

## VI. **RBC Capital Markets, LLC. v. Jervis: Implications for M&A Adviser Liability**

### A. Introduction

Mergers and acquisitions (M&A) are very often followed by lawsuits,<sup>1</sup> and shareholder plaintiffs have recently begun to include more defendants in such litigation.<sup>2</sup> While traditionally only the board of directors were named as defendants, shareholder plaintiffs in M&A litigation have recently brought claims against the financial advisers,<sup>3</sup> whose main task is to gather information to determine a company's appropriate valuation and to ascertain transactional risks.<sup>4</sup> The recent Delaware Supreme Court decision in *RBC Capital Markets, LLC v. Jervis*<sup>5</sup> created the possibility that financial advisers may be held liable for aiding and abetting the board of directors' breach of their fiduciary duties.<sup>6</sup> In that case, the Supreme Court found RBC, the financial

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<sup>1</sup> ROBERT M. DAINES & OLGA KOUMRIAN, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS, CORNERSTONE RESEARCH 1 (2013) ("Continuing a recent trend, shareholders challenged the vast majority of M&A deals in 2012."); Steven Davidoff Solomon, *Corporate Takeover? In 2013, a Lawsuit Almost Always Followed*, N.Y. TIMES DEALBOOK (Jan. 10, 2014, 12:20 PM), [http://dealbook.nytimes.com/2014/01/10/corporate-takeover-in-2013-a-lawsuit-almost-always-followed/?\\_r=0](http://dealbook.nytimes.com/2014/01/10/corporate-takeover-in-2013-a-lawsuit-almost-always-followed/?_r=0) [perma.cc/M27S-WWRW] ("These days, you can be sure that when a company announces it is being acquired, it will also be sued by a bevy of plaintiffs' lawyers.")

<sup>2</sup> William Savitt, *Advisers Found Liable for Board's Violations*, NAT'L L. J. (2014), <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.23562.14.pdf> [perma.cc/8NYQ-SZUU].

<sup>3</sup> See, e.g., *In re TIBCO Software Inc. Stockholders Litig.*, No. 10319-CB, 2015 Del. Ch. LEXIS 265 (Del. Ch. Oct. 20, 2015) (stating that the complaint sufficiently alleged a claim against a financial advisor for aiding and abetting the directors in breaching their fiduciary duties).

<sup>4</sup> LINDA ALLEN, JULAPA JAGTIANI & ANTHONY SAUNDERS, THE ROLE OF FINANCIAL ADVISORS IN MERGERS AND ACQUISITIONS, FED. RESERVE BANK OF CHI. 3 (2000).

<sup>5</sup> *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015).

<sup>6</sup> *Id.* at 823 ("First, on March 7, 2014, the Court of Chancery issued a post-trial decision and held RBC liable to a class of Rural stockholders (the "Class") for aiding and abetting breaches of fiduciary duty by Rural's board of directors (the "Liability Opinion" or "*Rural I.*" Second, on October 10, 2014, the Court of Chancery issued a decision setting the amount of RBC's

adviser for Rural/Metro Corporation (Rural), liable for approximately \$75.8 million in damages for aiding and abetting breaches of fiduciary duty.<sup>7</sup> This article will discuss the *RBC Capital Markets* decision and its anticipated impact on M&A financial advising processes. Part B details the pertinent facts and the key elements of the ruling. Part C explores some of the decision's potential implications for M&A financial advisers moving forward. Finally, Part D offers some concluding remarks.

## **B. *In re Rural Metro Corporation Stockholders Litigation***

### **1. Relevant Facts**

Rural was a company that provided ambulance and private fire protection services.<sup>8</sup> Its main competitor in the ambulance business was American Medical Response (AMR), a subsidiary of Emergency Medical Services Corporation (EMS).<sup>9</sup> EMS was rumored to be for sale in December 2010,<sup>10</sup> and RBC speculated that a private equity firm that purchased EMS might also be interested in acquiring Rural.<sup>11</sup> RBC intended to secure lucrative buy-side financing roles with the private equity firms bidding for EMS.<sup>12</sup> RBC believed that by leading the sale process of Rural, private equity firms would believe that RBC

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liability at \$75,798,550.33 . . . In this decision, we affirm the principal legal holdings of the Court of Chancery.”).

<sup>7</sup> *Id.* (“First, on March 7, 2014, the Court of Chancery issued a post-trial decision and held RBC liable to a class of Rural stockholders (the “Class”) for aiding and abetting breaches of fiduciary duty by Rural’s board of directors (the “Liability Opinion” or “*Rural I*.” Second, on October 10, 2014, the Court of Chancery issued a decision setting the amount of RBC’s liability at \$75,798,550.33 . . . In this decision, we affirm the principal legal holdings of the Court of Chancery.”).

<sup>8</sup> *Id.* at 824.

<sup>9</sup> *Id.* at 825.

<sup>10</sup> *Id.* at 828.

<sup>11</sup> *Id.* at 829 (Del. 2015) (“The trial court found that Munoz and his RBC colleagues realized that a private equity firm that acquired EMS might decide to buy Rural rather than sell AMR.”).

<sup>12</sup> *Id.* at 828 (“It found that RBC recognized that if Rural engaged in a sale process led by RBC, then RBC could use its position as sell-side advisor to secure buy-side roles with the private equity firms bidding for EMS.”).

had an inside track on Rural.<sup>13</sup> Thus, those private equity firms would use RBC to finance their bids for EMS.<sup>14</sup> In other words, RBC believed that it could get on EMS bidders' "financing tree" by leading the sale of Rural.<sup>15</sup>

On December 8, 2010, the Rural board of directors met to discuss the company's long term strategic choices.<sup>16</sup> The board of directors outlined three alternatives: (1) maintaining the status quo, which was to continue the company's standalone business plan, (2) sell Rural, or (3) work together with its competitor.<sup>17</sup> The Rural board tasked a special committee with retaining advisers and generating a recommendation on the best course of action,<sup>18</sup> but the special committee was not authorized to sell the company.<sup>19</sup> On December 23, 2010, the special committee interviewed RBC, which focused on the sale of the company.<sup>20</sup> RBC, representing Rural as the seller, also planned to offer loan commitments (also known as "staple

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<sup>13</sup> Gardner Davis & John Wolfel, *Investment Banker Held Liable for Flawed Rural/Metro Sale Process*, 29 WESTLAW J. CORP. OFFICERS & DIRS. LIABILITY, 1, 1 (2014) ("According to the court, RBC correctly perceived that the firms would think they would have an inside track on Rural if they included RBC among the banks financing their bids for EMS, referred to in M&A world as 'financing trees.' RBC believed that with the Rural angle it could get on all of the EMS bidders' financing trees.").

