IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE RURAL METRO STOCKHOLDER LITIGATION RBC CAPITAL MARKETS, LLC, Defendant-Below, Appellant v. JOANNA JERVIS, ET AL., Plaintiffs-Below, Appellees.	C.A. No. 140, 2015 ON APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 6350-VCL

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL

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IDENTITY OF AMICUS, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF

Amicus is the Securities Industry and Financial Markets Association ("SIFMA"). SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose nearly 900,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org. SIFMA is authorized to file this Brief pursuant to an affirmative vote of SIFMA's Litigation Advisory Committee, concluded on March 20, 2015, in accordance with procedures approved by SIFMA's Board of Directors.

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. Chief among these concerns is the potential expansion of common law tort liability rules for financial advisors. SIFMA's members play varied roles in M&A transactions, including assisting in negotiations and providing financial advice, assisting with valuation analyses, and providing fairness opinions for their clients. The specific criteria for potential liability for financial advisors is a recurring issue in M&A litigation that transcends this case, and SIFMA believes that those criteria should be defined in a clear and concise manner.

SUMMARY OF ARGUMENT

The Court of Chancery's decision would, if affirmed, inject uncertainty and inconsistency

into the guidance long provided by this Court, as the ultimate expositor of Delaware corporate and fiduciary law, on M&A-related issues. 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 underlying this Court's precedents, ignores the nature of the negotiated, contractually determined role of the financial advisor by 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. Moreover, the Court of Chancery's interpretation of the Delaware Uniform Contribution Among Joint Tortfeasors Act (DUCATA), 10 Del.C. Act, 10 Del. C. §§ 6302.04, imposing damages on an unprecedented basis, inequitably externalizes and shifts to the financial advisor the costs of the stockholders' decision to exculpate their directors from financial liability for breaching their fiduciary duty of care in a manner supported by neither statutory construction nor sound policy.

SIFMA respectfully submits that this Court should take this opportunity to clarify the law governing these issues and reverse the decision below.

BACKGROUND

The issues decided by the Court of Chancery, which this Court will consider anew on this appeal, arose in the context of the fact-specific industry background and dynamic that inform the financial advisor/board of directors relationship. We begin with a discussion of that background, an understanding of which (SIFMA respectfully submits) is essential to an informed judicial consideration of the legal framework that should properly govern that relationship. That background is reducible to three basic points.

First, Delaware courts generally uphold contracts agreed to by sophisticated parties,[1] and

[1] *See Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1035 (Del. Ch. 2006) (Strine, V.C.) (in the context of "sophisticated commercial parties" insulating a seller from a rescission claim, there is no "moral

the roles that financial advisors play in M&A transactions are traditionally defined by contract (in the form of engagement letters) negotiated by or on behalf of a board or a committee of the board and its counsel and the financial advisor and its counsel – all sophisticated parties. Because M&A transactions occur in a variety of contexts and involve financial institutions of different sizes and market niches, financial advisors play many different roles that cannot be squeezed into a one-size-fits-all mold. Some financial institutions are engaged to bring to bear their particularized experience relevant to the transaction in question. Others are asked by a board solely to opine on whether, based on the information available to them, the consideration to be received or paid in a transaction is fair from a financial point of view. It is fundamental that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ." 8 Del. C. § 141(a). That board prerogative includes determining the scope of services for which the board may need to contract with a third-party financial advisor when considering potential M&A transactions.[2]

