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IN THE SUPREME COURT OF THE STATE OF DELAWARE

C&J ENERGY SERVICES, INC., JOSHUA E. COMSTOCK, RANDALL C. MCMULLEN, DARREN M. FRIEDMAN, ADRIANNA MA, MICHAEL ROEMER, C. JAMES STEWART, III, AND H.H. "TRIPP" WOMMACK, III, Defendants Below Appellants, vs. CITY OF MIAMI GENERAL EMPLOYEES' AND SANITATION EMPLOYEES' RETIREMENT TRUST, on behalf of itself and on behalf of all others similarly situated, Plaintiff Below, Appellee.	x)))))))))))))))) x	No. 655, 2014 Court Below—Court of Chancery of the State of Delaware, C.A. No. 9980-VCN PUBLIC VERSION E-filed: December 12, 2014
NABORS INDUSTRIES LTD. and NABORS RED LION LIMITED, Defendants Below Appellants, vs. CITY OF MIAMI GENERAL EMPLOYEES' AND SANITATION EMPLOYEES' RETIREMENT TRUST, on behalf of itself and on behalf of all others similarly situated, Plaintiff Below, Appellee.	x)))))))))))) x	No. 657, 2014 Court Below—Court of Chancery of the State of Delaware, C.A. No. 9980-VCN CONSOLIDATED

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TABLE OF CONTENTS

Page

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 4

I. C&J's Board is disinterested, has extensive industry knowledge, and is closely aligned with its stockholders. 4

II. Nabors emerged as a potential strategic partner. 5

III. The Board considered and negotiated a potential Nabors transaction. 6

IV. The Board fully understood that the Transaction could potentially be viewed as a sale of control and obtained modest deal protection terms. 9

V. The Board approved the Transaction after receiving sell-side style financial presentations from Citi and Tudor. 11

VI. No topping bid emerged after C&J publicly announced the Transaction. 12

VII. Plaintiff's litigation efforts. 13

ARGUMENT 14

I. The Court of Chancery erred in holding that *Revlon* applies. 14

A. Question presented 14

B. Scope of review 14

C. Merits of argument 14

II. The Court of Chancery misinterpreted and misapplied *Revlon*. 18

A. Questions presented 18

B. Scope of review 18

C. Merits of argument 18

1. The Court of Chancery misinterpreted *Revlon*. 19

2. The trial court misapplied *Revlon*. 21

III. The Court of Chancery erred in finding irreparable harm and concluding that the balance of equities fall in Plaintiff's favor. 27

A. Question presented 27

B. Scope of review 27
C. Merits of argument 27
IV. The Court of Chancery erred by granting a mandatory injunction. 31
A. Question presented 31
B. Scope of review 31
C. Merits of argument 31
1. The trial court applied the wrong standard of proof and evidentiary burden for a mandatory injunction 31
2. The trial court's legal support provides no support. 33
3. The Court of Chancery applied the wrong standard even for a prohibitory injunction. 34
Ruling of the Court, dated Nov. 24, 2014 ..... Exhibit A
Letter from The Honorable John W. Noble to Counsel, dated Nov. 25, 2014. ..... Exhibit B
Order Granting Preliminary Injunction, Certifying Interlocutory Appeal, and Staying the Injunction Pending Appeal, dated Nov. 25, 2014. ..... Exhibit C
Order, dated Nov. 26, 2014. ..... Exhibit D

TABLE OF AUTHORITIES

CASES

Page(s)

Abrons v. Maree,
911 A.2d 805 (Del. Ch. 2006) 28

Alpha Nat. Res., Inc. v. Cliffs Nat. Res., Inc.,
2008 WL 4951060 (Del. Ch.) 31-32

Barkan v. Amsted Indus., Inc.,
567 A.2d 1279 (Del. 1989) 20, 25

Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC,
27 A.3d 531 (Del. 2011) 35

Eastman Kodak Co. v. Cetus Corp.,
1991 WL 255936 (Del. Ch.) 34-35

Equity-Linked Investors, L.P. v. Adams,
705 A.2d 1040 (Del. Ch. 1997) 21, 26

Gimbel v. Signal Cos.,
316 A.2d 599 (Del. Ch. 1974), aff'd, 316 A.2d 619 (Del. Ch. 1974) 27

In re Cogent, Inc. S'holder Litig.,
7 A.3d 487 (Del. Ch. 2010) 27-28

In re Del Monte Foods Company Shareholders Litigation,
25 A.3d 813 (Del. Ch. 2011) 33

In re Dollar Thrifty S'holder Litig.,
14 A.3d 573 (Del. Ch. 2010) 19, 25

In re El Paso Corp. S'holder Litig.,
41 A.3d 432 (Del. Ch. 2012) 28-29, 32, 34

In re MONY Grp. Inc. S'holder Litig.,
852 A.2d 9 (Del. Ch. 2004) 25-26

In re Pennaco Energy, Inc.,
787 A.2d 691 (Del. Ch. 2001) 20, 25

In re Plains Exp. & Prod. Co. Stockholder Litig.,
2013 WL 1909124 (Del. Ch.) 18

In re Smurfit-Stone Container Corp. S'holder Litig.,
2011 WL 2028076 (Del. Ch.) 29

In re TIBCO Software, Inc.,
2014 WL 6674444 (Del. Ch.) 29-30

In re Toys "R" Us, Inc. S'holder Litig.,
877 A.2d 975 (Del. Ch. 2005) 28, 32, 34

Ivanhoe Partners v. Newmont Mining Corp.,
535 A.2d 1334 (Del. 1987) 14-16

Koehler v. NetSpend Holdings, Inc.,
2013 WL 2181518 (Del. Ch.) 28

Lyondell Chem. Co. v. Ryan,
970 A.2d 235 (Del. 2009) ....passim

McMillan v. Intercargo Corp.,
1999 WL 288128 (Del. Ch.) 27

Mitchell Lane Publishers, Inc. v. Rasemas,
2014 WL 4925150 (Del. Ch.) 34

NACCO Indus., Inc. v. Applica Inc.,
997 A.2d 1 (Del. Ch. 2009) 32

Paramount Commc'ns, Inc. v. QVC Network, Inc.,
637 A.2d 34 (Del. 1994) 15, 19-20, 25

Ret. Sys. v. Corti,
954 A.2d 319 (Del. Ch. 2008) 35

Ret. Sys. v. Crawford,
918 A.2d 1172 (Del. Ch. 2007) 28, 30

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,
506 A.2d 173 (Del. 1986) 14, 34

SI Mgmt. L.P. v. Wininger,
707 A.2d 37 (Del. 1998) 14

NATURE OF PROCEEDINGS

On June 25, 2014, C&J Energy Services, Inc. ("C&J") announced a transaction (the "Transaction") in which it will combine with Nabors Industries, Ltd.'s ("Nabors") completion and production services business segments ("Nabors C&P"). Upon closing, Nabors is expected to own approximately 53% (50.25% on a fully-diluted basis) of the combined entity ("New C&J"), and C&J's existing stockholders are expected to own the remaining 47% (49.75% on a fully-diluted basis). Nabors' ownership is constrained by several contractual and structural restrictions that severely inhibit Nabors' ability to control New C&J and ensure that C&J's stockholders can participate in any future control premium.