<sup>14</sup> *Id.*

<sup>15</sup> *RBC Capital Mkts.*, 129 A.3d at 828.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 828-29.

<sup>18</sup> *Id.* at 829 ("[T]he Board unanimously agreed that the Company should promptly proceed to engage an appropriate strategic advisory team and pursue an in-depth analysis of the alternatives discussed during the meeting. Also at the December 8 meeting, the Board 'unanimously agreed that the scope of authority for the [S]pecial [C]ommittee created at the Board's meeting of October 27, 2010 would be revised to include this project, and authorized and directed the [C]ommittee to proceed to interview advisers.'") (second, third, and fourth alterations in original).

<sup>19</sup> *Id.* at 828.

<sup>20</sup> *Id.* at 829 ("The trial court found that, unlike the other firms, RBC devoted the bulk of its presentation to a sale and recommended coordinating the effort with the EMS process.").

financing”)<sup>21</sup> to the potential buyers.<sup>22</sup> However, RBC did not disclose its plan to use its position as Rural’s adviser to secure financing roles with the private equity firms bidding for EMS.<sup>23</sup> On December 26, 2010, the special committee informed Rural’s board that it had selected RBC and Moelis as the company’s primary and secondary advisers, respectively.<sup>24</sup>

In early 2011, Rural had trouble attracting financial buyers who participated in the EMS process to simultaneously consider acquiring Rural, EMS’s competitor.<sup>25</sup> Among other things, confidentiality agreements executed with Rural and EMS’s respective bidders prevented those bidders from using or sharing such information with individuals involved in the sale of the other company.<sup>26</sup> KKR, Bain

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<sup>21</sup> See generally, Jeremy Walsh, Andrew Gregson & Matthew Ayre, *An Introduction to Stapled Financing: Pre-arranged Acquisition Finance in an Illiquid Market*, TRAVERS SMITH 1 (2015), [http://www.traverssmith.com/media/581665/an\\_introduction\\_to\\_stapled\\_financing.pdf](http://www.traverssmith.com/media/581665/an_introduction_to_stapled_financing.pdf) [<https://perma.cc/PMD5-VKKD>] (“In the context of funding the acquisition of a company, stapled financing refers to a financing package arranged by the seller and its financial advisers which is offered to potential purchasers, usually as part of an auction process. It is so-called because the proposed terms of the financing package are usually distributed with (or ‘stapled to’) the information memorandum.”).

<sup>22</sup> *RBC Capital Mkts.*, 129 A.3d at 829.

<sup>23</sup> *Id.* at 830 (“The trial court found that RBC did not disclose that it planned to use its engagement as Rural’s advisor to capture financing work from the bidders for EMS, and the minutes do not reflect such a disclosure.”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 831.

<sup>26</sup> *Id.* at 832 (“The no-conflict provision provided: ‘natural persons participating in the discussions with the recipient in connection with the potential negotiated transaction have not been, are not, and will not be participating in a potential financing of an acquisition or other similar transaction involving EMS or AMR.’”); See Davis & Wolfel, *supra* note 13, at 2 (“According to the Chancery Court, it should have been clear from the outset, particularly to sophisticated market participants like RBC, that financial sponsors who participated in the EMS process would be limited in their ability to consider Rural simultaneously because they would be constrained by confidentiality agreements they signed as part of the EMS process”); STEVEN M. HAAS & G. ROTH KEHOE II, DE COURT HOLDS SELL-SIDE FINANCIAL ADVISOR LIABLE FOR AIDING AND ABETTING BOARD’S FIDUCIARY BREACH IN MERGER, HUNTON & WILLIAMS 2 (2014), <https://www.hunton.com/files/News/f2b2b3cb-820b-4b81-8acb-e6447557130c/Presentation/NewsAttachment/21bcf152-bc5f-48be-bcbb->

Capital, and J.P. Morgan separately suggested that Rural's sale would likely be better accomplished if delayed until after completion of the EMS sale.<sup>27</sup> However, Rural moved forward with its sale process, and this prevented healthy competition among the bidders to produce the best sale price.<sup>28</sup> Warburg, which had withdrawn from the EMS process, was in a better position compared to other private equity firms to actively pursue Rural.<sup>29</sup> In order to encourage Rural to accept Warburg's offer, RBC manipulated the valuation process to make Warburg's bid look more attractive.<sup>30</sup> RBC did not provide the board of directors with preliminary valuation until three hours before the meeting to approve the deal.<sup>31</sup> Furthermore, RBC did not disclose its

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e678c5a7d5fe/DE\_Court\_Holds\_Sell\_Side\_Financial\_Advisor\_Liable\_for\_Aiding\_and\_Abetting\_Boards\_Fiduciary\_Breac.pdf [perma.cc/86CQ-4DEE] (“As the Company’s sale process unfolded, it became apparent that the EMS bidders were unable to pursue the Company simultaneously. Among other things, the confidentiality agreements that the EMS bidders entered into restricted the bidder’s ability to share or evaluate EMS’s confidential information.”).

<sup>27</sup> *RBC Capital Mkts.*, 129 A.3d at 832 (“As the auction developed, Moelis’s concerns regarding transaction complexity were realized, Harding, the Rural point person for Moelis, commented that a potential bidder for Rural, KKR, suggested it ‘would be tough’ to participate in ‘simultaneous [*sic*] auctions.’ Moreover, KKR told Rural’s bankers that it ‘would be ideal’ if the EMS deal and the Company’s deal were ‘stagger[ed].’ After speaking with Bain Capital Partners, LLC (‘Bain’), Harding shared with Shackelton and RBC that the private equity firm also thought that ‘lining up two deals for public companies simultaneously is tough but staggered, even fairly closely, could work[.]’”) (alterations in original).

