REVVING-UP *REVLON* IN THE WAKE OF *RURAL METRO*: A CALL FOR DIRECT LIABILITY ON FINANCIAL ADVISORS

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I. INTRODUCTION

Corporate business and finance is grounded in transactional expertise. In modern business, the decisions made and actions taken by corporate directors and officers are critical in the context of mergers and acquisitions (M&A) because of the integral role that these directors and officers play in the transactions.[1] Equally, if not more, essential is the role of financial advisors, namely investment banks.[2] Today, 97.5% of M&A transactions valuing over $100 million attract stockholder litigation,[3] which ensues when shareholders believe their investments have been exposed to adverse effects of the mergers, such as losses from bad sales or poor decisions by directors and officers.[4] In such litigation, plaintiffs' attorneys have targeted sell-side financial advisors in their search for "deep-pocketed" defendants.[5]

Traditionally in stockholder litigation, corporate officers, accountants, auditors, and those handling financial reporting were "considered primary components in maintaining integrity and public confidence in the marketplace."[6] It seems, however, that plaintiffs have discovered that

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1 Alexandra R. Lajoux, *Role of the Board in M&A*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 7, 2015), https://corpgov.law.harvard.edu/contributor/alex-lajoux/ (explaining that directors have two main roles in M&A transactions: readiness and oversight).

2 Dale Arthur Oesterle & Jon R. Norberg, *Management Buyouts: Creating or Appropriating Shareholder Wealth?*, 41 VAND. L. REV. 207, 211 (1988). The financial advisor is hired by the corporation for its expertise in the current or prospective M&A transaction. *Id.* Often, the chosen advisors are investment banks, which present expertise in "price evaluations and assistance in securing financing, issuing new securities, structuring bids, and mounting defenses." *See id.*

3 Robert S. Reder & Stephanie Stroup Estey, *Sell-Side Financial Advisors in the M&A Crosshairs*, 68 VAND. L. REV. EN BANC 279, 280 (2015).

4 *See generally id.* (suggesting that poor decisions from investment advisors and directors may result in loss of shareholders' stock value, resulting in millions of dollars in liability).

5 *Id.* at 279.

6 Mark Klock, *Two Possible Answers to the Enron Experience: Will It Be Regulation of*

financial advisors also play an integral role in M&A, as they have begun to target "sell-side financial advisors as a means to obtain monetary damages . . . by claiming these advisors aided and abetted alleged fiduciary breaches by the target company boards which retained them."[7]

It is well settled that in M&A, sell-side boards of directors can be held liable for breach of fiduciary duty to shareholders of corporations.[8] Section 102(b)(7) of Delaware General Corporate Law, however, permits a corporation to include an exculpatory provision in its certificate of incorporation that protects individual directors from personal liability to shareholders for breaches of fiduciary duties.[9] Yet, the statute does not mention whether corporate officers or corporate advisors, such as investment banks, are similarly shielded.[10] Over the past few decades, courts have ruled that sell-side boards of directors and corporate officers may be held liable for breaches of fiduciary duties resulting from the transaction, if certain conditions exist.[11] Arguably, the most important case regarding director and officer liability in transactions is *Revlon, Inc. v. MacAndrews & Forbes Holdings*,[12] which set the tone for what would eventually become the modern "*Revlon* doctrine." In *Revlon*, the court stated that "[t]he ultimate responsibility for managing the business and affairs of a corporation falls on its board of directors, . . . [which owes] fiduciary duties of care and loyalty to the corporation and its shareholders."[13]

Modern case law, however, has increasingly targeted sell-side financial advisors, namely investment banks, by holding advisors liable for aiding and abetting directors' breach of fiduciary duty.[14] The paramount case, which set the stage for this new trend over the past few years, is *In re Rural Metro Corp. Stockholders Litigation*.[15] In *Rural Metro*, the court held that a

Fortune Tellers or Rebirth of Secondary Liability?, 28 Iowa J. Corp. L. 69, 80 (2002).

7 Robert S. Reder & Margaret Dodson, *Delaware Supreme Court Upholds Multi-Million Dollar Damages Award Against Sell-Side M&A Advisor*, 69 Vand L. Rev. En Banc 27, 27 (2016).

8 *See generally* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986); *In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265, at *68–77 (Del. Ch. Oct. 20, 2015); Mohsen Manesh, *Nearing 30, Is* Revlon *Showing Its Age?*, 71 Wash. & Lee L. Rev. Online 107 (2014).

9 Del. Code Ann. tit. 8, § 102(b)(7) (2015).

10 *See* Reder & Dodson, *supra* note 7, at 28.

11 *See Revlon*, 506 A.2d at 185; *TIBCO*, 2015 Del. Ch. LEXIS 265, at *68–77.

12 506 A.2d 173. *Revlon* is integral to the field, as it still serves as the basis for the continuing expansion of the doctrine, which this Comment argues is displayed in *Rural Metro*. *See In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014).

13 *Revlon*, 506 A.2d. at 179.

14 *See, e.g.*, *In re* Zale Corp. Stockholders Litig., No. 9388-VCP, 2015 Del. Ch. LEXIS 274 (Del. Ch. Oct. 29, 2015); *TIBCO*, 2015 Del. Ch. LEXIS 265; *Rural Metro*, 88 A.3d 54.

15 *Rural Metro*, 88 A.3d 54 (holding the financial advisors liable for aiding and abetting breach of fiduciary duty by directors in sale of company).

company's board of directors had breached its fiduciary duties to its shareholders, and subsequently ruled that the company's advisor, an investment bank, had knowingly aided and abetted in the breach of those duties.[16] Sell-side financial advisors should not take rulings like *Rural Metro* lightly, as the Delaware Chancery Court held the advisor liable for $78.5 million in damages for aiding and abetting.[17]

This Comment highlights the *Rural Metro* doctrine's importance and its implications on financial advisors in sell-side transactions and mergers. Predominantly, this Comment argues that the *Rural Metro* doctrine is more essential than ever as an expansion of the *Revlon* doctrine, and that financial advisor liability should not be dependent on the liability of the directors and boards. Financial advisors have an incredible impact on sell-side M&A because of their expertise and influence on the boards of directors, and should, therefore, be held to a higher standard. Part II examines the history and background of case law and the liability of different parties in sell-side transactions, including financial advisors. This discussion focuses first on the *Revlon* doctrine, and then highlights key cases that have expanded liability in sell-side transactions through use of the *Rural Metro* doctrine. Part III explores the role of financial advisors in M&A. Part IV examines the modern expansion of the *Revlon* doctrine and its implications on financial advisors. Lastly, Part V proposes that holding sell-side financial advisors directly liable to the shareholders is imperative to make the advisors more accountable and increase shareholder protection during mergers and acquisitions.

II. THE BUILDING BLOCKS OF THE MODERN DOCTRINE: SECTION 102(b)(7) AND *REVLON*

A. *Delaware Code § 102(b)(7)*

The Delaware legislature initially lightened the burden of liability on directors by permitting exculpation provisions in a corporation's governing documents.[18] These provisions remove liability for breaches of the duty of care.[19] Section 102(b) of the Delaware Code states:

16 *Rural Metro*, 88 A.3d at 63. For a thorough discussion of the *Rural Metro* case and the *Rural Metro* doctrine, see *infra* Part IV.C.1.

17 Reder & Dodson, *supra* note 7, at 28; *see* Manesh, *supra* note 8, at 134 ("[T]he investment banks that knowingly advise or assist corporate boards in an unreasonable sales process may face harsh monetary sanctions for aiding and abetting a *Revlon* violation.").

18 *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2015).

