more restrictive view of the Standstill before agreeing with Robert Smith. OB 24 & n.7. After considering the evidence and Johnston's

opened the gates, invited TransCanada in, and demonstrated their eagerness to sell." Op. 3.

TransCanada likewise had actual knowledge that Skaggs and Smith "were focused on selling at a defensible price and retiring with their change-in-control benefits, rather than seeking the best transaction reasonably available." Op. 143. Poirier knew management wanted a deal, there was a "gap" between management and the Board, and that Columbia had "eliminated the competition." *Supra* 13. He believed, based on Smith's assurances, that Columbia management wanted to get a deal done and would dare the Board to turn down a bid below its range. *Supra* 15. Poirier also "understood that Smith had made a commitment to a do a deal with TransCanada" that the Board was "freaking out" and wanted to get a deal done "whatever it takes," which TransCanada understood enabled it to make the coercive $25.50 Offer. Op. 68-70, 82; *supra* 18-19.

Both TransCanada and *amicus* relitigate the trial court's factual findings, which are entitled to deference. TransCanada insists Smith's behavior "could reflect" various motivations and characterizes the evidence showing Skaggs and Smith's conflicts as "ambiguous." OB 25-26. *Amicus* argues that "many of the red flags…cited as evidence of such knowledge and participation…are consistent not

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testimony, the court found Johnston "knew better and questioned that interpretation, but went along." *See* Op. 3.

only with knowing participation in a fiduciary breach but also with arm's-length negotiation." AB 11. Exactly. TransCanada and *amicus* may view the trial court's factual findings differently, but the latter are entitled to a "'high level' of deference." *RBC*, 129 A.3d at 861-62. *Amicus*'s concession that these facts are "consistent…with knowing participation in a fiduciary breach" (AB 11) validates the trial court's role and supports affirmance.

b. At a Minimum, TransCanada Had Constructive Knowledge of Skaggs and Smith's Breaches

Regardless, only constructive knowledge is required to prove knowing participation and TransCanada had, at a minimum, constructive knowledge of Skaggs' and Smith's breaches that it exploited. Op. 133 (citing *RBC*, 129 A.3d at 862). No Delaware court has required a showing of actual knowledge of a breach to maintain an aiding-and-abetting claim. Assuming TransCanada has not waived the argument,[10] its premise is rebutted by multiple Delaware decisions, including authorities TransCanada cites, that—relying on or consistent with *RBC*—have held

[10] *Cal. State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 855 (Del. 2018) (argument "confined…to a footnote in their opening brief on appeal" was "waived"); Del. Sup. Ct. R. 14(b)(vi)(A)(3). Regardless, TransCanada assumes constructive knowledge applies. *See* OB 22.

constructive knowledge of a breach suffices under Delaware law.[11] Other jurisdictions have recognized the same.[12]

To argue otherwise, TransCanada decouples "knowing" from "participation," arguing that "[t]he language [concerning actual or constructive knowledge from *RBC*] was describing the requirement for the defendant's conduct (the 'participation' part of 'knowing participation'), not whether constructive knowledge of the breach is sufficient." OB 21 n.5. That argument fails as a matter of construction—"[t]he adjective 'knowing' modifies the concept of 'participation.'" *In re Rural Metro Corp.*, 88 A.3d 54, 97 (Del. Ch. 2014). Regardless, there is not one standard for proving knowledge of a breach, then another for proving an aider-and-abettor's knowledge of its involvement. The standard is unitary: the aider-and-abettor must know (actually or constructively) it is participating in (substantially assisting) a

[11] *See, e.g.*, *Matrix Parent, Inc. v. Audax Mgmt. Co., LLC*, 319 A.3d 909, 942 (Del. Super. Ct. 2024); *Firefighters' Pension Sys. of City of Kansas City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 275 (Del. Ch. 2021); *Jacobs v. Meghji*, 2020 WL 5951410, at *8 (Del. Ch. Oct. 8, 2020); *Cambria Equity P'rs L.P. v. Relight Enters. S.A.*, 2021 WL 2336984, at *16 (Del. Ch. Jan. 5, 2021); *Trs. of Gen. Elec. Pension Tr. v. Levenson*, 1992 WL 41820, at *4 (Del. Ch. Mar. 3, 1992).

[12] *Fed. Express Corp. v. U.S. Dep't of Com.*, 39 F.4th 756, 771 (D.C. Cir. 2022); *Overwell Harvest Ltd. v. Widerhorn*, 2021 WL 5049777, at *10 (N.D. Ill. Nov. 1, 2021); *In re Xtreme Power Inc.*, 563 B.R. 614, 645 (Bankr. W.D. Tex. 2016).

breach of duty. *See id.* Accepting TransCanada's argument would be illogical and unprecedented.[13]

Delaware courts do not limit the use of constructive knowledge to only cases involving "inherent wrongdoing" either. OB 20-21. TransCanada's authorities are pleadings-stage decisions concerning pleadings-stage inferences. OB 21. None impose a heightened burden for proving knowing participation through constructive knowledge. Even if they did, those cases recognize that "the Court may infer knowing participation" where, like here, "it appears that the defendant may have used knowledge of the breach to gain a bargaining advantage in the negotiations." *E.g.*, *Jacobs*, 2020 WL 5951410, at *7 n.49.

TransCanada's suggestion that the "constructive-knowledge standard" must be more "demanding" for third-party buyers (OB 22) similarly misstates the law. *Malpiede*, which recites the aiding-and-abetting standard, *itself addressed a claim against a third-party buyer*. 780 a.2d at 1096. It did not impose a higher "constructive-knowledge standard" for third-party buyers. This makes sense. Proving an aiding-and-abetting claim against a third-party buyer is already more difficult because arm's-length bargaining is privileged. *See, e.g.*, *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 837 (Del. Ch. 2011). But "[c]reating or

[13] Neither TransCanada nor *amicus* cite any decision holding there is a separate standard for proving knowledge of the breach than participation therein.

exploiting a fiduciary breach"—as TransCanada did through its serial Standstill violations and exploitation of Smith—"is not part of legitimate arm's-length bargaining[.]" *See id.*

Amicus's authority is also inapposite. The Southern District of New York's *thirty-year-old* decision interpreting Missouri law in *Terrydale Liquidating Trust v. Barnes*[14] has been clarified such that a lesser showing of "conscious avoidance"—not actual knowledge—suffices to plead knowing participation under New York law. *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 368 (S.D.N.Y. 2007). Further, unlike *Terrydale*, this case does not involve conduct "which may appear reasonable at the time [but] may later be shown upon closer inspection to be unreasonable." *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992). "TransCanada recognized *in real time* that Skaggs and Smith were behaving eccentrically, even bizarrely, for sell-side negotiators" and exploited them at the expense of Columbia's stockholders. Op. 6.

c. At a Minimum, TransCanada Had Constructive Knowledge of the Board's Care Breaches

The record likewise amply supports the trial court's factual findings "that TransCanada knew…the Board was failing to provide meaningful oversight." Op.

