IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT TC ENERGY CORPORATION

Dated: September 19, 2024

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Amicus Curiae the Chamber of Commerce of the United States of America (the "Chamber") files this brief in support of Appellant TC Energy Corporation ("TransCanada"). The Court of Chancery's June 30, 2023 Opinion goes beyond existing precedent by imposing significant monetary liability on a third-party buyer for aiding and abetting fiduciary breaches of which it had no actual knowledge. Its holding is legally incorrect, and disregarding Delaware's high standard for such liability will have a chilling effect on third-party buyers in future corporate transactions. This Court should reverse.

STATEMENT OF INTEREST

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

A significant number of the Chamber's members are incorporated in Delaware. The Chamber has often been granted leave to participate as amicus curiae by the Supreme Court of Delaware, including in cases concerning corporate governance and shareholder rights. *See, e.g., Kellner v. AIM Immunotech, Inc.*, C.A. No. 3,2024 (Del. July 11, 2024); *Salzberg v. Sciabacucchi*, No. 346,2019 (Del. March 18, 2020).

SUMMARY OF THE ARGUMENT

Under well-established Delaware law, the buyer in a corporate acquisition generally cannot be held liable to the seller's shareholders for breach of a fiduciary duty. The reason is simple and well-justified: The buyer's fiduciary duty is to its own shareholders, whose interests will generally conflict with the sellers' shareholders. Absent exceptional circumstances, the shareholders of the buyer and the seller are represented by their own, separate fiduciaries, who are accountable to them and charged with obtaining the best possible deal for them. That arrangement promotes efficiency by encouraging vigorous negotiation and avoids conflicts of interest.

Aiding and abetting liability is an exception which, although recognized by courts in Delaware and elsewhere, has been strictly circumscribed. Under this Court's precedent, a buyer is liable for aiding and abetting a seller's breach of fiduciary duty only where the buyer knowingly participates in that breach. For a claim based on the sale process, that requires a finding that the buyer created or exploited the seller's conflict of interest or conspired in the fiduciary breach. A corollary is that arm's-length negotiation—even tough negotiation—is privileged and cannot give rise to liability of the buyer to the seller's shareholders. That rule makes sense, because it preserves the alignment of interests described above. To do otherwise would undermine a buyer's fiduciary duty to its own shareholders.

The Court of Chancery's decision did not purport to change that law, but it effectively expanded the circumstances that give rise to aiding and abetting liability. The Court of Chancery's opinion also expands the circumstances under which a buyer may be liable for a seller's inadequate disclosures to its shareholders. If left to stand, the Court of Chancery's decision will have a chilling effect on future acquisitions and will incentivize expensive and unnecessary diligence on the part of buyers, who will understandably be torn between potential liability to either their counterparty's shareholders or their own.

The Chamber writes separately because of the importance of this issue to the Delaware and national business communities. Delaware is the corporate home of businesses across the United States, including most of the country's largest corporations. Even non-Delaware corporations are affected by the state's corporate law because jurisdictions across the United States routinely and justifiably look to Delaware as a model for their corporate law decision-making. As such, the detrimental and expensive consequences of the Court of Chancery's decision on future mergers and acquisitions is of significant importance to the Chamber's membership.

ARGUMENT

I. Under existing Delaware law, the standard for imposing aiding and abetting liability on a third-party buyer is high, and should remain so.

A third-party buyer may be liable for aiding and abetting a seller's breach of fiduciary duty only in exceptional circumstances.

In general, a third-party buyer does not face liability for aiding and abetting a seller's breach of fiduciary duty concerning the sale process because "arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting." *In re Columbia Pipeline Grp. Merger Litig.*, 299 A.3d 393, 472 (Del. Ch. 2023) (quoting *Morgan v. Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010)); *see also Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001). Accordingly, "a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting." *Columbia Pipeline*, 299 A.3d at 472 (quoting *Malpiede*, 780 A.2d at 1097); *see also, e.g., Tomczak v. Morton Thiokol, Inc.*, 1990 WL 42607, at *16 (Del. Ch. April 5, 1990) (granting summary judgment and noting that "[a]lthough [the buyer's] purchases certainly had the effect of putting economic pressure on [the seller], what [the buyer] essentially did was to simply pursue arm's length negotiations with [the seller] through their respective investment bankers in an effort to obtain [the target] at the best price that it could."). As a result, "[a] third-party bidder who negotiates at arm's length . . . 'rarely faces a viable claim for aiding and abetting.'" *Columbia Pipeline*, 299 A.3d at 472 (quoting *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 837 (Del. Ch. 2011)).

