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IN THE SUPREME COURT OF THE STATE OF DELAWARE

C&J ENERGY SERVICES, INC., JOSHUA E. COMSTOCK, RANDALL C. MCMULLEN, DARREN M. FRIEDMAN, ADRIANNA MA, MICHAEL ROEMER, C. JAMES STEWART, III, AND H.H. "TRIPP" WOMMACK, III, Defendants Below Appellants, vs. CITY OF MIAMI GENERAL EMPLOYEES' AND SANITATION EMPLOYEES' RETIREMENT TRUST, on behalf of itself and on behalf of all others similarly situated, Plaintiff Below, Appellee.	No. 655, 2014 Court Below—Court of Chancery of the State of Delaware, C.A. No. 9980-VCN PUBLIC VERSION E-Filed: December 15, 2014
NABORS INDUSTRIES LTD. and NABORS RED LION LIMITED, Defendants Below Appellants, vs. CITY OF MIAMI GENERAL EMPLOYEES' AND SANITATION EMPLOYEES' RETIREMENT TRUST, on behalf of itself and on behalf of all others similarly situated, Plaintiff Below, Appellee.	No. 657, 2014 Court Below—Court of Chancery of the State of Delaware, C.A. No. 9980-VCN CONSOLIDATED

THE C&J APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

This appeal presents important questions regarding the degree of judicial intervention that is permitted where a company determines that the best way to maximize stockholder value and pursue its long-term strategy is to acquire assets using a majority block of its stock as consideration subject to significant control-inhibiting provisions. Plaintiff spends the bulk of its 60-page brief regurgitating the same litany of evidentiary mischaracterizations the trial court rejected. The C&J Defendants[1] will not respond to each of Plaintiff's mischaracterizations except to point out a handful of representative falsehoods. Defendants will instead focus on the flaws in Plaintiff's efforts to salvage the trial court's Order.

First, Plaintiff contends that a transaction that results in a transfer of majority stock to a single stockholder constitutes a *per se* "sale of control" that triggers *Revlon*. Delaware law does not mandate such a mechanical form over substance approach to determine whether a transaction results in a sale of control. This Court's holding in *QVC* acknowledges that structural devices—particularly with respect to stockholders' ability to enjoy a future control premium—will inform whether control has shifted. Here, unlike in *QVC*, the Board negotiated protective devices to constrain Nabors' ability to exercise control of New C&J. Like the trial court, Plaintiff gives *QVC* and the protective devices short shrift.

[1] Capitalized terms not defined herein shall have the meaning set forth in the C&J Appellants' Opening Brief ("Op. Br.").

Even if *Revlon* applies, the trial court erred in holding that *Revlon* required a "sales process" under the circumstances. The trial court acknowledged the C&J Board's involvement in the process, its "undoubted" knowledge of C&J's value, the effective post-signing market check, and the impending fully-informed stockholder vote. But the trial court found the Board had not satisfied *Revlon* without a solicitation process because the Board did not have impeccable knowledge of Nabors C&P and pursued the Transaction as an "acquisition" rather than a "sale." Plaintiff's brief ignores the former finding, and focuses only on the later. But this finding most acutely demonstrates the trial court's error. It cannot be squared with the evidence, and whatever one labels the Transaction, the question the trial court should have asked is whether the Board had adequate information and whether its actions fell within a range of reasonable choices to maximize stockholder value under the circumstances. The trial court failed to approach the issue in this manner, and its mandated sales process improperly ignores and overrides the undisputed fact that the Board was pursuing this Transaction to further its long-term growth strategy, not to abandon it. The Board approached the Transaction with the same rigor as a *Revlon* board and facilitated a post-signing market check. To inflexibly require a company in these circumstances to engage in a sales process creates dangerous precedent for judicial intervention and an expansion of *Revlon*.

ARGUMENT

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

Like the trial court, Plaintiff assumes that *Revlon* applies simply because Nabors will own more than 50% of New C&J. The key, however, is whether C&J has transferred control of New C&J to Nabors, regardless of percentage ownership. *See Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 43 (Del. 1994). Here, Nabors has acquired more than 50% of C&J's stock but not control.

