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IN THE SUPREME COURT OF THE STATE OF DELAWARE

In re PLX TECHNOLOGY INC. STOCKHOLDERS LITIGATION	: : : : :	No. 571, 2018 Appeal from the Court of Chancery Consol. C.A. No. 9880-VCL

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TABLE OF DEFINED TERMS

Avago:	Avago Technologies Wireless (U.S.A.) Manufacturing Inc.
Barclays:	Barclays Capital, Inc., financial advisor to Avago for the Transaction
Board:	PLX Board of Directors
Chancery Court:	Delaware Court of Chancery
December 2013 Projections:	The financial projections adopted by the Board on December 13, 2013
Deutsche Bank:	Deutsche Bank Securities, Inc.
June Projections:	The projections Whipple provided to DB on June 13, 2014
IDT:	Integrated Device Technology, Inc.
IDT Merger:	The proposed merger of IDT and PLX
Krause:	Thomas Krause, Vice President of Corporate Development at Avago
LSI:	LSI Logic Corporation
Merger:	Avago's acquisition of PLX for cash consideration of $6.50 per share
PLX or the Company:	PLX Technology, Inc.
Plaintiffs:	Appellants-Plaintiffs Andrew Ellis and Boby Varghese
Potomac:	Potomac Capital Partners II, L.P.
Riordan:	Thomas Riordan, Former PLX Director
Recommendation Statement:	The Schedule 14D-9 filed by PLX on July 8, 2014

Salameh:	Mike Salameh, PLX Chairman
Schmitt:	Ralph Schmitt, PLX Director
Singer:	Co-Manager of Potomac Capital Management II, LLC
Valuation Date:	August 11, 2014
Whipple:	Arthur Whipple, PLX CFO

NATURE OF PROCEEDINGS

This appeal challenges the legal and factual bases for the Chancery Court's post-trial conclusion that Plaintiffs failed to establish that any damages flowed from Potomac's knowing participation in the Board's breaches of fiduciary duty in connection with the Merger. Potomac was the only non-settling defendant remaining in the case at trial.

Potomac was an activist investor in PLX, acting through Singer who served as a PLX director. The Vice Chancellor's post-trial opinion found that Potomac "knowingly participated in the steps Singer took to breach his fiduciary duties and induce a breach by the Company's other directors." Exhibit A ("Op.") at 121. "Potomac and Singer undermined the Board's process and led the Board into a deal that it otherwise would not have approved." *Id.* at 115. By withholding information from the Board, Potomac and Singer "fatally undermined the sale process." *Id.* The Vice Chancellor elaborated on the consequences of Potomac's misconduct:

> No one can tell what would have happened if Singer and Deutsche Bank had been candid, but the Board might well have proceeded differently.... [T]he Board could have been more vigorous in its pre-signing market canvas.... [T]hey could have negotiated more effectively for a higher price. Most important, the Board could have taken more time to consider the Company's alternatives in depth, rather than agreeing in principle to a deal at Avago's preferred price after nine busy days in May. Among other things, they could have made sure that Deutsche Bank had prepared a current valuation of the Company, and they could have addressed any concerns about the December 2013 Projections more thoroughly.

Id. at 115-16.

The December 2013 Projections "were prepared in the ordinary course of business, adopted by the Board, and used to structure compensation plans and when applying for D&O insurance." *Id.* at 125. Deutsche Bank's DCF analysis using the December 2013 Projections "generated a valuation range well above the Avago deal price." *Id.* at 3, 57.

Notwithstanding the above post-trial findings, the Chancery Court awarded no damages. The Vice Chancellor rejected the DCF analysis from Plaintiffs' expert, which used the December 2013 Projections to determine the standalone value of PLX. Despite acknowledging that the December 2013 Projections were what "the company believe[d] is the right number" in terms of its forecasts, the Chancery Court supported its damages approach on the basis that it lacked "sufficient confidence" in one aspect of the December 2013 Projections, the DCF analysis was "not sufficiently persuasive," and its inputs "were not sufficiently convincing." *Id.* at 32, 124, 126, 130.

The Chancery Court made no effort to modify the DCF analysis from Plaintiffs' expert in any way. Instead, the Chancery Court concluded that "[a] far more persuasive source of valuation evidence is the deal price that resulted from the Company's sale process." *Id.* at 131. The Chancery Court deemed the sale process to be "sufficiently reliable to exclude the plaintiffs' damages contention." *Id.*

The Chancery Court's finding of no damages flows from a fundamental error of law. The Chancery Court ruled that, for purposes of determining the sufficiency of damages in a plenary action, it was bound by recent precedent from this Court regarding statutory appraisals. Appraisal is "a limited legislative remedy" where there is "a judicial determination of the intrinsic worth (fair value) of their shareholdings" with no adjudication of wrongdoing. *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1186 (Del. 1988) ("*Cede I*"); 8 Del. C. §262(a). The Chancery Court's eleven-page discussion of the absence of damages contains five citations to *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017), and three citations to *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017), but none to this Court's opinion in *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015). Op. at 124-35. By relying on statutory appraisal precedent to justify giving "heavy, if not dispositive, weight" to the deal price, *Dell*, 177 A.3d at 23, the Chancery Court misapplied the law.

"Unlike an appraisal action, assessing damages in [a plenary action] requires the court to make judgments concerning liability and other contingencies." *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440-41 (Del. 2000) ("*Bomarko II*"). "Once liability has been found and the court's powers shift to the appropriate remedy, the Court of Chancery has broad discretion to craft a remedy to address the wrong." *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 262-63 (Del. 2017).

"Responsible estimates that lack mathematical certainty are permissible so long as the court has a basis to make a responsible estimate of damages." *Red Sail Easter Ltd. Partners, L. P. v. Radio City Music Hall Prods., Inc.*, 1992 WL 251380, at *7 (Del. Ch. Sept. 29, 1992). Any "uncertainties in awarding damages are generally resolved against the wrongdoer." *Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 1993) ("*Thorpe I*"). Even in contract cases, the "wrongdoer rule" means that "doubts about the extent of damages are generally resolved against the breaching party," and a trial court may "take into account the willfulness of the breach in deciding whether to require a lesser degree of certainty." *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1131 (Del. 2015).

Here, Plaintiffs were harmed by the defective sale process and presented evidence from which a responsible estimate of damages could be calculated. Remand to apply the correct legal rules respecting damages is appropriate.

SUMMARY OF ARGUMENT

1. In finding that Potomac knowingly participated in the Board's breaches of fiduciary duty, but rejecting liability for a lack of causal damages, the Chancery Court erred by failing to follow well-established precedent from plenary actions in favor of authority applicable to statutory appraisal cases. While improperly importing appraisal jurisprudence, the Chancery Court erroneously gave the same deference to the deal price that would arise if there were a conflict free, fully-informed, arm's-length transaction between a willing buyer and willing seller operating under no compulsion for a transaction. Even then, the Chancery Court made explicit findings that Singer and Potomac "fatally undermined the sales process" and the directors misled stockholders (and other interested buyers) about the fairness of the Merger, that negates the deal price as being probative of fair value. Op. at 115.

In declining to award damages, the Chancery Court asserted that there was some evidentiary uncertainty as to whether the Company could achieve forecasted operating results for certain lines of business under the December 2013 Projections, and it resolved that uncertainty against Plaintiffs. However, as the Chancery Court found, the December 2013 Projections were prepared and used in the "ordinary course of business" (*id.* at 34), and were only inchoate because Singer and Potomac coerced the Board into a premature sale that it "otherwise would not have approved." *Id.* at 115. To the extent that reliably-prepared projections of inherently unknowable future

operating results can pose an evidentiary uncertainty, any such uncertainty should be resolved against the wrongdoer who created it.

2. Even if the correct legal standards were applied, the Chancery Court erred because several key findings underlying its damages determination do not follow logically from the facts or accepted financial principles. The Chancery Court disregarded its own factual findings when giving overriding weight to the passive, post-signing market check and relied upon its own concerns over the reliability of the December 2013 Projections that were not shared by Company management. The Chancery Court also found that the beta used for the DCF analysis performed by Potomac's expert was more reliable than the one calculated by Plaintiffs' expert, when that conclusion does not follow any logical deductive process.

STATEMENT OF FACTS

On April 30, 2012, PLX and IDT announced that they reached an agreement by which IDT would acquire the Company for mixed consideration, valued at $7.00 per share or roughly $330 million. Op. at 8; A17. On December 18, 2012, the Federal Trade Commission moved to block the IDT Merger on antitrust grounds. Op. at 9; A56. The parties abandoned the deal the next day. *Id.*

In January 2013, Potomac launched an "activist campaign" with the intent to "pressure PLX … into a sale." Op. at 1, 10-14; A24-26. Singer was "Potomac's co-managing member" and "led the activist campaign." Op. at 1, 10; A24-26; A54-56, A528. "Singer's investment thesis was simple." Op. at 1. According to his own testimony, "[w]hen the IDT deal fell apart, the stock declined precipitously, and in the company's [proxy], it indicated there was a competitive bidder for PLX." A528-29. As "the Board already made a decision to sell the company," Singer believed "they should go back to the other party in the bidding process" and follow through on a transaction. *Id*. Potomac "bought shares at depressed prices" and therefore "could achieve short-term profits if PLX was sold to the other bidder." Op. at 1, 10; A42-43.