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imperative to impinge on the ability of rational parties dealing at arms-length to shape their own arrangements, and courts are ill-suited to set a uniform rule that is more efficient than the specific outcomes negotiated by particular contracting parties to deal with the myriad situations they face"); *see also*, *e.g.*, Glenn D. West, Aaron J. Rigby and Emmanuel U. Obi, *Negotiating Investment Banking Engagement Letters: Avoiding Certain Traps for the Unwary Banker and Its Client*, Mergers and Acquisitions Institute (2010); Kevin Miller, *The Obligations of Financial Advisors—New Decision Upholds Contractual and Other Limitations*, Deal Lawyers (2008) ("the express terms of financial advisory engagement letters and the fairness opinions upon which claimants purport to rely typically (and almost universally) contain enforceable limitations on the financial advisor's liabilities and obligations"). As the Seventh Circuit has explained in absolving a financial advisor of liability in a M&A context, it would be a "mistake, one very costly for investors at other firms who would have to pay a risk premium to investment bankers in the future," to "throw out the detailed contract" that was negotiated and that governs the financial advisor's roles and responsibilities and instead "to make up a set of duties as if this were tort litigation"; rather, "[i]ntelligent adults can set their own standards of performance, and courts must enforce the deal they have struck." *The HA2003 Liquidating Trust v. Credit Suisse Secs. (USA) LLC*, 517 F.3d 454, 458 (7th Cir. 2008).

[2] *See*, *e.g.*, *Houseman v. Sagerman*, No. 8897-VCG, 2014 WL 1600724, at *10 (Del. Ch. Apr. 16, 2014) (dismissing breach of fiduciary duty claims against directors and aiding and abetting claims against financial advisor in acquisition; not unreasonable for board to hire financial advisor for limited purpose of assisting in due diligence, shopping the company, and identifying additional acquirers, without providing a fairness opinion. "Our case law interpreting *Revlon* makes clear that there is no single way to sell a company – no single financial service is *required*, and the fact that here, [the financial advisor] agreed to participate in a transaction wherein it would not issue a fairness opinion does not demonstrate that [the financial advisor] knew the failure to obtain additional services would constitute a breach of the Board's duties." (emphasis in original))

Unlike a board's lawyers – who are trained, licensed, and retained to provide legal advice (including, in the M&A context, advising boards of directors how to discharge their fiduciary duties in the multitude of transactional settings in which a board may find itself) – a board's financial advisors are not qualified or even legally permitted to play that role, however narrow or comprehensive their mandate may be. Nor is it unusual for a board to retain two or more financial advisors to play complementary or compartmentalized roles in a transaction, as Rural Metro did here. These marketplace realities underscore why the Court of Chancery's characterization of financial advisors as "gatekeepers" (discussed *infra* at 7-8) is misplaced.

Not all boards are the same, either. Some may have many directors with a long history with the company or deep expertise in a particular industry. Others may include individuals with significant M&A experience from their service as directors or officers of other companies, or even the same company. This varies the extent to which a given board expects and relies on information or advice from its financial advisors. Nor will financial advisors invariably have knowledge or expertise superior to that of a given board either in valuing a company, or in determining what process to use in selling the company and what bids to consider, accept or reject.[3] There being "no single blueprint that a board must follow to fulfill its duties"[4] in pursuing the sale of a company, it is for the board to determine what services it will hire a financial advisor to perform to assist the board in carrying out the board's oversight function.[5]

Engagement letters define the parameters of the board/financial advisor relationship.

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[3] *See Smith v. Van Gorkom*, 488 A.2d 858, 876 (Del. 1985) ("We do not imply that an outside valuation study is essential to support an informed business judgment; nor . . . that fairness opinions by independent investment bankers are required as a matter of law. *Often insiders familiar with the business of a going concern are in a better position than are outsiders to gather relevant information* . . . under appropriate circumstances, such directors may be fully protected in relying in good faith upon the valuation reports of their management." (emphasis added)).

[4] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242-43 (Del. 2009) (quotation omitted).

[5] *See supra* nn.2-3.

They typically provide that, in rendering the specific services to be provided under the terms of the engagement letter, the financial advisor "will act as an independent contractor." They also routinely contain an acknowledgement by the board that nothing therein is intended to create duties owed to the board beyond those expressly provided in the letter. Moreover, the financial advisor routinely and explicitly disclaims the creation of any fiduciary or agency relationship between the parties, or the imposition of any fiduciary or agency duties upon any party.[6] The engagement letter also routinely contractually sets the standard of performance to which the financial advisor will be held (gross negligence and willful misconduct).