"[T]ransactional creativity[] should not affect how the law views the substance of what truly occurred…." *Gatz v. Ponsoldt*, 925 A.2d 1265, 1281 (Del. 2007). Under the trial court's approach, the Board's only options were to (i) buy Nabors C&P with cash (or less than 50% of C&J's stock), or (ii) auction a company that was not for sale. If C&J structured the Transaction as a cash acquisition (or a "sale" of under 50% of C&J), it would have significantly burdened C&J with debt and increased the purchase price (by foregoing tax benefits). Op. Br. at 6. And C&J's stock price made it an ideal time to use stock as currency. *Id*. at 5. So the Board properly opted to maximize stockholder value by trading in C&J's stock and receiving robust control protections. *See Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1057-58 (Del. Ch. 1997).

To support its argument that *Revlon* applies, Plaintiff cites inapposite cases involving transactions where a third party made hostile bids or the company independently initiated a process to sell itself. Those circumstances differ from the situation here, where C&J was not for sale but instead entered into a strategic combination to maximize long-term equity value for C&J's stockholders. Delaware law requires a nuanced review of the Transaction, which demonstrates that no change in control has occurred and, as such, *Revlon* does not apply.

A. C&J stockholders retain the ability to receive a control premium.

With no evidentiary support, Plaintiff falsely asserts that "C&J stockholders will forever lose their ability to command a control premium for their shares." Pl. Br. at 26-27. But Plaintiff admits that New C&J's bye-laws will "protect C&J shareholders' right to a *pro rata* share of a future premium…." *Id*. at 27. C&J stockholders' indefinite right to share *pro rata* in any future control premium is powerful evidence that the Transaction did not result in a change of control. As Plaintiff aptly notes by quoting *QVC*, "*[o]nce control has shifted*, the current [C&J] stockholders will have no leverage *in the future* to demand another *control premium*." *Id*. at n.7 (emphasis added). Thus, C&J's stockholders ongoing right to receive a control premium removes the primary underpinning for enhanced scrutiny and affirms that the Transaction is not subject to *Revlon.*

B. The protective devices preserve C&J's control.

Plaintiff argues that the C&J Defendants have asked this Court to take an "unprecedented step" to find that the Transaction "can be removed from *Revlon* scrutiny by inserting into the transaction temporary 'protections' that only benefit C&J rollover directors." *Id*. at 28. Plaintiff mischaracterizes the protective provisions and misstates the law.

First, the C&J Defendants' argument is not "unprecedented." This Court explained the "control provision" concept in *QVC* and applied it to temporary provisions in *Ivanhoe*, which involved a ten-year standstill that restricted a 49.7% stockholder's "ability to purchase and exercise control of the corporation," which benefited stockholders by protecting them "from being squeezed out by an unbridled majority shareholder." *Ivanhoe Partners v. Newmont Min. Corp*., 535 A.2d 1334, 1343 (Del. 1987). For the same reason, the standstill here benefits C&J's stockholders. Plaintiff's reliance on *In re Sirius XM Shareholder Litigation* is misguided. *See* Pl. Br. at 29-30. In *Sirius*, the only legal issue decided was whether a fiduciary duty claim was time-barred. 2013 WL 5411268, at *1 (Del. Ch.). The Court of Chancery expressly refused to evaluate and did "not reach" the merits of plaintiff's argument about the contract provisions at issue. *Id*. at *5.

Second, Plaintiff's statement that the protections are "temporary" is a half-truth. The provisions protecting C&J stockholders' ability to receive a control premium—the most important provisions under *QVC*—are not "temporary." A1436, 1438 §§ 78, 80.7. Plaintiff ignores this and focuses only on the five-year term of the standstill period. But the temporal aspect of the standstill is not controlling under *Ivanhoe*, and Plaintiff makes no serious attempt to argue that the provisions in the Transaction are not "protective devices of significant value" to C&J's stockholders. *QVC*, 637 A.2d at 43. Plaintiff incorrectly alleges that C&J's stockholders are "in the same position" as the *QVC* stockholders. Central to *QVC*'s holding was the absence of "protective devices of significant value" for the minority stockholders. *Id*. C&J's stockholders, by contrast, retain significant power, including the right to nominate directors and receive a control premium, and benefit from robust provisions that constrain Nabors. *See* Op. Br. at 15-17.

Third, Plaintiff argues that Nabors will "select a majority of the Board." But a majority of New C&J's initial board will consist of current, elected C&J directors, and two of the board's three nominating committee members will be current C&J directors. A1327 § 6.9(a). Further, during the standstill period, Nabors, unlike C&J stockholders, cannot "seek . . . additional representation on, or propose any changes to the size of, the board of directors[.]" A1334 § 6.14(b)(v).

