FINANCIAL ADVISOR AIDING AND ABETTING OF A BREACH OF A FIDUCIARY DUTY POST RURAL METRO: CLARIFYING "KNOWING PARTICIPATION"

JASON W. RIGBY*

ABSTRACT

In recent years, corporate litigation has seen an influx of claims against third–parties who serve as advisors to corporations during change of control transactions. Generally, the claim is that the third–party advisor aided and abetted the corporation's board of directors in breaching some fiduciary duty that they owed. In Rural Metro Corporation Stockholders Litigation, *the Delaware Court of Chancery concluded a third–party financial advisor had "knowingly participated" in aiding and abetting a corporation's duty of care breach. "Knowing participation" is an essential element to proving an aiding and abetting claim but the Delaware courts have not defined what standard of conduct will meet this element.*

This comment will clarify the "knowing participation" element of an aiding and abetting claim to give boards of directors, third–party advisors to those boards and attorneys involved in M & A litigation, a better understanding of what conduct by third–parties will rise to the level of "knowing participation" in another's breach of a fiduciary duty. This comment proposes using a subjective and objective analysis of a third–parties conduct for "dishonest assistance," an English law doctrine for holding a third-party liable for breach of a fiduciary or trust relationship.

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I. INTRODUCTION

Goldman Sachs, J.P. Morgan, Barclays, and other financial institutions would be sure to take notice of a $76 million judgment against one of their own for conduct as an accessory to a board of director's fiduciary breach in a mergers and acquisition ("M&A") deal.[1] In *Rural Metro Corporation Stockholders Litigation*, liability was established against the selling company's financial advisor for aiding and abetting the board of director's breach of a fiduciary duty.[2] In addition to *Rural Metro*, other recent Delaware Court of Chancery opinions used accessory liability claims to put financial advisors on notice that they could be held accountable for their conduct in advising sell-side boards

[1]*See In re* Rural Metro Corp. Stockholders Litig., 102 A.3d 205, 263 (Del. Ch. 2014) (entering judgment against RBC Capital Markets, LLC, for their aiding and abetting of the Rural Metro Corporation's board's duty of care breach while engaged as Rural Metro's financial advisor in a change of control transaction), *appeal dismissed*, 105 A.3d 990 (Del. 2014).

[2]Trial proceeded solely against the sell-side board's financial advisor RBC Capital Markets, LLC. *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 63 (Del. Ch. 2014), *aff'd*, 129 A.3d 816, 824 (Del. 2015).

who breached their fiduciary duties in change of control transactions.[3] The aiding and abetting claim is the method of accessory liability frequently used. The claim must be linked to a board's breach of a fiduciary duty.[4] The Court of Chancery is critical of financial advisor's "steering" transactions, being involved in staple financing, and having conflicts with the boards or companies that employ them.[5] To further financial advisor's woes, the Delaware courts have not explicitly defined the standard of conduct for a banker's "knowing participation" in an aiding and abetting claim.[6] The "knowing participation" element is the main analysis in an aiding and abetting claim.[7]

M&A financial advisors to sell-side boards provide specialized advice and opinions on proposed transactions.[8] A financial advisor's expertise comes from the exposure and relevant experience gained from doing numerous deals with various clients.[9] As a byproduct of this past exposure it is difficult to assure shareholders that a financial advisor is providing guidance to a board that will maximize shareholder return from the sale of a company as opposed to acting with ulterior motives or other loyalties for the financial advisor's own benefit.[10] Scholars have debated whether financial advisors serve as gatekeepers, but the Delaware Supreme Court has declined to assign them this title.[11] Even

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[3]*See In re* El Paso Corp. S'holders Litig., 41 A.3d 432, 445 (Del. Ch. 2012) (explaining that Goldman Sachs steered the sell-side board towards a deal with Kinder Morgan whom Goldman's owned a $4 billion stake in); *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 833 (Del. Ch. 2011) (explaining that Barclays, the advisor to the Del Monte board, sought to assist the buyer in funding their acquisition of Del Monte).

[4]Penn Mart Realty Co. v. Becker, 298 A.2d 349, 351 (Del. Ch. 1972).

[5]*See Rural Metro*, 88 A.3d at 100; *El Paso*, 41 A.3d at 445; *Del Monte*, 25 A.3d at 833.

[6]*Compare* Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc., C.A. No. 13950, 1995 WL 694397, at *15 n.11 (Del. Ch. Nov. 21, 1995) (explaining that an aiding and abetting claim requires "complicity" between a third-party and a board "in any scheme to defraud or in any breach of fiduciary duties"), *with* Malpiede v. Townson, 780 A.2d 1075, 1097 (Del. 2001) (stating that an aiding and abetting claim requires a third-party to knowingly assist or advocate for certain conduct that could be a resulting breach of a fiduciary duty by a board of directors).

[7]*See In re* Zale Corporation Stockholders Litig., C.A. No. 9388-VCP, 2015 WL 5853693, at *21 (Del. Ch. Oct. 1, 2015) ("The key inquiry on the aiding and abetting claim is whether a plaintiff has pled adequately the third element, knowing participation.").

[8]*See* William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 BUS. LAW. 2055, 2061 (1990) (stating that boards will "[n]aturally, . . . turn for guidance to their specialist advisors who will typically have had a great deal of relevant experience").

[9]*See id.*

[10]*See* Christopher Foulds, *My Banker's Conflicted and I Couldn't Be Happier: The Curious Durability of Staple Financing*, 34 DEL. J. CORP. L. 519, 520 (2009) (examining financial advisor's conflicts that exist when they may stand on both sides of a transaction).

[11]*See* RBC Capital Mkts. LLC v. Jervis, 129 A.3d 816, 865 n.191 (Del. 2015) (stating that the Delaware Supreme Court does not "adopt the Court of Chancery's description of the role of a financial advisor in M & A transactions"); William W. Bratton & Michael L.

so, the debate will likely continue with each aiding and abetting claim validated by the Court of Chancery.

This comment seeks to clarify the "knowing participation"[12] element of an aiding and abetting claim against a financial advisor through the use of a subjective and objective analysis of the advisor's conduct for "dishonest assistance."[13] Adding to the analysis of "knowing participation" will give financial advisors, the boards that employ them, and the attorneys involved in M&A litigation a clearer understanding of what conduct will give rise to an aiding and abetting claim against a financial advisor in a M&A deal. Part II will examine the fundamentals of accessory liability before turning to the Court of Chancery's recent decisions on banker's accessory liability.[14] The discussion will then examine the "dishonest assistance" standard found in United Kingdom law.[15] Part III will address issues surrounding the current state of financial advisor aiding and abetting claims.[16] Part IV will discuss a clarified approach for analyzing "knowing participation" by infusing the "dishonest assistance" standard.[17]

II. THE BACKGROUND

Third-party aiding and abetting claims are rooted in common law tort doctrine.[18] In recent years litigants have not shied away from trying to use this claim to hold a non-fiduciary accountable for actions in a

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Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1, 7-8 (2014) (opining that the banker-client relationship is "nominally fiduciary territory" as a product of agency law but in practice the relationship emerges as one of arms-length counterparties); John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 308 (2004) (describing gatekeepers as outside professionals with "significant reputational capital" who serve the board); Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. (forthcoming 2016) (examining investment banks as fiduciaries to their M&A clients).

