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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. v. 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.	No. 655, 2014 Court Below—Court of Chancery of the State of Delaware C.A. No. 9980-VCN
NABORS INDUSTRIES LTD. and NABORS RED LION LIMITED, Defendants Below, Appellants, v. 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.	No. 657, 2014 Court Below—Court of Chancery of the State of Delaware C.A. No. 9980-VCN CONSOLIDATED PUBLIC VERSION Filed: December 12, 2014

OPENING BRIEF OF THE NABORS APPELLANTS

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December 5, 2014

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NATURE OF PROCEEDINGS

Delaware has a strong public policy in favor of upholding the agreements of sophisticated commercial parties. Only in the rarest of circumstances does this policy give way to competing principles of public policy. Delaware courts respect the contract rights of a party, unless that party was found culpable or was on notice that the contract rights were of questionable validity. Until now.

This is an interlocutory appeal of the Court of Chancery's ruling (i) preliminarily enjoining a stockholder vote of C&J Energy Services, Inc. ("C&J") on a proposed merger with a subsidiary of Nabors Industries Ltd. ("Nabors"), (ii) requiring C&J to solicit alternative proposals in violation of the standard and unremarkable "window-shop" provision in the merger agreement, and (iii) declaring that C&J's solicitation will not breach any provision of the merger agreement. The trial court issued this mandatory injunction using the wrong standard, and despite finding that the C&J stockholders are adequately informed and that no bidders have emerged in the five months since the transaction—with "relatively modest" (in the words of the Court below) deal protections—was publicly announced. Disregarding the near-sacrosanct policy in Delaware to uphold parties' contracts, the trial court, on a preliminary injunction record without

a full evidentiary hearing, "blue-penciled" the "window-shop" provision in the merger agreement without making a determination that Nabors aided and abetted the alleged breach of fiduciary duty. Additionally, the trial court issued an advance declaration that C&J's acts of solicitation would not breach the merger agreement in any respect—an issue that was neither properly before the trial court nor ripe for decision. The trial court erred.

On June 25, 2014, Nabors and C&J announced their strategic transaction whereby C&J will combine with Nabors' U.S. and Canadian completion and production business (the "Transaction"). After the Transaction, Nabors will own about 53% of the outstanding stock of the post-merger entity ("New C&J") (50.25% on a fully-diluted basis) (A37[1] ¶ 27), and C&J stockholders will own the remaining approximately 47%, with the right to share *pro rata* in any future control premiums, and with C&J management having operational control over New C&J. (A29-32 ¶¶ 3, 8; A924-928).

Plaintiff filed this class action on July 30, 2014, nearly five weeks after the deal was announced, ultimately seeking an injunction—not an expedited trial—to force the C&J board to explore other options. On November 24, 2014,

[1] "A[]" refers to the Exhibits to the Joint Appendix to Appellants' Opening Briefs, filed by the C&J Defendants on December 5, 2014.

the Court of Chancery issued a bench ruling, which it supplemented by letter on November 25, 2014 (the "Ruling"), followed by an order later on November 25 (as modified on November 26, the "Order") enjoining C&J from holding its stockholder meeting to vote on the Transaction for a 30-day period, requiring C&J to solicit alternative proposals to purchase C&J, and certifying an interlocutory appeal. On November 26, 2014, appellants filed notices of interlocutory appeal and motions to expedite. This Court ordered expedition of the appeals by Order dated December 1, 2014.

SUMMARY OF ARGUMENT

1. The trial court erred by granting a mandatory injunction requiring C&J to shop itself affirmatively when the trial court used the wrong standard, and when the trial court found that the C&J stockholders are adequately informed and no topping bid has emerged—and is unlikely to emerge—despite "relatively modest" deal protections.

2. The trial court erred by disregarding Delaware's almost unremitting public policy to honor contracts among sophisticated parties when it disregarded Nabors' vested contract rights without a full evidentiary hearing.

3. The trial court erred by disregarding again Delaware's policy in favor of upholding parties' agreements by blue-penciling the "window-shop" provision in the merger agreement when the trial court made no finding that Nabors aided and abetted the alleged breach of fiduciary duty.