19 *Id.*

> In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters: . . . (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit.[20]

In addition to providing protection to the individual directors, section 102(b)(7) ensures that individual directors and corporate officers "do not become overly risk-averse," though officers are not actually protected under the statute.[21] Section 102(b)(7) exculpatory provisions have had a profound effect on change-of-control transactions because of their power to provide complete protection to directors from certain liabilities.[22] Ultimately, exculpatory provisions eliminate director liability to the shareholders for a breach of the duty of care.[23] Delaware courts have protected individual directors by honoring exculpatory clauses even when they have found that the board, as a whole, had breached its duty of care.[24]

Despite the favorable protections exculpatory provisions provide to directors, these clauses do not expressly protect officers, financial advisors, or bad faith directors. Nor is Delaware legislature's intent clear from section 102(b)(7).[25] The statutory language refers to individual directors, but "it

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20 *Id.*

21 *Id.* at 87.

22 WILLIAM K. SJOSTROM, JR., BUSINESS ORGANIZATIONS: A TRANSACTIONAL APPROACH 449 (2d ed. 2016) (stating that an exculpatory provision, as designated in section 102(b)(7), "essentially allows a corporation to opt out of having its directors be personally liable for monetary damages for breach of the duty of care"). *Revlon* ultimately creates a separate duty, which is used in change-of-control scenarios. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

23 *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 86 (Del. Ch. 2014).

24 *See, e.g.*, *In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265 (Del. Ch. Oct. 20, 2015); *In re* Lear Corp. S'holder Litig., 967 A.2d 640 (Del. Ch. 2008); McPadden v. Sidhu, 964 A.2d 1262 (Del. Ch. 2008). Under section 102(b)(7), a duty of care claim is essentially destroyed if there is an exculpation provision in the corporation's governing documents. See DEL. CODE ANN. tit. 8, § 102(b)(7) (2015). Therefore, courts will usually protect the directors from liability under the duty of care unless their decisions are grossly negligent. *McPadden*, 964 A.2d at 1273–74.

25 *See* Manesh, *supra* note 8, at 118. Directors who act with gross bad faith or malevolence may not be protected by the statute. *Id.*

does not extend to aiders and abettors."[26] *In re TIBCO Software Inc. Stockholders Litigation*, which will be discussed in Part IV, C, illustrated this point. There the Delaware Chancery court held that although the directors were not personally liable for their breach of fiduciary duty, the financial advisor was liable for aiding and abetting that breach because section 102(b)(7) does not apply to financial advisors.[27] Section 102(b)(7) displayed the Delaware legislature's statutory approach to director liability in M&A transactions, and the courts followed with their own approach in *Revlon*.

B. *The* Revlon *Doctrine*

Revlon allowed the Delaware courts to consider the scope of directors' liability in sell-side transactions.[28] In *Revlon*, the Chairman of the Board and Chief Executive Officer of Pantry Pride, Inc., met with his counterpart at Revlon to discuss a possible acquisition of Revlon, Inc.[29] The Pantry Pride board subsequently authorized the Chairman to acquire Revlon, and the Revlon board met to consider the impending threat of a hostile bid from Pantry Pride.[30] At the meeting, Lazard Freres, Revlon's investment banker, advised the directors that Pantry Pride's asking price for Revlon stock was incredibly inadequate.[31] A number of failed negotiations followed that initial offering, with increasing bid offers from Pantry Pride for Revlon stock.[32] Eventually, Pantry Pride announced "it would engage in fractional bidding and top any [other third-party] offer by a slightly higher one."[33] The Revlon board, however, approved a third-party proposal at a price point higher than the Pantry Pride bid because the Board thought the third-party proposal better protected the Revlon shareholders.[34]

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26 *Rural Metro*, 88 A.3d at 86; *see* Manesh, *supra* note 8, at 130.

27 *See TIBCO*, 2015 Del. Ch. LEXIS 265, at *69–71; *see also* Reder, *supra* note 7, at 28; *contra* Susan E. Springer, Casenote, *Central Bank v. First Interstate Bank and the Demise of Section 10(b) Private Aiding and Abetting Liability: Opting for a Rule of Economic Efficiency*, 4 Geo. Mason L. Rev. 213, 213 (1995) (explaining that in prior case law, the Supreme Court had "denied private plaintiffs the right to sue aiders and abettors under" the 1934 Securities Exchange Act).

28 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (1986).

29 *Id.* at 176.

30 *Id.*

31 *Id.* at 177.

32 *Id.* at 177–78.

33 *Id.* at 178.

34 *Revlon*, 506 A.2d at 179 ("The board unanimously approved Forstmann's proposal because: (1) it was for a higher price than the Pantry Pride bid, (2) it protected the noteholders, and (3) Forstmann's financing was firmly in place.").

The *Revlon* court held the board of directors liable for breaching its fiduciary duty to its stockholders.[35] The Supreme Court of Delaware created a new fiduciary duty: a corporation's board of directors in a sell-side transaction must simply get the "best price" for its shareholders.[36] Furthermore, the court made clear that directors are "strictly held" to their fiduciary duties to the stockholders.[37] The Delaware court found that the Revlon's directors were concerned only with certain noteholders when they accepted the later third-party deal, rather than actually maximizing the sale price for the benefit of Revlon's stockholders.[38] The court reasoned that upon the imminent breakup and sale of the company, the Revlon "directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders . . . ."[39] Ultimately, *Revlon* created a separate duty, which stands for the rule that in M&A, sell-side boards of directors are held to a strict duty to obtain the best price for shareholders and maximize value.[40]

C. *Debate over the* Revlon *Ruling*

The *Revlon* ruling has inspired study and debate among scholars and practitioners over the past few decades. Some, like professors Lyman Johnson and Robert Ricca, assert that the *Revlon* doctrine is obsolete and no longer has a profound effect on the M&A field.[41] Johnson and Ricca's thesis argues that courts are reluctant to hold the board liable unless there is clearly outrageous conduct from a board of directors.[42] They argue that modern corporate and financial law has evolved so rapidly around *Revlon* that the importance of the doctrine has been severely diminished.[43] In addition, Johnson and Ricca assert that the *Revlon* doctrine no longer helps plaintiffs in suits against financial advisors because the courts have bestowed a "heavy burden" on litigants to prove that investment advisors aided and abetted the

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35 *Id.* at 182. No fiduciary duty was breached; instead, a new kind of duty was created by the Delaware Supreme Court, which applies specifically to change of control transactions. *See id.*

36 *Id.*

37 *Id.* at 181. The court noted that this standard requires the directors to act in the best interest of the corporation and its shareholders, imposing "an enhanced duty to abjure any action that is motivated by considerations other than a good faith concern for such interests." *Id.*

38 *Id.* at 182.

39 *Id.*

40 *Revlon*, 506 A.2d at 182.

41 Lyman Johnson & Robert Ricca, *The Still-Dwindled Revlon*, 71 WASH. & LEE L. REV. ONLINE 150 (2014).

42 *Id.* at 152.

43 *Id.* at 151.

breach of fiduciary duty.[44]

Others, in contrast, oppose Johnson and Ricca's argument, and explain that the *Revlon* doctrine has, in fact, expanded its reach with the evolution of modern corporate law and change-of-control transactions.[45] For example, Professor Mohsen Manesh directly rejects Johnson and Ricca's thesis.[46] Instead, Manesh explains how recent Delaware case law "underscore[s] the expansive reach" of the *Revlon* doctrine.[47] Specifically, he discusses that *Revlon*'s expansion is demonstrated by the courts' application of the doctrine to corporate financial advisors.[48] Manesh contends that *Revlon* is a significant legal precedent today, and that "chancery court decisions demonstrate *Revlon*'s extensive grasp, reaching corporate directors, officers, and even corporate advisors" to protect shareholders in change-of-control transactions.[49] Furthermore, Professor Manesh argues that the *Revlon* doctrine's present relevancy is illustrated by continued scholarly debate and interest in its boundaries.[50]

Although the boundaries of *Revlon* remain unsettled and unclear, this Comment supports Professor Manesh's stance, and argues that the *Revlon* doctrine is not only still relevant, but is actually expanding further into the different realms of corporate law. The *Revlon* doctrine, however, should be even further expanded to hold financial advisors to a higher standard.[51] That is, financial advisor's liability should not be solely dependent on a finding of aiding and abetting a breach of fiduciary duty, but they should be *directly* accountable for breaches of fiduciary duties to a corporation's shareholders for the acquisitions on which they have a heavy negative impact.