[12]"Knowing" requires a third-party to "act with the knowledge that the conduct advocated or assisted constitutes such a [fiduciary] breach [by the board]." "Participation" can be established by a third-party's "participat[ion] in the board's decisions, conspir[ing] with the board, or otherwise caus[ing] the board to make the decisions at issue." *See* Malpiede v. Townson, 780 A.2d 1075, 1097–98 (Del. 2001).

[13]"Dishonest assistance" is an English law doctrine that holds a third-party liable for their actions in assisting a breach of a trust or fiduciary relationship. The doctrine requires an objective and subjective analysis of the third-party's conduct. *See* Twinsectra Ltd v. Yardley, [2002] 2 A.C. 164, 173–75 (H.L.).

[14]*See infra* Part II.A.1 & Part II.A.2.

[15]*See infra* Part II.B.

[16]*See infra* Part III.

[17]*See infra* Part IV.

[18]*See infra* Part II.A.1.

M&A deal.[19] A similar claim is found in English law and is used as a method for holding dishonest, third-party non-trustees and non-fiduciaries liable to beneficiaries of a trust or fiduciary relationship.[20] Section A.1 will discuss the tort law foundations of aiding and abetting claims before turning to the doctrine's application in the Delaware Court of Chancery.[21] Section A.2 will examine the Court of Chancery's recent *Rural Metro* decision holding a sell-side financial advisor liable for aiding and abetting a board's breach of its duty of care.[22] Section A.2 will continue to examine other Court of Chancery decisions that were critical of banker's conduct.[23] Section B will explain the "dishonest assistance" standard found in English law.[24]

A. *Aiding and Abetting Liability Generally and its Application to Financial Advisors*

1. From Tort Doctrine to Use in the Delaware Court of Chancery

The *Restatement (Second) of Torts* frames the common law approach to civil liability for aiding and abetting.[25] A third-party is liable for aiding and abetting when he "give[s] substantial assistance" to the primary actor knowing the primary actor's resulting conduct would be a breach of some duty they owe to another.[26] A comment to the *Restatement (Second) of Torts* notes that if the assistance provided by a third-party to a primary actor is a "substantial factor in causing the resulting tort" then the third-party providing the assistance is a tortfeasor.[27] As a result, the third-party, in addition to the primary actor, would be responsible for a portion of the relief that follows from the harm caused by the primary actor.[28] The Delaware Supreme Court has frequently relied on the *Restatement (Second) of Torts*[29] and the Court of

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[19] *See infra* Part II.A.1 & Part II.A.2.
[20] *See infra* Part II.B.
[21] *See infra* Part II.A.1.
[22] *See infra* Part II.A.2.
[23] *See infra* Part II.A.2.
[24] *See infra* Part II.B.
[25] RESTATEMENT (SECOND) OF TORTS § 876 (1979).
[26] § 876(b).
[27] § 876 cmt. b.
[28] *Id.*
[29] *See* WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P., 49 A.3d 1168, 1174 (Del. 2012) (stating Delaware courts follow the Restatement (Second) of Torts in regard to a tortious interference claim); Riedel v. ICI Ams. Inc, 968 A.2d 17, 20 (Del. 2009) (stating the Delaware Supreme Court generally follows the Restatement (Second) of Torts in determining whether one party owes a duty of care to another).

Chancery has opined that a breach of a fiduciary duty is an equitable tort.[30]

The Delaware court's analysis of claims for aiding and abetting a breach of fiduciary duty comports with the *Restatement (Second) of Torts* view. Beneficiaries of a fiduciary relationship can hold a non-fiduciary, third-party liable for "knowingly participating" in a fiduciary's breach of his obligations.[31] In *Malpiede v. Townson,* the Delaware Supreme Court recognized third-party liability for aiding and abetting a breach of a fiduciary duty in the corporate context.[32] The claim required: " '(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, . . . (3) knowing participation in that breach by the [non-fiduciary] defendants,' and (4) damages proximately caused by the breach."[33]

Aiding and abetting claims generally boil down to a factual analysis of what establishes "knowing participation."[34] The "knowing participation" element is a stringent standard requiring plaintiffs to prove an alleged aider and abettor acted with the requisite scienter.[35] The level of scienter has evolved over the years.[36] A plaintiff can meet the current standard by showing a third-party "act[ed] with the knowledge that the conduct advocated or assisted constitutes such a [fiduciary] breach."[37]

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[30]*See* Hampshire Grp., Ltd. v. Kuttner, C.A. No. 3607-VCS, 2010 WL 2739995, at *54 (Del. Ch. July 12, 2010) (opining that a breach of a fiduciary duty could be classified as an equitable tort); *see also* J. Travis Laster & Michelle D. Morris, *Breaches of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 DEL. L. REV. 71, 71 (2010) ("[A] breach of a fiduciary duty is in fact a tort, although a unique species historically called an 'equitable tort.'").

[31]Penn Mart Realty Co. v. Becker, 298 A.2d 349, 351 (Del. Ch. 1972) (citations omitted) ("[O]ne who knowingly joins with any fiduciary . . . in a breach of his obligation is liable to the beneficiaries of the trust relationship."); *In re* Shoe-Town, Inc. Stockholder Litig., C.A. No.: 9483, 1990 WL 13475, at *7 (Del. Ch. Feb. 12, 1990) (citation omitted) ("Under Delaware law a nonfiduciary can be liable to the beneficiary of a fiduciary relationship for aiding and abetting the breach of a fiduciary's duty.").

[32]*See* Malpiede v. Townson, 780 A.2d 1075, 1096 (Del. 2001).

[33]*Id.* (quoting *Penn Mart*, 298 A.2d at 351).

[34]Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc., C.A. No.: 13950, 1995 WL 694397, at *15 (Del. Ch. Nov. 21, 1995) (citation omitted) (stating that aiding and abetting claims "largely come down to what constitutes 'knowing participation' ").

[35]In testing an aiding and abetting claim, a plaintiff must show the individual defendant acted with the requisite state of mind in assisting the board's breach of a fiduciary duty. *See* Allied Capital Corp. v. GC-Sun Holdings, L.P., 910 A.2d 1020, 1039 (Del. Ch. 2006).

