Simpson Thacher

Memorandum

Delaware Supreme Court Reverses Unprecedented Aiding and Abetting Decision Against Third-Party Acquiror

June 25, 2025

On June 17, 2025, the Delaware Supreme Court reversed the Court of Chancery's post-trial judgment in *In re Columbia Pipeline Group., Inc. Merger Litigation*, 299 A.3d 393 (Del. Ch. 2023), which had held TransCanada, acquiror of Columbia Pipeline Group, Inc., liable for aiding and abetting breaches of fiduciary duty by Columbia's officers and board during the deal process and awarding the plaintiff Columbia stockholders approximately $200 million in "nominal damages." *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2025 Del. LEXIS 226 (Del. June 17, 2025). Citing its recent decision in *In re Mindbody, Inc., Stockholder Litigation*, 332 A.3d 349 (Del. 2024) the Supreme Court reemphasized the challenge of finding an arm's-length buyer to be an aider and abetter, and reiterated the need to prove both actual knowledge of the target fiduciary's breach of duty and the wrongfulness of its own conduct.

Transaction Background

In 2015, Columbia, a Delaware corporation and owner of U.S. natural gas pipelines, began to consider a sale of the company. In September 2015, Columbia and TransCanada, owner of oil and gas pipelines throughout North America, began negotiations. Columbia's CEO/Board Chair, Robert Skaggs Jr., and Columbia's CFO, Stephen Smith, would lead the negotiations. Both officers wished to retire and had change-in-control agreements. By early November, the companies had entered into a non-disclosure agreement that included a standstill provision.[1]

In November 2015, TransCanada presented an all-cash proposal at $25-$26 per share, which Columbia rejected. Despite the standstill, TransCanada and Columbia remained in contact through Skaggs, Smith, and TransCanada's deal team lead, Francois Poirier, who had known Smith since 1999. Around this time, Smith, who was an "M&A neophyte," told Poirier that management wanted to sell and there were no other bidders. In late January, TransCanada's CEO provided an oral expression of interest in a deal at $25 to $28 per share and Skaggs obtained permission from the board to engage in exclusive negotiations with TransCanada after which TransCanada agreed to $26 per share, 90% in cash and 10% in stock. Despite the emergence of a second bidder, Skaggs and Smith recommended that the board renew exclusivity with TransCanada as they believed that they were close to signing a formal merger agreement. At that point, Poirier reneged on the $26 per share agreement, lowered TransCanada's bid to $25.50 per share, demanded an answer within three days, and threatened to

[1] The standstill required TransCanada to send all requests and "questions regarding procedures" to Smith and stated that TransCanada could not "acquire or offer to acquire" Columbia for 12 months unless Columbia's board requested the offer in writing in advance.

publicly announce that the negotiations were dead unless Columbia accepted the reduced offer. Skaggs and Smith recommended that the board take the reduced deal and the deal closed.[2]

Procedural History

Columbia stockholders subsequently sued Skaggs, Smith, and TransCanada. Plaintiffs alleged that Skaggs and Smith breached their fiduciary duties (specifically their duty of loyalty by initiating and timing the merger to favor their own self-interest and their duty of disclosure because the proxy statement was false and misleading as to the negotiations). Plaintiffs also claimed that the Columbia board breached its duty of care by failing to provide sufficient oversight of the sale process. Plaintiffs claimed that TransCanada aided and abetted the fiduciary breaches during the sale process and aided and abetted breaches of the duty of disclosure. During discovery, Skaggs and Smith settled and agreed to pay $79 million in return for dismissal of the claims against them, leaving TransCanada as the sole defendant.

After a five-day trial, the Court of Chancery found that plaintiffs proved the underlying breaches of fiduciary duty. The Court of Chancery further concluded TransCanada constructively knew of, and culpably participated in Skaggs's and Smith's breaches. The Court of Chancery determined that TransCanada was also liable for aiding and abetting the breaches of the duty of disclosure. As TransCanada had a right under the merger agreement to review the proxy and an obligation to inform Columbia of any material omissions but remained silent when the draft proxy failed to disclose all of Skaggs's and Smith's interactions with TransCanada, the Chancery Court concluded that TransCanada had "knowingly permitted" Columbia to issue a misleading proxy statement, which amounted to knowing participation in the issuance of the proxy statement. As to damages for the disclosure claim, the court awarded plaintiffs nominal damages of $0.50 per share or approximately $200 million.

On appeal, TransCanada argued that it was error to find that it had aided and abetted any sale-process breach by the officers or the board, or aided and abetted any disclosure breach and that it was error to award nearly $200 million in nominal damages.[3]

The Delaware Supreme Court Reverses

Justice Traynor, writing for the Court, began by stating that under *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001), the four elements of an aiding and abetting claim are: (i) the existence of a fiduciary relationship; (ii) a breach of the fiduciary's duty; (iii) knowing participation in that breach; and (iv) damages proximately caused by the breach. Justice Traynor then turned to *Mindbody*, which clarified that a plaintiff must prove both that the buyer knew of the sell-side breach and that the buyer knew that "its own conduct regarding the breach was improper." Citing *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (2015) and *Mindbody*, the Court reiterated

[2] Simpson Thacher represented Lazard as financial advisor to Columbia in its definitive agreement to be acquired by TransCanada and also represented Lazard in its capacity as a witness at the trial concerning the acquisition.