<sup>28</sup> *Id.* at 835 (“The trial court found that RBC’s faulty design prevented the emergence of the type of competitive dynamic among multiple bidders that is necessary for reliable price discovery.”).

<sup>29</sup> *Id.* (“Because Warburg had withdrawn from the EMS process, it was able to pursue Rural aggressively, thus giving Warburg an advantage over others who were still involved in evaluating EMS.”).

<sup>30</sup> *Id.* at 842 (“The record evidence supports the trial court’s factual finding that, on the deal front, RBC worked to lower the analyses in its fairness presentation so Warburg’s bid looked more attractive. Specifically, the trial court found that RBC made a series of changes to its fairness analysis.”).

<sup>31</sup> *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 78-79 (Del. Ch. 2014) (“On March 27, 2011, the directors convened a joint meeting of the Board and the Special Committee. The Board meeting started at 11:00 p.m. Eastern time on Sunday, March 27. The directors received written valuation analyses from RBC and Moelis at 9:42 p.m. Eastern time. This was the first

staple financing efforts in either the Rural or EMS deals.<sup>32</sup> RBC also failed to disclose its last minute push to reserve a place on Warburg's financing tree.<sup>33</sup>

## 2. Procedural History

Two Rural stockholders, Beatriz Llorens and Joanna Jarvis, filed suit against Rural's Board, Moelis, and RBC on April 6, 2011 after the public announcement of the merger. The case soon became a class action,<sup>34</sup> and the directors and Moelis settled with the plaintiffs.<sup>35</sup> The only remaining issue involved RBC's potential liability for aiding and abetting Rural's breach of fiduciary duty owed to its stockholders.<sup>36</sup> The Court of Chancery of Delaware held RBC liable for aiding and abetting Rural's breach of fiduciary duty and determined RBC's liability to be nearly \$75.8 million.<sup>37</sup> RBC appealed the case to the Delaware Supreme Court.<sup>38</sup> The Securities Industry and Financial Markets Association (SIFMA) submitted an amicus curiae brief in support of RBC and in support of reversal of the lower court

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valuation information that the Board ever received as part of the sale process. The merger agreement was approved after midnight.”).

<sup>32</sup> *RBC Capital Mkts.*, 129 A.3d at 847 (“The Proxy Statement omits discussions of RBC’s staple financing efforts—in both the Rural and EMS deals—and last minute push to reserve a place on Warburg’s financing tree.”).

<sup>33</sup> *Id.* (“The disclosure also fails to inform Rural’s stockholders that RBC sought to use its Rural engagement to obtain EMS buy-side financing work.”).

<sup>34</sup> *In re Rural Metro Corp.*, 88 A.3d at 79.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (“Shortly before trial, the directors settled for \$6.6 million, and Moelis settled for \$5 million. The plaintiffs proceeded to trail against RBC”); *See Savitt*, *supra* note 2 (“But because the directors had settled before trial, they were not exposed to any liability. The real interest of the case is that the court held the board’s financial advisers liable for ‘aiding-and-abetting’ liability.”).

<sup>37</sup> *RBC Capital Mkts.*, 129 A.3d at 823 (“Second, on October 10, 2014, the Court of Chancery issued a decision settling the amount of RBC’s liability at \$75,798,550.33, constituting 83% of the \$91,323,554.61 in total damages that the Class suffered, which represented the difference between the value the Company’s stockholders received in the merger and Rural’s going concern value.”).

<sup>38</sup> *Id.*

decision.<sup>39</sup> On November 30, 2015, the Supreme Court of the State of Delaware affirmed the decision of the Court of Chancery.<sup>40</sup>

### 3. Key Decisions Regarding the Liability of Financial Advisers

#### 1. Aiding and Abetting Liability

The Court of Chancery stated, and the Supreme Court of Delaware affirmed, that the plaintiffs must satisfy four elements: (1) Rural's board of directors had a fiduciary duty; (2) the board breached said duty; (3) RBC, the non-fiduciary defendant, knowingly participated in the breach; and (4) the breach of duty proximately caused the damages.<sup>41</sup>

The first element was not contested, as it was undisputed that Rural's board had a fiduciary duty to the corporation and its shareholders.<sup>42</sup> However, the parties contested whether Rural's board breached such duty.<sup>43</sup> This issue is related to the level of scrutiny that should be applied to Rural's action between December 2010 and March 2011.<sup>44</sup> RBC argued that Rural did not breach any fiduciary

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<sup>39</sup> Brief for the Sec. Indus. and Fin. Mkts. Ass'n as Amici Curiae Supporting Appellant, *RBC Capital Markets, LLC v. Joanna Jervis*, 129 A.3d 816 (Del. 2015) (No. 140, 2015) [hereinafter Brief for SIFMA as Amici Curiae].

<sup>40</sup> *RBC Capital Mkts.*, 129 A.3d at 823.

<sup>41</sup> *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 80 (Del. Ch. 2014).

<sup>42</sup> *Id.* (“The first element of a sale process claim for aiding and abetting is readily satisfied. The individual defendants were directors of a Delaware corporation. In that capacity, they were fiduciaries who owed duties of loyalty and care.”).

<sup>43</sup> *RBC Capital Mkts.*, 129 A.3d at 823 (“RBC raises six issues on appeal, namely, (1) whether the trial court erred by holding that the board of directors breached its duty of care under the enhanced scrutiny standard enunciated in *Revlon*; [and] (2) whether the trial court erred by holding that the board of directors violated its fiduciary duty of disclosure by making material misstatements and omissions in Rural's proxy statement, dated May 26, 2011 . . . .”).