[14] 611 F.Supp. 1006, 1027–31 (S.D.N.Y. 1984). Missouri does not recognize a claim for aiding-and-abetting a tort. *See, e.g.*, *CST Indus., Inc. v. Tank Connection, L.L.C.*, 2024 WL 3360421, at *9 (D. Kan. July 9, 2024).

143. TransCanada did not "also need[] to have known" of the Board's care breach to have aided-and-abetted the loyalty breach. OB 27. TransCanada independently aided-and-abetted both breaches. Op. 5.

Regardless, the trial court's factual findings also undermine TransCanada's assertion that "nothing evidenced to TransCanada a fiduciary breach by Columbia's board." Op. 27. TransCanada understood the Standstill barred it from seeking to acquire Columbia absent written Board authorization that it had not received (*supra* 9-10), and knew management permitted it to "consistently and repeatedly breach[] the Standstill, thereby violating a boundary that the Board had established to protect the integrity of any sale process." Op. 146. Smith also repeatedly betrayed the Board's confidences in obvious fashion, telling Poirier "TransCanada was unlikely to face competition," other competitors were "distracted," and there was a "gap" between management and the Board. Op. 38; *supra* 13. Post-leak, Smith bizarrely told Poirier the Board was "freaking out" and had directed management "to get a deal done with TransCanada 'whatever it takes.'" Op. 68-69 (cleaned up); *supra* 18-19. The court properly determined as a factual matter that, although TransCanada could not see inside Columbia's boardroom, at a minimum, it "had constructive knowledge that the Board was breaching its duty of care by failing to take the wheel from a conflicted management team." Op. 143-44.

It may not be "the buyer's job to actively search for conflicts or supervise sell-side fiduciaries when none is apparent" (OB 28), but the "pursuit of the best available price in negotiations with opposing management can[not] be undertaken *without regard to the target management's fiduciary obligations to its shareholders*." *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1058 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990). Once TransCanada had constructive knowledge of the Board's care breaches, it was obligated to refrain from "extracting terms which require[d] the opposite party to prefer its interests at the expense of its shareholders." *Id.*

2. TransCanada Culpably Participated in the Breaches

The trial court correctly concluded that TransCanada culpably participated in the sale process breaches. Op. 145-52. Insisting it "behaved as any reasonable third-party buyer would have" (OB 29), TransCanada retcons three factual findings made below: TransCanada's act of (i) "reneging on the $26 Deal, substituting the $25.50 Offer, and backing it up with a coercive threat"; (ii) "exploit[ing] Smith"; and (iii) "consistently and repeatedly breached the Standstill[.]" Op. 146-47. The trial court's factual findings are entitled to deference.

a. TransCanada Believed Columbia Accepted the $26 Offer

TransCanada's insistence that "there was no deal on which TransCanada reneged" rests on the erroneous premise that the parties must have had a formally approved, fully enforceable and unconditional agreement to transact for there to be

a deal. OB 30-31. However, a conditional offer can be accepted—even when certain terms are agreed to be subject to further negotiations—and, as the trial court correctly found, TransCanada made a conditional offer that Columbia accepted such that they had an agreement in principle.[15]

Indeed, "a preponderance of the evidence supports a finding that…Smith orally accepted the $26 Offer" and "both sides acted as if they had an agreement in principle" from then on. Op. 66. "Wells Fargo understood" Columbia had accepted the $26 Offer, discussing internally that "they accepted $26 with 10% stock but are trying to negotiate down the break fee." Op. 66. Materials prepared for the Wells Fargo Fairness Opinion Committee *thrice* refer to Columbia, and its Board, as having "accepted" the $26 Offer.[16] TransCanada senior executives described TransCanada as having a "done deal" in contemporaneous text messages. Op. 67. And Skaggs sent the Columbia deal team a note treating the price term as settled. These so-called "third-hand accounts" (OB 33) were "sufficiently supported by the record and are the product of an orderly and logical deductive process." *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 95 (Del. 2021) (cleaned up).

[15] Op. 164; *see also SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 349 (Del. 2013); *S'holder Representative Servs. LLC v. Shire US Hldgs., Inc.*, 2020 WL 6018738, at *17 (Del. Ch. Oct. 12, 2020), *aff'd* 267 A.3d 370 (Del. 2021).

[16] Op. 66-67. TransCanada nowhere explains why Wells Fargo would have prepared false or misleading fairness committee materials.

TransCanada's attempt to relitigate the record does not undermine the trial court's findings. On appeal (but not below), TransCanada argues that Columbia could not have agreed to the $26 Offer because Smith purportedly lacked authority and the Board did not formally vote to accept the offer at its March 10 meeting. OB 31. Both arguments confuse the Board's role in approving and recommending a definitive merger agreement with the agreement in principle found by the trial court here. Neither argument undermines the trial court's conclusion that both sides, including the Board, believed they had a deal. The Board's March 10 minutes are not to the contrary. Skaggs and Smith had prepared the Board for a $26/share price and Skaggs sent the Board the same note he sent the deal team. Op. 67; A871. Given Skaggs' guidance and the "pressure" of the leak (*see* Op. 21), the Board also treated the price term as settled and directed management to work toward a potential transaction. A810-11.[17] The Board subsequently approved the outbound script and continued exclusivity with TransCanada to avoid "losing the potential transaction with TransCanada," which it believed represented an "attractive price." A813; *see also* Op. 69 (Smith telling Poirier Board wanted to get deal done). The court did not

[17] Poirier did too, advising Girling of his call with Smith concerning what "could derail a transaction between now and announcement." B0228 (229:9-22).

err by considering *all* the contemporaneous evidence and finding the parties had an agreement in principle.[18]

TransCanada's reimagining of Columbia management's failure to timely waive other bidders' standstills similarly lacks factual support. OB 33. On March 4, 2016, the Board "confirmed [] that, if feasible, the standstill provisions in the other confidentiality agreements should be waived prior to entry into the merger agreement." A806; Op. 59. Exclusivity expired at 11:59 p.m. on March 8. A256 ¶368. Robert Smith conceded he should have waived the standstills on the morning of March 9. B0298-B0300 (416:19-418:16). The record sufficiently supports the trial court's conclusion that the "Board instructed Skaggs and Smith to waive the [other] standstills…as soon as exclusivity with TransCanada expired." Op. 60. Columbia management did not waive the standstills because they believed they had a deal. Op. 67.

TransCanada's conditions for the $26 Deal did not fail. "At trial, TransCanada sought to demonstrate that the conditions to the $26 Deal failed such that it was no longer viable. TransCanada's skilled litigation team assembled some evidence to support their story, *but it was not persuasive*." Op. 155. TransCanada now asks this Court to weigh evidence and undo the trial court's factual findings.

[18] The minutes were also of lesser evidentiary value than contemporaneous evidence because they were drafted after the preliminary Proxy was filed (not contemporaneously). Op. 90.

