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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, 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 Public Redacted Version Filed December 15, 2014 CONSOLIDATED

PLAINTIFF BELOW-APPELLEE'S ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

Defendants below[1] appeal an order of the Court of Chancery preliminarily enjoining a proposed merger between C&J and Nabors' subsidiary Nabors Red Lion, Ltd. ("Red Lion") ("Proposed Transaction").

The Court of Chancery's ruling should be upheld. Under the Proposed Transaction, C&J stockholders will become minority stockholders in a controlled Bermuda company, and no longer have the power to replace a single director. Nabors will hold a 53% majority stake, select a majority of the Board, receive a $938 million cash payment, and contribute its Completions and Productions Services division ("NCPS"). The Chancery Court was correct that the transaction involves a change of control and is subject to enhanced scrutiny under *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994) ("*QVC*") and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

In every prior known "*Revlon*" case in this State, the target inevitably knew that a transaction was a sale of corporate control and that some effort was required to obtain maximum price. Here, the C&J Board did not conceive of the Proposed Transaction as a sale of control by C&J stockholders to Nabors. Rather, the C&J

[1] C&J Energy Services, Inc. ("C&J" or "Company"), Nabors Industries Ltd. and Nabors Red Lion Limited ("Nabors"), Director Defendants Joshua Comstock ("Comstock"), Randall McMullen ("McMullen"), Darren Friedman ("Friedman"), Adrianna Ma ("Ma"), Michael Roemer ("Roemer"), C. James Stewart III ("Stewart"), and H.H. Wommack ("Wommack" and collectively "Defendants").

Board treated the Proposed Transaction as an *acquisition* of NCPS. While Delaware law does not proscribe a particular "blueprint" for a sales process, a board that does not realize it is selling control cannot be said to follow any "blueprint" at all, and breaches its duties.

The C&J Board abdicated negotiation of the deal to Joshua Comstock, C&J's CEO and Chairman, even though the Board knew that the deal was conditioned upon Comstock receiving an ironclad employment agreement. Comstock illicitly manipulated the acquisition process for his own ends by: (1) negotiating a $2.925 billion deal without Board authorization; (2) changing the valuation methodology of NCPS to back into an unauthorized deal price; (3) instructing Deloitte to stop its financial and accounting due diligence after Deloitte reported negative news about NCPS's declining performance and Comstock discovered [REDACTED] (4) secretly signaling to Nabors that Comstock would [REDACTED] to compensate for declining EBITDA forecasts; and (5) conditioning the deal on his receiving an employment agreement with a $19.1 million transaction bonus and severance payments of up to $220 million.

As a result of the Board's misunderstanding and Comstock's manipulations, the Board agreed to sell a thriving corporation for a negative premium.

SUMMARY OF ARGUMENT

C&J Issue I

Denied. The Court of Chancery Court did not err by holding that Plaintiff met its burden of establishing a reasonable likelihood of success that the Proposed Transaction effects a change of control triggering *Revlon*. Upon closing of the Proposed Transaction, Nabors will receive 53% of the equity in Red Lion and select a majority of the Red Lion board. (B102-1033, A629 at 18:6-11). The C&J stockholders, who currently enjoy an effective vote that gives them ultimate control over the identity of its Board, will constitute a minority in a controlled company, and will lose their core voting power immediately upon closing of the deal.

The Court of Chancery's decision is supported by decades of precedent from this Court, including *QVC* and *Revlon*, holding that the transfer of voting control from a body of disaggregated stockholders to a controlling stockholder is a change of control requiring the target board to take all reasonable steps to maximize the value of such a transaction.

Certain restrictions on Nabors' ability to replace or override the will of the Red Lion board of directors, which will include a majority of the current C&J Board, simply protects those directors, but provide no benefit to C&J's public stockholders. None of the restrictions preserves the right of C&J stockholders to

replace directors following the Proposed Transaction. None of the restrictions preserves the right of C&J stockholders to receive a control premium from Nabors in this deal.

<u>C&J Issue II</u>

Denied. The Court of Chancery's determination that the Board breached its fiduciary duty of care because it "did not approach this transaction as part of a sales effort" and took no steps whatsoever to obtain the best price reasonably available to C&J stockholders was not clearly erroneous. (A3516:11-12). The core of the Chancery Court's ruling did not criticize C&J's Board for pursuing one course of action over another. Rather, the basis for the Court's ruling was that the Board took no deliberate course of action to attempt to maximize the price paid to stockholders before selling the Company out from under them. As the Court of Chancery Court found, "[i]f the board members were not focused on the selling process, it is not clear why they would have discharged those aspects of the duty of care commonly associated with a board's decision to sell the enterprise." (A3549).

<u>C&J Issue III</u>

Denied. The Court of Chancery Court did not abuse its discretion in concluding that irreparable harm and the balance of the equities favored an injunction. The Court of Chancery correctly determined that, absent a preliminary injunction, C&J stockholders have no remedy to redress the Board's care

violations in failing to carry out their *Revlon* duties. C&J stockholders cannot seek monetary damages for care violations pursuant to the exculpation provisions in the C&J charter and DGCL § 102(b)(7). The Court of Chancery's finding is also correct because C&J stockholders have no appraisal rights in this stock-for-stock deal with a controlled company. *See* DGCL § 262(b)(2)(a).

In balancing the equities, the Court of Chancery Court made clear that the injunction was not permanent and that it was unlikely that any party would terminate the merger agreement. (A3521-3522). Moreover, the Court's finding that Nabors aided and abetted breaches of duty (including by promising Comstock "aggressive employment agreements" for him and his management team), the potentially significant manipulation of the Board's process, and the fact that the proxy statement is not final and there is no date for the stockholder vote, strongly tilt the equities in favor of C&J stockholders receiving the injunctive relief granted.

C&J Issue IV/Nabors Issues 1-4

Denied. While the Court of Chancery ordered C&J to "solicit interest" in acquiring the Company, the injunction, at bottom, merely prohibits C&J from holding a shareholder vote on the Proposed Transaction until the Board complies with its fiduciary duties. But even if read as a mandatory injunction, the Court of Chancery's action was proper. There is no contemporaneous evidence of any efforts whatsoever to sell C&J to anyone other than Nabors and the only evidence

C&J can provide is the eleventh hour testimony that the Court should disregard as an improper attempt to use the attorney client privilege as a "sword" after four months vigorously raising it as a "shield."

And neither C&J nor Nabors can rely on the sanctity of contract rights to escape the fact that the C&J Board owes fiduciary obligations to its shareholders, the breach of which requires an equitable remedy. Delaware law is clear: contract rights do not permit a director to escape fiduciary obligations. This is especially true where, as here, an order to "go shop" C&J is the obvious cure to remedy the lack of any concerted effort to properly sell the Company. Finally, the Court of Chancery's remedy was not premature, but rather the unremarkable consequence of the Board's inaction.

COUNTER-STATEMENT OF FACTS

I. OVERVIEW OF C&J

At the end of 2013, C&J was a successful, growing company; increasing revenue in Q1'14 by 19% compared to Q4'13 and 15% relative to Q1'13. (B1). In the first six months of 2014, C&J's share price increased 55%. (B14). Analysts noted C&J's strong performance, with Barclays highlighting that "C&J has a unique strategy that sets it apart from its peers." (B11). Comstock expects C&J to have "record revenues" in 2014. (A1642 at 15:9-12).

The Board believed C&J should grow through a strategic acquisition. At the end of 2013, C&J was looking at several acquisition targets, including COS,

. (A2225). C&J had retained Goldman Sachs – which would later advise Nabors in connection with the sale of C&J to Red Lion – to advise the Company. In January 2014, Director Defendant Ma, wrote Comstock emphasizing that C&J needed to get M&A program accelerated to give it more scale and that she was

(A2226; B713).

II. ORIGINS OF THE PROPOSED TRANSACTION

A. CITIGROUP AND PETRELLO PROPOSE A C&J/NCPS COMBINATION

In early 2014, Nabors emerged as another potential partner for C&J. (A627 at 11:14-12:5; B693; A2233). Unlike C&J, however, NCPS was struggling.

NCPS' profitability had declined year over year since 2012 [redacted]

[redacted]. (A2264; A1651 at 53:12-17).

In January 2014, Citi approached Comstock and Petrello about combining C&J with NCPS. (B693; A2233-4; B1204-B1216). Citi proposed merging C&J into a Nabors subsidiary, with C&J stockholders receiving 45% of the stock and Nabors retaining 55% and control over the subsidiary. Although Goldman Sachs was at the time advising C&J's management on potential acquisitions and had a longstanding relationship with Comstock (A1643 at 19:8-20:2), Petrello informed Comstock that Nabors would be using Goldman while Comstock should use *Nabors'* longstanding financial advisor, Stephen Trauber at Citi. (A1647 at 35:1-21-35:19). Without consulting the Board, Comstock acquiesced.