As a means of pressuring the PLX directors, "Singer issued a series of highly critical public letters in which he demanded that the Company's board of directors … conduct a sale process." Op. at 1, 10-14; A24-26; A54-56. "During meetings with members of the Board and PLX management, he insisted that they sell PLX." Op. at

1, 10-14, 17-19, 21-23; A483-84. "Potomac's internal communications show that Singer had no meaningful ideas other than selling the Company." Op. at 29; A68. Singer struggled to come up with any "specific ideas on what we will do differently" and the Company was "taking all the right steps." *Id.* Nonetheless, when Potomac nominated a dissident slate of directors – including Singer – for election to the Board in November 2013, Potomac's nominees prevailed. Op. at 28, 25; A942. "At Singer's request, the Board made him chair of the Strategic Alternatives Special Committee, which was charged with exploring strategic alternatives for the Company." Op at 1, 39-40; A253-54.

The day after Singer joined the Board, "a senior executive from Avago … contacted Deutsche Bank" to discuss an acquisition of PLX. Op. at 1-2, 36-38; A76-77. "Deutsche Bank was also advising Avago on its acquisition of LSI Corporation, one of PLX's competitors." Op. at 1-2, 36; A355. Avago was the other bidder that made an offer for PLX during the go-shop period for the IDT deal. Op. at 8; A937. Avago made another offer to acquire PLX for $6.00 per share in February 2013. Op. at 15; A938. The Board rejected that offer and advised Avago that the price had to "start with a 7." Op. at 2; A62. Following the Board's demand for at least $7.00 per share, "PLX's business had grown stronger." Op. at 2; A501.[1]

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[1] According to its CFO, PLX became "much, much stronger after the failure of the IDT deal .…" A501. PLX "divested unprofitable businesses, reducing operating expenses by approximately $20M, and strengthened [its] focus and technology

"The Avago executive told Deutsche Bank that he 'saw the PLX BoD transition' but that because of the LSI acquisition, Avago would be in the 'penalty box' until that deal closed." Op. at 2, 37; A77. "He said that once the LSI transaction was complete, Avago would be 'open for business on all topics,' including an acquisition of PLX, which he described as a '$300M deal.'" *Id*. With 45.9 million shares outstanding, "this figure equated to $6.53 per share." Op. at 2, 38; A931. "Deutsche Bank shared the information with Singer," but "Deutsche Bank and Singer did not share the information with PLX's management team or with the other members of the Board." Op. at 2, 38-39; A84. "As a result of the tip from Avago, Singer and Deutsche Bank knew when Avago was likely to bid (after the LSI acquisition closed) and how much Avago wanted to pay ($300 million)." Op. at 2, 36-38; A77; A84.

"Over the next four months, Singer bided his time." Op. at 2, 39-43. "In May 2014, Avago closed the LSI transaction and approached PLX, just as it said it would." Op. at 2, 106-07; A944. "The same senior executive from Avago asked to meet personally with Singer. The two discussed the pricing for a sale of PLX." Op. at 2, 49-50; A276; A278. "The next day, Avago proposed to acquire PLX for $6.25 per share. Nine days later, PLX had agreed in principle to a deal at $6.50 per share – just

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leadership in[PLX's] core PCI Express business." A22. With the market already showing great interest in the Company's new technology and emerging product lines, PLX anticipated "strong growth for many years to come." A47.

what Avago said it wanted to pay when it approached Deutsche Bank in December 2013." Op. at 2, 49-60; A945-47.

"During those nine days, as Chair of the Special Committee, Singer worked with Deutsche Bank to manage the process and lead the Board to a deal at $6.50." Op. at 2-3, 49-60. "One major problem was management's business plan, which had been prepared in December 2013, approved by the Board, and used by the Board when making decisions in the ordinary course of business." Op. at 3, 52, 55-58; A305. Deutsche Bank's DCF analysis presented to the Board on May 24, 2014 "generated a valuation range well above the Avago deal price." Op. at 3, 57; A295. "Using the December 2013 Projections, Deutsche Bank's model yielded a range of $6.90 to $9.78 per share, with $8.27 at the midpoint." Op. at 57; A295.

To ensure that Deutsche Bank could opine that a $6.50 per-share price was fair, "the Special Committee and Deutsche Bank had management prepare a new and materially lower set of projections, which management described as a 'sensitivity case.'" Op. at 3, 61-65; A308-09. "After presenting the two sets of projections to the Board, the directors asked for an explanation of the changes." Op. at 3, 67-68; A388. "Without ever receiving it, the Board signed off on Deutsche Bank's use of the June 2014 Projections for its valuation work." *Id.* Although management believed otherwise, "Deutsche Bank called the June 2014 Projections its 'Base Case' and the December 2013 Projections its 'Upside Case.'" Op. at 3, 64; A322; A374-75. "When

Avago received the June 2014 Projections, it correctly labeled them as a 'downside case' and continued to treat the December 2013 Projections as its base case." Op. at 3; A322.

On June 23, 2014, Avago and PLX announced their transaction. Op. at 69; A947. But the Recommendation Statement provided to PLX stockholders failed to disclose numerous key facts that undermined the fairness of the sale process, including: (1) Avago's "tip to Deutsche Bank, which Deutsche Bank relayed to Singer" immediately after he joined the Board; (2) the private meeting between the Avago senior executive and Singer that occurred the day before Avago made its renewed offer of $6.25 per share and where they "discussed pricing" for the Merger; and (3) that Singer directed Deutsche Bank to prepare the letter to Avago containing the counteroffer of $6.75 per share, which perfectly set up an agreement at the exact price that Singer already knew Avago was willing pay. Op. at 80-86; A412-19.

The Recommendation Statement also falsely described the June 2014 Projections as having been created "in the ordinary course of business for operating purposes," which gave a sense of unwarranted legitimacy to Deutsche Bank's corresponding valuation. Op. at 87-90; A442-43. Moreover, the Recommendation Statement omitted Deutsche Bank's earlier DCF analysis using the December 2013 Projections that the Board received in May 2014. Op. at 90-94; A431. This information undermined the fairness of the deal price and the negotiations with Avago

because the "entire range of the analysis" exceeded both the $6.75 per-share counteroffer and the final deal price. Op. at 90-94; A295.

The Merger closed on August 12, 2014, and all publicly held shares of PLX common stock were converted into the right to receive $6.50 in cash. Op. at 70; A949.

ARGUMENT

I. THE CHANCERY COURT MISAPPLIED THE LAW

A. Question Presented

Did the Chancery Court misapply the law for determining damages in a plenary action by: (1) importing statutory appraisal jurisprudence and giving the same deference to the deal price that would only arise from conflict-free, fully informed, arm's-length transaction between a willing buyer and a willing seller operating under no compulsion; (2) giving overriding weight to a passive, post-signing market check and wholly deferring to the deal price; and (3) resolving evidentiary uncertainties created by Singer and Potomac in their favor? A1169-71; A1175-77; A1179-81.

B. Scope of Review

The Court's "review of legal issues is *de novo*." *Bomarko II*, 766 A.2d at 439-41. This Court's "independent review is less deferential to any error [regarding] logic and computation than it is to matters of discretion or the weighing of credibility." *Enserch Corp. v. MacLane Gas Co., L.P.*, 1993 WL 541911, at *2 (Del. Nov. 18, 1993).

C. Merits of Argument

"Quite simply, equity will not suffer a wrong without a remedy." *Weinberger v. UOP, Inc.*, 1985 WL 11546, at *9 (Del. Jan. 30, 1985) ("*Weinberger II*"); *Ashby v. White*, 87 Eng. Rep. 808, 816 (Q.B. 1702). This Court has found reversible error when "the Court of Chancery viewed its remedial authority too narrowly."

Brinckerhoff, 159 A.3d at 262. "Once liability has been found and the court's powers shift to the appropriate remedy, the Court of Chancery has broad discretion to craft a remedy to address the wrong." *Id*.

The task of determining damages in a plenary action is different than determining fair value in a statutory appraisal action because the latter "does not involve an inquiry into claims of wrongdoing in the merger." *Cede I*, 542 A.2d at 1189. "The appraisal remedy … may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing … or gross and palpable overreaching are involved." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) ("*Weinberger I*"); *Cede I*, 542 A.2d at 1186 (finding that a plenary action and a statutory appraisal proceeding "serve different purposes and are designed to provide different, and not interchangeable, remedies").