As discussed further below, SIFMA acknowledges that financial advisors may be subject to liability under traditional tort law principles where the financial advisor knowingly assisted in a breach of the board's duty of loyalty, but such traditional torts should be carefully – and clearly – defined to ensure that financial advisors will know how to conform their behavior to the law. *See infra* at I(C).

Second, financial advisors are not in a position to monitor, let alone direct or control, the actions of the board, nor to make demands of it for information or access. It is the board's counsel (internal or external) – not their financial advisors – who advise it on how to discharge its fiduciary duties although even they cannot ultimately control the board's actions. One cannot aid and abet that which is out of one's control or outside the scope of one's knowledge and the proper discharge of directors' fiduciary duties is outside the specialized knowledge of financial advisors. Put simply: the board's lawyers provide legal advice as to how to fulfill a fiduciary duty, and its financial advisors provide financial advice.

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[6] *See In re Shoe-Town Inc. Stockholders Litig.*, No. 9483, 1990 WL 13475, at *7 (Del. Ch. Feb. 12, 1990) ("no such [fiduciary] duty [of a financial advisor] can be said to arise automatically . . . because a fairness opinion or outside valuation is not an absolute requirement under Delaware law, it makes little sense to strap those investment banks, who are retained, with the duties of a fiduciary").

In fact, as a practical matter, in the multifold M&A processes a client board may undertake, the financial advisors' presence at and participation in board meetings is controlled and limited by the board itself. This is done, among other reasons, to preserve the attorney-client privilege in connection with the board's requests for and receipt of legal advice, and in furtherance of the statutory mandate that it is the board's sole responsibility to oversee the corporation. *See supra* at 3. Not only are financial advisors not charged with controlling the M&A process, but also they have incomplete access to the board, the information it receives and considers, and the deliberations it undertakes.

Third, as discussed below, no financial advisor has ever been held liable by this Court under Delaware law for aiding and abetting a client board's breach of its fiduciary duty of care: this case would be the first. The Court of Chancery's decision creating a new aiding and abetting cause of action not only marks a sea change, but also injects an unprecedented level of uncertainty into the M&A marketplace because the specific content and scope of the cause of action are so imprecise and uncertain.

ARGUMENT

I. The Court Of Chancery's Recognition Of A Claim For Aiding And Abetting A Corporate Board's Breach Of Its Fiduciary Duty Of Care Was Reversible Error.

A. Introduction

The Court of Chancery defined the role of a financial advisor in M&A transactions in broad terms without properly recognizing the contractual and varying nature of that role, thereby unavoidably coloring the lens through which the Court addressed other aspects of its ruling. In assessing whether third party advisors should receive the same exculpation afforded directors under Section 102(b)(7), the Court of Chancery stated: "[d]irectors are not expected to have the expertise to determine a corporation's value for themselves, or to have the time or ability to

design and carry out a sale process. Financial advisors provide these expert services. In doing so, they function as gatekeepers." *In re Rural Metro Corp.*, 88 A.3d 54, 88-89 (Del. Ch. 2014) ("*Rural Metro I*"). It also spoke of financial advisors as "agents" (*id.* at 88, 94), a status that engagement letters routinely and explicitly disclaim.

SIFMA submits that, regardless of how this Court resolves the merits of this case, it should leave no doubt that "gatekeeper" inaccurately characterizes the role of the financial advisor, and that the label should not become a fulcrum to superimpose a new quasi-fiduciary common law structure on relationships that have long been based on contracts negotiated between sophisticated parties. Although the language was *dictum*, and tangential to the Court's ruling, it evidences a fundamental misreading of the financial advisor's role and relationship to its client. That misperception may have informed the Court's expansive view of the scope of Delaware's aiding and abetting law. Compounding the problem, the "gatekeeper" label has attracted widespread commentary and speculation,[7] including the unwarranted incorporation of that vague, imprecise term and concept into subsequent Court of Chancery decisions.[8] Unless this Court clarifies that the term "gatekeeper" is inapplicable to financial advisors to boards and committees in M&A transactions, its continued usage may accelerate in future litigation in Delaware and elsewhere. Courts might accept this *dictum* as factually correct and rely on it in