[36]*See, e.g., Malpiede*, 780 A.2d at 1097; *Carlton*, 1995 WL 694397, at *15 n.11 (explaining that an aiding and abetting claim requires "complicity" between a third-party and a board "in any scheme to defraud or in any breach of fiduciary duties"); Greenfield v. Tele-Communications, 15 DEL. J. CORP. L. 182, 187 (Del. Ch. 1989) (stating a third-party had to know a fiduciary was seeking to breach some duty they owed).

[37]*Malpiede*, 780 A.2d at 1097.

2. Delaware Court of Chancery Takes a Hard Look at Financial Advisor Conduct

Rural Metro should be the start of any discussion of aiding and abetting claims against financial advisors.[38] Rural Metro Corporation ("Rural") engaged RBC Capital Market, LLC ("RBC") to put Rural into play.[39] RBC, acting as Rural's financial advisor, was interested in financing not only Rural's deal but also the acquisition of another same-industry company that was already undergoing a sale process.[40] RBC ran Rural's sale parallel to that of the industry competitor's. The intent was to gain leverage for a potential role on the financing tree of bidders for the industry competitor, which they believed would also help them gain a role on any financing tree for bidders on Rural.[41] RBC never disclosed this interest to Rural.[42] Nevertheless, Rural's sale process continued resulting in a limited amount of interest and Rural's board ultimately approving a rather disappointing offer from Warburg Pincus, RBC's preferred bidder.[43] In the background, RBC had been working hard in a last minute effort to secure buy-side financing work from Warburg Pincus.[44] RBC tipped off Warburg Pincus to the internal dynamics of the Rural boardroom and worked to lower Rural's valuation to make Warburg's offer look more attractive to Rural's board.[45] In the end RBC did not receive any buy-side finance work from Warburg Pincus.[46]

After a trial that proceeded against only RBC, Vice Chancellor J. Travis Laster found RBC liable for aiding and abetting the Rural board's

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[38] *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 63 (Del. Ch. 2014) (finding financial advisor to sell-side board liable to shareholders for conduct during M&A deal), *aff'd*, 129 A.3d 816, 823 (Del. 2015).

[39] *Id.* at 69.

[40] *Id.* at 91–93.

[41] *Id.* at 91 ("RBC correctly perceived that the firms bidding for EMS would think they would have the inside track on Rural if they included RBC on their trees. RBC believed that as the financial advisor to Rural, it could get on all of the EMS bidders' financing trees.").

[42] *Rural Metro*, 88 A.3d at 91.

[43] Rural's board accepted Warburg Pincus' offer on March 27, 2011. *Id.* at 71, 79.

[44] RBC spent the weekend of March 25th pitching Warburg Pincus on their availability to fund other deals and working to lower their analysis of Rural in their fairness presentation. *Id.* at 76–78.

[45] On March 23 and March 24, RBC bankers had numerous conversations with Warburg Pincus about the Rural board's "internal dynamics" and specifically the different directors varying opinions on Warburg's bid. RBC attempted to make Warburg's $17.25 offer look more appealing by lowering Rural's valuation in its fairness presentation to the Rural board. *Id.* at 95.

[46] *Rural Metro*, 88 A.3d at 78.

breach of the duty of care.[47] The scienter requirement had to be met to prove the "knowing participation" element.[48] The Plaintiffs showed scienter by pointing to evidence of a conflict of interest. This conflict pulled RBC's loyalties away from the board and pointed RBC's interest somewhere else, in order for RBC to receive some incentive they would not otherwise have gotten without the Rural board's underlying breach of some fiduciary duty.[49] Vice Chancellor Laster found the "knowing participation" element to be readily satisfied.[50] RBC failed to disclose its interest in financing the industry competitor's sale through its strategic process of a parallel sale of Rural.[51] RBC also knew their client was inadequately informed about their company's value.[52] Lastly and "[m]ost egregiously" the banker never disclosed its ongoing interest in staple or buy-side financing for Warburg Pincus' acquisition of Rural.[53] Also, RBC was altering Rural's valuation downward in its pitch to Rural's board to accept Warburg Pincus' bid.[54] RBC "knowingly participated" in the Rural board's breach of the duty of care "by creating the informational vacuum that misled the Board."[55]

The writing was on the wall for financial advisors prior to the 2014 *Rural Metro* decisions. Nearly a decade ago, then-Vice Chancellor Strine showed displeasure over a financial advisor's request to provide staple financing.[56] In *Toys "R" Us*, the financial advisor to the sell-side's board of directors approached the client-board twice about providing buy-side financing to the bidders for one of the client-board's business divisions.[57] This created "an unnecessary issue" for the financial advisor

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[47]For purposes of examining the aiding and abetting claim against RBC, Vice-Chancellor Laster assumed the Rural board breached only its duty of care. He determined the Rural board failed the enhanced scrutiny test. *See id.* at 96–97; Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994) (explaining the enhanced scrutiny standard in a change of control transaction requires a board to "inform[] themselves of all material information reasonably available" in order to decide what option will most likely return the "best value reasonably available" to shareholders).

[48]"It is not the fiduciary that must act with *scienter*, but rather the aider and abettor." *Rural Metro*, 88 A.3d at 97.

[49]The advisor "is being paid in some fashion something he would not otherwise get in order to assist in the breach of duty." *Id.* at 100 (quoting Greenfield v. Tele-Communications, 15 DEL. J. CORP. L. 182, 188 n.2 (Del. Ch. 1989)).

[50]Vice-Chancellor Laster found RBC "acted with the necessary degree of *scienter*" to be held liable for aiding and abetting. *Rural Metro*, 88 A.3d at 97.

[51]*Id.* at 99.

[52]*Id.* at 99–100.

[53]*Id.* at 100.

[54]*Rural Metro*, 88 A.3d at 100.

[55]*Id.*

[56]*In re* Toys "R" Us, Inc., 877 A.2d 975, 1005–06 (Del. Ch. 2005).

