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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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INTRODUCTION

For the first time in Delaware law, the Court of Chancery found a third-party buyer liable for damages for aiding and abetting sell-side fiduciary breaches during a sale process. Plaintiffs insist that this is the rare case that justifies that result. But there is nothing rare about this case – this was a routine merger, where TransCanada appropriately bargained at arm's length. The unusual thing here is that, after determining in the appraisal action that the deal price represented fair value, the Court of Chancery reconceived this case as one where TransCanada did something wrong. The court did not find that TransCanada actually knew of any fiduciary breach on Columbia's side – only that ambiguous signals from Columbia's CEO (Robert Skaggs) and CFO (Stephen Smith) meant that TransCanada's "spidey senses" should be "tingling." A394 (1337:7-17). That is not enough to impose aiding-and-abetting liability under Delaware law.

Plaintiffs' approach is to just repeat the Court of Chancery's findings and claim deference. But the predominant questions here are legal – whether the facts meet the intentionally high standard for aiding-and-abetting liability. Even under the facts as the court found them, that standard is not met. Undisputed and contemporaneous documentary evidence establishes that TransCanada did not have the requisite *scienter* and did not culpably participate in any fiduciary breach. In any

event, the court's findings do not warrant deference, because they are not supported by the evidence and are not the product of an orderly and logical reasoning process.

Plaintiffs attempt to justify the outcome here by portraying TransCanada's conduct as especially bad. But the Court of Chancery did not find that; it recognized that TransCanada did not create or induce any breach, or even know of any breach. Rather, the court merely concluded that TransCanada should have intuited that Skaggs, Smith, and Columbia's board *all* had breached their fiduciary duties.

There was no breach from TransCanada's perspective. TransCanada did not know that Skaggs and Smith wanted to retire; it had no visibility into their interactions with the board; and it bargained for the best possible deal, just as it would in any other case. Nothing cited by the Court of Chancery amounts to culpable participation. At the time, no one believed that TransCanada breached the standstill, and Columbia could waive the standstill in any event. Further, TransCanada did not renege on a deal at $26/share; there was no deal because Columbia's board never approved it and the conditions for the deal were not met. And there was no threat about what would happen if the deal fell apart after the $25.50/share offer, because it is undisputed that Toronto Stock Exchange rules required disclosure in those circumstances.

The court's disclosure holding also is wrong. The court did not address *scienter* at all, and its nitpicking of Columbia's disclosures does not amount to

TransCanada's culpable participation in a breach. The court compounded its error by awarding hundreds of millions of dollars in "nominal" damages, without any proof of reliance, causation, or damages.

This Court should reverse.

ARGUMENT

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

To prove aiding and abetting, Plaintiffs had to prove that TransCanada (1) knew of and (2) culpably participated in Skaggs's, Smith's, or the Columbia board's fiduciary breaches. Opening Brief (OB) 18-19. Plaintiffs acknowledge that the standard is intentionally very difficult to meet, to protect vigorous arm's-length bargaining. Answer Brief (AB) 36; *see* OB 19-20. The undisputed facts here do not satisfy that demanding standard as a matter of law.

A. TransCanada Lacked Knowledge Of Any Breach

1. TransCanada Had No Actual Knowledge

For the sale-process claim, the Court of Chancery relied exclusively on constructive knowledge. OB 20. Plaintiffs argue (AB 30-34) that the court found that TransCanada had actual knowledge of the alleged fiduciary breaches. There was no such finding.

According to the court, Skaggs and Smith breached their fiduciary duties because they acted on their desires to retire with their full change-in-control benefits, and Columbia's board breached its fiduciary duties by failing to adequately supervise Skaggs and Smith. Ex. A, Post-Trial Op. on Aiding & Abetting Liability (Op.) 113, 144. The court did *not* find that TransCanada had actual knowledge of those breaches; it relied *only* on constructive knowledge. OB 20; *see* Op. 143-45.

The court could not have been clearer about that: TransCanada "did *not* actually know of Skaggs and Smith's plans" to retire, Op. 166 (emphasis added), and TransCanada "did *not* have direct interaction with any Board members and was not inside the boardroom for any meetings," Op. 144 (emphasis added).

According to Plaintiffs, the court found that TransCanada "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.'" AB 33 (quoting Op. 143). What the court actually said was that "Skaggs and Smith *broadcasted a series of signals*" that supposedly indicated to TransCanada that they "were focused on selling at a defensible price" and "*seemed* to want an exit badly." Op. 143-44 (emphases added). That is constructive knowledge, not actual knowledge – the most the court said is that the "signals" meant TransCanada's "spidey-senses should have been tingling." A394 (1337:7-17).

Plaintiffs downplay (AB 31) the finding that TransCanada did not know of Skaggs's and Smith's plans to retire, noting that the court made the finding in the context of the disclosure claim rather than the sale-process claim. That does not matter: Either TransCanada knew of Skaggs's and Smith's retirement plans or it did not.

Plaintiffs also argue (AB 31-33) that even if TransCanada did not know of Skaggs's and Smith's plans to retire, TransCanada knew other facts that amount to actual knowledge of the fiduciary breaches. That is incorrect.

Plaintiffs contend (AB 31-32) that TransCanada knew that Skaggs and Smith would obtain change-in-control benefits and that there were unlikely to be social issues with a deal. But any potential buyer would have known of those commonplace features of this transaction, which are not wrongful and are not themselves fiduciary breaches. *See In re Novell, Inc. S'holder Litig.*, 2013 WL 322560, at *11 (Del. Ch. Jan. 3, 2013) (possibility of receiving contractual change-in-control benefits, by itself, "does not create a disqualifying interest as a matter of law"). On the contrary, they ensured that Skaggs's and Smith's interest in getting the best deal aligned with that of Columbia's stockholders. OB 22-23.