A precise determination of damages is rarely possible in a plenary action for breach of fiduciary duty. *In re Netsmart Techs., Inc. S'holder Litig.*, 924 A.2d 171, 208 (Del. Ch. 2007) (referring to a damages calculation as "the crudest of judicial tools"). To be sure, "[n]o one can tell what would have happened had unconflicted parties negotiated the Merger. That is beyond the capacity of humans." *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 447 (Del. Ch. 2012). Consequently, when stockholders suffer a harm, the formulation of a compensatory damages remedy

following a breach will invariably require "reasoned guesswork." *Netsmart*, 924 A.2d at 207.

Given that inherent uncertainty, "[t]he Supreme Court has emphasized the capacious remedial discretion of this court to address inequity." *McGovern v. Gen. Holding, Inc.*, 2006 WL 1468850, at *24 (Del. Ch. May 18, 2006). Following a liability finding in a plenary case, the Chancery Court's "powers are complete to fashion any form of equitable and monetary relief as may be appropriate." *Weinberger*, 457 A.2d at 714; *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996) ("*Thorpe II*") ("[defendants] breached their fiduciary duties and … damages flowing from that breach are to be liberally calculated"). The Chancery Court's traditional approach is summarized as follows:

> In so ruling, I did not and do not pretend to have come up with a falsely precise or analytically immaculate approach to remedying the breaches of fiduciary duty I found. Rather, I concluded, and still maintain, that the remedy is a fair and equitable one, consistent with a highly contested record, that deprives the defendants of any unfair gain and restores Loral to the position it should have been in.

In re Loral Space & Communs., Inc. Consol. Litig., 2008 WL 4561146, at *1 (Del. Ch. Oct. 6, 2008).

When a defendant's misconduct causes an "evidentiary uncertainty" in calculating damages, "such ambiguities are construed against the self-conflicted [defendant] who created them." *Auriga Capital Corp. v. Gatz Properties*, 40 A.3d 839, 875 (Del. Ch. 2012) (finding that "[t]he fact we do not have concrete evidence of

what a fully negotiated third-party deal would have produced is [defendant's] own fault"); *Thorpe I*, 1993 WL 443406, at *12 (holding that "once a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer"). "A defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) (cited in *Auriga*, 40 A.3d at 877 n.160). Thus, a defendant "cannot avoid liability simply because calculation of damages is difficult." *Stone v. Stant*, 2010 WL 2734144, at *16 (Del. Ch. July 2, 2010).[2]

The Chancery Court's history is replete with decisions where its broad remedial powers were used to remedy the harm against the wrongdoer.[3] In *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161 (Del. Ch. 1999) ("*Bomarko I*"), for example,

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[2] Although Plaintiffs do not advocate for such a position here, academics reacting to the Chancery Court's post-trial opinion have asserted that, once the other elements of the claim are established, "the internal logic of Delaware law demands that burden of proof shift to defendants" with respect to damages. Holger Spamann, *PLX, Burden of Proof for Damages, and the Internal Logic of Delaware Law*, Harvard Law Forum on Corporate Governance and Financial Regulation (2014) (https://corpgov.law.harvard.edu/2018/11/30/plx-burden-of-proof-for-damages-and-the-internal-logic-of-delaware-law/).

[3] *See, e.g.*, *Auriga Capital*, 40 A.3d at 875; *Weinberger II*, 1985 WL 11546, at *9; *Loral Space*, 2008 WL 4561146, at *1; *McGovern*, 2006 WL 1468850, at *23-*24; *Gentile v. Rossette*, 2010 WL 2171613, at *1 (Del. Ch. May 28, 2010).

the court found that defendant "interfered with or corrupted the proper functioning of the Special Committee." *Id.* at 1179. In awarding damages of approximately five-times the deal price, the court explained that, "unlike the more exact process followed in an appraisal action, the 'law does not require certainty in the award of damages where a wrong has been proven and injury established.'" *Id.* at 1184 (citing *Red Sail*, 1992 WL 251380, at *12; *Thorpe I*, 1993 WL 443406, at *24). When self-interested conduct corrupts the sales and negotiation process, "potentially harsher rules come into play," and the calculation of damages "'is not to be determined narrowly ....'" *Id.* at 1184 (citing *Thorpe II*, 676 A.2d at 444).

On appeal, the Court affirmed the damages award and expressly recognized that remedying harm for a breach of fiduciary duty is different than determining fair value in appraisal proceeding:

> [U]nlike an appraisal action, assessing damages in this case unavoidably requires the court to make judgments concerning liability and other contingencies. In an appraisal action, a court must determine fair value of the stockholders' shares at the time of the merger. The question faced by the trial court in the instant action was determining what [the company's] stockholders' "shares would have been worth at the time of the Merger if [defendant] had not breached his fiduciary duties." ***The different focus of the damages inquiry in the instant case seems logical when one considers that [defendant's] breach of his duty of loyalty to [the company], in all likelihood, influenced the fairness of the merger transaction and concomitantly the price [the company's] stockholders received for their shares***. The Court of Chancery has greater discretion when fashioning an award of damages in an action for a breach of the duty of loyalty than it would when assessing fair value in an appraisal action.

Bomarko II, 766 A.2d at 440-41 (emphasis added).

Consistent with *Bomarko II*, the Court in *RBC* confirmed the equitable approach to determining damages in a plenary action. In an initial post-trial opinion, the Chancery Court found that the "self-interested manipulations" of the sales process by RBC "led to (i) an ill-timed sale of Rural that did not capture value attributable to its acquisition strategy; (ii) a mismanaged sale process that generated only one final bid by a bidder that knew it had the upper hand in bidding and price negotiations; and (iii) uninformed board approval based on manipulated valuation analyses." *In re Rural Metro Corp. S'holder Litig.*, 88 A.3d 54, 101 (Del. 2014). "Ordinarily this court places heavy reliance on the terms of a transaction that was negotiated at arm's length, particularly if the transaction resulted from an effective pre- or post-agreement market canvas." *Id.* at 102. But given that RBC's actions undermined the sales process and the overall "confluence of factors present here, exclusive reliance on the negotiated deal price is inappropriate." *Id.*

"The evidence at trial established that the value of Rural as a going concern exceeded what stockholders received in the merger." *Id.* at 102-03, 107-09. When RBC and Chris Shackelton, Rural director and managing director at Coliseum Capital Partners, "put Rural into play, the Company was just beginning to implement new growth strategies under a new CEO" that included the company making standalone acquisitions. *Id.* at 102. Management's projections were "reasonable and

achievable," but the acquisitions were not going to be fully integrated by the end of the projection period. *Id.* at 107. While recognizing the "weakness of extending the projections is that as the analysis looks farther into the future, it becomes less reliable," the Chancery Court ordered the parties' experts to submit revised DCF analyses using "the explicit method of extending the projections" to address the uncertainties in management's projections. *Id.* at 108. Upon receiving these analyses, the Chancery Court awarded damages of $4.17 per share. *In re Rural Metro Corp. S'holders Litig.*, 102 A.3d 205, 226 (Del. Ch. 2014).

On appeal, RBC argued that the Chancery Court "abused its discretion in calculating damages by ignoring the results of a full auction and post-signing market check and accepting an unreasonably inflated discounted cash flow as the sole evidence of value." *RBC*, 129 A.3d at 866. Although the task of incorporating the company's "aggressive acquisition program was problematic" for purposes of a DCF analysis, this Court endorsed the Chancery Court's reasoning that "'the technique of extending the projections deals with the valuation difficulties more forthrightly by making its assumptions explicitly and enabling them to be evaluated and tested.'" *Id.* The Court also acknowledged the Chancery Court's conclusion that "'exclusive reliance on the negotiated deal price [was] inappropriate'" because "'[w]hen the sales process started, the market did not understand Rural's prospects,'" and the "'faulty

[sales process]'" was insufficient for "'reliable price discovery.'" The Court therefore affirmed the damages award. *Id.* at 868.

Here, like in *Bomarko* and *RBC*, the Chancery Court found that Singer and Potomac harmed PLX stockholders in numerous ways. Op. at 115. But for Singer's and Potomac's manipulative and deceptive actions in "orchestrating a near-term sale of PLX," the Board "could have negotiated more effectively for a higher price," "could have taken more time to consider the Company's alternatives in depth," "could have made sure that Deutsche Bank had prepared a current valuation of the company," and "could have addressed any concerns about the December 2013 Projections more thoroughly." *Id.* at 103, 115-16. "Taken as a whole, this evidence suggests that Potomac and Singer undermined the Board's sales process and led the Board into a deal that it otherwise would not have approved." *Id.* at 115.