44 *Id.* at 153.

45 *See generally* Manesh, *supra* note 8.

46 *See generally* Manesh, *supra* note 8.

47 *See generally* Manesh, *supra* note 8, at 110. *See, e.g.*, *In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015); *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014).

48 Manesh, *supra* note 8, at 129–30.

49 Manesh, *supra* note 8, at 145.

50 Manesh, *supra* note 8, at 108.

51 As the *Rural Metro* holding demonstrates, financial advisors can be held liable for aiding and abetting, but not direct liability to the shareholders. *See Rural Metro*, 88 A.3d 54.

III. THE ROLE OF FINANCIAL ADVISORS IN M&A TRANSACTIONS

A. *Financial Advisors and Sell-Side Transactions*

Financial advisors, namely investment banks, have a crucial and profound role in, and effect on, sell-side transactions.[52] Investment bankers have three main roles in M&A: (1) a facilitator function; (2) to give fairness opinions; and (3) a strategic advisory function.[53] The financial advisor, as a facilitator, has two primary roles. First, the investment banker must arrange acquisition financing.[54] Raising capital is perhaps the investment banker's most important function in the transaction, and his or her skillset is required to design complex financial plans and instruments needed to tend to certain transactions such as mergers.[55] Second, an investment banker is an "auctioneer" in sell-side transactions: he or she essentially negotiates with the prospective acquiring companies to obtain the best share price.[56] An investment banker's expertise in the market and the effectiveness of certain share prices are crucial to negotiations.[57]

Next, the financial advisor's arguably most controversial and influential responsibility in M&A is to issue "fairness opinions."[58] A fairness opinion is an investment banker's opinion as to whether a prospective acquirer's bid is a "fair" asking price for the shares.[59] These opinions are heavily considered by the board of directors, and may include the investment bankers' recommendation of whether the board it advises should sell the company.[60] Fairness opinions have been heavily criticized,[61] and "[m]uch of the criticism focuses on the potential for conflicts of interest between the shareholders, the purported beneficiaries of the opinion, and the investment banker."[62] The misuse of fairness opinions by financial advisors

52 *See generally* Oesterle & Norberg, *supra* note 2; *see also* M. Breen Haire, *The Fiduciary Responsibilities of Investment Bankers in Change-of-Control Transactions: In re Daisy Systems Corp.*, 74 N.Y.U. L. REV. 277 (1999).

53 Haire, *supra* note 52, at 290–91.

54 Haire, *supra* note 52, at 290–91.

55 Haire, *supra* note 52, at 290–91.

56 Haire, *supra* note 52, at 291.

57 Haire, *supra* note 52, at 291.

58 Haire, *supra* note 52, at 292. It is the most influential function of the advisor, because the boards' decisions to buy or sell a company will rely heavily on the fairness opinion it receives from its financial advisors.

59 Haire, *supra* note 52, at 292–95; *see In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265, at *22–23 (Oct. 20, 2015).

60 *See TIBCO*, 2015 Del. Ch. LEXIS at *22–23.

61 Haire, *supra* note 52, at 293 (first citing Robert J. Giuffra, Jr., *Investment Bankers' Fairness Opinions in Corporate Control Transactions*, 96 YALE L.J. 119, 123, 127–28 (1986); then citing Jonathan R. Macey & Geoffrey P. Miller, *Trans Union Reconsidered*, 98 YALE L.J. 127, 141 (1988)).

62 Haire, *supra* note 52, at 293.

during the decision-making process can adversely influence the directors to injuriously accept or reject an offer from a potential acquirer, often making shareholders vulnerable in M&A transactions.[63] Nonetheless, the Delaware Supreme Court has previously criticized a corporate board for not obtaining a fairness opinion from a financial advisor.[64] In fact, today, a failure to obtain a fairness opinion from a financial advisor would most likely be suspect.[65]

The sell-side financial advisor's final role in M&A is to serve as a "strategic advisor."[66] This is the "most undefined and variable aspect of the [financial advisor's] role" in change-of-control transactions.[67] In this role, the investment banker may be asked to advise the board on the amount of capital, equity, or financing that the company should have readily accessible in the event an acquisition occurs, and to provide critical insights into certain bidders and financial estimates.[68] These various integral roles that financial advisors play in modern M&A transactions give them the ability to greatly influence the board's decision to sell or not sell the company.

B. *The Advisor's Influence on the Corporation*

Financial advisors drive negotiations, and their valuations and expertise are what guide the board to make certain decisions.[69] As savvy corporate players, the advisors act with full knowledge of their influence on the board.[70]

When financial advisors, mainly investment banks, give honest and candid advice about sell-side transactions to boards, they play a constructive and important role in the process.[71] When directors are overwhelmed with tender offers, they often turn to investment bankers for aid in evaluating and

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63 *See* Oesterle & Norberg, *supra* note 2, at 250. Such an action may result in financial harm to the shareholders due to loss of share value.

64 Haire, *supra* note 52, at 292 (citing Smith v. Van Gorkom, 488 A.2d 858, 876–77 (Del. 1985)).

65 *See* Haire, *supra* note 52, at 292–93 (citing Leonard Chazen, *Fairness from a Financial Point of View in Acquisitions of Public Companies: Is "Third-Party Sale Value" the Appropriate Standard?*, 36 BUS. LAW. 1439, 1442 (1981) (noting that nonuse of fairness opinion "would probably raise eyebrows")).

66 Haire, *supra* note 52, at 295.

67 Haire, *supra* note 52, at 295.

68 Haire, *supra* note 52, at 295.

69 *See* Haire, *supra* note 52, at 295.

70 *See In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014) (where the advisors' opinions were so influential that they essentially made the decisions for the directors); *In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015) (involving financial advisors' heavy influence on the directors).

71 *See* Oesterle & Norberg, *supra* note 2, at 211 ("The investment bankers play an important role when they give honest advice based on their special financial expertise."). This is important to the process, because the advisors may have special expertise in the area that the directors do not necessarily possess. *Id.*

structuring the bids.[72] Problems arise, however, when fairness opinions are not necessarily specialized for each company, but are instead "made-to-order," supporting the positions that the directors have already taken.[73] When the boards' interests are not parallel to those of its shareholders, these types of fairness opinions jeopardize shareholder investments and only mask the true intentions of the managers.[74]

The Delaware courts have acknowledged the great influence that the advisors have on the corporations' boards of directors.[75] In *In re Del Monte Foods Co. Shareholders Litigation*, the Delaware Chancery Court acknowledged the "pivotal role" that advisors play in the transactions, and noted that the courts "will consider the extent to which a board has relied on expert advisors."[76] Furthermore, the court explained that due to the financial advisors' influential and important role in the execution and implementation of the strategy in the transaction, advisors had to fully disclose their compensation and activities.[77] As the Delaware Chancery Court has recognized, the investment banker's influence on boards of directors cannot go untethered and unrestrained.[78]

Therefore, there needs to be a stronger focus on the direct liability of financial advisors to the shareholders of the corporations they advise in sell-side transactions. To ensure a healthy and fruitful transaction for the corporations' shareholders, the boards look to financial advisors for their expertise.[79] As a result, the advisors have just as much power, if not more, to positively or negatively affect stockholder value stemming from M&A transactions.

72 *See* Oesterle & Norberg, *supra* note 2, at 211.

73 *See* Oesterle & Norberg, *supra* note 2, at 211.

74 *See* Oesterle & Norberg, *supra* note 2, at 211–12 (citing Plaza Secs. Co. v. Fruehauf Corp., 643 F. Supp. 1535, 1537 (E.D. Mich.), *aff'd*, Edelman v. Fruehauf Corp., 798 F.2d 882 (6th Cir. 1986)) (describing that if the boards' intentions are not in line with the shareholders', untrue fairness opinions only help to mask the danger).

