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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 REPLY BRIEF

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INTRODUCTION

This case presents two issues. **First**, did the trial court err in excusing Patrick Miles' disloyalty in secretly investing in Alphatec Holdings based on his proffered motive of seeking to help friends by investing in a competitor while serving as a director and Vice Chair for NuVasive? **Second**, did the trial court erroneously immunize Alphatec Holdings for tortious conduct committed by its own employees based on *ipsi dixit* that those employees were aiding its subsidiary?

In both instances, reversal is warranted; the trial court misread the law.

Appellees expend the bulk of their Opposition Brief pounding the table on distractions rather than on the legal merits of those issues. That is symptomatic; there is little to be said on the merits that might support Appellees' fond wish to have the flawed decision below affirmed. And, that is what this Court will see for itself upon patiently wading through those distractions.

ARGUMENT

I. MILES' BREACH OF FIDUCIARY DUTY IS INESCAPABLE

Miles' Opposition Brief runs a litany of "fallacies of distraction" as Ruggero Aldisert (then Senior Judge in the United States Court of Appeals for the Third Circuit) captioned them in his treatise *Logic For Lawyers: A Guide To Clear Legal Thinking* (Clark Boardman 1989) at 176:

> Fallacies of distraction . . . shift attention from reasoned argument to other things that are always irrelevant. . . . They are ploys, but ploys are used in advertising and political campaigning, by essay writers, columnists, editorial writers, and television commentators.

Here, the dispositive issue is whether Miles' motives matter: *i.e.*, whether the trial court impermissibly excused his surreptitious investment in Alphatec Holdings (while serving as a director of NuVasive) because Miles proffered a motive of helping his personal friends who worked at Alphatec Holdings. Before turning to the dispositive issue, clarification is needed to dispel the distractions raised in Miles' Opposition Brief.

A. Miles' Distractions Count For Naught.

None has merit, and here is the reason why.

1. Miles asserts that "NuVasive now concedes" that his investment in Alphatec Holdings was not a breach of his duty of loyalty. (Opp. Br. at 19.) Miles is inexcusably wrong because this was explicitly set out in NuVasive's Opening Brief at footnote 4.

Miles' breach is twofold: **both** his investment (while serving as a NuVasive director) in NuVasive's competitor to help it launch a product that directly competes with NuVasive's flagship product **and** his failure to disclose that investment to NuVasive violated his fiduciary duty of loyalty. (A2352:8-21, A2488, A2349:5-A2351:5, A2474-A2506.)

This double-barreled violation was explicitly confirmed during post-trial oral argument before the trial court (and set out in footnote 4 of NuVasive's Opening Brief to this Court):

> 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; emphasis added).

There is no such concession.

2. Miles' Opposition Brief claims that NuVasive is trying "to convert the trial court's factual finding into a legal issue subject to *de novo* review[.]" (Opp. Br. at 18.) But, applying the wrong standard is always a legal issue; asking the wrong

question inherently produces the wrong answer. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) ("The formulation of the duty of loyalty . . . involves questions of law which are . . . subject to *de novo* review by this Court.") As explained *infra*, motives cannot excuse disloyalty; the trial court's error in allowing a role for motive applied the wrong legal standard.

There is no doubt that the review is *de novo*.

3. Miles' Opposition Brief claims that he "did not actively conceal his investment" from NuVasive. (Opp. Br. at 20.) Yet, Miles invested $500,000 in Alphatec Holdings under a front company (MOM, LLC) to avoid disclosure of his name. That, of course, is concealment. Miles also admitted under oath that he purposefully chose to avoid disclosing this investment to avoid confrontation with 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 concealed this investment and admitted to that concealment.

4. Miles' Opposition Brief asserts that "there was no business reason for NuVasive to need to know about the investment." (Opp. Br. at 21.) That assertion is baseless. Here, context is critical.

Only months earlier, 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). (A2293, A2314-A2330.) NuVasive did so precisely to keep Miles from joining Alphatec Holdings.

