EFiled: Dec 15 2014 02:41PM EST
Filing ID 56473054
Case Number Multi-Case

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 15, 2014

REPLY BRIEF OF DEFENDANTS BELOW, APPELLANTS
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PRELIMINARY STATEMENT

Rather than confront the serious defects in the Court of Chancery's order raised in the Nabors Appellants'[1] Opening Brief, Appellee chooses to rely on the fiction that the Court below found Nabors culpable. The mandatory injunction and declaration at issue writes out of the merger agreement contract rights that Nabors bargained for—even though the trial court did not find any wrongdoing by Nabors and the contract rights that have been blue-penciled are facially valid, "relatively modest" (in the words of the trial court), run-of-the-mill deal protections.

The series of alleged "facts" in Appellee's brief—most of which relate to allegations of breach of the duty of loyalty (a claim that the Court below expressly rejected and was not appealed) and which are written as if they were findings by the Court below (which they were not)—are largely addressed in the C&J Appellants' briefs, in which the Nabors Appellants join. Appellee's alleged "facts" are hotly disputed, and Nabors will vigorously defend those allegations at

[1] Capitalized but undefined terms have the meaning given to them in the Opening Brief of the Nabors Appellants, filed on December 5, 2014. "AB" refers to Plaintiff Below-Appellee's Answering Brief on Appeal, filed on December 9, 2014. "OB" refers to the Opening Brief of the Nabors Appellants, filed on December 5, 2014.

the appropriate time. That time is not now: Appellee's allegations are irrelevant to the simple, fundamental issues presented in the Nabors Appellants' appeal.

First, the injunction at issue is an affirmative injunction because it requires C&J to engage in a shopping process. Well-established Delaware law makes clear that a court cannot issue an affirmative injunction on a preliminary record. Appellee does not dispute that law; its brief does not even address *El Paso* or *Netsmart* on this point. Although Appellee claims that an injunction affirmatively requiring C&J to engage in a shopping process is not actually a mandatory injunction (AB at 52-53), to state that argument is to refute it.

Second, in this context, well-established Delaware law provides that courts respect and uphold parties' freedom of contract and do not blue-pencil vested contract rights without a finding of aiding and abetting or some other wrongdoing. Appellee does not dispute that law either, and, in fact, acknowledges it. (AB at 57 n.24). Here, the trial court expressly stated on the record that it made no aiding and abetting finding, and indeed there is no such finding in its Ruling or Order. Although Appellee disputes whether an aiding and abetting finding was made, Appellee does not dispute that the Nabors Appellants had no knowledge of, or participation in, the actual breach of the duty of care (erroneously) found by the Court below.

ARGUMENT

I. THE COURT OF CHANCERY IMPROPERLY ISSUED A MANDATORY INJUNCTION.

Although Appellee characterizes the Order as a negative injunction "prohibit[ing] C&J from proceeding with the Proposed Transaction unless and until the Board does its job" (AB at 52-53), the terms of the Order make clear that it is anything but. The Order provides that C&J is "***hereby ordered to solicit alternative proposals*** to purchase the Company . . . ." (A3557 ¶ 1) (emphasis added). That is a directive to undertake a specific task (namely, the sales process)—not a prohibition against taking further action. The Order imposes a mandatory injunction, as the Court in *El Paso* indicated: an injunction requiring a target to shop itself constitutes a mandatory injunction, "not a traditional negative injunction that can be done without an evidentiary hearing or undisputed facts." *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 449 (Del. Ch. 2012). Appellee does not dispute that law. Because the Court below required C&J to undertake an affirmative act—engage in a sales process—without determining whether the heightened standard for the issuance of a mandatory injunction had been met (or even considering that standard), the ruling of the trial court was in error.

Even if the trial court had acknowledged and applied the mandatory injunction standard, it still would have been improper to issue the injunction. It is

undisputed (AB at 53) that to obtain a mandatory injunction, the moving party "must show that it 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). That standard was not met here. Indeed, the Court of Chancery acknowledged more than once that its decision was a "very close call." (A3509, A3519). There are disputed facts, as set forth in the C&J Appellants' briefs, in which the Nabors Appellants join. And Appellee is not entitled to a mandatory injunction as a matter of law: the trial court's decision was not based on a full evidentiary record; and the Court of Chancery has repeatedly found that injunctions like the one issued here requiring the target to shop itself should not be issued on a preliminary injunction record. *El Paso*, 41 A.3d at 449-51; *In re Netsmart Tech., Inc. S'holder Litig.*, 924 A.2d 171, 208-209 (Del. Ch. 2007). Appellee does not address, let alone dispute, these holdings in its brief.