[57]*Id.*

and its client-board.[58] Then-Vice Chancellor Strine said such a request "tends to raise eyebrows by creating the appearance of impropriety."[59] It would have been better for a banker to take the position that their reputation and credibility as a sell-side advisor was too important for them to simultaneously pitch for buy-side work.[60] There was no need for judicial interference though, as then-Vice Chancellor Strine determined the banker's staple financing request did not have a casual influence on the issues at hand.[61]

In 2011, Vice Chancellor Laster issued an opinion that was critical of Barclay's role as financial advisor to Del Monte during its sale process.[62] The Vice Chancellor enjoined the Del Monte board of directors from holding a vote on its proposed merger after finding the plaintiff shareholders had a reasonable likelihood of success on their claims, one of which argued that the board did not act reasonably during the sale process.[63] The unreasonable taint in sale process came from Barclay's conflicted role as financial advisor to the board.[64] Barclays had not disclosed its buy-side financing intentions and had steered the sale process towards its preferred bidder by pairing the preferred bidder with another party that was concurrently bidding to buy Del Monte.[65] Barclay's self-motivated conduct and its withholding of information denied the Del Monte board the opportunity to seek another financial advisor or pursue other strategic alternatives.[66] The initial complaint did not name Barclays as a defendant but the plaintiffs added Barclays to the complaint after Vice-Chancellor Laster's opinion.[67]

Based on *Toys "R" Us* and *Del Monte*, financial advisors should have been aware of the potential for heightened judicial examination of their conduct. *Rural Metro* presented the right facts in the right scenario

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[58] *Id.* at 1005.
[59] *Id.* at 1006.
[60] *Toys "R" Us*, 877 A.2d at 1006.
[61] *Id.*
[62] *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 817 (Del. Ch. 2011).
[63] *Id.* at 836.
[64] *Id.*
[65] Barclays had intentions of providing buy-side financing from the get go. It pitched the sale of Del Monte to only a small, select group of firms with which it felt it had maximum potential for getting buy-side business from. Barclays also paired Vestar and KRR, two bidders for Del Monte, together in violation of their respective confidentiality agreements. Barclays actively concealed this behind-the-scenes pairing from its client and ended up receiving a buy-side role in financing. A significant conflict interest was now present – to get KKR to pay more for Del Monte while at the same time ensuring that a deal was reached for KKR in which KKR did not overpay for Del Monte. *Id.* at 833.
[66] *Del Monte*, 25 A.3d at 817.
[67] Amended Consolidated Verified Class Action Complaint for Breach of Fiduciary Duties and Aiding and Abetting, *In re* Del Monte Foods Co. S'holders Litig., C.A. No.: 6027–VCL (Del. Ch. filed Feb. 21, 2011).

to bring aiding and abetting claims to the immediate attention of financial advisors.[68]

B. *The English Concept of "Dishonest Assistance"*

"Dishonest assistance" is a fault-based English law doctrine used to impose liability on a third-party who assists in a breach of trust or a breach of a fiduciary obligation.[69] Liability requires a third-party to compensate a wronged beneficiary for the third-party's accessorial conduct.[70] The elements for dishonestly assisting a breach of a fiduciary duty in English law mostly overlap with the prongs present in Delaware law with one caveat.[71]

The substantive difference between the English law doctrine and the aiding and abetting claim found in Delaware is the requirement for dishonesty on the part of a third-party assisting in a fiduciary breach.[72] Lord Nicholls, in *Royal Brunei Airlines v. Tan*, first articulated the dishonesty standard.[73] Lord Nicholls explained the test to be whether the third-party objectively acted as an honest person would act in the circumstances at hand while noting that honesty itself has the inklings of a subjective examination.[74] Considering the hint of subjectivity, the test becomes what an honest man with the same characteristics, intelligence, and experience, as a third-party defendant, would have done under the circumstances.[75] Lord Nicholls elaborated that an honest person would be well aware of the nature and scope of the proposed transaction he was assisting with, the nature and scope of his role in that transaction, the general course of business the professional was involved in, and the possibility that proceeding with his action may have serious, adverse consequences to the beneficiaries of the primary actor's fiduciary relationship.[76] In sum, the test articulated in *Royal Brunei* calls for an

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[68] *See* Bratton & Wachter, *supra* note 11, at 63 (opining that the facts from *Rural Metro* "highlights the [aiding and abetting] theory's potential to generate big-ticket liability").

[69] *E.g.*, Anthony Clarke, 'Claims Against Professionals: Negligence, Dishonesty and Fraud' (2006) 22 PN 70, 71.

[70] *See id.*

[71] UK law looks for the existence of a fiduciary relationship, a breach of that relationship which results in a loss, assistance in that breach by a third-party, and dishonesty by the third-party. *See* Nikunj Kiri, 'Dishonest Assistance: The Latest Perspective From the Court of Appeal' (2007) 22 J.I.B.L.R. 305, 306.

[72] *See id.*

[73] Royal Brunei Airlines Sdn. Bhd. v. Tan, [1995] 2 A.C. 378, 389 (P.C.).

[74] *See id.*

[75] *See* Clarke, *supra* note 69, at 74.

[76] *See Royal Brunei*, [1995] 2 A.C. at 390.

objective analysis of a third-party's conduct with appreciation given to his personal attributes and his reasons for acting in the manner he did.[77]

Lord Nicholls' test on its face was said to be an objective one but its incorporation of subjective factors made it troublesome.[78] The House of Lords confronted this issue in *Twinsectra Ltd v. Yardley*.[79] The majority view advanced by Lord Hutton expanded the "dishonest assistance" test to include an objective element and a subjective element.[80] First, a third-party's conduct is examined for honesty compared to the standards of a reasonable, honest man.[81] Second, the conduct is examined for subjective reasonableness meaning a third-party has to appreciate that his conduct was dishonest when compared with an honest and reasonable man.[82]

Later English law cases explore the balancing of the subjective and objective elements of the combined test advanced in *Twinsectra*.[83] This comment will use Lord Hutton's combined test in proposing a subjective and objective analysis of "knowing participation" for use in Delaware aiding and abetting claims.[84]

III. THE PROBLEM

Two issues came to light after *Rural Metro*. First, how should a M&A financial advisor's relationship with his employing board be classified?[85] The *Rural Metro* opinion took the stance that bankers act as gatekeepers,[86] but the Delaware Supreme Court disagreed.[87] Second, a

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[77] *See id.* at 389.

[78] *See* Clarke, *supra* note 69, at 75.

[79] Twinsectra Ltd v. Yardley, [2002] 2 A.C. 164, 174 (H.L.).

[80] *See* Kiri, *supra* note 71, at 306.

[81] *See Twinsectra*, [2002] 2 A.C. at 172; Clarke, *supra* note 69, at 76.

[82] *See Twinsectra*, [2002] 2 A.C. at 172; Clarke, *supra* note 69, at 76.

[83] *See generally* Clarke, *supra* note 69, at 71 (examining the nature and evolution of the "dishonest assistance" test in UK law); Kiri, *supra* note 71, at 305 (offering guidance and clarification on the "dishonest assistance" test).

[84] *See infra* Part IV.

[85] *See* Tuch, *supra* note 11 (examining previous literature classifying financial advisors as gatekeepers, fiduciaries, or counterparties).

[86] *See In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 88 (Del. Ch. 2014) ("Financial advisors provide . . . expert services. In doing so, they function as gatekeepers."), *aff'd*, 129 A.3d 816, 824 (Del. 2015).