The exceptional nature of the Court of Chancery's decision is evident from the fact that, in describing the standard for knowing participation, the Court cited not a single case imposing monetary liability against a third-party buyer for aiding and abetting a breach of fiduciary duty related to the sale process. *See id.* at 470-76. In justifying its decision to impose such liability in this case, the Court of Chancery looked to this Court's "seminal" decisions in *Revlon* and *Mills Acquisition*, but in neither case was the buyer actually subjected to liability for aiding and abetting a breach of fiduciary duty. *See id.* at 472-74 (discussing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) and *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989) and noting that in both cases, "the Delaware Supreme Court did not expressly state that [the buyer] was culpable for aiding and abetting").

Looking next to other precedent, the Court again found only Court of Chancery decisions that either did not make a finding of aiding and abetting liability or merely held that the plaintiff had stated a claim for aiding and abetting liability at the motion to dismiss stage or was likely to prevail on such a claim for the purposes of granting injunctive relief. *See id.* at 474-75 (citing *Del Monte*, 25 A.3d at 813; *In* *re Mindbody, Inc., S'holder Litig.*, 2023 WL 2518149 (Del. Ch. Mar. 15, 2023); *Firefighters' Pension Sys. of Kans. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212 (Del. Ch. 2021); and *Chester Cnty. Empls.' Ret. Fund v. KCG Hldgs., Inc.*, 2019 WL 2564093 (Del. Ch. June 21, 2019)). But it does not follow that aiding and abetting liability exists whenever injunctive relief may be appropriate. That is particularly true given the chilling effects that are likely to result from the imposition of significant monetary damages for aiding and abetting. *See, e.g., Terrydale Liquidating Tr. v. Barness*, 611 F. Supp. 1006, 1027 (S.D.N.Y. 1984) (emphasizing importance of actual knowledge requirement under applicable law, given that the plaintiffs sought "not merely the return of the . . . assets" at issue "but affirmative monetary relief").

Moreover, as TransCanada ably explains in its opening brief, the decisions relied upon by the Court of Chancery are distinguishable on their facts. (*See* TransCanada's Opening Br. at 41-44). The lack of existing case law imposing liability on third-party buyers for aiding and abetting a sale process fiduciary breach not only reflects the deliberate difficulty of proving such a claim under existing law, but also illustrates the exceptional nature of the Court of Chancery's decision here.

The standard for holding a buyer liable for a seller's inadequate disclosures is also high, and properly so. The Court of Chancery has recognized that "an aiding and abetting claim based on a third-party's alleged failure somehow to *prevent* a board from providing misleading disclosures to stockholders rests on thin ice." *In re*

Xura, Inc. S'holder Litig., 2018 WL 6498677, at *15 (Del. Ch. Dec. 10, 2018) (emphasis in original). It is not enough that the buyer "knew certain facts and knew that the Board was not disclosing those facts to stockholders" where the buyer does not "knowingly *facilitate[]* alleged disclosure deficiencies or otherwise 'knowingly participate[]' in that aspect of the alleged breach of fiduciary [duty]." *Id.* (emphasis in original).

In finding aiding and abetting liability for the seller's insufficient disclosures, the Court of Chancery relied exclusively on its previous decision in *Mindbody*. *See Columbia Pipeline*, 299 A.3d at 487-88 (citing *Mindbody*, 2023 WL 2518149, at *44). However, unlike this case, the buyer in *Mindbody* had actual knowledge that significant information was omitted and took steps to prevent its disclosure. Here, by contrast, the Court of Chancery imposed liability on TransCanada for the seller's non-disclosure of information of which TransCanada had no actual knowledge and for non-disclosures that were judgment calls of the seller. In so doing, it expanded potential aiding and abetting liability well beyond existing precedent.

II. The Court of Chancery's holding will create significant practical problems for future mergers and acquisitions.

A. The Court of Chancery's holding imposes a duty on third-party buyers that is in significant tension with the buyer's duty to its own shareholders.