4. The trial court erred by issuing a declaration that C&J's affirmative solicitation of alternative proposals would not constitute a breach of the merger agreement when it made that ruling without an actual controversy before it, and when the issue had not been raised properly.

STATEMENT OF FACTS

Nabors and its wholly-owned subsidiary, Nabors Red Lion Limited[2] (the "Nabors Appellants"), set forth below the facts most pertinent to the arguments raised in this brief, and incorporate the Opening Brief of the C&J Defendants for its more detailed statement of facts.

I. THE TRANSACTION

A. Nabors and C&J Negotiate A Deal Structure.

Nabors is a Bermuda company involved in two primary business lines related to oilfields: (1) drilling and rig services and (2) completion and production services. (A35-36 ¶¶ 21, 25). In early 2014, Anthony Petrello, Nabors' CEO, was approached by C&J's CEO (Josh Comstock) and President (Randy McMullen) to explore a potential transaction. (A921-922). None of Comstock, McMullen, or any member of the C&J Board had any relationship or connection to Nabors. (A33-35 ¶¶ 13-22). C&J had been contemplating a potential strategic transaction since late 2013, and Citi, C&J's financial advisor, had identified Nabors as a potential strategic partner. (A1845-1846 ¶ 6; A1643 at 20:14-21:3). Nabors also

[2] Nabors Red Lion Limited ("Red Lion") is a wholly-owned subsidiary of Nabors. Upon closing, C&J will merge into Red Lion. C&J will become the surviving entity, and will be renamed C&J Energy Services, Ltd., here called "New C&J." (A920).

had begun a comprehensive strategic review process in 2013 to evaluate strategies to enhance stockholder value. (A921).

During the first meeting between Nabors and C&J on January 16, 2014, Petrello indicated that Nabors was considering options for its completion and production services business, including taking it public or selling it to a competitor. (A1644 at 24:17-25:19). After the meeting, both C&J and Nabors believed that a transaction would be a good fit, because of potential tax savings and synergies, among other reasons. (A2351-2353).

The parties thereafter engaged in extensive due diligence and hired legal, financial, and tax advisors to evaluate and negotiate the terms of a potential transaction. (A922-928). For more than five months, the parties negotiated at arms' length various terms, including price, protections for C&J stockholders, and deal structure. (*Id*.). The parties agreed that Nabors would own the majority of the combined entity, largely for tax purposes, and that C&J management would run it. (A1925-1938; A642).

There is nothing in the record to suggest that Nabors had any knowledge, involvement, or participation in C&J's decision not to engage in a full pre-signing market check. There is no evidence that Nabors made any requests to C&J concerning a pre-signing market check; in fact, there is not even an

exclusivity agreement—the parties negotiated and signed the deal without one. C&J determined, based on the analyses performed by Citi and its own expertise, that a pre-signing market check would not be advisable because the asset base of other potential parties did not offer the same level of synergies as a combination with Nabors. (A818, A2235-2242). Nabors was not a part of that decision, and the Court of Chancery did not find otherwise.

B. The Parties Bargained For Deal Protections Routinely Upheld In Delaware.

The parties negotiated certain common deal protections. The original draft merger agreement, sent by Nabors to C&J, included, among other things: a window-shop provision, three-day match rights, and a termination fee. (A925). As negotiations continued, the parties modified the specifics of those deal protections and eventually agreed to the following modest deal protection provisions, which have been upheld in Delaware time and again:

- **"Window-Shop."** The merger agreement contains a standard window-shop provision—that is, a no-solicitation provision with a "fiduciary out" allowing C&J to negotiate with a third party (including providing confidential information) with respect to an alternative Acquisition Proposal that is reasonably likely to lead to a Superior Proposal. (A210-212 § 6.4(b)(B)). The definitions of Acquisition Proposal (A210-211 § 6.4(a))

and Superior Proposal (*id.* § 6.4(e)) are typical, with standard thresholds of 15% and 50%, respectively.

