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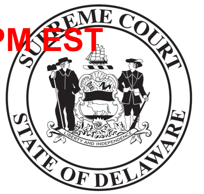

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE MINDBODY, INC., STOCKHOLDER LITIGATION	No. 484, 2023 Court Below: Court of Chancery of the State of Delaware Consol. C.A. No. 2019-0442

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This case concerns Plaintiffs' challenge to the acquisition of Mindbody, Inc. ("Mindbody") by third-party buyer Vista Equity Partners Management, LLC ("Vista"), which was approved by an overwhelming majority of Mindbody's stockholders and unanimously by Mindbody's Board of Directors, the vast majority of whom were undisputedly disinterested. The deal closed at $36.50 per share, a 68% premium to the market price. There were no bidders other than Vista despite a sale process run by an independent banker that reached out to over a dozen potential strategic and financial buyers pre-signing and dozens more during the 30-day go-shop period.

After trial, the Court of Chancery ruled that Mindbody CEO Richard Stollmeyer breached his fiduciary duties by (a) not informing the Board of details of various early meetings with Vista, his affinity for Vista, and his personal desire for liquidity; and (b) not disclosing these same facts to stockholders. The court also ruled that Vista was liable, under an aiding and abetting theory, for failing to prevent the non-disclosures in Mindbody's proxy materials.

The court concluded that the damages for the sale-process breaches were $1 per share, on the supposition that Mindbody could have countered Vista's $36.50 "best and final" offer, and if so, Vista might have raised its offer to $37.50. The court also concluded that, while it acknowledged there was no evidence of reliance,

causation, or damages, it could nevertheless award the same $1 per share as nominal damages for the disclosure breaches. The court further awarded prejudgment interest on the nominal damages. Finally, the court held that Defendants waived an argument that they are entitled to set off damages with the $27 million settlement Plaintiffs obtained from former Defendants Eric Liaw and Institutional Venture Partners XIII, L.P. ("IVP"), because Defendants did not raise it until post-trial briefing.

Defendants-below Appellants Stollmeyer, Vista, and Mindbody ("Defendants") appeal from the judgment of the Court of Chancery. For the reasons set forth below, this Court should reverse.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in ruling that Stollmeyer breached his fiduciary duties and in refusing to defer to the Board's judgment.

First, the court erred in its analysis of the sale-process claim by refusing to defer to the eight-member Mindbody Board, six of whom undisputedly had no conflict and none of whom received differential merger consideration. In rejecting deference, the court relied on Stollmeyer's non-disclosures to the Board concerning picayune details of meetings with Vista, his general desire for liquidity, and his affinity for Vista. However, the court did not find those non-disclosures would have been material to a reasonable board member or were material to the Board's considered decision to accept the highest (and only) bid, nor is there any logical reason why it would. The Board approved the transaction after hiring a leading technology banker and law firm, reaching out to over a dozen potential buyers, rejecting Vista's first offer, and accepting Vista's best-and-final offer with a 30-day go-shop provision whereby Mindbody could (and did) solicit competing bids. Any purported head-start for Vista did not impact the final deal price because no other potential bidder indicated it could top $36.50 even if given more time. Instead, the other potential bidders refused to match Vista's opening bid, let alone its best-and-final offer. The non-disclosures would not have impacted any reasonable board member's decision, and every Board member at trial so testified.

In any event, Stollmeyer did not have a disabling conflict. There was no finding or even allegation that Stollmeyer received any consideration other than the deal price for his Mindbody shares. The court's conflict ruling rested on commonplace circumstances in an acquisition by a financial sponsor—Stollmeyer had a general desire for liquidity but no imminent need, Stollmeyer generally liked Vista but expressed similar sentiment about other bidders, and Vista ultimately kept Stollmeyer as CEO at the same pay for roughly a year but made no pre-closing promises. None of this creates a disabling conflict as a matter of law.

Second, the court likewise erred in rejecting application of the *Corwin* defense based on non-disclosures in Mindbody's proxy materials. The non-disclosures were immaterial. The relevant considerations for stockholders were not details of Stollmeyer's meetings or his expression of positive feelings for Vista. Rather, they were the facts that Vista was the only bidder even after extensive outreach, $36.50 provided a 68% premium to the market price supported by an independent fairness opinion, ISS and Glass-Lewis endorsed the deal, and the independent Board unanimously believed the price was more than fair and the sale was occurring at an opportune time. The non-disclosures would not have affected the economically rational decision of nearly all Mindbody stockholders, save Plaintiffs, to approve the transaction.

2. The Court of Chancery erred in its damages award.

First, for the sales-process claim, the court awarded damages of $1 per share, on the unsupported assumptions that Mindbody could have countered Vista's $36.50 best-and-final offer and (if it had) Vista could have raised its bid to $37.50. There is no evidence—and Plaintiffs did not even argue—that the Mindbody Board *should* have countered Vista's $36.50 best-and-final offer after the Board already had countered Vista's $35 offer, given the absence of any other bidder. Nor is there evidence that, if Mindbody had countered again, Vista actually would have raised its offer. In the prior ten years, Vista never had gone above its best-and-final offer, and there was no particular reason to do so here. The court relied entirely on a Post-it note reflecting a "game" played by a handful of Vista employees (none on Vista's Investment Committee), making guesses before Vista's best-and-final offer about where the deal might ultimately land and setting a "line" of $37.50. This rampant speculation by non-decisionmakers does not support the court's assumption that Vista actually would bid higher than its best-and-final offer. And it certainly does not connect any potentially higher bid to the supposed breaches, which had no plausible effect on Vista's bidding.

Second, on the claim for non-disclosures in the proxy materials, the court awarded what it deemed "nominal" damages of $1 per share, amounting to more than $35 million before interest, not counting appraisal petitioners who may still elect the class remedy. The court acknowledged that Plaintiffs did not attempt to

prove reliance and there was no evidence that the non-disclosures caused any damages. Yet, by using the word "nominal," the court evaded these elements. Indeed, the court later acknowledged its nominal award actually was compensatory. Nominal damages are supposed to be token amounts provided in the absence of actual damages. There is no precedential or logical support for awarding tens of millions in damages, where there is admittedly no evidence that this amount was connected to the breaches.

Third, the court erred in awarding prejudgment interest on nominal damages. No precedent supports such an award, which contradicts the basic principle that interest is allowed only where damages were calculable before judgment.

3. The court erred in ruling that Vista aided and abetted breach of fiduciary duty based solely on not having corrected supposed non-disclosures in the proxy. Delaware law is clear that a third party can be liable for aiding and abetting only through affirmative misconduct, not a failure to act. The court's decision that an arm's-length buyer's contractual right to review the proxy creates liability for the seller's non-disclosures would mark an unprecedented and troubling change in Delaware law.

4. The court erred in ruling that Defendants waived their statutory right to setoff based on Plaintiffs' settlement with Liaw and IVP, giving Plaintiffs a pure windfall. The court recognized it was proper to decide setoff post-trial, but created

a rule whereby a party must give notice before trial of that post-trial issue. No Delaware case, nor Delaware's Uniform Contribution among Tortfeasors Act ("DUCATA"), ever has imposed such a rule, and the Court of Chancery previously had rejected it. That alone precludes waiver, as Defendants had no notice that they were waiving setoff by not raising it pre-trial. Such a waiver rule would be especially improper here, as the settlement agreement itself expressly provided for a setoff if the settling Defendants are determined to be joint tortfeasors. Thus, Plaintiffs always knew of the setoff issue, and Defendants never suggested otherwise.

STATEMENT OF FACTS[1]

A. Mindbody's Independent Board Encourages And Empowers Stollmeyer To Engage With Potential Acquirors

Mindbody was co-founded by Richard Stollmeyer in 2000 and went public in 2015. By 2018, it was experiencing difficulties with its business, including slowing revenue growth, declining subscriber counts, difficulty integrating two major acquisitions, and the threat that three of Mindbody's largest enterprise customers would depart, representing a potential multi-million dollar recurring revenue loss. A650-51 (1472:16-1473:3 (Liaw)); A794 (2042:1-2043:5 (White)); A449 (669:18-22 (Stollmeyer)). This resulted in Mindbody revising its 2018 revenue guidance downward on its Q1 earnings call, missing its already-reduced guidance in Q3 2018, and then issuing lower guidance for Q4 2018. A1301; A1353, A1378; A1316, A1318; A2031; A1404-05; A1406-09; A640-43 (1432:16-1433:16, 1439:10-1441:21) (Liaw)); A793-94 (2037:2-22, 2042:1-12 (White)); A611 (1314:20-1315:8 (Goodman)).

