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Case Number 571,2018

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

DEFENDANT BELOW-APPELLEE'S CORRECTED ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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OTHER AUTHORITIES

Table of Defined Terms

PLX Directors

Colombatto	Martin Colombatto (Potomac nominee)
Domenik	Stephen Domenik (Potomac nominee)
Hart	John Hart
Raun	David Raun (CEO, 2012 – Merger)
Salameh	Michael Salameh (Co-Founder; CEO, 1986 – 2008)
Schmitt	Ralph Schmitt (CEO, 2008 – 2012)
Singer	Eric Singer (Co-Manager of Potomac's general partner)
Verderico	Patrick Verderico

Former PLX Directors

Guzy	James Guzy, Sr.
Riordan	Thomas Riordan
Smith	Robert Smith

PLX Employees

Schaeffer	Gene Schaeffer, E.V.P of Sales
Whipple	Arthur "Art" Whipple, CFO

Deutsche Bank

Cho	Thomas Cho, Managing Director
Howell	Adam Howell, Managing Director

Avago

Krause	Thomas Krause, V.P. of Corporate Development

Other Terms

14D-9	PLX Schedule 14D-9, dated July 8, 2014 (A389-A462) (Opinion definition: "Recommendation Statement")
2014 AOP	PLX's annual operating plan for 2014 (B761-B763)
AOB	Appellants' Opening Brief
Avago	Avago Technologies Wireless (U.S.A.) Manufacturing Inc. and/or Pluto Merger Sub, Inc.
Balch Hill	Balch Hill Partners, L.P.
Barclays	Barclays Capital, Inc., financial advisor to Avago
Base Case	DB's final DCF analysis using the June Projections (A374)
Board	PLX Board of Directors
Broadcom	Broadcom Inc. (Company 2)
Connectivity	PLX's suite of interconnectivity products associated with the peripheral component interconnect ("PCI") standard
Cypress	Cypress Semiconductor Corporation (Company 1)
DB	Deutsche Bank Securities, Inc., financial advisor to PLX
December Projections	PLX's 2014 AOP and 2015-2018 projections, prepared in December 2013 (B819-B820) (Opinion definition: "December 2013 Projections")
FTC	Federal Trade Commission
IDT	Integrated Device Technology, Inc.
Inphi	Inphi Corporation (Company 3)

June Projections	PLX's updated 2014 AOP and 2015-2018 projections, prepared in June 2014 (A310-A314; B1128-B1129) (Opinion definition: "June 2014 Projections")
LSI	LSI Corporation
Mattson	Mattson Technology, Inc.
Merger Agreement	The merger agreement entered into between PLX and Avago on May 30, 2014
Opinion	Opinion of V.C. Laster, *In Re PLX Technology Inc. Stockholders Litigation* (C.A. No. 9800-VCL), dated October 16, 2018
Oxford	Oxford Semiconductor, Inc.
PCIe	PCI Express
Pericom	Pericom Semiconductor Corporation
PLX or the Company	PLX Technology, Inc.
PMCS	PMC-Sierra, Inc.
Potomac	Potomac Capital Partners II, LP
Semtech	Semtech Corporation (Company 9)
Special Committee	Strategic Alternatives Special Committee of the PLX Board
Sigma Designs	Sigma Designs, Inc.
Support.com	Support.Com, Inc.
Teranetics	Teranetics, Inc.
Merger	The acquisition of PLX by Avago, through a tender offer and short-form merger which closed on August 12, 2014

UF	Undisputed Fact (from the trial court's Pre-Trial Order, dated April 6, 2018) (A926-A966)
Upside Case	DB's final DCF analysis using the December Projections (A375)

NATURE OF THE PROCEEDINGS

In August 2014, PLX was sold in an arm's-length transaction to Avago for $6.50/share. More than 80% of PLX's shareholders tendered their shares. Plaintiffs settled with all defendants other than Potomac, a 10.2% stockholder that conducted a successful proxy contest to elect three directors to PLX's Board. In an Opinion by Vice Chancellor Laster, the Court of Chancery found Potomac liable for aiding and abetting a purported breach of fiduciary duty by "influencing the directors to favor a sale when they otherwise would have decided to remain independent." Op.110. However, the trial court found that Plaintiffs "failed to carry their burden of proof" on damages and that "the Merger consideration exceeded the standalone value of the Company." Op.121, 134. It thus entered judgment in favor of Potomac. Op.5.

The record supports that PLX was sold for a fair price. The Board shopped the Company for two years and conducted three separate market checks, reaching out to all logical buyers and providing them with all relevant information, including management's most optimistic set of internal projections. The Merger Agreement contained a 3.5% break-up fee and gave potential buyers forty-nine days to submit a topping bid. Yet, no other buyer offered to acquire PLX, let alone at a price higher than $6.50/share.

However, neither the record nor Delaware law supports the trial court's findings that the directors breached their fiduciary duties or that Potomac aided and abetted such a breach, as discussed in Points II-IV, below. Accordingly, Potomac respectfully requests that the Court affirm the entry of judgment in its favor due to the lack of damages, and reverse the trial court's unwarranted finding of liability, which unduly prejudices Potomac and the former directors of PLX.

SUMMARY OF ARGUMENT

As to Appeal:

1. Denied. The trial court correctly found that Plaintiffs failed to prove damages. The court applied the correct measure of damages and correctly found that potential buyers had a full and fair opportunity to acquire PLX, such that the deal price was indicative of the fair value of PLX. *See* § I(C), *infra*.

2. Denied. The trial court correctly found that Plaintiffs' DCF analysis was unreliable. Plaintiffs' expert relied on the December Projections, which the trial court correctly found were overly speculative. Further, Plaintiffs' expert relied on unreasonable inputs, such as a manipulated beta, resulting in an artificially inflated value that was more than $3.86/share higher than the deal price. *See* § I(C)(1), *infra*.

As to Cross-Appeal:

3. The trial court erred in finding that Potomac's belief that PLX should be sold created a conflict of interest for Singer. Nearly 70% of PLX's stockholders agreed that a sale would maximize the value of their investments, as evidenced by their election of Potomac's slate of directors to the Board, and the trial court found no liquidity crisis or other reason for Potomac or Singer to irrationally seek a sale at the expense of maximizing value. *See* § II(C)(1), *infra*.

4. The trial court erred in finding that Singer acted disloyally. Faced with the undisputed fact that Singer did nothing as a PLX director to pursue a sale, the trial court engaged in evidentiary gymnastics to avoid this inconvenient truth and premised its entire liability finding on a purported "secret tip" that Singer allegedly received about a potential future bid by Avago. The record, however, does not support that Singer received or withheld any "secret" information about Avago. At best, the record shows that Singer was given only "color," not specifics, about Avago, and that the other directors were contemporaneously given the identical "color." Further, the trial court did not find that Singer had any reason to favor Avago, and did not explain why Singer would irrationally forgo a near-term deal with other interested buyers, or why would he withhold information that could lead to a higher price. *See* § II(C)(2), *infra*.

5. The trial court erred in finding that the incumbent directors breached their fiduciary duties by being "influenced … to favor a sale when they otherwise would have decided to remain independent." The record confirms that the Board decided to sell PLX long before the involvement of any activist due to its well-founded concerns about PLX's future as an independent company. In fact, the Board repeatedly declined to sell PLX for inadequate prices even in the face of looming proxy contests. *See* § II(C)(3), *infra*.

6. The trial court erred in finding that Potomac knowingly participated in the Board's purported breach of fiduciary duty. The trial court acknowledged that there was no substantial assistance, as it is undisputed that Potomac did nothing other than run a successful proxy campaign. It was error for the court to find Potomac vicariously liable, under the doctrine of *respondeat superior*, for Singer's actions as a PLX director. *See* § III(C), *infra*.

7. The trial court erred in finding material disclosure violations in the 14D-9. The Merger was approved by fully-informed holders of over 80% of PLX's shares. Accordingly, any alleged breach of duty by the directors was ratified by the stockholders. *See* § IV(C), *infra*.

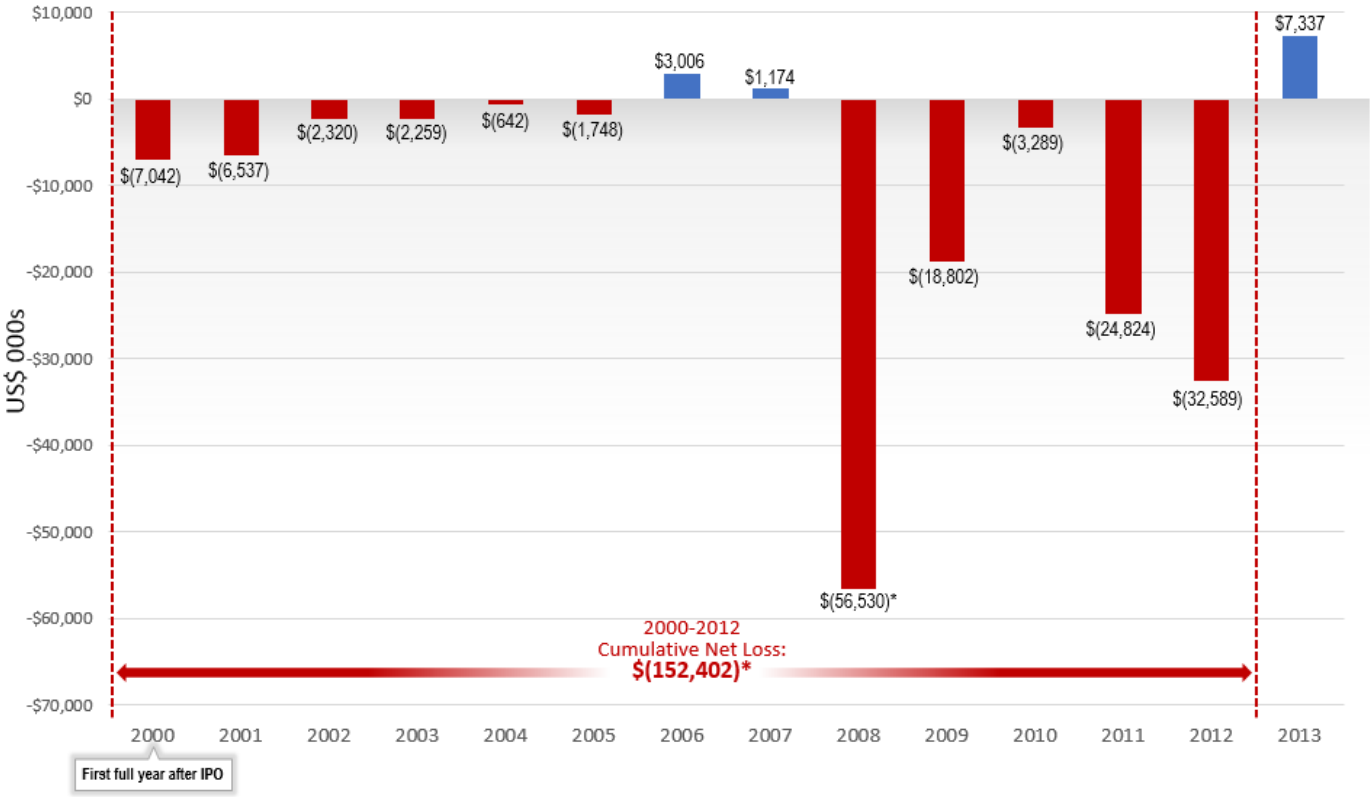
STATEMENT OF FACTS

A. PLX's Uncertain Future

PLX, a semiconductor company co-founded by Salameh in 1986, went public in 1999. A931-32(UF). By 2011, PLX "faced an uncertain future." Op.6; B404. This existential uncertainty remained when the Company was sold in 2014.