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[7] *See, e.g.*, Alison Frankel, *Delaware 'Abetting' Ruling v. RBC Should Scare M&A Advisors*, REUTERS, Mar. 10, 2014, http://blogs.reuters.com/alison-frankel/2014/03/10/delaware-abetting-ruling-v-rbc-should-scare-ma-advisors/; Harvey Miller, *The Examiners: Harvey Miller on the Rural/Metro Ruling,* WALL ST. J. L. BLOG, May 2, 2014, http://blogs.wsj.com/bankruptcy/2014/05/02/the-examiners-harvey-miller-on-the-ruralmetro-ruling/; Steven Davidoff Solomon, *Ruling Highlights Unequal Treatment in Penalizing Corporate Wrongdoers*, N.Y. TIMES, Mar. 18, 2014, http://dealbook.nytimes.com/2014/03/18/ruling-highlights-unequal-treatment-in-penalizing-corporate-wrongdoers/.

[8] The Court of Chancery has at least twice cited the "gatekeeper" reference in *Rural Metro I*. *See*, *e.g.*, *In re Comverge, Inc. S'holders Litig.*, No. 7368-VCP, 2014 WL 6686570, at *19 n.109 (Del. Ch. Nov. 25, 2014) (noting private equity buyer did not act as a kind of "gatekeeper" and citing to *Rural Metro I*); *Houseman*, 2014 WL 1600724, at *8 (citing approvingly to *Rural Metro I*: "[t]he threat of liability helps incentivize gatekeepers [such as investment bankers] to provide sound advice, monitor clients, and deter client wrongs," but finding in that case that a cause of action for aiding and abetting a breach of fiduciary duty of care was not supported).

determining legal liability, generating still further uncertainty about what Delaware law requires of financial advisors.

B. This Court Should Not Recognize A Cause of Action Against A Financial Advisor for Aiding And Abetting A Breach By A Corporate Board Of The Duty of Care.

This Court has previously "express[ed] no view on the question whether a third party may 'knowingly participate' in or give substantial assistance to a board's grossly negligent conduct or whether a third party may be liable for aiding and abetting only if the board's breach is intentional." *Malpiede v. Townson*, 780 A.2d 1075, 1097 n.78 (Del. 2001). This case squarely presents that question: whether, and in what circumstances, to recognize a common law cause of action against an unaffiliated third party financial advisor for aiding and abetting an *unintentional* breach of the duty of care.

For the reasons next discussed, SIFMA submits that this Court should not create such a claim. Alternatively, if this Court recognizes this brand-new cause of action, to alleviate the widespread uncertainty as to what Delaware law *is* in this context, the Court should cabin such a cause of action by clearly identifying situations to which such a cause of action should apply. This is critical not only to enable financial advisors and other actors in the M&A context to understand what the law requires, but also for the just and efficient adjudication of future disputes and the efficient use of judicial resources. Delaware courts have recognized that "the realities of modern complex litigation make proceeding past the pleading stage and into discovery exceedingly expensive."[9] Clear guidance by this Court regarding when such a rule would apply will assist in ensuring that cases may be adjudicated as efficiently as possible and at the earliest stage of a litigation as warranted.

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[9] *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007) (Strine, V.C.).

1. By Its Very Nature, A Claim For Aiding And Abetting A Fiduciary Duty Breach Is And Should Be Limited In Scope.

The historic origins and inherent nature of the civil cause of action for aiding and abetting support the existence of a cause of action at most for aiding and abetting a breach of fiduciary duty of loyalty, not for aiding and abetting a breach of the duty of care.[10] The core basis for imposing civil, common-law aiding and abetting liability upon parties that knowingly participate in tortious conduct is the criminal law concept that the aider/abettor is *equally culpable* by virtue of sharing the tortfeasor's improper purpose and knowledge of the full scope of its wrongdoing.[11] Delaware law, which treats aiding and abetting as a species of conspiracy,[12] has unremittingly required that an aider/abettor must be found to have *knowingly participated* in the breach – as would be required in a conspiracy claim.[13] Consistent with this conception of the

