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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NUVASIVE, INC., a Delaware Corporation, Plaintiff-Below/Appellant, v. PATRICK MILES, an individual, and ALPHATEC HOLDINGS, INC., a Delaware Corporation, Defendants-Below/Appellees.	)	No. 132,2025 Court below: Court of Chancery C.A. No. 2017-0720-SG

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE OF THE PROCEEDINGS

Appellee Patrick Miles ("Miles") is a former NuVasive, Inc. ("NuVasive") executive who used a threat to jump to a competitor, Appellee Alphatec Holdings, Inc. ("Alphatec Holdings") in September 2016 to leverage a promotion to Vice Chair and a compensation package of $36 million; then surreptitiously invested $500,000 in Alphatec Holdings in March 2017; and finally abandoned NuVasive altogether in October 2017 to join Alphatec Holdings as its Executive Chairman. Miles' secret investment in a competitor while employed as a board member gives rise to NuVasive's breach of fiduciary duty claim.

Miles' departure was less than friendly. He prefaced his resignation with a promise to NuVasive's Chairman and CEO: "I'm going to go kick your ass building up Alphatec." And, in conjunction with other Alphatec Holdings executives, Miles personally induced NuVasive's exclusive distributors and sales representatives in Florida, North Carolina, and Massachusetts to breach their agreements in order to sell competitive products to their NuVasive customers. This conduct by Alphatec Holdings' own executive team (albeit to recruit for its operating subsidiary, Alphatec Spine, Inc., "Alphatec Spine") gives rise to NuVasive's tortious interference claim (and the related statutory claims under the Florida and North Carolina Deceptive and Unfair Trade Practices Acts).

This case was tried October 2–6, 2023, resulting in two post-trial opinions. The trial court found in its August 16, 2024, Memorandum Opinion that Miles' failure to disclose his investment of $500,000 was not a breach of his fiduciary duty of loyalty. The trial court in its subsequent January 31, 2025, Letter Opinion exonerated Alphatec Holdings from liability because it is merely a publicly traded holding company with no operations.

Both rulings constitute reversible error.

On the fiduciary duty claim, the trial court impermissibly excused Miles' misconduct because he proffered a motive to help personal friends who worked at Alphatec Holdings; the inquiry into Miles' motive is baseless.

On the tortious interference and related statutory claims, the trial court committed reversible error in overlooking **who** committed the tortious conduct. In each instance, it was Miles or another executive whose contract of employment was solely with Alphatec Holdings who induced the breaches, and those were done with, *inter alia*, stock in Alphatec Holdings as the payoff for those breaching their commitments to NuVasive under a stock plan explicitly authorized by Alphatec Holdings' own Board of Directors for that very purpose.

SUMMARY OF ARGUMENT

I. MILES' BREACH OF FIDUCIARY DUTY IS SELF-EVIDENT

1. Miles' excuses for failing to disclose his investment to NuVasive cannot excuse his breach. *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) ("The reason for the disloyalty (the faithlessness) is irrelevant, the underlying motive (be it venal, familial, collegial, or nihilistic) for conscious action not in the corporation's best interest does not make it faithful, as opposed to faithless."). There is no *mens rea* element to Miles' fiduciary breach. "It makes no difference the reason why the director intentionally fails to pursue the best interests of the corporation." *In re Walt Disney Deriv. Litig.*, 907 A.2d 693, 749–50 (Del. Ch. 2005), *aff'd* 906 A.2d 27 (Del. 2006).

2. The fiduciary duty of loyalty requires disclosing information (like Miles' investment in Alphatec Holdings) that the fiduciary knows or has reason to know the employer would wish to have. *Metro Storage International v. Harron*, 275 A.3d 810, 842-43; 850-51 (Del. Ch. 2022) (citing Restatement (Third) of Agency § 8.11 cmt. b (stating that an agent breaches a duty by not giving his principal information that he knows the principal would want to know)).