Understanding that Mindbody's prospects were increasingly murky, Stollmeyer and the Board discussed outreach to potential acquirors. Stollmeyer had

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[1] Citations to "Op. __" refer to the Court of Chancery's post-trial ruling, *In re Mindbody, Inc., S'holder Litig.*, C.A. No. 2019-0442-KSJM (Del. Ch. Mar. 15, 2023). Citations to "Nov. Op. __" refer to the court's ruling on the form of judgment, *In re Mindbody, Inc., S'holder Litig.*, C.A. No. 2019-0442-KSJM (Del. Ch. Nov. 15, 2023).

previously, with the Board's blessing, kept open relationships with potential buyers as part of his job as CEO. A503 (885:5-886:10 (Cunningham)); A824 (2161:17-2162:7 (Smith)); A600 (1273:2-1274:19 (Goodman)). This included a discussion in 2017 with private equity buyer Hellman & Friedman LLC ("H&F"), A1337, and outreach in August 2018 to private equity firms Vista, Thoma Bravo, LP, and H&F. A1330; A1332-33; A1334; A1340. But, given Mindbody's ongoing difficulties, the Board agreed in September 2018 that more active outreach was warranted. A372 (362:17-363:13 (Stollmeyer)); A599 (1268:4-17 (Goodman)); A638 (1423:14-17 (Liaw)); A779 (1982:1-17 (Herman)).

On September 4, 2018, Vista employees Saroya and Stahl visited Mindbody's headquarters. A462 (721:19-722:4 (Stahl)); A1342. The court found that Stollmeyer informed Vista he was looking for "a good home" for Mindbody. A1342. The next day, Stollmeyer reported this meeting to the Board and expressed his view that the Board should explore a sale. A503 (884:21-886:21), A526-57 (978:6–981:2) (Cunningham); A598-99 (1266:16-1270:22 (Goodman)). The Board agreed and instructed Stollmeyer to "get smart on the topic" of Mindbody's strategic options and have "conversations in a more organized, aggressive way." A599 (1269:10-17 (Goodman)).

As part of this mandate, on October 9, 2018, Stollmeyer attended Vista's CXO Summit—a conference Vista hosted for executives of Vista portfolio companies and

other guests. A623 (1364:9–12 (Goodman)); A826 (2170:17–2171:1 (Smith)). The Mindbody Board supported Stollmeyer attending this event. A504 (888:14-889:12 (Cunningham)); A600 (1274:1-19), A624 (1365:4-6) (Goodman); A660 (1511:20-21 (Liaw)).

On October 15, Saroya informed Stollmeyer that Vista was interested in acquiring Mindbody for a premium over the then-current market price of $33.27. A247 ¶¶ 97-98; A419 (549:13–550:11 (Stollmeyer)). Stollmeyer declined Saroya's request to sign an NDA and relayed the conversation to Mindbody's executive team. A1348; A381 (400:5-12 (Stollmeyer)). Stollmeyer then individually contacted Mindbody's Board members—each director was aware of the indication of interest by October 24. A638 (1424:1-14 (Liaw)); A1347; A601 (1275:4-1276:24 (Goodman)); A1397; A1398; A2033 (rows 400-430); A834-35 (2204:19-2205:16 (Smith)); A1390; A756 (1892:1-1894:8 (Herman)); A2036 at C462; A1399; A505 (893:11-19 (Cunningham)); A1391-95 (Miller); A1396 (Christie).

B. Mindbody's Board Forms A Strategic Transaction Committee

The Board met on October 26, 2018 to discuss Vista's indication of interest. A505 (893:15-22 (Cunningham)); A383 (405:10-12 (Stollmeyer)). The Board formed a Strategic Transaction Committee ("STC") to evaluate acquisition proposals and make recommendations to the Board. A1400; A2023-25, A2028. Independent directors Goodman and Cunningham, who had previously participated

in sales processes as technology company CEOs, comprised the STC with Liaw as Chair. A1400; A2023-25, A2028; A601 (1277:8-18 (Goodman)); A631-32 (1394:19-1397:7 (Liaw)).

C. The Board Holds A Competitive Auction And Only Vista Bids

Following a "bake-off" between Qatalyst and Centerview Partners, the Board unanimously selected Qatalyst as financial advisor because it was more experienced and gave a superior presentation. Op. 55; A1430-21; A791 (2030:23-2031:8 (White)); A759 (1903:5-16 (Herman)); A611 (1316:21-23 (Goodman)). The Board was also represented by legal advisors at Cooley. A1649.

Mindbody's Q3 earnings miss, which resulted in a substantial downturn in Mindbody's stock price, signaled to the market that Mindbody might be an acquisition target. A1419. In early November 2018, Vista contacted Stollmeyer to express its interest, and Stollmeyer demurred, declining an invitation to visit Vista's then-President's house and instead suggesting the parties meet in December. A1415; A1421; A438 (628:1-3 (Stollmeyer)). On November 17, 2018, Vista again attempted to engage by inviting Stollmeyer to a philanthropic event. A2043 at G182. Stollmeyer declined to attend. *Id.* at G185; A422 (564:15-17), A448 (666:7-668:4) (Stollmeyer); A1433.

Meanwhile, with the Board's encouragement, Stollmeyer was also engaging with other potential acquirors, including major private equity players like Thoma

Bravo, KKR, and H&F. A1343; A2032 at row 34; A1344; A1346; A1434-42. For example, Stollmeyer attended a dinner at the home of a KKR founder in late October, and attended a Qatalyst retreat in early November where he "closed the bar" with H&F. A1434-42.

H&F asked Mindbody to sign an NDA on November 1, 2018—roughly two weeks after Vista's initial request. A788 (2018:14-2020:5 (White)); A1403. The STC was aware of this meeting, and Stollmeyer again declined to sign an NDA. A788 (2020:3-8 (White)); A1422-29. H&F sent a formal expression of interest one week later, and Thoma Bravo simultaneously expressed interest. A1417; A1422-29. Stollmeyer kept the STC fully apprised of these occurrences. A1422-29.

Qatalyst worked hand-in-hand with the STC and the Board to structure a sale process. A509 (909:11-19 (Cunningham)). Qatalyst identified and reached out to 15 potential financial and strategic buyers. A613-14 (1324:22-1325:22 (Goodman)); A1443; A1650; A1578-94. Many declined even to sign an NDA. The parties that did so—Vista, H&F, Thoma Bravo, Bain Capital, Permira/TCV, SLP, and Recruit—all received access to the same data room containing non-public information on December 15. A393 (447:20-448:10 (Stollmeyer)); A1444; *see* A1931-34; A2041 at 212:11-13; A358 (307:21-308:2 (Chang)).

Only Vista expressed concrete interest in pursuing an acquisition after gaining access to Mindbody's non-public information. Every other potential acquiror

expressed concerns regarding Mindbody's valuation. Thoma Bravo withdrew five days after receiving data room access "for valuation reasons." A1462; A1466. Bain did the same, concluding that Mindbody's trading price in the low-to-mid $20s accurately reflected its valuation. A1466; A1447. Other potential acquirors Permira, SilverLake, GoDaddy, Yelp, Comcast, Global Payments, PayPal, and Square also declined to proceed. A1466. By the time Vista made its opening bid on December 18, only Vista, H&F, and Recruit remained, and the Board recognized that Recruit "did not seem likely to produce" a "competitive" bid. A1462; A1466.

The Vista Investment Committee—which approves all Vista bids—met on December 14, 2018. A488 (824:13–19 (Stahl)). The court acknowledged that Vista believed it was part of a competitive process at this time. Op. 57. The Investment Committee approved a bid for Mindbody between $35 and $40 per share. Op. 61. After accessing the data room on December 15, Vista made an initial bid of $35 per share on December 18 and put a 24-hour timer on the offer. A1448-53.