"The first condition was for the TransCanada underwriters to support the $26 Deal, which they did by standing by their commitments." *Id.* TransCanada argues the court misread TransCanada's March 14 board minutes, which purportedly show the underwriters did not support the $26 Offer or "expressed discomfort." OB 31-32 n.9. But the only offer then-pending was the $26 Offer and the underwriters never withdrew their support. A882-83; B0262-B0264 (263:21-265:21); B0295-B0296 (296:5-297:1); B0321-B0322 (648:1-649:8). The minutes reveal no underwriter concerns and Poirier agreed the minutes should have reflected any concerns. B0294-B0295 (295:10-296:12). The trial court correctly concluded, after hearing multiple witnesses testify, that TransCanada's underwriters continued to support the $26 Offer.[19]

"The second condition was for the rating agencies to opine that TransCanada's rating would not fall below investment grade, which the ratings agencies gave." Op. 155. TransCanada previously received ratings agency approval for a financing package contemplating asset sales in lieu of debt. A806. TransCanada introduced the equity component to avoid further asset sales, but Poirier falsely told Smith

[19] All but one TransCanada witness falsely testified TransCanada's underwriters said the $26 Offer was not viable. *Compare* B0150 (151:8-15); B0303-B0305 (456:16-458:5); B0318-B0320 (642:1-644:21) *with* B0324-B0325 (1119:11-1120:16) (TransCanada treasurer testifying underwriters did not advise $26 Offer was untenable but might "result in a higher discount" on TransCanada stock issuance); B0326-B0327 (1132:12-1133:6) (same). During post-trial argument, TransCanada conceded that was not the case. B0335-B0336 (101:9-102:7).

TransCanada would raise the additional $800 million for the $26 Offer with asset sales (not equity), implicating the agencies.[20] The ratings agencies never expressed an unfavorable view of the $26 Offer because TransCanada never went to the agencies (and never planned to). The court correctly concluded, after hearing multiple witnesses testify, that the ratings agency condition did not fail.

"The final condition was for TransCanada's stock not to fall below $49 Canadian ["CAD"] per share. It did, but only briefly." Op. 155. TransCanada ignores that it imposed that condition because a material change in its stock price before *announcement* (on March 29 or 30) might compromise its ability to "cost efficiently" raise equity. Op. 67; A871; B0228 (229:9-22). TransCanada's stock traded below $49/share CAD but quickly recovered. Op. 78. Poirier believed TransCanada's stock was "hanging in nicely" and testified the $26 Offer was never off the table. Op. 83; B0270-B0271 (271:9-272:9).

The trial court did not err by finding that Columbia accepted the $26 Offer or that the $26 Offer was viable. The court correctly found that the $26 Deal was a "win-win transaction" for Columbia and TransCanada, but Poirier knowingly exploited Skaggs' and Smith's conflict to obtain more for TransCanada. Op. 7, 150.

[20] B0025 ($26 Offer was "structured to maintain the rating. No additional leverage, equity and significant asset sales …. On announcement, we don't think rating is at risk"); B0142-B0143 (143:2-144:18) ("Incremental equity was the way to bridge the gap and support the credit ratings"); B0229-B0230 (230:9-231:5).

b. TransCanada's Threat Violated the Standstill

TransCanada's threat was impermissible. Unsurprisingly, none of TransCanada's authorities condone buy-side threats to publicize deal discussions in violation of a contract with the target unless the target accepted a lower offer.[21] Neither did TransCanada's expert. B0333 (1405:3-8). Mayer Brown advised TransCanada that the Standstill "bar[red]" TransCanada from "threatening to disclose the existence of its $26 per share offer"; Johnston relayed this advice to the deal team. B0015, B0021; *see also* Op. 79, n.13. Poirier and Johnston *knew* TransCanada could not threaten to disclose negotiations to pressure Columbia. B0187-B0188 (188:6-189:14); B0309 (573:2-9). This is powerful—and unrebutted—evidence of *scienter* entitled to a "'high level' of deference." *RBC*, 129 A.3d at 861-62.

TransCanada insists "Toronto Stock Exchange rules required TransCanada to disclose the end of negotiations" (OB 35) but the $25.50 Offer was not "best-and-final" (Op. 146) as Poirier's clear trial testimony confirmed. Op. 81. Poirier never told Kettering that TransCanada was saying "no" to the $26 Deal. B0273 (274:6-17). Poirier testified *twice* that, had Columbia rejected the $25.50 Offer,

[21] In *In re Comverge, Inc.*, the court ruled at the pleadings stage that it was not reasonably conceivable the board acted unreasonably where the standstill was, unlike here, ambiguous and both sides advanced non-frivolous interpretations. 2014 WL 6686570, at *11 (Del. Ch. Nov. 25, 2014).

TransCanada would have reconsidered taking the risk of issuing stock with the $26 Deal. B0046 (419:9-421:7); B0272 (273:10-17). This evidence sufficiently supports the trial court's conclusion that that $25.50 Offer was not "best-and-final." The separate testimony TransCanada cites does not alter this conclusion, much less demonstrate clear error. And TransCanada's citation to evidence reflecting how Columbia's officers or the parties' advisors viewed the $25.50 Offer (OB 36) says nothing of Poirier's knowledge or testimony.

Moreover, TransCanada never invoked the applicable exception. The NDA forbade TransCanada from disclosing "the fact that discussions or negotiations…are taking place or have taken place concerning a Transaction" unless it "received the written advice of its outside counsel that it [was] required to make such disclosure to avoid violating applicable securities laws or stock exchange rules" and provided Columbia "with the text of the intended disclosure at least 24 hours prior to making the disclosure[.]"[22] TransCanada neither obtained the written opinion from outside counsel[23] nor provided a draft press release to Columbia. B0301 (425:15-21). The

[22] A824-25; *see also* B0026 ("We are still under our obligations of confidentiality under the NDA and cannot name [Columbia] or go beyond the news release that was issued this morning.").

[23] B0123-B0124 (274:25-275:6); B0127-B0128 (244:17-245:16); B0132 (353:14-23); B0134-B0135 (274:17-275:19).

informal email correspondence TransCanada cites (A851-52) *preceded* the *WSJ* leak, before TransCanada ostensibly would have been required to disclose anything.

c. TransCanada's Exploitation of Smith

The trial court also correctly found that Poirier exploited Smith. Op. 147. TransCanada's argument that it "could not have aided and abetted any breach relating to Smith's inexperience" (OB 37) makes no sense. Despite TransCanada's insistence that "Plaintiffs did not claim that Smith breached his duty of care by being a bad negotiator" (*id.*), Plaintiffs *did* actually claim Smith acted unreasonably in the sale process. A476 §I.A.1. The trial court agreed. Op. 126 ("Smith and Skaggs acted unreasonably.").

TransCanada's remaining arguments are misdirection. TransCanada did not "merely recogniz[e] and attempt[] to benefit from its counterparty's inexperience" (OB 37); TransCanada "identifie[d] a breach and zestfully exploit[ed] it," satisfying the culpable participation prong. Op. 152. TransCanada's own self-assessment of the Merger acknowledged Poirier exploited his relationship with Smith, "implicitly acknowledg[ing] that it had taken advantage of Columbia's fiduciaries," and advised management "to repeat the strategy, albeit without creating a similar evidentiary record." Op. 147; *supra* 23-24.