II. ALPHATEC HOLDINGS' LIABILITY IS PROPERLY PREDICATED ON ITS OWN EMPLOYEES' ACTIONS

1. Parent companies, like Alphatec Holdings, are legally accountable for the tortious conduct by their own employees. *All Pro Maids, Inc. v. Layton*, 2004

WL 1878784, at *7 (Del. Ch. Aug. 9, 2004) (finding that MM, although a "distinct corporate entity," was equally liable for tortious interference by its employee Layton "under the doctrine of *respondent superior*"). Alphatec Holdings' SEC filings include its employment agreements with its key executives, including Miles, who committed the tortious interference. These confirm that Alphatec Holdings—not its subsidiaries—directly employed these individuals; there is no legal doctrine of "slipsies" allowing Alphatec Holdings to disclaim liability for the employment of those agents and any legal doctrine of mistake is wholly inapposite. *See*, *e.g.*, *Lehman Bros. Holdings, Inc. v. Kee*, 268 A.3d 178, 191 n.95 (Del. 2021) ("The doctrine of mutual mistake focuses on what the parties believed when they *formed* a contract, not on subsequent developments that materially change the value of the bargain.")

2. Beyond the employment of the executives who did the tortious interference, Alphatec Holdings undeniably financed those torts by creating a Distributor Inducement Plan to permit offers of its own stock to NuVasive distributors to induce breaches of their contracts with NuVasive. Here, accordingly, Alphatec Holdings is "directly a participant in the wrong complained of" and so is a "parent [corporation which] is directly liable for its own actions." *United States v. Bestfoods*, 524 U.S. 51, 64 (1998).

STATEMENT OF FACTS

A. Facts Concerning Miles' Fiduciary Breach

NuVasive is a medical device company that develops technologies to treat spinal disease. (A204:20-A219:10.) NuVasive contracts with exclusive distributors and sales representatives throughout the country to sell its products. (A1913:15-A1928:2.) Miles worked at NuVasive from 2001 until October 2017. (A1929.) In early 2016, Miles served as NuVasive's President and Chief Operating Officer. (*Id.*)

Alphatec Holdings is a direct competitor of NuVasive that, through its subsidiary Alphatec Spine, also designs and promotes surgical instruments and implants to treat spinal disease. (A1934:16-A1935:4.) In January 2016, Alphatec Holdings was struggling financially and engaged UBS Financial Services ("UBS") to sell Alphatec Holdings. (A1941:24-A1944:10.)

UBS contacted numerous competitors within the industry, including NuVasive, to see if any would be interested in purchasing the entire company or some portion thereof. (*Id.*, A1993-A2057, A2058-A2061, A2062-A2063.) NuVasive's Chairman and CEO, Gregory Lucier ("Lucier"), had several NuVasive executives, including Miles, review and comment upon purchasing Alphatec Holdings. (A1993-A2057, A2058-A2061, A2062-A2063.) By February 2016, Miles advised NuVasive that he thought it would be a "waste of time" to pursue this opportunity because Alphatec Holdings was a "shitty company" with an "aged,

undifferentiated" product portfolio. (A2057, A2076:1-12.)

Yet, Miles was concurrently texting with a friend and former NuVasive executive Terry Rich ("Rich") about possibly buying Alphatec Holdings for himself. On January 27, 2016, Miles texted Rich saying, "Tell your buddy to put $'s behind ATEC so we can run at that." (A2116.)

In April 2016, Miles began secretly meeting with Mortimer Berkowitz ("Berkowitz"), a member of Alphatec Holdings' Board of Directors, about the prospect of investing millions of dollars through a new venture and taking the reins as its CEO. (A2179-A2185, A2066:6-15, A1945:3-A1970:7.)

Over the ensuing months, Miles—despite being an officer at NuVasive with fiduciary obligations to NuVasive—helped Berkowitz put together a comprehensive business plan for Alphatec Holdings, which discussed how to overhaul its sales force and improve its product portfolio at NuVasive's expense. (A2186-A2267.)

Miles denied participating in any meetings with Alphatec Holdings' lenders to help secure funding. (A0329:17-A333:13.) But documentary evidence showed that is not true. Miles personally attended a meeting in New York City with Deerfield Management, Alphatec Holdings' largest lender. Participants noted after that meeting that Miles "rocked the house with operational perspective and changes." (A2268-A2270, A1971:3-A1978:21, A1979:3-A1981:16.)

In July 2016, Alphatec Holdings decided to sell its international assets to Globus Medical, Inc. (A2271-A2273.) At that point, Miles found running the post-closing entity less appealing and so—at that time—he declined Alphatec Holdings' offer to become its CEO. (A2271-A2272.)