- **"Fiduciary Out."** The merger agreement permits C&J to terminate the deal with Nabors in favor of a Superior Proposal; this is not a force-the-vote deal. (A211 § 6.4(b)(C), A232 § 8.1(h)). The merger agreement provides Nabors a three business day recurrent match right (limited to two business days on most recurrences). (A211-212 § 6.4(b)(ii)(IV-V)). C&J may adjourn or postpone its stockholders meeting during any match period. (A207-208 § 6.1(b)). The exercise of the fiduciary out is subject to material compliance by C&J with the Window-Shop Provision and matching rights, and to payment by C&J to Nabors of a termination fee of $65 million (3.4% of the equity to be exchanged and 2.27% of deal value). (A233 § 8.2(b)(iii)).
- **Protection From Breaches Of Window-Shop Provision And Matching Rights.** In light of the modest deal protection measures, Nabors negotiated for a method to enforce compliance with them. Separate and apart from the traditional termination right for a breach of covenant that first requires a cure period (included in Section 8.1(e) of the merger agreement), Nabors negotiated for a termination right without a cure period if C&J "breached its obligations under Section 6.4 [*i.e.*, the Window-Shop Provision and

matching rights] in any material respect." (A232 § 8.1(d)(ii)). Moreover, a termination by Nabors under Section 8.1(d)(ii) of the merger agreement would be an initial trigger for a tail termination fee. (A233-234 § 8.2(b)(iv)).

In addition, C&J signed a support agreement with Comstock and certain entities affiliated with him (representing only approximately 10% of all outstanding shares as of June 25, 2014, the date the merger agreement was signed) in which the signatories agreed to vote certain of their shares of C&J common stock in favor of the merger agreement. (A370 § 1.1(a)(i)). The Support Agreement terminates if there is a change in recommendation by the C&J Board or if the merger agreement is terminated. (A374 § 2.1).

C. The Deal Is Publicly Announced And No Competing Offers Emerge.

On June 25, 2014, Nabors and C&J announced the Transaction, making it known that Nabors would own 53% of New C&J's stock, while C&J would operationally control the entity. The merger agreement and related agreements were publicly filed on July 1, 2014, giving would-be bidders notice of the initial "drop dead" date of December 31, 2014. (A231-232 § 8.1(c)). During the five months from the end of June until the end of November—and now less

than one month before the initial "drop dead" date[3]—C&J has not received any communications of potential interest from another company. (A1853 ¶ 8; A3515, A3520). This is not surprising, given that there are only a "small" number of entities that may be interested in acquiring C&J (A3520) and that the deal protections were "relatively modest," facts recognized by the Court of Chancery (*id.*).

D. The Mandatory Injunction And The Declaration.

After filing a complaint challenging the transaction, Plaintiff sought a preliminary injunction but did not seek an expedited trial. Plaintiff did not make any arguments in its briefs in support of its Motion for a Preliminary Injunction to support its claim against Nabors of aiding and abetting, other than a conclusory argument in one footnote in its reply brief that Nabors knowingly participated in a breach of fiduciary duty. (A2901 n.58).

Following argument at the preliminary injunction hearing, the Court entered a mandatory injunction and a declaration.

- **The "Breach The Window-Shop Injunction."** First, without ***any consideration*** of Nabors' rights as a signatory to the merger

[3] The "drop dead" date may be extended through March 31, 2015, by C&J or Nabors under certain circumstances, including if all conditions to close would be capable of being satisfied but for the failure of the Form S-4 to become effective. (A231 § 8.1(c)). As of the date this brief is filed with the Court, the S-4 has not yet become effective.

agreement, the Court below ordered C&J to breach the Window-Shop Provision. Specifically, the Order stated that C&J, "through its directors who have not been designated to be directors of C&J Energy Services, Ltd., is hereby ordered to solicit alternative proposals to purchase the Company (or a controlling stake in the Company) that are superior to the Proposed Transaction, as such term is defined by the merger agreement, for a period of 30 days from November 24, 2014." (A3557 ¶ 1).

- **The "Declaration of Non-Breach."** Second—and again without any consideration of Nabors' rights as a signatory to the merger agreement or any findings of fact as to Nabors' culpability as an aider and abettor of an alleged fiduciary breach—the trial court declared that C&J's compliance with the mandatory injunction would not constitute a breach of the merger agreement. Specifically, the Order stated that, "[t]he solicitation of proposals consistent with this Order and any subsequent negotiations of any alternative proposal that emerges will not constitute a breach of the Merger Agreement in any respect." (A3557 ¶ 2).