II. THE MANDATORY INJUNCTION IS INAPPROPRIATE BECAUSE THERE WAS NO FINDING OF AIDING AND ABETTING.

The Court of Chancery did not find that Nabors aided and abetted the C&J directors' breach of fiduciary duties. There were no aiding and abetting findings in the Ruling, nor in the trial court's letter clarifying the Ruling. This is not surprising, because the aiding and abetting claim was addressed by Plaintiff Below in a footnote to its Reply Brief, and then only in conclusory fashion. (A2901 n.58).

The trial court expressly acknowledged during the November 25 teleconference that it did not make a finding of aiding and abetting in its oral ruling granting the mandatory injunction, because the trial court "wasn't focused on why it would be important." (A3542). Nor did the trial court make a finding during the November 25 teleconference; rather, the court stated 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." (*Id*. (emphasis added)). This statement does not constitute a finding by the Court. Appellee misleadingly and inaccurately quotes the Court below, stating in its brief that "the Court of Chancery concluded that it ***was not*** 'particularly difficult . . . to find an aiding and abetting basis here . . . .'" (AB at 55 (emphasis added)).

Appellee's attempted misdirection should be rejected. The trial court said "***would not***"—not "was not"; that use of the subjunctive tense makes clear that there was no aiding and abetting finding (which is not surprising: the idea that an acquirer could be culpable of aiding and abetting by simply negotiating a deal—without any knowledge of or participation in an alleged breach of fiduciary duty by the target board—is contrary to Delaware law). And even after the trial court's statements during the November 25 teleconference, the Court chose not to make a finding in the Order or otherwise. In fact, the November 25, 2014 Order expressly issued "for the reasons stated at the [November 24, 2014] hearing" (A3556, Second "Whereas" Clause)—not because of any of the trial court's comments on November 25.

Having relied solely on the incorrect assertion that there was a finding of aiding and abetting, Appellee does not disagree with the bedrock Delaware law that respects agreements between sophisticated parties. Nor does Appellee make any attempt to distinguish the cases cited by Nabors—not *El Paso* (which is directly on point), not *Netsmart*, not *Toys "R" Us*—all of which premise blue-penciling on a finding of aiding and abetting. Thus, because there was no finding of aiding and abetting, it was reversible error for the Court of Chancery to issue the mandatory injunction.

III. EVEN IF THERE WERE A FINDING OF AIDING AND ABETTING, THAT FINDING WAS NOT SUPPORTED BY THE RECORD.

Assuming, *arguendo* that the Court below found a reasonable likelihood of success that Nabors aided and abetted the C&J directors' breaches of fiduciary duty, that finding was not supported by the record. The trial court noted—in dicta during the November 25 teleconference—that "Nabors was clearly in favor of urging and cajoling C&J to do as it did." (A3541). No such finding was made in the Ruling or Order. And, as a matter of law, simply negotiating a deal does not make a party an aider and abettor. *See Ryan v. Lyondell Chem. Co.*, 2008 WL 2923427, at *21 (Del. Ch. July 29, 2008) ("[a] hard bargain, however, cannot suffice to establish an aiding and abetting claim where parties negotiated at arm's length"); *In re Comverge, Inc.*, 2014 WL 6686570, at *20 (Del. Ch. Nov. 25, 2014); *Malpiede v. Townson*, 780 A.2d 1075, 1098 (Del. 2001).

In addition, none of the alleged acts relates in any way to C&J's decision not to engage in a shopping process, which (again, assuming *arguendo*) was the breach (*see* A3516-19) that Nabors purportedly aided and abetted. The Court below found that there was no support in the record for Plaintiff Below / Appellee's claims for the breach of the duty of loyalty. (A3519). Indeed, the Court of Chancery specifically found that the lack of a sales process was the basis

for the likely duty of care violation. *See* A3519 ("I am satisfied that there is a plausible showing of a likelihood of success on the merits as to a breach of the duty of care, and that goes to the absence of an effort to sell."). As set forth in the Nabors Appellants' Opening Brief, there is nothing in the record to indicate that Nabors influenced, in any way, C&J's decision not to engage in a sales process. (OB at 6-7, 21). ***Appellee does not dispute this fact***. And there is no finding, statement or suggestion by the Court of Chancery to the contrary.

