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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

SUPPLEMENTAL BRIEF OF DEFENDANT-BELOW/APPELLANT

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INTRODUCTION

Defendant-Below/Appellant TC Energy Corp. (TransCanada) submits this brief in response to the Court's order directing the parties to address the effect of *In re Mindbody, Inc., Stockholder Litigation*, 2024 WL 4926910 (Del. Dec. 2, 2024), on this case. *Mindbody* makes clear that this Court should reverse the Court of Chancery's judgment.

To start, *Mindbody* confirms that the legal standard for the "knowing participation" element of an aiding-and-abetting claim is, by design, exceptionally difficult to meet. On the "knowing" requirement, the Court clarified that the defendant both must know of the breach and must know that its own conduct was wrongful. Actual knowledge is required; constructive knowledge is not enough. On the "participation" requirement, the Court clarified that mere awareness of the seller's breach is not substantial assistance in the breach; substantial active assistance is required.

In light of *Mindbody*, it is clear that TransCanada should not be liable for aiding and abetting any fiduciary breach by Columbia's CEO, CFO, or board. On the sale-process claim, there was no evidence that TransCanada actually knew of any sell-side breach, much less actually knew that its own conduct was wrongful. TransCanada also did not actively participate in any breach; none of its conduct created or facilitated the fiduciary breaches. The four factors drawn from the

Restatement of Torts confirm that nothing about the sale-process claim meets the demanding standard for aiding-and-abetting liability under Delaware law.

On the disclosure claim, the Court of Chancery relied on the exact theory of liability that this Court rejected in *Mindbody*. The Court of Chancery held that a buyer knowingly participates in a seller's disclosure breach if the buyer has the opportunity to review the seller's disclosures, has a contractual obligation to notify the seller of any deficiencies, and fails to do so. In *Mindbody*, this Court rejected that theory, holding that it does not amount to knowing participation as a matter of law.

This Court should reverse.

ARGUMENT

I. *MINDBODY* CONFIRMS THAT THE COURT OF CHANCERY'S LIABILITY DETERMINATIONS SHOULD BE REVERSED

This Court's decision in *Mindbody* clarified the legal standard for an aiding-and-abetting claim against a third-party buyer. Under that standard, the facts here do not warrant liability for either the sale-process claim or the disclosure claim.

A. *Mindbody* Confirms That An Aiding-And-Abetting Claim Is Intentionally Difficult To Prove

Mindbody reaffirms that the standard for aiding-and-abetting liability under Delaware law is "exacting." 2024 WL 4926910, at *43. The Court emphasized that an aiding-and-abetting claim is exceptionally difficult to prove, particularly when the defendant is a third-party acquirer negotiating at arm's length. *Id.* at *32. That claim is "one of the most difficult to prove" under Delaware law, *id.* at *43 – so difficult that until the Court of Chancery's decisions in this case and in *Mindbody*, "no Delaware case [had found] liability against a third-party bidder for aiding and abetting a [sell-side] breach of fiduciary duty," *id.* at *34.

That demanding standard, the Court explained, "protects arms'-length negotiations," which are "central to the American model of capitalism." 2024 WL 4926910, at *32 & n.77 (quoting *Morgan v. Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010)). Only egregious cases warrant liability, such as where the buyer "attempts to create or exploit conflicts of interest" in, or "conspire[s]" with, the

seller's board. *Id.* at *32 (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1097-98 (Del. 2001)).