Meanwhile, NuVasive—unaware of Miles' pursuits with Alphatec Holdings—was positioning Miles as Lucier's successor. As part of those efforts, NuVasive appointed Miles to the Board of Directors on or around August 1, 2016. (A2276:12-A2279:5.) NuVasive also sent Miles to a leadership program run by Korn Ferry, a consulting firm, but he performed poorly there. (A0650:14-A0653:20, A2284:1-A2285:20.) Miles then reengaged with Berkowitz about joining Alphatec Holdings and, in September 2016, announced his resignation from NuVasive to become Alphatec Holdings' CEO. (A2289-A2292; A1982:14-A1983:8.)

NuVasive made a counteroffer to Miles to transition to the position of Vice Chairman. (A2293-A2330.) In this position, Miles would remain on NuVasive's Board of Directors making $500,000 per year and earn substantial equity (up to $36 million) that would vest over time. (A2293-A2294.) That offer made clear to Miles:

> As an executive employee of NuVasive, you acknowledge that you have an **ongoing fiduciary duty** to NuVasive. You agree that you will not accept work, enter into a contract or accept an obligation inconsistent or incompatible with your employment and fiduciary obligations to NuVasive, **or knowingly engage in any activity that compromises the interests of NuVasive**.

(A2316 (emphasis added).)

Miles accepted all this, including his "ongoing fiduciary duty." (*Id.*) Afterwards, Miles sent a communication to all NuVasive employees, stating, "I want to assure you I'm committed to you, our company, our surgeons and patients more than ever." (A2331.) At a NuVasive Board of Directors' meeting two months later, Miles asked for permission to speak. (A2287:13-A2288:11.) He then gave an impassioned speech apologizing for resigning and reaffirming his long-term commitment to NuVasive, even stating that he "bleeds purple"—a reference to NuVasive's corporate color. (*Id.*; A0220:6-9.)

With Miles temporarily unavailable, Alphatec Holdings hired Rich as its CEO in December 2016. (A2336:24-A2338:16.) When Rich took the position as CEO, he believed its product portfolio was "terrible" and "complete shit." (A2340:9-A2342:8.) He also viewed its distributor model as "[n]ot good" and negotiated as part of his hire the ability to completely overhaul it. (*Id.*)

To fix these problems, Alphatec Holdings needed money. Despite cash from the sale of its international assets, Alphatec Holdings had financial problems. (A2344:12-A2345:7.) By January 2017, Alphatec Holdings had only 14–16 weeks of cash and had already been cut off by one supplier for failure to pay bills. (*Id.*)

Because of these cash flow issues, Alphatec Holdings began marketing a PIPE that would allow institutional investors to buy stock directly and below the public market price. (A2353-A2354, A2404-A2409, A1936:3-A1938:15, A1988:4-

A1992:7.) According to its then-Chairman, Alphatec Holdings needed to raise approximately $19 million in "growth capital" to, among other things, "launch new products" and "enlist new distributors and grow the sales force" and that was admittedly communicated to potential investors. (A1984:6-A1985:2.)

Rich admitted: "without this PIPE investment, Alphatec [Holdings] wouldn't have been able to remain solvent." (A2345:2-7.) So, with Alphatec Holdings in dire straits, Rich contacted Miles as a potential investor. (A2346:20-A2349:13, A0355:17-A0356:10.) And, Miles did so, investing $500,000 in Alphatec Holdings in March 2017.

Miles asserts that he made this investment solely "out of unadulterated guilt" for not joining Craig Hunsaker ("Hunsaker," a former colleague at NuVasive) at Alphatec Holdings months earlier and had no understanding as to what Alphatec Holdings planned to do with the proceeds. (A0658:20-A0661:23.) But, Rich directly contradicted that testimony, noting that Miles "asked better questions than most investors," and specifically "asked [about] the use of [the] proceeds" because Alphatec Holdings' "potential use of that money was a factor that [Miles] felt was important" to his decision to invest. (A2349:5-A2351:5.)

Alphatec Holdings created materials for potential investors. (A2474-A2506.) These materials also confirmed that its goal was to better compete with NuVasive. (A2352:8-21, A2488.) Despite the intended use of the funds and his own fiduciary

duty to NuVasive, Miles surreptitiously invested $500,000 in Alphatec Holdings in March 2017. (A2507-A2636.)