The Court of Chancery's reasoning foists a lose-lose choice upon third-party buyers. "Under our law, both the bidder's board and the target's board have a duty to seek the best deal terms for their own corporations when they enter a merger agreement." *Morgan*, 2010 WL 2803746, at *8. Accordingly, a buyer is "not obligated to offer an inflated price for [a target] when it could acquire the company for less through honest bargaining." *Id.* at *7; *see also Terrydale*, 611 F. Supp. at 1029 (granting partial summary judgment to buyer and noting that it "had a duty to its own shareholders to aggressively pursue economically favorable transactions, rather than shield or warn [the seller's] shareholders of the consequences of their own trustees' decisions."); *Stanley Ferber & Assocs. v. Northeast Bancorp, Inc.*, 1993 WL 489334, at *6 (Conn. Super. Ct. Nov. 16, 1993).

From a buyer's perspective, the Court of Chancery's decision requires it to weigh its obligation to obtain the best price for its shareholders against the risk of liability to the seller's shareholders (to whom it owes no fiduciary duty). This case exemplifies that risk – the Court of Chancery awarded damages for aiding and abetting that totaled nearly $400 million for the sale process claim and "nominal" damages of nearly $200 million for the disclosure claim.[1] Moreover, the Court of Chancery held that TransCanada's proportionate share of the liability was significant, allocating it 50% of the liability for the sale process claim and 42% of the liability for the disclosure claim. *See In re Columbia Pipeline Group, Inc. Merger Litig.*, 316 A.3d 359, 366-67 (Del. Ch. 2024).

If a prospective buyer decides to take protective measures during negotiations to avoid the risk of litigation from the seller's shareholders, the buyer would then risk breaching its duty to its *own* shareholders to obtain the best possible price for the assets it is acquiring. As one example, the Court of Chancery suggested that TransCanada could have avoided liability simply by "stand[ing] by the $26 Deal . . ." *Columbia Pipeline*, 299 A.3d at 480. As TransCanada explains, there was actually no deal at $26/share. (*See* TransCanada's Opening Br. at 31-34). Moreover, agreeing to pay a higher price may insulate a buyer from liability to the seller's shareholders, but it exposes it to liability to its own shareholders. These risks to buyers are compounded by the fact that aiding and abetting liability may not be covered under standard insurance policies. *See, e.g.,* Sarah L. Swan, *Aiding and Abetting Matters*, 12 J. Tort L. 255, 280-81 (2019) ("Aiding and abetting has a complicated relationship with insurance, in that it is not entirely clear if and when insurance is

[1] The damages measures were held to be concurrent rather than cumulative. *Columbia Pipeline*, 299 A.3d at 499-500.

available for aiding and abetting."); Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, Note, 58 Vand. L. Rev. 241, 290 n.238 (2005) ("An important result of aiding and abetting being deemed an intentional tort is the unavailability of liability insurance . . ."). As a result, the Court of Chancery's decision in this case leaves prospective corporate buyers in an impossible position. By attempting to avoid the type of liability recognized in this case, buyers may create liability to their own shareholders.

B. The Court of Chancery's holding leaves third-party buyers uncertain about the protective measures they need to take in sale negotiations.

The Court of Chancery's decision leaves third-party buyers uncertain about when they may be risking liability to a seller's shareholders for aiding and abetting the seller's fiduciary breach. As the Court of Chancery recognized, "[k]nowing participation requires both knowledge that the fiduciary is breaching a duty and culpable participation by the aider and abettor." *Columbia Pipeline*, 299 A.3d at 406-07. However, many of the red flags that the Court of Chancery cited as evidence of such knowledge and participation in this case are consistent not only with knowing participation in a fiduciary breach but also with arm's-length negotiation.

For instance, with respect to knowledge, the Court of Chancery noted that the seller's representatives "were behaving eccentrically, even bizarrely, for sell-side negotiators." *Id.* at 407. However, what the Court of Chancery characterized as "eccentric" behavior was also explainable by the seller representatives' lack of experience in the M&A space. Indeed, the seller's CFO was a "neophyte dealmaker on his first and only assignment" with "no poker face." *Id.* at 405. The Court of Chancery's opinion suggests that a buyer risks liability when dealing with a less sophisticated counterparty. However, it is not enough to "believe[] . . . that" a counterparty was "exercising poor business judgment" to have the knowledge necessary for aiding and abetting liability. *See Terrydale*, 611 F. Supp. at 1028. The Court of Chancery's decision leaves uncertainty about how unsophisticated or irrational the counterparty must be to infer that its actions result from a fiduciary breach as opposed to poor business judgment. It also leaves questions about how a buyer should protect the seller's shareholders from an unskilled negotiator while also serving its own shareholders' interests in obtaining the best price.