Following a preliminary injunction hearing on November 24, the Court of Chancery issued a bench ruling (as supplemented on November 25, the "Ruling") followed by an order on November 25 (as modified on November 26, the "Order") requiring certain members of C&J's board of directors (the "Board") to solicit alternative proposals to purchase C&J and enjoining C&J from holding its stockholder meeting to vote on the Transaction for a 30-day period. On November 25, pursuant to Supreme Court Rule 42, the trial court entered an order certifying an interlocutory appeal. The next day, C&J and its Board members (the "C&J Appellants") filed a notice of appeal from the trial court's interlocutory order. This Court ordered expedition of the appeal by Order dated December 1.

The trial court committed reversible error in four ways.

First, the trial court incorrectly concluded that the Transaction is subject to *Revlon* scrutiny simply because Nabors will own initially 53% of New C&J. In doing so, the trial court ignored the control-inhibiting provisions C&J obtained and this Court's prior jurisprudence, which negate any control Nabors could wield and guarantee that current C&J stockholders will participate in any future control premium (in addition to the premium received in this Transaction).

Second, even if *Revlon* did apply, the trial court misapplied *Revlon*'s requirement and found that C&J's Board failed to satisfy *Revlon*.

Third, the trial court wrongly found irreparable harm and concluded that a balance of the equities favored an injunction given that it also found that (i) its merits conclusion was a "close call"; (ii) there are no disclosure claims, and stockholders—who will vote on the Transaction—are "adequately informed"; (iii) no competing bids have emerged in the five months since the Transaction was announced despite "relatively modest" deal protections; and (iv) the "odds of a better bid emerging" during the mandatory 30-day solicitation period ordered by the trial court "are really small."

Fourth, the trial court improperly imposed a mandatory injunction even though the plaintiff did not meet even the far lower standard required for a prohibitory injunction.

SUMMARY OF ARGUMENT

I. The trial court erred by holding that the Transaction is a "sale of control" that is subject to *Revlon*, even though several provisions restrict Nabors' control of New C&J and preserve C&J stockholders' right to a control premium.

II. Even if *Revlon* applies, the trial court erred by holding *Revlon* required the Board to take specific actions to sell C&J, including that C&J's stockholders had a "right" to a solicitation process because it was uncertain whether the Board had impeccable knowledge of Nabors' business. The trial court should have instead reviewed the Board's process in light of the circumstances to determine if the process was reasonable.

III. The trial court erred in finding irreparable harm and that the balance of the equities favored an injunction because it also found that (1) C&J's stockholders are fully informed and will have a vote, (2) no topping bid has emerged in five months despite modest deal protections, and (3) a topping bid is very unlikely to emerge in the injunction period.

IV. The trial court erred by granting a mandatory (or affirmative) injunction, requiring C&J to affirmatively shop itself, (1) based on finding a "plausible" likelihood of success on the merits, (2) without holding a full evidentiary trial, and (3) effectively re-writing a portion of the agreement governing the Transaction (the "Merger Agreement").

STATEMENT OF FACTS

I. C&J's Board is disinterested, has extensive industry knowledge, and is closely aligned with its stockholders.

C&J is a provider of premium, technologically-advanced oilfield completion services—hydraulic fracturing, coiled tubing, wireline, and other complementary services. A33 ¶12. C&J's Board consists of seven members, two of whom are members of management—Comstock (C&J's Founder and CEO) and McMullen (C&J's CFO). A33-34 ¶¶13-14. Comstock, McMullen, and the rest of C&J management have significant industry acumen and experience. A1845-46 ¶6; A1642 at 15:3-5, 15:17-16:11. The other five directors are not employed by C&J. Three of them—Ma, Friedman, and Roemer—have backgrounds in private equity, financial markets, and M&A in the energy industry. A1508-10. The remaining two—Stewart and Wommack—have substantial experience in the oilfield services industry. A1510; A1739-40 at 11:4-17:7. The trial court expressed "no doubt about the [B]oard's knowledge as to the value of C&J…." A3517 at 150:8-15.

The trial court found that the record did "not call into question the independence of the board or the disinterestedness of the board." A3518 at 12:16-18. Plaintiff alleged that the Board is conflicted because four of the seven directors will serve on New C&J's board. But there is no allegation that the board seats are material to any director in any way or that any director is subject to challenge. The trial court found "that at the time the merger was agreed to, the identity of the . . .

non-management directors [of New C&J] had not been determined." A3510 at 143:18-20; A3518-19 at 151:22-152:3.

In fact, C&J's directors have significant incentives to act in the best interests of C&J's stockholders. For instance, Comstock holds an approximate 10% stake in C&J, while McMullen owns an approximate 3% stake in C&J. A1478. The private equity firm at which Ma is a Managing Director holds approximately 10% of C&J's stock and supports the Transaction though it is not required to do so. A1845, 1848 ¶¶5, 10.

II. Nabors emerged as a potential strategic partner.

In recent years, C&J's corporate strategy has focused on growing its core service lines through organic expansion, acquisitions, and strategic combinations. A921. In late 2013, the Board authorized Comstock to explore additional growth opportunities, and he considered several potential strategic partners, [redacted] A1845 ¶6; A1642-43 at 17:12-18:21; A2367; A2225-26 at 1-2. Much like the eventual deal with Nabors, C&J was interested in acquiring business divisions from these strategic partners in exchange for stock or cash. *See* A1642-43 at 17:12-18:25. C&J's stock was "trading at a very, very good multiple in the industry" in 2013 and the first half of 2014, which made it an opportune time to use C&J stock as currency in a transaction. A3179 at 64:19-65:9. None of these possibilities advanced beyond exploratory discussions.