75 *See In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011).

76 *Id.* at 844–45 (ordering a preliminary injunction to prevent a merger even though the board of directors acted in good faith to execute a beneficial merger, because the board, in fact, injured the shareholders due to the misleading and malevolent intentions of the financial advisor it hired). This Comment is centered on curing cases such as *In re Del Monte*, where the financial advisor is not held liable because such liability to the shareholders is dependent on a finding of a breach of duty by the board. In *Del Monte*, it is clear the investment bankers were the main reason that the sale did not result in a beneficial outcome, and their bad faith intentions had great influence on the directors and encouraged the sale. *Id.* at 833, 836. Financial advisors who conduct business in this manner should be directly liable for their actions.

77 *Id.* at 832.

78 *See id.*; *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014); *In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015).

79 *See generally* Haire, *supra* note 52.

IV. MODERN EXPANSION OF THE REVLON DOCTRINE TO FINANCIAL ADVISORS

A. *Self-Regulation of Investment Bankers*

Due to the influence that investment bankers have on corporate transactions, there has been some attempt for self-regulation of financial advisors, but it may not be enough to protect shareholders. A number of professions have turned to self-regulation of misconduct, but most to greater avail than investment banking.[80] Professor Andrew Tuch, in his article "The Self-Regulation of Investment Bankers," explains that investment bankers are the "masters" of the financial industry and are scrutinized by the Delaware courts regarding "high-stakes" change-of-control transactions.[81] Tuch acknowledges that corporations that hire financial advisors are not able to fend for themselves during big M&A transactions, but that vulnerability should not characterize the relationship between the advisors and the boards.[82] Instead, "the relationships between investment banking firms and their clients are often characterized as fiduciary."[83] This suggests that although financial advisors do not owe fiduciary duties to the shareholders of corporations they advise, the advisors do owe such a duty to the boards that hire them.[84]

The Financial Industry Regulatory Authority (FINRA) is the self-regulatory entity for investment bankers and brokers.[85] It is registered with the Securities and Exchange Commission and functions under its supervision, authorized by Congress to "take action to ensure that investors are protected."[86] FINRA was created to serve as an internal mechanism whereby the investment banking community could fix some of the issues in the profession.[87] Delaware courts may scrutinize and reprimand investment

[80] *See* Sande L. Buhai, *Profession: A Definition*, 40 FORDHAM URB. L.J. 241, 272–74 (explaining that professional misconduct is governed by self-regulated entities in the fields of law, medicine, and accounting); Samuel J. Levine, *The Law: Business or Profession?: The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century*, 40 FORDHAM URB. L.J. 1, 8, 13 (2012) (explaining the self-regulation of lawyers).

[81] Andrew F. Tuch, *The Self-Regulation of Investment Bankers*, 83 GEO. WASH. L. REV. 101, 102 (2014).

[82] *Id.*

[83] *Id.*

[84] *See generally id.* Since the boards hire the advisors, the boards are considered the advisors' clients. Therefore, the advisors owe the boards a fiduciary duty. This Comment argues that, by extension, the advisors should owe the companies fiduciary duties.

[85] *Id.* at 104.

[86] *FINRA 2012 Year in Review and Annual Financial Report,* FINRA (2012), https://www.finra.org/sites/default/files/Corporate/p291721.pdf.

[87] Tuch, *supra* note 81 (discussing issues such as fraud, breach of fiduciary duties, and misconduct).

bankers, but FINRA is responsible for disciplining them for misconduct.[88]

Unfortunately, FINRA has largely been ineffective as a self-regulation tool and has imposed few sanctions on investment bankers.[89] Tuch noted "enforcement activity [under FINRA] likely underdeterred investment bankers' misconduct and failed to provide any credible deterrence against such misconduct," and most likely resulted in burdens that were greater than the benefits.[90] Tuch's conclusions cause concern, considering the weaknesses of other programs that were meant to alleviate misconduct in investment banking.[91]

B. *Why Do the Shareholders Go After the Advisors?*

There are three main reasons that plaintiff-shareholders seek recovery from financial advisors in adverse sell-side transactions. First, current methods of regulation do not adequately protect shareholders from investment banker misconduct.[92] As a result, shareholders sometimes turn to the courts to have the advisors held liable for their participation in bad sales.[93]

Second, plaintiff-shareholders recognize the possibility of recovering damages from the financial advisors' "deeper pockets."[94] The financial advisors in sell-side transactions are typically investment banks, many of which generate some of the highest revenues in the world and earn places on the Fortune 500 list.[95] In 2016, the top ten investment banks alone generated

[88] *Id.* at 104

[89] *Id.* at 173 ("FINRA appears to have virtually abdicated its role of enforcing its rules against one important category of broker-dealer: the investment banker. Despite evidence of potentially pervasive misconduct, FINRA imposed remarkably few sanctions on investment bankers during the sixty-six month period studied. That enforcement activity likely underdeterred investment bankers' misconduct and failed to provide any credible deterrence against such misconduct.").

[90] *Id.* at 148–49 ("The existing system of self-regulation burdens investment bankers and their employers by imposing extensive qualifications and registration requirements . . . . It imposes other constraints on firms relating to their financial condition and operations and record-keeping . . . . Given the burdens and the limited deterrence benefits, it is clearly reasonable to believe that the costs of FINRA's existing regulation of investment bankers, as now administered, exceed the benefits.").

[91] *Id.* (explaining the ineffectiveness of both the Securities and Exchange Commission and private enforcement in controlling investment banker misconduct).

[92] *See id.*

[93] *See In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014); *In re* TIBCO Software Inc. Stockholders Litig., 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015).

[94] Christopher A. Ward & Jarrett K. Vine, *Rural Metro: Potential Avenue for Recovery in Bankruptcy Litigation*, 33-5 AM. BANKR. INST. J. 22, 23 (2014).

[95] *Fortune 500*, FORTUNE, http://beta.fortune.com/fortune500/list/ (last visited Oct. 23, 2016); *Investment Banking Scorecard*, WALL ST. J., http://graphics.wsj.com/investment-banking-scorecard/ (last visited Oct. 24, 2016).

over $54 billion in revenues.[96] Notably, in 2015, the top ten investment banks together advised M&A transactions that totaled roughly $7 trillion dollars.[97] Arguably, the shareholders are aware that these companies, such as J.P. Morgan Chase and Goldman Sachs,[98] have much bigger bank accounts and much more cash on hand than corporations' boards of directors.

Lastly, shareholders pursue claims against investment advisors to hold them accountable for their actions in the acquisitions.[99] Accountability is incredibly important in high-value M&A transactions, because those with the power to make and influence decisions, such as the directors and advisors, should be responsible for the choices they make in structuring and executing change-of-control transactions. With some skin in the game, advisors will be more thorough and mindful in advising the boards during merger negotiations. This argument is premised on the idea that the misconduct of investment advisors in sell-side transactions is often the catalyst of the bad sale,[100] and, therefore, the investment banks should be held directly liable for those actions.

C. *Financial Advisor Liability*

Section 102(b)(7) protects directors from breach of duty of care claims only, not other fiduciary duty claims such as duty of loyalty actions.[101] But "bad faith or willing misconduct," the required threshold for culpability, presents a very difficult standard for shareholders to satisfy.[102] The issue with the current law is that the advisors' liability is dependent upon a finding of liability for breach of fiduciary duty on the part of the directors.[103] Therefore, as the law stands, financial advisors cannot be directly liable for their roles in M&A transactions. This is troublesome, as it not only leaves shareholders vulnerable to the potential bad faith of financial advisors, but

96 *Investment Banking Scorecard*, WALL ST. J., http://graphics.wsj.com/investment-banking-scorecard/ (last visited Oct. 24, 2016).

97 *Id.*

98 *Id.*

99 *See* Tuch, *supra* note 81, at 163–64.