To establish the "knowing participation" element of an aiding-and-abetting claim, the Court explained, a plaintiff must prove both "knowledge" and "participation." *Mindbody*, 2024 WL 4926910, at *31-35. To show knowledge, a plaintiff must prove "two types of knowledge": (1) that the buyer knew of the sell-side fiduciary breach and (2) that the buyer knew that "its own conduct regarding the breach was legally improper." *Id.* at *32 (emphasis omitted). The Court emphasized that these are two "distinct" requirements. *Id.*

This Court also made clear that the knowledge prong requires actual knowledge, not merely constructive knowledge. The Court explained that the plaintiff must prove that the buyer had "actual knowledge" that its own conduct was culpable. 2024 WL 4926910, at *32 (citing *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 862 (Del. 2015)); *see* Opening Brief (OB) 21 & n.5. The Court likewise indicated that a plaintiff must prove that the buyer had actual knowledge of the sell-side breach. *See* 2024 WL 4926910, at *37 (holding that the evidence was sufficient to show that the defendant "likely knew" of the sell-side breach, not just that defendant should have known of the breach). That makes sense, because a buyer could not have actual knowledge that its conduct with respect to a sell-side breach was wrongful (the second requirement) if the buyer did not actually know about the

breach in the first instance (the first requirement). These actual knowledge requirements are consistent with the understanding that an aiding-and-abetting claim is "one of the most difficult to prove" under Delaware law. *Id.* at *43.

To show "participation," this Court explained, the plaintiff must prove that the buyer provided "substantial assistance" to the breaching fiduciary "amounting to participation in that [fiduciary's] breach." *Mindbody*, 2024 WL 4926910, at *43. That assistance must be "active" or "overt," *id.* at *33; "a failure to act or mere passive awareness" of the sell-side breach does not suffice, *id.* at *39. The Court held that a buyer does not participate in a sell-side breach merely because it fails to perform a contractual obligation it owes to the seller. *Id.* at *42. Transforming a contractual obligation to the seller into a duty owed to the seller's stockholders "would collapse the arms'-length distance between the third-party buyer and the target, forcing the buyer to consider its duty to the target's stockholders instead of to its own stockholders." *Id.* at *43.

B. TransCanada Did Not Knowingly Participate In Any Sale-Process Breach Under The Standard Set Out In *Mindbody*

Mindbody confirms that TransCanada did not aid and abet any fiduciary breaches by Columbia's CEO (Robert Skaggs), CFO (Stephen Smith), or board relating to the sale process. TransCanada did not have actual knowledge of any sell-side breaches. OB 20; Reply Brief (RB) 4-8. The Court of Chancery relied on constructive knowledge, but *Mindbody* makes clear that is insufficient. In any event,

TransCanada did not even have constructive knowledge of the breaches. OB 20-29; RB 8-10.

TransCanada also did not have any knowledge of its own wrongdoing with respect to any breaches. The Court of Chancery did not address that requirement, and the record evidence does not come close to satisfying it. *See* Post-Trial Op. on Aiding & Abetting Liability (Op.) 143-45. The court suggested that TransCanada knew it was violating the standstill agreement, but the evidence shows otherwise, OB 24 – and anyway, the Columbia board could choose not to enforce the standstill without breaching its fiduciary duties, OB 23.

Further, TransCanada did not create or actively participate in any breach. The most the Court of Chancery could say is that TransCanada may have benefited from the sell-side breaches. OB 29-39.

To assess the "knowing participation" element in *Mindbody*, this Court considered four factors drawn from the Second Restatement of Torts: (1) "[t]he nature of the tortious act that the secondary actor participated in or encouraged, including its severity, the clarity of the violation, the extent of the consequences, and the secondary actor's knowledge of these aspects"; (2) "[t]he amount, kind, and duration of assistance given, including how directly involved the secondary actor was in the primary actor's conduct"; (3) "[t]he nature of the relationship between the secondary and primary actors;" and (4) "[t]he secondary actor's state of mind." 2024

WL 4926910, at *35 (citing *In re Dole Food Co. S'holder Litig.*, 2015 WL 5052214, at *42 (Del. Ch. Aug. 27, 2015)). The Court of Chancery did not expressly use those factors, *see* Op. 132-52, but application of the factors confirms that no liability is justified here.