So, NuVasive had just made a **multi-million-dollar investment to keep Miles away from Alphatec Holdings**. And, that investment included a contractual commitment from Miles to refrain from "any activity that compromises the interests of NuVasive." (*Id.*)

Miles knew or should have known that—in this context—NuVasive would want to have knowledge of his intent to invest in Alphatec Holdings: "[a]n agent owes the principal a duty to provide information to the principal that the agent **knows or has reason to know** the principal would wish to have." *Metro Storage Int'l v. Harron*, 275 A.3d 810, 850–51 (Del. Ch. 2022) (quoting Restatement of Agency §

8.11 cmt. b; emphasis added). [1]

There is ample business reason for needing to know in this context. Any corporation in that context would have a valid reason to be alerted to Miles again engaging in this way with Alphatec Holdings.

B. Miles' Motives Cannot Excuse His Disloyalty.

Miles seeks to circumscribe the duty of loyalty on secretly investing in a competitor without permission. Miles argues that there is a violation **only if** (a) the investment granted a controlling interest or decision-making role in the competitor or (b) was done for a bad faith motive. That impermissibly cabins the duty.

First, there is no corollary to the duty of loyalty that immunizes corporate fiduciaries for investing in competitors, as long as those investments are short of a controlling interest. Certainly, 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).

Second, there is no affirmative defense to breaching the duty of loyalty for ostensibly laudatory motives like Miles' proffered explanation that he invested in

[1] Neither *Jeter v. RevolutionWear, Inc.*, 2016 WL 3947951, at *13 (Del. Ch. July 19, 2016) nor *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) hold to the contrary. Indeed, neither involve anything remotely comparable to this context. Miles' cited authority is another distraction. So too is his speculation that his investment may not have given Alphatec Holdings a competitive advantage. Alphatec Holdings' success or failure cannot define whether Miles was disloyal—traitors (like Benedict Arnold) often fail.

Alphatec Holdings to help his friends. "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." *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) (emphasis added); *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.").[2]

[2] Miles' Opposition Brief asserts *Guttman* and *Disney* only forbid considering motive "after" finding disloyalty but not "before." That is a distinction without a difference that is supported neither by textual analysis of those decisions nor by any other authority. Motives are just immaterial; there is no "for sake of friendship" exception to the duty of loyalty.

II. ALPHATEC HOLDINGS IS LIABLE FOR ITS OWN EMPLOYEES

Any holding company is **directly liable** when tortious conduct can be traced to its own personnel or its own conduct: "[D]erivative 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'. . . . In such instances, the parent is directly liable for its own actions." *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).

That is the controlling rule of law. There is no corollary that allows a holding company to excuse itself from liability by asserting that its employees were merely serving a subsidiary's interest in their tortious conduct. So, the trial court erred in exonerating Alphatec Holdings on that basis: "to the extent that [Alphatec Holdings'] executives were facially employed by Holdings engaged in the recruitment of sales representatives and distributors, they took these actions entirely on behalf of Spine [Alphatec Holdings' subsidiary]." (A1888.)

Neither the trial court then nor Alphatec Holdings now offers authority (or even any argument) to support this **nonexistent corollary**. Indeed, there is none because such a corollary would eradicate the controlling rule of law on direct liability. If evading liability turns on a holding company insisting that its employees

were aiding a subsidiary, there are zero instances in which a holding company will be accountable for tortious conduct committed by its own employees.

Contrary to Alphatec Holdings' contention, correcting the legal standard to eliminate the nonexistent corollary under which the trial court erroneously exonerated Alphatec Holdings is a question of law subject to *de novo* review. *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668, 674 (Del. 2020) (stating that "questions of law, including contract interpretation, *de novo*"). This Court should eliminate that erroneous corollary and remand for the trial court to apply the correct standard to the record evidence. *Wright v. Moore*, 953 A.2d 223, 226–27 (Del. 2008) (remanding matter where trial judge did not apply correct standard).

And, absent the corollary, the record evidence substantiates liability. Alphatec Holdings employed the trio of executives involved in the tortious conduct: Miles, Hunsaker, and Rich. (A2757-A2796.) Their employment agreements required them to "devote substantially all of [their] business time and attention to the business and affairs of" Alphatec Holdings. (A2757-A2796.) None have separate employment agreements with Alphatec Spine. (A0882:6-A0887:1.)[3]

[3] Plus, Alphatec Holdings' employment of these executives was no mistake; its representations to the SEC year after year publicly confirmed their employment by Alphatec Holdings. (A3452-A3453, A3493-A3496, A3504, A3567-A3568, A3880, A4081-A4082, A4199, A4311-A4312).