Historically, PLX's primary focus was Connectivity (A933(UF)), its sole profitable product line. B402-05. This technology, however, was becoming obsolete and Connectivity revenues were expected to cease in 2016. B402-04; B820. By 2012, PLX was "focused solely" on a newer technology called PCI Express, which entailed multiple risks. B451.

First, "PLX ha[d] not turned a profit on its PCIe business for more than a decade despite its first mover advantage, consistently high share, and leadership in new product development." B405. PCIe losses totaled "more than $150 million" (B404), causing PLX to report losses nearly every year for more than a decade:



B1960; *see also* B404; A230. PLX's modest profits in 2013 ($7.3 million) and 2014 ($1.9 million) were due to end-of-life Connectivity purchases (B975; B987; B1166); PCIe remained unprofitable, generating further operating losses of $6.6 million. B1899-1990; B1961; *see also* B959.

Second, the PCIe technology "was controlled by Intel," which could at any time "ma[k]e a decision to take [the technology] in a different direction or to integrate the function into their product." B1419-20(Salameh); *see also* B182(Singer).

Third, the total market for PLX's PCIe products was only approximately $100 million. B822. Thus, even with 70% market share, PLX lacked the "critical

mass" to keep up with new product "tooling costs, which had risen from" "a couple hundred thousand dollars to [] millions of dollars." B1418. Rising costs had also prompted a wave of consolidation in the semiconductor industry, leaving PLX vulnerable to competition from better-capitalized companies like PMCS. Op.127; A102-03.

Recognizing "that the limited size and growth of the PCIe business would be insufficient to … sustain the company over the long term," the Board attempted to "expand its available market" by acquiring Oxford and Teranetics. B403. "Both were disasters." Op.6; *see also* A934(UF). Thus, the "only way" for PLX to survive was "to try to diversify into new product lines in order to increase its sales revenue." B404.

In 2010, PLX began investing in a new technology called ExpressFabric. B404; B1650(Whipple). Unlike the Company's core business – "inside the box"[1] chips – ExpressFabric was an "outside the box" product designed to revolutionize the market and "replace[] Ethernet in the data center." B1650(Whipple); *see also* B1617(Krause); B77(Singer). Additionally, PLX contemplated making a "system-level product using that core [ExpressFabric] technology." B1485(Raun); *see also* B1418-19(Salameh).

By June 2014, neither ExpressFabric nor systems had come to fruition and

[1] The "box" refers to physical electronic equipment such as a computer or server.

PLX remained a "subscale," "single product line" company whose PCIe technology was controlled by Intel. B1326-27(Salameh), B1419-20(Salameh).

B. The Failed IDT Merger

Cognizant of the substantial risk in remaining independent, in 2011, the Board began exploring "the outright sale of PLX." B404. PLX met with IDT in April and June 2011, and it met and entered into a confidentiality agreement with Avago in October 2011. A406-07; B370. In June 2011, IDT offered to acquire PLX for $5.00/share; the Board rejected this offer as "too low." B371.

In January 2012, PLX's then-banker prepared an "Overview of Strategic Alternatives," which concluded that "pursu[ing] a sale process … could be the most attractive option to shareholders" and would result in significantly higher valuations than if "PLX maintains the status quo." B278. The presentation also noted that PLX would be worth more if it "first divests the [Teranetics] business" before "pursu[ing] a sale process." *Id*. In a January 13, 2012 email, Schmitt confirmed that the question for the Board was not *whether* to sell, but *when*: "as is" or after divesting Teranetics. B273.

In early 2012, Balch Hill nominated a competing slate of directors and urged PLX to "seek a buyer." Op.7. The Board opted to pursue its strategy of divesting Teranetics before commencing a sale process. *Id.*; B372.

On March 25, 2012, IDT returned with a "significantly higher valuation,"

proposing to acquire PLX at an implied value of $6.75 to $7.00/share. B373. On April 30, 2012, PLX and IDT entered into a merger agreement at $3.50/share and 0.525 shares of IDT common stock – an implied value of $7.00/share based on IDT's then-stock price. B377; A936(UF).

In May 2012, as part of the IDT "go-shop" process, DB "contacted thirty-seven parties" – the first of three market checks that PLX would conduct over the next two years. Op.8; A936(UF); A407-13. Avago was the only party to submit a written proposal, offering $5.75/share. A936(UF); A407-08.

On December 19, 2012, PLX and IDT mutually terminated the IDT merger agreement after opposition from the FTC. A937(UF); *see also* B411-23.

C. The Board Decides to Revisit a Sale in the Second Half of 2013

When the IDT deal collapsed, the Board "decided [to]… give [the Company] a couple of quarters to stabilize" and to revisit a sale "in the second half of the year." B1326-27(Salameh); *see also* B1391-92(Schmitt); B424.

In February 2013, Avago made an unsolicited proposal to acquire PLX at $6.00/share. A938(UF); A409. In conversations with Avago, the Board agreed that "$6 is a good starting point and $7 may be too high." B425. On April 29, 2013, the Board rejected Avago's offer. B495. In subsequent discussions, the Board told Avago the price was "too low" and "should start with a 7," though it "did not say [that it] would refuse an offer below this range." A61; B496. Avago

declined further discussions. B500.

By August 6, 2013, PLX had "realize[d] the improved value" from divesting Teranetics and that "the Company's market value" had increased. B533-34. The Board therefore agreed that the "timing seemed optimal" to pursue an affirmative sale process. *Id.* On August 15, 2013, the Board approved the creation of the Special Committee. A939(UF).

In fall 2013, the Board contacted "fifteen potential bidders." A940(UF); Op.26; A561. Nine parties, including Avago, entertained presentations from PLX management. A940(UF); *see also* B561; B905. Only one party – Cypress – submitted an indication of interest. A940(UF); A410. The Board was prepared to do a deal with Cypress at $6.50/share. B569. However, Cypress declined to make an offer after completing due diligence, citing "the current valuation and risks of a new business." B570.

D. PLX Stockholders Elect Potomac's Slate to the Board

Potomac began to acquire shares of PLX in 2012 and, by November 2013, had acquired 10.2% of PLX's outstanding shares, making it PLX's largest stockholder. B75(Singer); A941(UF); A402. Singer, Potomac's co-manager, had more than twenty years of semiconductor industry experience and had been monitoring PLX for "many years." B87, 177-78(Singer).

On January 25, 2013, Potomac filed its first Schedule 13D. A937(UF); A24.

Citing PLX's history of losses and "failed acquisition strategy," Potomac urged the Board to "leverag[e] the improved operating model of the Company" (resulting from the Teranetics divestiture) through "a fair and thorough review of all strategic alternatives," which Potomac believed "would enable the Company to achieve an acquisition value substantially higher than what the Company could achieve as a standalone business." A24. Potomac also stated: "[i]f it is indeed the case that the pursuit of **… a standalone business is the optimal course to realizing and delivering value for shareholders, then the Board and management owe it to shareholders to explain how so."** A25 (emphasis in original).

In November 2013, after discussions to avoid a proxy contest failed (*see* A940(UF); B427; B471; B564-68), Potomac nominated Singer, Colombatto, and Domenik as replacements for Guzy, Riordan, and Smith. A941(UF). All three had substantial semiconductor industry experience. B631-34; B1502(Raun); B177-78(Singer). Potomac's proxy materials criticized the Board's "abysmal track record" and stated that, in light of the Board's failed acquisition strategy, entrenchment, and other factors, it had "no faith in the current Board to unlock th[e] value [of PCI Express] ***through either an exploration of strategic alternatives or overseeing a successful standalone operation***." B582 (emphasis added).

PLX's proxy materials described Potomac as a "self-interested activist

investor that is focused on short-term gains at the expense of other PLX Technology stockholders." B749.

On December 18, 2013, nearly 70% of PLX's stockholders elected Singer, Domenik, and Colombatto to the Board. A942-43(UF); B1969.

E. DB Updates the Board About the Market Check and Avago; Singer and the Other Directors Focus on Long-Term Initiatives

Following the Annual Meeting, DB updated the Board on the status of the sale process, including Avago's views on pricing and timing. A70-75; *see also* B904; B1719. A few days prior, DB had made sure the Board was aware of Avago's pending acquisition of LSI, which the Board knew would render Avago temporarily unable to engage. B840-41.

Once the new directors "saw that [the Board had] run a process" and received no viable offers, the Board's focus turned to executing the program of the company…." B1332-33. Singer did not press for a sale and even suggested "terminat[ing]" or putting the sales process "on hold." B931; *see also* B202-03(Singer); B930 ("[n]obody suggested" a sale); B914(Singer stated that "a good result…. could be thru a transaction or not"); B1432. Instead, Singer immediately dug into PLX's business and finance, addressing lower-than-expected Q4 results, customer-specific sales issues, and disappointing margins. B914; B930; B943. Singer also regularly communicated with Raun about PLX's revenue and bookings, and delays pertaining to the chip for ExpressFabric. B949; B981.

In particular, "[a]s a member of the Compensation Committee, [Singer] became a vocal advocate for more equity compensation that would align management's interests with stockholders" (Op.41; *see also* B1388), repeatedly pressing for "more equity comps and RSUs" to better "incentivize employees." B930; *see also* Op.41, A253, B914, B931, B932, B941, B985; B1538-39(Hart); B200-04(Singer). Singer also "spearheaded an initiative to look at [PLX] making an acquisition of Pericom [], to drive scale in the business." B124(Singer); *see also* B1006-07; B1503; B1392-93.

On January 23, 2014, Singer, Salameh, and Schmitt were appointed to the reconstituted Special Committee, with Singer as Chairman. A943(UF). Over the next five months, the Special Committee met just once, on February 7, 2014. B947-48. During this meeting, the Committee "concluded that it wished to continue with its current strategy of exploring a strategic transaction with [Cypress, Broadcom, and Inphi], and instructed Mr. Raun to remain open to other opportunities." *Id*. However, aware that Avago had gone "silent" as it was "consumed with the LSI acquisition" (B500; B984), the Committee decided "not to take any action with respect to Avago at this time." B948.

F. Avago Returns

On May 9, 2014, Raun advised the Board: "Per DB via Tom Krause… now that the LSI deal is done… PLX is one of [Avago's] agenda items…." B1005; A944(UF).

On May 17, 2014, DB advised "that Avago had requested… to meet with Mr. Singer and to receive an update from Mr. Raun regarding… the business." B1009. The Special Committee "directed Mr. Singer to meet with Avago" and "instructed Mr. Raun to continue meeting with Avago's management." *Id.*; A412-13. The Board also authorized a third market check involving "the three [parties] most likely to have interest" – Cypress, Broadcom, and Semtech. Op.109; B1009-10.

At the Special Committee's direction, Singer had dinner with Krause on May 21, 2014. Op.45-47; A413-14. Singer reiterated that Avago's prior offers did not reflect PLX's full value; Krause responded that "anything with a 7… [is] not going to happen." B132(Singer); B1721. Singer reported these discussions to the Special Committee, which then "directed [] Singer to meet, or have further discussions, with [Krause] to discuss a possible acquisition of the Company by Avago." A276.

