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Case Number 482,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF MIAMI GENERAL EMPLOYEES' AND SANITATION EMPLOYEES' RETIREMENT TRUST, on behalf of itself and on behalf of all others similarly situated,

Plaintiff-Below,
Appellant,

v.

JERRY M. COMSTOCK, JR., as Independent Executor of the Estate of Joshua E. Comstock, RANDALL C. MCMULLEN, DARREN M. FRIEDMAN, ADRIANNA MA, MICHAEL ROEMER, C. JAMES STEWART, III, H.H. "TRIPP" WOMMACK, III, THEODORE "TED" MOORE, NABORS INDUSTRIES LTD., and MORGAN STANLEY & CO. LLC,

Defendants-Below,
Appellees.

No. 482, 2016

Appeal from the Memorandum Opinion dated August 24, 2016 of the Court of Chancery of the State of Delaware, C.A. No. 9980-CB

CORRECTED APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's August 24, 2016 Opinion (the "Opinion" or "Op.")[1] dismissing Plaintiff's Verified Amended Complaint ("Complaint"). The Complaint asserts breaches of the duty of loyalty and aiding and abetting thereof in connection with the March 2015 acquisition of C&J Energy Services, Inc. ("C&J") by Nabors Industries Ltd. ("Nabors"), through merging C&J with Nabors division NCPS, creating C&J Energy Services, Ltd. ("New C&J") (the "Nabors Deal").

On November 24, 2014, focusing on alleged breaches of the duty of care, then-Vice Chancellor Noble orally granted Plaintiff's motion to preliminarily enjoin the Nabors Deal and asked the parties to jointly submit a form of order. The next day, over Plaintiff's objection, the trial court entered Defendants' proposed order, specifically requiring C&J to solicit alternative offers for 30 days (the "Injunction"). The trial court stayed the Injunction pending appeal. Defendants then asked the trial court to lift the stay while they sought an expedited appeal.

On December 17, this Court held oral argument on Defendants' appeal of the Injunction. Questioning focused on, *inter alia*, the passive market check arising from the Merger Agreement's "fiduciary out" provision, and whether the trial court made the requisite factual findings for a mandatory injunction.

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[1] A copy of the Opinion is attached as **Exhibit A** hereto.

Surprisingly, at no time during the argument, did the C&J Defendants disclose that just days earlier, ***Cerberus had offered to: (i) merge C&J with Cerberus-portfolio firm Keane Energy, (ii) infuse the resulting entity with $175 million, and (iii) give C&J stockholders $5.25 in cash plus a 49% interest in that entity*** (the "Cerberus Bid").

On December 19, this Court reversed the Injunction, focusing on the trial court's grant of mandatory relief based on a disputed preliminary record. *C&J Energy Servs., Inc., v. City of Miami Gen. Empls.' and Sanitation Empls.' Ret. Tr.*, 107 A.3d 1049, 1053–54 (Del. 2014) ("*C&J*" or the "PI Reversal") (holding that "[m]andatory injunctions should only issue with the confidence of findings made after a trial or on undisputed facts"). The Nabors Deal closed three months later.

On October 29, 2015, having obtained limited discovery on C&J's motion to recover damages against Plaintiff's injunction bond (the "Bond Motion"), Plaintiff filed the Complaint, primarily challenging *post*-Injunction conduct. Defendants moved to dismiss.

The trial court dismissed the Complaint and granted the Bond Motion on August 24, 2016. Plaintiff served timely notice of appeal on September 22, 2016.

SUMMARY OF ARGUMENT

Delaware corporate law protects directors who act in good faith from judicial second-guessing. Until the Opinion, however, the Court of Chancery would permit discovery when pleadings, like the Complaint here, suggest that fiduciaries: (i) harbored conflicted interests; (ii) acted on those self-interests to their benefit; (iii) manipulated information provided to non-conflicted board members; and (iv) misrepresented material information when soliciting stockholder approval.

This appeal challenges important, but straightforward, errors. The Opinion misapplies long-standing pleading standards, misconstrues disclosure law, and expands the application of this Court's ruling in *Corwin v. KKR Fin. Holdings, Inc.*, 125 A.3d 304 (Del. 2015), in ways that invite and reward self-interested concealment of material developments, while closing the courthouse doors to stockholders who specifically plead serious fiduciary disloyalty. The Opinion should be reversed.