Finally, Plaintiff speculates that Nabors will still own a majority interest in five years, despite correctly noting that "a court cannot assign any value to any 'speculative' events." Pl. Br. at 42 n.15 (quoting *Rapid-Am. Corp. v. Harris*, 603 A.2d 796, 805 (Del. 1992)). Given that Nabors' ownership of New C&J is diluted to 50.25% when outstanding options are exercised, even a slight divestiture or new issuance of New C&J stock could cause Nabors to lose its majority status. A865.

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

A. It is undisputed that the trial court misinterpreted *Revlon*.

1. *Revlon* does not mandate a particular sales process.

Plaintiff acknowledges that "*Revlon* does not require a board to pursue any particular sales process" and "Delaware law does not proscribe a particular 'blueprint' for a sales process . . . ." Pl. Br. at 2, 32. *Revlon* requires only that a board "act[] reasonably" in an attempt "to secure the transaction offering the best value reasonably available. . . ." *In re Pennaco Energy, Inc.*, 787 A.2d 691, 705 (Del. Ch. 2001); *QVC*, 637 A.2d at 44; Pl. Br. at 33. Mandatory processes are particularly inappropriate where, as here, the Transaction is complex, part of a long-term strategy, and not a run-of-the-mill 100% stock-for-cash sale. *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989); *Equity-Linked*, 705 A.2d at 1058; A668-69 at 72:3-76:5 (calling the Transaction "very unique"). In *Equity-Linked*, for example, the Court of Chancery held that *Revlon's* application is not inflexible, even where a "sale of control" is assumed. 705 A.2d at 1058-59. The court explained that *Revlon's* exhortation to "maximiz[e] the present value of the" company's equity is clear where there are competing all-cash bids for a company, but that aim is "not obvious" in more complex transactions where shareholders' future prospects are a primary concern. *Id.* at 1058. In those situations, "all that the law may sensibly ask of corporate directors is that they exercise independent, good faith and attentive judgment . . . ." *Id.*

Plaintiff argues that the trial court did not require any particular process. Pl. Br. at 32. But that is exactly what the trial court did. The Order mandates that the Board run a solicitation process because "the board did not consider alternative transactions [or] seek out other potential buyers" and did not have "impeccable knowledge" of Nabors C&P. A3514, 3517 at 147:7-9, 150:5-11. *Lyondell* reversed the trial court for holding that directors could only fulfill *Revlon* in one of three regimented ways: "by conducting an auction, by conducting a market check, or by demonstrating 'an impeccable knowledge of the market.'" *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009). Here, the trial court's regimented approach is even more egregious because it ignores the Board's objective.

2. Plaintiff implicitly agrees that the trial court's "impeccable knowledge" standard is erroneous.

According to the trial court, the Board's actions would have satisfied *Revlon* had the Board exhibited "impeccable knowledge" of "the company that it is selling." A3517 at 150:5-11. Plaintiff does not address any of the C&J Defendants' arguments concerning the trial court's improper "impeccable knowledge" standard. *See* Op. Br. at 23-26. Instead, Plaintiff implicitly agrees that the trial court erred, explaining that *Revlon* only "require[s] a board to have been 'adequately informed . . . .'" Pl. Br. at 33 (citation omitted).

B. Plaintiff's attack on the Board's process ignores much of the record and mischaracterizes the rest.

Having acknowledged that *Revlon* does not require a particular sales process and requires only adequate knowledge, Plaintiff is forced to interpret the trial court's ruling as a "determination that the Board . . . took no steps whatsoever to obtain the best price reasonably available" and "had no basis at all" for approving the Transaction under *Revlon*. Pl. Br. at 4, 43. According to Plaintiff, the Board "failed to take *any* steps whatsoever that could have satisfied its *Revlon* obligations." *Id.* at 36 (emphasis in original). This is contradicted by the record.

1. Plaintiff wholly ignores the post-agreement market check.

Plaintiff does not, and cannot, dispute that a post-agreement market check is an effective way to ensure that stockholders are receiving the highest value reasonably attainable, thereby satisfying *Revlon*. *See* Op. Br. at 24-25. Delaware courts have repeatedly rejected *Revlon* challenges where, as here, a Board negotiates for reasonable deal protections, discloses a transaction, and allows reasonable time for "topping bidders" to emerge. *See, e.g., In re MONY Grp. Inc. S'holder Litig.*, 852 A.2d 9, 23-24 (Del. Ch. 2004) ("[T]his court [has] upheld a six-week market check as a proper alternative to an active auction . . . a five-month market check [is] more than adequate to determine if the price offered by AXA was the best price reasonably available."); *Pennaco*, 787 A.2d at 707; *In re Plains Exp. & Prod. Co. S'holder Litig.*, 2013 WL 1909124, at *6 (Del. Ch.).