To be clear: the Nabors Appellants do not believe that the Court of Chancery made a finding on the likelihood of success on an aiding and abetting claim. Thus, Appellee's argument that Nabors failed to appeal the trial court's finding of aiding and abetting is perplexing. (*See* AB at 55). To the extent the Court below did make such a finding—as Appellee contends in its brief—that finding was in error, as set forth above.

Because there is no evidence that Nabors aided and abetted any breach of fiduciary duty preliminarily found by the Court, the Court's decision was in error.

IV. THE COURT OF CHANCERY'S DECLARATION THAT COMPLIANCE WITH ITS ORDER IS NOT A BREACH OF THE MERGER AGREEMENT WAS IN ERROR.

The Court of Chancery improperly issued a declaratory judgment that C&J would not breach the Merger Agreement with Nabors by soliciting proposals as part of the shopping process mandated by the injunction. (A3557 ¶ 1). This decision was made without the issue being raised in any pleading or brief below, on a preliminary record devoid of any finding of wrongdoing by Nabors, and without any analysis of the effect the ruling would have on the parties' rights under the Merger Agreement.

Even if this issue had been fairly presented below, the Court of Chancery could not have possibly analyzed the effect of its declaration, because it is not possible *ex ante* to know the extent of the breach by C&J or the extent of the harm to Nabors. To determine whether an issue is ripe (according to the case relied upon by Appellee): "[A] court must make a practical judgment as to whether the interest in postponing review until the question arises in a more concrete and final form is outweighed by the immediate and practical impact on the party seeking relief." *K&K Screw Prods., LLC v. Emerick Capital Investments, Inc.*, 2011 WL 3505354, at *9-10 (Del. Ch. Aug. 9, 2011) (finding that declaratory judgment claim relating to transaction taking place several years earlier was ripe

because "all material facts giving rise to [defendant's] potential claims regarding the propriety of the 2001 Transaction have occurred and are static," and there was no possibility of future events or ongoing breach).

Here, the sales process affirmatively ordered by the Court below is ongoing. Without knowing the extent of the breach or the extent of the harm, the Court below nevertheless decided—"off the cuff" and in advance of being presented with any facts—that the court-ordered solicitation process will not constitute a breach of the Merger Agreement. That declaration was erroneous. Its immediate impact is to eliminate any right of Nabors to declare a breach, despite the obvious effect of the Court's ruling on a fundamental provision of the Merger Agreement, and it essentially requires Nabors to close the deal notwithstanding that breach. That was inappropriate because it fundamentally altered the bargain between Nabors and C&J before any facts about why that bargain should or should not be altered (*i.e.*, the extent of C&J's breach and the extent of the harm to Nabors) even existed, let alone were presented to the trial court. This result is particularly inequitable given that there was no finding of wrongdoing against Nabors, but there was a preliminary finding of wrongdoing against the C&J directors. 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. *El Paso*, 41 A.3d at 451 ("[Plaintiff] seek to keep [buyer] bound but to allow [target] to prospect for more. I understand that, but they are stuck with the requirements of equity, which is that they accept the risks that come with enjoining the Merger, including the risk that [buyer] will walk when the drop-dead date expires.")

Finally, Appellee argues that the trial court's determination is legally supported because the Window-Shop Provision is invalid or unenforceable to the extent it causes C&J to breach its fiduciary duties. (AB at 57-58). That misses the point. The alleged breach of fiduciary duty concerns a pre-signing shopping period—not a post-signing one. In fact, the Court of Chancery specifically found that the deal protections (including the Window-Shop) were "relatively modest" (A3520), and Appellee admits that they were not preclusive (AB at 51). The Window Shop Provision did not cause, and is not causing, C&J to breach its fiduciary duties. As such, the provision is not per se invalid or unenforceable.

The trial court's "no breach" declaration was in error.

CONCLUSION

For the foregoing reasons, the decision of the Court of Chancery should be reversed.

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CERTIFICATE OF SERVICE

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