100 *See In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014) (where the advisors' opinions were so influential that they essentially made the decisions for the directors); *In re* TIBCO Software Inc. Stockholders Litig., 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015) (displaying the great influence that financial advisors can have on directors in M&A transactions).

101 DEL. CODE ANN. tit. 8, § 102(b)(7) (2015). *Revlon* duties are not expressly protected either under the statute. *See id.*

102 Reder & Dodson, *supra* note 7, at 28.

103 *See* Johnson & Ricca, *supra* note 41. Johnson and Ricca explain that courts' current narrow application of the doctrine has largely hindered shareholder recovery from investment bankers for aiding and abetting. *Id.* at 152–53. Notably, while the investment banks can be held liable for aiding and abetting, "such persons owe no direct fiduciary duties under Revlon, or at all for that matter." *Id.*

also passively gives financial advisors a liability shield from penalties for their actions regarding the transactions.

1. The Rural Metro Doctrine

Sell-side financial advisors were first held liable in *In re Rural Metro Corp. Stockholders Litigation*,[104] a decision that is paramount to the field and has driven case law in Delaware since its ruling in 2013.[105] In *Rural Metro*, Rural Metro Corporation (Rural Metro) was in the process of being acquired and hired RBC Capital Markets, LLC (RBC) as a financial advisor.[106] RBC was a subsidiary of the Royal Bank of Canada that Rural Metro's board of directors paid to assist in strategizing possible alternatives to a sale and advise the board of directors throughout the acquisition exploration period.[107] Throughout its period of service to the board, RBC repeatedly manipulated the Rural Metro board to advance its own interests and maximize its earnings on the sale.[108]

The *Rural Metro* court found that, under the *Revlon* standard, the Rural Metro board's sale was unreasonable and that RBC was liable for knowingly aiding and abetting the breach of fiduciary duty.[109] Although the shareholders settled with the directors, the court held their breach of fiduciary duty to nonetheless be a sufficient prerequisite to finding that the advisors had aided and abetted the breach.[110] The court, following the guide of section 102(b)(7), noted that the exculpatory provision in the agreement protected only the directors from personal liability, not RBC.[111]

Furthermore, the court instructed that the plaintiffs must bear the burden of proof for an aiding and abetting claim.[112] Since the shareholders settled with the board of directors and, therefore, pursued only the aiding and abetting claim against the advisors, the shareholders beared that burden

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

[105] Ward & Vine, *supra* note 94, at 23 (explaining that the *Rural Metro* decision was not only seminal for corporate litigation, but was also a crucial precedent in bankruptcy law).

[106] *Rural Metro*, 88 A.3d at 64.

[107] *Id.* at 64–67.

[108] *Id.*

[109] *Id.* at 110; *see* Ward & Vine, *supra* note 94, at 22 ("The Delaware Chancery Court held the financial adviser of a target board of directors 'liable for aiding and abetting breaches of fiduciary duty by the Board,' even though (1) the board and a secondary financial adviser had previously settled their own liability, (2) there was no breach of the duty of loyalty found and (3) the company's articles of incorporation contained a waiver of liability for the breach of the duty of care. Specifically, in *Rural Metro*, the court held RBC Capital Markets LLC liable for aiding and abetting the board of Rural/Metro Corp. in breaching their fiduciary duties during the sale of the company to Warburg Pincus LLC.").

[110] *Rural Metro*, 88 A.3d at 63 (noting that the shareholders settled with the directors before trial, but still decided to pursue the aiding and abetting claim against RBC).

[111] *Id.* at 86; *see also* Ward & Vine, *supra* note 94, at 22.

[112] *Rural Metro*, 88 A.3d at 84–85.

against RBC.[113] In addition, the court noted the following, which is the essence of the *Rural Metro* doctrine:

> For purposes of the aiding and abetting claim against RBC, this decision need hold only 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.[114]

RBC, through its manipulative and self-motivated plan, created an unreasonable process and informational gaps that created the board's breach of fiduciary duty.[115] As a result, the court found that RBC had aided and abetted the claim.[116]

2. Current Effects and Implications of the *Rural Metro* Doctrine on Financial Advisors

In the wake of the *Rural Metro* doctrine, boards of directors' fiduciary duties concerning their interactions with financial advisors in M&A transactions are held to a higher standard, and the directors must be diligent and informed when conducting transactions.[117] This is not a simple readjustment for the boards, such as exploring potential conflicts of interests with the financial advisors.[118] Rather, there should be agreements between the boards and financial advisors calling for continuing disclosure of information that may be relevant to the board's sale of the corporation.[119]

The *Rural Metro* doctrine has had a profound effect on financial advisors, as it is now very difficult for them to avoid conflicts resulting from sell-side transactions.[120] The financial advisors must now practice full

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[113] *Id.*

[114] *Id.* at 99.

[115] *Id.*

[116] *Rural Metro*, 88 A.3d 54; Manesh, *supra* note 8, at 131; *see* Ward, *supra* note 94, at 22.

[117] Reder & Dodson, *supra* note 7, at 37 (explaining that the board of directors must now "be active and reasonably informed when overseeing a sale process, including identifying and responding to actual or potential conflicts of interest").

[118] *Id.*

[119] *See id.*

[120] *Id.* at 38 ("As *Rural Metro* makes clear, financial advisors enjoy no similar statutory or other protection, yet, as a practical matter, it is very difficult for them to avoid conflicts. To be effective, investment bankers must talk to a wide range of players—both potential buyers and sellers—in any given industry. Post-*Rural Metro*, the key to maintaining this same level of effectiveness is to disclose any and all potentially material conflicts from the outset, and as they may arise during the course, of a sell-side engagement. Complete and timely disclosure will help insulate financial advisors from aiding and abetting claims by avoiding the kind of 'informational vacuum' that led the *Rural Metro* [c]ourt to find that RBC had

disclosure with the board of directors concerning all matters of the transaction to give themselves the best protection against a shareholder liability claim for aiding and abetting a board's breach of fiduciary duties.[121] Not only must the advisors fully disclose information to the directors, but they must also practice the same communication with the shareholders so that the shareholders are able to make fully informed decisions as to whether to approve the transaction.[122] Furthermore, financial advisors must be extensive and thorough in their research of and discussions with potential acquirers.[123] In doing so, they must ensure that they are delivering accurate information about the possible transactions to the board. Ultimately, the "bottom line for directors and financial advisors operating in a post-*Rural Metro* world is clear: full disclosure—by sell-side [financial] advisors to their clients and by target company boards to their stockholders—is crucial."[124] Full disclosure between those parties constitutes better protection for the board and the financial advisors.

3. *Rural Metro* Under Current Law and the "Aiding and Abetting" Requirement

i. Aiding and Abetting in the Wake of *Rural Metro*

A more in-depth discussion of Delaware's requirements for aiding and abetting on the part of the financial advisors will give a clearer sense of Johnson and Ricca's reasoning in support of their argument that the *Revlon* doctrine is insignificant. Professor Manesh's theory that the doctrine is still relevant and significant is sound, however. Nevertheless, Manesh's thesis lacks focus on the importance of further expanding the doctrine to hold advisors directly liable, not solely for aiding and abetting the directors' breach.[125] An aiding and abetting claim has four elements: "(i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in the breach by the non-fiduciary defendants, and (iv) damages

acted with the requisite scienter to support plaintiffs' aiding and abetting claim.").

121 *Id.*

122 *Id.*; *see In re* Zale Corp. Stockholders Litig., No. 9388-VCP, 2015 Del. Ch. LEXIS 274 (Oct. 29, 2015) (finding the shareholders' fully informed vote invoked the business judgment rule, thereby negating the directors' alleged breach of duty, and, by extension, an aiding and abetting claim against the advisors).

123 *See* Reder & Dodson, *supra* note 7, at 38 ("To be effective, investment bankers must talk to a wide range of players—both potential buyers and sellers—in any given industry. Post-*Rural Metro*, the key to maintaining this same level of effectiveness is to disclose any and all potentially material conflicts from the outset, and as they may arise the course, of a sell-side engagement.").