The Court of Chancery issued these extraordinary orders:

- On a record created for a preliminary injunction, not after an expedited trial;

- Notwithstanding its belief that the "issues here are very close" (A3509), that the matter is a "very close call" (A3519) and that the trial court had "gone back and forth throughout this day as to what [it] would do" (A3523);

- Without any consideration of Nabors' contract rights or the "modest" (in the Court's words (A3520)) nature of the deal protection measures;

- Irrespective of the fact that, as recognized by the Court below, "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" (A3520), and that no competing bidders have emerged in the five months since the Transaction was publicly announced;

- Notwithstanding that the C&J stockholders were adequately informed (A3520);

- After finding only a "plausible showing" of a likelihood of success on the merits as to a breach of the duty of care of the C&J board and stating "it certainly looks as if the board was not conflicted" (A3519);

- Without applying the proper standard for a mandatory injunction; and, importantly

- ***Without any finding as to Nabors' culpability as an alleged aider and abettor***.

ARGUMENT

I. THE COURT OF CHANCERY IMPROPERLY DEPRIVED NABORS OF ITS CONTRACT RIGHTS.

A. Question Presented

Whether the Court of Chancery erred in issuing a mandatory injunction and declaration that deprives Nabors, an innocent third party, of its contract rights. (A757-758; A3469; A3557-3558; A3539-3544).

B. Standard of Review

The grant of a preliminary injunction is reviewed without deference to the legal conclusions of the Court of Chancery. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995). Factual findings made by the Court of Chancery, however, are reviewed on an abuse of discretion basis. *Wilmington Sav. Fund Society, FSB v. Covell*, 1990 WL 84687 (Del. May 16, 1990) (ORDER).

C. Merits of Argument

1. The Court Below Erred By Issuing The Unprecedented Injunction And Declaration.

As set forth in the Opening Brief of the C&J Defendants, in which the Nabors Appellants join, the mandatory preliminary injunction and declaration at issue are unprecedented and were made in error. The trial court did not apply the correct standard for a preliminary injunction, using a "plausible" likelihood of success instead of a "reasonable" one. (A3519). Nor did the trial court use the

correct standard for a mandatory injunction—"a showing that the petitioner is entitled as a matter of law to the relief it seeks based on undisputed facts." *Alpha Natural Res., Inc. v. Cliff's Natural Res., Inc.*, 2008 WL 4951060, at *2 (Del. Ch. Nov. 6, 2008). In fact, the trial court repeatedly said its decision was a "close call." (A3509, A3519). The Court of Chancery also failed to hold a full evidentiary hearing, instead issuing its extraordinary orders based on a preliminary injunction record.

The trial court's injunction is—literally—unprecedented here, where the trial court stated that C&J stockholders are fully informed (A3520), and no bidders have emerged in the five months since the deal—with "relatively modest" deal protections (*id*.)—was publicly announced. Delaware courts repeatedly have exercised judicial restraint when considering whether to enjoin a transaction absent a competing offer and with sufficient disclosure. As the Court of Chancery observed in *Netsmart*:

> In cases where the refusal to grant an injunction presents the possibility that a higher, pending, rival offer might go away forever, our courts have found a possibility of irreparable harm. In other cases when a potential *Revlon* violation occurred but no rival bid is on the table, the denial of injunctive relief is often premised on the imprudence of having the court enjoin the only deal on the table, when the stockholders can make that decision for themselves.

In re Netsmart Tech., Inc. S'holder Litig., 924 A.2d 171, 208 (Del. Ch. 2007) (footnotes omitted); *In Re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1023 (Del. Ch. 2005).

In this case, as set forth in the C&J Appellants' Opening Brief, the Court of Chancery found no competing transaction and no disclosure issue. The C&J stockholders should be permitted to decide for themselves whether to accept this deal. And because they are fully informed, their vote approving the merger will validate any claims of breach of fiduciary duty about the process leading to the merger. *In re KKR Financial Holdings, LLC S'holder Litig.*, 2014 WL 5151285, at *15-16 (Del. Ch. Oct. 14, 2014) (reiterating that a fully-informed stockholder vote may validate otherwise flawed or conflicted board decision).