Plaintiffs next argue (AB 32-33) that TransCanada had actual knowledge that it had violated the standstill provision in its nondisclosure agreement with Columbia and that Columbia was not enforcing the standstill. There are three problems with that argument. First, Plaintiffs are inappropriately seeking to convert a contract option into a fiduciary obligation. As the Court of Chancery recognized (Op. 47), Columbia's board was not required to enforce the standstill if it welcomed the interest – the standstill was a contractual right it could choose to exercise, not an obligation it must enforce. OB 23.

Anyway, neither TransCanada nor Columbia thought that TransCanada violated the standstill. OB 23-24. Plaintiffs note (AB 32, 48-49) that in December 2015, TransCanada management received guidance that the standstill precluded TransCanada from "mak[ing] [a] run" at Columbia without the board's written invitation – but TransCanada management also understood from that guidance that TransCanada could continue discussions with Skaggs and Smith. B1; *see* A834. And *after* receiving that guidance, Columbia's general counsel told TransCanada that its discussions with Columbia did not violate the standstill. Op. 44-46, 123; *see* A844. Plaintiffs fail to address these undisputed facts.

Even if TransCanada knowingly violated the standstill, Columbia's decision not to enforce it did not necessarily show a fiduciary breach by Skaggs, Smith, or Columbia's board. OB 23. In fact, TransCanada never discussed the standstill with Skaggs or Smith (only with Columbia's general counsel). *See* A844. Plaintiffs have no response on this point.

Finally, Plaintiffs note (AB 33) that Smith told TransCanada that Columbia's management was eager to reach a deal. Eagerness is not a conflict of interest, much less a fiduciary breach. Further, TransCanada did not know whether Smith's messages had been approved by Columbia's board. *See* Op. 144.

The bottom line is that TransCanada lacked actual knowledge of any fiduciary breach. The Court of Chancery did not find to the contrary, so Plaintiffs' appeal for deference necessarily fails.

2. TransCanada Had No Constructive Knowledge

The Court of Chancery's determination about constructive knowledge is an application of law to fact reviewed *de novo*. *See Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004). For constructive knowledge to support aiding-and-abetting liability in a case involving a third-party buyer, the sell-side conduct must have been "inherently wrongful," such that it obviously and unambiguously amounted to a fiduciary breach. OB 21-22 (citing *Jacobs v. Meghji*, 2020 WL 5951410, at *7 (Del. Ch. Oct. 8, 2020)).[1] A lesser standard – where a third-party buyer is required to guess among possible interpretations of mixed signals – would undermine the arm's-length bargaining "that is central to the American model of capitalism." *Morgan v. Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010); *see* OB 22; Chamber *Amicus* Br. 16-17.

[1] As TransCanada noted (OB 21 n.5), this Court has never squarely held that constructive knowledge is sufficient for aiding-and-abetting liability. Although the Court mentioned constructive knowledge in *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015), that was only in the context of the culpable-participation requirement and not the knowledge requirement. Plaintiffs argue (AB 35-36) that the *scienter* requirement is the same for both, but their cited authority, *In re Rural Metro Corp.*, 88 A.3d 54 (Del. Ch. 2014), did not address that issue; it addressed which party (the fiduciary or aider-and-abettor) needed to act with *scienter*, *id.* at 97.

Plaintiffs acknowledge (AB 36) that arm's-length bargaining is "privileged," but argue that constructive knowledge can be based on sell-side conduct that is less than inherently wrongful. No case so holds. Plaintiffs rely (*id.*) on *Jacobs*, which observed that a defendant can knowingly participate in a breach by "us[ing] knowledge of the breach to gain a bargaining advantage." 2020 WL 5951410, at *7 n.49. That says nothing about the standard for determining knowledge of the breach itself. Plaintiffs also cite (AB 36) *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001), but *Malpiede* does not mention constructive knowledge at all. *See id.* at 1096-98.

Viewed from TransCanada's perspective, Skaggs's and Smith's conduct was not inherently wrongful. OB 22-26. TransCanada saw Skaggs and Smith bargain hard for Columbia's stockholders, including by rejecting four proposals, all priced at a premium, that would have triggered their change-in-control benefits. *See* A807. Smith's apparent eagerness to make a deal could have reflected his own inexperience at negotiating or his calculated decision about the best approach to secure TransCanada's engagement. *See* OB 25. Plaintiffs' response (AB 33-34) is that this Court should defer to the Court of Chancery's finding of knowledge, which considered the ambiguous nature of Skaggs's and Smith's conduct. But the court never found actual knowledge, *see* pp. 4-8, *supra*, and whether the facts amount to constructive knowledge is an application of law to fact reviewed *de novo*, *see Scharf*, 864 A.2d at 916.

TransCanada also lacked constructive knowledge of the Columbia board's supposed breaches, because it had no visibility into the board's interactions with Skaggs and Smith. OB 26-28. Plaintiffs first suggest (AB 38) that TransCanada did not need to have any knowledge of the board's breaches to be liable, but that is flatly contrary to Delaware law. *See RBC*, 129 A.3d at 862 (aiding-and-abetting liability requires the third party to "know[] that the board is breaching its duty of care" (internal quotation marks omitted)).

Next, Plaintiffs argue (AB 38) that TransCanada should have known, based on Skaggs's and Smith's conduct, that they were "betray[ing]" Columbia's board. But TransCanada could not have known if Skaggs and Smith were carrying out the orders of the board or pursuing an independent agenda, because TransCanada "was not inside [Columbia's] boardroom for any meetings." Op. 144.