Plaintiff wholly ignores the Board's facilitation of a five-month post-agreement market check with modest deal protections. The first and only time that Plaintiff even tangentially touches upon the post-agreement market check is in the "balance of equities" section of its brief, where it speculates that potential topping bidders—sophisticated companies like Schlumberger and Halliburton—may not know that C&J is "for sale" because "none of the Board minutes reflect a determination that C&J is, in fact, for sale." Pl. Br. at 51. Plaintiff, of course, has no support for its speculation. Rather, the record is replete with evidence that C&J publicly disclosed exhaustive details about the Transaction, leading the trial court to conclude that (a) "it is impossible to believe that [potential topping bidders] do not know about the transaction" and (b) the Board has disclosed adequate information about the Transaction. *See* Op. Br. at 13; A3520 at 153:9-19. Even if not contradicted by the record, courts have rejected Plaintiff's notion that topping bidders are not sufficiently savvy to emerge during a post-agreement market check. *See In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1043 n.100 (Del. Ch. 2012); *In re Toys "R" Us, Inc. S'holder Litig*., 877 A.2d 975, 1006–09 (Del. Ch. 2005).

2. The Board did not violate *Revlon* simply because it viewed the Transaction as an "acquisition."

In defending the trial court's application of *Revlon*, Plaintiff relies principally on the trial court's finding that the Board viewed the Transaction "pretty much as a buyer would" and "did not approach this transaction as part of a sales effort . . . ." Pl. Br. at 4, 33 (quoting A3516, 3519 at 149:11-22, 152:10-11). Plaintiff, like the trial court, incorrectly concludes that a board "necessarily" violates *Revlon* unless it views the transaction as a "sale." *Id*. at 33.

This is a false dichotomy and is especially untenable given that a board will not always know *ex-ante* whether *Revlon* applies, particularly where (as here) a transaction is not an outright sale and involves a slim majority stockholder who is subject to robust control limitation provisions. *See infra* at § I. It is not mutually exclusive for a board to (a) use the company's stock to "acquire" another business and (b) fulfill *Revlon*'s objective, *i.e.*, to take reasonable steps "to secure the transaction offering the best value reasonably available for the stockholders . . . ." *QVC*, 637 A.2d at 44. This is precisely what the Board did, as explained below.

The trial court and Plaintiff's false dichotomy would require a board to switch into "auctioneer" mode—focused solely on short-term price—whenever it is contemplating a strategic transaction as part of a long-term growth strategy. This is not the law. For example, in *Equity-Linked*, the Court of Chancery held that a board had satisfied *Revlon* by favoring a deal that provided stockholders potential long-term gains over a deal that would potentially result in a higher short-term payout but no long-term upside. *See* 705 A.2d at 1056-58.

Thus, the Board can—and did—satisfy *Revlon* while simultaneously viewing the Transaction as an "acquisition" of Nabors C&P. *See* Op. Br. at 21-26.

The trial court and Plaintiff make much of Board minutes referring to the "acquisition" of Nabors C&P, but this is a paper-thin analysis of the Board's conduct. A3516 at 149:11-17; Pl. Br. at 36. It is undisputed that the Board knew that the price for this "acquisition" was 53% of New C&J's shares, creating a new majority shareholder. A931. It is also beyond dispute that the Board took many steps "to secure the transaction offering the best value reasonably available," *QVC*, 637 A.2d at 44, such as (a) retaining two financial advisors and numerous tax/legal advisors and relying on their advice, (b) negotiating vigorously over price and other terms, (c) concluding, based upon their industry knowledge and advisors' assessment of other potential acquirors, that a "single-bidder" approach was optimal, (d) securing modest "seller-side" deal protections to allow for an effective post-agreement market check, (e) securing robust control-limiting provisions to ensure that C&J's stockholders will receive any future control premium and to restrict Nabors' control of New C&J, (f) constantly soliciting and receiving updates and information on the Transaction, (g) approving the Transaction only after receipt of two fairness opinions and detailed presentations, and (h) ensuring that C&J's stockholders would have adequate information about and ultimate veto power over the Transaction. *See* Op. Br. at 5-13, 16-17.

