EFiled: Jan 06 2025 04:59PM EST
Filing ID 75358885
Case Number 281,2024

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 PLAINTIFFS-BELOW/APPELLEES

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Dated: January 6, 2025

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NATURE OF PROCEEDINGS[1]

In *In re Mindbody, Inc. Stockholder Litigation*, this Court addressed important issues of first impression concerning a purchaser's liability for aiding-and-abetting a fiduciary's breach of his disclosure obligations. Recognizing that this case "addresses similar issues with different facts," the Court decided *Mindbody* narrowly "without more broadly foreclosing different outcomes based upon different facts or legal arguments that might or could be presented in future cases." ---A.3d---, 2024 WL 4926910, at *39 & n.117 (Del. 2024). Having appropriately tailored its rulings, the Court sought supplemental briefing to consider applying those holdings to this appeal. The "different facts" here compel a different result.

Mindbody did not involve claims of aiding-and-abetting breaches of *Revlon* duties by conflicted fiduciaries. *Mindbody* nevertheless reaffirmed that an acquirer may be found liable where, like here, it knowingly participates in breaches of duty "by extracting terms which require the opposite party to prefer its interests at the expense of its shareholders." *Id.* at *31 n.79 (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001)); *see also id.* at *41. The Restatement factors, which *Mindbody* emphasized, also confirm that the trial court properly found TransCanada liable for aiding-and-abetting Columbia fiduciaries' breaches of their obligations to

[1] Unless otherwise noted, all emphasis is added; citations and quotations are omitted. "AB __" refers to Appellees' Answering Brief.

act loyally and with due care. At a minimum, TransCanada likely knew Columbia fiduciaries' conduct constituted a breach and was substantially and directly involved in those breaches through its knowing and persistent exploitation of Skaggs and Smiths' conflicts of interest, including through intentional breaches of the rules that Columbia's board established—and TransCanada explicitly agreed to—for the sale process. And TransCanada had actual knowledge that its own conduct was improper, having *repeatedly taken steps that its own counsel expressly advised against.*

This Court need only reach TransCanada's active conduct in connection with the disclosure claims if it concludes the trial court's careful and well-supported findings of aiding-and-abetting the sale process breaches are clearly erroneous, which this Court should not do. TransCanada's active participation in misleading Columbia's stockholders through the false and misleading Proxy is starkly different from the passive conduct in *Mindbody*. TransCanada actively participated in drafting the Proxy, as the Merger Agreement explicitly required, and chose not to provide information required to prevent the Proxy from being materially misleading because TransCanada had a conscious and specific pecuniary motivation to stay silent: allowing the deal to close at a price below what TransCanada had initially agreed to pay.

Evaluating the Restatement factors wholistically, as discussed in *Mindbody*, and giving appropriate deference to the lower court's extensive factual findings over *two* trials leads to only one result: affirmance.

ARGUMENT

I. TRANSCANADA AIDED-AND-ABETTED THE SALE PROCESS BREACHES

The Restatement factors reinforce the trial court's finding that TransCanada aided-and-abetted the sale process breaches.

A. TransCanada Knew of Severe and Clear Sell-Side Breaches

The first Restatement factor considers "whether [TransCanada] acted with the knowledge that the conduct advocated or assisted constitutes…a breach." *Mindbody*, 2024 WL 4926910, at *36. This is the first of "two types of knowledge" required for aiding-and-abetting: "that an aider and abettor know that the *primary party's* conduct constitutes a breach[.]" *Id.* at *32 (emphasis in original). This is "distinct" from the "requirement that the aider and abettor…know that *its own* conduct regarding the breach was legally improper," requiring "*actual knowledge* that their conduct was legally improper."[2] "[B]oth aspects of knowing participation" are addressed "in a wholistic fashion." *Id.* at *31.

TransCanada's knowledge of the underlying breach turns on "the severity and clarity" of that breach. *Id.* at *36. The relevant question is whether, based on those

[2] *Id.* (second emphasis added). This language apparently clarifies *RBC Capital Markets, LLC v. Jervis*, which stated: "To establish *scienter*, the plaintiff must demonstrate that the aider and abettor had *actual or constructive knowledge* that their conduct was legally improper." 129 A.3d 816, 862 (Del. 2015) (quoting *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008)).

factors, the record "supports the conclusion that "[TransCanada] *likely knew* that the conduct of the primary violator[s]…constituted a breach." *Id.* at *37. Based on the contemporaneous documentary evidence and testimony presented at trial, the trial court carefully considered that question, correctly concluding that (at a minimum) TransCanada likely knew that Skaggs and Smith were breaching their fiduciary duties in connection with the sale of Columbia to TransCanada. *See* Op. 134-45.