124 *Id.* at 39.

125 *See* Johnson & Ricca, *supra* note 41 (arguing the doctrine, beginning with Revlon, has "dwindled"); Manesh, *supra* note 8 (submitting that even though the liability hinges on aiding and abetting, the modern doctrine is expanding and adapting to modern corporate law).

proximately caused by the breach."[126]

For sell-side transactions, the first element requires the court to find a fiduciary relationship between the board of directors and the shareholders, which inherently exists in every corporation.[127] Unless otherwise provided in the bylaws or articles of incorporation, a board of directors manages a Delaware corporation's business.[128] The directors have inherent fiduciary duties to the corporation and its shareholders.[129] The directors must protect the corporation's shareholders' interests and serve to their benefit under the duties of care and loyalty.[130] The choices that directors make are protected by the "business judgment rule," in which "there is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[131]

Under the second element, the board's misuse of its "business judgment," or any other action that violates its duties to shareholders, can constitute a breach of fiduciary duty.[132] If the plaintiffs meet their burden of showing a possible breach of fiduciary duty or a misuse of business judgment, a heavy burden then shifts to the directors to show that their decision was "entirely fair."[133] In sell-side transactions, this means that the

126 *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 80 (Del. Ch. 2014) (citing Malpiede v. Townson, 780 A.2d 1075, 1096 (Del. 2001)).

127 *See id.* at 80–81.

128 DEL. CODE ANN. tit. 8, § 141(a) (2016).

129 *See* William Lafferty et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PENN ST. L. REV. 837, 841 (citing Guth v. Loft, Inc., 5 A.2d 504, 510 (Del. 1939)) ("In fulfilling their managerial responsibilities, directors of Delaware corporations are charged with a fiduciary duty to the corporation and to the corporation's stockholders.").

130 *Id.* at 841 (citing *Guth*, 5 A.2d at 510) (explaining that directors must act as "trustees" to the organization).

131 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986); *see* Lafferty et al., *supra* note 129, at 841 ("When making corporate decisions, directors must fulfill the traditional duties of care and loyalty in order to satisfy their fiduciary obligations to the corporation and its stockholders . . . . A presumption exists under Delaware law that corporate directors act in accordance with these duties when making business decisions. This presumption is known as the 'business judgment rule.' The business judgment rule is a deferential standard of review; Delaware courts will generally refrain from unreasonably imposing themselves upon the business and affairs of a corporation when the board's decision can be attributed to some rational corporate purpose."); *see also Rural Metro*, 88 A.3d at 87 (explaining that, similar to the business judgment rule, section 102(b)(7) promotes stockholder interest by ensuring that the board of directors does not become overly risk-averse).

132 *See Rural Metro*, 88 A.3d at 97.

133 Lafferty et al., *supra* note 129, at 842 ("If the business judgment rule is rebutted by showing a breach of either the duty of care or the duty of loyalty, the board's action is reviewed using the entire fairness standard, and the directors bear the heavy burden of proving that the challenged decision or transaction is 'entirely fair' to the corporation and its

directors must show that they sold in “fair dealing” and at a “fair price.”[134] This arduous burden shift imposed on the directors bolsters the argument for rejection of Ricca and Johnson’s thesis and the expansion of the *Rural Metro* doctrine: if the shareholders can show a possible misuse of the directors’ business judgment, then their action for aiding and abetting becomes slightly easier to prove as the directors must then overcome the high “entirely fair” standard.[135] If the directors cannot refute the claim, then the second element is satisfied, and the predicate for the aiding and abetting claim has been presented.[136]

The third element rests on the financial advisor’s scienter.[137] If the advisor “knows that the board is breaching its duty of care and participates in the breach,” then the advisor may be liable for aiding and abetting.[138] To satisfy this element, it must be “reasonably conceivable” from the allegations that the financial advisor acted with the knowledge that his or her conduct “advocated or assisted” in the breach of a fiduciary duty.[139] To meet this standard, the advisor *must* act with the knowledge that the conduct would further assist or create the board’s breach.[140] Sometimes the knowing participation is so obvious that the court has no trouble assigning liability to the investment bankers.[141] Lastly, the fourth element will be satisfied as long as there are cognizable damages from the bad sale.[142]

stockholders.”).

[134] *Id.*; *see* Cede & Co. v. Technicolor, 634 A.2d 345, 361 (Del. 1993); *see also* William Penn P’ship v. Saliba, 13 A.3d 749, 756–57 (Del. 2011) (holding that an LLC’s board of directors in a sell-side transaction must ensure both a fair price and fair dealing for its shareholders).

[135] *See* Lafferty et al., *supra* note 129, at 842

[136] *See In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265, at *79 (Oct. 20, 2015) (“For the reasons explained previously, plaintiff has adequately alleged a breach of the fiduciary duty of care that the Director Defendants owed to TIBCO, which this Court has held can form the predicate for an aiding and abetting claim.”).

[137] *Rural Metro*, 88 A.3d at 97.

[138] *Id.* (“If the third party knows that the board is breaching its duty of care and participates in the breach by misleading the board or creating the informational vacuum, then the [advisors] can be liable for aiding and abetting.”).

[139] *TIBCO*, 2015 Del. Ch. LEXIS 265 at *79–80 (“The requirement of participation can be established if the alleged aider and abettor ‘participated in the board’s decisions, conspired with [the] board, or otherwise caused the board to make the decisions at issue.’”).

[140] *See id.*; *see also In re* Del Monte Foods. Co. S’holders Litig., 25 A.3d 813, 837 (Del. Ch. 2011) (“Under this standard, a bidder’s attempts to reduce the sale price through arm’s-length negotiations cannot give rise to liability for aiding and abetting.”).

[141] See *Rural Metro,* 88 A.3d at 97, and *TIBCO*, 2015 Del. Ch. LEXIS 265 at *79–80, where the knowing participation was obvious to both courts.

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

ii. The *Rural Metro* Doctrine Under Current Case Law

The *Rural Metro* doctrine and its ruling on financial advisor liability precisely lends to the high standard that Johnson and Ricca refer to in their thesis, as the doctrine is one of the many reasons that plaintiffs' actions against the financial advisors are often to no avail.[143] The financial advisor does not owe fiduciary duties directly to the corporate client, but they may, nonetheless, be indirectly liable to the shareholders.[144]

Since the *Rural Metro* ruling, the Delaware courts have ruled on a number of other cases concerning the liability of boards and financial advisors in sell-side transactions. First, in *RBC Capital Markets, LLC v. Jervis*, the Delaware Supreme Court affirmed the *Rural Metro* ruling.[145] The Court noted that RBC knowingly misled the directors by giving the board inaccurate and ill-motivated information regarding the sale of the company to another entity.[146] Driven by its own improper motives, "RBC misled the Rural directors into breaching their duty of care, thereby aiding and abetting the Board's breach of its fiduciary obligations."[147]

Likewise, in *In re TIBCO Software Inc. Stockholders Litigation*, the Delaware Court of Chancery held Goldman Sachs, acting as the financial advisor in the sell-side merger deal, liable for aiding and abetting a breach of fiduciary duty by the board of directors.[148] In *TIBCO*, Goldman Sachs more than simply aided in the breach—it created the breach by advising the board based on its own motivations and intentions to maximize the sale.[149]

143 *See* Johnson, *supra* note 41. *Contra* Manesh, *supra* note 8. *Rural Metro* involved extreme facts, and shareholders have since been largely unsuccessful in their actions against the advisors. *See In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 1003 (Del. Ch. 2014); Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015); *In re* Zale Corp. Stockholders Litig., No. 9388-VCP, 2015 Del. Ch. LEXIS 249, at *76–78 (Oct. 1, 2015), *rev'd*, 2015 Del. Ch. LEXIS 274 (Oct. 29, 2015).