While the Board believes that a "sale of control" has not occurred due to the control-limiting provisions in the Merger Agreement and bye-laws, *Id*. at 14-17, the critical point—which the trial court and Plaintiff ignore—is that the Board nevertheless took reasonable steps to secure the transaction offering the best value reasonably available for C&J's stockholders. *Id*. at 9-13. In short, whether they called the Transaction an "acquisition," "sale," "merger," or something else, C&J's directors satisfied *Revlon*.

3. Plaintiff mischaracterizes the record in an effort to argue that the Board's process was tainted.

Plaintiff attempts to impugn the Board's process through a series of mischaracterizations and half-truths regarding the process. Pl. Br. at 7-24. The C&J Defendants cannot possibly respond to all of the mischaracterizations in Plaintiff's brief. More egregious examples include:

<u>Board authorization</u>. Plaintiff alleges that Comstock "negotiat[ed] a $2.925 billion deal without Board authorization[.]" *Id*. at 2. Plaintiff fails to mention that (1) the actual deal price was $2.86 billion; (2) the Board authorized Comstock to negotiate the best deal possible and bring it to the Board for consideration; A1616; A1664 at 103:15-104:1, 105:5-13; A3175-76 at 49:2-51:10; (3) Comstock constantly (almost daily) kept the Board apprised of negotiations; and (4) the Board unanimously approved the Transaction on June 24, 2014. A1636.

<u>Price reduction</u>. Plaintiff alleges that Comstock failed to "us[e] NCPS's dismal performance" to "negotiat[e] a lower purchase price . . . ." Pl. Br. at 19.

But Comstock *did lower* C&J's offer (from $2.925 billion to $2.8 billion) days before closing as a result of due diligence. A2432.

Nabors C&P's declining profitability. Plaintiff alleges that [redacted] The Board was well aware of Nabors C&P's struggles; in fact, an impetus for the Transaction was that C&J could make better use of Nabors' underutilized assets. *See, e.g.*, A2355; A701; A1741 at 20:3-16; A2047; A2072.

[redacted] . . . ." Pl. Br. at 23. As with many of Plaintiff's mischaracterizations, this allegation takes a sound bite from an email without context. C&J, as part of due diligence, determined that what initially looked like [redacted] was caused by miscoded expense items in Nabors' accounting system and not by a problem with the underlying business or the accuracy of the aggregate forecast. A1673-75 at 141:4-148:10.

Nabors C&P's 2015 EBITDA. Plaintiff alleges that the Board was not informed that [redacted]

Plaintiff is incorrect: after due diligence, $445 million was C&J's best estimate for Nabors C&P's standalone 2015 EBITDA. A1853 ¶¶ 4-7; A2312-13.

[redacted]

Contrary to Plaintiff's assertions, the Board was informed (a) about the appropriate 2015 EBITDA estimate, [redacted]

Tax inversion. Insinuating that the tax benefits created by the inversion are fake, Plaintiff alleges that [redacted] Pl. Br. at 23. But C&J was advised by multiple tax advisory firms, who confirmed the validity of the tax strategy. A922, 925; A1657 at 76:4-19. Plaintiff has no authority to suggest otherwise.

Employment benefits. Plaintiff alleges that Comstock "condition[ed] the deal on his receiving an employment agreement" for himself and management. Pl. Br. at 2, 24. But (1) employment agreement negotiations did not begin until the parties had agreed on the terms of the Transaction; (2) the employment agreements were not finalized until three months after the Transaction was signed; (3) it was indisputably in the best interests of C&J's stockholders (and critical to the deal) to keep the industry-leading current management team in place; (4) the emails on which Plaintiff relies were sent *after* the Board approved the Transaction, when collective Board action would have been necessary to rescind approval of the Transaction. A929; A2519; A2528-29; A1693 at 220:15-21.

The Board's advisors. Plaintiff claims that Comstock withheld information from Citi and Tudor. Pl. Br. at 20-21. These claims are based on the same false allegations detailed above concerning Nabors C&P's standalone 2015 EBITDA.

[redacted] C&J instructed ***all*** of its advisors, not just Deloitte, to stop working on the Transaction when C&J threatened to abandon the deal unless Nabors conceded on various issues—a tactic

Comstock repeatedly used, contradicting Plaintiff's allegations concerning his motives. *See, e.g.*, A2487; A2499-500; A2298; A2309; A2343.