B. RETAINING C&J MANAGEMENT WAS A NON-NEGOTIABLE CONDITION FOR ANY DEAL

From the deal's inception, Comstock and Petrello agreed there would be no deal unless C&J's management would be retained. (A1643; B771-772; B781).

C. COMSTOCK AND PETRELLO BEGIN NEGOTIATIONS

Comstock and C&J management knew of problems with "buying" NCPS long before the Board even knew a deal was on the table. On March 5, 2014, C&J entered into an NDA with Nabors and Comstock and his team met with Petrello and other Nabors executives to review NCPS' financial outlook and EBITDA and "pro forma MergeCo financials." (A2244-2284).

During the March 5 meeting, Nabors informed Comstock that [redacted]

(A1651 at 53; B733). Shortly after the meeting, Nabors informed C&J management that its [redacted]. (B722-B725). [redacted]. (B722-B725; B727; B770).

D. THE BOARD AUTHORIZES A $2.6 BILLION OFFER FOR NCPS

On April 3, the Board met and approved a non-binding $2.6 billion offer to *acquire* NCPS. There was no discussion of selling C&J. Rather, the minutes expressly state, [redacted] (A1615).

Comstock invited Nabors' longtime bankers (turned C&J advisors) at Citi to present the potential Nabors deal to the Board. (B728-B769; B770). Citi's presentation describes the transaction as an ***asset acquisition*** by C&J of the NCPS business. (B736). Citi's April 3, 2014 presentation to the Board and the contemporaneous Board minutes do not mention that NCPS [redacted]

(B728-B769).[2]

The Board understood that Comstock would insist on running any combined company and had personal interests that could conflict with C&J's public stockholders. The Board never retained its own legal or financial advisors, never formed a special committee, and never appointed an independent board member to monitor and participate in the negotiations.

E. C&J AGREES TO GIVE NABORS A MAJORITY STAKE IN RED LION

Petrello's goal for the deal was retaining Comstock and his team while giving Nabors a majority stake in Red Lion. According to Petrello, the resulting "tax inversion" of C&J would immediately result in significant benefits and "the window will not last." (B721).

The "protections" that C&J now says protect C&J stockholders from Nabors' majority stake do not protect C&J, at most they protect Comstock and his management team. In an email to Comstock on March 5, C&J executive Prestidge

[2] Early on in the negotiation of the deal, Board Member Adrianna Ma expressed concern over the Proposed Transaction, stating that she was "luke warm" about raising C&J's bid to $2.9 billion. (A2290-1; A2541). Realizing that Ms. Ma could be a potential problem for the deal, Comstock co-opted her by promising her a potential consultancy deal. (A2387). Comstock held out the potential for this consultancy throughout the duration of the negotiation of the deal. (A3208).

(B719). Comstock reassured Prestidge that (B719). That is precisely what happened. The deal was structured to give Nabors a majority of Red Lion's outstanding shares, while assuring Comstock and his team continued in power with lucrative employment contracts.

F. C&J MAKES ITS FIRST PROPOSAL FOR A DEAL

Unlike the typical target, which responds to offers from buyers, on April 4, 2014, Comstock proposed a deal in which C&J stockholders would receive a minority stake in a combined company while Nabors would receive a majority stake, plus $916 million in cash, in exchange for contributing NCPS. (B771). Comstock's offer to pay a premium for NCPS rested on the (B771).

Comstock's proposal implied a $2.6 billion value for NCPS, representing a multiple of NCPS's 2014 EBITDA. (B771). Comstock knew that his proposal represented payment of a significant premium to Nabors for its underperforming NCPS division, noting on April 9 that

Comstock's proposal provided current C&J management five years of complete job security. (B771-B772). As Comstock's April 4 letter stated, [redacted] (*Id.*) Notably, Comstock's reference to [redacted] made no mention of C&J's stockholders' loss of voting powers.

G. PETRELLO PROPOSES A [redacted] TAX INVERSION

On April 10, 2014 Comstock and Petrello discussed Comstock's $2.6 billion proposal. [redacted] (B780-B781). Petrello urged Comstock to ***pay a higher premium*** for NCPS based on tax benefits to C&J [redacted].[3] (*Id.*)

After hearing Petrello's proposal, Comstock agreed to increase the price C&J would pay and included a $1 billion intra-company note in the deal. (B813; B1217-1218).

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[3] [redacted] (B780-B781) (emphasis added).

H. THE BOARD AUTHORIZES COMSTOCK TO INCREASE C&J'S OFFER FOR NCPS TO $2.75 BILLION, BUT NO MORE

Comstock then asked the Board for approval to increase C&J's offer to acquire NCPS to $2.75 billion. (A704). The Board reluctantly approved Comstock's request. Defendant Friedman cautioned Comstock that C&J should not "get on the slippery slope up on price." (A703). Defendant Stewart testified that Comstock had no authority to further increase C&J's offer beyond $2.75 billion without Board approval, stating [redacted] (A1746 at 38-39).

On April 16, 2014, Comstock sent Petrello the $2.75 billion offer, but also included a proposed dual class structure that was approved by the Board and could protect the interests of C&J stockholders following a transaction. (A1867). Petrello rejected the dual class structure and Comstock never raised it again.

I. NCPS'S RAPIDLY DECLINING PERFORMANCE

As C&J was increasing the valuation of NCPS to $2.75 billion, Nabors' corporate controller, [redacted] (B1477). When Nabors issued its Q1 2014 results, Comstock immediately recognized that NCPS's Q1 was [redacted] (B782). [redacted]

(A1660 at 88-89; B782). As Comstock explained to Trauber on April 22:

(A1660 at 88-89; B782).

(B1257).

J. WITHOUT AUTHORIZATION, COMSTOCK INCREASES C&J'S PROPOSAL TO $2.9 BILLION

On April 15, 2014, Citi expressly advised Comstock to remove the Board from the negotiations of the Proposed Transaction and "get the board out of the day-to-day." (A709). Following Citi's suggestion, Comstock stopped regularly consulting with the Board and, despite NCPS's dismal results, ***increased*** C&J's offer by ***$150 million***, to $2.9 billion, without Board authorization. (B786-787). Comstock told Petrello he was

(B786).

The Board did not approve the $150 million increase in the purchase price for NCPS. (A1664 at 103-05). Comstock admitted, (A1664 at 105:5-10).

K. COMSTOCK GIVES PETRELLO EVERYTHING HE WANTS ONCE PETRELLO OFFERS "AGGRESSIVE" EMPLOYMENT AGREEMENTS

On April 29, 2014, the Board had a regularly scheduled meeting at which the potential ***acquisition*** of NCPS was again discussed. The Board package and minutes make no mention of Comstock's April 25 letter and increased $2.9 billion offer.

During the evening of April 29, 2014, Comstock spoke with Petrello. Petrello informed Comstock that he would be "pushing aggressive employment agreements for [named executive officers]," including Comstock. (B691).[4] Comstock promptly agreed in principle to a $2.925 billion valuation of NCPS. (B691). The April 29 Board minutes make no mention of such potential agreement, let alone authorize Comstock to increase the price paid for NCPS from $2.75 billion to $2.925 billion. (B1140-1142).

[4] The metadata provided by C&J shows the text message was sent on April 30, 2014. The text message was in the custody of CFO McMullen and Petrello testified it likely came from Comstock given the subject matter. (A643 at 75:20-76:4).

Comstock understood that NCPS's declining performance would not support the $2.925 billion NCPS acquisition price that he had agreed to pay. On May 2, Comstock asked Petrello to update NCPS's financial information to include NCPS's 2015 EBITDA because (B788; A602 at 120:25-121:21; A1749 at 53:24-54:6; A1683-84; B1564-1565; B118-119). Despite informing KPMG only days earlier that NCPS's 2015 EBITDA was forecast at . (B794).

L. THE BOARD HAS NO INDEPENDENT FINANCIAL ADVISOR

The Board did not have an independent financial advisor for this deal. Citi was retained by Comstock, who unilaterally allowed Citi to provide $1.3 billion in financing to Nabors for the Proposed Transaction, giving it a $31 million incentive to see C&J pay a high price while giving up its stockholders' ownership control. ($19 million financing fee plus $12 million fee for advising C&J management). (B118).

Comstock understood Citi's incentives were improper. As window-dressing, he retained Tudor Pickering Holt & Co. ("Tudor") to provide a second fairness opinion. (B797-802). But Comstock limited Tudor's access to information. Moreover, the Board did not even meet with anyone from Tudor until

the June 23 and 24 board meetings when the Board voted to approve the deal to acquire NCPS. (A1634-1636).