2. Delaware Has A Strong Policy Of Upholding Contracts And Declines To Modify Them On Preliminary Injunction Records.

It is a fundamental premise of Delaware law that "parties should have the freedom to contract and that their contracts should not easily be invalidated." *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 172 (Del. Ch. 2005). For that reason, "Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties." *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009). "Parties

bargain for provisions in acquisition agreements because those provisions mean something," and it is "critical to our law that those bargained-for rights be enforced." *Id*. at 19. Because of the fundamental public policy of upholding the bargained-for contractual rights of parties, Delaware courts only interfere with the parties' bargain upon "a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than the freedom of contract." *Libeau v. Fox*, 880 A.2d 1049, 1056 (Del. Ch. 2005).

Despite this "fundamental public policy," the Court of Chancery ordered C&J to breach the Window-Shop Provision, and then declared that doing so would not constitute a breach of the merger agreement. Delaware courts have been loath to issue such an order absent an expedited trial. For example, in *Toys "R" Us*, plaintiffs requested that the Court either strike down certain deal protection measures or rewrite them. In denying plaintiffs' motion, the Court stated that even if plaintiffs had shown a probability of success on the merits, such relief would "be inappropriate on disputed facts" and before a trial. *Toys "R" Us*, 877 A.2d at 1023. Among other things, the Court noted that "a mandatory injunction of that kind" might release "the KKR Group from its obligation to close." *Id*. at n.81. The Court cautioned—almost a decade before Plaintiff in this case brought its motion for a preliminary injunction—that "plaintiffs who seek

such relief should move promptly, not for a preliminary injunction hearing, but for an expedited trial." *Id*. at 1023. Here, despite having several months to move for an expedited trial, Plaintiff moved only for preliminary relief.

Only two years after *Toys "R" Us*, in *Netsmart*, the Court of Chancery found (unlike in *Toys "R" Us*) that the plaintiffs *did* have a reasonable probability of success on their *Revlon* claims, including the claim that the target board did not have a reasonable basis for failing to undertake any exploration of interest by strategic buyers. Nonetheless, the Court declined to enjoin the transaction because (i) it recognized that enjoining the transaction would provide the acquirers a walk right under the terms of the agreement and (ii) the Court could perceive "no basis where [it] would have the equitable authority to require [the acquirers] to remain bound to complete [their] purchase of [Netsmart] while simultaneously reforming the Merger Agreement to increase [the acquirers'] transactional risk in that endeavor. Certainly, on this record, I could not justify such an unusual exercise of authority on the grounds of any misconduct by [the acquirer]." *Netsmart*, 924 A.2d at 209. Yet this is exactly what the trial court did here.

More recently, in *In re El Paso Corp. Shareholder Litigation*, 41 A.3d 432, 434 (Del. Ch. 2012), the Court of Chancery found that plaintiffs had "a reasonable likelihood of success in proving that the Merger was tainted by

disloyalty." (The Court of Chancery found to the contrary here. (A3520).) Nonetheless, the Court refused to enjoin the transaction. The Court's language in *El Paso* is directly on point here; dropping in the relevant names from this case into the Court's observations in *El Paso* is an illustrative exercise because the analysis is identical here:

> [T]he plaintiffs want an odd mixture of mandatory injunctive relief whereby I affirmatively permit [C&J] to shop itself in parts or in whole . . . in contravention of the no-shop provision of the Merger Agreement . . . but then to lift the injunction and then force [Nabors] to consummate the Merger "if no superior transactions emerge."
>
> That is not a traditional negative injunction that can be done without an evidentiary hearing or undisputed facts. Furthermore, that sort of injunction would pose serious inequity to [Nabors], which did not agree to be bound by such a bargain.…
>
> I share the plaintiffs' frustration that the traditional tools of equity may not provide the kind of fine instrument that enables optimal protection of stockholders in this context. . . . Be that as it may, that reality cannot justify the sort of odd injunction that the plaintiffs desire, which would violate accepted standards for the issuance of affirmative injunctions and attempt to force [Nabors] to consummate a different deal than it bargained for.
>
> Fundamentally, the plaintiffs say that I can issue a preliminary injunction that allows [C&J] a free option.… If something it likes comes along, [C&J] should be able to take it…. But if nothing does, then the injunction will expire and [Nabors] would somehow – by judicial compulsion, I assume – be forced to close, despite the

> pervasive breach of fundamental provisions of the Merger Agreement. . . . If my assumption about judicial compulsion is right, the plaintiffs do not seek a traditional negative injunction, but rather mandatory relief that can only be granted after a trial and a careful evaluation of [Nabors] legitimate interests.