The trial court did not "demand[] that TransCanada give concessions" to Columbia (OB 38) or "stoop to the skill of a less-experienced negotiator" (AB 14)

either; it simply refused to accept "TransCanada's persistent and opportunistic violations of the Standstill" or its co-opting of Smith as "legitimate instances of aggressive bargaining." Op. 95, 148. That is consistent with precedent, which precludes a buyer from "pursuit of the best available price in negotiations with opposing management…*without regard to the target management's fiduciary obligations to its shareholders*." *Gilbert*, 490 A.2d at 1058.

For much the same reason, third-party buyers do not face a "lose-lose" choice. AB 9. There is no reverse-*Revlon* claim for third-party buyers. Nor are third-party buyers who comply with contractual counterparty agreements and avoid exploiting sell-side fiduciaries "expose[d]" to meaningful liability for derivative overpayment claims. AB 11; *see also Chester Cnty. Emps.' Ret. Fund v. New Residential Inv. Corp.*, 2016 WL 5865004, at *1 (Del. Ch. Oct. 7, 2016) (demand not excused where plaintiff failed to adequately allege director defendants' incentive for overpayment), *aff'd*, 186 A.3d 798 (Del. 2018).

d. TransCanada's Repeated and Knowing Standstill Breaches

TransCanada also mischaracterizes or ignores the trial court's findings concerning its repeated, knowing, and willful Standstill violations. TransCanada's insistence that it could not have "knowingly violate[d] the standstill when it was just doing what Columbia said it could do" (OB 39) ignores that "TransCanada plainly understood what the Standstill prohibited," and that Johnston did not believe

Columbia's assurances that TransCanada could make an offer without violating the Standstill. Op. 3, 31, 44-46. TransCanada's suggestion "that the standstill prevented TransCanada only from making a formal offer without the board's written invitation" (OB 38-39) is literally contradicted by the Standstill's plain language, which "do[es] not distinguish among 'formal,' 'informal,' or 'binding" proposals'." Op. 46.

TransCanada's ancillary arguments all fail. TransCanada's claim that it "had no reason to believe that Columbia's board did not welcome TransCanada's interest" (OB 39) elide over its knowledge that the Standstill required written Board authorization *before* "seeking" to acquire Columbia and that TransCanada was "seeking" to acquire Columbia at all relevant times without that authorization. A170-71 ¶58; B0310 (594:11-21); *see also* B0197 (198:1-18), B0206 (207:5-12), B0218 (219:1-17).

TransCanada's claim that "Columbia did not think that TransCanada violated the standstill" (OB 39) is misleading. "Only the Board" could waive the Standstill, an undisputed premise. Op. 47. After Columbia sent the "pencils-down" letter in November and before March 2016, however, TransCanada never received a written invitation from the Board such that it could tell that the Board—rather than management—chose not to enforce the Standstill.

3. The Trial Court Properly Relied on Delaware Precedents

Ample Delaware precedent supports the trial court's ruling that TransCanada knowingly participated in the breaches. The trial court considered cases that *this Court* ruled involved viable aiding-and-abetting claims against third-party buyers. Op. 136 (citing *C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' and Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1072 (Del. 2014)). In *C&J*, this Court explicitly stated that "[t]he decisions in which the Delaware Supreme Court has issued or affirmed the issuance of injunctions targeted to specific deal protection terms *all involved viable claims of aiding and abetting against the holder of third party contract rights*." 107 A.3d at 1072 n.110.

In doing so, the Court cited *OTK Associates LLC v. Friedman* in which Vice Chancellor Laster described *Mills*, *Paramount*, and *Revlon* as aiding-and-abetting cases as he did below. *See* 85 A.3d 696, 720 n.2 (Del. Ch. 2014). TransCanada's argument that the trial court reimagined *Revlon* and *Mills* and "imputed holdings this Court did not make on issues this Court did not address" is wrong. OB. 42. The trial court faithfully adhered to *C&J* when it found that these facts supported a finding of knowing participation. Op. 137-42. TransCanada never meaningfully contests the trial court's conclusion that these precedents involved buyers who secured the cooperation of sell-side players and violated boundaries established by

a target board (Op. 147), as TransCanada did here, and its attempts to distinguish the cases are unavailing. OB 43-44.

TransCanada observes that, in *Revlon* and *Mills*, the buyer received preferential treatment from sell-side players before negotiating unreasonable deal protection measures that would thwart a topping bid. OB 43. But the trial court acknowledged as much (Op. 140-41), and TransCanada never explains why, in a post-closing case, a court should treat a breach of duty potentially resulting in the loss of a higher price from a topping bidder any differently than one resulting in the loss of a higher price from the buyer itself. There is no compelling distinction.

Similarly, TransCanada dismisses *In re Mindbody, Inc., Stockholder Litigation* because it did not involve aiding-and-abetting of sale-process breaches, but the trial court acknowledged as much and found the case instructive regardless. Op. 140 (citing 2023 WL 2518149, at *1 (Del. Ch. Mar. 15, 2023)). That made sense. In *Mindbody*, the buyer "prevail[ed] on the sale-process claim, but only because of a procedural foot fault." *Id.* at *3. The buyer also understood it was violating boundaries set by the board when the CEO informed the buyer of a process before it started, allowing the buyer "to conduct all of [its] outside-in work *before the process launched*." *Id.* at *38 (emphasis in original).

TransCanada highlights the staple financing arrangement in *Del Monte* but ignores the court's finding that both the advisor and buyer knowingly participated in

breaches of duty by violating a "No Teaming Provision," which—like the Standstill—was implemented to ensure control over a sale process. 25 A.3d at 937. Although the advisor's failure to disclose the staple financing engagement to the board was "troubling," it was the violations of the No Teaming Provision that "indisputably crossed the line[.]" *Id.* at 834. Likewise with TransCanada's Standstill breaches.

TransCanada distinguishes *Presidio* because the buyer there received a tip it realized was wrongful but ignores that the buyer realized that because, as the trial court explained, it violated boundaries established by the board—namely a merger agreement provision prohibiting the revelation of anything but the identity of a competing bidder. 251 A.3d at 281. The court also inferred the buyer intended to keep the information secret because, like here, it had the right to review and comment on the proxy but never raised the issue. *Id.*

None of the cases limit aiding-and-abetting liability to only instances where the buyer creates the breach or knowingly receives illicit information, as TransCanada argues. OB 42; *see also Chester Cnty. Emps.' Ret. Fund v. KCG Hldgs., Inc.*, 2019 WL 2564093, at *3 (Del. Ch. June 21, 2019) (CEO's desire to obtain compensation for management team created conflict and buyer exploited it). The inquiry is fact specific. A buyer may be liable for aiding-and-abetting where,

like here, it "identifies a breach and zestfully exploits it." Op. 481; *Malpiede*, 780 A.2d at 1097.