M. Comstock Tells Nabors How to Back Into The Numbers Needed to Support the Deal Value He Already Accepted

1. Comstock Discovers Nabors'

NCPS is not an independent, publicly traded company whose stock is valued by the market. To properly value NCPS requires assessing its actual financial results and forecasts. C&J retained Deloitte to conduct financial and accounting due diligence on NCPS. Deloitte recognized that this due diligence would present challenges because NCPS had never been independently audited. (B726).

On June 10, 2014, Deloitte reported that NCPS's results were in a downward decline since 2012. Deloitte identified as a "key issue" and a "top concern" that:

(B807).

On June 12, 2014, Nabors reported NCPS' May results. Comstock quickly realized Nabors was using As Comstock explained to Goldman Sachs,

(B859, B825).

. (A1672 at 136:10-137:3).

(A1672 at 136:10-137:3).

2. C&J Management Conceals From The Board Its Best 2015 EBITDA Estimate For NCPS

On June 18, 2014 – six days before the Board approved the transaction – Citi gathered due diligence results in "discussion materials" for C&J management. The materials noted that

(B872).

Citi concluded that NCPS's projected 2015 EBITDA was realistically (B872). (A2028). ***Nobody ever presented this information to the Board***. (B1083; A1683-1684; A1652 at 54:6-17; A604).

Notably, when Citi used its own best estimates for the completion business rather than accepting Nabors' production segment projections, its 2015 EBITDA forecast was (A2602; B861-862; B1230; B1294).

3. Comstock Tells Petrello He Will "Stretch" The EBITDA Multiple To Get A Deal Done

Management's forecast of in EBITDA did not support a $2.9 billion deal. At Comstock's and Citi's assumed multiple of the valuation of NCPS would only be . (B868). Instead of to benefit C&J by cancelling the deal or negotiating a ***lower purchase price***, Comstock secretly informed Petrello that he would cover for stating on June 19:

(B945) (emphasis added).

Critically, Comstock ***never informed the Board*** that he agreed [redacted] (A1680 at 169).

4. C&J Management Manufactures An "Upside Case" For NCPS In Order To Get A Deal Done

Petrello and Comstock both understood the significance of Comstock's agreement to "stretch" the multiple to [redacted] NCPS would be valued at $2.925 as long as its 2015 EBITDA was forecasted at [redacted] (6.5 x $450). (A1681 at 171). Nabors CFO immediately told Petrello, [redacted]." (B945). After Petrello sent Comstock supplemental NCPS information to "bridge" C&J management's 2015 EBITDA estimate of [redacted] and Nabors' inflated estimate of [redacted] (B1037; B1041-1044), Comstock promptly asked C&J CFO (and Board Member) McMullen the only question that mattered to him: [redacted] (B1035).

When McMullen responded the next day, Comstock immediately told Petrello that he knew the [redacted] target was a stretch, adding: "[redacted] (B1038) (emphasis added).

Comstock ***never informed the Board***, Citi, or Tudor that the revised 2015 EBITDA estimate of [redacted] was the result of his agreement to [redacted], that it was an upside case, or that the current run rate and

downside case were much lower. (B945; A602 at 120:25-121:21; A1683 at 181:8-A1684 at 182:13; A1749 at 53:24-A1750 at 54:20; A2771; B111-113; B118-119). Citi and Tudor used the manufactured forecast for their fairness opinions. (A694 at 175-77; A596 at 97:17-A597 at 98:4).

N. THE PROPOSED TRANSACTION

Under the Proposed Transaction, Nabors stands to receive 53% of Red Lion's outstanding shares plus $938 million in exchange for contributing NCPS. (B88). Nabors will also select a majority of Red Lion's Board. (A934). Even if the Court lends any weight to the Proposed Transaction's purported restrictions on Nabors' majority rights, those provisions do not preserve C&J stockholders' control rights and they terminate at the latest within five years. (A1421). Meanwhile, C&J's stockholders will receive a minority stake in a Bermuda company controlled by Nabors, losing the effectiveness of their vote, while being invested in a company whose applicable law all but eliminates the prospect of enforcing fiduciary duties.

Four of the seven C&J Board members – Comstock, McMullen, Roemer, and Wommack – will join the Red Lion Board and will never again face the "burden" of public investor accountability: Pursuant to the merger agreement and Red Lion's corporate documents, these four board members are virtually guaranteed to enjoy two three-year terms on the Red Lion Board. Red Lion's

majority stockholder, Nabors, has committed not to seek their removal and to oppose any proxy contest. (A996-997; A1084-85).

O. THE BOARD APPROVES THE DEAL ASSUMING IT IS AN ACQUISITION AND BASED UPON FLAWED VALUATION INFORMATION

On June 24, 2014, the Board approved the sale of C&J to Red Lion. The June 24, 2014 Board minutes and bankers' materials used during the meeting do not acknowledge that the Board was selling C&J. The June 24th Board Meeting Minutes explicitly state that the Board "approved the Company's ***acquisition*** of Navy." (A1636) (emphasis added). There is no discussion of a sales process or a canvassing of the market for potential alternative bidders. (B1361-B1363; B1416-B1438; B1439-B1461). Nor did the Board receive information on whether C&J stockholders would receive a control premium or even if the deal offered the best value reasonably available for the C&J stockholders. (A1751at 61:10-63:6). Comstock testified that, during the past year, he never considered selling C&J to another company. (A1643 at 19:5-7). Defendant Stewart testified that "we weren't going out there – we weren't interested, as far as a board… in selling the business." (A3548-3550). Citi was retained as a "buy-side" advisor and did not perform any work in connection with a sale of C&J. As Citi's fairness opinion made clear: "we were not requested to, and we did not, undertake a third-party solicitation process on C&J's behalf with respect to the acquisition of all or a part of C&J." (A1401).

The Board's sole focus was what C&J should pay to acquire the NCPS business. (A1654 at 63, A1662 at 95, A1663 at 99-100). Comstock manipulated the Board's evaluation of that value by providing incorrect and incomplete information. The Board was not informed that:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

In sum, the Board never conducted any sort of sales process. Instead, the Board approached the sale of C&J as an acquisition of NCPS. Indeed, on the face of the presentations, the consideration offered by Nabors – the NCPS business – is worth ***less*** than the then-current trading price for C&J stock. (A2023). The Board could not in good faith have approved the deal as a corporate sale because the bankers clearly told them the deal provides stockholders a ***negative premium***.

P. COMSTOCK THREATENS TO HOLD UP THE DEAL OVER MANAGEMENT COMPENSATION PACKAGES

Right before Comstock agreed to value NCPS at $2.925 billion, Petrello had promised Comstock "aggressive employment agreements" for Comstock and his management team. (B691). Shortly before the Board finally approved the Proposed Transaction, Comstock sent Petrello proposed employment contracts for himself and other C&J executives. (B1045).

Even Petrello was startled by Comstock's demands for a $19.1 million "success bonus" (B1045; B1080; A1690) and payouts approaching one quarter billion dollars if the employment agreement is terminated. (B1045; B1082). On June 25, 2014 (after the Board had approved the Proposed Transaction), Comstock learned that Nabors would not sign the employment agreements or a side letter confirming their material terms. (B1110). In response, Comstock refused to go forward with the transaction, stating:

(B1110). Petrello gave in and signed a side letter agreeing to the material terms of the employment agreements, including Comstock's $19.1 million success bonus and significant severance payments. (B1480). An hour later, Comstock and Petrello announced the deal. (B1482).

ARGUMENT

I. THE PROPOSED TRANSACTION EFFECTS A CHANGE OF CONTROL THAT TRIGGERS *REVLON*

A. QUESTION PRESENTED

Did the Court of Chancery err by holding that the Proposed Transaction effects a change of control that triggers *Revlon*? No.

B. STANDARD OF REVIEW

The parties agree that d*e novo* review applies to legal conclusions, an abuse of discretion standard applies to factual findings, and this is a mixed question of law and fact. (COB 14).[5]

C. MERITS OF ARGUMENT

The C&J Defendants argue that the Proposed Transaction is not a "change of control" transaction subject to *Revlon* because certain "protective devices" temporarily limit Nabors' control over Red Lion. (COB at 15-17). The Court of Chancery correctly held that the Proposed Transaction resulted in a change of ownership control, triggering *Revlon* duties, because "C&J's shareholders, who, of course, own 100 percent of C&J now, will end up only owning 47 percent of the new entity." (A3516 at 9:23-10:1). The Court also held that because C&J stockholders will not be able to elect any, much less a majority, of the Red Lion

[5] "COB" refers to the C&J Defendants' Opening Brief. "NOB" refers to the Nabors' Defendants' Opening Brief.

board, the *Revlon* doctrine applies to the Board's approval of the Proposed Transaction.