Notably, in the related appraisal action, the Court of Chancery found that Columbia's board ran a sufficiently reliable process for the deal price to represent fair value. OB 40. That was the process that TransCanada saw. Plaintiffs assert (AB 53) that the records in the two actions are different, but they – like the court – do not actually identify any factual differences or explain how they changed the outcome. OB 41.

The bottom line is that the facts, as found by the court, do not amount to constructive knowledge of any fiduciary breach.

B. TransCanada Did Not Culpably Participate In Any Breach

Separately, TransCanada is not liable for aiding and abetting because it did not culpably participate in any fiduciary breach. OB 29-39.

1. TransCanada Did Not Renege On A Deal At $26/Share

The linchpin of the Court of Chancery's decision was that TransCanada "reneged" on a supposed deal at $26/share and then "threatened" Columbia into accepting the $25.50/share offer. Op. 145. Those conclusions rest on both legal and factual errors.

a. There was no deal

Legally, there could not have been a deal at $26/share because Smith, who supposedly agreed to the deal on the Columbia side, did not have the authority to agree to a deal. OB 31. In response, Plaintiffs say (AB 41) that the deal was only an "agreement in principle," and not a "fully approved" deal. But Smith had no authority to bind Columbia even to an agreement in principle. AR80-81 (806:18-807:16).

Notably, in the court below, Plaintiffs admitted that "[Columbia's] Board never authorized Columbia management to accept TransCanada's offer." A450.[2]

[2] Plaintiffs note (AB 41) that TransCanada did not argue in the trial court that Smith lacked authority to agree to a deal. But Plaintiffs had never argued that Smith accepted the supposed deal, *see* A448-50, 640; the Court of Chancery first mentioned that theory in its opinion, *see* Op. 66.

And in their answering brief on appeal (AB 18), Plaintiffs assert that after Smith supposedly accepted the deal, Skaggs "recommended the Board accept" the $26/share offer – acknowledging that it had *not* already been accepted.

Plaintiffs suggest (AB 41) that Columbia's board somehow believed it had a deal. That makes no sense. It is undisputed that the board never voted on the $26/share offer. Op. 68; *see* A810-11. Plaintiffs rely (AB 41) on board minutes from three days after Smith supposedly accepted the $26/share offer, but the minutes refer to the "*potential transaction* with TransCanada," not a "deal" or "agreement in principle" with TransCanada. A813 (emphasis added). Plaintiffs argue (AB 41) that Columbia's board "treated the price term as settled" – but again, the board minutes describe TransCanada's offer only as a "non-binding indication of interest." A810-11. Plaintiffs suggest (AB 42 n.18) the minutes are not trustworthy because they were not drafted contemporaneously, but the minutes say the same thing as Skaggs's contemporaneous email to the board, which characterized TransCanada's $26/share offer as an "[i]ndicative/[p]rovisional [p]roposition." A871-72.

Further, there was no deal at $26/share because TransCanada's offer was expressly subject to three conditions, and all three conditions failed. OB 31-32. Plaintiffs do not dispute (AB 44) that the condition that TransCanada's stock had to remain at or above C$49/share failed. They say (*id.*) it did not matter because TransCanada's stock later recovered. But that is not how a conditional offer works;

the offer is valid only until a condition fails. *See In re Estate of Landon*, 2023 WL 5533132, at *3 (Del. Ch. Aug. 28, 2023). Notably, TransCanada's share price did not recover until after it withdrew the $26/share mixed offer and presented the $25.50/share all-cash offer. *See* Op. 78.

The condition that TransCanada's underwriters support the transaction also failed. The underwriters withdrew their support for the $26/share offer after the *Wall Street Journal* leak.[3] Because TransCanada's share price dropped as a result of the leak, the underwriters told TransCanada that the markets no longer would support the $26/share mixed offer but instead would "support[]" a "larger bought deal with a smaller over-allotment option" – *i.e.*, a deal with more cash and less stock. A883. The underwriters did not withdraw their support for acquiring Columbia altogether, AB 43, but they withdrew support for the $26/share offer specifically, and that was what mattered.

The condition that the ratings agencies "sign-off on the proposed financing" also was not met because TransCanada never approached the ratings agencies before withdrawing the $26/share offer following the *Wall Street Journal* leak. OB 32. Plaintiffs speculate (AB 43-44) that, if TransCanada had approached the agencies,

[3] Plaintiffs do not defend the Court of Chancery's speculation (Op. 64-65) that TransCanada was the source of the leak. *See* AB 18.

they would have viewed the offer favorably. But Plaintiffs do not dispute that TransCanada never received the agencies' assessment.

Significantly, neither TransCanada nor Columbia acted as though they had a deal. OB 32. Among other things, TransCanada sought and received an extension of its exclusivity period, which would have been unnecessary if there had been a deal. Op. 68. The extension agreement expressly contemplated that TransCanada could follow up with an offer that was not "as favorable" as its $26/share mixed offer. A877. Plaintiffs ignore these undisputed facts.

Instead, Plaintiffs cite (AB 40) the same third-hand accounts on which the Court of Chancery relied – emails and documents from Wells Fargo employees and text messages from TransCanada executives. But as TransCanada explained, it is undisputed that these third-hand accounts contain inaccuracies, and they are inconsistent with the actions and statements of the parties themselves. OB 32-33 & n.10. Plaintiffs' only response (AB 40 n.16) is that Wells Fargo had no incentive to make inaccurate statements. But that does not change that the statements are inaccurate when they say that Columbia's board accepted the $26/share offer on March 10. *See* A889.