Finally, TransCanada's contention that the court expanded *Revlon* liability "under the guise of an aiding and abetting claim" is baseless and improper. OB 40. TransCanada never appealed the trial court's conclusions concerning the underlying breaches (OB 5), ending the inquiry. TransCanada's elementary argument that it cannot be liable because Columbia's fiduciaries purportedly acted reasonably (*see* OB 40-41) is not before this Court. It is also contrary to the law of the case: the trial court rejected TransCanada's pleadings-stage argument that the *Appraisal Decision* barred Plaintiffs' *Revlon* claim. *In re Columbia Pipeline Grp.*, 2021 WL 772562, at *43 (Del. Ch. Mar. 1, 2021). TransCanada never appealed that ruling but raises the same argument here.

Finally, TransCanada's conclusory attempt to downplay the significance of the differing records between this action and the Appraisal Action is unavailing. The trial court found the differences material and believed the newly produced discovery in the former raised questions about the reliability of the factual record in the latter. *Supra* 25. Unsurprisingly, the *Liability Decision*'s factual findings, which were based on new evidence, significantly differed from those in the *Appraisal Decision*. Op. 12.

II. THE TRIAL COURT PROPERLY HELD THAT TRANSCANADA AIDED-AND-ABETTED DISCLOSURE BREACHES

A. Question Presented

Did TransCanada knowingly participate in breaches by Skaggs, Smith or the Board regarding the Proxy disclosures? Op. 165-68.

B. Scope of Review

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

C. Merits of Argument

The trial court correctly held that a buyer knowingly participates in a disclosure violation where, as here, it: (i) has the opportunity to review disclosures; (ii) undertakes an obligation to identify material misstatements and omissions in those disclosures; and (iii) nonetheless recklessly fails to identify those material misstatements and omissions. *See* Op. 165.

TransCanada's argument for a heightened standard of proof for a buyer lacks support. No Delaware case holds that an aider-and-abettor must participate in drafting the proxy with "intent to mislead." OB 45. A plaintiff need only show the aider-and-abettor acted "knowingly, intentionally, or with reckless indifference," *i.e.*, "with an 'illicit state of mind.'" *See, e.g.*, *RBC*, 129 A.3d at 862.

Worse, TransCanada ignores its affirmative Merger Agreement obligations to: (i) provide Columbia with truthful and accurate information for inclusion in the Proxy so the Proxy was not materially omissive or misleading; and (ii) inform Columbia if there was an issue with the Proxy that needed to be addressed for the Proxy not to be materially omissive or misleading. Op. 87; A947-48 §§5.01(a)-(b). Neither of TransCanada's authorities involved such an undertaking.[24]

Here, TransCanada knew of the material disclosure violations in the Proxy and recklessly disregarded its contractual obligations, dismissing the Proxy as "Columbia's document." *Supra* 22-23.

1. TransCanada Knew of the Breaches

TransCanada had actual or constructive knowledge that the Proxy was materially omissive and misleading. The *amicus*'s assertion that the court "imposed liability on TransCanada for the seller's non-disclosure of information of which TransCanada had no actual knowledge" is thus wrong. AB 8.

TransCanada had actual knowledge that the Proxy was materially misleading because the Proxy omitted and mischaracterized interactions between TransCanada and Columbia management between November 2015 and February 2016 that

[24] *Morrison v. Berry*, 2020 WL 2843514, at *12 (Del. Ch. June 1, 2020) (dismissing aiding-and-abetting claim based on conclusory pleading that acquirer had and exercised contractual right to merely review and comment on proxy); *In re Xura, Inc., S'holder Litig.*, 2018 WL 6498677, at *15 (Del. Ch. Dec. 10, 2018) (addressing acquirer's duty to prevent disclosure violations in absence of contract obligations).

violated the Standstill. *See* Op. 162-64; Allocation Op. 75. TransCanada mischaracterizes the trial court as having "held that the proxy statement failed to include *additional detail about meetings* between TransCanada and Columbia between November 2015 and February 2016." OB 48. The Proxy did not disclose the interactions *at all*, and falsely suggested that, beyond the January 7 meeting, there were *no interactions* between TransCanada and Columbia management in December 2015 and late January 2016 concerning a potential transaction. Op. 89, 163-64. TransCanada (or its advisors) interacted with Columbia management at least nine times, during which both sides discussed their interest in a transaction and Poirier indicated to Smith that TransCanada would be willing to pay $28/share. *See* Op. 27, 30-33, 35, 40-41, 48, 163-64. After the January 7 meeting, Smith and Poirier spoke daily about a potential transaction. Op. 41; 123; 143. That is plainly material.[25]

TransCanada's argument that it need not provide a "play-by-play" of the January 7 meeting is equally misguided. OB 48. The Proxy "portrayed the meeting as the first step in TransCanada's reengagement (it was not) and as involving a

[25] *Alessi v. Beracha*, 849 A.2d 939, 945-46 (Del. Ch. 2004) (discussions of "significant terms" including "valuation" between sell-side and buy-side CEOs were material); *see also Goldstein v. Denner*, 2022 WL 1797224, at *5 (Del. Ch. June 2, 2022) (complaint supported reasonable inference that an "expression of interest was material" where the buyer "expressed interest in acquiring the Company at a price of $90 per share," "was a credible bidder, and high-level representatives of Sanofi sought to engage with the Company about a deal").

balanced exchange of high-level information (it did not)." Op. 41. Rather, "Smith invited a bid and told Poirier that TransCanada did not face competition"[26] and "Poirier indicated that TransCanada would be willing to pay around $28 per share." Op. 163. Not only are valuation-related discussions material, these are quintessential partial disclosures and, having "traveled down the road of partial disclosure of the history leading up to the Merger," the Proxy needed "to provide the stockholders with an accurate, full, and fair characterization of those historic events." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994). The cases TransCanada cites on appeal (but not below) do not hold otherwise.[27]

TransCanada also had actual knowledge that the Proxy was materially misleading because it failed to disclose TransCanada's multiple Standstill breaches and that Columbia management was not enforcing the Standstill. Op. 164. The trial court's factual findings that TransCanada knew how the Standstill worked and blatantly breached it undermine TransCanada's primary argument that it did not

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[26] Op. 161-62 (quoting *Appraisal Decision*, 2019 WL 3778370, at *36). "TransCanada is bound by the factual findings and legal rulings in the Appraisal Decision." B0108 at *2.

[27] *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 749 (Del. Ch. 2016) (defendants need not disclose decline in warrants' value would be "exponential" where proxy already disclosed decline was expected); *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *12 (Del. Ch. June 27, 2008) (defendants need not disclose expressions of interest from rejected bidders where there was no indication firm offer was forthcoming).

believe it or Columbia was violating the Standstill so it could not know it was omitting material facts. *Supra* §§I(C)(2)(b)&(d).