1. The Nature-Of-The-Breach Factor Weighs Against Imposing Liability

The first factor assesses the severity and clarity of the sell-side breach. *Mindbody*, 2024 WL 4926910, at *36. This factor "goes to the first knowledge requirement" – the requirement that the buyer know of the sell-side breach – because the more severe and clear the breach, the more likely the buyer knew of it. *Id.* at *36-37. For example, the proxy statement in *Mindbody* did not disclose that the sell-side fiduciaries had twice tipped off the buyer about the potential sale; the Court concluded that those omissions were clear and severe disclosure breaches because of the obvious materiality of the information. *Id.* at *36-37. Given the severity and clarity of the omissions, the Court concluded that it was likely that the buyer knew that the seller's CEO breached his disclosure obligations. *Id.* at *37.

Here, Skaggs's and Smith's fiduciary breaches were not so severe and clear that TransCanada would have unambiguously recognized them to be breaches. The Court of Chancery said as much: Although in its view Skaggs and Smith breached their fiduciary duties by acting on their desires to retire early with their full change-of-control benefits, the court also found that they were "professionals who took pride

in their jobs and wanted to do the right thing." Op. 115 (quoting *In re Appraisal of Columbia Pipeline Grp., Inc.*, 2019 WL 3778370, at *28 (Del. Ch. Aug. 12, 2019)). The court concluded that Skaggs and Smith were not "so conflicted that they would sell at any price," but instead settled for a "defensible" price rather than pushing for the "best" price. Op. 116, 143. As the court acknowledged, if Skaggs and Smith had advocated for an unreasonably low price, Columbia's board would not have approved the deal. Op. 115. Instead, the court merely faulted Skaggs and Smith for failing to push for an extra $0.25/share (less than 1% of the deal price). Op. 116. That would not have appeared to TransCanada as an unambiguous breach.

Nothing else unambiguously showed a breach. *See* OB 22-25. As the Court of Chancery acknowledged, TransCanada did not actually know of Skaggs's and Smith's plans to retire. Op. 166. The most the court could say is that "Skaggs and Smith broadcasted a series of signals" that meant TransCanada's "spidey-senses *should have* been tingling." Op. 143-44; A394 (1337:7-17) (emphasis added).

The court also pointed to Skaggs's and Smith's supposed unwillingness to enforce the standstill agreement. Op. 143. But TransCanada did not know it was violating the standstill (Columbia's counsel told TransCanada it was not, *see* OB 24), and a failure to enforce a standstill can be a rational business decision, not a fiduciary breach, *see* Op, 47; OB 23; RB 6-7.

The breach by Columbia's board likewise was not severe and clear to TransCanada. The Court of Chancery concluded only that the board "inadvertent[ly]" breached its duty of care by not "sufficient[ly] monitor[ing]" Skaggs and Smith. Op. 127, 130. And the court recognized that TransCanada had no visibility into the board's dealings with Skaggs or Smith. Op. 144; *see* OB 27-29.

The slight and ambiguous nature of the breaches strongly supports the view that TransCanada lacked the actual knowledge of the breaches required for liability. Indeed, the Court of Chancery did not find actual knowledge; it relied entirely on constructive knowledge, Op. 143 – a conclusion that is not supported by the undisputed facts, OB 20-29, and is insufficient as a matter of law under *Mindbody*, *see* 2024 WL 4926910, at *37.

2. The Assistance Factor Weighs Against Imposing Liability

The second factor assesses the extent to which the buyer's conduct contributed to creating or facilitating the seller's breach. *Mindbody*, 2024 WL 4926910, at *37-38. This factor relates principally to the substantial assistance requirement of the participation prong of "knowing participation." *Id.* at *37.

Here, it is undisputed that TransCanada did not create any sale-process breach. TransCanada was not the cause of Skaggs's or Smith's change-of-control benefits or their desires to retire early – indeed, TransCanada was not even aware of those

desires. Op. 151. TransCanada also did not offer Skaggs or Smith "any inducements" to sell Columbia. *Id.*

The Court of Chancery focused solely on whether TransCanada exploited Skaggs's and Smith's conflicts during the negotiations. *See* Op. 145-48. It concluded that TransCanada had done so by reneging on a supposed deal at $26/share, breaching the standstill agreement, and exploiting Smith's inexperience at negotiating a public-company sale. Op. 145-46. The court was wrong on all three: There was no deal on which TransCanada reneged; TransCanada did not wrongfully breach the standstill; and TransCanada did not wrongfully exploit Smith's inexperience. *See* OB 30-36; RB 11-18.