Id. at 449-51 (footnotes omitted).

Here, it was reversible error for the trial court to order C&J to breach the Window-Shop Provision, and then to attempt to eliminate any right by Nabors to declare a breach—which has the effect of requiring Nabors to close the deal notwithstanding the breach. Without holding a full evidentiary hearing, the Court of Chancery simply does not have the equitable authority to require Nabors to consummate a different deal, with more transactional risk, than the one it bargained for.

3. Delaware Courts "Blue-Pencil" An Acquirer's Contract Rights Only In Extraordinary Circumstances.

As discussed above, as a matter of policy, Delaware Courts do not blue-pencil vested contract rights. In fact, "[t]he decisions in which the Delaware Supreme Court has issued or affirmed the issuance of injunctions targeted to specific deal protection terms all involved viable claims of aiding and abetting

against the holder of the third party contract rights."[4] *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 720 n.2 (Del. Ch. 2014) (citing *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994); *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1288 (Del. 1989); and *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 183–85 (Del. 1986)). For example, in *In re Del Monte Foods Company Shareholders Litigation*, 25 A.3d 813 (Del. Ch. 2011), the Court of Chancery entered an injunction delaying a stockholder vote and prohibiting defendants from enforcing certain deal protection measures for a period of time. However, the Court first held as a factual matter that the acquirer, KKR, had aided and abetted the target board's breaches of its fiduciary duties. *Id*. at 837. Applying the four-factor test from *Great Expectations*, the Court determined KKR's rights should give way because "KKR knew of and knowingly participated in the breach of duty." *Id.* at 841.

[4] An article the Court of Chancery characterized as persuasively "articulating how *QVC* can be explained . . . to determine whether to enforce a contract that contains provisions that are fiduciarily improper or that result from a fiduciary breach," sets forth four factors the courts should consider in determining "whether an acquiror's or merger partner's contract rights should give way to the need to protect the target company's stockholders from a fiduciary breach." *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95, 105 (Del. Ch. 1999) (quoting Paul L. Regan, *Great Expectations? A Contract Law Analysis For Preclusive Corporate Lock-Ups*, 21 CARDOZO LAW. REV. 1 (Oct. 1999) [hereinafter "*Great Expectations*"]. Tellingly, the first factor is "whether the acquiror knew, or should have known, of the target board's breach of fiduciary duty." *Id*. at 105 (quoting *Great Expectations* at 115).

Here, there has been no finding that Nabors aided and abetted the alleged breach of the duty of care.[5] The trial court made no factual finding that Nabors had any knowledge of, let alone influence, involvement, or participation in, C&J's decision not to engage in a full pre-signing market check. The idea that an acquirer could be culpable of aiding and abetting simply for pushing for a deal, without any knowledge of, or participation in, an alleged breach of fiduciary duty by the target board, is contrary to Delaware law. *In re Comverge, Inc.*, 2014 WL 6686570, at *20 (Del. Ch. Nov. 25, 2014); *Malpiede v. Townson*, 780 A.2d 1075, 1098 (Del. 2001). The Court of Chancery, therefore, committed reversible error by failing to respect Nabors' bargained-for rights by effectively striking the Window-Shop Provision and Nabors' ability to terminate based on a breach of that provision.

[5] We anticipate that Plaintiff will argue that the trial court made a finding of aiding and abetting during the November 25 teleconference concerning the form of Order to be entered. During that teleconference, the Court of Chancery confirmed that it "did not make a finding one way or another with respect to aiding and abetting ***because I wasn't focused on why it would be important***." (A3541-3542) (emphasis added). The Court below also commented that "it ***would not take much to find*** that, if there was a breach of fiduciary duty, that Nabors aided and abetted," because "Nabors was clearly in favor and urging and cajoling C&J to do as it did." (A3542) (emphasis added). Putting aside the clear legal error in the trial court's statement, the bottom line is that there was no such finding during the preliminary injunction argument, the letter supplementing the trial court's oral ruling, or in the Order. Nor could there be: there is no evidence in the record that Nabors had any knowledge as to, or participation in, how C&J's board approached the Transaction.