First, the court found that TransCanada knew Skaggs and Smith were acting disloyally because TransCanada understood they (i) "stood to receive lucrative change-in-control payments and that there would be no social issues in the deal, meaning that [they] had no plans to stick around"; (ii) had "powerful financial motivations to sell"; and (iii) "were focused on selling at a defensible price and retiring with their change-in-control benefits, rather than seeking the best transaction reasonably available." Op. 6, 143-44. Plaintiffs were not required to prove—and the trial court was not required to find—that Skaggs and Smith shared their intentions to retire with TransCanada.

Second, the trial court also correctly concluded that TransCanada likely knew Skaggs and Smith were acting unreasonably in the sale process and, in violation of their *Revlon* duties, were not seeking the best transaction reasonably available. Op. 143-44. After hearing testimony and examining the evidence (twice), the trial court concluded that "TransCanada recognized in real time that Skaggs and Smith were

behaving eccentrically, even bizarrely, for sell-side negotiators." Op. 6. The court drew this conclusion after examining Skaggs' and Smith's behavior and the reactions it elicited from Poirier and Wells Fargo over several months. Op. 119-27; 143-44. Several of Smith's actions and statements epitomize unreasonable sell-side conduct. Among other things, Smith confirmed during his January 7, 2016 meeting with Poirier that there was a "gap" between the Board and management and it was "not unanimous on the Board to sell." Op. 38. During the same meeting, Smith also told Poirier that Columbia had "eliminated the competition," signaling "that management wanted a deal and would not be seeking to drive up the price." Op. 38, 40. In February 2016, Smith encouraged TransCanada to submit a bid despite Poirier's repeated signals that TransCanada would come in below the Board's range. Op. 56-57. And on March 10, Smith told Poirier "that because of the leak, '[t]he [Columbia] board is freaking out and told the management team to get a deal done with [TransCanada] 'whatever it takes.'" Op. 68-69 (alterations in original). After Skaggs shared Columbia's script for potential competing bidders with TransCanada, Poirier called Smith, who "[t]old him we wanted to get this deal done with [TransCanada] and this would help us achieve that goal." Op. 75, 126.

Alone, these are obvious examples of unreasonable conduct in the context of the sale of a company. But the trial court went further, examining TransCanada and Wells Fargo's contemporaneous reactions and concluding that, "[a]t a minimum,

TransCanada knew that Skaggs and Smith were breaching their duty of care[.]" Op. 143-44. Indeed, as evidenced by the voluminous record, TransCanada correctly believed that Columbia management wanted to get a deal done and would "take a lower price to the [B]oard and dare them to turn it down." Op. 56-57. Wells Fargo was similarly "stunned" by Smith's "bizarre" statement that the Board was "freaking out." Op. 69, 125. After receiving the inbound script and speaking to Smith, "Poirier understood that Smith had made a 'commitment to do a deal with TransCanada.'" Op. 75 (quoting B0256). "Columbia's decision to extend exclusivity combined with management's commitment to a deal with TransCanada stunned Wells Fargo[,]" who found the decision inexplicable. Op. 76-77. Poirier and Wells Fargo also found Skaggs and Smith's "solicitude toward TransCanada" to be "incomprehensible" and Wells Fargo "advised that Skaggs and Smith were saying that they wanted to sell at any defensible price." Op. 126, 144.

The behavior of Skaggs and Columbia's outside counsel also alerted TransCanada to Skaggs' unreasonable conduct. Columbia's outside counsel "recommended a 'gentleman's agreement' regarding exclusivity" between Columbia and TransCanada "with the intention of keeping it out of the Proxy Statement" and, "[a]t Sullivan & Cromwell's suggestion, Skaggs proposed an informal, unwritten exclusivity agreement" to TransCanada. Op. 51; *see also*

SB001. Although TransCanada "insisted on a written exclusivity agreement,"[3] it viewed this behavior suspiciously—Johnston testified this was not something TransCanada would "typically" do and it was "not [TransCanada's] practice" to "try[] to keep things out of plaintiffs' counsel hands."[4] Viewed wholistically, TransCanada likely knew Skaggs and Smith were acting unreasonably, and Columbia's counsel's unusual request clearly put them on high alert.