But even if the Court of Chancery were correct, none of TransCanada's conduct rises to the level of substantial assistance in a fiduciary breach. The Court in *Mindbody* explained that to be liable as an aider-and-abettor, the buyer must substantially assist the seller "in [the] breach," 2024 WL 4926910, at *41 – in other words, the buyer's conduct must be directed at helping or encouraging the seller to commit the breach, *see* Restatement (2d) Torts § 876 cmt. d (1979). The assistance must be "active"; merely failing to prevent the seller from committing a breach is not sufficient. 2024 WL 4926910, at *41. A buyer that recognizes that the seller has a conflict, but deals with the seller in the same manner as it would an

unconflicted seller, at most creates an opportunity for the seller to commit a breach, but does not actively assist the seller in committing a breach.

That is all that can be said here. TransCanada never actively helped or encouraged Skaggs, Smith, or the Columbia board to breach their fiduciary duties. Nor did it exploit any conflict by attempting to benefit Skaggs or Smith in particular; it offered all stockholders the same price per share. *See* Op. 84-85. TransCanada merely negotiated with Columbia as it would have negotiated with any other acquisition target. *See* OB 34-35. For example, the court concluded that TransCanada had bluffed Columbia by telling Columbia that its $25.50/share offer was its best and final offer. Op. 146. Even if true, as TransCanada explained (and plaintiffs did not refute), a buyer is allowed to bluff about its negotiating position. *See* OB 34-35. Nothing suggests that any bluff was directed at helping or encouraging Skaggs or Smith to breach their fiduciary duties.

Because TransCanada did not actively assist any breach, the second factor also weighs against liability for the sale-process breach.

3. The Relationship Factor Weighs Against Imposing Liability

The third factor assesses the relationship between the buyer and the seller. *Mindbody*, 2024 WL 4926910, at *41. Where the buyer is a third party negotiating at arm's length, this factor weighs against imposing liability. *Id.* Where the third-party buyer then enters into a merger agreement with the seller, that agreement will

support liability only if it creates an independent duty to the seller's stockholders. *Id.* at *41-42.

Here, it is undisputed that TransCanada was a third-party buyer operating at arm's length throughout the sale process. As this Court explained in *Mindbody*, that status "affords [TransCanada] some protection in its negotiations with potential target companies and the directors and officers of those companies." 2024 WL 4926910, at *41.

Also as in *Mindbody*, there is nothing here that would "vitiate[] this protection" with respect to the sale-process claim. 2024 WL 4926910, at *41. During the sale process, TransCanada entered into a non-disclosure agreement with Columbia that contained a standstill provision, Op. 22-23, and then into an exclusivity agreement, Op. 51, 58. Nothing in those agreements changed the fundamental arm's-length relationship between TransCanada and Columbia; the agreements merely facilitated the parties' negotiations.

As this Court explained in *Mindbody*, a court should not convert a buyer's contractual obligation to the seller into a duty owed to the seller's stockholders, because that "would collapse the arms'-length distance between the third-party buyer and the target, forcing the buyer to consider its duty to the target's stockholders instead of to its own stockholders." *Mindbody*, 2024 WL 4926910, at *43. Accordingly, as in *Mindbody*, the relationship factor weighs against liability.

4. The State-Of-Mind Factor Weighs Against Imposing Liability

The fourth factor assesses whether the buyer knew that its conduct with respect to the breach "was legally improper." *Mindbody*, 2024 WL 4926910, at *43. That the buyer knew that its conduct "was not above suspicion" is insufficient; the buyer had to know that its conduct wrongfully contributed to the particular breach at issue. *Id.* at *44.