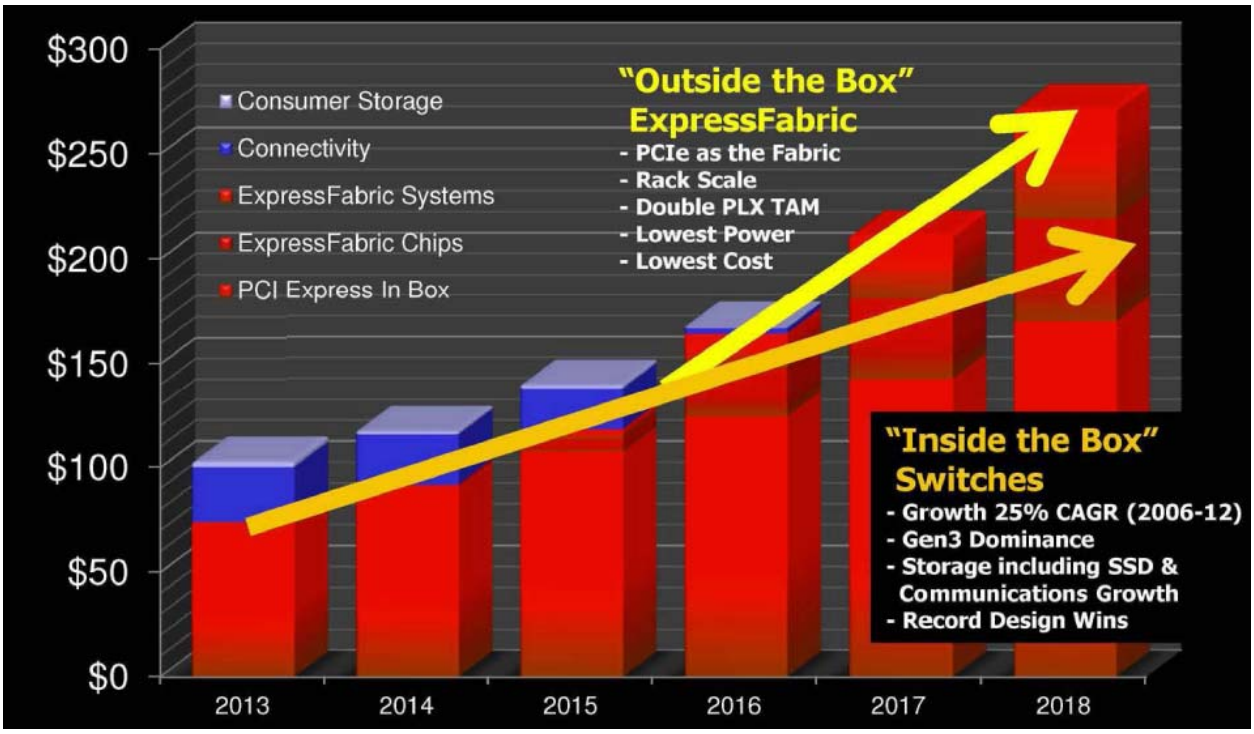
On May 22, 2014, Avago offered $6.25/share. A944(UF). Salameh circulated Avago's proposal to the Board, noting that the "special committee (Eric,

Ralph, Mike) are discussing this with DB later today." B1014-016; *see also* B1012. The Special Committee and DB spoke that evening and discussed potential counteroffers, including $6.75/share, which DB memorialized in a draft letter sent to the Special Committee and Raun. A280-82; *see also* B1345; B1394.

G. Recognizing that the December Projections Were Unreliable, the Board Requests Updated Projections

On May 23 and 24, 2014, the Special Committee and the Board, respectively, met to discuss Avago's proposal. B1022-25; A302-07; *see also* B1018. PLX's most recent projections at the time were the December Projections, consisting of (i) the Annual Operating Plan for 2014, which was "used to run the company" and approved by the Board; and (ii) out-year projections for 2015-2018, which were a "what could happen kind of thing," and were not used "on the operational side." B1461(Raun); *see also* B816; B1549-50(Riordan); B1651(Whipple); B1309; B1342(Salameh); B1549(Riordan).

The December Projections had been prepared "for the market check" (B917) and predicted that PLX would nearly triple its revenues to $271 million by 2018 (B761) by "quadrupl[ing] [PLX's] addressable market" (B658) through ExpressFabric and an unspecified "TBD" system-level product, as depicted below:



A92.

On December 11, 2013, when preparing to discuss the December Projections with the Board, management acknowledged: "our track record does not look good and the plan has risk and it is an aggressive plan." B752. Management sent the December Projections to the Board on December 13, 2013 with the following contemporaneous notation:

> 2014 and future require higher PCIe growth than seen recently. Although this is an aggressive plan compared to the past couple years performance and where we stand this quarter with soft demand from Storage market, management believes we should drive internally for this number as the plan. The key will be getting our strong Gen 3 design pipe into production….

B761; *see also* B752.

By May 2014, the first two quarters of the December Projections had already proved inaccurate. Op.127; *see also* B851; B1001; B1165; B1314(Raun). These misses were consistent with PLX's "track record of missing its projections." Op.127; *see* § I(C)(1)(a), *infra*. The Board, moreover, had received feedback that PLX's bidders viewed the projections as "aggressive" and "very optimistic." B1674-75.

Further, "[b]y the second quarter, PLX management had reported lower demand for PCI Express switches" (Op.127; *see also* B1049), undermining a key assumption of the December Projections (B761). Additionally, PMCS, "a well-funded competitor that had paid $100 million to acquire IDT's PCI Express business, was planning to enter the market for next-generation circuits," making it "more difficult for PLX to achieve its projections." Op.127-28; *see also* B1005; B986; B88-89(Singer); B214(Singer). ExpressFabric, moreover, had been "seriously delayed," which in turn delayed the potential to develop the "TBD" systems product. B1313-14(Raun); B1486(Raun).

Given these developments, on May 24, 2014, the Board "requested that management prepare… updated five-year projections… [to] reflect events and trends since the [December Projections] were prepared and management's current expectations regarding the future performance of the Company." A305.

H. PLX and Avago Enter into a Non-Binding Exclusivity Agreement

On May 24, 2014, while the Board awaited updated projections, DB presented "[p]reliminary valuation[s]," including a preliminary DCF analysis based on the December Projections and a preliminary "sensitivity" DCF analysis that assumed ten percent less revenue growth. B1038-39; A303-05; A414-15. The Board subsequently directed management to prepare a $6.75/share counteroffer to Avago and "authorized the Special Committee to negotiate… an exclusivity agreement… at [a] price of $6.50/share or higher." A306. The Board also directed Raun to continue discussions with Broadcom; Cypress and Semtech had declined further discussions. A303; A415.

On May 28, 2014, Avago increased its offer to $6.50/share, marked "best and final." A946(UF); B1045. On May 30, 2014, PLX executed a non-binding exclusivity agreement with Avago. A946-47(UF); B1048.

The June Projections were completed by June 13, 2014. Op.64; *see also* A310-14, B1128-29. Raun confirmed that "the June five-year analysis [was] very similar" to the analysis in December 2013. B1318(Raun); *compare* B819-20 *with* B1128-29. For the revenue projections, Raun and the PLX sales team "did a detailed, bottoms-up [], customer by customer, product by product" review. B1416; *see also* B1315, 1507(Raun). Whipple led the preparation of "the expense

forecast by year and… the out years balance sheets and statements of cash flow." B1664-65(Whipple).

The June Projections were still optimistic, predicting that PLX's revenues would double to $208.4 million by 2018. The following table compares the two sets of Projections by product category:

	2014	2015	2016	2017	2018
Connectivity & Storage					
Dec-13	$25,587	$20,981	$2,760	$-	$-
Jun-14	$26,743	$20,560	$6,260	$-	$-
Difference	*+$1,156*	*-$421*	*+$3,500*	*$-*	*$-*
PCI Express					
Dec-13	$90,812	$107,727	$124,635	$142,279	$169,853
Jun-14	$87,336	$104,351	$117,678	$129,047	$147,497
Difference	*-$3,476*	*-$3,376*	*-$6,957*	*-$13,232*	*-$22,356*
Express Fabric					
Dec-13	$496	$5,584	$22,828	$38,729	$49,747
Jun-14	$200	$3,650	$20,035	$37,351	$50,249
Difference	*-$296*	*-$1,934*	*-$2,793*	*-$1,378*	*+$502*
Systems					
Dec-13	$605	$5,060	$16,710	$30,447	$51,884
Jun-14	$392	$1,500	$5,403	$8,475	$10,674
Difference	*-$213*	*-$3,560*	*-$11,307*	*-$22,972*	*-$41,210*
Total PLX Revenue					
Dec-13	$117,500	$139,352	$166,933	$211,455	$271,484
Jun-14	$114,671	$130,061	$149,377	$174,873	$208,419
Difference	*-$2,829*	*-$9,291*	*-$17,556*	*-$36,582*	*-$63,065*

Sources: JX 307A (December projections file); JX 509A (June projections file).

B1964; *see also* A1012-13(Beaton); B1878-79.

As shown, "[t]he primary driver for the reductions was significantly decreased sales during the out years for the Company's system-level products" (Op.63), including the elimination of $27 million of "TBD" revenues in 2017 and

2018. B819-20; Op.63; B1516). Management also modestly reduced estimated PCIe revenues from a five-year CAGR of 16.9% to 14.0%. (*Compare* B819-20 *with* B1128-129; *see also* B1964; B1965. Connectivity revenues increased slightly, and changes to ExpressFabric were immaterial. B1964.

I. The Board Unanimously Approves the Merger Agreement and the Overwhelming Majority of PLX Stockholders Tender Their Shares

On June 20, 2014, DB presented its final valuation analyses, including a "Base Case" DCF analysis of the June Projections, which yielded $5.07 to $6.99/share; and an "Upside Case" DCF analysis of the December Projections, which yielded $6.39 to $8.98/share. A947(UF); A374-375; A388; Op.66-67.

On June 22, 2014, DB issued its opinion that $6.50/share was a fair price. A947(UF); B1161. The Board unanimously approved the Merger Agreement, which was executed the next day. A947(UF); B1161. Despite a modest 3.5% break-up fee, no party expressed interest in topping Avago's price during the seven weeks before the Merger closed. A415-16; A948(UF).

Avago's first-step tender offer closed on August 11, 2014, with more than 80% of PLX's stockholders tendering their shares. A949(UF). Potomac also tendered its shares and received the same consideration as other PLX stockholders. B229(Singer). The second-step merger closed on August 12, 2014. A949(UF).

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFFS WERE NOT DAMAGED

A. Question Presented

Did the trial court correctly determine that Plaintiffs failed to meet their burden of proof to demonstrate that stockholders suffered damage? This issue was preserved at A1230-36 and A1260-68.

B. Scope of Review

The Supreme Court "review[s] findings as to damages by the Court of Chancery for an abuse of discretion." *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 866 (Del. 2015) (citations omitted). Factual findings are reviewed for clear error. *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 210 (Del. 2011). "So long as the Court of Chancery's findings and conclusions are supported by the record and the product of an orderly and logical deductive process, they will be accepted." *Id.*

C. Merits of Argument

The trial court correctly found that Plaintiffs "failed to carry their burden of proof" on the element of damages. Op.121. Plaintiffs "sought to prove that the standalone value of the Company was $9.86 per share," an argument based on a DCF analysis performed by their expert, Ronald Quintero, utilizing the December

Projections.[2] The trial court correctly concluded that "Quintero's discounted cash flow valuation" – which "posited that the Company was worth 52% more than what the Board obtained from a third-party acquirer in a synergistic transaction" – was "not sufficiently persuasive to undergird a damages award exceeding half of the deal price." Op.124.

The trial court also found that "the sale process was sufficiently reliable to exclude the plaintiffs' damages contention" and that the deal price was "[a] far more persuasive source of valuation evidence." Op.131. Considering the "significant synergies," the trial court found that the deal price "exceeded the standalone value of the Company." Op.134. This conclusion was supported by "[t]he real world market evidence" – including PLX's historical stock prices – as well as the DCFs conducted by Potomac's expert, Neil Beaton, which, even using the December Projections, resulted in a "valuation [that] did not exceed the deal price of $6.50 per share." Op.126-27, 135. Beaton also performed a DCF using the June Projections, as well as comparable company and comparable transaction analyses, all of which resulted in values below $6.50/share. B1839-54.

[2] Quintero did not perform a DCF using the June Projections. He also claimed that he was "unable" to utilize the market approach because PLX was poised for "escape velocity" and he "couldn't find… any comparable companies" that similarly "projected growth that was a radical departure from where the company had been in the past." A993-96(Quintero); B1748, B1766(Quintero).