The Board let that offer expire to create leverage. A616 (1336:5-10 (Goodman)); A1462-63. Lacking another bidder, the Board consulted with Qatalyst and countered Vista's $35 offer with $40, with a reduced termination fee and 30-day go-shop. A1463. Stollmeyer, who held 1,808,570 shares (including options) of Mindbody stock, was targeting a final acquisition price in the forties but deferred to

the Board's judgment on the optimal counteroffer. A241 ¶ 70; A395 (454:16-455:9 (Stollmeyer)); A618 (1341:1-20 (Goodman)).

On December 20, Vista increased its bid to its "best and final" offer of $36.50. A395 (455:10-13 (Stollmeyer)); A513 (926:6-17 (Cunningham)); A1511. That represented a 68% premium to the closing price of Mindbody's Class A common stock on December 21, 2018. Op. 67. This offer also included the Board's proposed termination fee and 30-day go-shop. A359 (311:3-12 (Chang)).

On December 21, Qatalyst solicited a bid from H&F—the only remaining party the STC believed might bid—but H&F refused for valuation reasons, telling Qatalyst that it only saw itself potentially bidding "$30-35 but [had] no path to $40" and that Mindbody should accept $35 from another bidder. A1577. Internal H&F documents show it was "tapped out in the low 30s." *Id.*; A1572. And, as the STC predicted, Recruit also declined to proceed for valuation reasons, with internal records reflecting its view that $36.50 was "too expensive" and "quite good for the [Mindbody] shareholders." A1613; A1608.

No other bidders emerged, and there was no indication any higher bid was forthcoming.

The Board accepted Vista's best-and-final offer. A1499. On December 23, Qatalyst delivered a fairness opinion and the Board unanimously authorized Mindbody management to execute the Merger Agreement. A1512-13.

The Board members, both in contemporaneous communications and at trial, unanimously believed that $36.50 was a great deal for stockholders. A619 (1347:19-1348:5 (Goodman)); A2034; A514 (929:24-930:23 (Cunningham)); A830-31 (2188:21-2190:2 (Smith)); A761 (1913:14-1914:1 (Herman)). This included Liaw, as IVP's Board designee, which held 2,642,032 shares of Mindbody stock and thus would receive $2.6 million for each additional dollar in deal consideration. A650-51 (1472:18-1473:3 (Liaw)). These directors explained the Board's collective view that Mindbody faced highly uncertain prospects and that, even if Mindbody outperformed expectations, its stock price would not approach $36.50 in the foreseeable future. *Id.*; A1447; A619 (1346:2-1347:2 (Goodman)); A514 (929:22-932:15 (Cunningham)); A1572-76.

D. No Bidders Emerge During The Go-Shop Period And The Transaction Closes

The STC aggressively employed the go-shop provision, instructing Qatalyst to contact 52 potential bidders the day after the Merger was announced. A1655. This included 38 parties who did not participate in the initial process. *Id.* Eight signed an NDA,[2] but only two expressed interest in continuing diligence after receiving a management presentation. A1611. No party made a bid, let alone a topping bid. Op. 69.

[2] KKR, IAC, WorldPlay, Advent International, Francisco Partners, Vector Capital, GI Partners, and Warburg Pincus. A1611.

Stockholder response to the transaction was highly positive. Proxy advisors ISS and Glass Lewis both recommended that stockholders vote for the transaction. A1822-32. Analysts covering Mindbody overwhelmingly supported the Merger. *See, e.g.*, A1410-14; A1564-69; A1595-606; A1833-42. The founder of Luxor—the named Plaintiff—trumpeted the merger as "so [F'ing] awesome for business building" and responded to an email congratulating him on the Merger with "Santa got me just what I wanted." A1570-71; A1555-63. At the February 14, 2019 stockholder meeting, roughly 85% of stockholders voted to approve the transaction. Luxor, which would petition for appraisal, represented a substantial majority of the no votes. A228 ¶¶ 16-17.

Mindbody's performance continued to deteriorate after closing, missing the Proxy Statement's 2019 revenue projection. A1926-30; A378 (388:14-20 (Stollmeyer)). Stollmeyer stepped down as Mindbody CEO in mid-2020, forfeiting the unvested stock options he had received following the acquisition, representing 70% of his total option grant. A1935-47; A400 (475:12-18 (Stollmeyer)).

E. This Litigation

Luxor filed an appraisal petition in April 2019 and in June 2019 brought breach of fiduciary duty claims against Stollmeyer, Brett White, Mindbody's former CFO, and Liaw. A230 ¶¶ 24, 27. In August 2020, the court granted Liaw and IVP's motion to dismiss, but denied the motion by Stollmeyer and White. *In re Mindbody,*

Inc., C.A. No. 2019-0442-KSJM (Del. Ch. Oct. 2, 2020). No Board member except Stollmeyer and Liaw were ever named as defendants.

Following a partial settlement (of renewed claims against IVP and Liaw) and trial, the court entered judgment for Plaintiffs, concluding: (1) Stollmeyer had a "disabling conflict" because his "interest in near-term liquidity" and belief he would receive post-merger employment and equity overcame the presumption that, as a substantial stockholder, he was incentivized to pursue the highest price; and (2) Stollmeyer breached his duty of loyalty by favoring Vista in the bidding process. Op. 86-87.

The court acknowledged that an independent Board unanimously approved the transaction, but still found Stollmeyer breached his fiduciary duties by not providing sufficient information to the Board. Op. 96-97. The court found these same facts supported disclosure claims against Stollmeyer and overcame Defendants' *Corwin* defense. *Id.* at 97-102. Last, the court concluded Vista had aided and abetted Stollmeyer's disclosure breaches because it had not corrected the non-disclosures. *Id.* at 106-110.

The court awarded $1 per share in damages for both the sale-process and disclosure claims. Op. 111-116. Regarding the sale-process claim, the court awarded Plaintiffs a "fairer price" remedy by concluding Vista would have paid $37.50 per share had Stollmeyer not breached. *Id.* at 113-14. Regarding the

disclosure claim, the court noted Plaintiffs had not even attempted to prove "reliance and causation" and thus were not entitled to compensatory damages. *Id.* at 114. Nonetheless, the court awarded "nominal" damages of $1 per share—approximately $36 million, or $43.5 million if all appraisal petitioners elect the class remedy. *Id.* at 114-16.

In a subsequent decision before issuing final judgment, the court held that Defendants had waived their right to seek a settlement credit by not raising the issue pre-trial, Plaintiffs were entitled to interest on nominal damages, the appraisal petitioners can elect to receive class damages but need not do so until this appeal's conclusion, and appraisal petitioners are entitled to equitable interest. Nov. Op. Defendants took this appeal and posted a supersedeas bond of $123,683,849—the amount necessary to cover the class remedy along with interest accruing on (1) the sale-process damages; (2) the "nominal" disclosure damages; and (3) the appraisal petitioners' untendered stock.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN REFUSING TO DEFER TO THE BOARD AND IN RULING THAT STOLLMEYER BREACHED HIS FIDUCIARY DUTY

A. Question Presented

Did the Court of Chancery err in refusing to defer to the Board and in finding breach of fiduciary duty based on (1) one director's failure to inform a majority-independent board of supposed conflicts, where the court did not find the non-disclosures material to a reasonable board member and the evidence establishes they were immaterial (A998-1008; A1098-1108, A1139-44); and (2) disclosure violations in the proxy materials where the non-disclosures were immaterial to stockholders? A986-92; A1128-38.

B. Scope Of Review

"[A] trial court's application of enhanced scrutiny to board action necessarily implicates a review of law and fact. The deferential 'clearly erroneous' standard applies to findings of historical fact." *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015) (footnote omitted). "The Court of Chancery's legal conclusions are reviewed *de novo*." *Id.* "[T]his Court may review de novo mixed questions of law and fact, such as determinations of materiality, and in certain cases make its own findings of fact upon the record below." *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996) (citations omitted).