Plaintiffs also attempt (AB 42) to defend the court's reliance on Skaggs's and Smith's supposed failure to immediately waive other potential buyers' standstills after TransCanada's exclusivity expired. *See* Op. 67. That finding has no record

support: Columbia's board had instructed management only to waive the other standstills "if feasible" "before entry into a merger agreement with TransCanada," not specifically after exclusivity expired. A256 (¶ 347). Plaintiffs cite (AB 42) testimony from Columbia's general counsel, but he merely agreed that "the earliest possible time that [Columbia] could have waived the [other] standstills" was after TransCanada's exclusivity expired. B300 (418:5-7). He did not testify that Columbia's board *required* the standstills to be waived at that time. *See* B298-300 (416:12-418:16).

Finally, Plaintiffs urge (AB 40) this Court to defer to the Court of Chancery's finding that there was a deal at $26/share. But that conclusion is based on two legal errors – that Smith could have agreed to a deal without board authorization, and that the conditions for the deal were met. *See Soleimani v. Hakkak*, 2024 WL 1593923, at *5 n.66 (Del. Ch. Apr. 12, 2024). No deference is due on those issues.

Even if clear-error review applied, the court's finding flunks that standard. The court ignored undisputed facts that are inconsistent with its finding, *see, e.g.*, *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 159 (Del. 1996) – such as the fact that TransCanada and Columbia entered into the renewed exclusivity agreement that expressly contemplated that TransCanada might revise its offer, A877. The court also erred because its finding was not "orderly and logical." *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 95 (Del. 2021). For example, it was undisputed

that TransCanada's share price dropped below C$49/share, a necessary condition for the offer. That the share price later recovered (Op. 78) does not cure the fact that the condition failed. Besides, even if it mattered that the share price later increased, "no one knew" that would happen at the time, and thus the parties could not move forward with the offer. Op. 78. This is a paradigmatic case of clear error.

b. There was no threat

TransCanada did not culpably participate in any fiduciary breach by threatening Columbia with public disclosure unless Columbia accepted the $25.50/share all-cash offer. OB 34-36. To begin with, this Court and the Court of Chancery have recognized that negotiation tactics more aggressive than TransCanada's purported threat are permissible as a matter of law. OB 34-35 (citing cases). Plaintiffs' only response (AB 45) is that those cases did not address the exact situation here – but Plaintiffs do not dispute that the cases involved more aggressive conduct.

Further, TransCanada did not threaten Columbia. TransCanada, Columbia, and their bankers all understood in real time that TransCanada's $25.50/share offer was its "final" offer, and it is undisputed that under Toronto Stock Exchange rules, TransCanada was required to disclose the end of negotiations. OB 35-36. So when TransCanada's Francois Poirier told Columbia's management that TransCanada would need to make a disclosure if Columbia rejected the $25.50/share offer,

Columbia's management did not view that statement to be a "threat." A359 (361:21-22).

Plaintiffs have two responses. First, they argue (AB 45-46) that TransCanada's $25.50/share offer was not its "best and final" offer because Poirier testified, in hindsight, that TransCanada would have considered a Columbia counterproposal. But Poirier also testified that TransCanada would quickly have rejected that counterproposal. *See* OB 36. Plaintiffs have no answer to that.

Further, the undisputed evidence, including Skaggs's contemporaneous email to Columbia's board, shows that Columbia understood TransCanada's offer to be final and did not view Poirier's statement as a threat. *See* OB 35-36 (citing, *e.g.*, A813). Plaintiffs' only response (AB 46) is that the evidence does not speak to Poirier's intent. What matters is whether Columbia *understood* Poirier's statement as a threat – and it did not. *See* A359. Culpable participation requires the aider-and-abettor to actually "extract[] terms" it should not have, not merely intend to do so. *Malpiede*, 780 A.2d at 1097 n.81 (internal quotation marks omitted). There is no evidence that Columbia acted differently because of Poirier's statement about a potential disclosure.

Second, Plaintiffs argue (AB 46-47) that TransCanada did not take the procedural steps required under the nondisclosure agreement to make a disclosure required by Toronto Stock Exchange rules. But TransCanada needed to take those

steps only if the negotiations ended without a deal – and here, Columbia accepted TransCanada's $25.50/share offer.

Because there was no deal at $26/share and TransCanada did not impermissibly threaten Columbia, the Court of Chancery's theory of liability fails.

2. TransCanada Did Not Otherwise Culpably Participate In Any Breach

Because the Court of Chancery's decision was based on the supposed deal at $26/share, this Court can reverse without addressing the other actions cited by the Court of Chancery. OB 37. But the court also was wrong about them.

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

TransCanada's supposed exploitation of Smith's inexperience does not support liability for two reasons. OB 37-38. First, there is a mismatch with the fiduciary breach pleaded and pursued at trial. Plaintiffs alleged, and the Court of Chancery found, that Smith wanted to retire, *see* Op. 113-27 – not that his inexperience alone amounted to a fiduciary breach. TransCanada explained this (OB 37), and Plaintiffs' only response (AB 47) is that they had alleged that Smith "acted unreasonably." That is not responsive, because the *reason* Plaintiffs claimed Smith acted unreasonably was his desire to retire, not his inexperience. *See* A476.

Second, a third-party buyer, negotiating at arm's length, is allowed to attempt to benefit from a counterparty's inexperience. OB 37-38. The buyer is not required

to pull its punches or report the counterparty to his or her board. *Id.* Plaintiffs do not dispute this principle; instead, they assert (AB 47-48) that the Court of Chancery faulted TransCanada for crossing the line into impermissible exploitation. But they never explain how TransCanada did so, other than by permissibly benefiting from Smith's inexperience.

Plaintiffs cite (AB 47) a TransCanada post-merger assessment of the deal, which they say showed that TransCanada knew it had exploited Smith's inexperience. The assessment says no such thing. One slide opined that having Poirier deal principally with Smith instead of the bankers "[i]mproved the access to information and smoothed the process," B100 – but that says nothing about exploiting inexperience. Another slide listed "[l]egal" "[l]essons learned," including that TransCanada should "[m]inimize email conversations." B104. But this is general legal advice, not evidence of wrongdoing. Nothing on that slide indicated that TransCanada should hide its interactions with the seller; on the contrary, the slide suggested that TransCanada should "[k]eep a log of all conversations" with the seller. B104. Plaintiffs' theory simply does not reflect the evidence.