[87] RBC Capital Mkts. LLC v. Jervis, 129 A.3d 816, 865 n.191 (Del. 2015) (stating that the Delaware Supreme Court does not "adopt the Court of Chancery's description of the role of a financial advisor in M & A transactions"); Gatekeepers are outside professionals that advise a board of directors. In a M&A deal, they generally have great reputational capital on the line and receive a smaller incentive from ratifying a deal than does the principal. *See* Coffee, *supra* note 11, at 308.

plaintiff-friendly nuance of Delaware law appeared.[88] Directors that are found to be in breach of their duty of care are exculpated from direct liability if a corporation has a Delaware General Corporation Law ("DGCL") Section 102(b)(7) provision in its charter.[89] DGCL Section 102(b)(7) shields board members from liability in a duty of care claim; however, an underlying breach of the duty of care could serve as the predicate breach to allow a direct liability claim to proceed against a third-party who aided and abetted that breach.[90] These issues will be examined in turn.[91]

A. *Are Financial Advisors Gatekeepers?*

The investment banking industry is opposed to being classified as a gatekeeper in the M&A context.[92] However, this opposition is not unexpected, because financial advisors have traditionally relied on engagement letters filled with cautionary clauses to limit any potential liability.[93] Vice-Chancellor Laster's characterization of financial advisors as gatekeepers faced immediate criticism because it was not a role or set of duties financial advisors accepted in M&A deals.[94] The Delaware Supreme Court concluded that financial advisors are not gatekeepers.[95]

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[88]*See* Bratton & Wachter, *supra* note 11, at 64 (stating *Rural Metro* presents "a plaintiff-friendly quirk in Delaware law").

[89]A corporation may include this provision in their charter to eliminate director's personal liability arising from fiduciary breaches, except for the breach of loyalty and good faith. DEL. CODE ANN. tit. 8 § 102(b)(7) (2011).

[90]*See RBC Capital Mkts. LLC v. Jervis*, 129 A.3d at 857; Bratton & Wachter, *supra* note 11, at 64 (noting the denial of 102(b)(7) protection to RBC and the potential for direct liability).

[91]*See infra* Part III.A & Part III.B.

[92]*See* Brief of the Securities Industry and Financial Markets Association as Amicus Curiae in Support of Appellant and in Support of Reversal at 4, RBC Capital Mkts. LLC v. Jervis, No. 140, 2015 (Del. filed May 28, 2015) (suggesting the Court of Chancery's label of financial advisors as gatekeepers is "misplaced"); Alison Frankel, *Financial Advisers in Rural Metro Appeal: We're Not M&A Gatekeepers*, 29 WJDEC 10 (2015).

[93]*See* Bratton & Wachter, *supra* note 11, at 36–43 (examining financial advisors methods of limiting potential liability through engagement letters); Liz Hoffman, *RBC's Appeal on Merger Ruling Has Banks Concerned*, WALL ST. J. (Sept. 29, 2015, 7:43 PM), http://tinyurl.com/rbc-appeal-wsj.

[94]*In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 88 (Del. Ch. 2014), *aff'd*, 129 A.3d 816, 824 (Del. 2015); *see generally* Hoffman, *supra* note 93.

[95]RBC Capital Mkts. LLC v. Jervis, 129 A.3d 816, 865 n.191 (Del. 2015) (stating that the Delaware Supreme Court does not "adopt the Court of Chancery's description of the role of a financial advisor in M & A transactions").

Previous scholarly literature suggested that financial advisors would fall squarely into gatekeeper territory for their role in advising as to the fairness of an M&A deal.[96] Financial advisors generally gain business as a result of their reputational clout;[97] therefore, offering poor advice to a client board would not help an advisor in growing his business operations.[98] Beyond jeopardizing reputational capital, the threat of liability could be an additional incentive for financial advisors to provide rational, non-conflicted advice in certifying and verifying deals.[99] The potential liability resulting from approving the fairness of a merger should entice an advisor to ensure his client was not acting unreasonably and that the advisor was providing the necessary information for his client to act in a manner consistent with his fiduciary duties.[100]

The contrasting role to acting as a gatekeeper is acting as an arms-length counterparty.[101] Generally, the board and management of a sell-side company do not have the expertise or the time to facilitate a sales process or to determine the fair value of a company.[102] As a result,

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[96]Financial advisors "providing . . . 'fairness opinion[s]' as to the pricing of a merger" are an "[o]bivious example[]" of a gatekeeper. Coffee, *supra* note 11, at 309; *see also* Ted J. Fiflis, *Responsibility of Investment Bankers to Shareholders*, 70 WASH. U. L.Q. 497, 515 (1992) (arguing for the imposition of gatekeeper liability on bankers who offer negligent fairness opinions); Robert J. Giuffra, Jr., *Investment Bankers' Fairness Opinions in Corporate Control Transactions*, 96 YALE L.J. 119, 120 n.9 (1986) (explaining that bankers can serve as gatekeepers when they provide fairness opinions).

[97]*See* Lawrence A. Cunningham, *Beyond Liability: Rewarding Effective Gatekeepers*, 92 MINN. L. REV. 323, 335 (2007) (discussing recurring, frequent roles as a gatekeeper will add to the gatekeeper's value and "credence"); Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583, 1595 (2010) (arguing that gatekeepers have an incentive "to build and to preserve a reputation for diligence and honesty" in order to be engaged for future work).

[98]*See* Lucian Arye Bebchuk & Marcel Kahan, *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 DUKE L.J. 27, 41 (1989) ("Investment banks have an incentive to write opinions that attract future clients."); Coffee, *supra* note 11, at 309–10 ("[T]he gatekeeper as an entity would not rationally sacrifice its reputational capital for a single client or a modest fee.").

[99]A gatekeeper's opinion or assurance generally will be seen as more credible than if the opinion came directly from their client because the gatekeeper has less of an incentive to deceive other parties in a transaction. *See* Coffee, *supra* note 11, at 309.

[100]*See In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 89 (Del. Ch. 2014), *aff'd*, 129 A.3d 816 (Del. 2015); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994) (explaining a board needs to "inform[] themselves of all material information reasonably available" in a change of control transaction).

[101]*See generally* Bratton & Wachter, *supra* note 11, at 8 (opining that bankers arise as arm's-length counterparties in practice).