C. Merits Of Argument

1. The Sale-Process Claim Fails As A Matter Of Law

For the reasons discussed *infra* at 33-36, *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 305-06 (Del. 2015), applies and defeats Plaintiffs' claims, but if it does not, the applicable standard is enhanced scrutiny under *Revlon*. However, enhanced scrutiny "does not change the showing of culpability a plaintiff must make in order to hold the directors liable for monetary damages." *McMillan v. Intercargo Corp.*, 768 A.2d 492, 502 (Del. Ch. 2000); *see also Malpiede v. Townson*, 780 A.2d 1075, 1083-84 (Del. 2001). Plaintiffs must show "the defendant failed to act reasonably to obtain the best transaction reasonably available, either due to interestedness, because of a lack of independence, or in bad faith." *Firefighters' Pension Sys. of City of Kan. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 254 (Del. Ch. 2021).

(a) The Board's unanimous approval establishes that the only sale-process claim would be failure to disclose material information to the Board.

The Board unanimously approved the transaction, A516 (936:10-18 (Cunningham)), and the court erred as a matter of law in failing to afford proper deference to the Board's decision. The only directors alleged to suffer from conflicts were Stollmeyer and Liaw, and it is undisputed that the other six directors, each seasoned executives with no personal or financial ties to Stollmeyer or Liaw, were unconflicted.

Given that a supermajority-unconflicted Board approved the transaction,

Plaintiffs cannot rely merely on Stollmeyer's supposed breach of fiduciary duty to defeat the required deference to the Board. Where the claims "focus on the conduct of a single director, … in order to rebut the presumption of the business judgment rule, Plaintiffs must" show: "(i) the director was materially self-interested in the transaction, (ii) the director failed to disclose his interest in the transaction to the board, and (iii) a reasonable board member would have regarded the existence of the director's material interest as a significant fact in the evaluation of the proposed transaction." *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 717 (Del. 2020) (quotation marks and brackets omitted); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995) (same).

The court based its disregard of Board approval solely on its conclusion that because the Board "did not know about the conflicts that infected the sale process"—which boil down to the court's finding that Stollmeyer gave Vista a head start on the sale process because he desired liquidity and liked Vista, Op. 91, 95—the Board "did not manage [those conflicts] effectively." Op. 96. As discussed below, none of these purported conflicts would have been material to a reasonable board member, none was material to the actual Board, and none constitutes "material[] self-interest," as required to overcome deference to the Board.

To the extent Plaintiffs argue lack of oversight independent of Stollmeyer's non-disclosures (which the Court of Chancery did not find), such an argument would

be meritless. The Board's role is to get the "best price for the stockholders at a sale of the company." *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986). Courts look "particularly for evidence of a board's active and direct role in the sale process." *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989). The role of "independent directors becomes particularly important," and evidence of an "auction" and "canvassing the market" are tell-tale signs of a board that "fulfill[ed] its obligation to seek the best value reasonably available to the stockholders." *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 44 (Del. 1994). "Critically, in the wake of *Revlon*, Delaware courts have made clear that the enhanced judicial review *Revlon* requires is not a license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith." *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005).

Here, the Board formed a transaction committee that did not include the supposedly conflicted CEO, selected the financial and legal advisors, ensured all bidders received the same non-public information at the same time, conducted a competitive pre-signing auction that involved at least 15 potential buyers, and placed responsibility for price negotiation with the full Board. *See supra* at 11-16. The Board rejected Vista's first offer of $35 per share, A616 (1336:5-10 (Goodman)), made Vista increase its initial offer to a "best and final" $36.50, A1463, and did not

execute the merger agreement until after receiving a fairness opinion from its financial advisor, A1512-54. It further required a 30-day go-shop provision and instructed Qatalyst to reach out to 52 potential bidders during that period. *See supra* at 16.

This is not a case where the Board eschewed a higher bid or failed to seek a market check. As this Court has explained, "people seem to forget that *Revlon* was largely about a board's resistance to a particular bidder and its subsequent attempts to prevent market forces from surfacing the highest bid." *C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1070 (Del. 2014). *Revlon* "permit[s] a board to pursue the transaction it reasonably views as most valuable to stockholders, so long as the transaction is subject to an effective market check under circumstances in which any bidder interested in paying more has a reasonable opportunity to do so." *Id.* at 1067. Here, the Board actively solicited competing bids from dozens of potentially interested parties. *See supra* at 12-13, 15-16. The Board's highly active role only further shows the court's error in focusing solely on Stollmeyer's conduct while ignoring the Board's efforts to ensure it would obtain the highest possible price. The court rewriting the deal price after the fact, Op. 113-14, thus amounted to an improper exercise in second-guessing the Board's negotiating tactics. *See C&J*, 107 A.3d at 1053.

(b) None of the undisclosed information was material.

Stollmeyer's supposed failure to make sufficient disclosures to the Board can overcome deference to the Board only if "a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed transaction." *Cinerama*, 663 A.2d at 1168 (quotation marks omitted); *see also Haley*, 235 A.3d at 717. A board is sufficiently informed, "[e]ven if the board was not aware of every 'blow by blow,'" where "the record suggests that the board was informed about the transaction they would eventually vote to approve, especially the final terms of the deal." *C&J*, 107 A.3d at 1060-61.

The court did not conclude that knowledge of any of the supposed conflicts would have been material to a reasonable board member, or even mention binding precedent in *Haley* that requires such finding. *Haley*, 235 A.3d at 717. The court briefly suggested "Stollmeyer's actions deprived the Board of the information needed to employ a reasonable decision-making process." Op. 97. But that is not a determination of materiality because the question is not the reasonableness of the process, but whether disclosure of the supposedly withheld information would have affected a reasonable board's evaluation of the transaction. *Cinerama*, 663 A.2d at 1168.

A reasonable board member would not have changed their evaluation if they knew of Stollmeyer's supposed conflicts or Vista's supposed timing advantages.

These circumstances did not change the fact that each other potential bidder declined to bid not because they lacked time, but because they refused to meet Vista on price. *Supra* at 12-13, 15-16. Thus, the Board was left with the options of accepting Vista's best-and-final offer, countering for a second time, or refusing to do a deal. Because Vista's timing advantages and Stollmeyer's preferences are completely disconnected from Vista's willingness to exceed its best-and-final offer and match a theoretical second counter, and Plaintiffs did not argue that the Board should have declined to sell, the non-disclosures could not logically have impacted a reasonable board member's decision to accept Vista's best-and-final offer. *Cinerama*, 663 A.2d at 1168.

The evidence confirms this. Each of the five non-defendant directors who testified at trial stated that the undisclosed information did not matter to their judgment that the transaction was in stockholders' best interests. No director testified otherwise. As Cunningham testified, "even if I had been [aware of these facts], it wouldn't have impacted my judgment of our position and my assessment of the process." A519 (951:10-13 (Cunningham)). Herman testified that, regardless of the allegedly withheld facts, "I would support [the transaction] again if given the same opportunity." A761 (1913:14-1914:1 (Herman)). The others said the same. A831 (2189:23-2190:2 (Smith)) ("Anything in [the complaint] cause you to think that this was not the right transaction for Mindbody and its stockholders? A. Oh, no.

No. Nothing in that, no."); A630 (1390:23-1391:11 (Goodman)) ("Anything that you've been shown or asked about change your mind at all as to whether this was the best outcome for Mindbody? A. It has not."); *see also* A651 (1475:3-14 (Liaw)).

The court erred in failing even to mention this Board testimony. There is no suggestion that any of these well-credentialed and undisputedly independent directors were lying under oath. *Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062, at *14 (Del. Ch. Feb. 26, 2010), *aff'd*, 5 A.3d 586 (Del. 2010) ("[T]he Court has no reason to doubt either director's testimony on this issue, nor has Trilogy provided evidence as to why it should."). Plaintiffs did not challenge their credibility, and there is no credibility finding against any of them. This Court has recognized the importance of Board testimony regarding materiality. In *Haley*, an independent director's "statement, allegedly given under oath in a deposition, that he would have wanted to be informed of this information is significant." 235 A.3d at 724. This Court also has held that the Court of Chancery erred in refusing to consider board testimony that an undisclosed corporate opportunity was not material. *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 156 n.8 (Del. 1996). Likewise, here, the statements of *all* of the testifying, independent directors should carry substantial weight.