The Court of Chancery also found that TransCanada had constructive knowledge that the individual defendants were personally conflicted because the acquisition would facilitate their retirements. *Columbia Pipeline*, 299 A.3d at 476. However, individuals on the other side of the table in an M&A acquisition often have some personal interest in the transaction. For instance, they may anticipate future employment with a merged entity. It may also be the case that, as here, a sell-side negotiator stands to receive some sort of financial benefit from a transaction, such as a "golden parachute." That is neither uncommon nor necessarily improper. *See, e.g., Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 352 n.3 (Del. 1988) ("[S]ome commentators have argued that golden parachutes actually benefit shareholders because they reduce the personal incentive of target managers to systematically reject takeover bids."); *In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 710 (Del. Ch. 2001) (golden parachutes "grease the skids for sales transactions beneficial to stockholders."); *Flannery v. Genomic Health, Inc*., 2021 WL 3615540, at *28 (Del. Ch. Aug. 16, 2021) (holding that an executive's compensation benefit did not implicate their fiduciary duties).

Accordingly, the fact that a sell-side negotiator may have a personal interest in the outcome of a transaction is not enough to put a buyer on notice that ineffective negotiation is motivated by a fiduciary breach. *See, e.g., Morgan*, 2010 WL 2803746, at *7 (dismissing complaint where the plaintiff "has pled no facts that allow [the court] to infer that the [sellers'] board was *so radioactively conflicted* that any contact with that board to do a deal—even arm's-length negotiating—was aiding and abetting wrongdoing.") (emphasis added).

The Court of Chancery's decision also creates uncertainty about how hard a buyer may negotiate against a less skilled counterparty. With respect to participation, the Court of Chancery recognized that although "TransCanada did not create or exacerbate the conflict of interest that Skaggs and Smith faced" it nevertheless "exploit[ed] their conflicts of interest." *Columbia Pipeline*, 299 A.3d at 407. Among other things, the Court of Chancery noted that TransCanada's negotiator capitalized on his previous professional friendship with the seller's negotiator, directed communications, "ke[pt] everything on track", and "induc[ed]" his counterparty "to commit errors and give away points." *Id.* However, buyers should not be afraid to employ shrewd tactics in an arm's-length negotiation in order to obtain the best price for their own shareholders, nor are they required to stoop to the skill of a less-experienced negotiator.

The Court of Chancery gave significant weight to aspects of the negotiations in this case that it found went beyond arm's-length negotiation, including its findings that TransCanada reneged on a supposed deal at a particular price and threatened the seller with public disclosure; exploitation of the seller-negotiator's inexperience; and its violation of a standstill agreement with the seller. *See id.* at 477-78. TransCanada's opening brief explains at length why the Court of Chancery's findings were wrong as a factual matter. (*See* TransCanada's Opening Br. at 30-39). Beyond that, they exemplify the uncertainty that the Court of Chancery's opinion creates. Consider, for example, the Court of Chancery's conclusion that TransCanada's violation of a standstill agreement supports aiding and abetting liability: A breach of contract is not the same thing as a fiduciary breach, and the fact that a seller may allow a standstill violation does not necessarily mean that it is violating its own fiduciary duties. As the Court of Chancery noted, the seller's "Board was free to waive the restriction or ratify a breach after the fact", *id.* at 466, and a seller's decision to do so may be a legitimate negotiating strategy.

Of course, as the Court of Chancery explained, "[t]he totality of the circumstances matters." *Id.* at 407. But its reasoning nevertheless leaves corporate buyers in the difficult position of speculating *ex ante* about whether their counterparty's conduct in a particular case is sufficiently unusual that they must take protective measures or pull punches, which may conflict with their duties to their own shareholders. That speculation has a cost because it risks making even efficient corporate transactions less likely to occur or to occur under unnecessarily onerous conditions.

C. The Court of Chancery's holding also subjects buyers to significant risk and uncertainty in reviewing proxy materials.