"When a majority of a corporation's voting shares are acquired by a single person or entity … there is a significant diminution in the voting power of those who thereby become minority stockholders." *QVC*, 637 A.2d at 42. Upon closing, C&J stockholders will no longer have an effective vote to decide who serves as the members of the board of Red Lion. Nabors will immediately select a majority of the Red Lion Board. (B103, A629 at 18:12-21). Meanwhile, C&J stockholders can no longer vote any director out of office or even change the company's Bylaws.[6] And Nabors will never be required to pay the former C&J stockholders a control premium in connection with this deal.

The C&J stockholders in this case are in the same position as that of Paramount stockholders in the *QVC* case. Red Lion, which will have a controlling shareholder, stands in the place of Viacom, while Nabors stands in the shoes of Viacom's controller, Sumner Redstone. Here, as in *QVC*, once the Proposed Transaction closes, C&J stockholders will forever lose their ability to command a

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[6] *See* B260 ("Directors can be removed from office . . . prior to the expiration of their term only for cause by a resolution approved by a majority of other directors.") and A2968 at §29.7(a) (requiring supermajority to change the Bylaws).

control premium for their shares.[7] While the Bylaws protect C&J shareholders' right to a *pro rata* share of a future premium in the unlikely event that Red Lion is sold again,[8] they do not protect the right of any C&J shareholder to receive a premium in connection with the Proposed Transaction itself. *See, e.g.*, J. Travis Laster, "Revlon Is A Standard Of Review: Why It's True And What It Means," 19 Fordham J. Corp. & Fin. L. 5, 41 (2013) ("***The control premium that could be extracted in a future deal is just that – a share of the combinatorial value of the future deal.*** It represents a separate and distinct negotiating opportunity for the future board that is neither exclusive of nor co-extensive with the present negotiating opportunity.") (emphasis added).

This Court has explained why a bidder in the position of Nabors pays a control premium:

> The acquisition of majority status and the consequent privilege of exerting the powers of majority ownership come at a price. That price is usually a control premium which recognizes not only the value of a control block of shares, but also compensates the minority stockholders for their resulting loss of voting power.

QVC, 637 A.2d at 43.

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[7] *QVC*, 637 A.2d at 43 ("Once control has shifted, the current Paramount stockholders will have no leverage in the future to demand another control premium. As a result, the Paramount stockholders are entitled to receive, and should receive, a control premium and/or protective devices of significant value.")

[8] A1421.

Defendants ask this Court, based primarily on one inapposite case, *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987), to take the unprecedented step of ruling that an undisputed change of equity control and loss of voting control by C&J stockholders can be removed from *Revlon* scrutiny by inserting into the transaction temporary "protections" that only benefit C&J rollover directors. Neither *Ivanhoe*, nor equity, support this result. *Ivanhoe* involved a defensive scheme to preserve the independence of the company. The board ***protected the power*** of Newmont stockholders to elect a majority of their directors by limiting Gold Field's board membership to 40% even though it owned 49.7% of Newmont's stock. *Id.* at 1339-40. Under those unique circumstances, *Revlon* was not triggered because stockholders would still elect a majority of their board. Comstock and the C&J Board could have preserved C&J stockholders' voting powers, but did not.[9]

[9] Defendants mistake *QVC*'s discussion of the lack of "protective devices" to mean that the existence of any "protective device" can take a transaction out of the *Revlon* regime. Footnote 12 of *QVC* merely provides that under certain undefined circumstances, "protective provisions" can mitigate the tendency of a controlling shareholder to cause the vote of the minority "to become mere formalities…." *QVC*, 637 A.2d at 42 and n.12. No such provisions exist here because the former C&J stockholders will never again elect any directors, much less a majority. The provisions touted by Defendants merely protect the Red Lion board (and C&J management). They provide no protection to C&J's public shareholders. Notably, early in the negotiations, Comstock proposed a dual class structure wherein C&J shareholders would retain the authority to elect a majority of the Board. (A1878). In theory, that form of "protective device" could preserve C&J stockholders' influence and control rights. Comstock dropped that demand, and with it any prospect that the vote of former C&J stockholders would be anything other than "mere formalities."

Equity also favors upholding the Court of Chancery's holding that the Proposed Transaction is a change of control subject to *Revlon.* No one disputes that the "protective provisions" relating to composition of the Board and shareholder voting expire in no more than five years. Thus, the Proposed Transaction is at a minimum a deferred sale of control. While a deferred sale of control is unusual, it is not unprecedented. *In re Sirius XM S'holder Litig.*, 2013 WL 5411268 (Del. Ch. Sept. 27 2013), involved an investment by Liberty Media ("Liberty") in exchange for preferred stock convertible into a 40% equity interest. *Sirius*, 2013 WL 5411268, at *1. The Sirius investment agreement contained a standstill provision precluding Liberty from taking control for three years, but also preventing Sirius from using a poison pill or any other device to interfere with Liberty's ability to purchase additional shares. *See id.* Once the standstill provision expired and Liberty resumed purchasing shares, Sirius shareholders filed suit for the board's alleged breaches of fiduciary duty because it failed to seek a control premium for non-Liberty shareholders. The court dismissed plaintiffs' claims, concluding shareholders waited too long to challenge the change of corporate control.[10] *Id.* at 2, 4. The result in *Sirius* supports the Court of Chancery's decision here. If C&J stockholders wait five years – until Nabors'

[10] The court held that "plaintiffs are not entitled to watch Sirius take over half a billion dollars in capital from Liberty Media, sit on the sidelines… until after the statute of limitations expires, and then belatedly seek to deprive Liberty Media of the benefits of [its] contract." *Id.* at 2.

unfettered control kicks in – per *Sirius*, they will be left without a remedy because the statute of limitations will have lapsed.

Finally, even if the Court of Chancery erred in concluding that the Proposed Transaction was subject to *Revlon* (and it did not), Plaintiff has still established a likelihood of success on the merits because the record of concealment of material facts from a board that is all too willing to be led astray is even more striking here than it was in *Mills Acquisition Co. v. Macmillan, Inc*. 559 A.2d 1261 (Del. 1988). The record here makes clear that Comstock exceeded his authority and misled the Board, while the Board members were supine in allowing Comstock to manipulate the transaction process unburdened by any effective board-level oversight. In *Mills*, the Court found that the Board abdicated its responsibilities in the sales process to two conflicted Board members, who then proceeded to abuse the discretion given them. Both the conflicted insiders who manipulated the sales process and the board that willingly played along, breached their duty of loyalty. *Id.* at 1280-82.

Similarly, here, the C&J Board abdicated responsibility for sale of the Company and placed a conflicted Comstock[11] in charge of negotiating the Proposed Transaction while exercising no significant oversight. In fact, this case is

[11] The record shows that Comstock is conflicted as he receives a $19.1 million deal bonus following completion of the Proposed Transaction and the right to run the combined company for at least five years, or receive more than $170 million in severance.

even worse than *Mills* because, at least in *Mills*, the board was aware that it was selling the company and acted accordingly. Here, in stark contrast, in addition to allowing themselves to be kept out of the loop, the Board was not even aware it was selling C&J. Accordingly, this bad faith abdication of the Board's responsibilities in unwittingly selling the Company constitutes a clear duty of loyalty violation under *Mills*.

II. THE COURT OF CHANCERY CORRECTLY INTERPRETED AND APPLIED *REVLON* TO FIND A LIKELIHOOD OF SUCCESS ON THE MERITS

A. QUESTION PRESENTED

Was the Court of Chancery's determination that the C&J Board likely breached its fiduciary duties by treating the Proposed Transaction as an acquisition of NCPS rather than a sale of C&J clearly erroneous? No.

B. STANDARD OF REVIEW

"Assuming a correct formulation of the rule's elements, the trial court's findings upon application of the duty of loyalty or duty of care, being 'fact dominated,' are, on appeal, entitled to substantial deference unless clearly erroneous or not the product of a logical and deductive reasoning process." *Cede & Co. v. Technicolor Inc.*, 634 A.2d 345, 360 (Del. 1993).

C. MERITS OF ARGUMENT

1. The Court of Chancery Correctly Interpreted *Revlon*

Defendants incorrectly characterize the Court of Chancery's decision as hinging on the Board's failure to "shop" the Company,[12] cherry-picking language from the Court's oral ruling. The Court of Chancery correctly held that while *Revlon* does not require a board to pursue any particular sales process, it does

[12] The fact that the Court of Chancery ordered the Company to engage in a thirty day "go shop" process does not mean C&J could not have satisfied its *Revlon* obligations through some other avenue had its Board understood from the beginning that it was engaged in a sale of control transaction.

require an informed board to have acted reasonably in seeking out the maximum price available for stockholders.