This Court's PI Reversal recognized that while the Injunction rested on alleged care violations, Plaintiff's loyalty claims were colorable. *C&J*, 107 A.3d at 1073 ("[W]e acknowledge that there are colorable questions about the interests of certain key players . . . that have not been fully explored given the expedited nature of the proceedings."). Two months after the PI Reversal, the C&J Defendants compounded their strategic silence to this Court about the Cerberus Bid by omitting the Bid's terms and key facts about the sales process in the February 2015 final proxy soliciting approval of the Nabors Deal (the "Final Proxy").

Declining oil prices and the enormous debt the combined C&J/NCPS would assume already made stockholder approval uncertain. Informing C&J stockholders of an alternative transaction that provided more value, an immediate $5.25 cash dividend, *and* equity in a healthy company receiving a large cash infusion ***from*** Cerberus could have torpedoed the Nabors Deal. While bid terms are not necessarily disclosed unless the target board actually approves a transaction, the Cerberus Bid emerged after the Board announced the Nabors Deal, thus placing the Company's fate in stockholder hands. Moreover, the C&J Defendants were required to fully disclose the terms of the Cerberus Bid and the background of the Solicitation Process after they partially disclosed that the Special Committee had rejected a bid.

Today, New C&J is in bankruptcy. C&J's former stockholders have only this appeal to show for their investments. Defendants chose to keep investors in the dark. The Opinion rewards that choice, setting poor incentives going forward.

The Opinion should be reversed on several independent grounds. ***First***, misapplying the standard for deciding Rule 12(b)(6) motions, the trial court made factual findings contrary to the Complaint's allegations and drew key inferences in Defendants' favor.

Second, the trial court erroneously held that the following disclosures were legally immaterial: (i) the Cerberus Bid's terms; (ii) conduct of the solicitation process; and (iii) that the NCPS 2015 EBITDA number the Board considered eight months earlier was known to be unreliable as of the Final Proxy.

Third, the trial court acknowledged that Plaintiff's allegations "presumably would be sufficient to sustain a claim under the enhanced scrutiny standard of *Revlon.*" (Op. at 54.) The trial court, however, expanded the "*Corwin* doctrine" in ways unsupported by law and that create bad policy.

In *Corwin*, this Court held that the business judgment standard of review could apply to third party mergers otherwise subject to the entire fairness standard, but ***only if*** the defendants seeking the shift from enhanced scrutiny to business judgment carry ***their burden*** to prove that the vote was "fully informed." 125 A.3d at 312. *Corwin* maintained jurisprudential balance by allocating the burden to defendants and by specifying that "if troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked." *Id.* That "troubling facts . . . were not disclosed" here is a gross understatement.

Finally, the trial court erred in ordering payment of almost $550,000 on the injunction bond. "Good cause" exists for returning the bond to Plaintiff because the C&J Defendants concealed the Cerberus Bid from this Court, failed to comply in good faith with the plain terms of the Injunction Order they proposed, and failed to mitigate damages.

The Opinion should be reversed in its entirety.

STATEMENT OF FACTS

The trial court erroneously made factual findings contradicting the Complaint's well-pled allegations and drew inferences in Defendants' favor. Nevertheless, the trial court's own recitation of the facts establishes viable claims under Delaware law.

I. THE ORIGINAL NABORS DEAL

A. KEY PLAYERS IN THE DEAL

Before the merger, C&J was a growing oilfield services provider. (Op. at 3.) C&J's Board had seven directors. Five were non-management directors, and two—Joshua Comstock[2] (C&J's founder, chairman, and CEO) and Randy McMullen (C&J's President and CFO)—were management directors. (*Id.* at 4.) Nabors provides oilfield services. (*Id.* at 3.)

On March 20, 2015, C&J merged with NCPS to create New C&J. (*Id*. at 3.) On July 20, 2016, New C&J filed a petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, in the Bankruptcy Court for the Southern District of Texas, Houston Division, jointly administered as Case No. 16-33590 (DRJ).

[2] Comstock passed away in March 2016. On June 2, 2016, the trial court substituted Jerry M. Comstock, Jr., Executor of Comstock's Estate, as a party defendant. (*Id.* at 4 n.2.)