Miles admits that he funneled this money through an entity named MOM, LLC rather than his own name to conceal the investment from Lucier, NuVasive's Chairman and CEO:

> Q. Why did you put the investment for Alphatec into MOM, Inc. [sic]?
>
> A. I thought it would be easier.
>
> Q. Easier than what?
>
> A. Easier than having my name all over it.
>
> Q. Why would that be easier?
>
> A. Because I didn't want to deal with a misdirected inference that there was any undue interest, if you will, in it. I did it for Craig, and so I thought I'd do it under MOM, and it would be easier to not have to fight with Lucier about another thing.
>
> Q. So you didn't want Mr. Lucier to know?
>
> A. It was easier for him not to know.

(A2083:1-14.)

Miles knew better than to disclose his investment to anyone at NuVasive. (A2082:13-16.) A few months earlier, Miles had sought approval to personally invest in another company advancing technology used in spine surgery. (A2637-A2755.) Lucier denied Miles' request because he believed that Miles' "investment (on a personal level) would create a conflict of interest." (A2754-A2755.)

After making this secret investment in Alphatec Holdings in March 2017, Miles remained on NuVasive's Board of Directors and in its employ as its Vice Chairman until October 1, 2017. At that point, Miles abruptly resigned to become Alphatec Holdings' Executive Chairman.[1] (A2756.) Before sending his resignation email, Miles called Lucier to tell him of the resignation and stated, "I'm going to go kick your ass building up Alphatec." (A2286:7-23.)

B. Facts Concerning Alphatec Holdings' Tortious Interference Liability For Its Own Executives

Consistent with that threat, Miles (along with other Alphatec Holdings executives) immediately started urging NuVasive's distributors and sales representatives in Florida, North Carolina, and Massachusetts to breach their contractual obligations to NuVasive to help transform the sales force at Alphatec Spine.

Alphatec Holdings is the publicly traded parent company; its subsidiary Alphatec Spine is the operating company. Before addressing **what** that tortious interference consisted of, it is essential to address **who** at Alphatec Holdings did the interfering and the evidence of Alphatec Holdings' responsibility for that interference.

[1] Subsequently, in March 2018, Rich stepped down to President and COO of Alphatec Holdings, and Miles assumed the role of CEO. (A2334:20-A2335:4.)

1. Alphatec Holdings' Involvement/Accountability

Alphatec Holdings' Form 10-Ks filed with the SEC over a five-year period (*i.e.*, between 2017 and 2022) attach employment agreements that show Alphatec Holdings directly employed these key executives (A3452-A3453, A3493-A3496, A3504, A3567-A3568, A3880, A4081-A4082, A4199, A4311-A4312):

- Miles: Executive Chairman, and then Chairman and CEO. (A2757-A2760.)
- Hunsaker: Executive Vice President, People and Culture and General Counsel. (A2761-A2780.)
- Rich: CEO, and then President. (A2781-A2796.)

These agreements require these executives to "devote substantially all of [their] business time and attention to the business and affairs of the Company." (*Id.*) Importantly, the employment agreements provide that they "constitute [Alphatec Holdings'] only statement relating to its offer of employment to [the employee] and supersedes any previous communications or representations, oral or written, from or on behalf of [Alphatec Holdings] or any of its affiliates." (*Id.*)

These executives do not have separate employment agreements with Alphatec Spine, nor do these companies maintain any records for allocating their time between Alphatec Holdings and Alphatec Spine. (A0881:8-A0886:2.) And, this trio of Alphatec Holdings' executives were the point people engaged in tortiously interfering with NuVasive's exclusive distribution system contract.

But, this direct involvement of Alphatec Holdings' officers is far from the only evidence of its accountability for that tortious activity. Miles and Hunsaker worked with Alphatec Holdings' Board of Directors to implement its 2017 Distributor Inducement Plan ("Inducement Plan"). This was adopted by Alphatec Holdings' Board of Directors in December 2017 for the explicit purpose of "inducing, retaining, and incentivizing" key "[t]arget" distributors (including key distributors at issue in this case) by offering warrants to purchase shares of Alphatec Holdings' stock if distributors met certain sales thresholds. (A2797-A2800; A2084:2-A2100:20.) The Inducement Plan gave Miles, as Alphatec Holdings' Executive Chairman, the sole discretion to issue "[t]arget" distributors stock warrants and common stock. (A2797-A2800.) And, he—on behalf of Alphatec Holdings—did so here as part of Alphatec Holdings' interference.