In early 2014, Citigroup Global Markets, Inc. ("Citi") provided C&J a detailed overview of Nabors C&P. A1643 at 20:14-21:3. Nabors C&P's business operated similar assets to C&J's, but unlike C&J, Nabors C&P's assets were underutilized because Nabors focused on its other business segments. A2355; A701; A1741 at 20:3-16. C&J believed it could get Nabors C&P's "existing operations running with improved savings and synergy . . . ." A2355.

To increase the value of the Transaction, Citi proposed that C&J use at least 50.1% of its stock as currency to acquire Nabors C&P in order to make the transaction non-taxable to Nabors, allowing C&J to acquire the assets at a lower price. A1519-21; A1929; A1935. Such a transaction structure would also permit a "domicile inversion," wherein a U.S. company merges with a foreign target and redomiciles the combined company in the jurisdiction of the target for tax purposes. A1929, 1935; A1519-21. To avoid C&J's existing stockholders losing control, C&J management immediately began considering strong governance provisions. A2377; A2539. C&J made clear to Nabors that in any transaction, C&J's stockholders must be protected from Nabors' exercise of control. A2383; A1750 at 57:7-14.

III. The Board considered and negotiated a potential Nabors transaction.

As discussions with Nabors progressed into mid-March, Comstock began consulting informally with his fellow Board members and providing them with

information about the potential transaction. *See, e.g.*, A2385; A2392-93. On April 3, 2014, Comstock called a special Board meeting "to get [the Board's] blessing before going to [Nabors] with any numbers." A2286; A1614. During the meeting, Comstock updated the Board about the discussions with Nabors, and Citi presented the Board with a preliminary analysis of the potential transaction with a range of values between $2.6 and $3 billion. A1615-16; A1939. The Board was informed of the contemplated structure, in which Nabors would own more than 50% of New C&J, and considered the use of governance protections to address the loss of collective control by C&J stockholders. A1949; A1615.

Following discussions, the Board unanimously approved C&J making a non-binding offer for C&J and Nabors C&P to merge, with Nabors receiving consideration of $2.6 billion, comprised of cash and a 50.0001% stake in New C&J. A1616; A2332. The Board authorized Comstock to negotiate with Nabors to get the best price below $3 billion and provide financial and legal terms to the Board as appropriate. A1616; A3175-76 at 49:2-51:10.

Between April 3 and June 24, the Board formally met seven times and communicated with C&J management on numerous occasions regarding the potential Nabors C&P transaction. *See, e.g.*, A1614; A1617; A1620; A1624; A1626; A1629; A1633; A2340-41; A2342; A702. One director testified that "[Comstock] did brief us all along the way, as there were movements in deal terms,

on the economics, on governance, on other aspects of the deal …. [Comstock] chose to keep us abreast every step of the way, partly because he always keeps the Board involved." A3171-72 at 33:6-34:4, 36:4-37:8; *see also* A1741 18:23-19:8. So much so that one of the Board's financial advisors noted: "I've done deals for 26 years (hundreds) and never seen a CEO have to provide their board so much data day-to-day and have to constantly answer emails from the board." A709.

During this time, C&J and Nabors engaged in significant due diligence and negotiations on a variety of deal terms. *See, e.g.*, A1939; A1978; A1996; A2311; A2315. With respect to price, Nabors countered C&J's $2.6 billion offer with a $3.2 billion proposal. A2332; A922-23; A1864-65; A2339-40. After several counterproposals, the parties tentatively agreed on a value of $2.925 billion, subject to due diligence and board approval. A923-27; A1866; A1846 ¶7; A1877; A1887. Following further due diligence, Comstock lowered C&J's offer to $2.8 billion, and after further negotiations, the parties tentatively agreed that Nabors would receive $2.86 billion in cash and a fixed number of New C&J shares. A2295; A2517; A926-27. The parties also negotiated other non-economic terms, such as provisions limiting Nabors' control of New C&J and ensuring that C&J's stockholders will share *pro rata* in any future control premium. A1605-07; A1436 § 78; *infra* at § Arguments I.C.

Plaintiff alleged that C&J's willingness to increase the price is suspicious because Nabors C&P's performance was declining. In addition to the fact that the Board was aware of this fact and believed it presented an opportunity for C&J, this argument ignores the Board's business strategy, which was tethered to C&J's superior ability to operate Nabors C&P assets more profitably. A2456; A3517 at 150:15-17. Moreover, Comstock aggressively negotiated and repeatedly showed his willingness to walk away from the deal if it was not in the stockholders' best interests. *See, e.g.*, A2489; A2499-500; A2298; A2309; A2343. Throughout the process, C&J management regularly updated the Board and solicited its input on negotiation strategy. *E.g.*, A2399; A2403; A2406; A2289-91; A2340-41; A2343-44; A2541-42; A1846-47; A2410; A2322; A2332; A2455; A711; A1745 37:11-20.

In May 2014, the Board requested that Citibank, N.A. provide financing for the Transaction. A926. Recognizing the significance of the Transaction, the Board engaged Tudor, Pickering, Holt & Co. Securities, Inc. ("Tudor") to evaluate, and render an opinion as to the fairness of the Transaction. A1880; A2433. Tudor "has deep knowledge of the oil field service industry" and "consistently provided strategic insights and alternatives on the sector." A3167 at 16:22-17:7.

IV. The Board fully understood that the Transaction could potentially be viewed as a sale of control and obtained modest deal protection terms.