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[10] "Aiding and abetting is an ancient criminal law doctrine," whose transplantation to civil tort liability "has been at best uncertain in application" and remains unrecognized in the common law of many states. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181-82 (1994) (collecting cases). "[T]he leading cases applying this doctrine are statutory securities cases," *id.* at 181, and older common law cases recognizing a claim for aiding and abetting breaches of trust generally involved fiduciaries or trustees who had to account for personally profiting at the expense of their beneficiaries – a classic breach of the duty of loyalty rather than a negligence-based duty of care. *See*, *e.g.*, *Jackson v. Smith*, 254 U.S. 586, 588-89 (1921) (collecting cases).

[11] In the "canonical formulation" of that rule:

> To aid and abet a crime, a defendant must not just in some sort associate himself with the venture, but also participate in it as in something that he wishes to bring about and seek by his action to make it succeed. . . . We have previously found that intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense . . . . So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission.

Rosemond v. United States, 134 S. Ct. 1240, 1248-49 (2014) (internal quotations and citations omitted).

[12] *See*, *e.g.*, *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006) ("our state courts have noted that in cases involving the internal affairs of corporations, aiding and abetting claims represent a context-specific application of civil conspiracy law"); *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, No. 13950, 1995 WL 694397, at *15 n. 11 (Del. Ch. Nov. 21, 1995) ("analysis under the civil conspiracy test mirrors the analysis under the civil conspiracy/aiding and abetting standard"); *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1057 (Del. Ch. 1984) (collecting cases).

[13] *See*, *e.g.*, *Gatz v. Ponsoldt*, 925 A.2d 1265, 1276 (Del. 2007); *Malpiede*, 780 A.2d at 1097; *Weinberger v. Rio Grande Indus., Inc.*, 519 A.2d 116, 131 (Del. Ch. 1986); *Gilbert*, 490 A.2d at 1057.

aiding and abetting cause of action, many Delaware cases – including *Greenfield v. Tele-Communications*, cited in *Malpiede* – state that the "knowing participation" element requires that the underlying breach itself be deliberate or "inherently wrongful."[14] In reaching its result in this case, the Court of Chancery cited no authority supporting the imposition of aiding and abetting liability where the underlying breach was gross negligence – the applicable standard for a breach of the fiduciary duty of care. Indeed, in reaching its result, the Chancery opinion relied on a decision of this Court that explicitly *declined* to express a view on such a claim.[15]

As this Court has held, a breach of the fiduciary duty of care involves, by definition, a mental state no greater than gross negligence, not a finding of intentional wrongdoing such as disloyalty or bad faith:

> [B]ad faith will be found if a fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties . . . But . . . *there are no legally prescribed steps that directors must follow* . . . Thus, the directors' failure to take any specific steps during the sale process *could not have demonstrated a conscious disregard of their duties* . . . there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties.
>
> . . . [I]f the directors failed to do all that they should have under the circumstances, they breached their duty of care. Only if they

[14] *See* RBC Br. at 45-48; *Greenfield v. Tele-Commc'ns*, No. 9814, 1989 WL 48738, at *3 (Del. Ch. May 10, 1989) ("But where the charge is conspiracy or knowing participation with a breaching fiduciary, some facts must be alleged that would tend to establish, at a minimum, knowledge by the third party that the fiduciary was *endeavoring* to breach his duty . . . .") (emphasis added). *See also Gatz*, 925 A.2d at 1276 n. 27.

[15] Specifically, the Court of Chancery relied on *Arnold v. Soc'y for Savs. Bancorp, Inc.*, 678 A.2d 533, 534, 535 n.3 (Del. 1996) ("Since the aiding and abetting claim against the acquiring corporation is still pending in the Court of Chancery, we express no views as to its merit . . . . Arnold's claim against Bank of Boston for aiding and abetting the disclosure violations committed by the director defendants has been deferred by agreement of the parties and the Court of Chancery pending further proceedings."), and *Penn Mart Realty Co. v. Becker*, 298 A.2d 349, 350-51 (Del. Ch. 1972), an insider trading case. The Court of Chancery also relied on the Restatement (Second) of Torts § 876(b) (1977), but the Restatement's two illustrations of arguably negligent conduct by the primary tortfeasor (7 and 8) are supported by no relevant authority – most of the cited cases involved assaults.

> knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty.[16]

A claim for aiding and abetting a breach of the duty of care, if authoritatively recognized by the Court, would create an anomalous imbalance of responsibilities where a non-fiduciary may be held liable for an unintentional violation of a fiduciary duty by a fiduciary. As this Court explained in *Lyondell*, a breach of the duty of care necessarily means the directors' conduct was not *and by definition could not* have been in conscious disregard of a "known duty to act." Yet the aider/abettor, to be found liable, must be proved to have *known* that the board had that same duty to act, and to have further *known* that the directors were disregarding it. As noted above, financial advisors are not trained or licensed to advise on the scope of the directors' duty to act, nor will they have sufficient facts or legal expertise to know how to integrate such information or whether a client board is disregarding that duty. And yet, on this basis (and presumably on the mistaken notion that financial advisors are equipped to be "gatekeepers" in the M&A context), the Court of Chancery's decision would establish a new form of liability. This Court should not build a new cause of action on such a weak and inaccurate foundation.

2. Recognizing A Civil Cause Of Action For Aiding And Abetting A Breach Of The Duty Of Care Would Create Uncertainty For Those Attempting To Conform Their Behavior To Delaware Law.

Because a breach of the duty of care is by definition grounded in grossly negligent but not intentional conduct, a claim for aiding and abetting such a breach will create difficult problems of pleading and proof. Where the duty breached is that of loyalty, proof of aiding and abetting turns on knowing participation in the disloyal *act*. Delaware law also requires that the

[16] *Lyondell Chem. Co.*, 970 A.2d at 242-44 (emphasis added; quotations omitted). Under Delaware law, gross negligence is not intentional conduct. *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 64 (Del. 2006) ("'subjective bad faith,' that is, fiduciary conduct motivated by an actual intent to do harm" is "at the opposite end of the spectrum" from conduct that "involves lack of due care – that is, fiduciary action taken solely by reason of gross negligence and without any malevolent intent").

aider/abettor must have *substantially assisted* the breach — an element that necessarily entails some kind of overt action.[17]

Importantly, liability for aiding and abetting a breach of the duty of care would require pleading and proof (among other things) of the aider/abettor's *knowing participation in the directors' failure to take due care*. This would require persuasive evidence that the aider/abettor knew not only what the board *knew* and *did*, but also what the board *did not know* and what the board was supposed to do but *did not*, and that the financial advisor had the ability and opportunity to prevent the board's inaction and failed to do so. Only in such a scenario could the alleged aider/abettor possibly be liable for knowing failure to take some sort of action to try to prevent the client board from acting without the requisite due care.

In effect, the Court of Chancery's new rule of law would require financial advisors to assume a *de facto* duty to supervise the board – essentially to act as the board's overseer or keeper. Indeed, the Court of Chancery explicitly contemplated that its new rule would "create[] a powerful financial reason for the banks to . . . advise boards in a manner that *helps ensure that the directors* carry out their fiduciary duties when exploring strategic alternatives and conducting a sale process . . . ." *Rural Metro I*, 88 A.3d at 89 (emphasis added). The Court of Chancery's rule would require a financial advisor to assess facts (possibly incomplete), apply those facts to legal principles, and decide whether the board's conduct breached the directors' duty of care – a purely legal function that financial advisors are not trained to perform. This would effectively re-order the legal structure of corporate governance associated with M&A transactions, and create disquieting uncertainty for financial advisors seeking to conform their conduct to the law.

[17] *See*, *e.g.*, *Weinberger*, 519 A.2d at 131 (allegations of inaction "do not support a claim that the [aiders/abettors] participated at all (let alone knowingly participated)").

It also would conflate the roles of boards and their lawyers on the one hand, and financial advisors on the other hand.