The Court of Chancery's decision also imposes significant risks on buyers in their review of the seller's proxy statements, which will be inefficient and impracticable for buyers to mitigate. As described above, existing precedent imposes liability on buyers for aiding and abetting a seller's disclosure-related fiduciary breach only where the buyer knowingly participates in that breach – for instance, where the buyer actually knew that significant information had been omitted and took measures to prevent its disclosure, *see Mindbody*, 2023 WL 2518149, at *44, or where the buyer "provided knowingly false information," *see Xura*, 2018 WL 6498677, at *15 n.149.

Here, however, TransCanada engaged in no such knowing participation. The Court of Chancery made no finding that TransCanada provided any false information to the seller. Instead, it held TransCanada liable for the seller's omission of information of which TransCanada lacked actual knowledge and for judgment calls that properly resided with the seller. Moreover, TransCanada's contractual obligations were limited to providing accurate information with respect to TransCanada and reviewing the proxy materials—not drafting them. *See Columbia Pipeline*, 299 A.3d at 447.

The Court of Chancery's reasoning imposes significant new responsibility on a buyer that goes beyond any contractual obligation to provide accurate information for inclusion in a proxy statement and instead effectively requires the buyer to ensure the accuracy of the document for the benefit of the seller's shareholders. Not only is that inconsistent with the fiduciary obligations of the respective parties, it imposes significant risk on the buyer and will require the buyer to undertake significant expense to mitigate that risk.

D. The Court of Chancery's decision is inconsistent with Delaware law's promotion of efficient corporate transactions.

The privilege for arm's-length negotiating "helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism." *Morgan*, 2010 WL 2803746, at *8. Moreover, the "requirement that the third party knowingly *participate* in the alleged breach . . . is there for a reason."

Id. (emphasis in original). It "protects acquirors, and by extension their investors, from the high costs of discovery" where the acquiror engaged in no "nefarious activity." *Id.* The "rule also aids target stockholders by ensuring that potential acquirors are not deterred from making bids by the potential for suffering litigation costs and risks on top of the considerable risk that already accompanies buying another entity . . ." *Id.*

The Court of Chancery's decision creates uncertainty about when the privilege for arm's-length bargaining will apply. Its effect will be to chill future transactions or, at the very least, make them less efficient and more expensive. The Court of Chancery recognized that potential impact in *Morgan*, where it rejected an aiding and abetting claim against a third-party buyer in a transaction that provided benefits to the seller's preferred stockholders at the expense of its common stockholders. The court noted that "[i]f our law makes it a presumptive wrong for a bidder to deal with a board dominated by preferred stockholder representatives, *then value-maximizing transactions will be deterred*." *Id.* at *7 (emphasis added). Likewise, in the securities fraud context, the United States Supreme Court has recognized the inefficiencies that follow from excessive aiding and abetting liability. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). ("Secondary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets.")

The risks of proceeding with a transaction are heightened from the perspective of a third-party buyer because it necessarily has less information about a seller's potential breach of fiduciary duty than the seller itself. Indeed, "[t]ransactions which may appear reasonable at the time they are entered into may, upon more considered and deliberate reflection, prove to be objectively unreasonable." *Terrydale*, 611 F. Supp. at 1030. A buyer may seek to remedy its information deficit through various means, but those are likely to be inefficient because they shift to the buyer (and, ultimately, its shareholders) the cost of monitoring the seller's performance of its fiduciary duties to its shareholders. For instance, a buyer may insist on contractual information rights as part of due diligence. But the seller may not agree to provide that information, and even if it does, that is likely to significantly increase transactional costs. If a buyer has enough interest in a transaction, it may insist on a special committee process. However, despite the benefits that a special committee can bring, it also adds additional costs.

Delaware statutory law and precedent have long recognized the importance of predictability and efficiency in corporate transactions. For instance, "[t]he [Delaware General Corporation Law's] many provisions facilitating M&A transactions reflects the underlying assumption that social welfare can be improved by M&A transactions reached by parties bargaining at arm's-length." *Morgan*, 2010 WL 2803746, at *8. As described above, the Court of Chancery's reasoning stands in tension with those principles by effectively imposing duties on third-party buyers that are unpredictable, inefficient, and create tension with those buyers' duties to their own shareholders.

CONCLUSION

For the reasons above and in TransCanada's Opening Brief, this Court should reverse.

Dated: September 19, 2024

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