Nonetheless, the Chancery Court found that plaintiffs "were unable to prove that the breaches result in damages." *Id.* at 135. In doing so, the Chancery Court misapplied well-established principles for determining damages in a plenary action in three ways: (1) importing statutory appraisal jurisprudence to justify giving the same deference to the deal price in a plenary action that would arise from conflict-free, fully informed, arm's-length transaction between a willing buyer and a willing seller operating under no compulsion for a transaction; (2) relying on a single factor – a "passive, post-signing market check" – when deciding to give exclusive weight to the

deal price; and (3) resolving "evidentiary uncertainty" created by Singer and Potomac in their favor.

1. Deference to the Deal Price

When self-interested negotiators fatally undermine a deal process, "the unfairness of the process also infects the fairness of the price." *Bomarko I*, 794 A.2d at 1183; *see also HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 117 (Del. Ch. 1999) (the self-interested negotiators "have not convinced me that their misconduct did not taint the price to HMG's advantage"); *Kahn v. Tremont Corp.*, 694 A.2d 422, 432 (Del. 1997) (explaining that the fairness of the sales process and the resulting deal price can be "so intertwined"). The Chancery Court's task in a plenary action is thus to bring equity by remedying the bad acts that "influenced the fairness of the merger transaction and concomitantly the price … stockholders received for their shares." *Bomarko II*, 766 A.2d at 440-41.

By contrast, statutory appraisal involves the determination of the "fair value of the shares" while considering "all relevant factors" and does not require any finding of wrongdoing. 8 Del. Code §262(h). Appraisal will have "the most utility when private companies are being acquired or for public companies subject to a conflicted buyout …." *DFC*, 172 A.3d at 373. When a company is sold in an arm's-length transaction, free from conflicts of interest, and following a robust and open market check, the deal price can have "heavy, if not overriding, probative value." *Dell*, 177 A.3d at 30. As

this Court reiterated earlier this year, "the fair market value of a company is what it would sell for when there is a willing buyer and a willing seller" operating without any compulsion for a transaction. *DFC*, 172 A.3d at 369.

As numerous appraisal decisions make clear, heavy deference to the deal price should only be applied based on a thorough analysis of all relevant factors. For example the Court in *Dell* found that "the transaction process exemplifie[d] many of the qualities that Delaware courts have found favor affording substantial, if not exclusive, weight to deal price in the fair value analysis." 177 A.3d at 30-31. The post-trial opinion "characterized the sale process as one that 'easily would sail through if reviewed under enhanced scrutiny' and observed that '[t]he Committee and its advisors did many praiseworthy things, too numerous to catalog in its opinion ….'" *Id.* "Dell was a willing seller, ready to pay for credible buyers to do due diligence, and had a CEO and founder who offered his voting power freely to any topping bidder." *Id.* at 37. Even though "there is no requirement that the court assign some mathematical weight to the deal price," the factual findings were consistent with the notion that the deal price reached through arm's-length negotiations between a willing buyer and a willing seller, while operating under no compulsion for a transaction, is highly probative of the company's fair value. *Id.* at 18, 23.

Like *Dell*, the Court in *DFC* recognized that "the transaction resulted from a robust market search" by a willing seller, "the company was purchased by a third

party in an arm's length sale," and "there was no hint of self-interest that compromised the market check." 172 A.3d at 349. Although "there is no presumption in favor of deal price," the Court found that insufficient weight was given to the deal price under those facts. *Id.* at 349-51.[4]

Here, the Chancery Court expressly made findings of both an underlying breach of fiduciary duty and knowing participation by Potomac, including the specific finding that Singer "fatally undermined the sale process." *See* Op. at 108-16 (discussing "The Sale Process In This Case" and expressly identifying seven reasons why it was flawed and unreliable). Rather than there being "no hint of self-interest," *DFC*, 172 A.3d at 349, "Singer and Potomac had a divergent interest in achieving quick profits by orchestrating a near-term sale at PLX." Op. at 103-05. As opposed to a "willing seller," *Dell*, 177 A.3d at 37, "Potomac and Singer succeeded in influencing the directors to favor a sale when they otherwise would have decided to remain independent." Op. at 110. Instead of "praiseworthy" conduct, *Dell*, 177 A.3d at 30-31, Singer's self-interested and deceptive actions "undercut the legitimacy of the

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[4] *See also In re Appraisal of Ancestry.com, Inc.*, 2015 WL 399726, at *16 (Del. Ch. Jan. 30, 2015) (giving dispositive weight to the market price and stating: "The sales process was reasonable, wide-ranging and produced a motivated buyer. It has been approved of, as free from the taint of breaches of fiduciary duty, by this Court."); *Merion Capital L.P. v. BMC Software, Inc.*, 2015 WL 6164771, at *15 (Del. Ch. Oct. 21, 2015) (giving dispositive weight to the deal price and stating: "The sales process was subsequently challenged, reviewed, and found free of fiduciary and process irregularities in a class action litigation for breach of fiduciary duty.").

eventual price negotiations with Avago that Singer led." Rather than appearing like arm's-length negotiations, "the quick back-and-fourth in May 2014 can be seen as a means of arriving at the $300 million valuation that Krause identified in December 2013." Op. at 83. As opposed to the deal price being a "reliable indication of fair value," *DFC*, 172 A.3d at 351, "the directors agreed to accept less than what they rejected when PLX's business was weaker." Op. at 112. Indeed, the deal price fell significantly below the consideration that PLX directors approved in the sale to IDT. Op. at 8. As PLX's CFO explained:

> We sold PLX to IDT for $7 a share, cash and stock. A year later, we were the monopoly in the business. We had killed ... IDT's ability to compete in the PCI Express business. We had finished our most profitable year. We had gotten rid of Teranetics. We had a technology which we believed was going to be dramatically more powerful than the Ethernet technologies that existed in the data center today. And we sold the company for less than $7. I thought that was wrong.

A500-01; Op. at 111.

Accordingly, because of the underlying finding of breach and knowing participation, as well as the express findings of a "fatally flawed" deal process, the statutory appraisal paradigm used by the Chancery Court to justify dispositive deference to the deal price was error and should be reversed.

2. Dispositive Weight to a Passive, Post-Signing Market Check

In its post-trial opinion, the Chancery Court did not find that any aspects of the pre-signing shopping process, taken individually or collectively, sufficiently

demonstrated that the deal price was a reliable indicator of fair value. Op. at 131-35. To the contrary, the evidence demonstrates that the "pre-signing process was not extensive" and was "flawed from a fiduciary standpoint." Op. at 133-34. Singer and Potomac "had a divergent interest in achieving quick profits," pushed the PLX directors into approving a sale "when they otherwise would have decided to remain independent," and therefore "fatally undermined the sales process." *Id.* at 103, 110-15. Instead, Chancery Court held that "[m]ore important than the pre-signing process was the post-signing market check." *Id.* at 133. This finding was error in two ways; (1) the argument was never raised; and (2) relying on a market-clearing price as an overriding indication of fair value is inconsistent with longstanding Delaware law.

First, any "'[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argument are deemed waived.'" *In re Mobilactive Media, LLC*, 2013 WL 297950, at *12 n.152 (Del. Ch. Jan. 25, 2013); *Emerald Partners v. Berlin*, 726 A.2d 1215 (Del. 1999) ("Issues not briefed are ... waived."). Here, Potomac never argued that PLX conducted a passive, post-signing market check by virtue of satisfactory deal protection provisions that supports deference to the deal price. A1194-1269. Potomac did make a variety of arguments against an award of damages, including, *inter alia*, PLX's "unaffected stock price" supported the fairness of the deal price (A1263-65), and PLX ran multiple conflict-free "market checks" ***before*** the Merger Agreement was approved (A1261). Consequently, the Chancery

Court should not have given weight to a passive, post-signing market check when Potomac itself did not view it as deserving any weight.

Second, the existence of market-clearing price does not mean a company should be sold. "This Court has recognized 'the prerogative of a board of directors to resist a third party's unsolicited acquisition proposal or offer.'" *Unitrin, Inc. v. Am. General Corp.*, 651 A.2d 1361, 1383 (Del. 1995) (citing *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 43 n.13 (Del. 1994)). When directors, while acting in "good faith" and following a "reasonable investigation," determine that a third-party bid is "inadequate," the board may oppose that offer. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1985). Consistent with their situational duties to maximize stockholder value when considering a possible sale of control, directors should reject undervalued offers in favor of "remaining independent and not engaging in any transaction at all." *Chen v. Howard-Anderson*, 87 A.3d 648, 672 (Del. Ch. 2014). The target's directors may in good faith choose to '"follow a course designed to achieve long-term value even at the cost of immediate value maximization.'" *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 124-25 (Del. Ch. 2011) (citing *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1149-50 (Del. 1990)).