For the sale-process claim, the Court of Chancery never addressed whether TransCanada knew that its conduct was wrongful. *See* Op. 143-45. As in *Mindbody*, the court "made no finding" that TransCanada knew that its reneging of a supposed deal at $26/share, its supposed violations of the standstill, or its supposed exploitation of Smith "was wrongful" and "could subject it to liability to [Columbia's] stockholders." 2024 WL 4926910, at *44. Indeed, TransCanada did not even have actual knowledge of a sell-side breach. *See* Op. 144.

The Court of Chancery suggested that TransCanada knew that it was violating the standstill. Op. 29-30, 44-46. That does not establish TransCanada's knowledge of wrongdoing for two reasons. First, TransCanada did not knowingly breach the standstill. *See* OB 23-24, 38-39; RB 6-7, 20. Indeed, Columbia's general counsel, on the advice of Columbia's outside counsel at Sullivan & Cromwell, told TransCanada that its discussions with Skaggs and Smith did *not* violate the standstill. Op. 45-46; *see* A839. The Court of Chancery's later disagreement with that

interpretation does not suggest that TransCanada knew at the time that it was violating the standstill. *See* OB 38-39; RB 20.

Second, even if TransCanada knew that it was violating the standstill, that would not show knowing, wrongful participation in a sell-side fiduciary breach. *Mindbody* explains that a buyer's violation of a contractual obligation to a seller does not necessarily amount to participating in the seller's fiduciary breach. 2024 WL 4926910, at *41-42. That is the case here, because the Columbia board was not obligated to enforce the standstill if it welcomed a potential buyer's interest. *See* Op. 47; OB 23; RB 6-7. TransCanada had no insight into the Columbia board's decision-making process, Op. 144, and it could presume that Columbia's officers and directors were faithfully discharging their fiduciary obligations, *see In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2023 WL 6399095, at *18 (Del. Ch. Oct. 3, 2023). So from TransCanada's perspective, any failure to enforce the standstill did not necessarily signal a fiduciary breach. TransCanada thus did not know violating the standstill amounted to wrongful participation in a sell-side breach, as *Mindbody* requires.

The Court of Chancery also pointed to a TransCanada post-merger assessment of the deal that, in its view, showed that TransCanada recognized that it had exploited the relationship between Smith and Francois Poirier, TransCanada's then-Senior Vice President for Strategy and Corporate Development. *See* Op. 147. That

is not a reasonable reading of the assessment; the assessment merely said that having Poirier deal principally with Smith instead of the bankers "[i]mproved the access to information and smoothed the process." B100; *see* RB 19. But even if the assessment could be read the Court of Chancery's way, it would not show sufficient knowledge to impose aiding-and-abetting liability.

As this Court explained in *Mindbody*, the evidence must show that the buyer knew that it was wrongfully participating *in the breach at issue*, not merely that its conduct might be wrongful in some general sense. 2024 WL 4926910, at *44. For example, in *Mindbody*, there was evidence that the buyer had "scrubbed" its internal documents of details that suggested that the seller's CEO breached his duty of loyalty by favoring the buyer. *Id*. at *43-44. That evidence, the Court explained, could show the buyer's awareness "that its own actions during the sale process were not above suspicion," but it was insufficient to show that the buyer knew it had contributed to the seller's *disclosure* breaches, because the evidence simply did not relate to the disclosures. *Id.* at *44.

The same is true here. Even if the post-merger assessment could be read to show that TransCanada knew it had exploited Poirier's relationship with Smith to "smooth[] the process," B100, it does not show that TransCanada knew that doing so contributed to Smith's breach of his duty of loyalty that led Smith to agree to a "defensible" but less-than-best deal, Op. 143; *see Columbia Pipeline*, 2019 WL

3778370, at *28-29 (noting that Skaggs and Smith "rejected opportunities for a quick sale" and "held out for a higher price"). It thus is not sufficient to establish knowledge of wrongdoing.