A breach of the fiduciary duty of loyalty typically involves overt board action rather than unobservable board inaction. Being observable, overt board action is more likely to signal to an outside third party that the board may be engaging in intentional misconduct that is essential to a loyalty breach. But, where the board action (or inaction) is unobservable, an outside third party would have no way of knowing whether the board is breaching its duty of care, and even a plaintiff would be hard pressed to plead or prove that the third party knew of any such breach. The difficulties of pleading and proof inherent in a claim that is predicated upon a due care violation, which itself is predicated upon conclusions about the reasonableness of the board's conduct, are echoed in this Court's precedents describing the duty of care as intensely fact- and context-specific, with few black-letter rules to illuminate the path.[18] If this Court has determined – rightfully – that there can be no bright-line process rules for how a board should accomplish a particular goal, it would seem perverse to require a third-party advisor to know if and when a board is straying off course.

C. Should This Court Recognize Such A Cause Of Action, It Should Place Reasonable Limitations Upon Its Scope As Applied To Financial Advisors.

The Court of Chancery's decision appears to have turned in significant part on a "fraud on the Board" theory that "a claim for aiding and abetting a breach of the duty of care can be maintained . . . when a third party, for improper motives of its own, misleads the directors into breaching their duty of care." *Rural Metro I*, 88 A.3d at 99 & n.24; *In re Rural Metro Corp.*, 102

[18] *See C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' and Sanitation Emps.' Ret. Trust*, 107 A.3d 1049, 1053, 1067-69 (Del. 2014) (declining to require a pre-signing active solicitation process and questioning assumption that *Revlon* requires the board to have "impeccable knowledge" of the company's value; "*Revlon* and its progeny do not set out a specific route that a board must follow when fulfilling its fiduciary duties"); *Lyondell*, 970 A.2d at 242-43; *Van Gorkom*, 488 A.2d at 876 (no bright-line rule requiring an outside fairness opinion).

A.3d 205, 238-39 (Del. Ch. 2014) ("*Rural Metro II*"). The Court of Chancery's view of what the law should be may have been swayed by the specific conduct it found to be present in this case. That view should not, however, influence this Court's dispassionate consideration of whether, as a policy matter, a claim for aiding and abetting a breach of the duty of care should be recognized, or if recognized, what its scope should be.

SIFMA submits that a cause of action for aiding and abetting a breach of the duty of care, if recognized, should be limited to situations when the board has been purposely misled so as to directly and proximately cause the board to breach its duty of care or, if extended beyond that, then only with the greatest of caution. To avoid encouraging a wave of meritless litigation, with increased costs ultimately borne by the stockholders of Delaware corporations, a claim for aiding and abetting premised on an advisor's "fraud on the Board" should be limited to prohibiting the advisor from engaging in conduct that intentionally causes, or intentionally misleads the board so as to cause, the board to breach its duty of care. No such liability should be predicated merely on a failure on the part of the financial advisor to *prevent* directors from breaching their duty of care.

As RBC correctly notes, the "fraud on the Board" theory is an attempt to fit the square peg of these facts into the round hole of aiding and abetting law, because the Court of Chancery did *not* find that RBC acted in concert with the directors (as the doctrine requires), but rather that RBC acted *against* them. RBC Br. at 49. The remedy for wrongs to the corporation is normally a direct or derivative action by or on behalf of the company, not a claim founded on the internally inconsistent notion that a "victimized" board engaged in wrongdoing. As this Court has noted in the past, not every wrong will necessarily require a remedy, especially where the

stockholders themselves have chosen to proscribe a damages remedy against its own board for breaches of its duty of care. *See Arnold*, 678 A.2d at 541-42.

II. The Court Of Chancery's Construction Of DUCATA And DGCL Section 102(b)(7) In The Current Context Is Clearly Erroneous And Inequitable And Further Illustrates The Problems With Its Aiding And Abetting Liability Rule.