Similarly, the existence of a market-clearing price is not sufficient, on its own, to override a fatally undermined sales process. *See Smith v. Van Gorkom*, 488 A.2d

858, 875 (Del. 1985) ("[T]he fact of a premium alone does not provide an adequate basis upon which to assess the fairness of an offering price."). Like here, the Chancery Court in *Rural Metro* found that "RBC's self-interested manipulations caused the Rural process to unfold differently than it otherwise would have," and "a fully-informed Board would have had numerous opportunities to achieve a superior result." 88 A.3d at 101. But the fact that the board of directors accepted the highest bid after twenty-one potential buyers "executed confidentiality agreements and received the confidential information memorandum" did not extinguish RBC's potential liability. *Id.* at 71. Moreover, the scope of the deal protections was not a part of the analysis undertaken either in *Rural Metro* or here.

Permitting a passive, post-signing market check to eliminate liability would allow directors to be entirely "passive instrumentalities during merger proceedings," *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 368 (Del. 1993) ("*Cede II*") (citing *Unocal*) – so long an acceptable level of deal protections were eventually put in place – and would nullify decades of Delaware jurisprudence setting forth appropriate standards of conduct in a sales process. In other words, any self-dealing, bad faith conduct or aiding and abetting thereof would be cleansed so long as there are no onerous deal protections put in place. That cannot be the law.

3. Perceived Evidentiary Uncertainty

"The DCF model of valuation is a standard one that gives life to the finance principle that firms should be valued based on the expected value of their future cash flows, discounted to present value in a manner that accounts for risk." *Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *9 (Del. Ch. Aug. 19, 2005). "A reliable DCF valuation starts with management's contemporaneous projections." *Rural Metro*, 88 A.3d at 107. "When management projections are made in the ordinary course of business, they are generally deemed reliable." *Cede & Co. v. Technicolor, Inc.*, 2003 WL 23700218, at *7 (Del. Ch. Dec. 31, 2003). "In stark contrast, *post hoc*, litigation-driven forecasts have an 'untenably high' probability of containing 'hindsight bias and other cognitive distortions.'" *Id*. (citing *Agranoff v. Miller*, 791 A.2d 880, 892 (Del. Ch. 2001)).

When assessing liability, the Chancery Court made a series of findings that support the reliability of the December 2013 Projections. Op. at 32-35. PLX management prepared the December 2013 Projections in connection with "the next update of the Company's business plan." *Id.* at 32. PLX management worked directly with the Company's "sales organization" to develop revenues, and then with "the individual business units" to prepare "spending plans to support those targets." *Id.* "Senior management debated the resulting figures and made adjustments 'to get what ... the company believes is the right number.'" *Id.* Before finalizing the

projections, "management discussed the plan with the Board. The directors suggested some minor changes, but otherwise endorsed the projections." *Id.* at 34. Management then "distributed an updated plan" to the Board, and "the Board approved the plan." *Id.*

"[T]he Company used the plan in the ordinary course of business as if the Board and management believed it represented the Company's best estimates of its future performance." *Id.* "In April 2014, the Board signed off on a proposal for D&O insurance based on the December 2013 Projections. The Board also signed off on an executive compensation program based on the December 2013 Projections." *Id.* at 34-35. Before the Board agreed to the $6.50 per-share bid, Deutsche Bank's presented a DCF analysis to the Board on May 2014, which "generated a valuation range well above the Avago deal price." *Id.* at 3. "Using the December 2013 Projections, Deutsche Bank's model yielded a range of $6.90 to $9.78 per share, with $8.27 at the midpoint." *Id.* at 57.

In an attempt to diffuse the superior value shown by the December 2013 Projections, Potomac focused on a "customary disclaimer paragraph" accompanying those forecasts that described them as an "aggressive plan." *Id.* at 33. "During this litigation, the concept of an 'aggressive plan' became a mantra for the defense witnesses, most of whom were named defendants who had not yet settled when they testified by deposition." *Id.* Singer and the PLX directors "repeated those words

frequently and volunteered them gratuitously as if they had been instructed to mention them as often as possible. Their coordinated, redundant, and excessively emphatic performances undermined their credibility." *Id*. at 33-34.

Despite these findings, the Chancery Court concluded that the December 2013 Projections were not "sufficiently reliable" for purposes of awarding damages by focusing on a discrete aspect of the Company's future business. *Id.* at 125-27. "To reach the results projected for the later years in the projection period, the December 2013 Projections identified three principal layers of revenue. The first layer contemplated continued growth in PLX's existing 'inside the box' switches, which used a technology called PCI Express to facilitate ultra-fast data transfers between components 'inside the box' of a single computer." *Id.* at 125. "The second layer contemplated updating PLX's 'inside the box's switches to use a new technology called PCI ExpressFabric." *Id.* The Court of Chancery indicated that it would "have no difficulty" basing a damages award on projections from these business units. *Id.* at 125-26.

The "third layer of future revenue" came from PLX's "new line of 'outside the box' products that would use the ExpressFabric technology to connect components located in different computers, such as the multiple servers in a server rack." *Id.* This revenue was to help drive "higher growth" rates for PLX during the out years of the projection period, including 2017 and 2018. *Id.* The Chancery Court stated "[t]he

evidence at trial did not give [it] sufficient confidence to base a damages award on this element of the projections." *Id.* at 126. The Chancery Court suggested that these "outside the box" products required the Company to "enter the hardware market and compete with incumbent players like Cisco" and was "a new line of business involving a new set of customers with a new set of requirements." *Id.* In other words, the new business did not have time to prove itself before PLX was sold.

As discussed further below, the Chancery Court disregarded record evidence which demonstrates that PLX's systems business was already established with active customers and engineering commitments. *See infra*, §II(C)(2). Nonetheless, the Chancery Court erred by not resolving this perceived "evidentiary uncertainty" against "the self-conflicted [defendant] who created [it]." *Auriga*, 40 A.3d at 875; *Thorpe I*, 1993 WL 443406, at *12 (holding that "uncertainties in awarding damages are generally resolved against the wrongdoer").

Singer and Potomac were responsible for the perceived evidentiary uncertainty of the December 2013 Projections. *See* Op. at 115-16 (finding that, but for Singer's actions, the Board "could have addressed any concerns about the December 2013 Projections more thoroughly"). The only reason there is not a lengthier track record of success and growth for PLX's systems business was because "Potomac and Singer succeeded in influencing the directors to favor a sale when they otherwise would have decided to remain independent." Op. at 110. Rather than allow PLX's new systems

business to continue to develop and drive increased cash flows, "Potomac and Singer undermined the Board's process and led the Board into a deal that it otherwise would not have approved." *Id.* at 115.

PLX directors and management believed that any sale was premature because PLX would have been more valuable if its businesses were allowed to continue to develop, which the Chancery Court recognized in a lengthy recitation of supporting evidence. *See* Op. at 111-12, n. 535; A501 (Whipple testifying that "[a] few years later, after PCI ExpressFabric had developed, we would have been worth a lot more money."); A481 (Riordan testifying that PLX was "at a low point in the company's potential value"); A66-67 (August 4, 2013 letter from Salameh to Singer stating: "While we continue to be open to exploring alternatives to maximize stockholder value, our Board does not believe that a commitment to acting in the best interests of all stockholders and to maximizing stockholder value means selling PLX at an inopportune time and for an inadequate price – even if that price represents a premium to the current trading price."); A60 (April 8, 2013 presentation from PLX insurance carriers stating: "Given the recent changes at PLX, we do not think this is a good time to sell."); A468 (Schmitt testifying: "Q. And you formed [the Special Committee], but, again, there was . . . nothing to indicate that you – that you folks believed that this was a good time to sell the company, correct? [Objection] A. I'll say that's correct.").

Thus, in pushing the Company into a premature sale, Singer and Potomac "prevented [PLX] from generating the higher values that could be achieved by allowing [management] to develop [PLX's] business strategy with the opportunity for a later, better timed sale." *Rural Metro*, 88 A.3d at 103. The Chancery Court erred by allowing the perceived evidentiary uncertainty created by defendants' misconduct to form a basis for not awarding damages.

II. THE CHANCERY COURT'S DAMAGES DETERMINATION IS CLEARLY ERRONEOUS

A. Question Presented

Did the Chancery Court commit clear error in its conclusions regarding (1) the weight to be afforded to the passive, post-signing market check, (2) the reliability of the December 2013 Projections, and (3) an appropriate beta for the DCF analysis of PLX? A1159-160; A1175-77; A1309-11.

B. Scope of Review

Assuming a "correct formulation" of the law, the Court will review "'fact dominated'" questions for clear error. *Cede II*, 634 A.2d at 360.