As the Board members explained, their analysis and approval of the transaction did not rest on the "blow by blow" of Stollmeyer's efforts to generate

interested buyers (as they had instructed him) or his feeling about liquidity or Vista. Rather, their decision was based on three factors: (1) $36.50 was a very fair price and provided stockholders a substantial premium; (2) there was significant risk of the market souring on Mindbody in the near future, given its difficulties; and (3) there was no other bidder. A619 (1347:24-1348:3 (Goodman)); A514 (929:24-930:23 (Cunningham)); A650-51 (1472:18-1473:3 (Liaw)). The non-disclosures to the Board obviously have no relevance to the first two factors. As to the third, the non-disclosures were immaterial because there was outreach to over a dozen potential bidders; none would match Vista on price, and there was no evidence they would if given more time. *Supra* at 12-13. In any event, they got more time because the Board bargained for a 30-day go-shop during which their banker contacted over 50 bidders. *Supra* at 15-16. Indeed, the Board went far beyond what the law requires. The Board could have engaged exclusively with Vista in October following the expression of interest. *See C&J*, 107 A.3d at 1067-68 (single bidder process reasonable "so long as interested bidders have a fair opportunity" to bid); *Barkan v. Amsted Indus. Inc.*, 567 A.2d 1279, 1287 (Del. 1989) (directors "may approve [a] transaction without conducting an active survey of the market"); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 613 (Del. Ch. 2010) (single bidder sale process reasonable); *In re MONY Grp. Inc. S'holder Litig.*, 852 A.2d 9, 21 (Del. Ch. 2004) ("[T]he Board's judgment was reasonable that the risks of a pre-agreement

auction, as opposed to a post-agreement market check, outweighed the benefits.”). Instead, they conducted a robust and competitive sale process. *See supra* at 12-13, 15-16. Thus, there is no legal basis to question the Board’s judgment and no logical reason the non-disclosures would have mattered to a reasonable director. *See C&J*, 107 A.3d at 1070 (“the majority of C & J’s board is independent, and there is no apparent reason why the board would not be receptive to a transaction that was better for stockholders than the Nabors deal.”).

(c) Stollmeyer did not suffer from a disabling conflict and did not breach his fiduciary duties.

Not only was the non-disclosed information immaterial, Stollmeyer suffered no conflict. The court found a breach of loyalty on the theory that “Stollmeyer suffered a disabling conflict because he had an interest in near-term liquidity, a desire to sell fast, and an expectation that he would receive post-Merger employment accompanied by significant equity-based incentives as a Vista CXO.” Op. 86. Because it was error to conclude that such commonplace incentives created a disabling conflict, there is no basis for liability. *See Barkan*, 567 A.2d at 1286 (In the *Revlon* context, “[i]f no breach of duty is found, the board’s actions are entitled to the protections of the business judgment rule.”); *McMillan*, 768 A.2d at 502 (plaintiffs must show “the defendant directors failed to secure the highest attainable value as a result of their own bad faith or otherwise disloyal conduct”).

First, a generalized desire for liquidity poses no disabling conflict. An "*immediate* need for cash" can theoretically present a conflict. *McMullin v. Beran*, 765 A.2d 910, 922 (Del. 2000) (emphasis added). But Delaware courts have "evaluated liquidity theories of this sort with marked skepticism, characterizing them as 'unusual,' 'counterintuitive,' and 'aggressive.'" *Larkin v. Shah*, 2016 WL 4485447, at *16 (Del. Ch. Aug. 25, 2016). This is because the theory "ask[s] the Court to make an extraordinary inference: that rational economic actors have chosen to short-change themselves." *Id.* As then-Chancellor Strine noted, the circumstances in which a fiduciary's "immediate need for liquidity could constitute a disabling conflict of interest irrespective of pro rata treatment" were limited to "a crisis, fire sale where" the fiduciary prioritized liquidity over price "in order to satisfy an exigent need (such as a margin call or default in a larger investment)." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1036 (Del. Ch. 2012).

The court did not conclude Stollmeyer's desire for liquidity was motivated by an "immediate" need for cash based on "exigent" circumstances, and the evidence refutes any such conclusion. Stollmeyer earned roughly $8.5 million in cash in 2018 through his salary, bonus, and stock sales and more than $10 million in cash in 2017. A1991; A736 (1812:19-1813:15 (Murphy)). The expenses the court identified as motivating his liquidity needs, Op. 88, amounted to a fraction of his 2017 and 2018 earnings, the bulk of which was a charitable pledge he was satisfying through gifts

of Mindbody stock. A736 (1812:19-1813:15 (Murphy)); A402 481:8-482:19 (Stollmeyer).

Moreover, Stollmeyer's substantial holdings of Mindbody stock aligned his interests with all stockholders. *Chen v. Howard-Anderson*, 87 A.3d 648, 670-71 (Del. Ch. 2014). Even if Stollmeyer had a desire for liquidity, a sale to any bidder would satisfy that desire. A purported liquidity motive would not incentivize Stollmeyer to prefer any particular bidder, let alone to accept less than fair price, given that each additional dollar per share of deal consideration was worth roughly $2 million to Stollmeyer. A241 ¶ 70; A1978-79 §4.1; A454 690:17-691:1; A737 (1818:4-22 (Murphy)). Indeed, far from demanding acceptance of $36.50, Stollmeyer was anchored to the highest price and the Board counseled him down. A395 (454:16-455:9 (Stollmeyer)); A616 (1333:10-1334:1 (Goodman)).

Second, the court acknowledged that Stollmeyer did not negotiate employment with Vista until *after* the acquisition closed. Op. 76. The court did not find that Stollmeyer knew Vista would continue his employment while other potential acquirors would not (indeed, it is highly likely that all financial acquirors would have retained Stollmeyer). And the court found that Stollmeyer's eventual employment agreement had an identical salary and bonus with reduced potential equity interests subject to forfeiture. *Id.*

The court erred in concluding nonetheless that Stollmeyer's belief he would receive post-merger employment and stock options rendered him conflicted. Op. 91-92. "[T]he alleged hope of better employment opportunities does not constitute the kind of interest covered by Section 144." *Cinerama*, 663 A.2d at 1170. Delaware courts have recognized two scenarios where a promise or expectation of post-merger employment could constitute a disabling conflict: (1) if the acquiror's employment offer was "materially more favorable than his [current] employment," *McMillan*, 768 A.2d at 503; or (2) if an executive's current employment is "in jeopardy," such that a deal would save his job, *In re Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *12-13 (Del. Ch. Dec. 10, 2018). *See City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Comstock*, 2016 WL 4464156, at *19 (Del. Ch. Aug. 24, 2016) (plaintiff's failure to plead these scenarios "undercuts plaintiff's argument that Comstock simply was acting out of self-interest"), *aff'd*, 158 A.3d 885 (Del. 2017) (TABLE). The court cited no Delaware authority supporting its conclusion that Stollmeyer was conflicted because of an expectation of post-merger employment without one of these circumstances present. Op. 87-92.

Relatedly, the court found Stollmeyer was "uniquely smitten with Vista." Op. 88. However, the court failed to explain how this conflict caused Stollmeyer not to seek the best price reasonably available. Even if Stollmeyer had an affinity for Vista,

the court did not explain how any such favoritism would motivate Stollmeyer to accept less money in the Board's negotiation with Vista.

Finally, the court's other explanations do not give rise to any conflict. The court briefly mentioned that "Qatalyst leaked Stollmeyer's '$40 min' price." Op. 96. However, the court did not find that Stollmeyer knew about this supposed leak, and thus it cannot support a claim against him. Regardless, there is no theory by which this leak actually affected the outcome, as the price ended up below $40 per share anyway. If anything, the idea that Stollmeyer wanted at least $40 would have encouraged a higher bid. And Qatalyst similarly indicated to H&F that Mindbody was seeking $40, and thus no unique information was provided to Vista. A1577. Similarly, the court suggested in passing that Stollmeyer "strategically dr[ove] down Mindbody's stock price" but then provided no facts supporting this finding, no explanation for why Stollmeyer would do so when it would cost him millions of dollars, and no connection between this supposed conduct and any damages. Op. 86.