Although the economic impetus for the Transaction was the acquisition of Nabors C&P (rather than a sale), the Board was aware that the Transaction could

be deemed a "change in control" subject to *Revlon*. A3169 at 24:11-19. Contrary to the trial court's finding that "the board did not consider alternative transactions" or "seek out other potential buyers," A3514 at 147:7-10, the Board considered the possibility of alternative transactions "throughout the process" of evaluating and eventually approving the deal with Nabors. A3168-69 at 18:3-19:15, 21:17-22:12. The Board's financial advisors

Id. at 22:13-23:11. The Board concurred with its financial advisors' assessment of the low likelihood that other parties would be interested in acquiring C&J, particularly given that the Board has several members with significant industry connections: "this is not an industry where [acquisition] interest is kept confidential. They would have expressed it to us." *Id.* 23:12-24:10; *see also id.* at 24:21-25:7. Thus, the Board "did not see the need to go broadcast to the market that we may be up for sale," as it would be "highly, highly disruptive to the focus [and] execution of the company" and could "jeopardize C&J's value." *Id.*

Instead, C&J bargained for modest deal protections that would allow for an effective post-signing market check, including a no-solicitation provision (with a

favorable fiduciary out), a matching rights, and a termination fee of 3.25% of the enterprise value and 2.27% of deal value. A880; A992-95; A1322 § 6.4; A1342 § 8.2(b). Further, the Board obtained fairness opinions from two financial advisors with significant industry experience, both of whom calculated that C&J's stockholders would receive a premium in the Transaction. *See infra* at Facts § V.

V. The Board approved the Transaction after receiving sell-side style financial presentations from Citi and Tudor.

On June 24, the Board met to consider approval of the Transaction, during which the non-management directors met twice in an executive session. Both Citi and Tudor presented detailed sell-side valuation analyses indicating that C&J was receiving a premium. A2015; A2065. For instance, Citi calculated that due to the Transaction, C&J's stockholders would enjoy a 27% increase in earnings-per-share in 2015, an 18% increase in 2016, and a 17% increase in 2017. A2034. Citi's discounted cash flow ("DCF") model calculated that the Transaction provides a 15% premium for C&J's existing stockholders. A2033. Citi also calculated that the Transaction would create $104 million in synergies in 2015, $135 million in 2016, and $179 million in 2017. A2059. Citi opined that the Transaction was fair from a financial point of view. A1402.

Tudor's analysis calculated that C&J's stockholders should receive between 32% and 53% of the combined entity—C&J's actual 47% ownership is near the high end of this range. A2080. Tudor's DCF analysis calculated that the value per

share of C&J stock would increase between $1.09 and $3.17 due to the Transaction. A2081-82. Based on its analysis, Tudor concluded that the Transaction was fair and provided a fairness opinion to that effect. A1398.

Following discussion, the Board unanimously approved the Transaction. A1633; A928. In reaching its decision, the Board considered, among other things, the improved financial strength and operation scale of the combined entity, the ability to broaden C&J's existing global geographic footprint, cost savings and improved financial and operational efficiencies, operational synergies, improved liquidity with a greater combined lending base and lower cost of capital, and the reduced effective tax rate as a Bermuda entity. A929-31. The Board weighed these benefits against the costs of the Transaction, such as the fact that Nabors would initially own 53% of New C&J (50.25% on a fully-diluted basis). A931-32. The Board unanimously determined that the Transaction was in the best interests of the stockholders and should be put to a stockholder vote. A928.

The Transaction is subject to the majority approval of C&J's stockholders. A1338 § 7.1(a). Only Comstock has signed a support agreement for his 10% interest. A868, 1081. The Complaint contains no disclosure claims, and the trial court confirmed that "[t]he shareholders are adequately informed" about the Transaction. A3520 at 153:17-18.

VI. No topping bid emerged after C&J publicly announced the Transaction.

News quickly spread to potential topping bidders that Nabors had agreed to acquire 53% of New C&J's stock as part of the Transaction. The parties publicly announced the Transaction on June 25, 2014, explaining that Nabors would have a "53 percent ownership" of New C&J. A38 ¶29. From July through November, C&J's numerous presentations and New C&J's SEC filings explained that Nabors would own 53% of New C&J. A2130-31; A2108-09; A855. The trial court found that (a) C&J has not received any communications of potential interest from another company, (b) "it is impossible to believe that [potential topping bidders] do not know about the transaction," and (c) the "odds of a better bid emerging … are really small." A1853 ¶8; A3515, 3520 at 148:15-19, 153:7-16; A3535 at 11:8-10.

VII. Plaintiff's litigation efforts.

The trial court granted expedition on August 28, 2014. A454. After Defendants produced voluminous documents, Plaintiff deposed only two board members, Comstock and Stewart. After director Ma submitted an affidavit, Plaintiff deposed her. Plaintiff did not depose the other four directors.

Though Plaintiff retained an expert to provide a "valuation of C&J and Nabors [C&P]," A2569, the expert testified that he did not conduct a valuation and had no definitive opinion as to whether C&J's stockholders would receive a premium. A1788, 1798, 1805, 1810, 1813 at 5:8-15, 45:11-24, 71:23-72:12, 90:20-23, 105:20-106:14.

ARGUMENT

I. The Court of Chancery erred in holding that *Revlon* applies.

A. Question presented

Did the trial court err by holding that the Transaction constituted a "sale of control," even though the Merger Agreement and New C&J bye-laws[1] contain provisions inhibiting Nabors' ability to exercise control of New C&J and preserving C&J stockholders' ability to receive a control premium in a future transaction? *See* A3427-28 at 60:1-61:11; A789-94, A806-08.

B. Scope of review

De novo review applies to legal conclusions, and an abuse of discretion review applies to factual findings. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1340-41 (Del. 1987). This is a mixed question of law and fact.

C. Merits of argument

The trial court erred when it held that *Revlon*[2] applies to the Transaction simply because C&J's stockholders will own 47% of New C&J. A3516 at 149:2-8. *Revlon* "applies only when a company embarks on a transaction—on its own initiative or in response to an unsolicited offer—that will result in a change of control." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009). This Court

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[1] Bermuda refers to bylaws as "bye-laws."

[2] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

has explained that a transaction that creates a majority stockholder may not constitute a change of control if stockholders receive "protective provisions[.]" *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 43 (Del. 1994). In *QVC*, Paramount was widely traded with no controller; post-merger, however, there would be a controlling stockholder with the voting power to:

> (a) elect directors; (b) cause a break-up of the corporation; (c) merge it with another company; (d) cash-out the public stockholders; (e) amend the certificate of incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders' interests.

Id. Absent control-limiting protections, this Court found this power "would provide the new controlling stockholder with the power to alter" the Paramount board's long-term "vision" and leave Paramount stockholders with "no leverage in the future to demand another control premium." *Id.*

QVC's recognition of protective devices is also consistent with this Court's prior holding in *Ivanhoe*, 535 A.2d at 1344-45. There, this Court found that *Revlon* did not apply to a transaction that resulted in a 49.7% stockholder because a standstill agreement limited that stockholder's voting power through diminished board representation for a ten-year period. *Id.*

The trial court disregarded these principles by focusing solely on percentages. A3427 at 60:1-7 ("Sure sounds to me like they sold control" because C&J's stockholders will "own 47 percent of the company."). The Merger

Agreement and New C&J's bye-laws contain protective devices that negate each of the indicia of control noted by this Court in *QVC*.