Third, the trial court also correctly concluded that TransCanada likely knew of the Board's care breaches. Op. 143-44; *see also* AB 37-39. Poirier had a decade of investment banking experience and knew the Board was required to maximize stockholder value in a sale of Columbia. B0170-71 (171:18-172:10). Standstills aid a board in achieving that objective. As Vice Chancellor Will recently explained, when a standstill is implemented, "[t]he board is calling the shots…and a bidder limited by a standstill can only actively pursue the deal if it's invited by the board to do so," which "can help stabilize the sale process, enhance negotiating leverage for the target, and potentially lead to a higher sale price" as well as prevent a bidder with "access to insider information from leveraging that information to unfairly tip the sales process in their favor." *Bucks Cty. Emps.' Ret. Sys., et al*. v. *Clayton, Dubilier & Rice, LLC, et al.*, C.A. No. 2023-1151-LWW, at 16 (Del. Ch. Oct. 31, 2024)

[3] Op. 51.

[4] SB084-85 (609:16-610:8).

(TRANSCRIPT).[5] "Poirier understood that the Standstill precluded TransCanada from pursuing a transaction with Columbia for twelve months absent prior written Board authorization"[6] and that the Board never provided written authorization until March 2016.[7] TransCanada pursued transaction discussions for months before then anyway and made its exploitative threat in knowing violation of the Standstill. Through its repeated breaches of boundaries set by the Board,[8] TransCanada understood not only that Skaggs and Smith were breaching their duties, but that the Board was failing to oversee them.[9]

B. TransCanada Was Directly and Persistently Involved In the Sell-Side Breaches Throughout the Sale Process

The second Restatement factor considers "the amount, kind, and duration of assistance that [the aider-and-abettor] gave to [the primary violator], including whether [the former] was directly involved in [the latter]'s breach." *Mindbody*, 2024

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[5] This bench ruling is submitted in the Supplemental Appendix. *See* SB086-120.

[6] Op. 22.

[7] B0197 (198:1-18).

[8] The lower court identified at least fifteen breaches of the Standstill or NDA over five months. A726 n.16. Those findings are supported by the record and not clearly erroneous.

[9] For avoidance of doubt, the Standstill neither created independent fiduciary duties between TransCanada and Columbia's stockholders nor is liability predicated on TransCanada's Standstill breaches. Rather, TransCanada's repeated and knowing Standstill breaches demonstrate both its knowledge of the underlying wrongful conduct and that its participation in the underlying breaches was likewise wrongful.

WL 4926910, at *37. Unlike in *Mindbody*, where "Vista provided no affirmative assistance at all," the judgment below was not premised on TransCanada's "failure to act." *See id.*

Instead, "[t]he conduct in this case involved persistent and opportunistic [Standstill] breaches over an extended period, culminating in the exploitative $25.50 Offer[.]" Op. 152. "Poirier and TransCanada consistently and repeatedly breached the Standstill, thereby violating a boundary that the Board had established to protect the integrity of any sale process," and those breaches "were not close calls." Op. 146. A bidder who engages in such "persistent and opportunistic violations of process boundaries…is not merely taking advantage of a sell-side fiduciary's missteps" but is instead "forcing the fiduciary to blunder." Op. 149. Through its persistent and opportunistic Standstill violations, Poirier co-opted Smith, learned that Columbia management and its Board were breaching their duties, and *caused* the harm to Columbia's stockholders by: (i) reneging on the $26 Deal and making the $25.50 Offer; and (ii) threatening public disclosure of failed deal negotiations if the $25.50 Offer was not accepted.

C. TransCanada Was Not Bargaining at Arm's-Length

The third Restatement factor considers "the nature of the relationship between" the primary violator and the aider-and-abettor. *Mindbody*, 2024 WL 4926910, at *41. Although TransCanada's third-party bidder status "affords it *some*

protection in its negotiations with potential target companies,"[10] because arm's-length negotiations are privileged, arm's-length negotiation does not include "trying to create, exploit, or otherwise profit from fiduciaries' conflicts" or "extracting terms which require the opposite party to prefer its interests at the expense of its shareholders."[11] The "pursuit of the best available price in negotiations with opposing management can[not] be undertaken without regard to the target management's fiduciary obligations to its shareholders"[12] and "liability can still attach for third parties who create *or exploit* conflicts of interest" of sell-side fiduciaries.[13]

Consistent with precedent, the trial court acknowledged that "a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting"[14] and did not hold TransCanada liable "simply because it knew about the sell-side breaches of duty" and "took advantage of its counterparty's mistakes."[15] Instead, the court correctly found that TransCanada was

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[10] *Id.* at *41.

