ALERT MEMORANDUM

Delaware Court of Chancery Declines to Dismiss Aiding-and-Abetting Claims Against Financial Advisor in De-SPAC Transaction

February 26, 2026

Overview

In a recent decision that financial advisors should take note of, the Delaware Court of Chancery declined to dismiss a claim that a financial advisor aided and abetted breaches of fiduciary duty by the board of directors of a special purpose acquisition company ("SPAC") in connection with an allegedly misleading merger proxy statement. Although the case (*Electric Last Mile Solutions, Inc. Stockholder Litigation*)[1] arises out of the somewhat unusual facts of a "de-SPAC" transaction, where the subject company faced bankruptcy less than a year following its going-public merger, the Court's analysis and the scope of its ruling may have broader implications for financial advisors in M&A transactions.

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[1] *Re: Electric Last Mile Solutions, Inc. S'holder Litig.*, No. 2022-0630-KSJM, 2026 WL 207195 (Del. Ch. Jan. 27, 2026).

The ruling shows that notwithstanding recent Delaware Supreme Court decisions instructing lower courts to apply a more critical approach to assessing claims of aiding-and-abetting liability, risk in this area remains.[2] In this case, the Court declined to dismiss claims that the financial advisor had knowingly failed to correct projections contained in board materials, which were eventually summarized in the proxy statement. The Court imputed knowledge of allegedly conflicting information from a different transaction without considering whether it was obtained by a different deal team and whether information firewalls were put in place. The decision creates potential litigation risks for financial advisors who advise their clients while in possession of information related to the transaction gleaned from a previous or concurrent engagement. It also expands the potential for financial advisors to be attributed liability for statements by their clients in SEC filings, despite the absence of any formal underwriter liability and despite the weight of both recent and longstanding contrary Delaware precedent. We note a few key takeaways and ways of mitigating such risks below.

Case Background, Procedural Posture and the Underlying Claims

The case arose out of a de-SPAC transaction, in which Forum III Merger Corporation ("Forum III"), a SPAC, merged with Legacy Electric Last Mile Solutions, Inc. ("Legacy ELMS") in June 2021.[3] Forum III went public in August 2020, raising $250M with a two-year deadline to complete a merger.[4] Shortly before going public, Forum III entered into discussions with one of the two founders of Legacy ELMS.[5] Forum III and Legacy ELMS entered into a merger agreement in December 2020, which was approved by Forum III's stockholders on June 24, 2021.[6]

Forum III retained Jefferies LLC ("Jefferies") as its financial advisor in connection with the transaction in October 2020.[7] As part of its engagement, Jefferies prepared investor materials and engaged in diligence with Forum III's board but did not deliver a formal fairness opinion.[8] Upon the closing of the merger, Jefferies earned a transaction-contingent fee of $19.3 million.[9]

Pertinent to the claims against Jefferies, in parallel with the merger, Legacy ELMS also entered into separate transactions to acquire assets, including an Indiana manufacturing plant, from SF Motors, an electric car manufacturer.[10] Prior to Forum III's IPO, Jefferies had represented SF Motors to evaluate the Indiana plant acquisition, and allegedly received certain diligence information regarding Legacy ELMS in that role.[11]

Shortly after the De-SPAC merger, the two founders resigned following an internal investigation.[12] The company filed for Chapter 7 bankruptcy liquidation in June 2022.[13] Stockholder plaintiffs brought claims against Forum III directors for breaches of fiduciary duties.[14] The plaintiffs also brought claims against other defendants for aiding and abetting the breaches of fiduciary duty and other claims.[15]

In a prior ruling, the Court addressed plaintiffs' aiding-and-abetting claims against the two Legacy ELMS founders, who were not Forum III fiduciaries, in connection with alleged disclosure deficiencies in the