1. The Trial Court Correctly Found that Plaintiffs Failed to Prove Damages

a. The December Projections Were Speculative and Unreliable

The trial court was right to "lack[] confidence in the third layer of revenue" of the December Projections, which depended on PLX developing "a 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." Op.126. Every witness who testified about ExpressFabric, including Plaintiffs' star witness, Whipple, confirmed the "significant risk … with getting PLX into" this business. B1653(Whipple). Whereas PLX's core business was "inside the box" PCIe chips, "[w]hat [PLX] had developed in [] ExpressFabric was technology to take PCI Express outside the box," with the goal of "replac[ing] Ethernet in the data center." B1650, 1653(Whipple); *see also* B1485(Raun) ("ExpressFabric … [contemplated PLX] targeting the market of Ethernet"). Even "the chip for ExpressFabric … was a much more complex product than the company had ever done before" and, by May 2014, its development had been "seriously delayed." B1313, 1486(Raun).

Even if PLX could successfully develop an ExpressFabric product, it would still have to convince the market to adopt ExpressFabric in lieu of Ethernet as the new "de facto standard used in networking." B1617(Krause); *see also*

B1650(Whipple); B77(Singer). No buyer, not even Avago, believed this goal was realistic. B1623.

If ExpressFabric was speculative, then PLX's hope of developing a "TBD" "system-level product[] using that core technology" was a moonshot. B1485(Raun); *see also* B820. With systems, PLX did not just want to expand "outside the box," it wanted to make "the box" itself. B1486(Raun). When asked what a system-level product is, Raun explained: "Instead of just the chip that's in your iPad, it would be the iPad." *Id.* "Expand[ing] into the systems business" would entail servicing "a different set of customers," requiring "a different set of skills needed than what [PLX] had" and "a different kind of sales channel, … different kind of support, [and] different engineering teams that are developing systems …." B1419(Salameh). To call this idea speculative would be a gross understatement.

Contrary to Plaintiffs' contention, the "systems business" was not "already established." AOB:31. In June 2014, PLX's internal records still referred to the system-level product only as "TBD," and PLX had not yet realized *any* revenues

from either ExpressFabric or the "TBD" systems product (B1127-28)[3] – further underscoring management's abject speculation in predicting that these undeveloped products would soon grow into $100 million/year businesses. Indeed, by June 2014, the Board had not yet even decided whether to "launch large scale into the systems business." B1416-10(Salameh); *see also* B1486-87(Raun).

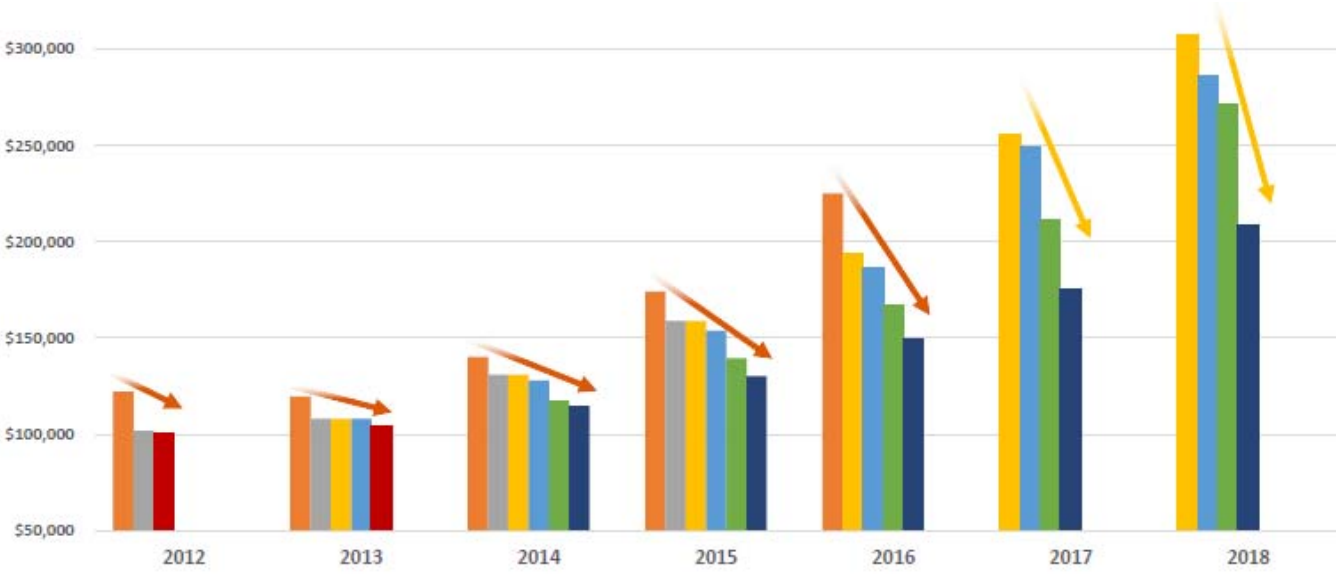
Plaintiffs ignore this evidence and instead recite a laundry list of components that they claim were already "being shipped" or "in development." (AOB:41). Almost all, however, were classified in the December Projections as part of PCIe revenues. B819-20. Even the slide cited by Plaintiffs shows that the only products "shipping" at the time were PCIe products. AOB:41; *see also* A152-57 (confirming that Capella-1 and Argo-1 are PCIe products; ExpressFabric still "in development"). Further, in arguing that customers were "already planning to use ExpressFabric and systems" (AOB:41), Plaintiffs ignore evidence confirming that, in the engineering context, "planning to use" meant only that customers were willing to test a working product, which in PLX's case didn't exist. B120(Singer).

[3] The native file for B1127-28 (provided to the trial court) reflects projected ExpressFabric revenues in row 47 ("ExpressFabric Portion") and projected revenues from the "TBD" systems product in row 52 ("Other System TBD"):

	A	B	C	AZ	BA
1				lack=Dec 2013 A(	
2					
3				Q114	Q214
47		ExpressFabric Portion		0	0
48		Fan Out Switch		15,347	18,005
49		Retimer			
50		ExpressNic & Other Cards		87	40
51		Argo 1, 2, 3, 4		0	15
52		Other System TBD			
53		Misc/Balance			

In addition to management's speculative forecasting, another "problem for the plaintiffs is that bidders do not appear to have fully credited the December Projections" and did not "believe[] that they supported valuations in the range that Quintero posited." Op.128. Bidders "understood [PLX's] long-term plans. But they just weren't buying [management's] story." *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 30 (Del. 2017).

Further, "PLX management had a track record of missing its projections" (Op.127), illustrated as follows:



	2012	2013	2014	2015	2016	2017	2018
April 2012 (IDT)	$122,019	$119,465	$140,257	$174,060	$225,170	-	-
December 2012	$101,719	$108,000	$130,893	$158,936	-	-	-
March 2013	-	$108,000	$130,900	$158,900	$194,000	$256,000	$ 307,200
September 2013	-	$108,208	$127,914	$153,657	$186,127	$249,163	$ 286,500
December 2013	-	-	$117,500	$139,352	$166,933	$211,455	$ 271,484
June 2014	-	-	$114,671	$130,061	$149,377	$174,873	$ 208,419
ACTUAL RESULTS	$ 100,248	$104,490	-	-	-	-	-

B1966. Each of these projections forecast explosive growth based on the hope of developing ExpressFabric and systems businesses. Yet PLX repeatedly fell short –

sometimes by enormous margins. Op.127. This trend continued with the December Projections, as "PLX missed its FY 2014 first quarter target by $1.4 million, then missed its second quarter as well." *Id.* Further, given "lower demand" than expected for PCIe switches and the "arrival of a new market entrant" (PMCS), there was no reason to believe that the remaining estimates would fare better. *Id.* at 127-28. *See Dell*, 177 A.3d at 27 ("management's track record of missing its own projections" did not support crediting its "optimism" regarding the company's future).[4]

Plaintiffs also point to the trial court's finding that the December Projections were prepared in the ordinary course, approved by the Board, and used operationally, such as to set compensation. AOB:2; Op.125. However, as the trial court correctly found, "that does not mean that the December 2013 Projections were sufficiently reliable to serve as the basis for a nine-figure damages award." Op.125. Moreover, the record is crystal clear that *only* the 2014 AOP – *not* the out-year projections for 2015-2018 – were approved by the Board and used operationally. B1471(Raun) ("The board only approved the AOP … The other[] [years] were just projections."); *see also* B754; B1342(Salameh) (the AOP is

[4] Plaintiffs' assertion that PLX met projections is based on a single forecast from *2009*. AOB:42-43. In addition to being facially absurd, this argument ignores that the 2009 projections included estimates *only* for PCIe, and are the only set of projections in the record that were not prepared with a sale of the Company in mind. *See* B1461(Raun).

"what the board approved."); B1549(Riordan). Even Whipple acknowledged that only "year one" was "the basis for the performance and the variable compensation that was awarded to the executive officers" and that "years two through five" were "aspirational." B1651.

Finally, the trial court's finding that "[t]he minutes of the May 21 meeting [] mark the first appearance in the record of the theme that the December 2013 Projections were 'aggressive'" is clearly erroneous. Op.47. Management specifically referred to the December Projections in a December 11, 2013 email as "an aggressive plan" (B752) – a disclaimer that was *not* included in prior management presentations (*see, e.g.,* B1981; *c.f.* Op.33); labeled the December Projections as "aggressive" when it sent them to the Board on December 13, 2013 (B761), and again referred to them as "a very aggressive plan" in a January 9, 2014 email. B916. The Board reiterated the "aggressive" nature of the December Projections when providing them to PLX's D&O carrier and compensation consultants in March 2014. A257; A260. The directors confirmed that the December Projections were "aspirational," "audacious," "optimistic,"

"unrealistic," and "overexuberant."[5] B1324, 1416, 1442, 1446(Salameh); B1308(Raun); B1396(Schmitt).

Given the objectively speculative nature of the December Projections, the trial court correctly found that they could not be the basis for a damages award.

b. Quintero's Inputs Were Flawed

The trial also correctly criticized Quintero for making unreasonable "judgments" when performing his DCF analysis and rightly concluded that "the inputs driving [Quintero's] math were not sufficiently convincing." Op.130.

First, Quintero used an implausible "beta of 0.985," which "implied that a small technology company operating in the cyclical semiconductor industry exhibited less volatility than the market as a whole." Op.129. Though Plaintiffs claim that "Quintero utilized PLX's actual beta" (AOB:44), they ignore that Quintero manipulated his calculation by (1) "using daily returns, rather than a more standard interval of weekly or monthly returns," and (2) looking only at "the one-year period preceding June 20, 2014," "a period of time when PLX was experiencing relatively low volatility because Potomac's activist campaign had

[5] The contemporaneous evidence contradicts the trial court's abject speculation that the directors were "instructed to mention" the word "aggressive" "as often as possible." (Op.33). Further, though the court discounted their testimony as being given by "named defendants who had not yet settled" (*id.*), in fact, all of the directors testified *after* the settlement agreement had been entered into, and with the knowledge that, in the trial court's view, they were "unlikely to ultimately face any liability." B57.

driving its stock price 'up pretty much to the ceiling.'" Op.129-30) (quoting A1019(Beaton)). As the trial court noted, "[w]hen Beaton replicated Quintero's beta using monthly returns, the beta increased to 1.458." Op:130. This calculation also resulted in an R-squared measure over twice as high. B1925; A1021(Beaton).