The Court of Chancery found that because the board "was looking at this pretty much as a buyer would, [] there simply was not the engagement that one would expect from a board in the sales process." (A3519). This factual finding is amply supported by the record and did not rely on the Board's decision to pursue one particular process over another. By not looking at the deal with Nabors as a sale of control, the Board necessarily pursued the wrong objectives. "In the sale of control context, the directors must focus on one primary objective — to secure the transaction offering the best value reasonably available for the stockholders." *QVC* at 44. While *Revlon* does not provide a "blueprint" for the sales process, it does require a board to have been "adequately informed and [to have] acted reasonably." *In re Pennaco Energy, Inc.*, 787 A.2d 691, 705 (Del. Ch. 2001) (citing *QVC*). Adequate information logically includes, at a bare minimum, the knowledge that the company is engaged in a sale of control transaction, ***and some consideration of alternatives to the transaction***. Indeed, particularly because Red Lion stock does not exist and is difficult to value, the Board was required, at a minimum, to consider the possibility of alternative transactions. As the *QVC* Court explained: "[T]he directors should analyze the entire situation and evaluate in a disciplined manner the consideration being offered. Where stock or other non-cash

consideration is involved, the board should try to quantify its value, if feasible, ***to achieve an objective comparison of the alternatives***." *QVC* at 44 (emphasis added). *See also In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 830 (Del. Ch. 2011) (directors are duty-bound to "try in good faith . . . to get the best available transaction for the shareholders" and must show they "sought 'to secure the transaction offering the best value reasonably available for the stockholders") (citing *QVC*, 637 A.2d at 44).

None of the cases cited by Defendants involved a situation where a company's board failed to understand that it was engaged in a sale of control transaction. For example, in *Revlon* itself, the board had authorized merger/buyout negotiations, "a recognition that the company was for sale." *Revlon* at 182. *QVC* involved an "intended sale of control." *QVC* at 43. In *Lyondell*, a damages case implicating only the duty of loyalty and not the duty of care, the Court concluded that *Revlon* was implicated "when the directors began negotiating the sale of Lyondell." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 24 (Del. 2009). The Pennaco board specifically decided "a sale at the right price could be the company's best strategy." *Pennaco* at 700. Similarly, there was no dispute that the "Dollar Thrifty Board *decided* to enter into a transaction that involved the sale of the company in a change of control transaction . . . ." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595 (Del. Ch. 2010). *Barkan* involved an underlying

transaction where the board had "established a Special Committee of its members to investigate the merits of any transaction involving a change of corporate control." *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1282 (Del. 1989). In *Equity Linked Investors, L.P. v. Adams*, 705 A.2d 1040 (Del. Ch. 1997), the company was near bankruptcy and investigating all alternatives, including the sale of majority equity, and the "board was striving to maximize the possibility of the common stock participation in some 'upside' benefit." 705 A.2d at 1058.

2. The Court of Chancery Correctly Applied *Revlon*

(a) The Board Made No Effort To Sell The Company Other Than Through The Proposed Transaction

The record is clear that, throughout negotiations between C&J and Nabors, the Board did not even recognize it was engaged in a change of control transaction and did not have its own advisors. Comstock had coopted Citi by promising it could provide 100% financing, generating $19 million in financing fees on top of its $12 million advisory fee. Tudor was also retained by Comstock and did not even meet with the Board until the June 23 and June 24, 2014 meetings when the Board approved the Proposed Transaction. As Chief Justice Strine recently explained, this situation made it unlikely the Board would do its job right:

> The worst of all worlds is for independent directors to wake up one day, and find that they not only cannot rely upon the impartiality of management, but that management has also co-opted the company's longstanding financial and legal advisors, so all of the most knowledgeable sources of advice are suspect. . . .

> This is a DANGER SIGNAL, akin to the one at Niagara about the approaching falls. . . . ***If independent directors get weak advisors, they will screw up. They will not do right by the stockholders, they will get sued, and they may lose or at the very least, get publicly embarrassed***.

(A2908) (emphasis added).

Here, the Board did not have independent advisors, did not view the Proposed Transaction of C&J as a sale of the Company, and did not reach the requisite conclusion that this transaction was a better alternative to maximize share value than any other available alternative.

- On April 3, 2014, the Board authorized negotiation of an *acquisition* of NCPS, not a sale of C&J (A1616);
- Citi was retained as a "buy-side" advisor and did not perform any work in connection with a sale of C&J (A642 at 72:13-20; A1398, 1400);
- Comstock testified that there had been no effort to sell C&J within the last year (A1642 at 219:5-7);
- Stewart testified that "we weren't going out there – we weren't interested, as far as a board… in selling the business" (A3548-9); and
- On June 24, 2014, the Board approved the *acquisition* of NCPS, not a sale of C&J (A1636).

Indeed, the contemporaneous evidence in this case establishes that the C&J Board failed to take *any* steps whatsoever that could have satisfied its *Revlon* obligations. The Board did not canvass the market or retain independent advisors to assist with the sale of the Company, and made no effort to identify any potential alternative bidders for C&J. The financial advisors' fairness opinions merely state

that the exchange ratio was "fair" to C&J stockholders – not that it is the ***best reasonably attainable price for C&J***, *see QVC,* 637 A.2d at 44, and Citi and Tudor both ***disclaim*** any opinion about the value of possible alternatives to the transaction. (A1397, 1400). In sum, the Court of Chancery's determination that Plaintiff was likely to succeed on its breach of fiduciary duty claims under *Revlon* was not clearly erroneous.

(b) The Court of Chancery Was Not Required To Accept Defendants' *Ex Post* Revision of the Record

Having reviewed Plaintiff's opening brief, Defendants realized they had a glaring problem. The record was undisputed: despite selling ownership control of C&J to Nabors, which would be the controlling stockholder of Red Lion, the Board had engaged in no sales process whatsoever and conducted no diligence at all concerning what value C&J could get in a sale transaction. Comstock admitted as much. (A1643) Stewart said so. (A1751-52 at 61:25-62:19). Citi said so. (A670 at 78:8-11). The Board's minutes said so, too. (A1616, A1636). In other words, nothing in the record remotely suggested the Board conducted anything other than a (flawed) asset acquisition process, despite the fact that it was actually selling ownership control of C&J.

In a last ditch attempt to rewrite the record, C&J presented the affidavit of Director Defendant Ma ("Ma Affidavit") and her deposition testimony. The only purpose of Ma's testimony was to contradict the undisputed record. Ma's last-

minute testimony did not sway the Court of Chancery and should not sway this Court.

Based exclusively on Ma's testimony, the C&J Defendants assert that the Board asked Citi and Tudor about "strategic alternatives to the Transaction." (COB at 22). Ma's testimony was not credible. Citi and Tudor were retained as "buy-side" advisors and none of their presentations discuss a single alternative bidder or transaction. The contemporaneous board minutes discuss a potential "acquisition" of NCPS and never refer to potential alternative bidders for C&J either. Moreover, Ma conceded that the Board did not even consider retaining financial advisors to consider strategic alternatives, testifying:

> Q. Did the Board consider hiring any financial advisors in connection with the potential sale of C&J while Citi and Tudor were working on the acquisition of NCPS?
>
> A No, we did not.

(A3211 at 25:8-12).

The Court of Chancery did not abuse its discretion in discounting testimony that contradicted the contemporaneous record.

Further, Ma's testimony that the Board understood the Proposed Transaction involved a change of control, causing it to implement purportedly modest deal protections, raises serious jurisprudential problems, even if it were truthful. (COB at 24). As an initial matter, C&J asserted privilege, redacted documents, and

clawed back documents during discovery on any issue pertaining to the legal advice the Board received in connection with the Proposed Transaction, before suddenly relying on such purported advice during oral argument in the Chancery Court. (A3423-24, A3463-64). The Court should reject this "evidence." "[A] party cannot use the attorney-client privilege as both a "shield" from discovery and a "sword" in litigation. In *Chesapeake Corp. v. Shore*, 771 A.2d 293, 301 (Del. Ch. 2000), then-Vice Chancellor Strine refused to permit defendants to use "concealed advice as a sword," noting in that context "the Shorewood board has invoked the business strategy and attorney-client privileges whenever it could do so." Here, as there, it would be "inequitable" to permit defendants to use that same advice as a "sword" and "[y]et… refuse[] to allow [Plaintiff] to inquire even as to the basic nature of those [communications]." *Id.* "[T]he only fair way to proceed is not to give any weight to any advice of this nature…." *Id.*

Moreover, Ma's testimony does not even help the C&J Defendants. If it is true (as Defendants now assert) that the Board knew it was subject to *Revlon*, then the Board not only breached its duty of care but was disloyal. In that case, the Board – understanding that a majority of its members would be offered guaranteed five-year board memberships of Red Lion – knowingly failed to implement any sales process and deliberately did not retain any independent financial advisor to assure itself that the Proposed Transaction maximized the price that stockholders

could reasonably get for selling control. Such knowing violation of a duty to act is disloyal. *See Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 240 (Del. 2009) (directors who fail to act in the face of a known duty to act breach their duty of loyalty).