[11] *Id.* at *31 n.79 (quoting *In re Hechinger Inv. Co. of Del., Inc.*, 278 Fed.App'x 125, 130-31 (3d Cir. 2008) and *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1058 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990)).

[12] *Gilbert*, 490 A.2d at 1058.

[13] *Mindbody*, 2024 WL 4926910, at *41.

[14] Op. 135 (quoting *Malpiede*, 780 A.2d at 1097).

[15] Op. 151-52.

not merely acting as an arm's-length acquirer under these unique facts. First, Poirier and Smith had a long-standing friendship through which Poirier co-opted Smith during the sale process. Op. 95, 147; *see also* AB 23-24. Second, Poirier knew the Standstill—a clear process boundary set by the Board—prohibited TransCanada from pursuing an acquisition of Columbia, but nevertheless repeatedly violated that boundary to further his exploitation of Smith. *Supra* §I(B).

Even then, the trial court only concluded that "TransCanada's conduct reached the level of culpable participation when it exploited the sell-side fiduciaries by reneging on the $26 Deal, making the $25.50 Offer, and backing it up with a coercive threat that violated the NDA." Op. 152. "TransCanada took that step because Poirier and his colleagues believed that they could exploit" Skaggs and Smith based on Poirier's exploitation of them and Standstill breaches throughout the prior months. *Id.* Said differently, TransCanada's "persistent and opportunistic violations of the Standstill should not be brushed away as legitimate instances of aggressive bargaining."[16] Arm's-length bargaining yielded the agreed-upon $26 Deal and TransCanada's culpable actions caused the reduction in that price to $25.50/share.

[16] Op. 148; *see also In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 837 (Del. Ch. 2011) (plaintiffs established reasonable likelihood of success on aiding-and-abetting claim where buyer "knew it was bound by the No Teaming Provision and was barred from discussing a Del Monte bid with anyone absent prior written permission from Del Monte").

D. TransCanada Knew It Was Acting Wrongfully

The final factor concerns "the requirement that the aider and abettor must know that *its own* conduct was legally improper." *Mindbody*, 2024 WL 4926910, at *43. TransCanada knew its threat was legally improper because its outside counsel *expressly advised* TransCanada in writing against threatening public disclosure.[17] TransCanada believed it had a deal at $26/share, acknowledging: "*We had a deal as offered*."[18] Poirier testified the $25.50 Offer was not best and final.[19] He nonetheless threatened a press release—violating his counsel's express advice—to bludgeon Columbia to accept the $25.50 Offer.[20] This case is unique because TransCanada's counsel expressly told Poirier that his conduct "was legally improper."

TransCanada also knew its serial Standstill breaches violated the express rules the Board established for the sale process.[21] TransCanada knew exactly how the

[17] Op. 79 n.13 ("Mayer Brown had advised TransCanada specifically against making threats, and Johnston relayed that advice to Poirier" (citing B0015)).

[18] Op. 70 (emphasis in original); *see also* AB 16-18, 39-44. Wells Fargo likewise acknowledged that "they [*i.e.*, Columbia] accepted $26 with 10% stock but are trying to negotiate down the break fee." A313; *see also* Op. 66-67.

[19] Op. 78-79; *see also* B0272-B0273 (273:10-274:6-17).

[20] B0187-B0188 (188:6-189:14); B0048 (426:21-427:1), ; *see also* AB 10, 21, 45-47.

[21] Op. 133-42; *see also Mindbody*, 2024 WL 4926910, at *30 (communications from Stollmeyer and Qatalyst to Vista that violated sale process guidelines were "indicative of a potentially flawed sale process").

Standstill worked—again, based on counsel's explicit legal advice to Poirier—but knowingly and repeatedly violated it for months through its unauthorized communications with Columbia management. AB 9-10, 32, 48-49. Poirier himself acknowledged that TransCanada "must get [Columbia]'s acquiescence to pursue this transaction, or even to seek to influence them" under the Standstill. Op. 30. Mayer Brown also understood how the Standstill operated. AB 24 n.6.