C. Merits of Argument

The Chancery Court's conclusions regarding fair value "do not follow from the court's key factual findings and from relevant, accepted financial principles." *Dell*, 177 A.3d at 5. When "factual findings do not have support in the record" or the "valuation is not the result of an orderly and logical deductive process," the Chancery Court's determination of fair value will not be upheld. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 35 (Del. 2005); *DFC*, 172 A.3d at 348-49 (explaining that a determination of fair value should have a "reasonable basis in the record and in accepted financial principles"). Here, the Chancery Court erred because its conclusion that Plaintiffs did not prove causal damages does not follow logically from the facts or accepted financial principles with respect to several key issues.

1. Passive, Post-Signing Market Check

The Chancery Court held that the deal protections in the Merger Agreement met the standards for a "passive, post-signing market check," and, with "[n]o topping bid" having emerged, Plaintiffs "failed to show causally related damages, and their claim for aiding and abetting therefore fails." Op. at 134-35.

The Court rejected the same narrow reasoning in *RBC.* In that case, "RBC contend[ed] that the trial court ignores our recent holding in *C&J Energy*, advocating that the post-signing market check cures any shortcomings of the Rural sale process." *RBC*, 129 A.3d at 856. "But RBC ignore[d] other significant aspects of our holding in *C&J Energy*, including our recognition that '[t]he ability of the stockholders themselves to freely accept or reject the board's preferred course of action is also of great importance in this context.'" *Id.* The Court explained that stockholders (as well as directors) "were not fully informed when they voted to accept the deal." *Id.* at 857. When combined with the other misconduct that "undercut the reliability and competitiveness of the Rural sale process," the Court concluded that the passive, post-signing market check did not support a finding that the deal price was fair. *Id.*

Here, the factual findings in the post-trial opinion support the very same conclusion. The Chancery Court not only found that Singer and Potomac "fatally undermined the sale process" and knowingly participated in and induced the Board's breaches of fiduciary duty leading up to its approval of the Merger, but also that

Plaintiffs proved their "disclosure claims" due to materially false and misleading statements made in the Recommendation Statement. Op. at 80-94.

The same way that stockholders were deceived regarding the fairness of the Merger, the Recommendation Statement gave other potential bidders materially incomplete and inaccurate information about the value of PLX and its financial prospects. As the Chancery Court recognized, the Recommendation Statement falsely represented that the June 2014 Projections were prepared in "the ordinary course of business for operating purposes" and only after the Board and PLX management "'discussed updating the five year forecast based on more current information.'" *Id.* at 87-90. Given that the June 2014 Projections resulted in significant reductions in PLX's cash flows, this would give potential bidders the false impression that PLX's financial outlook had recently declined, when in reality it had only "grown stronger." *Id.* at 2, 87-90.

Rather than being prepared in the ordinary course of business, the June 2014 Projections "were prepared for purposes of Deutsche Bank's valuation analysis in the shadow of the pending deal." *Id.* at 65. The Board directed Deutsche Bank to rely on those forecasts for purposes of its fairness opinion even though it never received an explanation of what caused the significant reductions in PLX's cash flows as compared to the December 2013 Projections. *Id.* at 67. The Recommendation Statement falsely labeled the June 2014 Projections as the "Base Case" and the

December 2013 Projections as the "Upside Case," even when PLX management believed the exact opposite. *Id.* at 87-90.

Moreover, the Recommendation Statement omitted Deutsche Bank's DCF analysis using the December 2013 Projections that was presented to the Board on May 24, 2014, which "generated a valuation range well above the Avago deal price." *Id.* at 3, 90-94. "Using the December 2013 Projections, Deutsche Bank's model yielded a range of $6.90 to $9.78 per share, with $8.27 at the midpoint." *Id.* at 57. Conversely, Deutsche Bank's DCF analysis for the June 2014 Projections set forth in the Recommendation Statement "yielded a range of $5.07 to $6.99 per share, with $5.89 at the midpoint." *Id.* at 66-67. As a result, the Recommendation Statement gave a materially misleading representation as to the value of PLX. *See Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) (liability recognized where management "attempted to sabotage" a sale process by failing to provide proper due diligence materials to potential bidders).

Critically, the Merger Agreement contained a no-shop provision, which made the Recommendation Statement the only source of new information for potential bidders, during the post-signing period. *Id.* at 109. Just the same way that PLX stockholders could not cast a fully informed vote on the Merger, any potential bidders interested in making a superior proposal could not make a fully informed decision about whether to do so.

2. December 2013 Projections

When finding that Potomac induced and knowingly participated in breaches of fiduciary duty by the PLX directors, the Chancery Court determined that the December 2013 Projections were reliably prepared in the ordinary course of business and regularly used by management and the Board in its ongoing operations. *Id.* at 32-35. But when looking at these same projections for the purposes of determining causal damages, the Chancery Court concluded that they were not "sufficiently reliable" because they included future, inchoate revenue from PLX's emerging systems business. *Id.* at 125-27. The factual record does not support a finding of any insurmountable uncertainty.

When asked during deposition about PLX management providing the December 2013 Projections to Avago on May 21, 2014 – just one month before the Merger Agreement was executed – Whipple testified that these projections were their "best view of what the future held." A507. PLX management not only believed that the December 2013 Projections were "attainable," but "[t]hey were the basis for the performance and the variable compensation that was awarded to the executive officers." A508-09. PLX management "had a vested interest having them be achievable" for the Company. A509. As Whipple explained, PLX management "never tried to oversell the board of directors on where we were going. Our motto was, under-promise and over-deliver." *Id.*

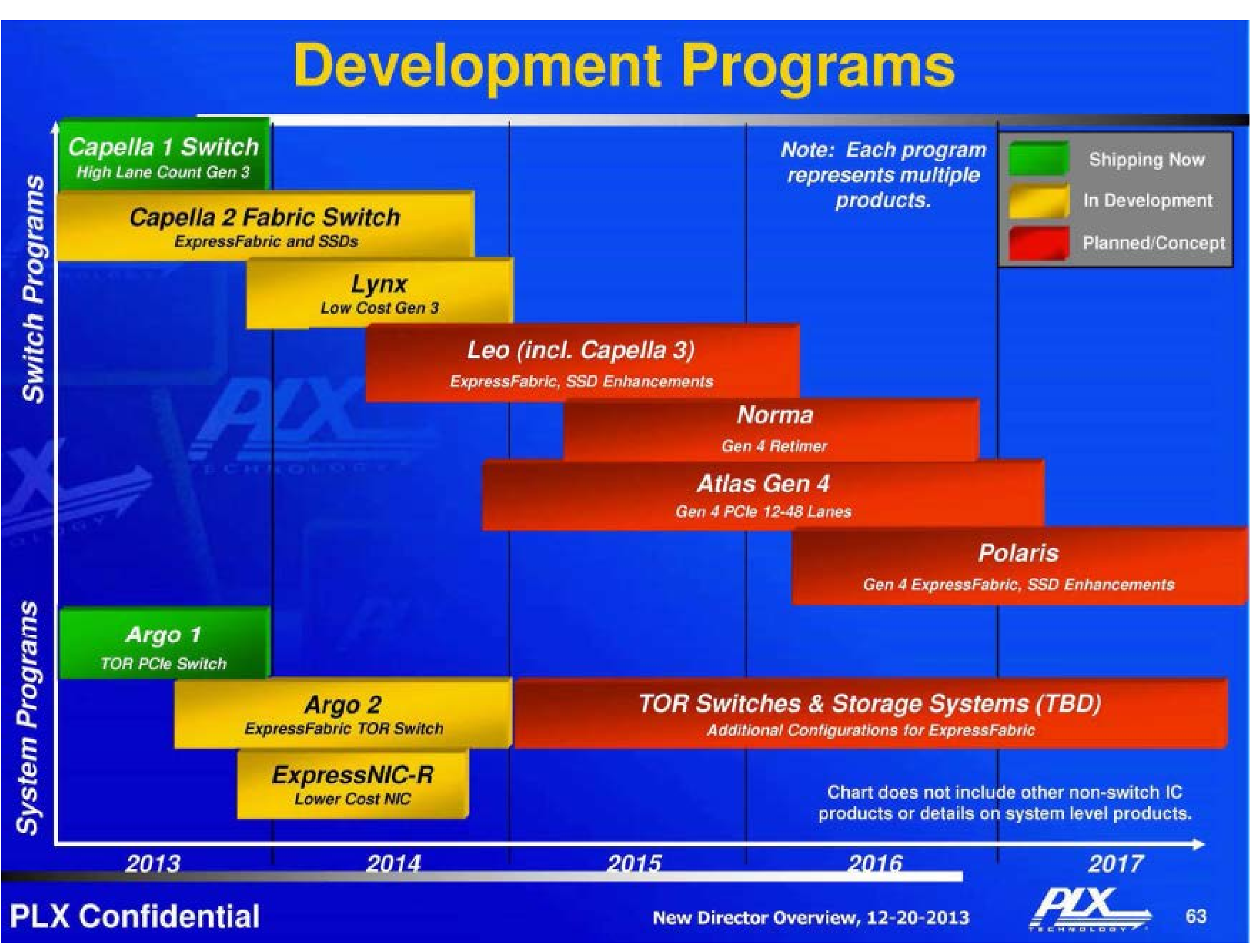
At the time that PLX management was preparing the December 2013 Projections, the Company was experiencing a growing interest in, and demand for, its emerging "outside the box" products. A134-35. In a presentation made to Singer and the new PLX directors in December 2013, PLX management compared the current market interest in the Company's emerging products lines to what it was just eighteen months earlier, as demonstrated by the follow slides:

Id.