2. The Disclosure Claim Fails As A Matter Of Law

There is also no liability for the independent reason that a merger approved by a fully informed, uncoerced majority of disinterested stockholders is subject to an irrebuttable presumption of the business judgment rule. *See Corwin*, 125 A.3d at 305-06. Stockholders overwhelmingly approved the transaction, with

approximately 85% voting in favor and most of the "no votes" coming from Plaintiff Luxor. *Supra* at 17. The court held *Corwin* unsatisfied here because of information not disclosed to stockholders in the proxy materials. Op. 97-102.

This information was immaterial to the stockholders. "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985). "Omitted facts are not material simply because they might be helpful." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000). And it is not enough for the alleged missing disclosure to be "somewhat more informative." *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 89 (Del. 1995).

The court listed the omissions and partial disclosures that supposedly rendered the proxy misleading. Op. 100-02. Each concerned Stollmeyer's "interactions with Vista," except Chang informing Vista of Stollmeyer's $40 target, which of course exceeded the deal price (discussed *supra* at 32-33). *Id.* For example, the court concluded the proxy should have disclosed that Stollmeyer spoke with a Vista portfolio CEO before the sale process and that Vista invited Stollmeyer to a charity event he did not attend. Op. 101-02.

These omissions were immaterial. The relevant considerations for stockholders were that the deal price reflected a 68% premium to the unaffected stock price, a leading technology banker made targeted outreach to over a dozen

highly motivated, sophisticated, and deep-pocketed financial and strategic buyers, there was an arm's-length negotiation between Vista and the Board, the unanimous Board approved the deal, there was an independent fairness opinion, and no other bids emerged during the sale process and post-signing 30-day go-shop that targeted dozens of additional potential bidders. *Supra* at 12-16. These facts were disclosed. A1615-821; A1843-925. None of the supposedly withheld information affects any of these considerations. And none would make a "no" vote rational for stockholders, as a "no" vote would mean turning down the only deal on the table, which provided substantial value for stockholders, with substantial risk that no deal (let alone a better one) would be achievable in the future.

That Stollmeyer supposedly told Vista he "wanted to find a home for his company," Op. 100, that he was invited to a charity event with a Vista principal (and declined), *id.*, or even that he supposedly gave Vista a head start by informing them of an upcoming sale process (without *any* non-public information about Mindbody's value), *id.*, had no bearing on the deal price and thus would be irrelevant to the stockholder vote. *Supra* at 25-29.

There was no finding, nor could there be, that any other bidder was prepared to match or top Vista's bid. Thus, the details of every Stollmeyer meeting were immaterial to stockholders, whose concern was simply that Mindbody obtain the highest price. *See Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *15 (Del. Ch.

June 30, 2014) (plaintiff "has not advanced any persuasive rationale for asserting that more details regarding these 'many' meetings would be material to Mindbody's stockholders. The details provided in the Proxy sufficiently describe the sales process and potential strategic alternatives to allow the stockholders to draw their own conclusions about the transaction."); *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *26 (Del. Ch. Dec. 9, 2011) ("[T]angential tidbits [about meetings] did not alter the total mix of information."). Indeed, if such details were required, proxy materials would become a mountain of information ultimately useless to stockholders. *See Zirn v. VLI Corp.*, 1995 WL 362616, at *4 (Del. Ch. June 12, 1995) ("[T]he law ought guard against the fallacy that increasingly detailed disclosure is always material and beneficial disclosure. In some instances the opposite will be true."), *aff'd*, 681 A.2d 1996 (Del. 1996).

II. THE COURT OF CHANCERY ERRED IN ITS DAMAGES AWARD

A. Question Presented

Whether the Court of Chancery erred in (1) awarding damages of $1 per share for the sale-process breaches with no evidence linking that higher price to the breaches (A1033-41); A1157-70); (2) awarding damages of $1 per share for the disclosure breaches, despite recognizing no reliance or causation, by deeming $35 million (and potentially up to $44 million) in damages "nominal." A1041-43; A1244; A1280-81.

B. Scope Of Review

This Court "review[s] findings as to damages by the Court of Chancery for an abuse of discretion." *RBC*, 129 A.3d at 866. Legal issues are reviewed *de novo*. *Id.* at 849.

C. Merits Of Argument

1. There Were No Damages From The Sale-Process Breaches

Even assuming *arguendo* that there was a breach regarding the sale process, the court erred in concluding Plaintiffs proved causally related damages. Absent causation, the award of damages is improper. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006).

For the damages based on non-disclosures to stockholders, the court recognized that the plaintiff must prove "reliance and causation," and "Plaintiffs made no effort to prove either." Op. 114. However, the court failed to note that the

same is true with respect to the Board. Just as there is no evidence that the non-disclosures in the proxy caused any damages, there is also no evidence suggesting that Mindbody would have obtained a higher price if Stollmeyer had given the Board more information.

The court awarded Plaintiffs $1 per share based on sheer conjecture that "Vista would have paid $37.50 had Stollmeyer not corrupted the process." Op. 114. According to the court, "[i]f Mindbody had countered a second time off Vista's $36.50 figure, such as by matching Vista's $1.50 increment and going from $40 to $38.50, then Vista would have made a further move," such that "the likely result was a deal at $37.50." *Id.* Thus, the court's causation analysis rests on the twin assumptions that, but for the supposed breaches, (a) Mindbody would have countered a second time and (b) Vista would have raised its offer to $37.50. But the court simply assumes the first, and the supposed evidence of the second is not remotely on point.

First, the court cites *nothing*—no evidence of any kind—showing the Board would have countered a second time if Stollmeyer had not breached his duties or the Board had been aware of such breaches. The court does not even say the Board *would have* countered, only that "[i]f" it did, Mindbody could have obtained a higher price. Op. 114. But unless the Board would have countered but for the breaches, then there is no causation and therefore no damages. As discussed *supra* at 25-27,

the Board members testified that the non-disclosures would not have mattered to them. That uniform, unrebutted testimony makes perfect sense, as there is no logical connection between Stollmeyer's non-disclosures and the Board's decision not to counter Vista's offer a second time. This is particularly true given that Stollmeyer was anchored to a higher price than Vista actually paid. A618 (1341:1-20 (Goodman)). The non-disclosures did not affect the material facts: Vista's best and last $36.50 offer was a 68% premium to market, there was no other offer, the go-shop provision afforded other potential buyers ample time to top $36.50, and the market was getting worse for Mindbody.

The court makes much of a Post-it note by Vista employees guessing where the final price might land, Op. 113, but there is no scenario where a target company board would have inside information about a bidder's negotiating strategy (which the Post-it note did not even reflect). Absent a standard of clairvoyance, there is no reason to believe—and no evidence to suggest—the Board would have risked losing the deal by countering Vista's best-and-final offer. Indeed, Plaintiffs did not even argue that the Board would have or should have countered a second time. Nor would such an argument be tenable, as "there is no single blueprint that a board must follow to fulfill its duties, and a court applying *Revlon*'s enhanced scrutiny must decide whether the directors made a *reasonable* decision, not a *perfect* decision." *C&J*, 107 A.3d at 1067 (quotation marks and footnote omitted).

Second, there is also no evidence to suggest that, if Mindbody had countered a second time, Vista would have moved up from its best-and-final offer. In ten purchases of public companies from 2010-18, Vista *never* went above (though it sometimes went below) its best-and-final offer. A1163 & n.300. The court cited nothing to suggest that Vista would have topped its own best-and-final offer here, seemingly for the first time.

In any event, there is no evidence to support the idea that Vista would have offered more but for the breaches. Indeed, the breaches could not have mattered to Vista's bids because, at the time, Vista believed it was in competition with other potential bidders. Op. 57; A2045 at G673-74. Thus, even if Stollmeyer had told the Board everything or gave other bidders more time, it would not have mattered because Vista actually believed it was in competition yet nonetheless made a $36.50 best-and-final offer knowing it risked losing the deal to a higher bidder. And, as it turned out, even with more time during the go-shop period, there still were no other bidders. The alleged breaches were inconsequential to the outcome of the deal process.