<sup>44</sup> *Id.* at 850 (“On appeal, both parties agree that *Revlon* applies—only they differ as to when, in the continuum between December 2010 and March 2011, *Revlon*'s enhanced scrutiny was triggered.”).

duty, since the business judgment rule applied,<sup>45</sup> and the enhanced scrutiny first established in *Revlon, Inc. v. MacAndrew & Forbes Holdings, Inc.*<sup>46</sup> was not triggered.<sup>47</sup> RBC contended that Rural was merely exploring alternatives in December 2010, and the sale of the company was not inevitable.<sup>48</sup> However, the Delaware Supreme Court disagreed with RBC and affirmed the lower court's finding that the company was for sale from the outset.<sup>49</sup> The court noted, among other things, the following facts: (1) financial advisers in RBC understood that they were hired for a sell-side engagement;<sup>50</sup> (2) the Special Committee hired RBC to sell the company without Rural board's

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<sup>45</sup> *Id.* (“As to RBC’s argument that the business judgment rule—not *Revlon*—applies to the Board’s decision to explore strategic alternatives in December 2010, the most faithful reading of the record before us is that the Court of Chancery, as a factual matter, found that there was no exploration of strategic alternatives.”); see *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (“The business judgment rule is a ‘presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’ A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter’s decision can be “attributed to any rational business purpose.”).

<sup>46</sup> *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (requiring that a board of directors for a company facing imminent sale make reasonable efforts to obtain the highest possible sale price for its shareholders).

<sup>47</sup> *RBC Capital Mkts.*, 129 A.3d at 850 (“At oral argument, counsel for RBC contended that *Revlon* applied ‘at the point where the auction was coming to an end and they had two bids, and they were then in a position of deciding to sell the Company—when the sale of the Company became inevitable . . . . That’s when it became inevitable in this fact pattern.’”).

<sup>48</sup> *Id.* (“As to RBC’s argument that the business judgment rule – not *Revlon* – applies to the Board’s decision to explore strategic alternatives in December 2010, the most faithful reading of the record before us is that the Court of Chancery, as a factual matter, found that there was no exploration of strategic alternatives.”).

<sup>49</sup> *Id.* at 851 (“[W]e will not disturb the Court of Chancery’s factual determination that, in December 2010, ‘the directors had never actually authorized a sale process[,]’ and that ‘[i]t was Shackelton and RBC who expanded their mandate into a sale.’”) (alterations in original).

<sup>50</sup> *Id.* at 850 (“For example, on December 23, DiMino emailed the head of RBC’s Rural team, Munoz, the following: ‘Well done, lets [*sic*] get this baby sold!’ Earlier that day Munoz notified his RBC colleagues: ‘Just got word we got the Rural Metro sellside [*sic*] mandate.’ RBC, thus, understood that it was engaged to sell the company.”) (alterations in original).

authorization;<sup>51</sup> and (3) the board eventually ratified the Special Committee's actions.<sup>52</sup> Therefore, the court held that Rural's actions triggered *Revlon*'s enhanced scrutiny in December 2010.<sup>53</sup>

Under the enhanced scrutiny standard in the context of M&A, the directors must establish the reasonableness of the decision-making process and the reasonableness of the directors' action.<sup>54</sup> The court held that the Rural board breached its *Revlon* duty for failing to: (1) explore other strategic alternatives since the Special Committee hired RBC to sell the company despite the lack of board authorization,<sup>55</sup> (2) become well-informed about Rural's value,<sup>56</sup> and (3) provide oversight in a process where its integrity had been undermined since RBC's main purpose was to capture financing work from the bidders for EMS.<sup>57</sup>

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<sup>51</sup> See *supra* note 19 and accompanying text.

<sup>52</sup> *RBC Capital Mkts.*, 129 A.3d at 852 (“First, without genuinely exploring other strategic alternatives, the Special Committee initiated an active bidding process seeking to sell itself in December 2010, and the Board, on March 15, 2011, purportedly ‘restated and ratified’ the actions of the Special Committee, including the initiation of the sale process that had transpired over the preceding months.”).

<sup>53</sup> *Id.*

<sup>54</sup> *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 83 (Del. Ch. 2014) (“To satisfy the enhanced scrutiny test in the M & A context, the defendant directors must establish both (i) the reasonableness of ‘the decisionmaking process employed by the directors, including the information on which the directors based their decision,’ and (ii) ‘the reasonableness of the directors’ action in light of the circumstances then existing.”); see *RBC Capital Mkts.*, 129 A.3d at 850 (“[A] court applying *Revlon*’s enhanced scrutiny must decide whether the directors made a *reasonable* decision, not a *perfect* decision.”).

<sup>55</sup> *RBC Capital Mkts.*, 129 A.3d at 850 (“[T]he trial court found that the Special Committee, acting ‘without Board authorization,’ ‘hired RBC to sell the Company.’”).

<sup>56</sup> *Id.* at 856.

<sup>57</sup> *Id.* at (“[T]he stockholders—and the board—were unaware of RBC’s conflicts and how they potentially impacted the Warburg offer.”); Lee A. Meyerson et al., *Delaware Chancery Court Holds Financial Advisor Liable for Aiding and Abetting Fiduciary Duty Breaches*, SIMPSON THACHER 2 (2014), <http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub1725.pdf?sfvrsn=2> [https://perma.cc/CJ73-99MK] (“RBC . . . did not disclose its interest in cross-selling its engagement as sell-side advisor to Rural to try to secure financing work from bidders for the acquisition of [EMS].”).

RBC further argued that *Revlon*'s enhanced scrutiny is a mechanism solely by which to provide injunctive relief to plaintiffs, and not to establish a breach of fiduciary duty which includes post-closing damages.<sup>58</sup> However, the Delaware Supreme Court disagreed with RBC and held that Rural's breach of fiduciary duty under the *Revlon* analysis created a basis for RBC's aiding and abetting liability, triggering monetary damages.<sup>59</sup>

In order to establish RBC's aiding and abetting liability, the aider and abettor must have acted with scienter, which can be established if the aider and abettor had actual knowledge that the conduct at issue was illegal.<sup>60</sup> The court stated that RBC created an "informational vacuum" by failing to disclose its conflicts and ulterior motives to Rural's board of directors.<sup>61</sup> The court supported its decision by pointing to the following actions by RBC: (1) RBC did not disclose to Rural its plan to use its role as Rural's adviser to capture buy-side financing work from bidders for EMS;<sup>62</sup> (2) RBC failed to provide the board of directors with information about Rural's value;<sup>63</sup> and (3) RBC did not inform the board of its intention to obtain Warburg's business while at the same time negotiating the sale price.<sup>64</sup> RBC's internal communications showed that its main priority was to obtain the Warburg's buy-side financing, and not to serve the interest of Rural's board.<sup>65</sup> Thus, the court stated that RBC aided and abetted the Rural

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<sup>58</sup> *RBC Capital Mkts.*, 129 A.3d at 857.