Though Plaintiffs contend that certain changes in PLX's business warranted a one-year look-back, the fact that PLX was – in Quintero's own words – "project[ing] growth that was a radical departure from … the past" is hardly a basis to assume reduced volatility going forward. B1748(Quintero). Indeed, Quintero's own report admits that PLX's beta was well over 1 for almost the entirety of the five-year period preceding the Merger, and well over 2 for much of it (A854), confirming that the "period of time" chosen by Quintero was "not representative of how PLX's stock would perform" in the future. Op:129. *Cede & Co. v. JRC Acquisition Copr., L& LR, Inc.*, 2004 WL 5366085, at *9 n. 94 (Del.Ch. Feb. 10, 2004) ("A five-year period … is the most common" to calculate beta).

Overall, the trial court found that "Beaton derived a more credible beta of 1.72 through a comparable companies analysis." Op.130. Though Plaintiffs criticize Beaton's use of a proxy beta (AOB:45), courts have routinely endorsed peer group betas, particularly where, as here, PLX's "counterintuitive" beta was not a reliable indicator of future volatility (A1019(Beaton)). *See, e.g., In re Appraisal of SWS Grp., Inc.*, 2017 WL 2334852, at *17 (Del. Ch. May 30, 2017).

Plaintiffs' claim that "no one knows how Beaton calculated his 'peer beta'" is demonstrably false, as Beaton testified at length about his criteria and methodology. A1034-35(Beaton). Plaintiffs' remaining criticisms are likewise based on a gross distortion of the record.

Quintero's artificially low beta was just one of many errors in his weighted average cost of capital calculation. Rather than relying exclusively on "the more academically and empirically driven CAPM model," Quintero averaged five different cost of equity calculations, including one using the build-up model and another using the Butler-Pinkerton calculator, neither of which are suited for public companies. *In re Orchard Enters., Inc. S'holder Litig.,* 88 A.3d 1, 42 (Del. Ch. 2014). Further, Quintero's discount rates – 13.14%-14.76% – are objectively unreasonable given PLX's projected "hockey stick" growth that depended on "introducing a new product," akin to an early-stage company. A1019, 1025-26(Beaton). Beaton's CAPM calculation resulted in a more reasonable, but still conservative, discount rate of 17.4%. B1845-47.

Plaintiffs suggest that the trial court erred by not unilaterally "modify[ing] [Quintero's] DCF analysis" by "us[ing] Beaton's weighted average cost of capital" and Quintero's remaining inputs. AOB:2, 46. But, even if the court were willing to do Plaintiffs' job, Quintero's other inputs suffered from the same lack of judgment. Most significantly, Quintero utilized an unreasonably high terminal-

year growth rate of 43%, even though PLX had no consistent history of earnings growth and had never before achieved an earnings growth rate near 43%. A667; A981(Quintero); *c.f.* A1018(Beaton). Beaton selected a much more reasonable 25% growth rate (B1842), which corresponded with PLX's historical "CAGR of ~25%" for PCIe revenues. A92; A1017-18(Beaton). This difference alone added an unwarranted $1.43/share to Quintero's value. AOB:46; A840-41. Another $0.56/share resulted from Quintero's mistaken belief that PLX had $25 million cash (it had only $11 million) and his erroneous conclusion that this cash was "excess" rather than essential to R&D, particularly when assuming a 43% growth rate. B1927-28; A1018, 1032-33(Beaton); B1171.

Finally, Quintero was unable to explain why his value of $9.86/share was so wildly out of line with how potential buyers and the investing public viewed PLX. Though Quintero claimed that there was "a valuation gap," he was unable to identify any information that he uniquely possessed to justify "reach[ing] a price that was 3 bucks higher than what the only bidder who came forward was willing to pay." A1000-02(Quintero) (Court: "[W]hat knowledge do you have that is different than what a bidder had….?" Quintero: "I don't know, Your Honor.")).

2. The Trial Court Correctly Concluded that the Deal Price Was a "Persuasive Source of Valuation Evidence"

"[W]hen a widely held, publicly traded company has been sold in an arm's-length transaction, the deal price has 'heavy, if not overriding, probative value.'"

(Op.131) (quoting *Dell*, 177 A.3d at 30).

In an effort to distance themselves from this Court's recent holdings in *Dell,* 177 A.3d 1 and *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017), Plaintiffs contend that the appropriate measure of damages here is "different" than in an appraisal proceeding. AOB:14. However, as the trial court correctly found, where, as here, stockholders allege in a plenary action that a company "should not have been sold at all and should have continued to operate as an independent going concern," damages are "equal to the 'fair' or 'intrinsic' value of their stock at the time of the merger, less the price per share that they actually received." Op.121-23 (citation omitted). "The 'fair' or 'intrinsic' value … is determined using the same methodologies employed in an appraisal." Op.122; *see also RBC*, 129 A.3d at 867-68 (Del. 2015); *Berger v. Pubco Corp.,* 976 A.2d 132, 134 (Del. 2009).

Here, PLX was sold to "a third party in an arm's length sale" after "a robust market search that lasted approximately two years in which [all logical] strategic buyers had an open opportunity to buy without inhibition of deal protections." *DFC*, 172 A.3d at 349. The Board began meeting with potential acquirers in April 2011; it contacted "thirty-seven" potential buyers in May 2012; and it "contacted fifteen potential bidders [and] executed nine non-disclosure agreements" in fall 2013. Op.6, 132. In 2014, the Board authorized Raun to contact Cypress, Inphi,

Exar, and Semtech; and in May 2014, "[a]fter Avago made its offer of $6.25 per share," DB "spoke again with Inphi, Semtech, and Cypress," as well as Broadcom. Op.132-33.

The Board also conducted a "passive, post-signing market check." Op.133. The Merger Agreement, signed in June 2014, contained a "fiduciary out" and a modest 3.5% break-up fee, and it "gave competing suitors forty-nine calendar days to express interest" – terms that the trial court found satisfied this Court's standard in *C & J Energy Servs., Inc. v. City of Miami Gen. Empls.' and Sanitation Empls.' Ret. Tr.*, 107 A.3d 1049 (Del. 2014). Op.108-09.

Plaintiffs do not offer a meaningful challenge to the sale process. They do not dispute that PLX "approached every logical buyer," *DFC*, 172 A.3d at 376, and they "do not contend that the Board improperly tilted the playing field or steered the company to a favored bidder." Op.110. Though they point to the trial court's statement that the "pre-signing process was not extensive" (AOB:25), the Opinion clearly refers only to DB's discussions in late May 2014, not the indisputably "extensive" market checks conducted over the prior two years. Op.133.

Plaintiffs likewise do not identify any information that potential buyers – including the nine who received management presentations – lacked. Indeed, it is undisputed that "PLX provided the December 2013 Projections to bidders" in 2014, and that it provided even "rosier" sets of projections in the earlier market

checks. Op.128. *See DFC*, 172 A.3d at 376 (deal price was not suspect where "no one was willing to bid more in the months leading up to the transaction before management significantly adjusted downward its projections").

Plaintiffs contend that the trial court's deference to the deal price is inconsistent with its findings of a conflict and disloyalty.[6] AOB:23. However, the sole "conflict" that the trial court identified was on the question of whether "the Company should [] have been sold at all" (Op.110); it did not find that Singer had any reason not to maximize value once the decision to sell was made. (*See* § II(C)(1), *infra*). The trial court likewise found that the incumbent directors breached their fiduciary duties *not* by tainting the sale process, but by purportedly allowing themselves to be "influenc[ed] … to favor a sale when they otherwise would have decided to remain independent." Op.110-11. Thus, though allegedly "flawed from a fiduciary standpoint, the details of the sale process" – including the Board's "approach" – were "reasonable." Op.108-10, 134-35.

Plaintiffs also point to the trial court's finding that Singer "undercut[] the legitimacy" of the price negotiations by purportedly withholding a "tip" about Avago's interest in a transaction.[7] AOB:23-24; Op.83. The trial court, however, did not find that Singer had any reason to negotiate a suboptimal price, or that he

[6] These findings are erroneous for the reasons discussed in § II below.

[7] This defective and illogical "tip" theory is addressed in § II(C)(2) below.

irrationally did so. (*See* § II(C)(2), *infra*). To the contrary, as both the court and Plaintiffs acknowledged, Singer, as a principal of PLX's largest stockholder, was uniquely motivated to seek the highest possible price possible:

> THE COURT: Mr. Singer, he is conflicted as to the decision stand-alone versus sell. He's not conflicted as to get the highest price once he sells.
>
> MR. BARON: I agree with that.
> …
>
> THE COURT: As to that, when I'm thinking about Singer, at that point he's like the greatest guy to have, isn't he? … [I]sn't Singer the guy who we actually want in there? Because he's the one that's going to be pushing for top dollar….
>
> MR. BARON: He is … I would agree with that….

B46-48.

There is no evidence, moreover, to suggest that Avago or any other bidder would have been willing to pay more than $6.50/share. Plaintiffs point to the $7.00/share implied value of the IDT transaction (AOB:24), but ignore that the consideration consisted of cash and stock and that, within two weeks, the implied value dropped to below $6.50/share and remained there for months. B1959; *see also* B1123-30. Moreover, IDT had unique synergies in that it was expressly seeking to create a "monopoly" in the PCIe market by acquiring its only real

competition.[8] B418. In the following two years, no bidder other than Avago made an offer, let alone an offer above $6.50/share. B1025.

Plaintiffs next contend that the trial court erroneously gave the post-signing market check "dispositive" weight, an argument based on a single sentence in the Opinion wherein the court stated: "[m]ore important than the pre-signing process was the post-signing market check." AOB:24-27; Op.133. In fact, the trial court concluded that the *combination* of the pre-signing market checks and the reasonable post-signing market check *all* supported the persuasiveness of the deal price.[9] Op.133; *see also* Op.108 ("The Board combined a narrow, pre-signing canvass with a post-signing market check. This was a reasonable approach.").

Finally, Plaintiffs contend that the deal price was unreliable because potential bidders were "deceived" by purported disclosure violations in the 14D-9 and therefore lacked the necessary information upon which to make a bid. AOB:35-39. However, it is undisputed that potential buyers had *more than two years* leading up to the announcement of the Merger Agreement, as well as sixteen

[8] Despite these synergies, IDT experienced buyer's remorse, demanding that PLX agree to "a significant reduction in the price of the deal" in exchange for offering proposed remedies to the FTC. B408.

[9] Plaintiffs' contention that Potomac "never raised" and thus "waived" the post-signing market check as a basis for deferring to the deal price is completely baseless. AOB:25. Potomac expressly argued at trial that, "[d]espite three market checks and a modest 3.5% break-up fee, no buyer other than Avago made an offer," and that these facts "support the reliability of the deal price." A1261 (citation omitted).

additional days before the 14D-9 was filed, to express interest in acquiring PLX. *See* Op.128. Further, it is undisputed that PLX provided potential bidders with all relevant information, including its most optimistic set of projections, which it presented "as its best estimate of the Company's future, without the 'Upside Case' gloss that DB later put on them." Op.128. This case is therefore nothing like the cases cited by Plaintiffs, as the directors did not "attempt[] to sabotage the … due diligence process" by withholding information, *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009), or otherwise cause "the market [to] not understand [the company's] prospects," *RBC*, 129 A.3d at 868 (citation omitted); *accord Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000). Rather, as in *Dell*, the Board did everything it could "to convince the market that the Company was worth more. Prospective buyers just did not believe the potential." 177 A.3d at 50.

"[T]he failure of other buyers to pursue the company when they had a free chance to do so" provides "objective" evidence of "the fairness of the price paid." *DFC*, 172 A.3d at 376; *see also Dell*, 177 A.3d at 29. If, as Plaintiffs claim, PLX was worth $3.86/share more than the deal price, "then it seems likely that another buyers would have competed with Avago." Op.128.

3. PLX's Unaffected Stock Price Supports the Trial Court's Conclusion

PLX's stock price, the market for which had all the same "hallmarks of an

efficient market" as in *Dell*, 177 A.3d at 25, confirms that $6.50/share exceeded fair value. The following chart illustrates PLX's stock price performance versus the S&P500 and the R2K indices:

B1967; B1231-43; B1245.