(c) The C&J Board Did Not Accidentally Comply With Its *Revlon* Obligations

The Court of Chancery also examined whether, notwithstanding its failure to acknowledge the transaction as a sale of control, the C&J Board nonetheless met its duty under *Revlon* (by accident) by virtue of the value it obtained for shareholders in the form of NCPS. (A3517). The Court of Chancery, however, properly concluded that the record was insufficient to give the Board this generous inference. (A3517-18). Nothing warrants a different result now.

First, based on Ma's testimony C&J attempts to argue that the Board was aware of and seeking out a control premium. The record relied upon by C&J, though, does not bear out its claim. Ma's testimony is refuted by Stewart's testimony, given before Defendants saw Plaintiff's brief. As Stewart testified:

Q.

A.

(A1751 at 58:14-22).

C&J nevertheless insists that it was informed by both Citi and Tudor that the Proposed Transaction "yielded a 15% premium for C&J stockholders as of June 24" (COB 23), but C&J cites to nothing in the record from Citi or Tudor reflecting that determination. To the contrary, material Citi provided to C&J's board of directors in connection with its fairness opinion demonstrates that C&J shareholders will receive a ***negative control premium*** at the time the deal closes. (A2023). According to these materials: (1) C&J's equity value at the time the Board approved the Proposed Transaction was $1.907 billion (based on the previous day's closing price); and (2) C&J's share of the equity value of Red Lion at that time was worth $1.866 billion. (A2023). Thus, the Board approved a transaction where C&J shareholders were exchanging equity in the Company with a value of $1.907 billion for equity in Red Lion with a value of only $1.866 billion.[13] Similarly, C&J obscures the fact of the negative premium by assertion "that the Transaction provides a number of strategic benefits to C&J."[14] While Defendants may argue that uncertain synergy benefits may stem from the

[13] C&J's valuation expert concluded that C&J stockholders will receive a premium, but ended up testifying that if he used the Company's actual beta to calculate value (rather than an industry average beta), any and all premium going to C&J shareholders disappears and they are left with a negative premium. (A2995 at 95:2-21).

[14] Even if the potential synergies hypothetically generated in the merger were properly considered in determining whether C&J stockholders receive a *control* premium (and they are not), the vast majority of those synergies, almost $1 billion, would not be realized until 2018. (A2059). Indeed, Citi projected that Red Lion would experience a net synergies *loss* of ███ million at closing as a result of integration costs. (A2059).

combination, synergies are not the same as a premium that is received for handing an entity control over the corporation.[15] (COB 23). Nabors will have a majority stake in Red Lion and receive a majority of those uncertain future benefits.[16]

Second, C&J claims the Court of Chancery abused its discretion in "faulting 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." (COB 24). Relying on *Lyondell*, *Pennaco*, and *Barkan*, C&J essentially creates and takes down a straw man argument that the Court of Chancery insisted that *Revlon* requires some sort of specific path or adherence to one of a distinct set of ways to sell a public company. (COB 25). Not so. Likely with this Court's *Lyondell* decision in mind, the Court of Chancery went out of its way to assess whether the Board can be said to have received the best price available even without seeking that out. The Court of Chancery's determination that the Board had no basis at all for concluding that the Proposed Transaction maximized the price that C&J

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[15] Notably, under Delaware law, synergies would not be included in an assessment of the "fair value" of the Red Lion shares if stockholders would have had appraisal rights. *See Rapid –Am. Corp. v. Harris*, 603 A.2d 796, 805 (Del. 1992) ("a court cannot assign any value to[,] any 'speculative' events.'"); *Borruso v. Commc'ns Telesystems Int'l*, 753 A.2d 451, 458 (Del. Ch. 1999) (shareholders ceding control are entitled to a control premium, which is "fully reflective of the intrinsic worth of the corporation on a going concern basis").

[16] C&J attempts to argue that, due to market movement since the Proposed Transaction was signed, C&J shareholders are even better off. (COB 23) This argument is misguided because reasonableness of the transaction is determined according to the time it was agreed upon, not afterwards.

stockholders could receive for ceding control was amply supported by the record and not clearly erroneous.

III. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN FINDING IRREPARABLE HARM AND BALANCING THE EQUITIES IN FAVOR OF A PRELIMINARY INJUNCTION

A. QUESTION PRESENTED

Did the Court of Chancery abuse its discretion in concluding that C&J shareholders would suffer irreparable harm absent a preliminary injunction and that a balancing of the equities weighed in favor of granting the injunction? No.

B. STANDARD OF REVIEW

In determining whether the Court of Chancery made a proper finding regarding irreparable harm, this Court applies an abuse of discretion standard. *See SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998). Likewise, this Court reviews the Court of Chancery's balancing of the equities under an abuse of discretion standard. *See, e.g., North River Ins. Co. v. Mine Safety Appliances Co.*, 2014 WL 5784588, at *9 (Del. Nov. 6, 2014).[17]

C. MERITS OF ARGUMENT

1. C&J's Stockholders Face Irreparable Harm

The Court of Chancery correctly held that shareholders "are entitled to hav[e] a sales process run" where they are losing majority control and that C&J shareholders were facing irreparably harm because the Board was approaching this

[17] C&J claims this is a mixed question of fact and law, but does not identify any legal conclusions embedded in the Court of Chancery's determination nor cite a single case in which this Court reviewed *de novo* the irreparable harm and balancing of the equities prongs of a preliminary injunction determination.

transaction as an acquisition of NCPS, not a sale of C&J. (A3516-3517, 3520). C&J's arguments misapprehend the Court of Chancery's ruling.

First, C&J argues that shareholders are not threatened with irreparable harm because there will be an informed vote on the transaction. (COB at 27, 28). C&J implies that an injunction is *never* appropriate, regardless of the defective nature or lack of a sales process, so long as disclosures are adequate. *Id.* That is not relevant here, because the disclosures to C&J stockholders not only contain material omissions, but are outright deceptive and rest on affirmative misrepresentation.[18] C&J does not cite a single case from any jurisdiction where a court found that harm caused by failure to conduct *any* sales process can be *cured* by proxy disclosures without providing any other relief. But that is what C&J asks this Court to conclude. The Court should reject this invitation. Even if the disclosures were corrected, Defendants' misguided view of the case would eliminate the duty of care completely. To be sure, C&J's cited cases do not hold differently:

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[18] Although the Court of Chancery did not premise the injunction on disclosure violations, Plaintiff does not agree that shareholders are adequately informed. Plaintiff challenged C&J's disclosures from the outset, and in briefing identified numerous respects in which the proxy fails adequately to disclose to shareholders key elements of the Proposed Transaction. *See* A57, 61, 532-33, 553-4, 2897-98. These inadequate disclosures would provide an independent basis for a preliminary injunction. *See, e.g., In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 960 (Del. Ch. 2001) ("it is appropriate for the court to address material disclosure problems through the issuance of a preliminary injunction that persists until the problems are corrected."). Nonetheless, whether shareholders were informed is immaterial as C&J holders will suffer irreparable harm absent the preliminary injunction even if they were adequately informed.

- In *McMillan v. Intercargo Corp.*, 1999 WL 288128, at *4 (Del. Ch. May 3, 1999), plaintiff did not challenge the sales process *at all* and the sole basis of an injunction was a disclosure claim that the Court *rejected.*

- In *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 499-500 (Del. Ch. 2010) ("it is unlikely that Plaintiffs will succeed on their claim that the process followed by the Cogent Board was unreasonable."), the court found that the sales process was reasonable.

- In *Louisiana Municipal* the court granted a *disclosure*-based injunction and declined to grant a broader injunction because shareholders had appraisal rights. *Louisiana Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185, 1192 (Del. Ch. 2007) ("My conclusion that shareholders face neither irreparable harm nor extraordinary inequity in the absence of the desired injunction rests critically upon the availability of another remedy: appraisal rights…So long as appraisal rights remain available, shareholders fully apprised of all relevant facts may protect themselves.")

Whether or not C&J shareholders are adequately informed (and they are not), they will be irreparably harmed if the Board can simply ignore its duty to undertake a reasonable sales process. Unlike the cases C&J cites (*see, e.g., Cogent,* 7 A.3d at 500), this is not a case where price alone is inadequate. It is not a case where C&J ran a reasonable sales process. And it is not a case where adequate legal damages or appraisal rights exist. *See infra* at 48. Here, the value C&J shareholders will receive from the Proposed Transaction – which the evidence shows is grossly inadequate and represents a negative premium – is a *by-product* of the Board's utter failure to conduct a sales process or seek and obtain material information as to the value of NCPS.