[102]*See Rural Metro*, 88 A.3d at 88; Bratton & Wachter, *supra* note 11, at 11–12 (explaining that a board of a selling-company needs expert outside advice from M&A advisors); Fiflis, *supra* note 96, at 515 (stating a banker's expertise and knowledge puts them in a better position than a selling-company's board to deliver opinions about the fairness of a bid).

directors enlist outside financial advisors for expert advice, fairness opinions, and suggestions for possible strategic alternatives.[103] Advisors and sell-side boards frame their relationship through an engagement letter.[104] Advisors craft an engagement letter to essentially contract out of any fiduciary type relationship.[105] After executing an engagement letter, financial advisors, drawing on their expertise, commence a sale process by valuing the selling company before beginning to search for potential bidders.[106] Scholars have noted that engagement letters "get the bankers comfortably close to immunity" from conflicts of interest and limit an advisor's exposure to liability absent some willful misconduct or bad faith action.[107] In a sense, an advisor is operating with a client board in a service industry type relationship.[108] Advisors use engagement letters as an opportunity to opt-out of a fiduciary relationship and to gain client consent for conflicts.[109]

This comment does not seek to add to the scholarly debate over whether financial advisors should qualify as gatekeepers, fiduciaries, or arms-length counterparties.[110] Rather, this comment builds on the

[103] *See* Allen, *supra* note 8, at 2061 (explaining that boards "naturally" turn to outside advisors for assistance in M&A transactions); Bratton & Wachter, *supra* note 11, at 11–12.

[104] The engagement letter provides the bankers fee arrangement, which often includes a retainer and percentage fee based on the ultimate sale price of the company. *See* Bratton & Wachter, *supra* note 11, at 13–14.

[105] An engagement letter often contains boilerplate disclosures of an advisor's conflicts to which a client then would consent to. These letters typically contain boilerplate disclosures limiting an advisor's liability to the client for any fiduciary duty stemming from grossly negligent conduct or willful misconduct. Engagement letters go even further so as to classify an advisor as an "independent contractor" who owes duties only to the client board. *See id.* at 36–43; *see generally* Daniel G. Berick, *Engagement Letters for Investment Banking Services*, 43 PRAC. LAW. 77, 78–79 (1997) (explaining the elements generally found in a financial advisors engagement letter).

[106] *See* Bratton & Wachter, *supra* note 11, at 12–13.

[107] *See id.* at 42–43.

[108] *See* Arthur H. Rosenbloom, *Investment Banker Liability: A Panel Discussion*, 16 DEL. J. CORP. L. 557, 564 (1991) (statement of Arthur H. Aufses, III) ("[I]nvestment bankers . . . see advice as a basic service being sold to director clients . . . .").

[109] As to potential conflicts, the boilerplate language in an engagement letter usually informs a client that the bank is a large, multifaceted institution that may have many potential conflicts. *See* Bratton & Wachter, *supra* note 11, at 36–37; Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557, 1568 (2006) (noting the customary indemnification clauses and conflict disclosures bankers place in engagement letters).

[110] This debate is left to more learned scholars. *See generally* Bratton & Wachter, *supra* note 11, at 8 (opining a banker-client relationship is one of arm's-length counterparties); Coffee, *supra* note 11, at 309 (offers bankers providing fairness opinions as an example of a gatekeeper); Tuch, *supra* note 11 (examining bankers as possible fiduciaries to their M&A clients).

Delaware Supreme Court's narrow holding on the issue.[111] The aiding and abetting claim results from a financial advisor's "knowing participation" established through the advisor's creation of an "informational vacuum" during his client's sale.[112] The focus of this comment is not to pursue a better claim of action against financial advisors for misconduct or disloyalty. The purpose of this comment is to give financial advisors, boards, and attorneys a clearer framework for diagnosing "knowing participation" in an aiding and abetting claim.[113]

B. *The 102(b)(7) Workaround*

Rural Metro is the first case to extend aiding and abetting liability to a breach of the duty of care.[114] The purpose of DGCL Section 102(b)(7) is to exculpate corporate directors from personal liability for a breach of the duty of care.[115] This exculpation leaves a direct liability claim against a third-party for aiding a board's breach of the duty of care.[116] *Rural Metro* presented this scenario and left RBC Capital Markets liable to shareholders for $76 million.[117]

This plaintiff-friendly nuance of Delaware law appears to be a workaround for shareholders to impose direct liability on a third-party with a deep pocket.[118] The Delaware Supreme Court previously passed on the question of whether a third-party can "knowingly participate" in a board's breach of the duty of care or a board's grossly negligent fiduciary

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[111] *See* RBC Capital Mkts. LLC v. Jervis, 129 A.3d 816, 862 (Del. 2015) (stating that the Delaware Supreme Court affirms the trial court's decision that a third party that misleads a board or creates the "informational vacuum" can be held to have knowingly participated in aiding and abetting a board's breach of a fiduciary duty).

[112] *See id.*

[113] *See infra* Part IV.

[114] Appellant RBC Capital Markets, LLC's Opening Brief at 46, RBC Capital Mkts. LLC v. Jervis, No. 140, 2015 (Del. filed May 19, 2015) (noting appellants found no other Delaware case extending aiding and abetting liability resulting from an underlying breach of the duty of care by a board of directors).

[115] Of course the corporation must include this provision in its charter. DEL. CODE ANN. tit. 8 § 102(b)(7) (2011); *see* Emerald Partners v. Berlin, 787 A.2d 85, 90 (Del. 2001) (explaining that 102(b)(7) allows for exculpation of directors from personal liability for any damages resulting from a breach of the duty of care).

[116] *See* Goodwin v. Live Entm't Inc., 1999 WL 64265, at *28 (Del. Ch. Jan. 25, 1999) (noting skepticism of allowing an aiding and abetting claim where the underlying fiduciary breach is one of gross negligence).

[117] *In re* Rural Metro Corp. Stockholders Litig., 102 A.3d 205, 263 (Del. Ch. 2014), *appeal dismissed*, 105 A.3d 990 (Del. 2014).

[118] *See* Bratton & Wachter, *supra* note 11, at 64 (noting the 102(b)(7) workaround allowed Plaintiffs to "nail[] the banker directly" in the RBC Capital case).

breach.[119] Prior Court of Chancery cases stated the underlying breach of an aiding and abetting claim had to be done in an "inherently wrongful manner."[120] Then Vice-Chancellor Strine noted skepticism in finding "knowing participation" by a third-party when the underlying breach was an exculpated, breach of the duty of care.[121] Accepting a duty of care breach as the predicate for an aiding and abetting claim essentially allows shareholders to make out a direct claim against a third-party while the individual directors themselves cannot be held personally liable for the underlying breach.[122]

Rural Metro is an important case in this sense because Vice-Chancellor Laster found liability for an aiding and abetting claim where the underlying, predicate fiduciary breach was for gross negligence, which allowed the directors to be insulated from monetary liability by DGCL 102(b)(7).[123] This workaround allowed the Rural-shareholders to assert what amounted to a direct claim against RBC, the sell-side financial advisors.[124] This is what then-Vice-Chancellor Strine predicted in *Goodwin*.[125] *Rural Metro* did not allow RBC to find any safe harbor under DGCL Section 102(b)(7),[126] and the Delaware Supreme Court's decision on appeal did not change that.[127]

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[119]*See* Malpiede v. Townson, 780 A.2d 1075, 1097 n.78 (Del. 2001) (expressing no opinion on whether the underlying fiduciary breach to an aiding and abetting claim could be one of gross negligence).