TransCanada's post-signing self-assessment confirms its knowledge of its own wrongdoing. In *Mindbody*, Vista only had "some awareness that its own actions during the sale process were not above suspicion" and the trial court did not find that Vista was "clean[ing] up their paper trail." 2024 WL 4926910, at *44. Here, TransCanada "acknowledged that it had taken advantage of Columbia's fiduciaries and hoped to repeat the strategy, albeit without creating a similar evidentiary record." Op. 147; *see also* AB 23-24, B0051, B0097, B0100.

II. TRANSCANADA AIDED-AND-ABETTED THE DISCLOSURE BREACHES

Mindbody also supports affirmance of the trial court's finding that TransCanada aided-and-abetted disclosure violations. Importantly, the court anticipated this Court's holding in *Mindbody* that, in the absence of a duty, passive conduct cannot alone give rise to liability. Op. 133. The court nevertheless correctly held TransCanada liable for aiding and abetting disclosure violations.

A. The Proxy Was Clearly and Severely Misleading

Here, as in *Mindbody*, TransCanada was aware the Proxy omitted "undoubtedly material" information and therefore "likely knew that the conduct of the primary violator[s]," Columbia's fiduciaries, "constituted a breach." 2024 WL 4926910, at *37.

There can be no serious debate. The Proxy did not merely omit additional "details," "nitpicks" or "play-by-play," as TransCanada has argued. Rather, it omitted or mischaracterized myriad interactions between November 2015 and March 2016 that TransCanada *knew* violated the Standstill. Notably, the Proxy omitted two months' worth of negotiations in December 2014 and January 2015. AB 55-57. The Proxy then falsely portrayed Smith and Poirier's January 7 meeting "as the first step in TransCanada's reengagement" and "a balanced exchange of high-level information," when Smith actually "invited a bid and told Poirier that

TransCanada did not face competition"[22] and Poirier had already "indicated that TransCanada would be willing to pay around $28 per share."[23] TransCanada "cannot dispute…that the Proxy omitted the material fact that Smith invited a bid and told Poirier that TransCanada did not face competition at the January 7, 2016, meeting." *In re Columbia Pipeline Gp., Inc.*, 2021 WL 809361, at *3 (Del. Ch. Mar. 2, 2021) (ORDER) (hereinafter, "*SJ Op.*").

The terms of the Standstill and TransCanada's multiple violations of it are also undoubtedly material, which again TransCanada cannot dispute.[24] TransCanada understood what the Standstill prohibited and that its many undisclosed interactions with Columbia management violated the Standstill. AB 9-10, 57-58; Op. 22, 29-31. TransCanada also understood that the Standstill obligations, including "whether there were any standstill obligations that bound the [other] bidders," were "obviously significant," *i.e.*, material. AB 61; Op. 88.

TransCanada's knowledge of the severity of the disclosure violations makes this record far stronger than in *Mindbody*. Although Vista knew the proxy omitted material interactions with Stollmeyer and Qatalyst, it never received the sale process

[22] Op. 41.

[23] Op. 161-63.

[24] *Id.* (TransCanada "cannot dispute…that the Proxy omitted the material fact that [other bidders] and TransCanada were subject to standstills with DADW provisions, that TransCanada breached its standstill, and that Columbia opted to ignore TransCanada's breach.").

guidelines and had no real time knowledge that those interactions violated them. *Mindbody*, 2024 WL 4926910, at *11, *37. Here, however, TransCanada received process guidelines (*i.e.*, the Standstill) *and knew* its forbidden interactions with Columbia management reflected a "flawed sale process." *See id.* at *37.

The remaining omissions or misstatements—including the Proxy's (i) failure to disclose that Columbia accepted the $26 Offer, (ii) false description of the $26 Offer as "indicative," (iii) misleading description of the reasons TransCanada made its $25.50 Offer, and (iv) false description of the $25.50 Offer as "final"—are also "undoubtedly material." *See id.* TransCanada attacks the Court's factual findings but never attacks materiality beyond raising meritless self-flagellation arguments it waived below.[25]

Skaggs and Smith's retirement plans were also indisputably material.[26] As discussed above, TransCanada had actual knowledge—through Poirier's months-long co-opting of Smith—that Skaggs and Smith were prioritizing their personal interests and had no plans to stick around post-closing. *Supra* §I(A); *see also* AB 31.