4. Plaintiff mischaracterizes the Transaction in an effort to argue that there is no premium.

Plaintiff's final attempt to attack the Board is to criticize the substance of the Transaction itself. Having abandoned its valuation expert, Plaintiff is forced to mischaracterize the Transaction to argue that C&J's stockholders received a "negative premium." Pl. Br. at 23, 40-41. C&J's stockholders are *not*, as Plaintiff claims, simply receiving Nabors C&P. *Id.* Rather, C&J stockholders are receiving one share of *New C&J* in exchange for each current share of C&J. A874. Thus, the appropriate metric to determine the premium is the value of one share of C&J vs. one share of New C&J (or, in the aggregate, 100% of C&J vs. 47% of New C&J). This metric was used by all financial analysts in the Transaction and this lawsuit (including Plaintiff's expert). A2033; A2081-82; A2171; A2617.

Plaintiff claims that "C&J cites to nothing in the record from Citi or Tudor reflecting" a 15% premium. Pl. Br. at 41. But the C&J Defendants cited to A2033, in which Citi conducts a DCF analysis of the value of 100% of C&J ($2.271 billion) and the value of 47% of New C&J ($2.621 billion) to conclude that C&J's stockholders receive a "+15%" premium in the Transaction. A2033.

5. Ma's testimony does not raise "jurisprudential" issues.

Plaintiff initially deposed only two C&J board members—Comstock and Stewart. Only after Ma submitted an affidavit with the C&J Defendants' preliminary injunction brief did Plaintiff demand Ma's deposition at the eleventh hour. A7. Plaintiff now baselessly asserts that Ma gave untruthful testimony in a calculated effort to counter the assertions in Plaintiff's briefing. Pl. Br. at 37-38. This remarkable assertion should be disregarded.

Plaintiff further argues that Ma's testimony raises "jurisprudential" issues because she testified that the Board understood the Transaction may involve a change in control, while Defendants have previously withheld privileged documents. *Id*. at 38. These issues do not conflict. [redacted] Nothing in this testimony reveals legal advice; it is no more revealing than subject-matter information required on a privilege log. Plaintiff is, in essence, arguing that it is unfair for the C&J Defendants to use testimony that *Plaintiff* elicited by asking a deposition question.

III. Plaintiff suffers no irreparable injury absent an injunction.

"Only questions fairly presented to the trial court may be presented for review." Del. Sup. Ct. R. 8. In its Answering Brief, Plaintiff relies on nonexistent disclosure claims to argue that C&J stockholders will be irreparably harmed without an injunction. Pl. Br. at 45. Plaintiff ignores the trial court's express holding that disclosure claims were not "fairly presented" to the court and had "been waived," and that C&J stockholders are "adequately informed." A3509, 3520 at 142:14-21, 153:17-18. Because Plaintiff did not plead disclosure claims or fairly present them to the trial court, such claims cannot support the injunction. *See* Del. Sup. Ct. R. 7; *Anderson v. Silicki*, 925 A.2d 503, 503 (Del. 2007).

Plaintiff undermines its other claim of irreparable harm by arguing that its duty of loyalty and aider-abettor claims remain viable. Pl. Br. at 55-57. Monetary damages are thus adequate, and there is no irreparable injury. Op. Br. at 29-30. Plaintiff criticizes the C&J Defendants for replacing the term "appraisal rights" with the (properly bracketed) term "[monetary remedies]" in a quotation, but it does not explain how its damages claim for duty of loyalty and aiding/abetting liability is any less a monetary remedy than appraisal rights. Pl. Br. at 49.

Plaintiff simply has no response to the fact that it was improper for the trial court to stand in the way of a fully-informed stockholder vote on a Transaction for which there is no available alternative.

IV. Plaintiff has conceded and waived arguments.

Plaintiff concedes many of the arguments presented in the Opening Brief by either (i) failing to respond, or (ii) improperly relegating responsive arguments to footnotes. First, it is well settled that failing to respond to an argument concedes that argument. *See, e.g.*, *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999); *Boulden v. Albiorix, Inc.*, 2013 WL 396254, at *10 (Del. Ch.). Second, Supreme Court Rule 14(d) states that "[f]ootnotes shall not be used for argument ordinarily included in the body of a brief or for the purposes of avoiding the[] page limitations." Del. Sup. Ct. R. 14(d). Even though the Court allowed Plaintiff to file a 60-page brief, Plaintiff violated Rule 14(d) by making numerous arguments in 12-point font footnotes throughout its Answering Brief. These footnote arguments are improper and should be disregarded. *Lum v. State*, 101 A.3d 970, 972 (Del. 2014); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1264 (Del. 2012).

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CERTIFICATE OF SERVICE

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