PLX's unaffected stock prices were well below $6.50/share, even accounting for overall market trends. Adjusting the pre-IDT price of $3.98/share and the pre-Potomac price of $4.53/share to take into account the increases in the R2K through the Merger date (37.79% and 26.85%, respectively) yields stock prices of $5.56/share and $5.75/share, respectively. B1173-222; B1231-43; *see* A1264.

Even PLX's *affected* stock prices do not support a value over $6.50/share.

On June 20, 2014, the last trading day before the Merger was announced, PLX's stock closed at $5.94/share; the average price over the preceding 30 days was also $5.94/share. B1174. Indeed, in the six preceding years, PLX's stock price exceeded $6.50/share on just thirty days: nine following the IDT announcement; and twenty-one following Potomac's first 13D filing. B1173-222.

Plaintiffs do not dispute these facts and do not identify any information to suggest that there was "a valuation gap" between the stock price and fair value. *Dell*, 177 A.3d at 25. Indeed, Plaintiffs do not address PLX's stock price at all in their appeal.

4. The Court Should Reject Plaintiffs' Unpreserved "Evidentiary Uncertainty" Argument

Recognizing their failure to prove damages, Plaintiffs contend, for the first time on appeal, that "evidentiary uncertainty" regarding whether PLX could have achieved its projections should have been construed in their favor. AOB:15, 28. This argument was never raised below and is waived. Supr. Ct. R. 8; *Seaport Vill. Ltd. v. Terramar Retail Centers, LLC*, 148 A.3d 1170 (Del. 2016).

Further, any "uncertainty" about PLX's future prospects is incorporated into the fair value calculus, which takes into account a company's future value as a going concern. *See Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 298 (Del. 1996). Indeed, this same "uncertainty" exists in every case where stockholders assert that a sale undervalued a company. *See Answers Corp. Shareholders Litig.,*

2011 WL 1366780, at *9 (Del. Ch. Apr. 11, 2011) ("Now might be the right time to exit; greater success might be just around the proverbial corner. It is, of course, obvious that no one knows.")

Plaintiffs' proposed standard would also radically change Delaware law. Plaintiffs ask this Court to create a presumption of damages whenever liability has been established, eliminating damages as an essential element that Plaintiffs must prove. *See Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001). It would also allow Plaintiffs to recover based upon mere "speculation or fancy," which Delaware courts have consistently rejected. *Henne v. Balick*, 51 Del. 369, 375 (Del. 1958); *see also Ravenswood Inv. Co., L.P. v. Estate of Winmill*, 2018 WL 1410860, at *20 (Del. Ch. Mar. 21, 2018), as revised (Mar. 22, 2018) (declining to award damages based upon "rank speculation"). Contrary to Plaintiffs' claim, there is no inherent injustice in finding that a wrong caused no monetary harm. Indeed, a claim that an otherwise reasonable sale process was commenced for improper reasons is a paradigmatic case. *See, e.g., In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 774 (Del. 2006) (affirming dismissal of disclosure claim that caused no monetary harm to stockholders).

II. SINGER AND THE REMAINDER OF THE BOARD FULFILLED THEIR FIDUCIARY OBLIGATIONS

A. Questions Presented

Did the trial court err in concluding that (1) Singer had a conflict of interest in believing that PLX should be sold; (2) Singer acted disloyally; and (3) PLX's disinterested, independent directors also acted disloyally by being "susceptible to activist pressure"? These issues were preserved at A1241-59.

B. Scope of Review

The trial court's conclusions of law are reviewed *de novo* and its factual findings are reviewed for clear error. *SV*, 37 A.3d at 209-211.

C. Merits of Argument

1. Potomac's Belief that a Sale Would Maximize PLX's Value Was Aligned With the Nearly 70% of Stockholders Who Voted for Its Slate

The trial court concluded that Potomac and Singer had a "divergent interest… in achieving a near-term sale." Op.98. Significantly, the trial court did not find that Singer's interest diverged with respect to maximizing value in the sale process; rather, it found a conflict on the question of whether "the Company should [] have been sold at all." Op.110. This conclusion ignores a critical fact: nearly 70% of PLX's stockholders supported Potomac's stated platform of pursuing strategic alternatives. B1969.

Effecting the will of the stockholders is the antithesis of a conflict of interest. *See Blasius Indus., Inc. v. Atlas Corp.,* 564 A.2d 651, 659, 663 (Del. Ch. 1988). During the proxy contest, the Board expressly positioned the upcoming election as a referendum on "the future of PLX Technology." B573. PLX's proxy materials were "detailed and substantive," informing stockholders of the Board's plan to, among other things, "quadruple the size of the addressable market by 2017" through ExpressFabric. Op.29-30 (quoting B574); *see also* B641-94. PLX's stockholders, however, "view[ed] the matter differently." *Blasius*, 564 A.2d at 663. Cognizant of the "risk and upside potential" of remaining independent, a majority of stockholders chose "to opt for certainty" by endorsing the pursuit of a sale via the election of Potomac's slate. *Answers,* 2011 WL 1366780, at *9.

As the stockholder vote makes clear, Singer's interests were not divergent but rather "precisely aligned" with the PLX electorate. *In re Synthes, Inc. Shareholder Litig.*, 50 A.3d 1022, 1038 (Del. Ch. 2012). The trial court erred in substituting its judgment for that of "the real parties in interest – the disinterested equity owners." *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 314 (Del. 2015).

The trial court's conclusion, moreover, is contrary to Delaware law. Though the trial court posited that investors like Potomac are "impatient shareholders" who

typically "pursu[e] short-term performance at the expense of long-term wealth" (Op.102) (citation omitted), Delaware law does not recognize purported "impatience" as a basis to overcome the presumption that large stockholders are incentivized to maximize the value of their shares. *In re Morton's Rest. Grp., Inc. Shareholders Litig.*, 74 A.3d 656, 662 (Del. Ch. 2013). Indeed, in *Synthes*, then-Chancellor Strine specifically rejected as "counterintuitive" the allegation that a stockholder was conflicted because he "was an impatient capitalist looking to sell out fast and thus willing to take a less than fair market value for Synthes," describing the theory as a "chutzpah" version of the traditional conflict analysis. 50 A.3d at 1033, 1036. Similarly, in *Morton's,* then-Chancellor Strine rejected the allegation that a large stockholder was conflicted because it "typically flips companies … every three to five years" and because similar firms typically "force a sale at a suboptimal price whenever [they are] in the process of starting a new investment fund." 74 A.3d at 667-68.

None of the "'narrow circumstances'" identified in *Synthes* and *Morton's* to "create a disabling conflict of interest" exist here. *Morton's,* 74 A.3d at 667 (*quoting Synthes*, 50 A.3d at 1036). No claim or finding was made that Potomac – which received the same per-share consideration as all other PLX stockholders – faced some "exigent need (such as a margin call or default in a larger investment)" such that it sought "a sale of the corporation … at below fair market value in order

to meet its own idiosyncratic need for immediate cash." *Synthes*, 50 A.3d at 1035-36. Further, there was no "crisis, fire sale." *Id.* Simply stated, no evidence was presented of any "basis for conceiving that [Potomac] wanted or needed to get out of [PLX] at any price, as opposed to having billions of reasons to make sure that when [it] exited, [it] did so at full value." *Id.* at 1037; *see also Sheet Metal Workers Local No. 33 Cleveland District Pension Plan v. URS Corp.*, C.A. No. 9999-CB at 10, 53 (Del. Ch. Aug. 28, 2014) (TRANSCRIPT) (rejecting allegation that large stockholder "was an aggressive arbitrage event-driven hedge fund" that forced the Board into a short-term transaction as contrary to "[c]ommon sense."); *Transkaryotic Therapies, Inc.*, 954 A.2d 346, 366 (Del. Ch. 2008) (rejecting allegation that stockholders were "willing to leave a substantial sum of money on the table simply to rid themselves of" their investment) (citation, quotations, and ellipses omitted).

The "facts" identified by the trial court (Op.103-04) show only that Potomac believed that a sale would maximize the value of *this particular investment*, not that it would irrationally pursue a strategy of "impatience" at the expense of receiving "top dollar." *Morton's*, 74 A.3d at 669. Indeed, the evidence confirms that Potomac's single outside investor was a charitable organization with a long-term outlook (B180-81(Singer)) and that Potomac and Singer had a track record of

pursuing long-term strategies with other investments. B1698(Singer); B82-3(Singer).

The trial court also ignored that, as a director, Singer pursued long-term initiatives antithetical to a sale such as issuing RSUs[10] and acquiring another semiconductor company (*see* § SOF § E, *supra*), and he even advocated walking away if Avago would not increase its price:

> I remember Eric saying: Well, if they don't go to $6.50, screw 'em. We'll go do something else.… [I]n other words, if we couldn't get a fair value for the stock, then let's execute. We can run the – [H]is comment was: We've got a good strategy. Let's execute it.

B1529(Hart).

Finally, though the trial court credited the Board's stated belief during the proxy contest that "Singer wanted PLX sold" (Op.104), these opinions are not evidence of Potomac's actual state of mind. The trial court compounded this error by ignoring that the directors later admitted that they were wrong. Hart said it best:

> I can't overemphasize the fact that my expectation of Potomac['s nominees] before they joined the board and after were dramatically different.

[10] Though the trial court acknowledged that Singer "became a vocal advocate for more equity compensation," it disposed of this inconvenient fact by speculating that Singer must have wanted to "ensure that management would not resist a sale." Op.41. The court cited no evidence to support this speculation, and contradicted itself by acknowledging that "Singer also weighed in on other compensation issues, such as his desire to make cash bonuses harder to achieve." Op.41 & n. 22.

…

> I [was]… expecting [Singer] to be an activist shareholder…. But when he got on the board, he was not – you know, certainly if an opportunity to sell the company came up, he'd want to look at it very closely. But, on the other hand, if it didn't come up, he was willing to have a longer game … and let the company develop products, et cetera.

B1532, 1539(Hart); *see also* B1334(Salameh); B1390(Schmitt); B1501-02(Raun).

2. Singer Fulfilled His Fiduciary Obligations

The trial court found that Singer acted disloyally by purportedly withholding from his fellow directors a "secret tip" that he received from DB the day after he became a director: that "after Avago completed the LSI deal, it wanted to acquire PLX for approximately $300 million." Op.81, 115. Plaintiffs raised this conspiracy theory for the first time post-trial in a bid to explain away the incontrovertible evidence demonstrating that, once Singer learned of the Board's extensive market checks, he did nothing to pursue a sale of PLX. (*See* SOF § E, *supra*). The trial court accepted this theory, finding that this "development … mitigated any need [for Singer] to push hard for a near-term sale" and allowed Singer to "bide[] his time" waiting for Avago to return. Op.2, 36.

The trial court's theory is illogical and wholly unsupported by the record. Neither Plaintiffs nor the court were able to explain why Singer, with his supposed single-minded focus on a near-term transaction, would inexplicably forgo a deal with the "four potential transaction partners" that were still in play and instead

choose to wait for the only buyer who couldn't do a deal for many months. Op.109. The trial court likewise failed to articulate any reason for Singer to withhold Avago's information from the Board, particularly if it could have allowed the Board to negotiate for a better price. *See* Op.115-16.

Moreover, the sole evidence on which the trial court relied to support this conspiracy theory are two internal DB emails sent by Howell on December 19, 2013, neither of which states that Avago "wanted to acquire PLX for approximately $300 million" or supports that Singer withheld this information from anyone. Op.81. Rather, according to the first email, Krause told Howell that PLX is an "interesting little deal" but "[p]ulling trigger on $300M deal [] before LSI is difficult." A77. The second email, sent two hours *earlier*, states that Howell "gave [Singer] the color from [his] Krause email." A84. The term "color," of course, contradicts the conveyance of specific information. Moreover, Plaintiffs, who bore the burden of proof, chose not to elicit any testimony about this email during depositions or at trial, instead adding these exhibits on the last day of trial, after all fact testimony had concluded. (A967-68). Plaintiffs thus failed to meet their burden of proof.