Alphatec Holdings nonetheless asserts that their tortious acts were not done "solely" for the holding company because each also had titles with its subsidiary Alphatec Spine. (Opp. Br. at 30) That **attempted dodge** avails Alphatec Holdings not at all. Rather, it confirms that the tortious conduct was "done to effect the purposes of two independent employers," which necessarily subjects both to liability. Restatement (Second) of Agency § 226 (1958) cmt. a.

This is black letter law: "[a] person may be the servant of two masters . . . at one time as to one act[.]" *Id.*; Restatement (Third) Of Agency § 7.03 (2006) (same). And, such persons "may cause both employers to be responsible for an act." Restatement (Second) of Agency § 226 cmt. a; *see also White v. Revco Discount Ctrs., Inc.*, 33 S.W.3d 713, 724-725 (Tenn. 2000) (both private employer of off-duty police officer as well as municipality may be subject to vicarious liability for torts committed by officer).

Here, the record confirms that predicate for joint liability. These executives neither record time serving its subsidiary versus serving the publicly traded holding company nor can contentions of their devoting "100 percent" of their time "in the interest of Alphatec Spine" (A0883) be reconciled with their contractual commitments to "devote substantially all of [their] business time and attention to the business and affairs of" Alphatec Holdings. (A2757-A2796.)

Alphatec Holdings' CEO Miles openly admitted what makes its joint liability inescapable in this case: in his work, Miles makes no distinction between the entities but just acts to drive shareholder value in the publicly traded parent company: Alphatec Holdings. (A2084:2-A2100:20.) This Court should follow his lead and likewise make no distinction for purposes of liability in this case.[4]

That is enough but there is more. Beyond tortious conduct by holding company employees paid exclusively by the holding company, Alphatec Holdings' Board of Directors also participated in the tortious interference via corporate act. The Board adopted the **2017 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.)

Direct liability for a holding company gets no better than this Board level involvement. That is why Alphatec Holdings offers three attempted distractions on its direct-from-the-top involvement in this campaign of tortious interference against NuVasive.

First, Alphatec Holdings mantras an irrelevancy, asserting that it is merely a "passive entity" (Opp. Br. at 29) and has "no business operations" (*id*. at 4, 6, and

[4] Alphatec Holdings also repeatedly references a related case against Alphatec Spine currently on appeal in California. (Opp. Br. at 29-30 and 36, n.5.) There is zero legal significance to the issues in this appeal to be found there, and there are parallel cases only because Alphatec Spine declined to consent to jurisdiction in Delaware to permit the entire controversy to be heard in a single forum.

29). But, it had a Board and it had employees; both engaged in conduct that was an integral part of the tortious conduct against NuVasive. There is no blanket immunity for a holding company in this context.

Second, Alphatec Holdings seeks to excuse its Inducement Plan by asserting that NuVasive's Florida distributor had already breached its contract with NuVasive before that Inducement Plan was approved by Alphatec Holdings' Board. (Opp. Br. at 36.) Not so. Hunsaker—in negotiating terms with NuVasive's Florida distributor—agreed to provide warrants and stock ***prior*** to breach, rendering Alphatec Holdings' cited cases inapposite. (Opp. Br. at 36; A1644-A1645.) Nor was this Inducement Plan merely a "generic" plan adopted without knowledge of its executives' ongoing interference: the Board's written consents approving this 2017 Inducement Plan confirm that it was implemented for purposes of recruiting the owner of NuVasive's Florida distributorship. (A2797-A2800.)

Finally, seeking to avoid its own Board action, Alphatec Holdings contends that NuVasive waived any argument concerning this Inducement Plan by failing to raise it below. (Opp. Br. at 34-35.) Not so. NuVasive raised it in its Pre-Trial briefing (as even Alphatec Holdings acknowledges in its Opposition Brief at page 35) and developed it further in its Post-Trial Opening Brief (A1644-A1645, A1692), which is why the trial court addressed this in its January 31, 2025 Letter Opinion. (A1887.) This point is anything but waived.

CONCLUSION

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

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