By December 2013, customers that were already planning to use the Company's ExpressFabric technology and systems products included such durable businesses as Dell, Lenovo, Futjitsu and DataDirect Networks. A134. PLX had active engineering teams assigned for these engagements. *Id*. Moreover, companies like Microsoft, HP, Samsung, EMC and Hitachi were in the midst of evaluating ExpressFabric, and new opportunities existed with IBM, Toshiba, Oracle and Juniper. *Id.*

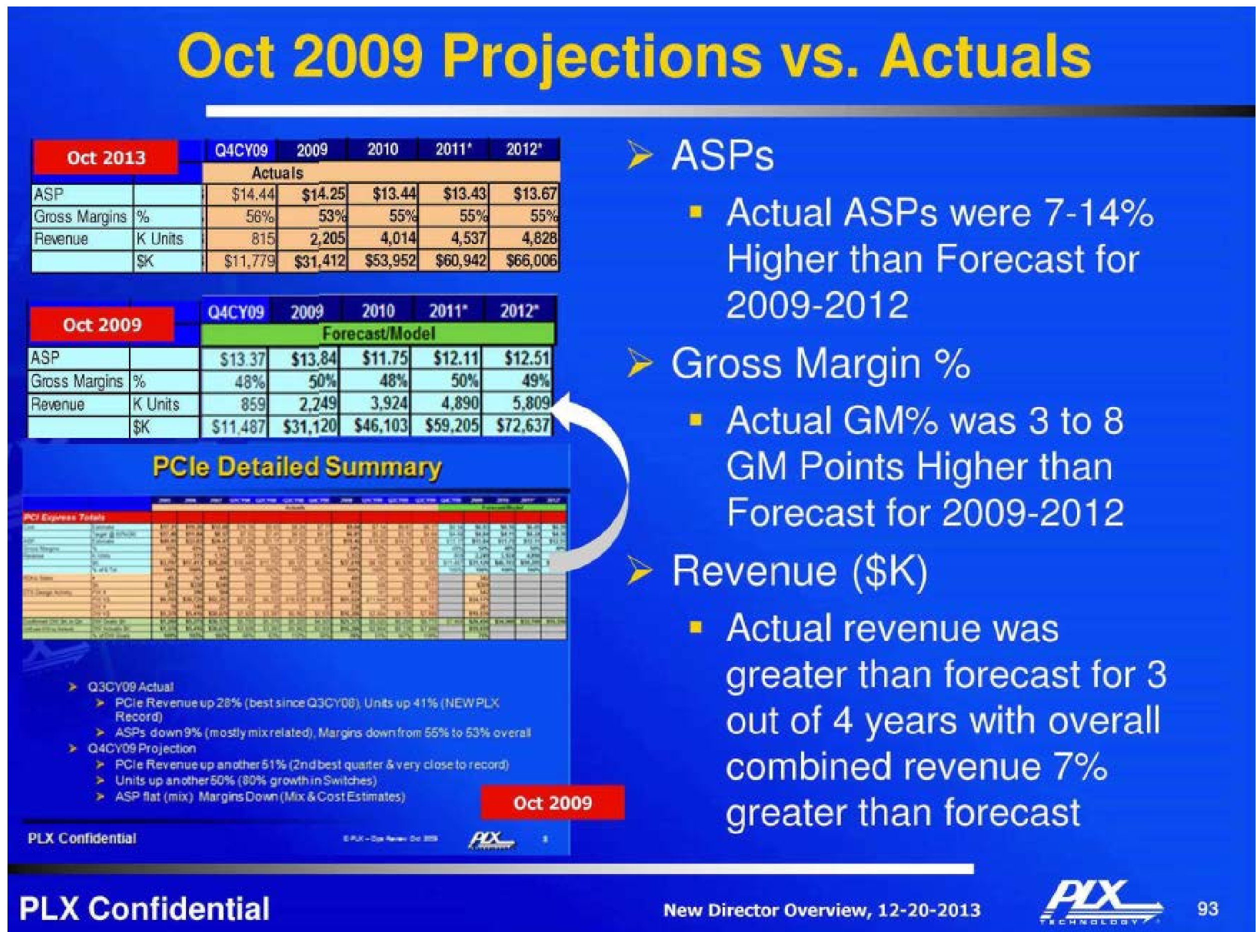
PLX management also developed detailed engineering schedules with for individual ExpressFabric products, including systems products. A148. The Cappella

1 Switch and the Argo 1 systems product were already being shipped, the Cappella 2 Fabric Switch and the Argo 2 Switch and the ExpressNIC-R Switch systems product were in active development, and the Leo Switch, the Norma Switch, the Atlas Gen 4 Switch, the Polaris Switch, and additional TOR Switches and Storage Systems were scheduled to begin development by early 2015. *Id.* PLX's engineering schedules are summarized in the following slide, which was provided to PLX directors in December 2013:



Id.

Although the Chancery Court expressed concern about whether PLX management could meet its forecasts in the December 2013 Projections, PLX management did not. A263-67; A271-75. In presentations to the Board and to potential buyers, PLX management touted its track record of performance compared to prior multi-year projections. A266; A273. When comparing four-year financial projections prepared in October 2009 to the Company's actual results, PLX's gross margins were "3 to 8 GM Points Higher" than what was forecasted. *Id.* The Company's actual revenue was "greater than forecast for 3 out of 4 years with overall combined revenue 7% greater than forecast." *Id.* The Company's average selling prices were also between "7-14% Higher than Forecast" for that same time period. This data is summarized in the following slide:



A178; A266; A273.

Thus, the Chancery Court's concerns about the lack of "sufficient reliability" of the December 2013 Projections do not have "reasonable basis in the record," and its judgment should therefore be reversed as to its damages determination. *DFC*, 172 A.3d at 348-49.

3. Calculation of Beta

When considering the DCF analysis from Plaintiffs' business valuation expert using the December 2013 Projections, Ronald G. Quintero ("Quintero"), the Chancery Court took issue with only a single discretionary input – the Company's beta. Op. at

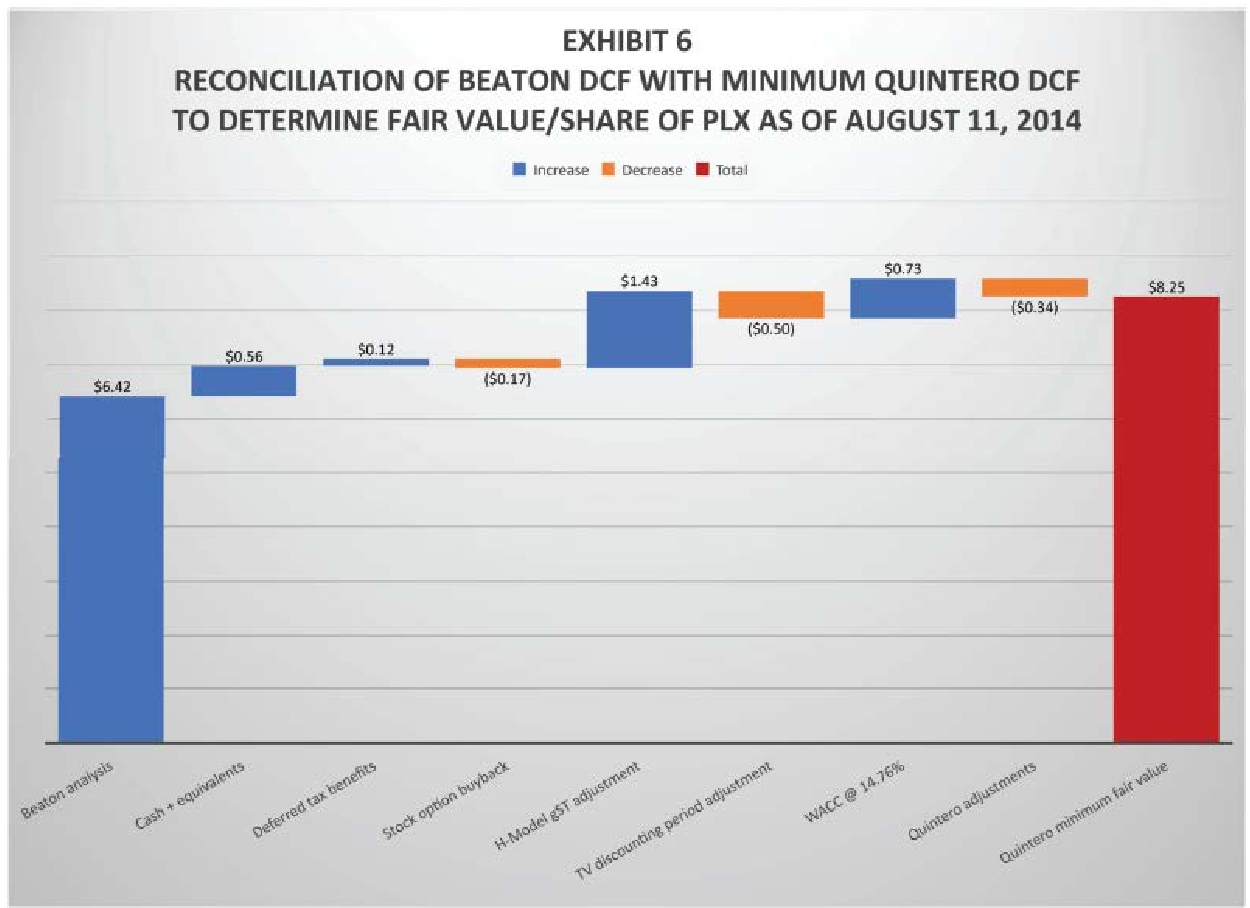
129-30. Quintero calculated a beta of 0.985 by using daily observations during the one-year period preceding the public announcement of the Merger. A788. With no stated support, the Chancery Court stated that the peer beta calculated by Potomac's expert, Neil Beaton ("Beaton"), of 1.72 was "more credible" than Quintero's beta calculation. Op. at 130. With this finding, the Chancery Court concluded that it was "not persuaded that the plaintiffs carried their burden of proof on damages." *Id*. at 131. This finding disregards the record and the methodologies that Quintero and Beaton used to calculated their respective betas.