2. The Tortious Interference

Let's now review quickly what Alphatec Holdings' own officers did to interfere with NuVasive's exclusive distributorships in Florida, in North Carolina, and in Massachusetts. In each, the pattern was strikingly similar.[2]

[2] A more thorough analysis of Alphatec Holdings' interference with NuVasive's contracts with its distributors and sales representatives can be found in its Post-Trial Opening Brief and Reply Brief. (A1617-A1716, A1835-A1875.)

Florida

Absolute Medical, LLC ("Absolute Medical") served as NuVasive's exclusive distributor in Florida since 2013. (A2827:13-A2828:25.) Pursuant to Section 9.02 of their agreement, Absolute Medical could terminate its commitments with NuVasive only if it first notified NuVasive of a material breach and afforded NuVasive 30 days to cure. (A2849.)

Absolute Medical had sales representatives, including Dave Hawley ("Hawley") and Ryan Miller ("Miller"). (A2836:18-A2838:9.) Under Section 5.09(e), Absolute Medical had them execute a fixed-term agreement with Absolute Medical for one year (*i.e.*, until December 31, 2016), coupled with a one-year post-termination prohibition on competing in their NuVasive territory or soliciting their NuVasive customers (*i.e.*, until December 31, 2017). (A2845-A2846, A2868-A2924.)

Alphatec Holdings' own executives (*e.g.*, Miles, Rich, and Hunsaker) personally recruited and enticed Absolute Medical's owner (Gregory Soufleris) to leave NuVasive to become an Alphatec Spine distributor, including by (i) bringing him to its San Diego headquarters for formal meetings just two weeks after Miles resigned from NuVasive (A2925-A2976; A2828:22-A2830:11, A2831:5-A2836:21) and (ii) subsequently negotiating terms for his Alphatec Spine distributorship. (A2977-A2992.)

Those terms included offering warrants to purchase 50,000 shares of Alphatec Holdings' common stock and 75,000 RSUs if Soufleris met certain sales thresholds. (A2988-A2991.) The warrants were issued under Alphatec Holdings' Inducement Plan and were approved by Miles. (A2799-A2805.) With that inducement, Soufleris emailed NuVasive executives stating that Absolute Medical was resigning from its exclusive agreement without asserting that NuVasive breached the distributor agreement or otherwise articulating any basis for termination under its provisions. (A2993-A2994.)

Alphatec Holdings' executives, including Rich, also successfully recruited Hawley and Miller to Alphatec Spine. (A2997:12-A3002:7; A3003-A3029.) Three days after Soufleris terminated the Absolute Agreement with NuVasive, Hawley and Miller resigned from Absolute Medical. (A3032-A3137.)

North Carolina

Kenneth Kormanis ("Kormanis") and Michael Jones ("Jones") worked as sales representatives for inoSpine, LLC ("inoSpine"), an exclusive distributor of NuVasive products in North Carolina. (A3140:7-14; A3143:21-A3145:13.) Each executed agreements with inoSpine, to which NuVasive was a third-party beneficiary. (A3146-A3157, A3158-A3173.)

Beginning in late 2017, the same Alphatec Holdings executives (*i.e.*, Miles, Rich, and Hunsaker) began recruiting Kormanis and Jones to become sales

distributors for Alphatec Spine. (A3174-A3211.) And, on March 1, 2018, Jones and Kormanis each executed distributor agreements with Alphatec Spine through their respective entities. (A3212-A3263.)

Massachusetts

Timothy Day ("Day"), through his entity Rival Medical, LLC ("Rival Medical"), contracted with NuVasive as an exclusive distributor in Massachusetts and Rhode Island. (A3264-A3296.) Rival Medical, in turn, hired Adam Richard ("Richard") as a sales representative. (A3297-A3316.) Rival Medical's distributor agreement parallels Absolute Medical's agreement with NuVasive: it can only be terminated for cause; required Rival Medical to exclusively promote NuVasive products during the three-year term; and foreclosed competing with NuVasive or soliciting NuVasive surgeons in Massachusetts or Rhode Island for one year after the expiration of the agreement. (*Id.*)

Yet, in February 2019, Alphatec Holdings' executives Miles and Hunsaker began recruiting Day and Richard. (A3317-A3369.) On March 29, 2019, Day executed a one-year contract to be directly employed as Alphatec Spine's Territory Development Manager. (A3370-A3376.) On March 30, 2019—the day after receiving his Alphatec Spine offer—Rival Medical (using the same tactic as Soufleris did in Florida) "resigned" from NuVasive without asserting that NuVasive breached the Rival Medical agreement. (*Id.*) Alphatec Spine also hired Richard and

assigned him to work in his prior NuVasive territory notwithstanding his restrictions. (A3317-A3319, A3377-A3392.)