TransCanada's secondary argument—raised for the first time on appeal—that Delaware precedents concerning self-flagellation absolve it of liability "even if TransCanada believed it was violating the standstill" (OB 49) confirms why disclosure was required. "[T]he rule [against self-flagellation] does not limit a party's duty to disclose all material facts relating to the party's actions, *including those that might relate to misconduct*." *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 n.34 (Del. 1997). The trial court made *factual findings* that TransCanada *knew* the Standstill prohibited its actions, Columbia management was not enforcing it, and TransCanada breached it. Op. 146. Requiring disclosure of TransCanada's interactions with Columbia management, the bounds of the Standstill, and TransCanada's concomitant beliefs does not require TransCanada to admit wrongdoing—it simply acknowledges that facts related to TransCanada's misconduct are material.

This makes sense. The Proxy did not disclose that TransCanada (or any other bidder) was bound by a "standstill" *at all*.[28] Nor did it fully and fairly summarize

[28] The only mention of the term "standstill" in the Proxy was its misleading partial disclosure that no other bidders were bound by standstills that would prohibit them from making an unsolicited proposal after the Merger was announced. *Appraisal Decision*, 2019 WL 3778370, at *35; *see* A1055.

the breadth of the Standstill's restrictions implicated by TransCanada's undisclosed interactions with Columbia management. Instead, the Proxy stated only that "TransCanada was prohibited from making a proposal absent an invitation to do so from the Board." A1045. This was a misleading partial disclosure: "In reality, TransCanada was prohibited from making any effort, directly or indirectly, to 'seek…to acquire' Columbia or 'seek or propose to influence the management, board of directors…or…affairs' of Columbia, 'including by means of…contacting any person relating to any of the matters set forth in this Agreement." Op. 59. TransCanada never stopped seeking to acquire Columbia. *Id.* Nor did the Proxy disclose that the Standstill barred threats of public disclosure, like Poirier's coercive threat. "Rather than simply requiring [TransCanada] to engage in 'self-flagellation,' disclosure here would serve the important purpose of providing information likely to alter the total mix of information available to [Columbia] stockholders" that would have enabled them to surmise what TransCanada *knew*: that it repeatedly breached the Standstill and Columbia management was uninterested in enforcing it. *See In re MONY Grp. Inc. S'holder Litig.*, 852 A.2d 9, 27 (Del. Ch. 2004).

TransCanada also had actual knowledge that the Proxy was materially misleading because it: (i) did not disclose "the fact that Columbia's officers accepted the $26 Offer, resulting in the $26 Deal," (ii) falsely described TransCanada's $26 Offer as "indicative"; (iii) misleadingly described the reasons that TransCanada

made the $25.50 Offer; and (iv) falsely described the $25.50 Offer as a final. *See* Op. 164-65. TransCanada's contrary arguments again relitigate the factual conclusions underpinning each disclosure violation. But ample evidence supports these factual findings, which are subject to deference and should not be disturbed on appeal. *Supra* 17-21, 40-44.

Perhaps recognizing this, TransCanada again invokes its appeal-only, "no self-flagellation" defense, lumping each omission and misleading disclosure together to argue it need not disclose that it "reneged on a deal." OB 50. Again, requiring disclosure that the $26 Offer was a real offer that Columbia had accepted is not self-flagellation. *See Loudon*, 700 A.2d at 143 n.34. Nor would striking the word "final" from "final offer" in the Proxy. Poirier clearly testified that he did not say the $25.50 Offer was "best and final" anyway. Op. 78-79, 81.

Loudon does not hold otherwise. 700 A.2d at 144. There, the Court ruled that, in the context of an annual stockholder meeting, a board need not disclose why a director resigned. *Id.* But there were no "allegation[s] that the directors *knew* why [the director] resigned and knowingly suppressed that information." *Id.* at 144 n.35. Unlike *Louden*, TransCanada knew the Proxy misleadingly described the end-stage negotiations and its true reasons for making the $25.50 Offer.

Finally, TransCanada had constructive knowledge that other bidders were bound by standstills and Skaggs and Smith intended to retire. Op. 166-67. As to the

former, the trial court found that "TransCanada had surmised in real time that its competitors had agreed to similar standstills, and it sought in [its] exclusivity agreement to have the right to control whether Columbia could" release other bidders from their standstills. Op. 167. Indeed, while the Proxy was being drafted, TransCanada's attorneys "wanted to know whether there were any standstill obligations that bound the bidders," meaning that "information was obviously significant to [them]," *i.e.*, material. Op. 88. TransCanada's appeal-only argument that nothing short of actual knowledge of other parties' standstill obligations can show knowledge contradicts its Appraisal Action argument "that stockholders should have known that the NDAs contained [don't-ask-don't-waive] restrictions" because "80% of surveyed NDAs contained standstills and 64% contained [don't-ask-don't-waive provisions.]" *Appraisal Decision*, 2019 WL 3778370, at *35.

As to Skaggs' and Smith's intentions to retire, TransCanada concedes materiality,[29] but insists it lacked actual knowledge. OB 46-47. TransCanada had constructive knowledge and that is sufficient. *Supra* 34-37. The trial court's finding that Poirier had actual knowledge that Columbia management were not sticking around, motivated to sell, and behaving bizarrely undermines TransCanada's argument that it had no reason to believe further disclosure was needed.

[29] Indeed, it is the law of the case. *Appraisal Decision*, 2019 WL 3778370, at *36 ("a reasonable stockholder would have regarded their plans as material").

TransCanada realized the significance of its exploitation as well, touting how Poirier used his relationship with Smith to co-opt him and committed "to use the same playbook again, but without generating the same amount of evidence." Op. 91; *supra* 23-24.

Affirming the trial court's decision would not "make buyers the insurers of sellers' disclosures." OB 50. Skaggs and Smith settled and were found liable. Nor would affirmance make buyers "wary of pursuing acquisitions out of concern for liability for proxy statements they do not control" (*id.*) or "impose[] significant new responsibility on a buyer that goes beyond any contractual obligation to provide accurate information." AB 16. TransCanada's aiding-and-abetting liability stems from its affirmative Merger Agreement obligations and its own knowing misconduct. The Merger Agreement required TransCanada to provide materially accurate information and to inform Columbia if there was any issue with the Proxy that needed to be addressed so the Proxy not to be materially omissive or misleading. Op. 87; A947-48 §5.01(a)-(b). TransCanada could have negotiated for different terms but did not.

2. TransCanada Culpably Participated in the Breaches

The trial court correctly found that TransCanada culpably participated in the disclosure violations. Poirier and other TransCanada executives reviewed the "Background of the Merger" section of the Proxy and participated in its drafting,

including by providing comments about Poirier's and Girling's communications with Smith and Skaggs, but failed to correct the material omissions and misstatements TransCanada knew about firsthand. Op. 87-88. TransCanada did so recklessly without regard to its contractual commitments. Op. 167. When Johnston raised potential disclosure issues with the Proxy, Girling recklessly counseled her against correction, dismissing the Proxy as "Columbia's document." *Supra* 22-23. TransCanada's argument that the trial court failed to address its intent is wrong. OB 52.