[2] *In re Mindbody, Inc., S'holder Litig.*, 332 A.3d 349 (Del. 2024); *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 342 A.3d 324 (Del. 2025). The Court requested supplemental briefing on the impact of *Mindbody* and *Columbia Pipeline* on the aiding and abetting claims in the present case, which formed the basis in part for its letter decision. *See Electric Last Mile*, 2026 WL 207195, at *3.
[3] *Electric Last Mile*, 2026 WL 207195, at *1.
[4] *Id.*
[5] *Id.*
[6] *Id.* at *1, *2.
[7] *Id*. at *1.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*. at *7.
[12] *Id*. at *2.
[13] *Id*.
[14] *Id*.
[15] *Id*. The Plaintiffs also asserted an unjust enrichment claim tied to Jeffries receiving transaction-contingent fees. *Id*. at *10.

de-SPAC proxy statement.[16] The Court held that it was reasonably conceivable, at the pleadings stage, that Taylor and Luo knowingly participated in the alleged disclosure-related breaches associated with the transaction.[17]

The latest ruling, discussed here, addresses claims that Jefferies aided and abetted the Forum III board's breach of fiduciary duties by reviewing and approving an allegedly misleading proxy statement.[18]

Plaintiffs alleged that the proxy statement had three types of misleading statements.[19] *First*, plaintiffs alleged that the proxy stated that Forum III "did not contact any prospective target companies before the IPO" whereas, in fact, management had met with Legacy ELMS before Forum III's IPO.[20] *Second*, plaintiffs alleged that the proxy statement "failed to disclose Jefferies' conflict arising from its prior work for SF Motors."[21] *Third*, plaintiffs alleged that the proxy statement contained financial projections for Legacy ELMS that were significantly higher than the financial projections that Jefferies had received as part of its diligence of Legacy ELMS as part of its engagement for SF Motors.[22]

In its motion to dismiss, Jefferies asserted that, even assuming the directors breached their fiduciary duties, the complaint failed to state an aiding and abetting claim against Jefferies.[23]

Governing Legal Framework for Aiding and Abetting

The Court's analysis proceeds against the backdrop of two recent Delaware Supreme Court decisions, which clarified the requirements of the "knowing participation" standard that plaintiffs must satisfy to establish aiding and abetting liability.

In *Mindbody*, the Supreme Court reversed a post-trial finding of liability against a third-party buyer, emphasizing that establishing the scienter element of "knowing participation" requires the plaintiff to show that the secondary actor had actual knowledge both of the primary actor's fiduciary duty breach and of the fact that its own conduct was wrongful.[24] Participation in turn requires "substantial assistance to the primary violator," meaning "active participation rather than passive awareness."[25] After trial, the Court of Chancery found that a third-party buyer aided and abetted a CEO's breach of fiduciary by failing to correct proxy disclosures after having the opportunity to review them.[26] The Supreme Court reversed, holding that a failure to correct disclosures upon review, even in the presence of a contractual obligation to do so, does not on its own constitute substantial assistance sufficient to establish knowing participation.[27]

In *Columbia Pipeline*, issued after the *Mindbody* reversal, the Supreme Court also reversed a post-trial finding of aiding-and-abetting liability against a third-party buyer, reiterating that constructive knowledge or routine transactional conduct is insufficient to establish knowing participation.[28] The Court again stressed that the breach by the buyer of a contractual duty in the merger agreement to notify the seller of any material misstatements in the proxy statement does not alone satisfy the "substantial assistance" requirement—the secondary actor must take affirmative steps in furtherance of the primary actor's breach.[29] As the Court later summarized when describing the import of *Mindbody* and *Columbia Pipeline* in the *Electric Last Mile* letter decision, those decisions "settled that a party's failure to correct an incorrect proxy statement, even in the face of a contractual duty to do so, is not

[16] *Id*.
[17] *Id*.
[18] *Id*. at *7.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*. at *4.
[24] *Mindbody*, 332 A.3d, at 391.
[25] *Id*. at *392-3
[26] *Id*. at *399.
[27] *Id*. at *401.
[28] *Columbia Pipeline*, 342 A.3d, at 356-7.
[29] *Id*. at 368, 371.