144 Manesh, *supra* note 8; *see Rural Metro*, 88 A.3d 54; *see also* Royce de R. Barondes, *Fiduciary Duties of Officers and Directors of Distressed Corporations*, 7 GEO. MASON L. REV. 45, 76 (1998) ("An investment bank that provides substantial assistance in the consummation of a transaction that the investment bank knows or should know to be in violation of a board's fiduciary duty aids or abets the board's primary violation and thus will be liable to the beneficiary of the duty. The cost of that risk ultimately will be reflected in fees paid to such professionals by firms operating in the vicinity of insolvency.").

145 RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).

146 *Id.* at 863.

147 *Id.*

148 *In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265, at *85 (Oct. 20, 2015).

149 *Id.* ("[I]t is reasonably conceivable from the facts alleged in the Complaint that Goldman was motivated to and intentionally created an informational vacuum by failing to disclose material information to the Board at a critical time when it was evaluating and reconsidering its options concerning whether it could act to secure some or all of the $100 million in additional equity value that the Board mistakenly believed it had obtained when approving the Merger. As such, the Complaint sufficiently alleges a claim for aiding and

Yet, under Delaware law, the plaintiffs could bring only an aiding and abetting cause of action.[150]

Subsequent cases threatened the aiding and abetting cause of action. For example, in *In re KKR Financial Holdings LLC Shareholder Litigation*, the Delaware Chancery Court granted a motion to dismiss an aiding and abetting claim against a sell-side financial advisor because it found no predicate breach of fiduciary duty.[151] That decision was affirmed in *Corwin v. KKR Financial Holdings LLC*, where the Delaware Supreme Court upheld the lower court's decision, but also established significant precedent that threatened the aiding and abetting liability imposed on directors.[152] The court held that the shareholders' "disinterested" vote to approve the sale invoked the business judgment rule, which protected the board from a possible breach of fiduciary duty and thereby shielded the advisors from liability.[153]

Corwin's impact is displayed in Delaware's *Zale I* and *Zale II* rulings. In *Zale I*, which was decided before *Corwin*, the Delaware Chancery Court denied a motion to dismiss a claim against a sell-side financial advisor for aiding and abetting a corporation's board.[154] After *Corwin*, however, the same court reheard the case in *Zale II*.[155] The court reversed its decision by applying *Corwin*'s holding and reasoning that, because there was a "fully-informed" and "disinterested" shareholder vote, the business judgment rule applied.[156] Therefore, the claim against the financial advisor for aiding and abetting was dismissed.[157] After the *Zale II* ruling, "financial advisors everywhere no doubt breathed a collective sigh of relief."[158]

abetting the Director Defendants' [breach of the] duty of care.").

150 *See generally In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014); *In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 LEXIS 265 (Del. Ch. Oct. 20, 2015); RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015); *see also* Manesh, *supra* note 8, at 130.

151 *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 1003 (Del. Ch. 2014) (("An aiding and abetting claim 'may be summarily dismissed based upon the failure of the breach of fiduciary duty claims against the director defendants.'") (citation omitted)).

152 Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015).

153 *Id.* at 306; *see* Reder & Estey, *supra* note 3, at 281.

154 *In re* Zale Corp. Stockholders Litig., 2015 Del. Ch. LEXIS 249, at *76–78 (Oct. 1, 2015), *rev'd*, 2015 Del. Ch. LEXIS 274 (Oct. 29, 2015); *see* Reder & Estey, *supra* note 3, at 281.

155 *In re* Zale Corp. Stockholders Litig., No. 9388-VCP, 2015 Del. Ch. LEXIS 274, (Oct. 29, 2015); *see* Reder, *supra* note 3, at 281.

156 *Zale*, 2015 Del. Ch. LEXIS 274, at *7.

157 *Zale*, 2015 Del. Ch. LEXIS 274.

158 Reder & Estey, *supra* note 3, at 281.

Ultimately, recent case law demonstrates that under the Delaware courts' application of the *Rural Metro* doctrine, financial advisors will be found liable only in sell-side transactions for "aiding and abetting" a board's breach of fiduciary duties, but will not be held directly liable.[159] Thus, the only way shareholders may successfully file suit against sell-side financial advisors is by a court finding that: (1) the directors had a fiduciary duty to the shareholders and that they breached that duty; and (2) the investment advisors aided and abetted the directors in the breach of that duty.[160] This becomes increasingly difficult if the shareholders are allowed an informed vote to approve the merger.[161]

It is both the weakness of the aiding and abetting tort and the strictness of the *Rural Metro* doctrine, among other things, that fuel the argument that the doctrine, rooted in *Revlon*, has begun to diminish,[162] and that *Rural Metro* left plaintiffs with nothing other than a heavier burden and a "long-shot aiding and abetting claim."[163] Nonetheless, regardless of the difficulties and downsides of bringing the claim, following *Rural Metro*, there was a dramatic increase in aiding and abetting claims against sell-side financial advisors.[164] As discussed, financial advisor aiding and abetting liability is completely dependent on a finding of breach of fiduciary duty by the board regardless of the level of misconduct, ill will, and bad faith by the advisors.[165] Professor Manesh is justified in saying the doctrine is still significant and is adapting to modern corporate law,[166] but his thesis falls short of the current

159 *See In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014); *In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015); RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).

160 *See Rural*, 88 A.3d 54; *see also* Reder & Dodson, *supra* note 7, at 28 (explaining that the financial advisors do not receive the same protections as individual directors under section 102(b)(7)).

161 *See Zale*, 2015 Del. Ch. LEXIS 274. If the shareholders were allowed a vote on the transaction, a suit against the advisors, or directors for that matter, may be less likely to be successful, as they themselves had already approved the merger.

162 Johnson & Ricca, *supra* note 41 (arguing that the *Rural Metro* doctrine has "dwindled" over time).

163 *Id.* at 153 ("But the burden in a *Revlon* setting can be heavier yet where, as in *Rural Metro*, the directors are not defendants in the case because then the plaintiff must also prove that the directors breached a fiduciary duty. This leaves the plaintiff, not the defendants, with all the burdens—very high ones—in a long-shot aiding and abetting claim. *Rural Metro* is a cautionary tale for egregiously conflicted financial advisers, but, from a remedies perspective, it is a distinct outlier. These types of claims may arise in *Revlon* settings—where they typically fail—but they are not uniquely *Revlon* duty claims, and they do not 'limit' our thesis.").

164 Reder & Dodson, *supra* note 7, at 28 (suggesting that *Rural Metro* was essentially the catalyst that bridged the gap from *Revlon*, focused mainly on directors and boards, to the modern targeting of the financial advisors in sell-side transactions).

165 *See In re* Del Monte Foods. Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011).

166 *See* Manesh, *supra* note 8, at 110.

and imminent need to take the liability for financial advisors to the next level.

V. THE IMPORTANCE OF HOLDING SELL-SIDE FINANCIAL ADVISORS LIABLE

A. *Sell-Side Financial Advisors Should be Held to a Higher Standard*

In much of the recent case law, the financial advisors not only knowingly participated in a board's breach of fiduciary duties, but they *induced* the breach to advance their own interests.[167] When the advisor's conduct is that clear, the plaintiff shareholders should not have to find a breach of fiduciary duty by the directors as a predicate. Instead, they should be able to hold the financial advisors directly accountable for their actions, perhaps in the form of a direct derivative suit against the advisors. The advisors' liability in such situations should *not* depend on that of the directors.[168]

Contrary to the idea that the *Revlon* doctrine has dwindled,[169] the doctrine has in fact expanded through *Rural Metro*, with its sights set on greater shareholder protection through imposing liability on financial advisors in sell-side M&A transactions.[170] The increasing amount of shareholder litigation generated by change-of-control transactions demonstrates the *Rural Metro* doctrine's contemporary importance and relevance.[171] While Johnson and Ricca question the limitations of the doctrine in its ability to actually hold financial advisors liable in sell-side transactions,[172] the availability of a cause of action against the advisors, regardless of the limitations and difficulties, shows the doctrine has, in fact, expanded since *Revlon* to adapt to modern corporate law.[173] The doctrine has not shown its age, and, as can be seen in *Rural Metro* and other recent

[167] *See In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015); *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014).