ARGUMENT

I. MILES' BREACH OF FIDUCIARY DUTY IS SELF-EVIDENT

A. Question Presented

Did the trial court err in excusing Miles' breach of his fiduciary duty to disclose his investment into his employer's competitor because Miles (i) wanted to help his friend who worked for that competitor and (ii) wanted to avoid confronting NuVasive's Chairman and CEO with his proposed investment? (A1685-A1687, A1841-A1845.)

B. Scope of Review

Here, review is *de novo*. "The formulation of the duty of loyalty . . . involves questions of law which are . . . subject to *de novo* review by this Court." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).

C. Merits of Argument

1. Miles resigned from NuVasive to become Alphatec Holdings' CEO, but reversed course and remained with NuVasive when it appointed him to the Vice Chairman role and provided him an additional compensation package (worth up to $36 million). NuVasive did so precisely to keep Miles from joining Alphatec Holdings. (A2293, A2314-A2330.)

Within months of accepting that deal and while still at NuVasive as its Vice Chairman, Miles nonetheless secretly invested $500,000 in Alphatec Holdings. And,

he did so using a shell company—MOM, LLC—to conceal that investment from being visible to NuVasive. (A2083:1-14, A2082:13-16.)

The trial court found (a) Miles was making that investment to support his "very good friend" Hunsaker who had just joined Alphatec Holdings and (b) Miles decided to keep this investment secret to avoid conflict with NuVasive's Chairman and CEO, Lucier. (A1899-A1910.) Yet, as a matter of law, neither of those motives matter.

Miles' motives are legally immaterial. *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) ("The reason for the disloyalty (the faithlessness) is irrelevant, the underlying motive (be it venal, familial, collegial, or nihilistic) for conscious action not in the corporation's best interest does not make it faithful, as opposed to faithless."); *In re Walt Disney Deriv. Litig.*, 907 A.2d 693, 749–50 (Del. Ch. 2005), *aff'd* 906 A.2d 27 (Del. 2006) ("It makes no difference the reason why the director intentionally fails to pursue the best interests of the corporation.").

What matters is that while serving as NuVasive's Vice Chairman, Miles intentionally concealed his investment and did so because he knew NuVasive would not authorize it. (A2083:1-14, A2082:13-16.) Past is prologue: four months before making this investment in Alphatec Holdings, Miles sought NuVasive's approval to invest in another company in spine technology. (A2637-A2755.) NuVasive denied Miles' request, because it believed that an "investment (on a personal level) would

create a conflict of interest." (A2754.)

Miles' fiduciary duty plainly requires disclosing information (like his investment in Alphatec Holdings) that the fiduciary knows or has reason to know the employer would wish to have. *Metro Storage International v. Harron*, 275 A.3d 810, 842-43; 850-51 (Del. Ch. 2022) (citing Restatement (Third) of Agency § 8.11 cmt. b (stating that an agent breaches a duty by not giving his principal information that he knows the principal would want to know)).[3]

Metro Storage is instructive on the failure to disclose:

> [T]he Nagel brothers and Harron reached an understanding that Harron would not take on any new consulting engagements after May 24, 2012, that he would wrap up all of his outside consulting engagements by November 24, 2012, and that he would not engage in any outside consulting work without permission from the Nagel brothers . . . . Yet Harron did not disclose that he started the Tremont Engagement in August 2012. . . . **Harron kept his consulting secret precisely because he knew that he was not supposed to be doing it and that the Nagels would not authorize it.**

[3] NuVasive's Code of Conduct (which applies to all employees regardless of their fiduciary status) requires disclosure of investments that create decision-making power. But, that floor for non-fiduciaries is not Miles' only obligation. His September 2016 elevation to Vice Chairman included separate and far broader obligations consistent with that fiduciary role: "As an executive employee of NuVasive, you acknowledge that you have an **ongoing fiduciary duty** to NuVasive . . . will not accept work, enter into a contract or accept an obligation inconsistent or incompatible with your employment and fiduciary obligations to NuVasive, or **knowingly engage in any activity that compromises the interests of NuVasive**." (A2316 (emphasis added).)