So too are TransCanada's (OB 52) and *amicus*'s (AB 8) attempts to distinguish *Mindbody*, where the Court of Chancery recognized that a buyer understood the significance of omitted information because it scrubbed the information from internal materials. 2023 WL 2518149, at *44. Here, TransCanada touted its exploitation of Columbia management and advocated scrubbing in future transactions, "recommending…management cultivate similar relationships that could be exploited in future transactions…without generating the same amount of evidence." Op. 91. TransCanada also recognized the significance of the omitted material in real time—most notably its repeated violations of the Standstill, which violated sale process boundaries. *Supra* 61 (TransCanada wanted to know whether other bidders were bound by standstills).

TransCanada's suggestion that it must have edited each specific deficient disclosure to be found liable is frivolous. OB. 51. None of TransCanada's authorities suggest such a standard. *Morrison*, 2020 WL 2843514, at *12 (discussing participation in drafting 14D-9, not specific disclosures). Nor did TransCanada argue for such a standard below when, citing those authorities, it conceded its participation in drafting the Proxy but argued "'knowing participation' require[d] proof that [it] participated in drafting the proxy *and* did so 'with the intent to mislead.'" A601 (emphasis in original). TransCanada's proposed standard is not the law. *Rural Metro*, 88 A.3d at 106 ("[RBC banker] reviewed the Proxy Statement, but he did not look to see if these matters were addressed.") *aff'd sub nom RBC*, 129 A.3d at 862.

TransCanada's arguments that it was only required to provide input on certain sections of the Proxy that used information it provided, and that Columbia was solely responsible for the other sections, which contained all the disclosure violations, are also unfounded. OB 51. TransCanada never made either argument below. TransCanada did not argue about the extent of its contractual obligations *at all*. *See id.* It stipulated to the trial court's interpretation of the Merger Agreement in the *Liability Decision*. *Compare* Op. 87 *with* A285-86 ¶431. Regardless, TransCanada's argument is contradicted by the Merger Agreement's plain language,

which says nothing of the source of the information. Op. 87; A285-86 ¶431; A947-48 §5.01(b).

III. THE TRIAL COURT PROPERLY EXERCISED EQUITABLE DISCRETION IN AWARDING NOMINAL DAMAGES

A. Question Presented

Did the trial court properly exercise its discretion in awarding an equitable remedy of $0.50/share in nominal damages arising from the disclosure claim? Op. 178-88.

B. Scope of Review

This Court "review[s] findings as to damages by the Court of Chancery for an abuse of discretion. The Court of Chancery has the power to grant such relief as the facts of a particular case may dictate." *RBC*, 129 A.3d at 866 (cleaned up). The Court of Chancery has broad discretion in fashioning equitable and monetary relief and this Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy—in this case the damages—to be awarded for a found violation of the duty of loyalty by a corporate fiduciary." *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000). Damages awards are reviewed for abuse of discretion; this Court will "not substitute [its] own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness and arbitrariness." *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015).

C. Merits of Argument

This Court should sustain the Disclosure Claim damages because the trial court did not "exceed[] the bounds of reason in view of the circumstances" or "ignore[] recognized rules of law or practice to produce injustice" in awarding an equitable remedy of $0.50/share in nominal disclosure damages. *Harper v. State*, 970 A.2d 199, 201 (Del. 2009). Even under *de novo* review, the trial court correctly applied settled legal principles in crafting and equitable remedy.

TransCanada does not dispute that nominal damages may be a remedy for breaches of the duty of disclosure, but insists nominal damages can only be "trivial amounts" and seemingly argues that a class-wide, per-share remedy of nominal damages is unavailable. OB 54. TransCanada is mistaken. Although nominal damages are "*usually* assessed in a trivial amount, selected simply for the purpose of declaring an infraction of the [p]laintiff's rights," nominal damages awards are not exclusively trivial or symbolic. *Ravenswood Inv. Co. v. Est. of Winmill*, 2018 WL 1410860, at *25 (Del. Ch. Mar. 21, 2018). Rather, "[n]ominal damages of $1.00 per share have been awarded in certain circumstances in which a rational basis can be found in the record for the award." *Oliver v. Bos. Univ.*, 2006 WL 1064169, at *35 (Del. Ch. Apr. 14, 2006). As the trial court explained, collecting precedents, although "[t]raditionally, this type of award has been called nominal damages[,]" such damages "in this setting is not the symbolic award of $1 that a court grants

when no greater damages were suffered or proven." Op. 10, 179. Rather, it is a per-share damages award that represents "a relatively small (arguably nominal) percentage of the value of each share, but when applied across a class of shares, the amount adds up." Op. 179.

The trial court looked to those precedents—*Gaffin v. Teledyne, Inc.*,[30] *In re Mindbody, Inc., S'holder Litig.*,[31] *Smith v. Shell Petroleum, Inc.*,[32] and *Weinberger v. UOP, Inc.*[33]—and exercised its broad equitable powers to remedy the harm to Columbia's stockholders. *See* Op. 178-88. In each case, the Court of Chancery used its equitable powers to award nominal damages if—despite plaintiffs' failure to prove reliance, causation or damages—there was a rational basis in the record to remedy stockholders who were injured by being deprived of their right to make an informed decision regarding a corporate transaction.

Adhering to these precedents, the trial court examined multiple "sources of evidence suggest[ing] that the court could award up to $2.50 per share" before concluding "the most persuasive figure [was] $0.50 per share." Op. 185. The court

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[30] 1990 WL 195914, at *18 (Del. Ch. Dec. 4, 1990), *aff'd in part, rev'd in part on other grounds*, 611 A.2d 467 (Del. 1992).

[31] 2023 WL 2518149, at *46.

[32] 1990 WL 186446, at *5 (Del. Ch. Nov. 26, 1990) (awarding $2/share ($34,365,760) in class-wide damages).

[33] 1985 WL 11546 (Del. Ch. Jan. 30, 1985) (awarding $1/share ($5,688,502) in class-wide damages), *aff'd*, 497 A.2d 792 (Del. 1985).

considered the degree to which TransCanada benefited from its wrongdoing and whether the deal would remain profitable for TransCanada despite the damages award, and used academic studies concerning the value of voting rights as a cross-check. Op. 185-88. The trial court had a "rational basis" to award nominal damages based on evidence "found in the record" (*see Oliver*, 2006 WL 1064169, at *35) and it did not "attempt[] to value the class's but-for damages." OB 55

TransCanada nevertheless insists that this case and *Mindbody* were decided in error because each of *Gaffin*, *Smith*, and *Weinberger* involved plaintiffs who had "prove[n] causation" and "did not involve nominal damages." OB 56. Wrong. In each case, the court awarded class-wide nominal damages despite plaintiffs' failure to prove causation.[34] This Court's decision in *Dohmen v. Goodman*, which concerned an investor's individual claim to recoup a capital contribution in a fund based on its manager's breach of his disclosure duty, does not hold otherwise. 234 A.3d 1161, 1167 (Del. 2020). There, the trial court subtracted the value of plaintiff's investment on the date he was first able to withdraw (but did not) from his initial

[34] *See Gaffin*, 1990 WL 195914, at *17 (no proof that "any significant number of tendering stockholders would not have tendered if they had received [the undisclosed] information"); *Smith*, 1990 WL 186446, at *4 ("if those shareholders…who chose not to seek an appraisal…had been provided with completely accurate disclosures, most of them would still have decided to accept the cash-out merger price rather than seek an appraisal"); *Weinberger*, 1985 WL 11546, at *9 ("even if the minority shareholders…had been provided with the information…, a majority of their number would have been likely to vote to approve the merger anyway").

investment, and awarded compensatory damages. *See Goodman v. Dohmen*, 2017 WL 3319110, at *20 (C.D. Cal. Aug. 3, 2017). *Dohmen* did not cite, much less overturn, *Gaffin*, *Smith*, or *Weinberger*—the Court, merely confirmed "the per se damages rule presumes only nominal damages." 234 A.3d at 1168.