<sup>59</sup> *Id.* ("The Board violated its situational duty by failing to take reasonable steps to attain the best value reasonably available to the stockholders. We agree with the trial court that the individual defendants breached their fiduciary duties by engaging in conduct that fell outside the range of reasonableness, and that this was a sufficient predicate for its finding of aiding and abetting liability against RBC.").

<sup>60</sup> *Id.* at 862 ("It is the aider and abettor that must act with *scienter*. The aider and abettor must act 'knowingly, intentionally, or with reckless indifference . . .[;] that is, with an 'illicit state of mind.' To establish *scienter*, the plaintiff must demonstrate that the aider and abettor had 'actual or constructive knowledge that their conduct was legally improper.'" (alterations in original).

<sup>61</sup> *Id.* ("RBC knowingly induced the breach by exploiting its own conflicted interests to the detriment of Rural and by creating an informational vacuum.").

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 862-863.

<sup>65</sup> *Id.* at 840.

board's breach of fiduciary duty by intentionally misleading the Rural directors into breaching their fiduciary duty.<sup>66</sup>

RBC argued that its actions did not proximately cause the damage Rural's stockholders suffered because Moelis, the second financial adviser, provided a separate financial analysis which served as the basis for the Rural board's decision.<sup>67</sup> Thus, RBC claimed that "Moelis's presence cleansed the process."<sup>68</sup> The court rejected RBC's argument, stating that Moelis' financial analysis was not a superseding cause that severed the causal connection between RBC's action and the sale of Rural,<sup>69</sup> because the Rural board treated Moelis' financial analysis "secondary" to that of RBC.<sup>70</sup>

## 2. Amicus Curiae Brief by the Securities Industry and Financial Markets Association

SIFMA argued that the recognition of aiding and abetting liability would create uncertainty concerning how SIFMA member firms provide services in M&A dealings.<sup>71</sup> SIFMA reasoned that this decision would impose on financial advisers—who have traditionally only been responsible for providing financial, rather than legal, advice

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<sup>66</sup> *Id.* at 863.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 864 ("RBC's argument that Moelis's presence cleansed the process falls short, in part, because the supposedly conflict-cleansing bank was paid on the same contingent basis as the primary bank.").

<sup>69</sup> *Id.* ("[A] superseding cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original tortious conduct and the injury.' However, 'the mere occurrence of an intervening cause . . . does not automatically break the chain of causation stemming from the original tortious conduct.'") (alterations in original) (quoting *Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 821, 829 (Del. 1995)).

<sup>70</sup> *Id.* ("The Board's receipt of Moelis's financial analysis—which the Special Committee treated as 'secondary' to that of RBC—does not remedy RBC's improper conduct, nor does it destroy the causal link between RBC's actions, the Board's failure to satisfy itself of its fiduciary obligations, and the harm suffered by the Company's stockholders.").

<sup>71</sup> See Brief for SIFMA as Amici Curiae, *supra* note 39, at 1 ("SIFMA's interest in this case arises from the potential impact of the Court of Chancery's decision that, if left unchecked, will create uncertainty around how SIFMA member firms provide services to boards and committees in merger and acquisition ('M&A') transactions, and could change the role that financial advisors have played in such transactions under the legal precedents of this State.").

as to how to fulfill a fiduciary duty<sup>72</sup>—an obligation to supervise the board.<sup>73</sup> More specifically, SIFMA was concerned that the Court of Chancery attached the ambiguous “gatekeeper” label to financial advisers.<sup>74</sup>

The Delaware Supreme Court addressed the concern by limiting the decision to a narrow holding: the financial adviser is liable for aiding and abetting only when it “intentionally duped” the board of directors into breaching its fiduciary duty.<sup>75</sup> According to the court, the scienter requirement would make lawsuits claiming aiding and abetting liability on financial advisers very difficult.<sup>76</sup> More importantly, the Supreme Court pointed out that the term “gatekeeper” used by the trial court would inappropriately expand the court’s narrow holding since the failure of financial advisers to prevent directors’ breach of fiduciary duty does not automatically give rise to an aiding and abetting liability claim.<sup>77</sup>

### **3. Section 102(b)(7) of the Delaware General Corporation Law does not extend to Aiders and Abettors**

Section 102(b)(7) of the Delaware General Corporation Law exculpates directors from personal liability when there is a breach of a

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<sup>72</sup> *Id.* at 5 (“Put simply: the board’s lawyers provide legal advice as to how to fulfill a fiduciary duty, and its financial advisors provide financial advice.”).

<sup>73</sup> *Id.* at 2 (“The Court of Chancery’s extraordinary imposition of liability on a financial advisor for aiding and abetting a client board’s breach of its fiduciary duty of care is inconsistent with principles . . . superimposing on the advisor an obligation to supervise the board, and creates an ambiguous standard of conduct to which financial advisors would be unable to conform with any reasonable degree of certainty.”).

<sup>74</sup> *Id.* at 7 (“Compounding the problem, the ‘gatekeeper’ label has attracted widespread commentary and speculation, including the unwarranted incorporation of that vague, imprecise term and concept into subsequent Court of Chancery decisions.”) (footnotes omitted).

<sup>75</sup> *RBC Capital Mkts.*, 129 A.3d at 865 (“Here, these concerns are overstated since the claim for aiding and abetting was premised on RBC’s ‘fraud on the Board,’ and that RBC aided and abetted the Board’s breach of duty where, for RBC’s own motives, it ‘intentionally duped’ the directors into breaching their duty of care.”).

<sup>76</sup> *Id.* at 865-66.