[3] TransCanada did not challenge the Court of Chancery's finding that Skaggs and Smith breached their duty of loyalty as corporate officers by favoring their self-interest, or the finding that the Columbia board breached its duty of care by failing to provide sufficient oversight of the sale process.

that the requirement that an aider and abettor act knowingly "makes an aiding and abetting claim among the most difficult to prove." Rejecting the Chancery Court's determination of liability based on constructive knowledge the Court stated that *Mindbody* requires "actual knowledge."

As to whether TransCanada had actual knowledge that Skaggs and Smith were breaching their fiduciary duties, the Court pointed out that even though they were eager to strike a deal and wanted to retire with their change-in-control benefits that they also had incentives to pursue the best deal possible and rejected several TransCanada proposals. The Court stated that "we see Skaggs's and Smith's eagerness as sending ambiguous signals at best." The Court concluded that an "inference that such subtle and unintentional signals should arouse suspicion—much less constitute clear and direct knowledge—that a sell-side fiduciary is acting disloyally or in bad faith would not, in our view, be justifiable." As to whether TransCanada had actual knowledge that the Columbia board was breaching its duty of care by providing insufficient oversight of Skaggs and Smith, the Court concluded that this breach would have been even less clear to TransCanada because it did not have direct interaction with the board members and was not present for any board meetings. The Court stated that without the requisite actual knowledge of the underlying breaches, TransCanada could not know that its own conduct was legally impermissible. In other words, lacking actual knowledge of the sell-side breaches, the Court concluded that TransCanada could not have knowingly participated in them.

For the sake of completeness—as the Court could have ended its inquiry with its determination that the trial record did not support a finding that TransCanada had actual knowledge—the Court also reviewed the finding that TransCanada culpably participated in the breaches. The Court stated that it "emphasized in *Mindbody* that whether a defendant's participation in another's breach of duty is culpable hinges in large part on whether the defendant substantially assisted in the commission of the breach." The Court explained that to substantially assist an aider and abettor's participation in a primary actor's breach of fiduciary duty must be of an "active nature" and "include something more than taking advantage of the other side's weakness and negotiating aggressively for the lowest possible price." The Court went so far as to state that:

> The bidder may have, under such circumstances as we have seen here, stretched the bounds of hard bargaining so ungraciously as to unsettle the polite observer. But a bidder's aggressive bargaining tactics, however disquieting, do not constitute aiding and abetting unless the bidder has substantially assisted, that is, "knowingly participated" *in the* breach.

Reviewing the incidents alleged to have been culpable participation (Poirier's exploitation of Smith's negotiation inexperience; TransCanada's violation of its $26.00 offer; and the purported disclosure threat if Columbia did not accept the lower offer), the Court first concluded that taking advantage of a personal relationship and superior negotiating skills and experience to secure the best reasonably available price could not expose a party to aiding-and-abetting liability. Second, the Court stated that it could not conclude that TransCanada actually knew that it was breaching the standstill and that it was substantially assisting the Columbia negotiators in the breach of their fiduciary duties in light of the parties' mutual understanding that the standstill permitted informal

communications and only required a written invitation before a formal offer. Third, the Court concluded that there was no deal at $26 on which TransCanada could have reneged and that the lower court's finding to the contrary was not supported by the record, and the Court was not persuaded that TransCanada's subsequent $25.50 offer was accompanied by a coercive threat.

As to TransCanada's aiding and abetting liability for the breaches of the duty of disclosure, the Court concluded that TransCanada did not culpably participate in the disclosure breaches. Evaluating "the amount, kind, and duration of assistance" by TransCanada under *Mindbody*, including how directly involved TransCanada was in the primary actor's conduct, the Court stated that there was "no meaningful difference" between these facts and those in *Mindbody*. In *Mindbody*, where there was an absence of affirmative conduct by the aider and abettor, the Court had concluded that the culpable participation factor weighted against a finding of liability. The Court found the same to be true in this case because although TransCanada offered comments on the proxy, it did not propose any of the statements found to be misleading or suggest any omissions.

As to TransCanada's actual knowledge that its own conduct was legally improper, the Court concluded that that the record did not contain sufficient support to determine that TransCanada knowingly participated in any of the disclosure breaches found by the lower court. The Court noted that the Court of Chancery did not find as a factual matter that TransCanada "knew that its failure to abide by its contractual duty to notify Columbia of potential material omissions in the Proxy Materials was wrongful and that its failure to act could subject it to aiding-and-abetting liability." Lacking this crucial element, the Court concluded that the plaintiffs' aiding and abetting claim against TransCanada failed.

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