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[25] *Oxbow Carbon & Mins. Hldgs., Inc. v. Crestview-Oxbow Acq., LLC*, 202 A.3d 482, 502 n.77 (Del. 2019) ("[A]n issue not raised in post-trial briefing has been waived, even if it was properly raised pre-trial.").

[26] *SJ Op.* at *3 (TransCanada "cannot dispute in this proceeding that the Proxy omitted the material fact that Skaggs and Smith were planning to retire in 2016").

B. TransCanada Actively Participated in Preparing the Proxy

This case does not involve TransCanada's mere "passive awareness" of disclosure violations "that would come from simply reviewing draft Proxy Materials." *Mindbody*, 2024 WL 4926910, at *40. Unlike in *Mindbody*, where Vista personnel simply "received and reviewed" a copy of the proxy and "ne[v]er suggested changes,"[27] TransCanada "actively contributed to drafting [and] editing the Proxy."[28] "TransCanada reviewed the Proxy Statement in detail" and Poirier testified that "[t]here was an exchange of drafts between both companies to verify [the Proxy's] completeness and accuracy."[29] Poirier understood it was important for the Proxy to be accurate and truthful,[30] and he "read the Proxy Statement and provided comments on both the preliminary and definitive versions."[31] Others at TransCanada did too.[32] But TransCanada never corrected obviously material omissions.

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[27] *Id.* at *38,

[28] *Id.* at *40 ("the trial court found that no one at Vista who reviewed the draft Proxy Materials suggested any changes").

[29] Op. 166 (citing B0163); *see also* B0287-88 (288:21-289:5), SB005 ("Both Francois and I are reviewing [the Proxy] in conjunction with our notes.").

[30] B0288 (289:6-12), SB074-75 (21:11-22:9).

[31] Op. 166; *see also* SB004, SB033, SB060, SB073-82 (20:23-29:14).

[32] Op. 166; *see also* A286, SB004, SB008, SB033.

Columbia's fiduciaries were not equally aware of each category of omitted information either. *See Mindbody*, 2024 WL 4926910, at *41. Rather, TransCanada was directly involved with the breach and "caused misrepresentations in connection with the [Proxy] by withholding information from [Columbia's] fiduciaries." *See Buttonwood Tree Value P'rs, L.P. v. R. L. Polk & Co.*, 2017 WL 3172722, at *10 (Del. Ch. July 24, 2017). Notably, "TransCanada was more focused on the Standstill than Columbia" and only TransCanada knew "the reasons Poirier gave to Columbia for reneging on the $26 Deal were pretextual." Op. 166. Although there were certain material omissions "where TransCanada had actual knowledge to the same degree as Columbia,"[33] TransCanada's active involvement in drafting the Proxy (above) and its heightened contractual obligations under the Merger Agreement (below) distinguish this case from *Mindbody* where Vista could not be said to have caused the disclosure violations through inaction.[34]

[33] Allocation Op. 73.

[34] *Id.* at 72 ("If two parties owe a disclosure obligation, and both have the requisite knowledge, then both are capable of making the disclosure and causally responsible for failing to make it.").

C. TransCanada Was Not an Arm's-Length Third-Party with Respect to the Disclosure Violations

1. TransCanada's Knowledge of the Underlying Misconduct and Motivation to Remain Silent Constitute a Conscious Act

Again, TransCanada's qualified immunity as a third-party bidder is premised on arm's-length negotiations. *Supra* §I(C). TransCanada's direct participation in, and actual knowledge of, the underlying conduct distinguishes TransCanada from a typical, arm's-length buyer. *See id.* It also distinguishes this case from *Mindbody*, where Vista heard and reacted to tips made by sell-side fiduciaries or their representatives that indicated a potentially flawed process. *See Mindbody*, 2024 WL 4926910, at *13-14, *37, There, the Court found Vista's inaction did not constitute substantial assistance, relying on rulings from other jurisdictions holding that a mere "failure to act can constitute participation for aiding and abetting liability only where an independent duty exists between the alleged aider and abettor and the plaintiff." *Id.* at *42. Those rulings rest on the "basic proposition that mere bystanders, even if aware of the [wrongdoing], cannot be held liable for inaction since they do not…associate themselves with the venture or participate in it as something they wish to bring about." *IIT, an Int'l Inv. Tr. v. Cornfeld*, 619 F.2d 909, 927 (2d Cir. 1980) (cited in *Mindbody*, 2024 WL 4926910, at *42 n.137). Said differently, those

cases recognize that an actor is "under no duty to rescue prospective victims from a peril *that the actor did not create*."[35]