<sup>77</sup> *Id.* at 879 n.191.

duty of care.<sup>78</sup> RBC contended that such exculpatory provision shields RBC from any liability.<sup>79</sup> The court rejected RBC's argument on both legal and policy grounds.<sup>80</sup> The court noted that the literal language of Section 102(b)(7) only extends to directors, and does not cover aiders and abettors.<sup>81</sup> Moreover, the court pointed out that an exculpation provision extending to financial advisers would create a "perverse incentive system" for financial advisers.<sup>82</sup> Financial advisers who only consider their interests could intentionally mislead boards of directors, and yet enjoy the protection of their "victim's liability shield" when plaintiff stockholders seek retribution.<sup>83</sup> Therefore, even though the directors are shielded from monetary damages under Section 102(b)(7), RBC is still liable for monetary damages for knowingly and intentionally inducing the board's breach of fiduciary duty.<sup>84</sup>

### C. Implications for Financial Advisers

#### 1. Financial Advisers Must be Wary of Creating an "Informational Vacuum" and Must Disclose

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<sup>78</sup> DEL. CODE ANN. tit. 8, §102(b)(7) (West 2015) ("A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit.").

<sup>79</sup> *RBC Capital Mkts.*, 129 A.3d at 873 ("RBC challenges, on both legal and policy grounds, the trial court's conclusion that Rural's Section 102(b)(7) exculpatory provision precluded contribution from the defendant directors . . .").

<sup>80</sup> *Id.* at 874-75 (explaining that the literal language of section 102(b)(7) does not exculpate a third-party member's aiding and abetting liability, and stating that an application of such exculpation provision on financial advisers would produce absurd results).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 874 ("Our Legislature did not intend for Section 102(b)(7) to safeguard third parties and thereby create a perverse incentive system wherein trusted advisors to directors could, for their own selfish motives, intentionally mislead a board only to hide behind their victim's liability shield when stockholders or the corporation seeks retribution for the wrongdoing.").

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

### Material Conflicts

The Delaware Supreme Court criticized RBC for creating an informational vacuum for both the Board and the stockholders by not informing them of Rural's true value, and by not disclosing RBC's conflict of interest.<sup>85</sup> Among other things, RBC (1) did not provide the board with a valuation analysis until hours before the meeting to approve the deal;<sup>86</sup> (2) failed to disclose its plan to use its position as Rural's adviser to capture buy-side financing work from bidders for EMS;<sup>87</sup> and (3) used "back-channel communications" with Warburg to capture the acquirer's buy-side financing business, which interfered with its advisory obligations to Rural.<sup>88</sup> This decision is consistent with *In re TIBCO Software Inc. Stockholders Litigation*,<sup>89</sup> a recent Delaware case which found that the plaintiffs had sufficiently stated

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<sup>85</sup> *Id.* at 856, 862 ("Moreover, Rural's directors were not in a position to rely on the ability of the Company's stockholders to have a fair chance to evaluate its decision, in light of the fact that both the Board and the stockholders were operating on the basis of an informational vacuum created by RBC. . . . RBC knowingly induced the breach by exploiting its own conflicted interests to the detriment of Rural and by creating an informational vacuum.").

<sup>86</sup> See *supra* note 31 and accompanying text.

<sup>87</sup> *RBC Capital Mkts.*, 129 A.3d at 862-863 ("RBC's knowing participation included its failure to disclose its interest in obtaining a financing role in the EMS transaction and how it planned to use its engagement as Rural's advisor to capture buy-side financing work from bidders for EMS; its knowledge that the Board and Special Committee were uninformed about Rural's value; and its failure to disclose to the Board its interest in providing the winning bidder in the Rural process with buy-side financing and its eleventh-hour attempts to secure that role while simultaneously leading the negotiations on price. RBC's desire for Warburg's business also manifested itself in its financial analysis, provided by RBC the day the Board approved the merger. RBC's illicit manipulation of the Board's deliberative processes for self-interested purposes was enabled, in part, by the Board's own lack of oversight, affording RBC 'the opportunity to indulge in the misconduct which occurred.'" (quoting *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989))).

<sup>88</sup> *Id.* at 863 ("The Board was unaware of RBC's modifications to the valuation analysis, back-channel communications with Warburg, and eleventh-hour attempt to capture at least a portion of the acquirer's buy-side financing business. RBC made no effort to advise the Rural directors about these contextually shaping points.").

<sup>89</sup> *In re TIBCO Software Inc. Stockholders Litig.*, No. 10319-CB, 2015 Del. Ch. LEXIS 265 (Del. Ch. Oct. 20, 2015).

an aiding and abetting claim against Goldman Sachs for creating an “informational vacuum.”<sup>90</sup> Here, Goldman Sachs allegedly knew that the board failed to realize a share count error that significantly changed the aggregate equity value.<sup>91</sup> However, Goldman Sachs did not disclose such material information to the board because it had a strong incentive to hide this information to avoid either threatening the merger or having its fee reduced.<sup>92</sup>

The *RBC Capital Markets* decision can serve as a useful guide for financial advisers in avoiding aiding and abetting liability. A crucial measure is disclosure to their clients of any material conflicts of interest.<sup>93</sup> They should establish internal reporting systems and mechanisms to disclose any conflicts of interest at the outset of an engagement and throughout the sale process.<sup>94</sup> Financial advisers should be diligent in doing so since *RBC Capital Markets* may encourage shareholder plaintiffs to aggressively pursue aiding-and-abetting claims against financial advisers.<sup>95</sup>

One potential conflict of interest that the Delaware court remains skeptical of is staple financing.<sup>96</sup> The Court of Chancery was critical

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<sup>90</sup> *Id.* at \*86 (“In sum, for the reasons explained above, I conclude it is reasonably conceivable from the facts alleged in the Complaint that Goldman was motivated to and intentionally created an informational vacuum by failing to disclose material information to the Board at a critical time when it was evaluating and reconsidering its options concerning whether it could act to secure some or all of the \$100 million in additional equity value that the Board mistakenly believed it had obtained when approving the Merger.”).

<sup>91</sup> *Id.* at \*80.

<sup>92</sup> Albert H. Manwaring, IV, *Goldman Sachs May Still Be Liable After Board’s Fiduciary Duty Breach Exculpated*, MORRIS JAMES 2 (2015), <http://www.morrisjames.com/newsroom-articles-609.html> [perma.cc/W3YN-WP2E].