In short, the state-of-mind factor, like each of the other Restatement factors, weighs against imposing liability on TransCanada on the sale-process claim.

C. TransCanada Did Not Knowingly Participate In Any Disclosure Breach Under The Standard Set Out In *Mindbody*

Mindbody confirms that TransCanada did not aid and abet any fiduciary breaches by Skaggs, Smith, or the Columbia board relating to the disclosures in Columbia's proxy statement.

The disclosure claim here is essentially the same as the one this Court rejected in *Mindbody*. Nothing about this case warrants a different result. TransCanada did not know of any disclosure breaches, much less know that it did anything wrong with respect to the disclosures. OB 46-51. TransCanada also did not participate in any disclosure breaches; Columbia prepared the proxy and all TransCanada did was not suggest certain corrections to Columbia's draft. OB 51-53. The Restatement factors confirm that aiding-and-abetting liability is not appropriate here. This Court thus should reverse, just as it did in *Mindbody*.

1. The Nature-Of-The-Breach Factor Weighs Against Imposing Liability

This Court concluded that the sell-side disclosure breaches in *Mindbody* were sufficiently severe and clear that the buyer "likely knew" of them. 2024 WL 4926910, at *37. In particular, the Court relied on the seller's failure to disclose that it had twice given the buyer inside information about the sale process ahead of other potential bidders, which the buyer used to outmaneuver its rivals. *Id.* at *36.

The facts here are very different. The Court of Chancery merely identified areas relating to the sale process where, in its view, the proxy statement should have provided more detail. Op. 161-65. Even if those omissions amounted to disclosure breaches, the breaches were not so severe and clear that it was obvious that Columbia's board was breaching its disclosure obligations, as opposed to exercising reasonable judgment about what detail to provide, OB 46-51; RB 25-28; *see Mindbody*, 2024 WL 4926910, at * 43 (a "third-party bidder" should not be required "to second-guess the materiality determinations and legal judgment of the target's board of directors"):

- *Failure to disclose Skaggs's and Smith's plans to retire*. Any disclosure breach here was not severe and clear: The proxy disclosed Skaggs's and Smith's change-in-control benefits and noted that Columbia's executives could have interests different from stockholders. A1057, 1077-83. It just did not say specifically that Skaggs and Smith planned to retire. And as the Court of Chancery recognized, TransCanada did not know that Skaggs and Smith planned to retire. OB 46-47; RB 25.

- *Failure to include additional details about the negotiations*. This breach was not severe and clear because the omissions were not obviously material. OB 48-49; RB 25-26. A proxy statement does not have to disclose every detail of every interaction between the buyer and seller; an omission is material only if it "significantly alters the total mix of information" available to the stockholder. *Mindbody*, 2024 WL 4926910, at *37. Here, the 18 pages of detail adequately apprised Columbia's stockholders of the sale process; stockholders did not also need to know, for example, that one of TransCanada's bankers attended the same energy conference as Columbia's CEO. RB 26.

- *Failure to disclose TransCanada's violation of the standstill*. This breach was not severe and clear because neither TransCanada nor Columbia believed that TransCanada had breached the standstill. OB 49; RB 26-27. In particular, Columbia's general counsel and its outside counsel interpreted the standstill to prevent a bidder only from making a formal offer without the board's approval – an interpretation shared by *every* bidder involved in the process. OB 49. The breach also was not severe and clear because the standstill was a contract right that the Columbia board could choose to enforce or not and any failure to enforce that right was not necessarily a fiduciary breach. OB 23.

- *Failure to disclose other bidders' standstills*. This breach was not severe and clear because TransCanada did not know that other bidders had agreed to standstills. Op. 167; *see* OB 49-50. Further, the Court of Chancery thought that the other bidders' standstills were relevant only because they showed that Columbia treated TransCanada differently, by allowing TransCanada alone to breach its standstill. Op. 88. That is not accurate: The other bidders also were permitted to make indicative bids without Columbia enforcing the standstill. *See* Op. 17, 24. Anyway, no one thought that TransCanada had breached the standstill at the time – so no one thought that TransCanada was given preferential treatment with respect to the standstill. OB 49-50.