Id. at 851. The result should be no different here.

Plus, accepting the trial court's insertion of this *mens rea* element disserves every Delaware corporation. It impermissibly shifts the inquiry in analyzing fiduciary duty claims from **what** was done to **why** it was done. Indeed, making motive the dispositive element for fiduciary analysis deprives every Delaware corporation of the ability to protect itself and its shareholders from errant fiduciaries: why Jean Valjean stole bread (to feed his sister's starving children) in Victor Hugo's novel *Les Miserables* does not change that what was done (theft) was a crime.

2. Here, however, there is even more to that error. The trial court acknowledged that NuVasive could establish that Miles breached his fiduciary duty by showing that he acted with a purpose **other than** advancing the best interests of NuVasive but found that NuVasive failed to satisfy this standard because (a) his excuses for disclosing the investment were justified and (b) no conflict of interest existed. (A1900-A1903.)

Not so. Miles' failure to disclose his investment in no way benefited NuVasive. Indeed, the trial court contradictorily found that Miles made that investment to help a friend and declined to disclose it to NuVasive to avoid unpleasantries (knowing that permission would be denied). Miles and the trial court cannot have it both ways; if Miles is accepted at face value in his explanations, they *ipso facto* demonstrate that his conduct was designed for purposes other than to

advance the best interests of NuVasive and so prove a breach of fiduciary duty.

Plus, in context, the conflict was obvious. NuVasive had recently denied Miles' permission to invest in another company in the same field. And, NuVasive had gone to extraordinary efforts in September 2016—only seven months earlier—to keep Miles from going to assist Alphatec Holdings and to stay at NuVasive with a promotion to Vice Chair and a multi-million-dollar compensation package.

Here, the trial court misapprehended breaches of fiduciary duty. When a fiduciary "intentionally acts with a purpose other than that of advancing the best interests of the corporation," there is a breach. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (citation omitted). And "any emotion [that] may cause a director to [intentionally] place his own interests, preferences or appetites before the welfare of the corporation," including greed, "hatred, lust, envy, revenge, . . . shame or pride" will establish breach. *In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989).

Perhaps, in an alternate universe, a different corporation might waive a fiduciary's decision to advance interests other than the corporation to which he owed fiduciary obligations in both investing in a competitor and hiding that investment. But, NuVasive never did so, making the trial court's decision to waive that conflict on its own an impermissible intrusion on NuVasive's business judgment. While its Board of Directors could (but never did) decide to waive Miles' misconduct, the trial

court cannot usurp the Board's role to waive that conflict. [4]

[4] And, to be clear, NuVasive never waived any aspect of Miles' breach of fiduciary duty. This was explicitly raised in the trial court's questions during post-trial oral argument and explicitly answered to confirm NuVasive's position that it waived nothing:

> THE COURT: Which was the breach of duty, the investment or the failure to disclose the investment?
>
> ATTORNEY COWEN: Well, the investment wouldn't be a breach if there had been a disclosure and approval.
>
> THE COURT: Well, I understand that.
>
> ATTORNEY COWEN: So it is the failure to disclose.
>
> THE COURT: All right.
>
> ATTORNEY COWEN: It's the combination. I invested secretly. And I think that's the way we've pled it and the way we've argued it.

(A4388:12-24.)

II. ALPHATEC HOLDINGS' LIABILITY IS PROPERLY PREDICATED ON ITS OWN EMPLOYEES' ACTIONS

A. Question Presented

Did the trial court error when it exonerated Alphatec Holdings, a publicly traded company, for the tortious acts of its own officers and directors merely because those executives engaged in such conduct to increase profits of a subsidiary (which, of course, increased the shareholder value of Alphatec Holdings)? (A1688-A1692.)

B. Scope of Review

Here, review is *de novo*. This Court reviews "questions of law, including contract interpretation, *de novo*." *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668, 674 (Del. 2020) (citations omitted).