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

TransCanada did not violate the standstill, and particularly did not do so with *scienter*. OB 38-39.

First, TransCanada believed that its actions did not violate the standstill. Specifically, Columbia's unconflicted general counsel – on the advice of its unconflicted outside counsel at Sullivan & Cromwell – told TransCanada that the standstill prevented TransCanada *only* from submitting a formal offer without the Columbia board's approval. OB 23-24, 38. And TransCanada received written board invitation before presenting its formal offer. Op. 59-60. TransCanada did not act culpably by acting consistently with Columbia's own interpretation of the standstill.

Plaintiffs dispute (AB 49) Columbia's interpretation of its standstill. But what matters is what the parties thought at the time. *No one* contemporaneously believed that the standstill prevented all contact between a bidder and Columbia without a written invitation from Columbia's board. It is undisputed that three other prospective buyers, all subject to standstills with the same relevant terms, each submitted expressions of interest to Columbia without written invitations. Op. 17, 24. TransCanada pointed this out, *see* OB 24, and Plaintiffs have no response.

Second, TransCanada did not know that Columbia's board could be breaching its fiduciary obligations by not enforcing the standstill, as opposed to reasonably deciding not to enforce it. OB 39. Plaintiffs' arguments on this point are non-responsive. They first repeat (AB 49) their argument that TransCanada knew that it needed written board approval to approach Columbia. But the point is that the board

could choose not to require approval consistent with its fiduciary duties. The board's failure to enforce a contractual right was not a *per se* fiduciary breach. *See* Chamber *Amicus* Br. 14-15.

Plaintiffs argue (AB 49) that because TransCanada did not receive written board approval, TransCanada should have known that Skaggs and Smith, not Columbia's board, were choosing not to enforce the standstill. That does not make sense. TransCanada did not know what Columbia's board told Skaggs or Smith, and TransCanada never discussed the standstill with Skaggs or Smith. Op. 144. All TransCanada could see was that Columbia did not enforce the standstill, granted exclusivity to TransCanada, provided diligence, negotiated the merger agreement, and accepted TransCanada's offer. Given that Delaware law presumes that directors and officers fulfill their fiduciary obligations, *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2023 WL 6399095, at *18 (Del. Ch. Oct. 3, 2023), TransCanada had no reason to suspect any disconnect between Skaggs, Smith, and Columbia's board.

C. The Court Of Chancery's Decision Is Out Of Step With Delaware Law

Plaintiffs do not dispute that the Court of Chancery's decision is the first time a Delaware court has held a buyer liable for damages for aiding and abetting a sell-side fiduciary breach during a sale process. *See* OB 40. None of this Court's precedents supports imposing liability here. OB 40-44.

As TransCanada explained (OB 41-43), the Court of Chancery erred by relying on *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989), both because those cases did not involve aiding-and-abetting claims, and because they are factually distinguishable. Further, the court's decision is inconsistent with the deference Delaware courts afford to fiduciaries under *Revlon*. In effect, the court subjected this deal to greater scrutiny because it was challenged through an aiding-and-abetting claim against the third-party buyer, rather than if the deal had been challenged through a fiduciary-breach claim against the seller's board. OB 40-41.

Plaintiffs rely (AB 50) on *C&J Energy Services, Inc. v. Miami General Employees Retirement Trust*, 107 A.3d 1049 (Del. 2014). They cite (AB 50) a footnote that quoted a Court of Chancery decision that, in turn, characterized decisions in which this Court affirmed injunctions against third-party buyers as "involv[ing] viable claims of aiding and abetting" against those buyers. 107 A.3d at 1072 n.110 (internal quotation marks omitted). That footnote cannot bear the weight Plaintiffs put on it. The Court in *C&J* did not cite, much less discuss, *Revlon* or *Mills*. Maybe there could have been viable aiding-and-abetting claims in *Revlon* or *Mills*, but no such claim actually was brought or addressed by the Court.

Plaintiffs argue (AB 51) that *Revlon* and *Mills* are similar to this case because in all the cases, the sellers potentially lost out on higher-priced offers. That is not

responsive to TransCanada's argument, which is that *Revlon* and *Mills* involved defendants that deliberately coordinated with the sellers to thwart higher-priced offers – an allegation never made here. *See* OB 43.

The Court of Chancery also erred by relying on *In re Mindbody, Inc. Stockholder Litigation*, 2023 WL 2518149 (Del. Ch. Mar. 15, 2023). That case also did not involve an aiding-and-abetting claim with respect to a sale process, and it involves very different facts. OB 43-44. Plaintiffs note (AB 51) that the sale-process claim in *Mindbody* was procedurally defaulted, but that does not change the fact that the claim was not decided on the merits.

The court also cited decisions where the buyer created the sell-side conflict or knew that it was receiving illicit information. Op. 142. Neither happened here. OB 44. Plaintiffs note (AB 52-53) that the decisions did not expressly limit aiding-and-abetting liability to the situations described. But the point remains that the decisions did not find that a buyer can be liable in the circumstances here, where the buyer did not create the conflict and had no actual knowledge of any breach.

The Court of Chancery's sale-process determinations would, if affirmed, significantly and unjustifiably expand the scope of aiding-and-abetting liability. It would place buyers in an impossible situation. *See* OB 21-22; Chamber *Amicus* Br. 9-11. A buyer has an obligation to its stockholders to obtain the best price for the target. *Morgan*, 2010 WL 2803746, at *8. But under the court's approach, the buyer

must restrain itself out of concern for liability to the seller's stockholders if there are "signals" that could be consistent with a sell-side fiduciary breach. Op. 143. A buyer that incorrectly guesses that there is a breach would lose out on a deal it could have achieved.