Control premium. New C&J's bye-laws ensure that C&J's stockholders will receive any control premium Nabors receives in a future transaction (in addition to C&J's stockholders' 15% to 26% premium from the Transaction). If New C&J is sold, or if all or substantially all of its assets are sold or leased, all common shareholders will receive the same type or amount of consideration on a per share basis. A1436 § 78. This bye-law has no time limitation and cannot be changed without a unanimous vote of New C&J's shareholders. A1438 § 80.7.

Supermajority shareholder votes. A two-thirds vote of the shareholders will be required to (a) amend New C&J's bye-laws (unless approved by the Chairman and at least three directors not nominated by Nabors), (b) sell New C&J or all or substantially all of its assets, (c) issue any New C&J shares that require shareholder approval under NYSE rules, or (d) repurchase more than 15% of New C&J's outstanding shares in a given year. A1421 § 29.7. These provisions remain in place for a period of five years. *Id.*

Board restrictions. New C&J will have a seven-member board, four of whom are current C&J directors. A1327 § 6.9(a). The board will have a three-member nominating committee, two of whom must be current C&J directors. *Id.*

at § 6.9(b). The board will also be classified, and current C&J directors will sit in each class. *Id.* at § 6.9(a).

<u>Standstill period</u>. During the standstill period, Nabors may not (1) acquire additional shares beyond its ownership as of closing, (2) solicit proposals for a merger, (3) solicit proxies for a vote, (4) grant proxies to any third party, (5) seek additional representation or propose changes to the size of the board, or (6) sell its stock to any person or group subject to SEC rule 13d during the standstill period. A1333-35 §§ 6.14-6.15(a). Thus, any transferee cannot (1) hold stock in New C&J with the "purpose, or … effect of, changing or influencing the control" or (2) own more than 20% of New C&J. *Id.* The standstill period lasts until the earlier of (a) the five year anniversary of the effective date of the Transaction or (b) the date Nabors beneficially owns fewer than 15% of New C&J's shares. A1334 § 6.14(c).

Together, these protective provisions sufficiently deprive Nabors of the power to alter current C&J's long-term strategic vision. That strategic vision was never abandoned by C&J's Board, and in fact drove this Transaction by allowing C&J to continue to expand its asset base and geographic footprint. Current C&J stockholders will continue to have the same right to participate in the fruits of that strategy and any future control premium. For these reasons, the Transaction does not constitute a change of control.

II. The Court of Chancery misinterpreted and misapplied *Revlon*.

A. Questions presented

If *Revlon* applies, did the trial court err by: (1) interpreting *Revlon* to mandate a particular "sales process;" A3520 at 153:17-24; A808; and (2) finding that Plaintiff had discharged its burden to show a probability that the Board could not demonstrate *Revlon* compliance? A3517 at 150:5-20; A783-98, A816-19.

B. Scope of review

The first question is a question of law.[3] The second question is a mixed question of law and fact. *De novo* review applies to matters of law, and an abuse of discretion review applies to factual findings. *See supra* Arguments § I.B.

C. Merits of argument

"On a preliminary injunction motion, the [p]laintiff[] bear[s] the burden of establishing a reasonable probability that at trial the [d]irector [d]efendants would be unable to show that they acted reasonably," as *Revlon* requires. *In re Plains Exp. & Prod. Co. Stockholder Litig*., 2013 WL 1909124, at *4 (Del. Ch.). The trial court found the Board did not satisfy *Revlon* because it did not have "impeccable knowledge," which it held was required to forego "shop[ping] the company or hav[ing] a pre-agreement market check or a go-shop provision." A3515, 3517 at

[3] To the extent this Court finds any factual matters in this point of error, they should be reviewed for an abuse of discretion.

148:11-13, 150:5-11. The trial court's conclusion is contrary to the analysis required by *Revlon* and the record.

1. The Court of Chancery misinterpreted *Revlon*.

In holding that the Board had not satisfied *Revlon*, the trial court explained:

> The shareholders are adequately informed, and one can ask why they should not be allowed to decide. The answer, which is not a particularly satisfying one, is simply that they are entitled to having a sales process run when their company is being sold, and I don't believe that there was a sales process as that concept is commonly understood.

A3520 at 153:17-24. The trial court's 'understanding' of a 'sales process' seems to require "steps to sell or shop the company...." A3517 at 150:5-6.

But *Revlon* does not "entitle" stockholders to a particular "sales process" or require a Board to "shop the company." *Revlon* requires the Board "to secure the transaction offering the best value reasonably available for the stockholders," and "[n]o court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control." *QVC*, 637 A.2d at 44 (first quote); *Lyondell*, 970 A.2d at 242 (second quote). Deference to the path selected by the directors is appropriate "so long as they choose a reasonable route to get there." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595-96 (Del. Ch. 2010). The question is not whether the trial court agrees with the Board's choices in the pursuit of maximum available

value, but whether the Board's decisions fall within a range of reasonableness in view of the circumstances:

> [A] court should not ignore the complexity of the directors' task in a sale of control. There are many business and financial considerations implicated in investigating and selecting the best value reasonably available. The board of directors is the corporate decisionmaking body best equipped to make these judgments . . . . If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness.

QVC, 637 A.2d at 45; *see also Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989) ("A stereotypical approach to the sale and acquisition of corporate control is not to be expected in the face of evolving techniques ... employed in today's corporate environment."); *In re Pennaco Energy, Inc.*, 787 A.2d 691, 705 (Del. Ch. 2001) ("While one would not commend the Pennaco board's actions as a business school model of value maximization, the process the directors used to sell the company cannot be characterized as unreasonable.").

For instance, in *Lyondell*, the trial court "decided that the *Revlon* sale process must follow one of three courses, and that the … directors did not discharge that 'known set of [*Revlon*] duties.'" *Lyondell*, 970 A.2d at 243. This Court reversed, holding that "there are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties. Thus, the directors' failure to take any

specific steps during the sale process could not have demonstrated a conscious disregard of their duties." *Id.* This trial court has again incorrectly interpreted *Revlon* to impose a rigid "sales process," rather than looking at the circumstances and the Board's actions to determine if those actions were a reasonable attempt to maximize value. *See Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1056-58 (Del. Ch. 1997) (approving a board's decision under *Revlon* not to engage in a sales process that could have yielded a higher immediate bid where the board's goal was to give stockholders the chance of upside benefit in the future development of the company's assets).