- *Failure to disclose that TransCanada had reneged on the $26/share deal*. This breach was not severe and clear because the contemporaneous documentary evidence shows that neither Columbia nor TransCanada thought they had a deal at $26/share. OB 50; RB 28. Further, the proxy statement disclosed that TransCanada had made and withdrawn the $26/share deal; the only thing it omitted was TransCanada's supposed motivations for doing so. OB 50-51. TransCanada had no obligation to insist that Columbia disclose that TransCanada had successfully bluffed Columbia. OB 50-51; RB 28.

The bottom line is that none of the supposed disclosure breaches were so clearly wrongful and severe that it is "likely" that TransCanada knew of the breaches – much less that TransCanada knew of its own wrongdoing with respect to those breaches. *Mindbody*, 2024 WL 4926910, at *37.

2. The Assistance Factor Weighs Against Imposing Liability

As in *Mindbody*, TransCanada provided no active assistance to Columbia at all. *See* 2024 WL 4926910, at *37-38. The Court of Chancery's theory, drawn from the prior trial-court decision in *Mindbody*, was that the mere fact that TransCanada had a contractual obligation to review the proxy statement and did not inform Columbia of the supposed deficiencies was sufficient to establish liability. Op. 165.

This Court decisively rejected that theory in *Mindbody*. The Court explained that aiding-and-abetting liability "requires more than the passive awareness of a fiduciary's disclosure breach that would come from simply reviewing draft [p]roxy [m]aterials." 2024 WL 4926910, at *40. The Court held that liability requires "some kind of active role," such as creating the "informational vacuum" that caused the seller not to know material information; a buyer that merely "passively stood by while [the seller] breached [its] disclosure duty" provided "no active assistance . . . at all." *Id.* at *40-41. The Court further held that failing to offer corrections to a proxy does not amount to active assistance, even if the buyer owed a contractual

obligation to the seller to review the proxy and inform the seller if the proxy was untrue or misleading. *Id.* at *41.

That reasoning applies with equal force here. Like the buyer in *Mindbody*, TransCanada took no affirmative step to create or facilitate any disclosure breach. As in *Mindbody*, there was no informational vacuum here – the Court of Chancery found that, with one exception, Columbia knew everything that TransCanada knew. *See* Opinion Resolving Post-Trial Issues (Allocation Op.) 74-75. (The exception was that Columbia did not know of TransCanada's supposed motivation for reneging on the $26/share deal, *see* Allocation Op. 75 – but as explained, there was no deal on which TransCanada reneged, *see* OB 31-36.) Further, as in *Mindbody*, TransCanada did not actively encourage any disclosure breach, such as by proposing any of the omissions; Columbia drafted its proxy statement and TransCanada did not offer edits to the disputed part of the proxy. OB 51-52.[1]

Also as in *Mindbody*, TransCanada's contractual obligation to review and propose corrections to the proxy statement does not support liability. The relevant

[1] TransCanada offered edits to other parts of the proxy statement that are not at issue. *See* Op. 90. Those edits cannot support liability; a buyer does not actively assist a disclosure breach with respect to one part of a proxy statement by offering edits to an unrelated part of the proxy. *See Mindbody*, 2024 WL 4926910, at *40. TransCanada also provided Columbia with information about itself to go into the proxy, *see* Op. 87; Plaintiffs have never alleged that there were any inaccuracies in that information.

contractual language here is materially identical to the language in *Mindbody* – both agreements required the seller to provide the buyer with a "reasonable opportunity" to review and comment on the draft proxy statement, and both required the buyer to "promptly notify" the seller if it "discovered" "any information" required to ensure that the proxy does not contain any untrue or misleading statements. *Compare* A948 (§ 5.01(b)), *with Mindbody*, 2024 WL 4926910, at *38 (quoting merger agreement). The Court explained in *Mindbody* that a buyer's failure to provide the corrections as required under such a contract did not move the buyer from "passive awareness" of the seller's disclosure breach into active participation, and thus was not sufficient for aiding-and-abetting liability. *Mindbody*, 2024 WL 4926910, at *39-41. The same is true here, so this factor weighs against imposing liability.