The Vice Chancellor correctly held that stockholders "are entitled to hav[e] a sales process run . . . ," correctly concluded that C&J stockholders were facing irreparable harm as a result of the Board's failure to understand it was selling the Company, and correctly insisted that C&J conduct a sales process before asking the stockholders to vote on the Proposed Transaction. (A3520). Only a preliminary injunction could adequately protect C&J stockholders from the irreparable harm caused by a board's unwitting sale of their company. *See, e.g., Del Monte*, 25 A.3d at 838 ("Absent an injunction, the Del Monte stockholders will be deprived forever of the opportunity to receive a pre-vote topping bid …. The unique nature of a sale opportunity and the difficulty of crafting an accurate post-closing damages award counsel heavily in favor of equitable relief"); *Police & Fire Ret.Sys. of Detroit v. Bernal*, 2009 WL 1873144, at *2 (Del. Ch. June 26, 2009) (finding irreparable harm where "it would be impossible to 'unscramble the eggs' by attempting to unwind the merger once it has been completed").[19]

Second, C&J argues that the possibility of money damages make injunctive relief inappropriate. COB at 29-39. But money damages in lieu of an injunction

[19] The Court of Chancery's purported "lack of conviction" regarding the necessity of an injunction is not supported by the record. (COB at 29). The Court of Chancery rhetorically questioned why shareholders should not be allowed to vote on the Proposed Transaction as it stands and quickly answered its own question. Shareholders are "entitled to hav[e] a sales process run" and the record demonstrated the Board likely failed to exercise its duty of care because it did not conduct a sales process. (A3520-21). The Court of Chancery made a well-reasoned decision, fully supported by binding precedent and persuasive authority.

do not provide an adequate remedy. Harm is irreparable unless an "alternative legal redress [is] *clearly* available and [is] as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Del Monte*, 25 A.3d at 837-38 (citing *T. Rowe Price Recovery Fund, L.P. v. Rubin,* 770 A.2d 536, 557 (Del.Ch.2000) (emphasis added)).

Here, the Court of Chancery reasonably concluded that money damages are not clearly available because "it is likely that any due care claim for monetary damages would be exculpated by the Section 102(b)(7) provision." (A3519-20). It was not an abuse of the Chancery Court's discretion to conclude that doubts as to the availability of monetary damages based on exculpation weigh in favor of injunctive relief. *See, e.g., Del Monte*, 25 A.3d at 838 ("Exculpation under Section 102(b)(7) can render empty the promise of post-closing damages" and "weigh[s] in favor of pre-vote relief"); *El Paso*, 41 A.3d at 448 ("plaintiffs have shown there is a likelihood of irreparable injury" where "it appears unlikely that the independent directors of El Paso – who are protected by an exculpatory charter provision – could be held liable in monetary damages for their actions). To be sure, Plaintiff argued and believes that it has already shown very serious breaches of the duty of loyalty. But with the Court of Chancery unable to yet reach the same conclusion, but finding likely breaches of the duty of care, a remedy was required.

The cases C&J relies on are inapposite. Defendants are wrong to claim that

the *Municipal Police* court held that any possibility of obtaining "monetary remedies" counsels against injunctive relief. COB at 30 (citing *Crawford*, 918 A.2d at 1192).[20] Rather, the Court found that the availability of *statutory appraisal rights* counseled against an award of a preliminary injunction under the particular facts at issue. C&J stockholders have no such appraisal rights.

Smurfit-Stone is also inapposite. There, the board was aware it was selling itself and conducted a comprehensive sales process in which other companies submitted *lower* bids than the acquirer, leading the court to fairly conclude that a topping bid was highly speculative. In addition, the stockholders also enjoyed statutory appraisal rights. *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *4-8, *25-26 (Del. Ch. May 24, 2011).

TIBCO is inapposite both because "Plaintiff [did] not challenge the sale process that led to the execution of the merger agreement" and because Plaintiff had already quantified damages at $100 million. *In re TIBCO Software Inc. Stockholders Litig.*, 2014 WL 6674444, at *1, *10-11, *19 (Del. Ch. Nov. 25, 2014). The entire basis for injunctive relief there was to reform a merger agreement to reflect the economic agreement of the parties, and the Chancellor clearly concluded that the full panoply of equitable and legal remedies remained

[20] C&J misleadingly replaces the phrase "appraisal rights" with monetary damages in the quote it uses from *Municipal Police*, separately quoted by Plaintiff in its entirety at page 46 of this brief.

available post-closing.

2. The Court of Chancery Did Not Abuse Its Discretion In Concluding That The Equities Favored Relief

The Court of Chancery had ample basis for concluding that the equities weigh in favor on an injunction. C&J argues that the equities weigh against an injunction because "(1) there is no viable competing proposal and (2) the stockholders will vote on the transaction." COB at 28 (citing cases). None of these arguments even begin to show that the Chancery Court's determination was somehow an abuse of discretion. Indeed, C&J's cases misapprehend the law and are easily distinguished on their facts.

First, Delaware law does not require a competing proposal as a prerequisite to injunctive relief. *See Del Monte,* 25 A.3d at 839 (noting that the Court of Chancery has consistently "issued preliminary injunctions designed to cure pre-vote harm," even in the absence of any competing proposal).

Second, in each of C&J's cited cases, the board understood it was selling the company and implemented some form of sales process.[21] Further, denying a

[21] *See In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 979 (Del. Ch. 2005) ("The Company sought bids from a large number of the most logical buyers for the toy business, and it eventually elicited attractive expressions of interest from four competing bidders who emerged from the market canvass"); *In re Cogent*, 7 A.3d at 493 ("With the aid of financial advisors . . . Cogent's Board has been exploring strategic opportunities for the Company for more than two years"); *Koehler v. NetSpend Holding, Inc.*, 2013 WL 2181518, at *5 (Del. Ch. May 21, 2013) ("With the help of its advisors, the NetSpend Board evaluated the [indiciation of interest] alongside NetSpend's standalone business prospects and the possibility that other parties might

preliminary injunction on the basis that there are no competing proposals would be particularly unjust where, as here, the Board maintained until the hearing before Vice Chancellor Noble that it was not selling the Company at all. The Board has never explained how the market was supposed to realize that C&J was for sale when the Board itself did not believe it was selling the Company and none of the Board minutes reflect a determination that C&J is, in fact, for sale. In effect, Defendants ask this Court to rule that using deal protections that do not preclude a bid automatically satisfies a board's fiduciary duties. That is not and should not be the law.

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be interested in acquiring the Company"); and *Abrons v. Maree*, 911 A.2d 805, 808 (Del. Ch. 2006) (board formed a special committee to "review the offer and determine what action should be taken").

IV. THE CHANCERY COURT PROPERLY GRANTED THE NOVEMBER 25, 2014 INJUNCTION

A. QUESTION PRESENTED

Did the Chancery Court properly grant the November 25, 2014 injunction? Yes.

B. STANDARD OF REVIEW

"Generally, the grant or denial of a preliminary injunction is reviewed for abuse of discretion. . . . Nevertheless, this Court reviews the grant of a preliminary injunction without deference to the embedded legal conclusions of the trial court." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996); *SI Management L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

C. MERITS OF ARGUMENT

1. The Court of Chancery's Preliminary Injunction

While the Court of Chancery's November 25, 2014 injunction requires C&J to solicit other bids, in reality the injunction is a preliminary injunction enjoining a vote on the Proposed Transaction until the Board remedies its likely care violations. As the Court of Chancery acknowledged, the Order was drafted under time pressure and thus is not the model form that could have been entered with the luxury of time. (A3559-60). The Court of Chancery's remedy clearly presumes neither party intends to walk away from the Proposed Transaction. In effect, the

Court of Chancery simply prohibited C&J from proceeding with the Proposed Transaction unless and until the Board does its job.

2. The Undisputed Record Supports The Court of Chancery's Issuance Of A Mandatory Injunction

Defendants claim a mandatory injunction is inappropriate because there must be "a showing that the petitioner is entitled as a matter of law to the relief it seeks based on undisputed facts."[22] (NOB 14; *see* COB 31-32). The Court of Chancery's findings and the record are more than sufficient to meet this burden.[23]

Indeed, the Court found that C&J shareholders "technically no longer will have control" and that "[t]he C&J board did not approach this transaction as a sales

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[22] Defendants' reliance on *Alpha Natural Resources, Inc. v. Cliffs Natural Resources, Inc.*, 2008 WL 4951060 (Del. Ch. Nov. 6, 2008) is questionable at best. (NOB 14; COB 31-32). *Alpha* involved a request for a temporary restraining order where no record had been developed and the dispute of fact was whether someone "had a good faith reason" to believe that a delay would increase the chances of obtaining shareholder approval of a merger. 2008 WL 4951060, at *2 (Del. Ch. Nov. 6, 2008). "The reasonableness standard" of *Revlon*, however, "permits a reviewing court to address inequitable action even when directors may have subjectively believed that they were acting properly." *In re Rural Metro Corp.*, 88 A.3d 54, at 84 (Del. Ch. 2014); *Del Monte,* 25 A.3d at 830-31; *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *7 n.9, 10 (Del. Ch. Jan. 14, 1991) ("board inaction, even where not inequitable in purpose or design, may nonetheless operate inequitably."); *see also Stahl v. Apple Bancorp, Inc.*, 579 A.2d 1115, 1121 (Del. Ch. 1990); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988).