2. The trial court misapplied *Revlon*.

A review of the Board's process reveals that the Board satisfied *Revlon.* As an initial matter, C&J's Board was active and well-informed throughout the process. The trial court had "no doubt about the board's knowledge as to the value of C&J." A3517 at 150:8-15. The directors—all of whom undisputedly have significant industry experience—were extremely well-informed regarding the Transaction itself. *See supra* at Facts §§ I, III, V. In addition to the seven formal Board meetings, Comstock and the Board remained in close contact throughout the process, so much so that a veteran Citi advisor commented that he had "never seen a CEO provide their board so much data day-to-day." A708.

The trial court found the Board did not satisfy *Revlon* because it "did not consider alternative transactions" or "recogni[ze]" that the Transaction involved a "sales process." A3514 at 147:7-10; A3519 at 152:13-17. But it is indisputable that the Board understood that the Transaction could potentially be viewed as a sale of control—invoking the *Revlon* standard of scrutiny—and informed itself accordingly. A3169 at 24:14-19. Of course, even if the Board called the Transaction an "acquisition" of Nabors C&P—which is entirely appropriate, given the economics of the Transaction and the governance controls—the Board knew that a component of the price for the acquisition was 53% of C&J's stock. *See supra* at § I.C (detailing governance provisions); A968-69 (explaining that C&J is the "acquiring entity" under accounting guidelines).

The Board received numerous presentations from Citi during the process, and asked both Citi and Tudor, who are "constantly in the market looking for bidders and sellers of different assets," about strategic alternatives to the Transaction. A3168 at 18:3-19:15, 20:16-21:3. C&J's financial advisors gave the board a "landscape of potential buyers of [C&J's] assets." A3168-69 at 21:24-23:4. The Board was also well aware of the short list of potential buyers "with enough balance sheet scale to be able to consummate 100 percent cash take out of C&J." *Id.* The Board has industry connections that would have alerted them to any potential interest from other purchasers, particularly given that "this is not an

industry where [acquisition] interest is kept confidential. They would have expressed it to us." *Id.* at 23:12-24:10, 24:21-25:7 ("[T]he Board, along the way, myself included, we have a very active dialogue with the investor and the strategic buyer community."); *see also supra* at Facts § III.

Moreover, before approving the Transaction, the Board received valuation materials and presentations from its advisors. Citi informed the Board that the Transaction yielded a 15% premium for C&J's stockholders as of June 24. And because C&J bargained for a Transaction that did not include a "collar," the Transaction price has improved over $800 million (or approximately 30%) for C&J since it was entered into on June 25. A2175. Further, it is undisputed that the Transaction provides a number of strategic benefits to C&J. *See, e.g.*, A1943-45; A2024; A2123-26.

Plaintiff attempted to impugn the substantive merits of the Transaction with an expert report that (after correction of an admitted mathematical error) indicated a -0.6% premium. A1816 at 115:8-116:13; A2167; A2171, A2176. However, Plaintiff abandoned its expert report after Plaintiff's expert admitted during his deposition that he (a) did no valuation of C&J or Nabors C&P (and wasn't asked to), (b) performed only an "illustration" of a potential premium calculation but conducted no analysis of the appropriate values to use for this "illustration," and (c) did not reach a definitive conclusion as to whether C&J's stockholders received

a premium. A1788 at 5:8-15; A1798 at 45:11-24; A1805 at 71:23-72:12; A1810 at 90:20-23; A1813 at 105:20-106:14. The C&J Appellants' expert conducted an independent valuation that calculated a 26% premium. A2171, 93-94.

Finally, recognizing that the Transaction was potentially subject to *Revlon*, C&J's Board allowed for an effective post-signing market check prior to the stockholder vote subject by agreeing only to, in the trial court's words, "relatively modest deal protections." A3520 at 153:7-16.

Against this backdrop, the trial court faulted the Board for pursuing a single-bidder approach based on its "uncertain" finding that the Board did not have "impeccable knowledge" of Nabors C&P. A3517 at 150:5-20. The trial court erred. First, the trial court's notion that a board must conduct a pre-agreement market check (or sales process) or have "impeccable knowledge" is the same notion this Court criticized in *Lyondell*. *Lyondell*, 970 A.2d at 243 (noting that the trial court's decision that "the *Revlon* sale process must follow one of three courses" could not demonstrate bad faith because "there are no legally prescribed steps that directors must follow").

Adhering to the teaching of *QVC*, in *Pennaco*, the court concluded that it was not "unreasonable for the Pennaco board to deal with Marathon on an exclusive basis" and forego a pre-signing market check where Pennaco "was a source of industry interest," "the Pennaco board's knowledge of the company has

not been seriously challenged," and the board had "relevant expertise and experience in the energy business…." *Pennaco*, 787 A.2d at 705-06. Thus, the court concluded, "[t]here is no basis to believe that the board itself did not have a sound basis to evaluate the price at which a sale of the company would be advantageous." *Id.* at 706. In *Barkan*, this Court held that if directors "possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market." 567 A.2d at 1287. A board only needs to have "adequate information." *Id.*; *see also QVC*, 637 A.2d at 45. *Revlon* is only "a test of reasonableness"—not impeccability. *Dollar Thrifty*, 14 A.3d at 595-96. There is no question that the Board had such information.

Second, the trial court's inflexible approach ignores that numerous cases have permitted a single-bidder approach where (as here) a board is careful to balance that approach with an effective post-agreement market check. A post-agreement market check, coupled with a sound basis to evaluate value, can be sufficient where (a) the deal protection terms are reasonable, (b) the transaction has been publicly disclosed, and (c) a sufficient amount of time is available for topping bidders to emerge. *See, e.g.*, *Pennaco*, 787 A.2d at 707; *In re MONY Grp. Inc. S'holder Litig.*, 852 A.2d 9, 20-24 (Del. Ch. 2004). These factors are indisputably satisfied. A3520 at 153:7-16.