Affirming the disclosure damages award would not "massively expand the scope of potential liability for buyers and sellers." OB 57. As precedent makes clear, it would not expand the scope of potential liability *at all*. As to purely compensatory damages, defendants in future disclosure cases may rebut the presumption of reliance (Op. 175) and plaintiffs will likewise bear the burden of proving nominal damages. *See Oliver*, 2006 WL 1064169, at *35 (declining to award per share nominal damages absent showing rational basis in the record).

IV. THE TRIAL COURT DID NOT ERR IN EXERCISING ITS DISCRETION UNDER DUCATA

A. Question Presented

Did the trial court correctly find TransCanada responsible for 50% and 42% of the sale process and disclosure damages, respectively? Allocation Op. 64-70; 70-76.

B. Scope of Review

"This Court reviews the Court of Chancery's conclusions of law *de novo*" but "afford[s] a trial court's factual findings a high level of deference, and will leave such conclusions undisturbed unless they are the by-product of clear error." *RBC*, 129 A.3d at 869 (cleaned up).

C. Merits of Argument

The trial court, correctly applied DUCATA, finding that an equal allocation of fault would be inequitable and relying on other case-specific factors to allocate TransCanada 50% and 42% liability for the Sale Process and Disclosure Claims, respectively. Allocation Op. 64-70; 70-76.

1. The Trial Court Correctly Applied DUCATA

The trial court acknowledged "[t]he default method is to divide the damages equally among all joint tortfeasors" and deviated, as DUCATA and Delaware case law permits, because it would be inequitable. Allocation Op. 37. The court did not "start by allocating 50% of the fault to TransCanada." OB 60.

Nor did the court allocate TransCanada 50% liability because it took two sides to negotiate the Merger. OB 59. Rather, the court explained that "it took two sides to *cause the harm*." Allocation Op. 66. Without Skaggs' and Smith's conflicts, TransCanada "could not have gotten its foot in the door, established compromising relationships with the officers, elicited confidential information from them, and stolen a march on other potential bidders." *Id.* But "[a]bsent TransCanada's repeated and persistent breaches of the Standstill, TransCanada could not have secured those advantages for itself" and been "position[ed] to renege confidently on the $26 Deal and threaten to terminate discussions publicly[.]" *Id.*

TransCanada's argument that this context-specific approach to allocation "would make DUCATA's framework meaningless" in all merger-related litigation proves too much. OB 59. DUCATA "was intended to apply equitable considerations in the relationships of injured parties and tortfeasors" and courts eschew mechanistic approaches like the approach TransCanada argued for below. *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 237 (Del. Ch. 2014), *aff'd sub nom. RBC*, 129 A.3d 816. The trial court did not err in formulating the law.

2. The Trial Court's Allocation of Responsibility was not Clearly Erroneous

Nor did the trial court err in applying the law. The trial court's allocation-related factual findings will be left "undisturbed unless they are the by-product of clear error." *RBC*, 129 A.3d at 869 (cleaned up). TransCanada offers no basis to

conclude that the factual findings—a combined 278 pages over two opinions—were not "sufficiently supported by the record" or "the product of an orderly and logical deductive process." *Backer*, 246 A.3d at 95 (cleaned up).

a. TransCanada is 50% Responsible for the Sale Process Damages

The trial court correctly considered the nature of TransCanada's conduct and its causal connection to the harm the class suffered in allocating TransCanada 50% liability for the Sale Process Claim. *See* Allocation Op. 65-76. TransCanada again asks this Court to overturn the factual findings that: TransCanada believed it was breaching (and knew Columbia management was not enforcing) the Standstill; agreed to the $26 Deal; and reneged on the $26 Deal TransCanada with the $25.50 Offer, which was not "best and final" and breached the NDA. *See* OB 61-62. There is no basis to do so. *Supra* §I.

TransCanada misleadingly argues the trial court erred by allocating fault as if TransCanada had actual knowledge of Skaggs' and Smith's intentions to retire. OB. 62. Not so. The trial court expressly recognized TransCanada had "constructive knowledge[.]" Op. 74. Moreover, it did not allocate liability for the Sale Process Claim based on TransCanada's relative degree of knowledge (as with the Disclosure Claims). Rather, the trial court correctly accounted for all TransCanada's misconduct—including its knowing Standstill violations, exploitation of Skaggs and Smith, and reneging on the $26 Deal with a threat that violated the Standstill—when

allocating liability for the Sale Process Claim. Allocation Op. 11-15, 17, 23-25, 39, 65-68.

b. TransCanada is 42% Responsible for the Disclosure Damages

The trial court did not err in allocating TransCanada 42% liability for the Disclosure Claim. The trial court properly considered each tortfeasors' conduct, *i.e.*, their failure to correct material misstatements or omissions, and its causal connection to the harm by allocating responsibility based on relative knowledge of the underlying omission or misstatement. Allocation Op. 70-76. "That allocation favor[ed TransCanada], because the disclosure issues where [TransCanada] bore a greater level of responsibility were more serious, and the court could have weighted them more heavily." Allocation Op. 3.

TransCanada's argument that certain disclosures would require self-flagellation and should not have been allocated (OB 63) is another appeal-only argument and none of the disclosures require self-flagellation. *Supra* 58-60. TransCanada also falsely argues that the court wrongly "assumed that TransCanada and Columbia 'played an equal role' in *creating the proxy statement"* and therefore erred in allocating fault because "TransCanada could only review the draft and make suggestions." OB 63. But the trial court expressly rejected TransCanada's argument that Columbia—as drafter—must have a greater share of liability, holding that TransCanada's reckless failure to fulfill its contractual obligations "played an equal

role *in causing the disclosure violations*" and that TransCanada's "willful disregard of [its] affirmative obligation to act is no less culpable than an affirmative act." Allocation Op. 72-73.

TransCanada does not otherwise challenge the trial court's allocation decision respecting the Disclosure Claim; it should therefore be affirmed.

CONCLUSION

This Court should affirm the trial court's judgment in all respects.

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