The court's conclusion to the contrary rests on a Post-it note, where various Vista employees, none on the Investment Committee, made water-cooler guesses as to the final deal price, with the "line" set at $37.50. Op. 113-14 (citing A1454-61). This document was created the day after Vista made its initial bid of $35 per share

and before Vista engaged in any price negotiations with Mindbody. A1454-61. The fact that some Vista employees—not the decisionmakers—guessed a deal might close at $37.50 does not prove that Vista actually would have paid that amount. And it certainly is not evidence that Vista paid $36.50 instead *because of any supposed breaches*, which is the relevant question. Vista simply negotiated for the lowest price it could obtain, as any buyer does.

Finally, as a legal matter, the court erred in concluding Plaintiffs are entitled not only to Mindbody's fair price, which the Court did not address, but a "fairer price." Op. 112. A fairer price has been awarded only in cases where there is fraud and/or direct causation between the breach and the failure to get a higher price. *See In re Dole Food Co. S'holder Litig.*, 2015 WL 5052214, at *44 (Del. Ch. Aug. 27, 2015) ("An award exceeding the fair value of the plaintiffs' shares may be appropriate 'particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved.'") (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983)). Absent this kind of egregious misconduct or clear causation, there is no basis for the court to overrule the Mindbody Board's independent judgment regarding the best transaction price or implement its own belief for how the Board should have acted, especially given that every other potential bidder that reviewed Mindbody's non-public information was unwilling even to bid, let alone top Vista's initial $35 offer.

2. There Were No Damages From The Disclosure Breaches And The Imposition Of Enormous Nominal Damages Was Improper

For the disclosure violations, the court found that "Plaintiffs made no effort to prove" reliance and causation but nonetheless awarded "nominal damages" in the amount of $1 per share. Op. 114-16. This "nominal" award, which totals more than $35 million (not counting appraisal petitioners and prejudgment interest), exactly matches the compensatory award for the sale-process breaches. Op. 114. Indeed, the court later acknowledged, in awarding prejudgment interest, that the supposedly nominal award is actually "compensatory" in nature. Nov. Op. 25. Awarding compensation without evidence of reliance and causation, in the guise of a nominal award, is legal error.

This Court has held that "to recover compensatory damages, an investor who proves a breach of the fiduciary duty of disclosure must prove reliance, causation, and damages." *Dohmen v. Goodman*, 234 A.3d 1161, 1175 (Del. 2020). If a plaintiff does not prove individualized reliance and causation, only nominal damages are available. *Id.* at 1174-75.

The Court of Chancery has recognized the limited role of nominal damages: "Nominal damages are not given as an equivalent for the wrong, but rather merely in recognition of an injury and by way of declaring the rights of the plaintiff. Nominal damages are usually assessed in a trivial amount, selected simply for the

purpose of declaring an infraction of the Plaintiff's rights and the commission of a wrong." *Ravenswood Inv. Co., L.P. v. Est. of Winmill*, 2018 WL 1410860, at *25 (Del. Ch. Mar. 21, 2018) (quotation marks and brackets omitted), *aff'd*, 210 A.3d 705 (Del. 2019) (TABLE). Thus, nominal damages need not meet the requirement for reliance, causation, and damages precisely because they are trivial. To the extent damages are compensatory, they are not nominal and cannot evade those requirements.

The court bypassed *Dohmen* by rebranding the $35 million in compensatory damages here as "nominal," Op. 116, though the court later changed tack and recognized they are compensatory. Nov. Op. 25. In doing so, the court relied heavily on *Weinberger v. UOP, Inc.*, 1985 WL 11546 (Del. Ch. Jan. 30, 1985), *aff'd,* 497 A.2d 792 (Del. 1985) (TABLE), which awarded $1 per share. Op. 115-16. But this Court explained the very limited scope of that decision: "*Weinberger* was able to rationalize its award based on the expert testimony in support of its award of $1 per share as a fair measure of compensation." *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 476 (Del. 1992). Its reasoning does not apply where "plaintiff's experts … were unable to render an opinion with any specificity as to the" damages. *Id.* In short, *Weinberger* rested on evidence supporting causation and the amount of damages awarded—and, notably, it did not even use the word "nominal" and instead focused on "a fair measure of compensation" 1985 WL 11546, at *10.

There is no precedent suggesting a plaintiff can have both a sizeable damages award for disclosure breaches *and* no evidence of reliance or causation, simply because the damages are called "nominal." *See Oliver v. Boston Univ.*, 2006 WL 1064169, at *35 (Del. Ch. Apr. 14, 2006) (refusing to award "[n]ominal damages of $1.00 per share" because no "rational basis [could] be found in the record for the award"). That would be a blatant end-run around the reliance, causation, and damages requirements. *See Dohmen*, 234 A.3d at 1168 (differentiating between requirements to prove nominal and compensatory damages).

The court attempted to distinguish *Gaffin* on the ground that "there is ample evidence to support the $1-per-share award" here, Op. 116 n.652, but as the court recognized, there is *no* evidence of reliance and causation, Op. 114. That should be the end of the matter. The only supposed "evidence" the court cites is that a "$1 increase in the per share price would not have rendered the deal undesirable for Vista, nor would it represent a windfall to the class." Op. 116. However, this rationale has nothing to do with causation or reliance, and thus cannot justify the damages award. It is not the proper role of Delaware courts to rewrite deals after the fact in order to force an arm's-length buyer to pay the highest price it could have paid, particularly where the breach did not cause a single dollar in damages.

3. The Award Of Prejudgment Interest On Nominal Damages Is Improper

The court further erred by awarding prejudgment interest on nominal damages. Delaware law allows prejudgment interest only if damages are calculable before judgment. *See Janas v. Biedrzycki*, 2000 WL 33114354, at *5 (Del. Super. Ct. Oct. 26, 2000) (citing *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403 (Del. 1988)) ("[Prejudgment] interest is available as a matter of right where the damages are of a pecuniary nature and are capable of calculation prior to judgment."); *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 487 (Del. 2011) (affirming the rule applied in *Janas*).

The court's finding that there were no calculable damages for the disclosure breaches thus forecloses an award of prejudgment interest. The court held otherwise by concluding that the nominal damages are "compensatory and disgorgement" in nature. Nov. Op. 25. However, as the court recognized, there is no proof of a connection between non-disclosure and harm to stockholders. *See supra* at 42. Thus, regardless of whether the court later deemed the nominal damages "compensatory," they were not calculable before judgment. The court cited two cases, but neither granted prejudgment interest on nominal damages or questioned the rule that prejudgment interest is available only when damages were calculable. *See Nutt v. GAF Corp.*, 1987 WL 12419 (Del. Super. Ct. May 21, 1987); *In re Columbia Pipeline Grp., Merger Litig.*, 299 A.3d 393, 495 (Del. Ch. 2023).

III. THE COURT OF CHANCERY ERRED IN RULING THAT VISTA AIDED AND ABETTED BREACHES OF FIDUCIARY DUTY

A. Question Presented

Whether the Court of Chancery erred in holding that an arm's-length buyer is liable for aiding and abetting breaches of fiduciary duty by not correcting supposed non-disclosures in the seller's proxy materials to its stockholders. A1028-32; A1144-46.

B. Scope Of Review

This Court "review[s] the Court of Chancery's conclusions of law *de novo* and its factual findings with a high level of deference." *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chi.*, 75 A.3d 101, 108 (Del. 2013).

C. Merits Of Argument

The court erred in ruling that Vista aided and abetted Stollmeyer's disclosure breaches. For an aiding and abetting claim, a plaintiff must prove: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, ... (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach." *Malpiede*, 780 A.2d at 1096 (quotations omitted). There was no underlying breach of fiduciary duty. *Supra* Part I.C.1. The nominal damages award is also improper. *Supra* Part II.C.2. But even if there were an underlying breach and damages, the aiding and abetting claim fails.

There is no claim for aiding and abetting based solely on a buyer's failure to correct the seller's proxy statement. This Court has recognized an aiding and abetting claim where a *financial advisor* "purposely misled the [seller's] Board so as to proximately cause the Board to breach its duty of care." *RBC*, 129 A.3d at 865. But this Court stressed that this "holding is a narrow one that should not be read expansively to suggest that any failure on the part of a financial advisor to *prevent* directors from breaching their duty of care gives rise to a claim for aiding and abetting" such breach. *Id.* Accordingly, a financial advisor is not liable for "passive awareness … of the omission of material facts in disclosures to the stockholders, made by fiduciaries *who themselves were aware of the information*." *Buttonwood Tree Value P'rs, L.P. v. R. L. Polk & Co.*, 2017 WL 3172722, at *10 (Del. Ch. July 24, 2017).