Here, however, TransCanada was not an innocent bystander that discovered potential disclosure violations by Columbia's fiduciaries. Of the Proxy's seven material misstatements and omissions, *five* arose from actions that TransCanada knew violated the Standstill or NDA.[36] And where, like here, the aider-and-abettor took action—even if slight—to associate itself with the underlying wrongdoing or create the peril, courts will find aiding-and-abetting liability. For example, in *Brennan v. Midwestern United Life Insurance Company*, an insurance company (Midwestern) came to believe a stockbroker (Dobich) may have been committing securities violations in its stock, artificially inflating the stock's value. 417 F.2d 147, 150-51 (7th Cir. 1969). Midwestern initially threatened to report Dobich but, after entering merger negotiations, instead referred Dobich's customers back to him and remained silent to avoid scuttling the potential merger. *Id.* at 151-54. The court found that "Midwestern's acquiescence through silence in the fraudulent conduct of

[35] Deborah A. DeMott, *Fiduciary Breach, Once Removed*, 94 TEX. L. REV. 238, 242 (2016).

[36] The only material misstatements and omissions that did not arise from actions that TransCanada knew violated the Standstill were (1) the "partial and misleading description of the $26 Offer," which TransCanada made and had actual knowledge of, and (2) that "Skaggs and Smith were planning to retire in 2016," which TransCanada had constructive knowledge of. *See* Allocation Op. 74-75.

Dobich combined with its affirmative acts was a form of aiding and abetting" because Midwestern "facilitate[ed] the fraud and allow[ed] Dobich's scheme to continue to Midwestern's benefit." *Id.* at 154-55.

Other federal courts have similarly found aiding-and-abetting liability where there is a "conscious and specific motivation for not acting on the part of an entity with a direct involvement in the transaction."[37] In *Drobbin v. Nicolet Instrument Corp.*, for example, an investor (Nicolet) was alleged to have aided-and-abetted violations of Section 14(f) of the Securities Exchange Act, which requires certain disclosures to be made ten days before any "arrangement or understanding" resulting in the appointment of a majority of a company's directors. 631 F. Supp. 860, 908 (S.D.N.Y. 1986). While negotiating a stock purchase agreement with a company (Braintech), Nicolet and Braintech came to an understanding that two Nicolet directors would eventually join Braintech's board and effectively replace a board majority. *Id.* at 909. Before making any disclosures, a Nicolet representative (Brue) was elected by Braintech's board. *Id.* Despite recognizing that "Nicolet's

[37] *IIT*, 619 F.2d at 927 (dismissing claim where there were no allegations that aider-and-abettor "intended by its silence to forward completion of the fraudulent transactions in the expectation of benefiting from the success of the fraud"); *see also, e.g.*, *Schwartz v. Michaels*, 1992 WL 184527, at *20 (S.D.N.Y. July 23, 1992). Other courts have found aiding-and-abetting liability where third parties have "actual knowledge of the underlying fraud and intent to aid and abet a wrongful act," which may be shown by circumstantial evidence. *See, e.g.*, *Metge v. Baehler*, 762 F.2d 621, 625 (8th Cir. 1985).

involvement in this violation may be viewed more as mere inaction than as affirmative assistance," the court found "a conscious and specific motivation on Nicolet's part for not inducing Braintech to make the disclosures required before Brue took office in the reasonable expectation that the deal it had just negotiated with Braintech would more likely come to fruition if it installed one of its employees on the Braintech board immediately." *Id.* at 910. Citing this motive, coupled with Nicolet's "actual knowledge of the facts that triggered Braintech's §14(f) disclosure obligations," the court held Nicolet liable for aiding-and-abetting the §14(f) violation. *Id.*

TransCanada was no stranger to the Proxy—it had actual knowledge of the Proxy's misstatements and omissions through its participation in the underlying conduct. The trial court held that TransCanada also had actual knowledge of Skaggs and Smith's self-interested motivations and likely knew that they (and the Board) were acting unreasonably. *Supra* §I(A). Perhaps most importantly, TransCanada stood to (and did) benefit from that misconduct by consciously choosing not to address the materially misleading and omissive Proxy and thus increasing the likelihood of consummating the Merger at a price below which TransCanada had agreed to pay.