C. Merits of the Argument

Alphatec Holdings' SEC filings showcase the employment agreements with the key executives involved in the alleged misconduct: Miles, Hunsaker, and Rich. (A2757-A2796.) These employment agreements plainly and unambiguously confirm that Alphatec Holdings—not its subsidiaries—**directly** employed Miles, Hunsaker, and Rich. (*Id.*)

Specifically, these employment agreements provide the terms of their employment with Alphatec Holdings, including their title, to whom they would report, salary, bonus, benefits, severance, and post-employment obligations. (*Id.*) These employment agreements further provide that these executives were required

to "devote substantially all of [their] business time and attention to the business and affairs of" Alphatec Holdings. (*Id.*)

Alphatec Holdings' General Counsel, Hunsaker, testified that these contracts and five consecutive years of SEC filings reciting and relying on those contracts were mistakes. (A695:8-697:1.) The trial court failed to conduct any analysis regarding the doctrine of mistake (which itself constitutes reversible error). (A1888.)

There are no legally excusable mistakes here. Calling "slipsies" is for children on a playground, not a legal doctrine allowing drafters to evade the consequences of their own choices. Legal doctrines of mistake, if examined, are wholly irrelevant to Hunsaker's self-serving excuse. *See*, *e.g.*, *Lehman Bros. Holdings, Inc. v. Kee*, 268 A.3d 178, 191 n.95 (Del. 2021) ("The doctrine of mutual mistake focuses on what the parties believed when they *formed* a contract, not on subsequent developments that materially change the value of the bargain.")

Alphatec Holdings made these representations to the SEC and the investing public for over five years in its Form 10-Ks; it knew what it was doing and carefully differentiated between Alphatec Holdings and its subsidiary in these employment agreements (A3452-A3453, A3493-A3496, A3504, A3567-A3568, A3880, A4081-A4082, A4199, A4311-A4312):

- the restrictive covenants in the employment agreements apply to Alphatec Holdings and its "affiliates," which would include its subsidiary Alphatec

Spine (A2757-A2796);

- the employment agreements unequivocally provide that they "constitute [Alphatec Holdings] **only** statement relating to its offer of employment to [the employee] and supersedes any previous communications or representations, oral or written, from or on behalf of [Alphatec Holdings] **or any of its affiliates**" (*id.* (emphasis added)); and
- these executives do not have separate employment agreements with Alphatec Spine. (A0882:6-A0887:1.)

This is more than enough (with or without the doctrine of *contra preferentem*) to hold Alphatec Holdings to account for their tortious interference. But, there is more. Alphatec Holdings' Board of Directors adopted the Inducement Plan for the explicit purpose of "inducing, retaining, and incentivizing" key "[t]arget" distributors with warrants to purchase shares of Alphatec Holdings' stock." (A2797-A2800; A2084:2-A2100:20.) So, Alphatec Holdings purposely financed the efforts of its own executives to induce NuVasive's distributors to breach.[5]

The trial court's form-over-substance approach creates a blanket immunity for a holding company even where, as here, the holding company's own employees are

[5] Alphatec Holdings also chose to operate with its executives maintaining no records for allocating their time between their Alphatec Holdings and Alphatec Spine. (A0882:6-A0887:1.) Indeed, Miles admitted that he makes no such distinction between his roles and merely acts to drive shareholder value: *i.e.*, his shares in Alphatec Holdings and those of its other investors. (A2084:2-2099:20.)

the tortfeasors. The United States Supreme Court aptly summarized why this is unacceptable:

> As Justice (then-Professor) Douglas noted almost 70 years ago, derivative liability cases are to be distinguished from those in which "the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management" and "the parent is directly a participant in the wrong complained of." Douglas 207, 208. In such instances, the parent is directly liable for its own actions. *See* H. Henn & J. Alexander, Laws of Corporations 347 (3d ed. 1983) (hereinafter Henn & Alexander) ("Apart from corporation law principles, a shareholder, whether a natural person or a corporation, may be liable on the ground that such shareholder's activity resulted in the liability").

United States v. Bestfoods, 524 U.S. 51, 64 (1998); *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *7 (Del. Ch. Aug. 9, 2004) (finding that MM, although a "distinct corporate entity," was equally liable for tortious interference by its employee Layton "under the doctrine of *respondent superior*").

CONCLUSION

For these reasons, this Court should reverse the judgment of the trial court.

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