This limitation on liability for a *financial advisor* is even more obviously necessary for an *arm's-length buyer* on the opposite side of the transaction. A contrary rule would require an arm's-length buyer to second-guess the business judgment of a target company board, advised by counsel, regarding what should and should not be disclosed. That is why the Court of Chancery has held that "[a] general duty on third parties to ensure that all material facts are disclosed, by fiduciaries to their principals, is, so far as I am aware, not a duty imposed by law or equity." *Id.*; *In re Xura*, 2018 WL 6498677, at *15 ("[A]n aiding and abetting claim based on a

third-party's alleged failure somehow to prevent a board from providing misleading disclosures to stockholders rests on thin ice.").

The court attempted to bypass this rule on the ground that Vista had a contractual obligation in the merger agreement to correct misstatements and omissions in the proxy. Op. 110. However, there is no breach of contract claim here. Vista had no disclosure duty to Mindbody's shareholders, and imposing such a duty would disrupt the disclosure regime under the securities laws. *See Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998) (noting Delaware's "deference" to federal securities laws).

In addition, the Merger Agreement only gave Vista the opportunity to review the proxy materials; Vista had no ability—let alone obligation—to force Mindbody to make changes. A1771 § 6.3(b). Instead, Mindbody was required only to "give due consideration" to Vista's suggestions. *Id.* Regardless, the contractual provision is irrelevant to whether Vista's inaction constitutes *substantial assistance* for purposes of aiding and abetting liability. As a matter of law, it does not. *See RBC*, 129 A.3d at 865; *Buttonwood*, 2017 WL 3172722, at *10.

In any event, there is no evidence that Vista knew (or should have known) that anything more needed to be disclosed. *See RBC*, 129 A.3d at 865-66 ("[T]he requirement that the aider and abettor act with *scienter* makes an aiding and abetting claim among the most difficult to prove."). Vista reviewed Mindbody's proxy and

supplemental proxy statements "to ensure that there were no factual inaccuracies, based on [its] knowledge at the time," with the assistance of counsel, and determined that the disclosures were accurate. A475 (773:2-774:13 (Stahl)). As discussed above, the non-disclosures concerned the kind of details generally recognized as immaterial and not included in proxy statements. *Supra* I.C.2. And even if they were material, the supposed omissions were made by a "fiduciar[y] who [him]sel[f] w[as] aware of the information." *Buttonwood*, 2017 WL 3172722, at *10. There is accordingly no basis to find that Vista aided and abetted Stollmeyer's disclosure breaches.

IV. THE COURT OF CHANCERY ERRED IN RULING DEFENDANTS WAIVED THEIR RIGHT TO SEEK A SETTLEMENT CREDIT

A. Question Presented

Whether the Court of Chancery erred in holding Defendants waived their right to seek a settlement credit despite the settlement agreement imposing both a bar order and corresponding provision for a setoff for joint tortfeasors, and despite that Defendants raised the issue in their post-trial brief promptly after the court approved the settlement agreement. A1235-41; A1273-78.

B. Scope Of Review

This Court reviews "questions of statutory construction" and "the Court of Chancery's conclusions of law *de novo*." *Ikeda v. Molock*, 603 A.2d 785, 786 (Del. 1991); *RBC*, 129 A.3d at 869.

C. Merits Of Argument

The court erred in concluding that "the Non-Settling Defendants waived their right to" a settlement credit for the $27 million settlement between Plaintiffs and Defendants Liaw and IVP. Nov. Op. 10. "[T]he standards for proving waiver under Delaware law are quite exacting. Waiver is the voluntary and intentional relinquishment of a known right. It implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those rights." *Bantum v. New Castle Cty. Vo-Tech Educ. Ass'n*, 21 A.3d 44, 50 (Del. 2011) (cleaned up). In addition, "the facts relied upon to prove waiver must be

unequivocal." *Id.* (cleaned up). The court did not mention these standards. Instead, it found waiver based entirely on a novel rule that a party must raise setoff before trial. Nov. Op. 10.

There is no such rule and no basis to find waiver of the statutory "right of contribution [that] exists among joint tortfeasors." 10 *Del. C.* § 6302(a). As the court recognized, it allows "parties to pursue claims for contribution *after* the court has made liability determinations." Nov. Op. 8 (emphasis added). Thus, Defendants correctly believed that the proper time to raise a request for setoff was after trial. Indeed, Defendants could not have sought setoff before trial because the court only approved the settlement after trial. A1061-72.

At no point did Defendants suggest they were waiving the right to seek setoff after trial. To the contrary, Plaintiffs entered into a settlement agreement providing that "any joint damages recoverable against all other alleged tortfeasors, including Non-Settling Defendants, will be reduced by the greater of (a) the Settlement Amount, and (b) the pro rata share of the responsibility for such damages, if any, of Settling Defendants, should it be determined that any of the Settling Defendants are joint tortfeasors." Nov. Op. 4. The court's final order approving the settlement after trial included a Bar Order that is expressly intended to comply with DUCATA Section 6304(b). A1067-68. And Defendants then sought setoff in their post-trial briefs. A1203 n.493.

The court relied on *In re Rural/Metro Corp. Stockholders Litigation*, 102 A.3d 205 (Del. Ch. 2014), but that case confirms the lack of waiver here. In *Rural/Metro*, the non-settling defendant "disavowed any [] assertion" of the settling defendants' joint tortfeasor status at trial and did not raise the issue in its post-trial briefs. *Id.* at 244. Nonetheless, the court found the non-settling defendant did ***not*** "waive[] its right to argue during post-trial proceedings that the Settling Defendants are joint tortfeasors." *Id.* at 245. This Court affirmed, recognizing that joint tortfeasor status can be determined post-trial in a case involving a bench trial. *See RBC*, 129 A.3d at 870.

The court distinguished *Rural/Metro* because the defendant there took the "ministerial" steps of making a crossclaim for contribution and raising the issue in the pre-trial stipulation and order. Nov. Op. 11. But *Rural/Metro* never suggested these facts were relevant, let alone dispositive, to waiver. Indeed, the DUCATA does not require such pre-trial cross-claim where, as here, the non-settling party does not seek a reduction relative to the settling party's comparative fault. *RBC*, 129 A.3d at 869-70.

In any event, the court's supposition that Plaintiffs may have tried the case differently had they known about setoff (Nov. Op. 10-11) is baseless. Plaintiffs were on notice of the possibility of setoff because the settlement agreement expressly said so. There is no evidence to suggest Plaintiffs believed the dubious proposition that

Defendants would not seek a setoff. Moreover, Plaintiffs had no practical ability to pursue a strategy that denied Liaw was a joint tortfeasor, as their own pleadings and summary judgment briefing argued he was. A73-74 ¶¶ 2, 21-23, A 114 ¶ 136, A142-43 ¶¶ 232-35; A220. And putting aside what they may have argued, the facts were the facts, and there was no way to prevent Liaw and IVP from testifying about their roles in the transaction.

The court's reliance on *Advanced Fluid Systems, Inc. v. Huber*, 381 F. Supp. 3d 362 (M.D. Pa. 2019), *aff'd*, 958 F.3d 168 (3d Cir. 2020), was likewise misplaced. The defendants there did not "squarely raise [the setoff] issue before judgment was rendered." 958 F.3d at 185. Here, Defendants raised the issue in their post-trial brief and well before judgment was entered.

At the very least, the court broke new ground in holding that a party in a bench trial must preserve the setoff issue pretrial, even though it will be addressed post-trial. No Delaware precedent suggests such a rule. Given that a "waiving party must know of the requirement or condition," *Bantum*, 21 A.3d at 51 (quotation marks omitted), there can be no waiver here. Indeed, fundamental fairness prevents applying a new waiver standard to Defendants that no Delaware case had previously endorsed and of which Defendants had no notice. That is especially true given that applying this new waiver rule simply gives Plaintiffs a windfall, allowing them double-recovery from different Defendants.

CONCLUSION

The Court should reverse the judgment.

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