Affirming the court's decision also would create significant uncertainty for buyers, who would not know what signals that are consistent with unconflicted bargaining actually are the result of a fiduciary breach. *See* Chamber *Amicus* Br. 11-15. All of this will serve to chill acquisitions of Delaware companies, to the detriment of stockholders.

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

To prove that TransCanada knowingly participated in a disclosure breach, Plaintiffs had to show that TransCanada knew that the disclosure was deficient and that TransCanada participated in drafting the disclosure with the intent to mislead. OB 45. Both elements are missing here.

A. TransCanada Did Not Know Of Any Disclosure Breach

None of the disclosure breaches in the proxy statement was so clearly wrong that it put TransCanada on notice of a breach. OB 46-51.

Skaggs's and Smith's plans to retire. The Court of Chancery acknowledged that TransCanada did not know of Skaggs's and Smith's plans to retire. Op. 166. TransCanada also lacked constructive knowledge of that fact. OB 46-47; *see* p. 8-9, *supra*. Plaintiffs merely parrot (AB 61-62) the court's decision, without addressing TransCanada's arguments at all.

Additional details about the parties' communications. How much detail to include about several months' worth of communications is a question of judgment. OB 48. Plaintiffs do not dispute that. *See* AB 57. Plaintiffs also do not dispute that Columbia – not TransCanada – drafted the section of the proxy statement about the parties' communications.

In order for TransCanada to know that Columbia was breaching its disclosure obligations – as opposed to exercising reasonable judgment about what to include –

the proxy statement must have been so obviously deficient that it was outside the zone of reasonableness. *See* OB 48-49 (citing *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 749 (Del. Ch. 2016)). Here, the proxy contained 18 pages cataloging the parties' interactions. A1035-53. None of Plaintiffs' nitpicks about what more the proxy could have included clearly shows that Columbia was outside the zone of reasonableness. *See* AB 56.

For example, Plaintiffs complain (AB 56) that the proxy statement did not say that a TransCanada banker attended the same energy conference as Columbia's CEO. *See* Op. 163. The Columbia board reasonably could decide that it was not necessary to include that level of minutiae. Plaintiffs also complain (AB 56) that the proxy did not disclose that TransCanada indicated to Columbia in December 2015 that it was considering offering up to $28/share. But the proxy discloses that in January 2016, TransCanada told Columbia that it was interested in acquiring Columbia "in the range of $25 to $28" per share. A1041. From TransCanada's perspective, it was reasonable for Columbia to not repeat that point multiple times. *See Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *15 (Del. Ch. June 30, 2014) (proxy statement does not need to include "blow-by-blow disclosures").

TransCanada's supposed violations of the standstill. TransCanada explained that neither it nor Columbia thought that TransCanada had violated the standstill. OB 23-24, 49; *see* pp. 6-7, 19-21, *supra*. In Plaintiffs' view (AB 58), the proxy

statement should have disclosed that the standstill did not allow any contact without a board invitation, and here TransCanada made contact without board approval. But no one interpreted the standstill that way at the time. *E.g.*, A835; *see* OB 23-24, 38. And the proxy accurately described the underlying facts as the parties understood them at the time. *See* A1045 (proxy statement explaining that "TransCanada was prohibited from making a proposal absent an invitation to do so from the Board"). Plaintiffs do not advance any new argument on this point. *See* AB 57-58.

Further, Delaware law does not require "self-flagellation," meaning that TransCanada did not need to insist that Columbia disclose a potential violation of the standstill that had not been judicially determined. *See* OB 49. Plaintiffs accuse (AB 58) TransCanada of raising self-flagellation for the first time on appeal, but that is incorrect – TransCanada made this argument in its trial brief, *see* AR67, and the court invoked that principle in its motion-to-dismiss decision, *see In re Columbia Pipeline Grp.*, 2021 WL 772562, at *12, *36 (Del. Ch. Mar. 1, 2021). Plaintiffs note (AB 58) that self-flagellation covers only legal conclusions, not the underlying facts – but what they want is for the proxy statement to have given an opinion on whether TransCanada violated the standstill.

Other bidders' standstills. It is undisputed that TransCanada did not know that other bidders had entered into standstills. *See* Op. 167. Plaintiffs note (AB 61) that TransCanada had "surmised" as much, but they cite no authority that a buyer

should be required to propose edits to a proxy statement based on such a guess. TransCanada also explained that this omission was not material, OB 50; *see In re Xura, Inc., S'holder Litig.*, 2018 WL 6498677, at *15 (Del. Ch. Dec. 10, 2018); Plaintiffs did not respond.

Reneging on the supposed $26/share deal. TransCanada explained that there was no deal on which TransCanada reneged. OB 30-36, 50; *see* pp. 11-18, *supra*. Plaintiffs do not advance any new arguments in response. *See* AB 59-60. TransCanada also explained that, even if it had impermissibly bluffed about its best and final offer, it was not required to self-flagellate by insisting that Columbia disclose that TransCanada had successfully bluffed Columbia. OB 50.

B. TransCanada Did Not Participate In Any Disclosure Breach

Separately, TransCanada did not participate in any disclosure breach with the intent to mislead. OB 51-53.

The Court of Chancery did not address TransCanada's *scienter* at all. OB 52. The court's legal standard included no *scienter* requirement. *See* Op. 165 (a defendant knowingly participates in a disclosure violation when it "has the opportunity to review a proxy statement," "has an obligation to identify material misstatements or omissions," and then "fails" to do so). That is reversible error. *See, e.g.*, *Malpiede*, 780 A.2d at 1079.