[120]*See* Nebenzahl v. Miller, 1996 WL 494913, at *7 (Del. Ch. Aug. 26, 1996) (citations omitted); *see also* Greenfield v. Tele-Communications, 15 DEL. J. CORP. L. 182, 187 (Del. Ch. 1989) (stating that "knowing participation" could be inferred from facts pled to show a third-party knew "that the fiduciary was endeavoring to breach his duty").

[121]"I find little merit [that defendants] . . . can be subject to accomplice liability for 'knowingly participating' in alleged breaches of the duty of care by the Board, breaches from which the Board is insulated from liability." Goodwin v. Live Entm't Inc., 1999 WL 64265, at *28 (Del. Ch. Jan. 25, 1999) (citations omitted).

[122]*See id.*

[123]In making his ruling in *Rural Metro*, Vice-Chancellor Laster noted that the Delaware Supreme Court had never declared an aiding and abetting claim could be supported by an underlying fiduciary breach that was grossly negligent. *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 98–99 (Del. Ch. 2014), *aff'd*, 129 A.3d 816 (Del. 2015).

[124]Rural's board of directors were exculpated from personal monetary liability by a 102(b)(7) provision. DEL. CODE ANN. tit. 8 § 102(b)(7) (2011).

[125]*See Goodwin*, 1999 WL 64265, at *28.

[126]*See Rural Metro*, 88 A.3d at 86 (stating that Rural's 102(b)(7) provision does not provide any exculpation to RBC).

[127]RBC Capital Mkts. LLC v. Jervis, 129 A.3d 816, 874 (Del. 2015).

IV. THE BLENDED STANDARD FOR "KNOWING PARTICIPATION"

The Section 102(b)(7) workaround should entice financial advisors to normalize their conduct in an effort to steer clear from potential liability for aiding and abetting a board's breach of the duty of care.[128] This section seeks to clarify the "knowing participation" element of an aiding and abetting claim by proposing the use of a blended standard of UK law and US law.[129]

The "knowing participation" element is at the forefront of an aiding and abetting a breach of a fiduciary duty claim.[130] A third-party must act with the understanding that his assistance to a board will lead the board to breach some duty owed to his beneficiaries.[131] In *Rural Metro*, the third-party financial advisor assisted the board's fiduciary breach by creating the "informational vacuum" that left the board unprepared and inadequately informed when selling its company.[132] The "knowing participation" element should be clarified in an effort to keep financial advisors from funneling self-benefitting information to a client-board when that information may lead a client-board to breach some duty it owes to shareholders. Adding the two prong "dishonest assistance" analysis to the "knowing participation" element will assist financial advisors in their role as trusted experts to client-boards.[133]

A. *The Honest and Reasonable Financial Advisor*

The first prong of the proposed blended analysis analyzes a financial advisor's conduct objectively.[134] The fact finder would judge a defendant-advisor's conduct in light of what an honest, reasonable professional would do under the same circumstances.[135] In defining an honest and reasonable professional, a fact finder would give him the

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[128]Financial advisors can now be held liable for aiding and abetting a board's breach of their duty of care–a breach in which boards are generally insulated from monetary liability by 102(b)(7) protections. *See supra* Part III.

[129]*See infra* Part IV.A & Part IV.B.

[130]*See* Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc., 1995 WL 694397, at *15 (Del. Ch. Nov. 21, 1995).

[131]*See* Malpiede v. Townson, 780 A.2d 1075, 1097 (Del. 2001).

[132]*See In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 100 (Del. Ch. 2014), *aff'd*, 129 A.3d 816 (Del. 2015).

[133]*See* Rosenbloom, *supra* note 108, at 603 (statement of Dale Arthur Oesterle) ("[B]oards of directors in takeover situations need advice from experts on the critical question before them: should the board accept a deal at an offered price?").

[134]*See* Royal Brunei Airlines Sdn. Bhd. v. Tan, [1995] 2 A.C. 378, 389 (P.C.) (creating the layout of the honest and reasonable man in the English doctrine of "dishonest assistance").

[135]*See id.*

same intelligence, level of experience, and professional characteristics as the defendant-advisor.[136]

Defining honesty is necessary to applying the first prong of the blended standard. Dishonesty is not acting as an honest person would.[137] An honest person is someone who is respectable and is "marked by integrity."[138] An honest person does not act in a fraudulent or deceptive manner.[139] By contrast, dishonesty is equal with "conscious impropriety."[140] An honest man would not deceive another so as to gain a benefit for himself while disadvantaging the other party.[141] An honest man would not approve a deal that he knows is detrimental to his client's beneficiaries.[142] An honest man would appreciate the importance of a transaction to all those involved and would be aware of the importance of his role in the transaction.[143]

The honest and reasonable financial advisor would place a client's interests above his own self-interests.[144] A banker's stamp on a M&A deal is assurance that a bid to buy a client-company is fair and reasonable to the client-company and its shareholders.[145] An honest financial advisor would not abuse this privilege and his integral role as an advisor as a means to further his own interests at the possible expense of a client or their beneficiaries.[146] Thus, many possible actions taken by a financial advisor would be dishonest when examined under this objective test.[147]

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[136]*See id.* at 391; *See also infra* Part IV.B (FINRA rules and regulations can be useful to define an honest and reasonable banker).

[137]*See Royal Brunei*, [1995] 2 A.C. at 389 (explaining that "acting dishonestly . . . means simply not acting as an honest person would in the circumstances").

[138]*See* MERRIAM-WEBSTER'S NEW COLLEGIATE DICTIONARY 549 (1973).

[139]*See id.*

[140]*Royal Brunei*, [1995] 2 A.C. at 389.

[141]*See id.*

[142]*See id.*

[143]*See id.* at 390.

[144]*See* Coffee, *supra* note 11, at 346 (noting that a gatekeeper's loyalty to a client must be weighed together with their role as a market-protector).

[145]*See* Davidoff, *supra* note 109, at 1565 (stating a fairness opinion is a financial advisor's opinion on whether a transaction "is within a range of values encompassing financial fairness"); Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary: Delaware's Framework for Disclosing Fairness Opinions*, 63 BUS. LAW. 881, 882–83 (2008) (discussing the use of fairness opinions under Delaware law).