Third, the trial court misapplied its own erroneous legal principle. It stated that "[i]n order to justify not shopping the company or engaging in other techniques available to sellers, it is generally viewed as imperative that the board have impeccable knowledge of the value of *the company that is selling*." A3517 at 150:5-11 (emphasis added). The trial court stated that it had "no doubt about the Board's knowledge as to the value of C&J." *Id.* at 150:12-13. The trial court erred by finding that this standard was not fulfilled because C&J's Board did not have "impeccable knowledge" of *Nabors C&P*. *Id.* at 150:13-20.

Fourth, the trial court effectively substituted its judgment for that of the Board's judgment not to conduct a market check. The Board considered and rejected the idea of a market check or solicitation process because it would "disrupt" C&J's business and could affect its value. A3169 at 23:12-24:10. As Chancellor Allen concluded in *Equity-Linked*, because C&J's Board was not abandoning its long-term strategy and believed that this Transaction was in furtherance of that strategy, "to engage in a *Revlon* auction . . . would be to defeat [the Board's] legitimate strategy." *Equity-Linked*, 705 A.2d at 1057; *MONY*, 852 A.2d at 21 ("Single-bidder approaches offer the benefits of protecting against the risk that an auction will be a failed one, and avoiding a premature disclosure to the detriment of the company's then-ongoing business.").

III. The Court of Chancery erred in finding irreparable harm and concluding that the balance of equities fall in Plaintiff's favor.

A. Question presented

Did the trial court err in finding that Plaintiff met its burden of showing irreparable harm absent an injunction and that the balance of the equities weighed in its favor? A3519-21 at 152:18-154:9; A799-803; A828-30.

B. Scope of review

This is a mixed question of law and fact. This Court conducts a *de novo* review with respect to matters of law and an abuse of discretion review with respect to factual findings. *See supra* at Arguments § I.B.

C. Merits of argument

The trial court erred by risking the stockholders' right to vote on the Transaction. A preliminary injunction "should never be granted except in a clear case of irreparable injury, and with full conviction on the part of the court of its urgent necessity." *Gimbel v. Signal Cos.*, 316 A.2d 599, 602 (Del. Ch. 1974), *aff'd*, 316 A.2d 619 (Del. Ch. 1974). "[S]hareholders are not threatened with irreparable harm" where there will be an informed vote on a transaction. *McMillan v. Intercargo Corp.*, 1999 WL 288128, at *4 (Del. Ch.). ("The shareholders are not threatened with irreparable harm, because it is they who in the end will decide whether or not the company will be sold now."). And "inadequacy of price alone is not a proper basis for a preliminary injunction." *In re Cogent, Inc. S'holder*

Litig., 7 A.3d 487*,* 500 (Del. Ch. 2010); *see also La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1192 (Del. Ch. 2007).

Similarly, Delaware courts have repeatedly held that the equities weigh against an injunction where (1) there is no viable competing proposal and (2) the stockholders will vote on the transaction. *See, e.g., In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 451 (Del. Ch. 2012); *Abrons v. Maree*, 911 A.2d 805, 810 (Del. Ch. 2006); *Cogent*, 7 A.3d at 515 (recognizing that "it would be imprudent to terminate the only deal available, when the stockholders can make that decision for themselves"); *Koehler v. NetSpend Holdings, Inc.*, 2013 WL 2181518, at *22-23 (Del. Ch.); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1023 (Del. Ch. 2005) (denying injunctive relief where plaintiffs merely faced the "theoretical possibility" of losing a higher bid).

The trial court violated all of these well-established principles in finding a threat of irreparable injury and that the balance of equities tipped in favor of an injunction. Specifically:

<u>No competing proposal</u>. The trial court found that no competing proposal has emerged in five months despite "relatively modest deal protection measures." A3520 at 153:7-16.

<u>Fully-informed vote</u>. The trial court found that "[t]he shareholders are adequately informed …." *Id*. at 153:17-24.

Lack of conviction regarding urgent necessity. The trial court repeatedly found that it does not expect its injunction to result in any expressions of interest from other potential purchasers:

> I pause because it has been five months since the deal was announced and no one has come forward. The number of entities that would be interested in acquiring C&J is small, and it is impossible to believe that they do not know about the transaction. Given the relatively modest deal protection measures, one does wonder why, if the deal is as bad as the Plaintiff contends, no one has put forth another offer. It is easy to be skeptical that another buyer will emerge.

A3520 at 153:7-16. The following day, the trial court re-emphasized its skepticism about the mandated "go shop" period: "as I made pretty clear yesterday, I think the odds of a better bid emerging are really small." A3535 at 11:8-10. This is not the judicial "conviction" regarding an "urgent necessity" that Delaware law requires.

Monetary harm. The trial court wrongly found irreparable injury based on its conclusion that there was no "basis for loyalty claims" and "therefore, it is likely that any due care claim for monetary damages would be exculpated by the Section 102(b)(7) provision." A3519-20 at 152:20-153:2.

Delaware courts have rejected this argument, and with good reason: a board protection mechanism (Section 102(b)(7)) should not be used as a weapon against that board. *See In re TIBCO Software, Inc.*, 2014 WL 6674444, at *22 (Del. Ch.); *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *26 n.172 (Del. Ch.); *but see El Paso*, 41 A.3d at 448. As Chancellor Bouchard

recently found in *TIBCO*, "a Section 102(b)(7) provision . . . does not change the fact that the damages alleged by Plaintiff are quantifiable." *TIBCO*, 2014 WL 6674444, at *22. Indeed, as the trial court previously noted in this matter, "[t]hat monetary relief after closing may be unlikely (because of … § 102(b)(7)) does not necessarily satisfy the irreparable harm standard." *See* A456 at n.2.

Despite the trial court's preliminary ruling that it found no "basis for loyalty claims," Plaintiff's Complaint asserts such claims, and the trial court left open the possibility of further record development. A3520 at 153:3-6. Defendants, of course, contest all of Plaintiff's assertions and claims, but irreparable harm does not exist where a Plaintiff is pursuing damage claims for the alleged harm at issue. *See La. Mun. Police Emps.' Ret. Sys.*, 918 A.2d at 1192 ("So long as [monetary remedies] remain available, shareholders fully apprised of all relevant facts may protect themselves. They need no further intervention from this Court.").

In light of the foregoing, the trial court erred in finding irreparable harm and that the balance of equities favored an injunction.