<sup>93</sup> John A. Bick et al., *Delaware Court of Chancery Finds Financial Advisor Liable for Aiding and Abetting Fiduciary Duty Breaches*, DAVIS POLK 1 (2014), [http://www.davispolk.com/sites/default/files/03.12.14.Delaware.Court\\_of\\_Chancery.Finds\\_Financial.Advisor.Liable.pdf](http://www.davispolk.com/sites/default/files/03.12.14.Delaware.Court_of_Chancery.Finds_Financial.Advisor.Liable.pdf) [perma.cc/L2UZ-MVNL].

<sup>94</sup> Thomas A. Cole et al., *Delaware Supreme Court Affirms Rural Metro*, SIDLEY AUSTIN 5 (2015), <http://www.sidley.com/news/2015-12-03-ma-securities-shareholder-litigation-and-corporate-governance-update> [perma.cc/6GVW-XYBM].

<sup>95</sup> Savitt, *supra* note 2.

<sup>96</sup> *Financial Advisor Liable for Aiding and Abetting Buyout Target Board’s Breach of Fiduciary Duty*, ROPES & GRAY 2 (2014), <https://www.ropesgray.com/newsroom/alerts/2014/March/Financial->

about the conflict of interest that RBC created in aggressively trying to participate in buy-side financing.<sup>97</sup> Skepticism towards staple financing is apparent in *In re El Paso Corporation Shareholder Litigation*,<sup>98</sup> *In re Del Monte Foods Company Shareholders Litigation*,<sup>99</sup> and *Toys "R" Us, Inc. Shareholder Litigation*,<sup>100</sup> in which courts closely scrutinized whether the conflict of interest created by a financial adviser's role in providing staple financing tainted the board's process.<sup>101</sup> Thus, financial advisers should be diligent in disclosing to and receiving approval from the company's board regarding "the timing and scope of the financial adviser's interactions with any bidder."<sup>102</sup>

## 2. Financial Advisers Do Not Have to Act as "Gatekeepers" for the Board

*RBC Capital Markets* should not be interpreted as a case that would lead to an avalanche of successful claims on financial adviser liability,<sup>103</sup> especially since the Delaware Supreme Court specifically repudiated the "gatekeeper" label that the lower court attached to

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Advisor-Liable-for-Aiding-and-Abetting-Buyout-Target-Boards-Breach-of-Fiduciary-Duty.aspx [perma.cc/UKQ2-ETEF].

<sup>97</sup> See *supra* note 62 and accompanying text.

<sup>98</sup> *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 434 (Del. Ch. 2012).

<sup>99</sup> *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011).

<sup>100</sup> *In re Toys "R" Us, Inc., S'holder Litig.*, 877 A.2d 975, 1006 (Del. Ch. 2005).

<sup>101</sup> *In re El Paso Corp.*, 41 A.3d at 434 ("Although Goldman's conflict was known, inadequate efforts to cabin its role were made."); *In re Del Monte Foods Co.*, 25 A.3d at 832 ("This Court has not stopped at disclosure, but rather has examined banker conflicts closely to determine whether they tainted the directors' process."); *In re Toys "R" Us, Inc.*, 877 A.2d at 1006 ("That decision was unfortunate, in that it tends to raise eyebrows by creating the appearance of impropriety, playing into already heightened suspicions about the ethics of investment banking firms.").

<sup>102</sup> Cole et al., *supra* note 94 ("Participation (or even only attempted participation) in any buy-side financing should require, among other thing, clear disclosure to—and approval of—the company's board regarding the timing and scope of the financial advisor's interactions with any bidder.").

<sup>103</sup> Savitt, *supra* note 2 ("Plaintiffs should be expected to pursue aiding-and-abetting claims aggressively, but the bar remains high and, absent a change in law, nonfiduciary liability for fiduciary breaches should remain the rare exception.").

financial advisers.<sup>104</sup> In fact, the Delaware Supreme Court emphasized the importance of taking into account the role of a financial adviser, which is primarily contract-based and involving sophisticated parties dealing at arm's length.<sup>105</sup> A financial adviser's liability in aiding and abetting arises when it acts contrary to the interest of the company, thereby nullifying the advice it has been hired to provide.<sup>106</sup> The Delaware Supreme Court made sure that the holding was narrow by requiring that the financial adviser have acted with scienter in order to be liable for aiding and abetting a breach of fiduciary duty, thus making it difficult for plaintiffs to prove such a claim.<sup>107</sup> The court noted that aiding and abetting liability was accepted in this case only because of "the unusual facts."<sup>108</sup>

### **3. Financial Advisers Can Still be Liable even if the Board's Breach of Fiduciary Duty under *Revlon* does not Face Monetary Liability**

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<sup>104</sup> RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 879 n.191 (Del. 2015) ("Adhering to the trial court's amorphous 'gatekeeper language' would inappropriately expand our narrow holding here by suggesting that any failure by a financial advisor to prevent directors from breaching their duty of care gives rise to an aiding and abetting claim against the advisor."); William P. Mills et al., *Delaware Supreme Court Upholds Rural Metro Decision, but Financial Advisors can Breathe a Sigh of Relief*, CADWALADER 1 (2015), <http://www.cadwalader.com/resources/clients-friends-memos/delaware-supreme-court-upholds-rural-retro-decision-but-financial-advisors-can-breathe-a-sigh-of-relief> [perma.cc/ZN6S-NQ6D] (stating that the Supreme Court rejected the Chancery Court's characterization of financial advisors as "gatekeepers"); Ariel J. Deckelbaum et al., *Delaware Supreme Court Affirms Rural/Metro Decision, Including Aiding and Abetting Liability*, PAUL WEISS 3 (2015), [http://www.paulweiss.com/media/3270522/2dec15m\\_aalert.pdf](http://www.paulweiss.com/media/3270522/2dec15m_aalert.pdf) [perma.cc/7HXV-DQNT] ("A financial advisor must be wary of creating an 'informational vacuum' that leads to a board's breach of its fiduciary duties, but does not have to act as a 'gatekeeper' for the board.").

<sup>105</sup> Cole et al., *supra* note 96 ("The trial court's description does not adequately take into account the fact that the role of a financial advisor is primarily contractual in nature, is typically negotiated between sophisticated parties, and can vary based upon a myriad of factors.").

<sup>106</sup> Mills et al., *supra* note 104.

<sup>107</sup> *Id.* at 2.