The trial court also disregarded evidence showing that Singer's fellow directors were given the exact same "color" at the exact same time. On December 18, 2013, Salameh stated that he and the new directors "will meet with [] Deutsche

Bank" about "the status of the process," emphasizing that "it is very important we meet with DB in the near future ***so we can all get the current color*** of the potential buyer status."[11] B904 (emphasis added). That "color" was then communicated to all Board members in a "BoD update" that DB "prepped" for "Salimi [sic], Singer, Ralph, and Dave." A84. This update, also dated December 19, 2013, outlined Avago's continued interest in PLX, its view on pricing, and its stance on timing – the very same "color" conveyed to Singer. A70-75.

In all events, there was nothing "secret" in DB's emails. By December 2013, the Board knew Avago was interested, as it had already evaluated two acquisition proposals in the preceding two years. The Board was also aware of Avago's price parameters. Howell's summary expressly stated that, per Krause: PLX "is still 'an interesting little deal, but only at the right price… ***and we've told PLX where we stand on that***.'" A77 (emphasis added). DB's December 19, 2013 Board update reiterated that Avago was "potentially willing to increase [its] offer above $6/share." A73. Moreover, the fact that Avago had previously offered $6.00/share but "went away" when the Board suggested "$7 or above" left little room for speculation about the range of possible deal prices. B1438(Salameh); *see*

[11] Though the trial court pejoratively characterized Singer as having had "off-line conversations" with DB (Op.49 at n.264), there is nothing wrong with a director communicating directly with the company's bankers, especially after being encouraged to do so by the Chairman of the Board.

also B1393-94(Schmitt). With 45.9 million shares outstanding, these values equate to deal prices of $275.4 million to $321.3 million.

The Board was likewise well aware of Avago's timing issues relative to the LSI acquisition, which was publicly announced days before the alleged "tip." B840. As soon as the news broke, DB offered a call "to give [the Board] some further color on the deal." *Id*. In response, Riordan commented: "well, now we know why [A]vago has been paying no attention whatsoever to PLX." B841; *see also* B984 (Avago "appears consumed with the LSI acquisition."). DB's December 19, 2013 update confirmed Avago's "[w]illing[ness] to wait until process is finished at which point they can decide if price is right." A73.

The trial court's central finding that Singer received a "secret tip" is neither "supported by the record" nor "the product of an orderly and logical deductive process" and should be reversed as clearly erroneous. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

3. PLX's Incumbent Directors Fulfilled Their Fiduciary Obligations

The trial court acknowledged that where, as here, a board has conducted a robust sales process that resulted in a price that "exceeded the standalone value of the Company," "there ordinarily would not be grounds to debate whether the Board fulfilled its duties." Op.110, 134. Nevertheless, the court found that the incumbent directors breached their fiduciary duty of loyalty because "Potomac and

Singer succeeded in influencing [them] to favor a sale when they otherwise would have decided to remain independent." Op.110. The trial court erred in reaching this conclusion.

a. The Business Judgment Rule Applies

The trial court improperly reviewed the incumbent directors' decision to sell PLX rather than "remain independent" under enhanced scrutiny. Op.110. The decision whether to "put the company up for sale" is governed by the business judgment rule. *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009); *see also Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *7 (Del. Ch. June 30, 2014).[12]

Here, there is no basis to rebut the presumptions of the business judgment rule, as it is undisputed that PLX's incumbent directors were disinterested and independent. Plaintiffs did not assert, and the court did not find, that Singer dominated or controlled any of the remaining directors. Though the court made a vague reference to "undisclosed[13] conflicts of interest" (Op.110), it is axiomatic

[12] Further, as this Court noted in *Corwin*, the *Revlon* doctrine was not "designed with post-closing damages claims in mind." 125 A.3d at 312. Applying the business judgment rule to post-closing damages claims will also have the added benefit of incentivizing plaintiffs – particularly after *Corwin* and *Trulia* – to seek corrective disclosures pre-closing, rather than permitting ostensibly uninformed stockholders votes to go forward.

[13] Singer's affiliation with Potomac was hardly "undisclosed;" it was referenced repeatedly throughout the proxy contest and the 14D-9. *See* Op.30 (quoting B749); A403; A409-A414.

that the conflict of a single director "cannot impugn the entire [] board." *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *9 (Del. Ch. May 4, 2005), *aff'd,* 897 A.2d 162 (Del. 2006).

Further, though the court found that the Board was "susceptible to activist pressure" (Op.111), all but one of the Board decisions identified by the Court were made in 2014 – after Potomac's proxy contest had already concluded and there was no "activist pressure." *See In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1003, 1006 (Del. Ch. 2005) (rejecting allegation "of a passive board who deferred too easily to" a conflicted CEO as lacking plausible "motives.").

The sole decision identified by the trial court that was made during a pending proxy contest was the Board's initial decision in August 2013 to "explore a possible sale."[14] Op.110. However, Delaware law does not recognize the "threat" of losing a board seat as a basis "to rebut the business judgment rule." *Ryan v. Gursahaney*, 2015 WL 1915911, at *6 (Del. Ch. Apr. 28, 2015), *aff'd*, 128 A.3d 991 (Del. 2015). Indeed, "there is no logical force to the suggestion that otherwise independent, disinterested directors of a corporation would act disloyally or in bad faith and agree to a sale of their company 'on the cheap' merely … because of the possibility that [they] might face opposition for reelection at the

[14] Clearly, a decision made before Singer joined the Board – when Potomac was a minority, non-controlling stockholder with no Board representation – cannot serve as the predicate breach for aiding and abetting.

next annual stockholders meeting" – especially since, "by approving the merger agreement[], the [directors] affirmatively agreed to give up their directorial positions." *In re Lukens Inc. Shareholders Litig.,* 757 A.2d 720, 729 (Del. Ch. 1999), *aff'd*, 757 A.2d 1278 (Del. 2000).

Where "business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose," *i.e.* if "the transaction constitutes waste." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006) (citation omitted). As set forth below, the record does not support such a finding.

b. Plaintiffs Did Not Meet Their Burden[15] of Showing that the Directors' Decision to Sell PLX was Unreasonable, Let Alone that it Lacked a Rational Business Purpose

Delaware law does not support the trial court's conclusion that PLX's disinterested, independent directors breached their fiduciary duties by being "influenc[ed] … to favor a sale." Op.110. Directors are not "Platonic masters;" they are "agents of the shareholders." *Blasius,* 564 A.2d at 663. Here, a majority of PLX's stockholders made clear that they supported Potomac's platform of pursuing strategic alternatives. (*See* § II(C)(2), *supra*). A Board responding to the

[15] "By choosing to settle with the directors and continue only with the aiding and abetting claim, the plaintiffs took up the burden of proof on each of the elements of aiding and abetting, including the existence of a fiduciary breach." *In re Rural Metro Corp.*, 88 A.3d 54, 85 (Del. Ch. 2014).

wishes of its stockholders does not constitute the "extreme set of facts required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties." *Lyondell*, 970 A.2d at 243 (citation omitted).

Moreover, the trial court's finding that the directors "would have decided to remain independent" if not for "activist pressure" is not supported by the record. Op.110-11. The evidence confirms that the Board shared the stockholders' concern about the Company's "very uncertain future" (B404), which prompted the Board to begin exploring a sale in 2011 – long before activist involvement. *See* SOF §§ A, B, *supra*; *Merlin Partners LP v. AutoInfo, Inc.*, 2015 WL 2069417, at *12-13 (Del. Ch. Apr. 30, 2015) (rejecting allegation that board was "pressured" by a hedge fund "to sell quickly" where it "had already … consider[ed] … a potential sale" and reached out to buyers "months before [the fund] became a stockholder.").

Further, if the Board was supine in the face of activism, it could have sold the Company to IDT in February 2012, after Balch Hill nominated a competing slate of directors (A935(UF)), or to Avago in April 2013, after Potomac did the same. A937-38(UF); *see* SOF §§ B, C. Instead, on both occasions, the Board deemed the proposed prices ($5.00/share and $6.00/share, respectively) "too low." B371; A61. In May 2013, the Board "made clear" to Avago that it was "not

pressured" by "the activist shareholder in the background" and "would take [its] chances … rather than settle for a price [it] consider[s] too low" – which is exactly what it did. B498. Moreover, if at any time the incumbent directors wanted to entrench themselves in the face of a looming proxy contest, they could have accepted Potomac's settlement offers, which contemplated the incumbent directors running for re-election and preserving their majority. *See* A940(UF); B427; B471; B564-68.

Nothing happened between April 2013, when the Board rejected Avago's offer, and August 2013, when the Board decided to commence a sale process, to suddenly cause the directors to "acquiesce[] torpidly" to Potomac's demands. *Toys "R" Us*, 877 A.2d at 1003. Notably, though the Board could have quieted Potomac by commencing a public sale process, it chose to keep the process confidential out of concerns for employee retention. B1426(Salameh); B1378(Schmitt).

The trial court disregarded this evidence and instead asserted that DB "had warned against a sale process." Op.110. DB did no such thing. Rather, the purported "warning" was the sole con – outweighed by four pros – of pursuing a "[p]roactive sales process." B515. The pros included that a sale process "could lead to a higher valuation" due to increased "leverage." *Id*.

The trial court's finding that the directors and management did not think that it was "a good time to sell" is likewise not supported by the record. Op.110-11. The sole evidence cited by the court is a D&O renewal presentation from April 2013, when the Company was still in its post-IDT recovery period. Op.110 (citing A57-60). While Schmitt and Riordan testified that the proxy contest might have influenced the Board's exact timing (Op.110-11), Schmitt confirmed that, "irrespective of Potomac[,] … the board was of the view that renewing the sale process after one, two or even three quarters was the company's next step." B1377(Schmitt). Further, Schmitt and Riordan were part of the unanimous vote on August 6, 2013 to affirmatively pursue a sale, agreeing that the "timing seemed optimal" to do so. B533-34. There is no evidence that any director believed on or after this date that it was a bad time to sell.[16]

The trial court's remaining examples of the Board allegedly succumbing to activist pressure are equally unsupported:

- The trial court criticized the decision to make Singer Chairman of the Special Committee and to allow him to have "one-on-one" discussions with DB

[16] Whipple was the lone witness who believed that PLX should remain independent as, in his view, the Company "would have been worth a lot more money" in a "few years … "after [] Express Fabric had developed." B1643(Whipple). PLX's stockholders, fully informed of management's plans for ExpressFabric, disagreed. *See Answers*, 2011 WL 1366780, at 9 (shareholders can decide for themselves "whether to opt for risk and upside potential or to opt for certainty.").

and Avago. Op.112-13. However, as both Plaintiffs and the trial court acknowledged, once the decision to sell was made, Singer was "the greatest guy to have" as he was uniquely motivated to "push[] for top dollar." B46-48.

- The trial court found that, after Singer joined the Board, "the incumbent directors found within themselves a new willingness to support a sale at prices below the values that they had previously rejected." Op.111. In fact, the Board had never rejected an offer above $6.00/share. *See* A936(UF); B569

- The trial court criticized the directors for "engaging in the 'art of the possible'" when they approved a $6.75/share, rather than a $7.00/share, counteroffer to Avago. Op.114. However, the last time the Board suggested "$7 or above, [Avago] went away" B1438(Salameh), and the Board was rightly concerned that Avago would "just walk away" again if it "went back" at "the $7 dollar" level." B1393-94(Schmitt).