enough for a defendant's conduct to amount to substantial assistance."[30]

To assess whether a defendant engaged in "knowing participation" in the primary actor's breaches of fiduciary duty, the court must engage in a fact-intensive analysis of four so-called *Dole* factors derived from the Restatement (Second) of Torts:

1. The nature of the underlying tortious conduct, including its severity and clarity.
2. The amount, kind, and duration of the assistance provided.
3. The nature of the relationship between the primary and secondary actors.
4. The secondary actor's state of mind.[31]

In prescribing this framework, the Delaware Supreme Court stressed that the "knowing participation" inquiry is a demanding one.[32] Both cases, however, applied the framework upon a developed trial record, leaving open how such framework should apply at the pleadings stage.

The Court's Analysis

Applying the *Dole* test, Chancellor Kathaleen St. J. McCormick held that three of the factors supported an inference that Jefferies "knowingly participated" in the directors' breaches of fiduciary duties.

With respect to the first factor, the Court held that it was reasonably conceivable that Jefferies had "first-hand knowledge that Forum III's disclosures misled stockholders and the Forum III board" because it had "advised Forum III throughout the transaction" and had obtained "conflicting information about the Indiana Plant's capacity, workforce and financial performance" as a result of its previous engagement with SF Motors.[33] In reaching that conclusion, however, the Court inferred that the information obtained by Jefferies in connection with its SF Motors engagement was available to, and attributable to, the team advising Forum III. The opinion did not consider, at least at the motion to dismiss stage, whether the allegedly conflicting information was received by a different deal team or whether internal confidentiality protocols limited the flow of that information between deal teams, effectively treating Jefferies as a unitary actor. On that same basis, the Court concluded with respect to the fourth factor that it was "reasonably conceivable that Jefferies knew its own conduct was improper."[34]

In assessing the second factor, the Court treated the authorship and dissemination of presentations to the board and stockholders as affirmative assistance, distinct from mere silence or passive awareness.[35] The Court's analysis focused on Jefferies's authorship of two separate presentations which were delivered to Forum III's board and shareholders respectively, which contained "allegedly misleading representations" regarding the Indiana Plant's capacity and workforce.[36]

The Court's analysis of the second and fourth factors turned on Jefferies' role in preparing board materials while suffering from what the Court perceived to be a conflict.[37] Though the Court seemed to acknowledge that mere review of the proxy statement with knowledge of its inaccuracies does not count as active participation, the decision indicates that, in the Court's view, the preparation of board materials that contain at least some of the same alleged misrepresentations as the proxy statement crosses the line.

In support of that conclusion, the Chancellor invoked the seminal *Rural/Metro* case, in which the Court of Chancery held (and the Delaware Supreme Court affirmed) that a financial advisor may be liable for aiding and abetting where it creates an "information vacuum" to induce the board to take action benefiting the advisor.[38] In that case, however, the financial advisor actively manipulated the sales process to guide

[30] *Electric Last Mile*, 2026 WL 207195, at *6.
[31] *Id*. at *4.
[32] *Mindbody*, 332 A.3d, at 391.
[33] *Electric Last Mile*, 2026 WL 207195, at *7, *9.
[34] *Id*. at *9.
[35] *Id*. at *8.
[36] *Id*.
[37] *Id*. at *8, *9.
[38] *Id*. at *8

the board to accept an offer that provided the advisor's financing team with a substantial fee.[39] It failed to inform the board and a special committee about its interest in providing buy-side financing to the winning bidder and actively attempted to "secure that role while simultaneously leading the negotiations in price."[40] The information vacuum in Rural/Metro thus involved intentional, conflict-driven manipulation of the sales process.[41] Here, though, the alleged information vacuum involved the creation of board materials that included management projections prepared by another party, which were alleged to be overly optimistic.