[146]The *Royal Brunei* decision was not handed down in a M&A dispute but its principles of law are helpful in shaping this comment's blended analysis. *See generally Royal Brunei*, [1995] 2 A.C. at 389 (stating "[h]onest people do not intentionally deceive others to their detriment").

[147]Many of the actions taken by RBC in *Rural Metro* can be used as examples of dishonesty. RBC's actions were used as the basis for this comment's blended standard. *Cf. In*

A financial advisor's decision to pitch the sale of his client-company to only certain firms that are likely to give the advisor priority in financing the acquisition would be dishonest.[148] Choosing select buy-side firms that may potentially enrich an advisor as opposed to accepting bids from any firm that may pay top dollar for the client-company is an example of putting the advisor's interest above the client's.[149] Similarly, steering a client-company into accepting a bid from a banker's preferred buy-side firm is dishonest.[150] A banker would be pushing the client-company to accept a bid with an interest in building a relationship with the buy-side firm as opposed to conducting a sale that is the most beneficial to the client-company.[151]

Under the blended analysis, any backdoor dealings by an advisor would also be scrutinized for dishonesty. An honest banker would not decrease the projected value of a client-company to make a buy-side firm's low bid look more attractive.[152] An honest banker would act on the contrary: give a fair, well-reasoned valuation that accurately portrays the value of a client-company.[153] An honest banker would not provide a bidding buy-side firm with confidential information from inside a client-company's boardroom.[154] Under the blended standard, such actions

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re Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 100 (Del. Ch. 2014), *aff'd*, 129 A.3d 816 (Del. 2015).

[148]RBC pitched Rural's sale to a select group of buy-side firms it felt would include them on the buy-side financing work. *Cf. id.* at 91.

[149]*See id.*

[150]*Cf. id.*; *In re* El Paso Corp. S'holders Litig., 41 A.3d 432, 445 (Del. Ch. 2012) (explaining that Goldman Sachs steered the sell-side board towards a deal with Kinder Morgan which was in Goldman's self-interest).

[151]Staple financing is a good example of a sell-side financial advisor pushing the client-company to accept an offer from the advisors preferred bidder. *See* Foulds, *supra* note 10, at 536 (noting that in a staple-financing transaction a financial advisor could receive a total transaction fee in which only 20% of the fee is from advising the sell-side board with the remaining 80% coming from any generated staple-lending work).

[152]The selling-company's board is under a duty to "get the highest value reasonably attainable for the shareholders." By intentionally lowering a selling-company's valuation a financial advisor would be baiting the selling-company's board to breach this duty. *See* Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1288 (Del. 1989); *cf. Rural Metro*, 88 A.3d at 95–96 (explaining that RBC was attempting to make Warburg Pincus' bid more appealing to the Rural board by suppressing the company's valuation).

[153]*See, e.g.*, *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 203–04 (Del. Ch. 2007) (stating that a banker's acceptance of a transactions fairness is based on the methods they used to arrive at that valuation including the figures and values used).

[154]The internal deliberations of a selling-company's board and its interactions with its financial advisors "should be kept confidential from the interested parties and their negotiators." *See* Jeffrey A. Chapman & Benjamin W. James, *The Use of Special Committees in Mergers and Acquisitions*, 42 TEX. J. BUS. L. 315, 330 (2008); *cf. Rural Metro*, 88 A.3d at 95 (explaining that RBC was tipping the buy-side firm about the inside thoughts of the Rural board).

would be done with the interest of the banker in mind rather than in the best interest of the client-company.

B. *The Subjective View of the Defendant-Financial Advisor*

The second prong of the blended analysis examines an advisor's conduct subjectively.[155] The subjective element requires a third-party to realize his conduct was dishonest as judged against the honest and reasonable professional.[156] Proving this subjective standard should not be difficult once the objective element of the test is met.[157]

The Financial Industry Regulatory Authority's ("FINRA") rules should act as a guide when analyzing a financial advisor's subjective realization that his conduct was dishonest.[158] Bankers in M&A deals should be registered with FINRA and as a consequence fall under the organization's self-regulatory authority.[159] As a member of FINRA, a banker "shall observe high standards of commercial honor and just and equitable principles of trade."[160] In addition, as a FINRA member, a financial advisor is obligated to disclose conflicts when issuing a fairness opinion to a client-board.[161] As a consequence of an M&A financial advisor's need to register with FINRA, it would be hard for any advisor

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[155] *See generally* Twinsectra Ltd v. Yardley, [2002] 2 A.C. 164, 172 (H.L.) (adding the subjective element to the "dishonest assistance" claim in English law).

[156] "[T]he defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men." *See id.* at 174.

[157] *See* Royal Brunei Airlines Sdn. Bhd. v. Tan, [1995] 2 A.C. 378, 391 (P.C.) (stating that a professional's conduct should be easily identified as being dishonest if that conduct "would offend the normally accepted standards of honest conduct"); Clarke, *supra* note 69, at 76 (stating that where the third-party's conduct is "obviously dishonest by ordinary standards, there will be no doubt about" whether the third-party subjectively realized same).

[158] FINRA is a non-governmental organization that regulates broker-dealers and carries out the "effective and efficient regulation of the securities industry." FINRA, http://www.finra.org/about (last visited June 1, 2016). The need for a self-regulating organization to police bankers was foreshadowed by lawyers and bankers in the early 1990's. *See generally* Rosenbloom, *supra* note 108, at 569 (statement of David J. Bershad) ("I do not believe that there is a professional organization . . . that is setting out standards to govern the way bankers function. The result is a vast potential for conflict in the way investment bankers function . . . .").

[159] *See* Andrew F. Tuch, *The Self-Regulation of Investment Bankers*, 83 GEO. WASH. L. REV. 101, 118 (2014) (stating that "banker[s] acting as an M&A advisor will qualify as a broker" thus mandating them to register with FINRA and follow the organizations rules).

[160] FINRA MANUAL R. 2010 (2008).

[161] The banker is required to disclose "any material relationships that existed during the past two years" that resulted in compensation "as a result of the relationship between the member [banker] and any party to the [proposed] transaction." FINRA MANUEL R. 5150 (2008).

to show he did not know his conduct was dishonest when adjudged against the honest and reasonable standard.[162]

V. CONCLUSION

Rural Metro's precedent allowing advisors to be held liable for aiding and abetting a board of director's breach of the duty of care is causing concern within the financial advising industry. The crutch of an aiding and abetting claim is the "knowing participation" element. Examining the "knowing participation" element for a financial advisor's objective and subjective dishonesty will provide clarity. The proposed blended "knowing participation" standard will give financial advisors, boards, and attorneys in M&A litigation, a clearer understanding of what conduct will give rise to an aiding and abetting claim in the Delaware Court of Chancery post *Rural Metro*.

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[162] *Cf.* Tuch, *supra* note 159.