- The trial court found that, "at the time they approved the counteroffer and granted authority for a deal at $6.50, the directors … had not yet received a valuation of the Company on a standalone basis." Op.113. However, the only "authority" granted was for a non-binding exclusivity agreement. And, unlike *In re Rural Metro Corp*, the Board undisputedly had DB's final valuation sufficiently before it approved the final Merger Agreement on June 22, 2014.

88 A.3d 54 at 95-96. Further, by the time the Board approved the counteroffer, DB had provided its preliminary valuation (*see* A283-07), and the Board had received four additional valuations in preceding two years (B318-67; B428-45, B472-93, B535-60), all of which "said … that a price in th[e] range [of] $6 to $7 was a very good result." B1437(Salameh). The Board also knew that PLX's unaffected stock price was $4.53/share. *See* B1029. There is simply no support for the conclusion that the directors "lacked essential information." Op.113.

- Finally, the trial court found that "the Special Committee instructed management … to generate a lower set of revenue projections." Op.114. However, nothing in the record reflects an instruction to create "lower" projections, and the evidence confirms that the directors "didn't give [management] any direction on … what direction it should go." B1345(Salameh). Further, as set forth above, there were in fact many "developments" that "warrant[ed] changing" the December Projection. Op.114-15; *see* SOF § G, *supra*.

III. POTOMAC IS NOT VICARIOUSLY LIABLE FOR SINGER'S ACTIONS AS A PLX DIRECTOR

A. Question Presented

Did the trial court err when it concluded that Potomac "knowingly participated" in an alleged breach of fiduciary duty by the PLX Board by imputing Singer's actions as a PLX director to Potomac? This issue was preserved at A1258-59.

B. Scope of Review

See § II(B), *supra*.

C. Merits of Argument

It is well settled that the "knowing participation" element of an aiding and abetting claim "requires that the secondary actor have provided *substantial assistance* to the primary violator." *Buttonwood Tree Value Partners, L.P. v. R. L. Polk & Co., Inc.*, 2017 WL 3172722, at *9 (Del. Ch. July 24, 2017) (citation omitted, emphasis in original). Absent participation, an aiding and abetting claim cannot survive. *Malpiede*, 780 A.2d at 1098 (affirming dismissal of aiding and abetting claim for lack of "participation in a fiduciary breach").

Here, it is undisputed that Potomac did nothing other than run a successful proxy contest that resulted in the election of one of its principals to the PLX Board – "the highest and best form of corporate democracy." *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996); Op.119. Indeed, the trial court expressly

acknowledged at the outset of the action that Potomac did not "give[] substantial assistance to Singer once he got on the Board." B58. There is thus no basis for a finding of knowing participation in any subsequent breaches.

Despite the lack of substantial assistance, the trial court nevertheless concluded that Potomac "knowingly participated" in Singer's alleged breach of fiduciary duty because "once elected to the Board, Singer continued to act on Potomac's behalf" and "Singer's knowledge and actions can attributed to Potomac." Op.119-20. However, in holding Potomac liable by attribution, the trial court improperly found Potomac vicariously liable for Singer's actions under the doctrine of *respondeat superior*. Op.119-20; *see also* B72 (stating that "the blackletter doctrine of *respondeat superior*" is a "vehicle" to hold Potomac liable for "breaches of duty committed by Eric Singer.").

Delaware courts have consistently rejected attempts to hold stockholders liable by attribution for the acts of their representatives on corporate boards. Indeed, Justice Jacobs, writing as a Vice Chancellor, expressly found that applying *respondeat superior* principles in this context "would work an unprecedented, revolutionary change in [Delaware] law" by creating fiduciary duties even for minority, non-controlling stockholders. *Emerson Radio Corp. v. International Jensen Inc.*, 1996 WL 483086, at *20 n. 18 (Del. Ch. Aug. 20, 1996) (rejecting claim to hold stockholder liable for the acts of its general partner while serving on

a corporate board); *see also Khanna v. McMinn*, 2006 WL 1388744, at *28 (Del. Ch. May 9, 2006) (same).

As then-Vice Chancellor Jacobs explained in *Emerson*:

> The argument has no legal foundation… If plaintiffs' argument were the law, then whenever a director is affiliated with a significant stockholder, that stockholder automatically would acquire the fiduciary obligations of the director by reason of that affiliation alone. **The notion that a stockholder could become a fiduciary by attribution (analogous to the result under the tort law doctrine of *respondeat superior*) would work an unprecedented, revolutionary change in our law, and would give investors… second thoughts about seeking representation on the corporation's board of directors.**

1996 WL 483086, at *20 n. 18 (emphasis added); [17] *see also Arnold v. Soc'y for Sav. Bancorp, Inc.,* 1995 WL 376919, at *8 (Del. Ch. June 15, 1995), *aff'd and remanded,* 678 A.2d 533 (Del. 1996) (dismissing *respondeat superior* claim; "[b]ecause [corporation] owed no fiduciary duty to its stockholders, either directly or vicariously, it cannot be held liable for its directors' failure to act as fiduciaries.").

[17] Other courts applying Delaware law have reached the same conclusion. *US Airways Group, Inc. v. British Airways PLC,* 989 F. Supp. 482, 494 (S.D.N.Y. 1997); *see also Fried v. LVI Servs., Inc.*, 2011 WL 2119748, at *5 (S.D.N.Y. May 23, 2011); *CCBN.Com, Inc. v. Thomson Fin., Inc*., 270 F. Supp. 2d 146, 151 (D. Mass. 2003); *accord Glob. Crossing Estate Representative v. Winnick*, 2006 WL 2212776, at *21 (S.D.N.Y. Aug. 3, 2006).

The trial court's finding of vicarious aider and abettor liability is also internally inconsistent because, by definition, an aiding and abetting claim can be asserted only against "a party who is not a fiduciary."[18] *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *28 (Del. Ch. Jan. 25, 1999), *aff'd*, 741 A.2d 16 (Del. 1999)); *Khanna*, 2006 WL 1388744, at *28 (dismissing *respondeat superior* claim as inconsistent with claim for aiding and abetting, in which the defendant was sued "as a *non-fiduciary*") (emphasis in original).

The trial court further erred by concluding that everything Singer did as a PLX director was "on Potomac's behalf" and therefore within the scope of his role at Potomac. Op.119. In order "to rebut the presumption that directors with affiliations to more than one corporation 'change hats' in order to fulfill their obligations to each entity," Plaintiffs were required to identify actions taken by Singer than were not "within the scope of his duties" as a PLX director. *Fried*, 2011 WL 2119748, at *5-6; *see also United States v. Bestfoods*, 524 U.S. 51, 69 (1998). Plaintiffs did not do so.

Actions by Singer within the scope of his duties as a PLX director cannot support a finding of vicarious liability. As a PLX director, Singer "had fiduciary duties to act on behalf of the shareholders of [PLX], not on behalf of the entit[y]

[18] Plaintiffs did not sue Potomac for breach of fiduciary duty, and they addressed *respondeat superior* in passing in a footnote in their Post-Trial Reply Brief. (A1300).

that appointed [him]." *In re Global Crossing, Ltd. Sec. Litig.*, 2005 WL 1907005, at *3 (S.D.N.Y. Aug. 8, 2005). PLX's stockholders chose Singer as *their* agent on PLX's Board. "Thus, when [he] acted as [a] director[] of [PLX], [he was] not acting within the scope of [his] employment." *Id.* (rejecting claim to hold nominating entities liable under *respondeat superior* for their executives' purported fraud); *see also Fried*, 2011 WL 2119748, at *5.

Finally, as Justice Jacobs warned, holding stockholders liable "by attribution" for the acts of their affiliates on corporate boards would "give investors second thoughts about seeking representation on the corporation's board of directors." *Emerson*, 1996 WL 483086, at *20; *see also Khanna*, 2006 WL 1388744, at *28 (same); *Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006) (rejecting stockholder liability premised on the nomination of directors as "hav[ing] a chilling effect on transactions that depend on a particular shareholder being able to appoint representatives to an investee's board.").

Though the trial court attempted to limit its decision only to *affiliated*, and not "independent," director-nominees (Op.120), no public policy goal would be advanced by stripping owners of representation on corporate boards. Indeed, Justice Jacobs' warning was made in a case that involved affiliated directors. *Emerson*, 1996 WL 483086, at *20 n.18. Moreover, it is up to the stockholders –

not the courts – to decide whether affiliation with a nominating stockholder is disqualifying. Stockholders are participants in a corporate democracy who "control their own destiny through informed voting." *Williams*, 671 A.2d at 1381. Decisions about who is best suited to serve on a corporate board should be left to "the real parties in interest – the disinterested equity owners," who "can easily protect themselves at the ballot box." *Corwin*, 125 A.3d at 313.

IV. THE STOCKHOLDER VOTE WAS FULLY INFORMED.

A. Question Presented

Did the trial court err in concluding that the stockholder vote was not fully informed? This issue was preserved at A1229-48.

B. Scope of Review

See § II(B), *supra*.

C. Merits of Argument

The trial court found that the 14D-9 misleadingly stated that the June Projections were prepared "in the ordinary course of business; and failed to disclose Krause's purported "tip," the substance of Singer's conversation with Krause on May 21, 2014 and his alleged role in the Avago price negotiations, and the values from DB's preliminary DCF analysis in May 2014. Op.83, 87, 94. However, with the exception of the alleged "tip" – a theory that fails for the reasons discussed in § II(C)(2) above – Plaintiffs made these same allegations in their Complaint, but abandoned their pre-closing request for injunctive relief. B21-23, 31-34. Because Plaintiffs chose to sit on their rights, their post-closing disclosure claim is waived. *See Nguyen v. Barrett*, 2016 WL 5404095, at *7 (Del. Ch. Sept. 28, 2016); *Ryan v. Lyondell Chem. Co.*, 2008 WL 2923427, at *21 (Del. Ch. July 29, 2008); *Andra v. Blount*, 772 A.2d 183, 190 (Del. Ch. 2000).

The disclosure claim, in any event, has no merit. The 14D-9 fully disclosed the circumstances surrounding the preparation of the June Projections, including

that they were requested and prepared after Avago's offer. *See* 14D-9 at A414-19, 426, 431, 442-47. These Projections, moreover, were treated no differently than PLX's other mid-year forecasts (*see* § I(C)(1), *infra*), all of which had likewise been prepared "for the sale process." B1461(Raun); *see also* B1396(Schmitt); B1536(Hart). Raun confirmed that "[a]ny event that required a copy of the plan… would be using [the June Projections] from that time forward." B1515(Raun).

The 14D-9 also disclosed Singer's discussions with Avago, including his meeting with Krause on May 21, 2014 and a further communication on May 28, 2014. 14D-9 at A414-16. Contrary to the trial court's conclusion, no "reasonable stockholder would consider [] important" that Singer also may have had discussions "about tender and support agreements" (Op.86). *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000) (citation omitted). There is likewise no basis in the record for the trial court's unfounded speculation about Singer being an unidentified "interlocutor" in the negotiation of the counteroffer to Avago. Op.85-87; *see* SOF §§ F, H, *supra*. There was thus nothing to disclose.

Finally, neither the Board nor DB relied on DB's May 2014 valuation, which was expressly labeled as "[p]reliminary" and was based on an inaccurate share count and "SBC" (stock based compensation) information. A286; *compare* A295-96 *with* A374-75. *See In re Micromet, Inc. Shareholders Litig.*, 2012 WL

681785, at *13 (Del. Ch. Feb. 29, 2012) (no requirement to disclose projections used "solely as an internal tool" and "not relied upon… in [] fairness opinion").

Because the Merger was ratified "by a fully-informed, uncoerced majority of the disinterested stockholders," Plaintiffs' claim against Potomac should have been dismissed. *Corwin*, 125 A.3d at 305-06.

CONCLUSION

Potomac respectfully request that the Court deny Plaintiffs' appeal and affirm the entry of judgment in favor of Potomac, and grant Potomac's cross-appeal, reversing the trial court's findings on liability.

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