Plaintiffs assert (AB 54) that no case requires an intent to mislead. But *Morrison v. Berry*, 2020 WL 2843514, at *12 (Del. Ch. June 1, 2020), says just that: The defendant was not liable because it was not alleged to have "participated in [] drafting" the proxy statement "with the intent to mislead." More generally, this Court's precedents establish that an aiding-and-abetting claim requires *scienter*. *See, e.g.*, *Malpiede*, 780 A.2d at 1097-98. In the context of a disclosure claim, the intent to mislead provides the *scienter* requirement.

Plaintiffs argue (AB 55 n.24) that *Morrison* is inapposite, because there the third-party buyer merely had a contractual right to review the proxy statement at issue, whereas here TransCanada had a contractual obligation to identify inaccuracies. There are two problems with that argument. First, it again inappropriately elevates a contractual obligation owed to Columbia to a fiduciary duty owed to Columbia's stockholders. They are separate, and Plaintiffs cite no authority holding that a contractual obligation can change the legal standard for aiding-and-abetting liability. Second, there is no difference, in terms of participation, between a buyer that reviews a seller's proxy because of a contract obligation (the situation here) and one that does so because it exercises a contract right (the situation in *Morrison*).

Plaintiffs also argue (AB 63) that for one deficiency (the lack of disclosure of the other potential buyers' standstills), the Court of Chancery stated that

TransCanada "proceeded recklessly." Op. 167. But the court did not point to any evidence showing recklessness, other than TransCanada's failure to correct the deficiency. *See id.* A finding of *scienter* without any evidence of the defendant's mental state is clearly erroneous. *See Ocean Bay Mart, Inc. v. City of Rehoboth Beach*, 285 A.3d 125, 136 (Del. 2022) (fact findings must be supported by record evidence).

Separately, TransCanada did not contribute to any disclosure breaches. TransCanada simply reviewed Columbia's draft and did not offer the corrections the Court of Chancery thought were warranted on the sections about Columbia's actions. OB 51-52. Plaintiffs say (AB 64) that knowing participation does not require the defendant to have "edited each specific deficient disclosure." But it requires the defendant to have done *something* affirmative to "participate[] in the drafting" of the deficient disclosures. *Morrison*, 2020 WL 2843514, at *12. That is akin to a causation requirement, and it is not met if the proxy would have been exactly the same if the defendant had not reviewed the proxy. *See Xura*, 2018 WL 6498677, at *15. Plaintiffs suggest (AB 64) that TransCanada conceded below that it had participated in drafting the proxy. That is incorrect; TransCanada never stated that it participated in drafting the sections that the court found deficient. *See* A601-06.

Plaintiffs next suggest (AB 64) that contributing to the proxy statement generally is enough for liability – even if the defendant contributed only to parts that

are accurate and complete. That makes no sense. The claim is for aiding-and-abetting disclosure breaches, and the breaches are the specific deficiencies identified by the Court of Chancery. *See* Op. 164. A defendant cannot be liable for participating in drafting a non-deficient proxy.

Plaintiffs fail to address the consequences of adopting their position. They seek to turn TransCanada's contractual obligation into a guarantee enforceable by Columbia's stockholders. OB 50-51; *see* Chamber *Amicus* Br. 15-16. If that view were adopted, buyers would be less willing to pursue acquisitions; would refuse to have involvement in sellers' proxy statements; or would insist that sellers disclose so much unnecessary detail that the proxy statements would not be useful. All of those outcomes would harm stockholders.

This Court should reverse on the disclosure claim.

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

This Court has held that a plaintiff that fails to prove reliance, causation, and damages cannot recover compensatory damages and may be awarded only "nominal" damages for a disclosure breach. *Dohmen v. Goodman*, 234 A.3d 1161, 1175 (Del. 2020). In Delaware – like everywhere else in the United States – nominal damages means a "trivial" amount. *Ravenswood Inv. Co. v. Est. of Winmill*, 2018 WL 1410860, at *25 (Del. Ch. Mar. 21, 2018); *see Black's Law Dictionary* 418 (8th ed. 2004) (defining "nominal damages" as a "trifling" sum).

Here, Plaintiffs do not dispute that they failed to prove causation, reliance, or damages for their disclosure claim. Yet the Court of Chancery awarded them $199 million in damages anyway. Op. 188; *see* OB 16. That amount is not trivial – particularly since the court expressly intended for the damages to be compensatory, by seeking to approximate where the deal "might have ended up" without the disclosure breaches. Op. 183-85; *see* OB 55.

Plaintiffs admit (AB 68-69) that the court's nominal damages award was intended to "remedy" the supposed injuries from the disclosure claim. They argue (AB 67) that "nominal" damages does not only mean trivial damages but can also include per-share damages awards to remedy harm. Their sole authority is *Oliver v. Boston University*, 2006 WL 1064169 (Del. Ch. Apr. 14, 2006), which describes

"damages of $1.00 per share" as "[n]ominal." *Id.* at *34-35. But the *Oliver* court ultimately awarded the plaintiffs one dollar, *see id.*, so this statement is *dicta*.

Anyway, *Oliver*'s statement is unsupported. *Oliver* cited only *Weinberger v. UOP, Inc.*, 1985 WL 11546 (Del. Ch. Jan. 30, 1985). *See* 2006 WL 1064169, at *35 n.285. Although *Weinberger* involved an award of per-share damages, the court did *not* call that award nominal, and expressly stated it was seeking to "compensate[]" plaintiffs. 1985 WL 11546, at *9-10; *see* OB 56. *Weinberger* thus does not address nominal damages.