This case surfaces an additional problem with holding a financial advisor liable for money damages for aiding and abetting a board's breach of its duty of care: the interplay of DUCATA and the fact that directors are often (as here) exculpated from monetary liability for breaches of the duty of care pursuant to Section 102(b)(7) corporate charter provisions. Here, the directors' exculpation enabled the stockholder-plaintiffs to argue that each director's adjudicated responsibility for damages to stockholders should be ignored and given no effect for purposes of allocating joint tortfeasor liability under DUCATA.

The Court of Chancery's acceptance of that argument, if left unchecked by this Court, would enable stockholders – who voted to place such exclusions from liability in their corporate charters to begin with – to shift the damages associated with an underpriced sale or merger from the fiduciaries (the directors) who are primarily liable but are statutorily immunized from a damages claim to a non-fiduciary (and non-immunized) third party (the financial advisor). Thus, if a board is found to have breached its duty of care but its directors were exculpated from liability, and the financial advisor is found to have aided and abetted that breach, it is the financial advisor that would bear a disproportionate and inequitable share of the damages liability (essentially all of it). That interpretation of DUCATA, which is unsupported by either the text of that statute or Section 102(b)(7), effectively makes financial advisors sureties for grossly negligent directors who may approve M&A transactions – with no risk of liability to the directors themselves.

In apportioning joint tortfeasor liability for the adjudicated damages, the Court of Chancery treated Section 102(b)(7) as a "heads-I-win-tails-you-lose" provision that has one meaning for liability determining purposes but an opposite meaning for damages allocation purposes under DUCATA. The Court of Chancery held that "[t]he presence of an exculpatory provision does not eliminate the underlying duty of care or the potential for fiduciaries to breach that duty." *Rural Metro I*, 88 A.3d at 85. Thus, a breach of the duty of care by the directors can give rise to a damages claim against the financial advisor for aiding and abetting even where the directors are exculpated from liability to pay the damages they are found to have caused. *Id*.

Yet, in *Rural Metro II*, when assessing whether RBC was entitled to obtain contribution from any other joint tortfeasors under DUCATA, the Court of Chancery held that the directors' breaches of duty should be entirely disregarded – even for purposes of allocating the damages among the joint tortfeasors (RBC, the other financial advisor, and the directors). As a result, RBC, one of two financial advisors here, incurred a judgment for 83% of the adjudicated damages to the stockholders.

There is no basis in the text of DUCATA, or its animating policy, that justifies, let alone compels, importing Section 102(b)(7) exculpation treatment into DUCATA. This interpretation of DUCATA improperly *shifts* damages liability attributable to director behavior to the financial advisor, rather than *eliminating* that liability, as Section 102(b)(7) was designed to permit.[19] The end result was to treat the directors' breach of fiduciary duty as if it had never occurred, thereby denying financial advisors the equitable allocation of damages liability benefit that forms the

[19] A. Thompson Bayliss & Sarah E. Hickie, *Buck-Passing Under 102(b)(7): The (Unanticipated?) Liability-Shifting Impact of Director Exculpation*, 28 INSIGHTS: THE CORP. & SEC. L. ADVISOR 11, 7 n.43 (Nov. 2014) (collecting authority).

basis of DUCATA in the first place.[20] The trial court's application of the interplay of DUCATA and of Section 102(b)(7) is not only erroneous and inequitable, but it also further underscores why this Court should not validate a cause of action for aiding and abetting a board's breach of its duty of care.

CONCLUSION

The decision below should be reversed.

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[20] The primary purpose of contribution among joint tortfeasors is to effectuate "equity among wrongdoers." C. Douglas Floyd, *Settlement in Joint Tort Cases*, 18 Stan. L. Rev. 486, 490 (1966); *see also Godsell Mgmt. Inc. v. Turner Promotions, Inc.*, No. 2222-MA, 2009 WL 1299344, at *1 (Del. Ch. May 4, 2009) ("The doctrine of contribution is an equitable principle based on natural justice"); *Chamison v. HealthTrust Inc.—Hospital Co.*, 735 A.2d 912, 918 (Del. Ch. 1999) (noting that the right of contribution rests on "general principles of equity").