Other than in the context of a finding of aiding and abetting, the only other situation in which Delaware Courts have blue-penciled bargained-for contract provisions or interpreted those provisions in a way to avoid blue-penciling is when the provision (on its face or based on an advocated interpretation thereof) is so inappropriate that the acquirer either had notice, or should have been on notice, of its invalidity. For example, the Court of Chancery in *ACE Limited v. Capital Re Corp.*, 747 A.2d 95 (Del. Ch. 1999), declined, in a motion for a temporary restraining order, to interpret a window-shop provision as requiring the Capital Re board to obtain a legal opinion before responding to an acquisition proposal. *Id*. at 103. The Court observed that the proponent of that interpretation, ACE, was "a sophisticated party who bargained for, nay demanded" the wording of the window-shop provision and "was on notice of its possible invalidity" should it be interpreted in such a way. *Id*. at 109. The Court contrasted the interpretation advocated by ACE with a provision requiring a board "not to play footsie with other potential bidders or to stir up an auction," which the Court stated was a "perfectly understandable, if not necessary" restriction "if good faith business transactions are to be encouraged."[6] *Id*. at 106. As discussed above, the Window-Shop Provision is run-of-the-mill.

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[6] *See also QVC Network, Inc. v. Paramount Commcn's, Inc.*, 635 A.2d 1245, 1271 (Del. Ch. (Continued . . .)

4. The Court Of Chancery Improperly Issued A Declaration When The Issue Was Neither Ripe Nor Properly Before The Court.

The Court of Chancery's blue-penciling is improper for another reason. As discussed above, part of the trial court's modifications to the merger agreement included a declaration that C&J's solicitation of proposals and subsequent negotiations of alternative proposals will not be considered a breach of the merger agreement in any respect. (A3557 ¶ 2). In addition to being improper because it changed the bargained-for deal and increased Nabors' transaction risk without holding a full evidentiary hearing, the trial court's advance determination was improper because it was made without being raised in any pleading, without evaluation of the record and without there being an actual case or controversy before the trial court.

The Court of Chancery issued a declaration of no breach despite this issue not being presented by the parties below or explored by the trial court. By

(. . . continued)
1993) (declining to enforce only a Stock Option Agreement containing "unreasonable features" that Viacom "knew of (and in fact demanded)" and a no-shop provision that prevented Paramount from considering any transaction "subject to any material contingencies relating to financing," but not declining to enforce a standard termination fee) *aff'd* 637 A.2d 51 (Del. 1993); *cf. Pontiac Gen. Empl. Ret. Sys. v. Ballantine*, C.A. No. 9789-VCL (Del. Ch. Nov. 3, 2014) (finding it reasonably conceivable a bank aided and abetted a board's breach of fiduciary duty by including a dead-hand poison put feature in an indenture because "[t]here was ample precedent from this Court putting lenders on notice that these provisions were highly suspect").

making a determination that the shopping process would not constitute a breach without a proper evaluation of this issue, the Court below erred. In addition, the Court of Chancery cannot issue a declaratory judgment unless there is an actual controversy presented. 10 *Del. C.* § 6501; *XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014). One of the requirements for an "actual controversy" is that the issue involved must be ripe for judicial determination. *Id*. Here, not only was this issue not presented in any pleading or brief in the Court below, it is simply not ripe for judgment. At this stage, it is not certain whether Nabors would enforce its right to walk away from the deal because of C&J's shopping process. There may be no need, therefore, for the Court of Chancery ever to determine the effect of its Order on Nabors' vested contract rights. The purpose of the "actual controversy" requirement is to avoid judicial determinations that amount to advisory opinions. *Id*. at 1219. Yet, this is precisely what the trial court has issued.

CONCLUSION

For the foregoing reasons, the Nabors Appellants respectfully request that this Court reverse the Court of Chancery, order that Plaintiff's Motion for Preliminary Injunction be denied, dissolve the preliminary injunction, and grant such other and further relief to which the Nabors Appellants may be entitled.

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CERTIFICATE OF SERVICE

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