Plaintiffs additionally cite (AB 68) *Gaffin v. Teledyne, Inc.*, 1990 WL 195914 (Del. Ch. Dec. 4, 1990), *aff'd in part, rev'd in part on other grounds*, 611 A.2d 467 (Del. 1992), and *Smith v. Shell Petroleum, Inc.*, 1990 WL 186446 (Del. Ch. Nov. 26, 1990), in which the courts awarded per-share damages. But like *Weinberger*, neither *Gaffin* nor *Smith* described the award as "nominal," and both made clear that the award had a compensatory function. *See* OB 56. Plaintiffs also rely (AB 68) on *Mindbody*, which awarded the same type of nominal damages as the court here. *Mindbody* currently is on appeal to this Court, and the Court should reverse the nominal damages in *Mindbody* as well. *See* OB 56-57.

After *Weinberger*, *Gaffin*, and *Smith*, this Court has made clear that a compensatory award requires proof of reliance, causation, and damages, and is not nominal. *Dohmen*, 234 A.3d at 1175; *see* OB 56-57. Plaintiffs barely address

Dohmen. They say only (AB 70) that *Dohmen* did not expressly overturn *Gaffin*, *Smith*, or *Weinberger*. But *Dohmen* also did not cite those decisions or otherwise affirm them. When this Court clarifies Delaware law, it does not need to expressly disavow each potentially inconsistent Court of Chancery decision.

The critical point, which Plaintiffs do not dispute, is that *Dohmen* holds that compensatory damages are not permissible without proof of reliance, causation, and damages. 234 A.3d at 1175. The "nominal" damages award here was expressly intended to be compensatory, but Plaintiffs lacked proof of causation, reliance, or damages. The award thus flunks *Dohmen*, and the Court should reverse.

Affirming the damages award here would give plaintiffs a path to obtaining huge compensatory damages awards without needing to demonstrate that they even were harmed or that the defendant caused the harm. OB 57. It also would incentivize plaintiffs to bring disclosure claims post-closing to obtain damages, instead of pre-closing when any deficiencies still could be corrected. All of that would lead to a massive expansion of liability that ultimately would chill the acquisitions of Delaware companies.

IV. THE COURT OF CHANCERY ERRED IN ALLOCATING FAULT

The Court of Chancery erred in allocating 50% of the sale-process damages and 42% of the disclosure damages to TransCanada. OB 58-63.

A. The Court of Chancery Misapplied Delaware Law

The Court of Chancery misapplied the framework set out in the Delaware Uniform Contribution Among Tortfeasors Act (DUCATA), 10 *Del. C.* § 6301 *et seq*. DUCATA requires the trial court to start by allocating fault equally among the tortfeasors, and permits the court to deviate from that allocation only if the court determines that it is "inequitable." *Id.* § 6302(d). Here, although there were three tortfeasors (Skaggs, Smith, and TransCanada), the court started with a 50% allocation of fault to TransCanada. OB 59-60; *see* Ex. B, Opinion Resolving Post-Trial Issues (Allocation Op.) 66. That is a legal error.

Plaintiffs contend (AB 71-72) that the court actually started with a one-third allocation but then determined that that allocation would be inequitable. No such determination appears in the decision. Tellingly, Plaintiffs' only citation (AB 70) is to the court's discussion of the statutory principles, *see* Allocation Op. 37 – not to its application of those principles to the facts here.

The court believed it could treat Skaggs and Smith as a "unit" because they were on one "side" of the deal. Allocation Op. 66. But that ignored that Skaggs and Smith each contributed to the deal – and thus to Plaintiffs' alleged harm – in different

ways. *See* OB 60. Plaintiffs have no response. The court thus erred in its legal standard for allocation.

B. The Court of Chancery Clearly Erred In Its Allocations

The Court of Chancery's allocations were clearly erroneous for both the sale-process claim and for the disclosure claim. OB 60-63. Plaintiffs barely defend those allocations; they essentially just repeat their liability arguments. *See* AB 73-75.

On the sale-process allocation, Plaintiffs have only one new argument. TransCanada explained that the court erred by allocating fault to TransCanada based on the view that TransCanada actually knew of Skaggs's and Smith's supposed conflicts. *See* OB 61-62. In response, Plaintiffs note (AB 73) that, for the disclosure allocation, the court said that TransCanada had only constructive knowledge. *See* Allocation Op. 74. But in the *sale-process* allocation, the court did not make that distinction, and instead allocated fault on the basis that "TransCanada knew that Skaggs and Smith were conflicted." Allocation Op. 39, 67. Plaintiffs do not address that mistaken finding.

Plaintiffs next argue (AB 73) that the Court of Chancery did not allocate fault for the sale-process damages solely on the basis of TransCanada's relative degree of knowledge, but instead took a holistic approach. But the court took "awareness" and "intent" into account in its overall assessment, Allocation Op. 66-67 (internal

quotation marks omitted), so if it was wrong about TransCanada's awareness, then its overall assessment is wrong.

On the disclosure allocation, the Court of Chancery allocated fault for each omission based on TransCanada's supposed knowledge of that omission and then took an average across all omissions. Allocation Op. 74. That was flawed for two reasons: The court incorrectly assigned liability for omissions for which TransCanada was not required to self-flagellate, and the court incorrectly assumed that TransCanada's failure to correct a deficient proxy statement was just as culpable as Columbia's drafting of the deficient proxy in the first instance. OB 62-63.

Plaintiffs barely respond. On the first argument, they just cross-reference (AB 74) their argument on liability; and on the second argument, they parrot (AB 74-75) the Court of Chancery's assertion that reviewing and drafting are equally culpable, without providing any actual justification.

Given the Court of Chancery's legal and factual errors, even if the Court affirms on liability and damages, the Court should vacate the allocations of fault.

CONCLUSION

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

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