<sup>108</sup> RBC Capital Mkts., 129 A.3d at 866.

Section 102(b)(7) does not immunize a financial adviser from aiding and abetting liability for a board's breach of the duty of care.<sup>109</sup> This position is consistent with *In re TIBCO Software Inc. Stockholders Litig.*, which stated that a duty of care claim for which the board is exculpated could become a basis to find aiding and abetting liability against financial advisers.<sup>110</sup> Thus, since Section 102(b)(7) does not apply to non-directors who aid and abet a breach of fiduciary duty, financial advisers would not be able to use section 102(b)(7) to absolve themselves from personal liability.<sup>111</sup>

#### **4. Existence of a Secondary Financial Adviser Does Not Absolve the Primary Adviser from Aiding and Abetting Liability**

Despite RBC's argument that Rural's retention of Moelis was a superseding cause that absolved RBC from liability,<sup>112</sup> the Court made it clear that Moelis's contribution as a secondary financial adviser did not break the causal link between RBC's wrongdoing, the board's breach of fiduciary duty, and the harm caused to the company and the shareholders.<sup>113</sup> In other words, the retention of a secondary financial adviser does not automatically exempt the primary adviser from aiding and abetting liability.<sup>114</sup> The court pointed out that the Board treated Moelis's financial analysis as secondary, and that there was a significant difference in fees paid to the primary and secondary financial advisers.<sup>115</sup>

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<sup>109</sup> *Financial Advisor Liable for Aiding and Abetting Buyout Target Board's Breach of Fiduciary Duty*, *supra* note 96 ("Section 102(b)(7) of the Delaware General Corporation Law, which allows corporations to absolve directors from personal liability to stockholders for monetary damages for breaches a duty of care, does not apply to non-directors who aid and abet a breach of fiduciary duty, even when the directors themselves are otherwise exculpated by a Section 102(b)(7) provision.").

<sup>110</sup> *In re TIBCO Software Inc. Stockholders Litig.*, No. 10319-CB, 2015 Del. Ch. LEXIS 265, at \*71 (Del. Ch. Oct. 20, 2015).

<sup>111</sup> *See supra* note 109 and accompanying text.

<sup>112</sup> *RBC Capital Mkts.*, 129 A.3d at 863.

<sup>113</sup> *Id.* at 864.

<sup>114</sup> *Mills et al.*, *supra* note 104.

<sup>115</sup> *Id.* ("In coming to this conclusion, the Court further noted that the Board treated the second financial advisors' advice as secondary and that significant fees to be paid to the second financial advisor were similarly contingent on consummation of the transaction.").

### 5. Engagement Letter is Insufficient to Waive Conflict of Interest

RBC also asserted that it should not be liable for aiding and abetting the board's breach of fiduciary duty because it had disclosed all conflicts of interest by negotiating a term in the Engagement Letter that allowed RBC to finance the purchase of Rural's competitors.<sup>116</sup> However, the court rejected RBC's argument and found that a generic and ambiguous conflict acknowledgement in RBC's engagement letter, such as one that failed to disclose the degree of conflict to Rural's board, did not preclude RBC's aiding and abetting liability.<sup>117</sup> Therefore, financial advisers should not be satisfied with a mere "generic boilerplate" signed at the outset of a deal, but should address the parameters of any conflict of interest in the engagement letters.<sup>118</sup>

#### D. Conclusion: To Disclose or Not to Disclose

Although *RBC Capital Markets* opened up the possibility that financial advisers could be held liable for aiding and abetting a board's breach of fiduciary duty,<sup>119</sup> this case should not fundamentally change

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<sup>116</sup> *RBC Capital Mkts.*, 129 A.3d at 858.

<sup>117</sup> *Financial Advisor Liable for Aiding and Abetting Buyout Target Board's Breach of Fiduciary Duty*, *supra* note 96 ("Vice Chancellor Laster rejected RBC's arguments that a generic conflicts acknowledgement in its engagement letter precluded aiding and abetting claims. The Court found that RBC failed to disclose the degree of its conflict to the Rural/Metro board, and Delaware Law requires that any conflict waiver be knowing and unambiguous, including with respect to the degree of the conflict. Generic boilerplate signed at the outset of the deal (and before the actual conflict exists) will not suffice.").

<sup>118</sup> *Cole et al.*, *supra* note 94 ("If the financial advisor's intention to provide buy-side financing to a bidder (either for the transaction in question or another deal), the parameters of any understanding on such matters should be specifically addressed in the engagement letter.").

<sup>119</sup> Alison Frankel, *High Court Affirms Rural/Metro: Should Financial Advisers Worry?*, REUTERS (Dec. 1, 2015, 7:58 PM), <http://www.reuters.com/article/otc-rural-idUSL1N13R01Z20151202> [perma.cc/QWJ6-DFAE] ("The decision marks the first time the Delaware justices have held a financial adviser liable to shareholders for aiding and abetting a corporate board's breach of duty—certainly a scary prospect for banks.").

the dynamic between M&A advisers and the board. The Delaware Supreme Court affirmed the ruling narrowly by requiring scienter on the part of financial advisers,<sup>120</sup> and also refused to characterize financial advisers as “gatekeepers.”<sup>121</sup> The court upheld RBC’s aiding and abetting liability only because the board process was severely compromised with “unusual facts.”<sup>122</sup> Thus, financial advisers should be able to avoid aiding-and-abetting liability by providing clear and unambiguous disclosure concerning any conflict of interest to the board.

Koya Choi<sup>123</sup>

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<sup>120</sup> *RBC Capital Mkts.*, 129 A.3d at 865 (“Here, these concerns are overstated since the claim for aiding and abetting was premised on RBC’s ‘fraud on the Board,’ and that RBC aided and abetted the Board’s breach of duty where, for RBC’s own motives, it ‘intentionally duped’ the directors into breaching their duty of care.”).

<sup>121</sup> See *supra* note 77 and accompanying text.

<sup>122</sup> Savitt, *supra* note 2 (“*Rural Metro* and *Nine Systems* both involved board processes found after trial to have been severely compromised by the conduct of third parties.”).

<sup>123</sup> Student, Boston University School of Law (J.D. 2017).