To buttress the "information vacuum" theory, the Court cited Jefferies' incentives to close the deal, and adopted the plaintiffs' position that "Jefferies was closely involved in the Merger on both sides, and therefore participated in a conflicted transaction."[42] However, nothing else in the opinion suggests that the interests of Forum III and SF Motors were adverse to each other in any manner that would have rendered Jefferies conflicted. Although the prior engagement involved a transaction related to Legacy ELMS and allegedly generated information that would have been relevant to Forum III's disclosures in the De-SPAC transaction, Jefferies did not represent Legacy ELMS itself but rather a third party, whose interests were distinct from—and in many respects—adverse to those of Legacy ELMS in the prior deal.

The Court also gave short shrift to the fact that in Jefferies' engagement letter the client expressly "disclaimed reliance on the accuracy underlying Jefferies' analyses."[43] While acknowledging that such disclaimer may have some weight, the Court declined to treat the disclaimer as dispositive for purposes of the motion to dismiss.[44] At most, the Court held, the third Dole factor was "neutral."[45]

Analysis and Key Takeaways for Financial Advisors

— While this decision was delivered at a motion to dismiss stage, without the benefit of a developed factual record (and thus accepted plaintiffs' factual pleadings as true for purposes of the analysis), the legal analysis itself would, if upheld, represent a potential expansion of financial advisor liability. In particular, the *Electric Last Mile* decision might be read as imposing liability on financial advisors for a company's disclosures in M&A transactions, at least where the financial advisor prepares board materials while it is in possession of information that contradicts those disclosures from parallel or past engagements.

— For purposes of analyzing whether Jefferies had information about the target company that contradicted the board materials it prepared, the Court seemingly treated Jefferies as a single unitary actor. The decision does not grapple with the possibility that two separate deal teams worked on these two transactions, thus imputing the knowledge of one deal team to another, even if such deal teams may have been bound by confidentiality restrictions and subject to internal wall-crossing procedures. This aspect of the Court's decision may be due to the fact that the Court is obligated to draw all reasonable inferences in favor of the plaintiff at the motion to dismiss stage, but nonetheless it appears to be somewhat in tension with the *Columbia Pipeline* decision, where the Delaware Supreme Court

[39] *See In re Rural Metro Corp.*, 88 A.3d 54 (Del. Ch. 2014), *aff'd sub. nom. RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015).

[40] *Jervis*, 129 A.3d at 862–63 (noting that "RBC's knowing participation included its failure to disclose its interest in obtaining a financing role in the EMS transaction and how it planned to use its engagement as Rural's advisor to capture buy-side financing work from bidders for EMS; its knowledge that the Board and Special Committee were uninformed about Rural's value; and its failure to disclose to the Board its interest in providing the winning bidder in the Rural process with buy-side financing and its eleventh-hour attempts to secure that role while simultaneously leading the negotiations on price").

[41] *Id*.

[42] *Electric Last Mile*, 2026 WL 207195, at *8.

[43] *Id*. at *9.

[44] *Id*.

[45] *Id*.

found that aiding and abetting liability cannot rest on constructive knowledge alone.[46] As this decision does not resolve factual disputes, the advisor retains such exculpatory arguments on a more developed factual record should the case proceed to trial.

— The Court's analysis turns in significant part on the allegation that Jefferies was "conflicted" based on its undisclosed engagement with SF Motors. The Court referenced Jefferies' undisclosed engagement in its analysis for three of the four Dole factors, and repeatedly stressed that Jefferies had a "conflict."[47] The upshot is that the failure to disclose the advisor's involvement in transactions involving a contractual counterparty to one of the merger parties—even where interests are not adverse with respect to the transaction on which the financial advisor is engaged—can metastasize into a "conflict" and raises the question of whether, in such situations, the advisor has a duty to disclose any information that may be relevant to the client's assessment of the transaction. To mitigate litigation exposure, financial advisors should consider whether their existing conflicts-checking process adequately captures prior or concurrent engagements involving the counterparty, even where the advisor did not represent the counterparty.

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[46] *Columbia Pipeline*, 342 A.3d, at 356-7

[47] *See Electric Last Mile*, 2026 WL 207195, at *7-9.