[168] *See TIBCO*, 2015 Del. Ch. LEXIS 265, at *79 (aiding and abetting liability for breach of fiduciary duty is dependent on the "predicate" finding of that breach on the part of the directors); *see also In re* Zale Corp. Stockholders Litig., No. 9388-VCP, 2015 Del. Ch. LEXIS 249 (Oct. 1, 2015), *rev'd*, 2015 Del. Ch. LEXIS 274 (2015) (granting advisors' motion to dismiss because there was no liability found on the part of the directors).

[169] *See* Johnson & Ricca, *supra* note 41.

[170] *See* Manesh, *supra* note 8 (suggesting that the doctrine is actually expanding to adapt to modern corporate law and the greater protection of shareholders).

[171] *See* Reder & Estey, *supra* note 3, at 279–80.

[172] *See generally* Johnson & Ricca, *supra* note 41.

[173] *See* Revlon, Inc. v. Macandrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (applying the ruling only to directors' liability). *But see In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014) (expanding the doctrine to liability for financial advisors).

cases, is actually an incredibly important emerging doctrine through which plaintiffs can hold the wolves of the corporate world liable for taking advantage of their vulnerability.[174]

Yet, there needs to be further expansion in the courts, and possibly the legislature, to hold investment bankers and other financial advisors liable when they pursue only their own, and not stockholder, interests. The financial advisors need to be held accountable for their misconduct, as their misleading actions have been punished too weakly for too long.[175] As discussed in Part III(A), financial advisors play major roles in the sell-side transaction and boards rely heavily on their advice.[176] The financial advisors have a great impact on the boards and the corporations that they advise,[177] and any misconduct or misleading information can have negative impacts on the transactions.[178]

Johnson and Ricca highlight that financial advisors, particularly investment banks, can be held liable for aiding and abetting, but "such persons owe no direct fiduciary duties under *Revlon*, or at all for that matter."[179] This statement should not be adhered to by the Delaware courts and legislators. Instead, the modern doctrine stemming from *Rural Metro* should be expanded even further to impose fiduciary duties on the financial advisors, or at least hold them to a higher standard of direct liability.[180] There should be no required predicate for finding the directors liable for breach of duty to recover from the financial advisors, as it is a hurdle for shareholders and makes direct action against adverse financial advisers impossible.[181] Aiding and abetting liability under *Revlon* and *Rural Metro* is not enough—

[174] *See Rural*, 88 A.3d 54; *In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015).

[175] *See* Reder, *supra* note 3, at 279 (explaining that, in their search for "deep-pocketed" defendants, shareholders have recently begun to seek recovery from financial advisors). That liability has, thus far, only been allowed in the form of aiding and abetting. *See generally In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014); *In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 LEXIS 265 (Del. Ch. Oct. 20, 2015); RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015); *see also* Manesh, *supra* note 8, at 130.

[176] *See generally* Haire, *supra* note 52 (explaining the three main roles that financial advisors have in banking).

[177] *See supra* Part III.

[178] Haire, *supra* note 52, at 295; *see* Oesterle & Norberg, *supra* note 2, at 211–12; *see also In re* Del Monte Foods. Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011) (where the actions of the advisor heavily influenced the board to make a bad sale).

[179] Johnson & Ricca, *supra* note 41, at 152.

[180] *See* Manesh, *supra* note 8 (explaining that financial advisory liability is dependent on that of the board).

[181] *See In re* TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 Del. Ch. LEXIS 265 (Oct. 20, 2015) (demonstrating that the court requires a "predicate" finding of director liability before liability can be imposed on the advisor).

investment bankers need to be held accountable for their negligent and adverse actions in M&A transactions, and should not have the double-protection of: (1) the hurdle the plaintiffs have to pass in finding liability on the part of the board; and (2) the weakness of "aiding and abetting," as opposed to a form of direct liability.

There was a hint of hope for this argument when the Chancery Court of Delaware suggested in the *Rural Metro* proceedings that financial advisors, particularly investment bankers, are "gatekeepers" who may have some fiduciary responsibilities to the companies they advise.[182] Although the Delaware Supreme Court did not rule parallel to this argument, at least one Delaware Court judge has pondered holding the advisors to both a higher standard and to direct fiduciary duties to the shareholders and the corporation.[183]

B. *Possible Counter-Arguments*

The argument for direct liability on the advisors in M&A transactions is new and expansive, and, therefore, there are several potential counter-arguments. First, some may posit that a more expansive standard would be too invasive on investment bankers and deter them from advising corporations in sell-side transactions. An expansion of the doctrine, however, would not deter advisors from participating in sell-side transactions; rather, it would most likely deter misconduct. Many of the largest investment banks generate hundreds of millions of dollars in revenue through advising M&A deals.[184] Therefore, it is likely that they would not cease advising activities because the standard was heightened. Instead, they would most likely adapt to the new corporate law just as they have adapted to *Revlon* and *Rural Metro*.[185]

In addition, some scholars may object to judicial overreach, in particular that courts should not create fiduciary duties that do not exist.[186] They may argue that courts should not be allowed to impose such restrictions and standards as doing so is a slippery slope: courts may soon use it as a way

[182] Reder & Dodson, *supra* note 7, at 38; *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 87 (Del. Ch. 2014) (explaining that financial advisors are "gatekeepers" in sell-side change-of-control transactions).

[183] *See Rural Metro*, 88 A.3d at 88 (suggesting that advisors as "gatekeepers" may owe fiduciary duties of their own).

[184] *See Investment Banking Scorecard*, *supra* note 96; *Fortune 500*, *supra* note 95.

[185] *See* Reder & Dodson, *supra* note 7, at 38. Many of the investment banks listed on the Fortune 500 are the largest companies and, arguably, would not cease their advising activities just because the standard has been heightened.

[186] *See, e.g.*, Del. Code Ann. tit. 8 (2016). The Delaware General Corporation Law does not provide that fiduciary duties exist between financial advisors and boards of directors or the corporations they counsel. *See id.*

to abuse judicial power.[187] Expanding the *Rural Metro* doctrine, however, would not be a judicial overstep because the courts would be confined to that which is warranted by the contemporary corporate world, namely the protection of shareholders and traded corporations. With so much money at stake in M&A, and so much litigation resulting from sell-side transactions, there needs to be more accountability and higher standards to protect shareholders.[188]

VI. CONCLUSION

There is an increasing need for the Delaware courts and legislature to take action to protect shareholders in sell-side transactions. Financial advisor control in modern sell-side transaction is undeniable. There are mergers valued at trillions of dollars annually, with investment banks generating billions of dollars of revenues from advising those deals. In the wake of *Revlon* and *Rural Metro*, there has been a sharp increase in shareholder litigation against corporations' financial advisors. *Rural Metro* and other modern case law have expanded the *Revlon* doctrine to adapt to the contemporary corporate environment by allowing shareholders to recover from financial advisors for aiding and abetting claims. The aiding and abetting claim, however, has proven too weak to hold the advisors liable for their own misconduct when the court does not find a predicate breach of the board's fiduciary duties.

Therefore, the Delaware courts and legislature must further expand the *Rural Metro* doctrine to allow for direct financial advisor liability to the shareholders. This may come in the form of either Delaware-court created fiduciary duties owed by the advisors to the shareholders, or a heightened standard imposed by the Delaware legislature that removes the requirement of a finding of liability on the board of directors. Ultimately, Delaware needs to adapt to emerging corporate needs, as it did with section102(b)(7), *Revlon*, and *Rural Metro*, and continue to protect the shareholders of its corporations.

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[187] *See* Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469 (1999) (defining "slippery slope" and its implications).

[188] *See Investment Banking Scorecard*, *supra* note 96; *see also* Reder & Estey, *supra* note 3, at 280.