3. The Relationship Factor Weighs Against Imposing Liability

As in *Mindbody*, TransCanada was a third-party acquirer operating at arm's length, which protects TransCanada from liability. *See* 2024 WL 4926910, at *41. Also as in *Mindbody*, the merger agreement between TransCanada and Columbia did not "vitiate[]" that protection. *Id.*

Indeed, as noted, the relevant provisions of the merger agreement here were materially identical to the ones at issue in *Mindbody*. Both agreements required the seller to give the buyer an opportunity to review the draft proxy, and required the buyer to inform the seller if the draft was inaccurate or misleading. *Compare* A984

(§ 5.01(b)), *with Mindbody*, 2024 WL 4926910, at *38. As this Court explained in *Mindbody*, those provisions are not sufficient for aiding-and-abetting liability. 2024 WL 4926910, at *41-42. Under Delaware law, a buyer can be liable to a seller's stockholders for inaction only if the buyer owed the stockholders an affirmative duty to act. *Id.* at *42. Delaware law is not unique in that regard. *See id.* at *42 & n.137.

This Court concluded the provisions in *Mindbody* did not give rise to a duty owed by the buyer to the seller's stockholders. 2024 WL 4926910, at *43. The result should be the same here. The provisions here do not refer to the stockholders. *See* A948 (§ 5.01(b)). And under Delaware law, stockholders generally are not considered intended third-party beneficiaries of a merger agreement that can sue to enforce its obligations, particularly where the merger agreement contains a no-third-party-beneficiary provision. *See Crispo v. Musk*, 304 A.3d 567, 577 (Del. Ch. 2023). The merger agreement here contained that provision. *See* A973 (§ 8.08).

This Court also explained that there are "compelling public policy reasons" not to transform a buyer's disclosure obligation to the seller into a buyer's fiduciary duty to the seller's stockholders. *Mindbody*, 2024 WL 4926910, at *43. Doing that, the Court explained, "would collapse the arms'-length distance between the third-party buyer and the target, forcing the buyer to consider its duty to the target's stockholders instead of to its own stockholders." *Id.* It also "would require a potential third-party bidder to second-guess the materiality determinations and legal

judgment of the target's board of directors, which already owes fiduciary duties to its stockholders." *Id.*

The Court accordingly held that the merger agreement in *Mindbody* did not change the relationship factor. The provisions here are materially identical to those at issue in *Mindbody*, so the result should be the same here.

4. The State-Of-Mind Factor Weighs Against Imposing Liability

Finally, as in *Mindbody*, there was no evidence that TransCanada knew that its conduct with respect to the disclosure breaches was wrongful. The Court of Chancery "made no finding that indicated that [TransCanada] knew that its failure to abide by its contractual duty to notify [Columbia] of potential material omissions in the [p]roxy [m]aterials was wrongful and that its failure to act could subject it to liability to [Columbia's] stockholders." *Mindbody*, 2024 WL 4926910, at *44; *see* Op. 165-68. As in *Mindbody*, the Court of Chancery did not address this requirement at all.

There is no evidence that would have supported a finding that TransCanada knew of its own wrongdoing with respect to the disclosure breaches. There simply was nothing in the record on this point. *See* Op. 86-90. Unlike the seller in *Mindbody*, TransCanada did not attempt to "scrub[]" its internal documents of any relevant information. 2024 WL 4926910, at *43. And anyway, that evidence was not enough for liability in *Mindbody*. *Id*. Given the even weaker record here, there

is no basis for imposing aiding-and-abetting liability on TransCanada on the disclosure claim.

CONCLUSION

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

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