IV. The Court of Chancery erred by granting a mandatory injunction.

A. Question presented

May the trial court grant a mandatory injunction, requiring C&J to affirmatively shop itself, (1) based on finding a "plausible" likelihood of success on the merits, (2) without holding a full evidentiary trial, and (3) in a manner that rewrites the Merger Agreement? A3422-23, 3469, and 3519-20 at 55:15-56:8, 102:4-11, 152:6-153:6.

B. Scope of review

This is a question of law and should be reviewed *de novo*.[4] *See supra* Arguments § I.B.

C. Merits of argument

The Order requires certain members of the Board to take mandatory, affirmative acts to "solicit alternative proposals to purchase [C&J] (or a controlling stake in [C&J]) that are superior to the [Transaction]." A3556 ¶ 1.

1. The trial court applied the wrong standard of proof and evidentiary burden for a mandatory injunction.

The Order is "a mandatory preliminary injunction," which grants affirmative corrective or remedial action to be taken. *See Alpha Nat. Res., Inc. v. Cliffs Nat. Res., Inc.*, 2008 WL 4951060, at *2 (Del. Ch.). "This requires more than simply a showing of a reasonable probability of success .... It requires, in addition, a

[4] To the extent this Court finds any factual matters in this point of error, they should be reviewed for an abuse of discretion.

showing that the petitioner is entitled as a matter of law to the relief it seeks based on undisputed facts." *Id.* A mandatory injunction is so extraordinary that the existence of factual disputes removes the court's power to enter it without the benefit of trial. *See NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 31 (Del. Ch. 2009) (collecting authority for the holding that "this Court only could have issued a mandatory injunction or other affirmative and compulsory relief, such as an order of specific performance, after trial"); *Toys*, 877 A.2d at 1022-23 ("To grant that sort of mandatory relief would ... be inappropriate on disputed facts, and plaintiffs who seek such relief should move promptly, not for a preliminary injunction hearing, but for an expedited trial").

The Court of Chancery confronted similar circumstances in *El Paso*, holding that plaintiffs' requested relief, which consisted of "mandatory injunctive relief" that permitted the seller to shop itself to potential bidders, was improper. *El Paso*, 41 A.3d at 449-51. Such relief was "not a traditional negative injunction that can be done without an evidentiary hearing or undisputed facts." *Id.* at 449.

Here, the trial court entered mandatory injunctive relief based on only a "plausible" likelihood of success on the merits (a standard that even falls short of the standard for granting a prohibitory preliminary injunction). A3519 at 152:6-12. Moreover, rather than hold an expedited trial or base its decision on undisputed facts, the trial court noted that (1) the "issues here are very close," (2) it went

"back and forth" as to its decision during the non-evidentiary hearing, (3) it was "uncertain" of key findings, (4) its conclusion is "obviously tentative now" and "could readily change" as the record is further developed, and (5) it made findings regarding the Board's conduct and thought processes despite the fact that Plaintiff deposed less than half of the Board members. A3472-73, 3509, 3517, 3520, 3523 at 105:17-106:6, 142:11-13, 150:12-15, 153:3-6, 156:5-7.

2. The trial court's legal authority provides no support.

The trial court explained that its Order was guided by the 20-day injunction issued in *In re Del Monte Foods Company Shareholders Litigation*, 25 A.3d 813 (Del. Ch. 2011). However, the *Del Monte* court issued a negative injunction that delayed the stockholder vote and enjoined enforcement of deal protections for 20 days. *Id*. at 840-41. The court did not impose any mandatory obligations on the company to solicit bids or otherwise shop itself. Moreover, the *Del Monte* court expressly considered the effect of the injunction on the merger agreement and the parties' bargained rights, and concluded that the "preliminary injunction will not, itself, give either party the right to terminate." *Id*. at 843. The lower court here conducted no such analysis and went far beyond the parameters of the injunction issued in *Del Monte*. *See* A3544 at 20:15-19.

Even if the trial court had issued a *Del Monte* injunction, that type of relief would be inappropriate here. Such relief would re-write the Merger Agreement

and deprive the parties of the benefit of their bargain. After *Del Monte*, the Court of Chancery later ruled in *El Paso* that injunctive relief like *Del Monte*'s is unwarranted because it improperly re-writes the parties' agreement. *See El Paso*, 41 A.3d at 451 (such an injunction would "allow [the seller] to terminate the Merger Agreement on grounds not permitted by the Merger Agreement and without paying the termination fee set forth in the Merger Agreement, but then ... force [the buyer] to consummate the Merger 'if no superior transactions emerge.'"). It is inappropriate for the trial court, at least at the preliminary injunction stage, to "blue-pencil" a merger agreement and order what amounts to a do-over of the bargained agreement. *See Toys*, 877 A.2d at 1022-23.

3. The Court of Chancery applied the wrong standard even for a prohibitory injunction.

Even if the trial court had only entered a prohibitory (or negative) preliminary injunction, it would have erred. To obtain a preliminary prohibitory injunction, a Plaintiff must demonstrate "a reasonable probability of success on the merits ...." *Revlon*, 506 A.2d at 179. A party showing a "reasonable probability" of success must demonstrate "that it will prove that it is more likely than not entitled to relief." *Mitchell Lane Publishers, Inc. v. Rasemas*, 2014 WL 4925150, at *3 (Del. Ch.). A party is permitted to show the lower "plausible" likelihood of success on the merits only when seeking an injunction in aid of arbitration. *See Eastman Kodak Co. v. Cetus Corp.*, 1991 WL 255936, at *4-5 (Del. Ch.). Under

this standard, which is akin to what a party must show to survive a motion to dismiss, a party can have a "plausibl[e]" claim that likely "would be insufficient" in the conventional injunction context. *See id.*; *see also Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

It was error to require only a "plausible showing." *See* A3519 at 152:6-9. It was also error for the trial court to rely on factual findings of which it was "uncertain," *e.g.*, the Board's knowledge of Nabors. Because it was Plaintiff's burden, any "uncertainty" should have been resolved in Defendants' favor, not Plaintiff's.

The trial court's erroneous standard is particularly inappropriate given that "where, as here, no other bidder has emerged despite relatively mild deal protection devices, the plaintiff's showing of a reasonable likelihood of success must be particularly strong." *Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 954 A.2d 319, 331 (Del. Ch. 2008); A3520 at 153:7-16.

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CERTIFICATE OF SERVICE

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