Quintero utilized PLX's actual beta. A977. Quintero observed that PLX's beta was declining over time and thus used a one-year period. A976-77. A longer period beta would look too far backward, as PLX had recently undergone significant change – including substantial divestitures of unprofitable businesses – and emerged a profitable, debt-free company with a "pristine balance sheet" and a near monopoly in its PCI Express business. A976-78. Quintero calculated PLX's trailing one-year raw beta at .985 based on the daily closing prices of PLX and the S&P 500 for the year ended June 20, 2014, before PLX stock was impacted by the announcement of the Avago Offer. A788. Quintero's beta fell within the range of PLX-specific betas contemporaneously observed by Deutsche Bank (.820) and Barclays (1.082), as well as betas from the BPM (.840) and the PHLX Semiconductor Index (1.130). A856.

Conversely, no one knows how Beaton calculated his "peer beta," including Beaton. In his opening report, Beaton stated that he utilized a beta "equal to the mean of the selected guideline public companies." A565. Beaton's report provided no further information. *Id*. At deposition, Beaton testified, "I used the median." A922. At trial, Beaton denied that he used a mean or median and testified that he downloaded "all those stock prices" for six companies into an Excel spreadsheet and calculated one combined proxy beta via a wholly undefined methodology. A1035-36. Beaton also testified at deposition that he used "five-year monthly" betas for his peer group (A922), but not all of Beaton's "guideline" companies were publicly traded for five years preceding the Valuation Date. A1035. Moreover, three of Beaton's six chosen companies had the three highest five-year betas out of the thirty-four companies that met his claimed selection criteria. A1314. Potomac never produced Beaton's worksheets, either in expert discovery nor at trial. Thus, "Beaton's analysis ... is unmoored to any objective financial analysis the court can reasonably evaluate, and thus cannot be the basis of what are, in aggregate, substantial discounts to [PLX's] fair value." *Gesoff v. IIC Industries, Inc.*, 902 A.2d 1130, 1159 (Del. Ch. 2006) (prior testimony by the same expert).

Not only is Quintero's beta reliable and based on the only replicable calculation provided to the Chancery Court, but Plaintiffs' damages were not pinned to the dispute over beta being resolved in their favor. A840-41. Quintero's rebuttal report

presented bridges quantifying the areas of dispute between the high and low ends of his DCF analysis and that performed by Beaton on a per-share basis. *Id.*[5] If Quintero had simply used Beaton's weighted average cost of capital, Quintero's DCF analysis would have ranged between $7.33 and $7.52 per share, as demonstrated by the following slides:



Id.

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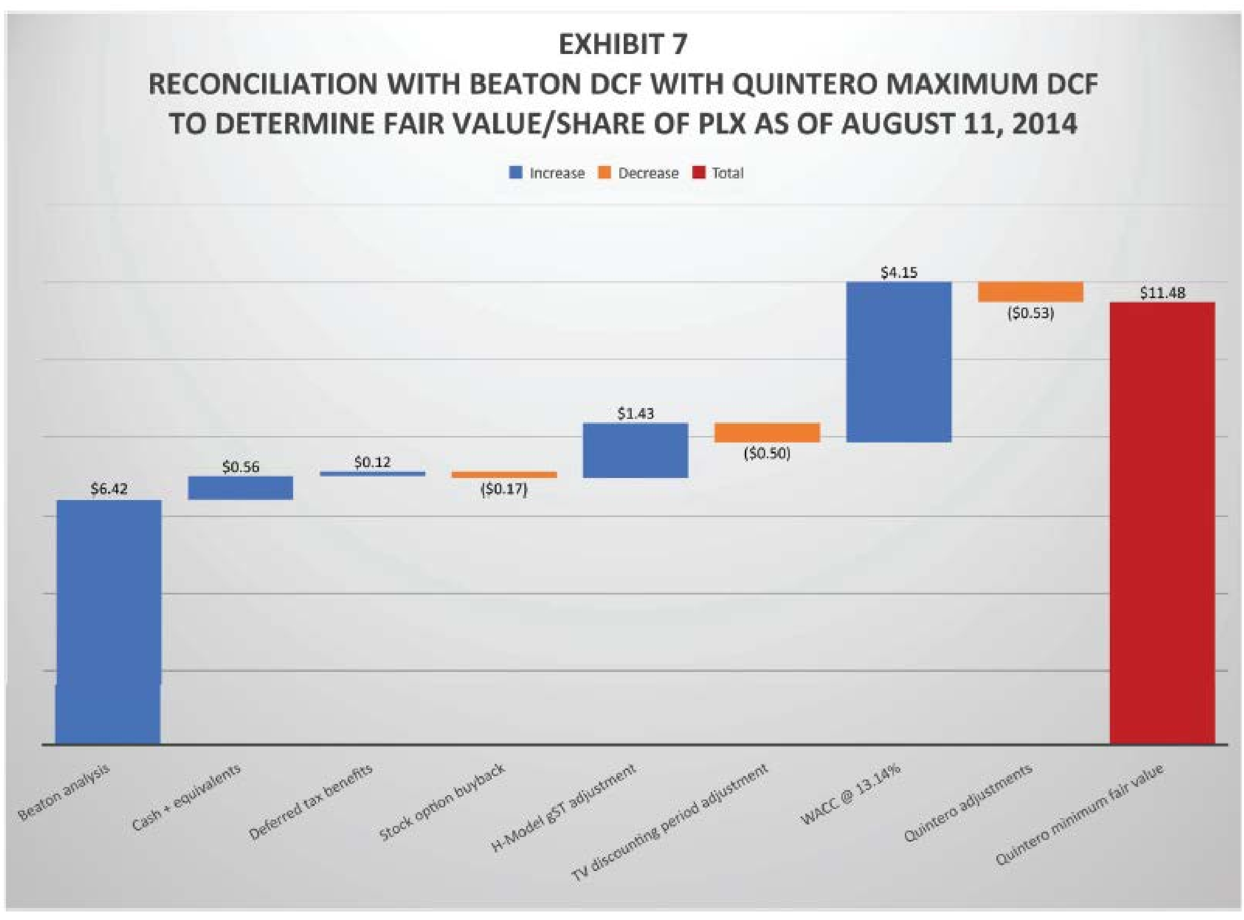
5 Whereas Quintero presented a high end, a low end and a midpoint for his DCF analysis using the December 2013 Projections, Beaton calculated a single point of value.



Id.

Consequently, the Chancery Court's conclusion that Quintero's beta calculation was less reliable than Beaton's beta, and that it prevented Plaintiffs from proving causal damages, does not have a "reasonable basis in the record and in accepted financial principles," *DFC*, 172 A.3d at 348-49, and its judgment should therefore be reversed to allow for a proper damages determination.

CONCLUSION

For these reasons, plaintiffs respectfully requests that the Court reverse the judgment with respect to the Chancery Court's determination of damages.

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Respectfully submitted,

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