2. The Merger Agreement Imposed More Demanding Disclosure Requirements of TransCanada Than in *Mindbody*

TransCanada also provided substantial assistance by recklessly ignoring its obligations under the Merger Agreement. Although *Mindbody* decided the issue of knowing participation in the context of a "contractual obligation between a target corporation and a third-party buyer to notify the other of potential disclosure violations," it did not "foreclos[e] different outcomes based upon different facts or legal arguments[.]" 2024 WL 4926910, at *38-39.

TransCanada's contractual obligations here differ materially from Vista's. Notably, the merger agreement in *Mindbody* only required Vista to provide information that Mindbody reasonably requested for inclusion in the proxy.[38] Mindbody also expressly disclaimed the veracity of any information Vista provided.[39] The Court found the disputed contractual provisions did not create an independent disclosure duty to Mindbody's stockholders and did not vitiate Vista's third-party relationship with Mindbody where Vista otherwise bargained at arm's-length. *See Mindbody*, 2024 WL 4926910, at *41.

[38] SB070 §6.3(d) ("[Vista] will furnish all information concerning it and its Affiliates, if applicable, as [Mindbody] may reasonably request[.]").

[39] SB069 §6.3(b) ("Notwithstanding the foregoing, no covenant is made by the Company with respect to any information supplied by [Vista.]").

Here, however, the Merger Agreement not only required TransCanada to notify Columbia of any potential disclosure violations in the Proxy, it also imposed an independent obligation on TransCanada to *provide all information required so that the Proxy would not be materially omissive or misleading*.[40] TransCanada could have bargained for a different result by negotiating different language, like that in *Mindbody*. Perhaps recognizing this, TransCanada never argued below that the Merger Agreement did not impose on TransCanada a contractual duty to speak up about the disclosure violations.[41]

To be clear, the Merger Agreement did not create or "give rise to a separate duty of disclosure owed by [TransCanada] to [Columbia]'s stockholders." *See Mindbody*, 2024 WL 4926910, at *42. That outcome is consistent with the premise of aiding-and-abetting liability, in which a third party owing no separate duties may nonetheless face liability for knowingly participating in the primary violator's breach of duty. *See, e.g.*, *RBC*, 129 A.3d at 865 n.191 (holding financial advisor liable while emphasizing contractual nature of third-party relationship and rejecting notion of "gatekeepers"). Rather, the Merger Agreement contextualizes TransCanada's *participation* in the underlying disclosure breach. TransCanada's

[40] Allocation Op. 71 (describing TransCanada's three different obligations under Merger Agreement); *see also* A285-86 (same).

[41] Plaintiffs raised the issued below. A500 ("TransCanada had not only the right to review the Proxy, but a contractually imposed duty to speak.").

failure to adhere to its contractual obligations demonstrates its conscious decision to withhold material information from the Proxy so it could consummate the Merger at a lower price than it agreed to pay.

D. TransCanada Knew its Conduct Concerning the Disclosure Violations Was Legally Improper

The final factor is whether the aider-and-abettor "know[s] that its own conduct was legally improper." *Mindbody*, 2024 WL 4926910, at *43. "[T]he less obvious the violation, the harder it is to find that a third-party buyer, acting at arms'-length, acted with *scienter* as to both the primary party's conduct and its own conduct." *Id.* Conversely, obvious disclosure violations should make it easier to find *scienter*.[42]

The Proxy's omissions—particularly those concerning TransCanada's pre-March 2016 interactions with Columbia that violated the Standstill—were obvious. *Supra* §II(A). TransCanada knew about the interactions the Proxy omitted and what really took place. Op. 166. TransCanada also knew its pre-March 2016 interactions and Poirier's threat violated the Standstill because it knew exactly how the Standstill worked and its own lawyers told it so. *Supra* §I(d) *Id.* TransCanada nevertheless recklessly chose not to correct the Proxy's material misstatements and omissions. Op. 166. And TransCanada had a conscious and specific motivation for its decision

[42] *See, e.g.*, *In re MicroStrategy, Inc. Sec. Litig.*, 115 F. Supp. 2d 620, 638 (E.D. Va. 2000) ("[A]n inference of scienter becomes more probable as the violations become more obvious.").

to remain silent: it stood to benefit immensely from the misleading and omissive Proxy. *Supra* §II(C)(1).

CONCLUSION

For these reasons and in Appellees' prior briefing, the trial court's decisions should be affirmed.

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Dated: January 6, 2025