[23] Nabors also complains that the Court applied the wrong standard for a preliminary injunction in the first instance. (NOB 13). In its holding, the Court of Chancery clearly explained that "in order to earn a preliminary injunction, the plaintiff must demonstrate a *reasonable* probability of success on the merits." (A3514). The bench ruling was made very late in the day after hours of oral argument - simply because the Court of Chancery at one point in its ruling used the term "plausible" rather than "reasonable" does not change the standard the Court of Chancery explicitly stated it was applying to determine whether to grant the injunction. It is disingenuous to argue that the Court of Chancery did not understand and did not apply the appropriate standard. It clearly did.

process." (A3516). Specifically, though, Defendants ignore the Court of Chancery's explanation for why it ordered the relief at issue despite finding that "shareholders are adequately informed." (A3520 *see* NOB 15). "C&J shareholders are entitled to hav[e] a sales process run when there is a company being sold, and I don't believe that there was a sales process as that concept is commonly understood." (A3520). Indeed, the Court's supplement to its bench ruling reaffirms this conclusion: "If the board members were not focused on the selling process, it is not clear why they would have discharged those aspects of the duty of care commonly associated with a board's decision to sell the enterprise. (A3549).

Moreover, the record ***is*** undisputed that the Board conducted no sales process whatsoever. (*See supra* at 35). The only reason Defendants are able to even suggest a dispute is because of the eleventh hour affidavit and post-briefing testimony of Director Defendant Ma. And, for the reasons set forth in section II.C.3 of the Counter-Statement of Facts, her testimony should be given no weight.

Because the Court of Chancery easily found that the Proposed Transaction was a sale of control by C&J and the contemporaneous evidence is undisputed that the Board conducted no sales process, an injunction was proper.

3. The Injunction Issued By The Court of Chancery Was Hardly Novel

Nabors argues that the Court of Chancery was wrong to "blue-pencil vested contract rights" in this case because only those cases in which a party aids and abets the underlying breach of fiduciary duty warrant such a remedy. Nabors contends the Court of Chancery made no such finding here. (NOB 19-21). Nabors' argument is improper and wrong.

First, while Nabors argues that the Court of Chancery's finding of aiding and abetting cannot support the remedy provided here, it did not actually appeal the Court of Chancery's determination. As a result, Nabors has waived its opportunity to appeal the determination and the Court of Chancery's finding that Plaintiff met its burden with respect to aiding and abetting cannot be disturbed on appeal.

Second, Nabors' argument ignores the telephonic hearing held by the Court of Chancery on November 25, 2014. During the telephonic hearing, counsel for Nabors suggested to the Court that there had been no ruling on aiding and abetting during the preliminary injunction hearing the prior day. (A3541 at 8-21). In response, the Court of Chancery's issued such a ruling. Specifically, the Court of Chancery concluded that it was not "particularly difficult…to find an aiding and abetting basis here because the whole problem was how C&J's board approached the transaction." (A3542 at 2-5).

Indeed, the record is more than sufficient to show that Nabors "knowingly participate[d]" in the underlying breach, which caused damages. *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1057 (Del. Ch. 1984). At minimum, as the Court of Chancery observed, "there was a failure to pursue this matter… recognizing that there was a change of control and this was a sales transaction and not essentially an acquisition transaction." (A3542 at 8-13). "Knowing participation" is "satisfied when the aider and abettor acts with knowledge that the conduct advocated or assisted constitutes such a breach." *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 97 (Del. Ch. 2014) "If the third party knows that the board is breaching its duty of care and participates in the breach by misleading the board or creating the informational vacuum, then the third party can be liable for aiding and abetting." *Rural Metro*, 88 A.3d at 97. As Chief Justice Strine has acknowledged, liability for aiding and abetting arises where a third party "purposefully induced the breach of the duty of care." *Goodwin v. Live Entertainment, Inc.*, 1999 WL 64265, at *28 (Del. Ch. Jan. 25, 1999). Here, the Court of Chancery found that "Nabors was clearly in favor and urging and cajoling C&J to do as it did, and that's how the deal was structured." (A3543 at 14-16).

The record is more than sufficient to find that Nabors "cajoled" C&J into a deal. Petrello was well aware that Comstock and management were willing to, and in fact did, "stretch" on valuation points as forecasts were not coming to fruition

(B945) regardless of whether it was in the best interests of C&J. Because Nabors' only gripe with the Court of Chancery's "blue-penciling" of the Proposed Transaction was the failure to make a proper finding as to aiding and abetting liability,[24] and a proper finding was actually made, Nabors provides no basis to reverse the Court of Chancery's decision to "blue-pencil" the Proposed Transaction.

4. The Court of Chancery Properly Concluded That Complying With The Injunction Will Not Breach The Merger Agreement

Nabors argues that the Court of Chancery does not have the power to hold that compliance with the court's injunction will not breach any provision of the Merger Agreement. (NOB 23). Nabors' arguments are misplaced.

First, Nabors claims that the issue was not properly placed before the Court of Chancery. *Id.* That is incorrect. C&J expressly requested that the Court of Chancery find that C&J's solicitation of superior proposals does not breach any provision of the Merger Agreement in its proposed form of order. *See* A3554.

The Court of Chancery's holding is supported by the factual record and the law. As discussed above, Nabors aided and abetted C&J's breaches of fiduciary duty. *See supra* at 53. The Merger Agreement's prohibition on solicitations are

[24] Critically, none of the cases relied upon by Defendants to establish that the Court of Chancery's relief was improper involve a counterparty to a transaction found to have aided and abetted a breach of fiduciary duty. (NOB 15-20, 22).

invalid to the extent they cause C&J to breach its fiduciary duties. Under these circumstances, controlling authority and bedrock principles of contract interpretation dictate that the Merger Agreement's non-solicitation provisions are unenforceable. *See supra* at 56 (citing *Omnicare*, 818 A.3d at 937-938, n. 78; Williston on Contracts § 30.19, 203-04). From this, it *necessarily* follows that compliance with the court's order does not and cannot violate the Merger Agreement.

Second, Nabors argues that the finding is, in effect, a premature declaratory judgment insofar as no actual controversy exists because "it is not certain whether Nabors would enforce its right to walk away from the deal because of C&J's shopping process." (NOB 24). But *certainty* that Nabors will treat solicitation as a breach of contract and respond by termination is not required for there to be a ripe controversy. The relevant inquiry is whether C&J may engage in solicitations or whether such solicitations will cause it to be in breach of contract. As counsel for C&J noted, absent the well-supported finding the Court of Chancery made, C&J would be left with a "Hobson's choice" between compliance with the order and exposing itself to be in "breach of the[merger] agreement and termination rights." (A3543 at 19:23-20:10). This presents a sufficiently ripe controversy.

Additionally, eventual litigation on this issue appears unavoidable, particularly given that Nabors refuses to let C&J "off the hook with respect to any

breach of contract claim" and reserves the right to argue deprivation of its "property rights." (A3543 at 17:8-20). S*ee K&K Screw Products, L.L.C. v. Emerick Capital Investments, Inc.*, 2011 WL 3505354, at *1, *9 (Del. Ch. Aug. 9, 2011) (buyer was entitled to a declaration that it did not breach any contractual duties by entering into a transaction, notwithstanding seller's assertions that the controversy was not ripe because it had not asserted or threatened to assert claims based on entry into the transaction as this fact did not render the controversy contingent or speculative, particularly because seller refused to waive its right to pursue claims against buyer).[25]

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[25] Nabors' reliance on *Xi Specialty Ins.* is misplaced. Although the case sets forth the governing legal standard for ripeness, it is factually inapposite. In that case there was not a ripe controversy because the dispute focused on a trust's request for a declaratory judgment as to "how much coverage *would* be available…*if* the Trust were to initiate litigation" when a highly speculative series of events needed to occur simply to trigger coverage under the insurance policies at issue in a manner that would allow the trust to recover. *XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1218-20 (Del. 2014).

CONCLUSION

For the foregoing reasons, Defendants' appeal should be denied.

Dated: December 9, 2014

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