B. COMSTOCK'S SELF-INTERESTED NEGOTIATIONS TRIGGER STOCKHOLDER CHALLENGE

Comstock grew C&J through a series of acquisitions, consistently rejecting all proposals to sell "*his*" company. (A146-A147, ¶¶42-44.) In January 2014, however, bankers at Citigroup Global Markets, Inc. ("Citi") proposed that Comstock cause C&J to acquire Nabors' completion and production services business by merging C&J with a Nabors subsidiary, "with C&J's stockholders retaining 45% of the combined entity's stock and Nabors retaining 55%." (Op. at 5; A147, ¶45.) Comstock and McMullen met with Anthony Petrello, Nabors's Chairman, to discuss Citi's proposal. (Op. at 5; A147, ¶46.) Everyone at the meeting understood that Comstock's support for any deal required his remaining Chairman of the combined entity. (Op. at 5; A147-A148, ¶¶46–47.) The deal's core premise was Comstock expanding his corporate empire while C&J stockholders sold voting control. (A147-A149, ¶¶47-51.) Comstock did not tell the Board about these discussions until much later. (Op. at 5; A148, ¶48.)

On March 5, "Nabors informed Comstock that NCPS's EBITDA for 2014 and 2015 would be significantly worse than previously projected." (Op. at 5; A149, ¶50.) Later that month, Nabors reduced NCPS's 2014 EBITDA projection from $463 to $412 million. (Op. at 5; A149, ¶51.)

On April 3, 2014, Comstock presented the Nabors Deal to the Board "as an acquisition of NCPS," never explaining "that the deal would result in a majority sale of C&J." (Op. at 5–6; A149-A150, ¶52.) Comstock, however, informed the Board that a majority of its members would join the New C&J board, and that Nabors would guarantee their jobs for the equivalent of two staggered terms. (Op. at 6; A150-A151, ¶54.) The Board authorized Comstock to send a non-binding proposal to acquire NCPS for up to $2.6 billion. (Op. at 6; A151, ¶55.)

On April 4, Comstock proposed a deal valuing NCPS at $2.6 billion, giving Nabors a majority stake in the combined company. (Op. at 6; A151, ¶56.) The offer letter, however, also made clear that Nabors had to ensure the employment terms of C&J's management. (Op. 6; A152, ¶58.)

Several weeks later, Nabors released weak first quarter results. (Op. at 7; A155, ¶67.) Nevertheless, without C&J Board permission, Comstock submitted a new proposal valuing NCPS at $2.9 billion. (Op. at 7; A156-A157, ¶¶69–70.) Petrello recognized that Comstock's objective was empire building and ensuring payoffs for himself and C&J management, rather than getting the best deal for C&J's stockholders. (A157, ¶71.) On April 30, 2014, Petrello promised Comstock he was "pushing aggressive employment agreements for NEOs," including Comstock. (*Id.*) Comstock then accepted an NCPS $2.925 billion valuation. (Op. at 7; A157, ¶71.)

C&J management retained Deloitte LLP ("Deloitte") to perform due diligence. (Op. at 8; A160, ¶80.) In mid-June, Deloitte informed Comstock that

Nabors may have used "creative accounting" to overstate results. (Op. at 8; A161-A162, ¶81.) Comstock withheld this information from the Board and instructed Deloitte to cease work. (Op. at 8; A162, ¶82.)

C&J's management viewed the Nabors' 2015 EBITDA estimate of $445 million as the "upside case." (Op. at 9; A163-A164, ¶¶89–90.) Management never told Citi or Tudor Pickering Holt & Co. ("Tudor") this fact, and the banks used this figure as their "base case" for their fairness opinions. (Op. at 9; A164, ¶91.)

C&J's Board approved the Nabors Deal on June 24, 2014. (Op. at 9; A164-A165, ¶92.) Citi and Tudor valued the Nabors Deal at $30.76 per share, compared to C&J's then-current share price of $32.50. (Op. at 10; A166-A167, ¶96.) Citi also determined that C&J was worth $37.38 per share on a standalone basis. (*Id.*)

Shortly before the June 24 Board meeting, "Comstock sent Petrello proposed employment contracts for himself and other C&J executives." (Op. at 9; A167, ¶97.) Comstock's proposed agreement included a $19.1 million success bonus, $173 million in severance payments, and $220 million in connection with an unapproved change of control transaction. (Op. at 9; A167-A168, ¶¶97–98.) The next day, Nabors rejected the employment agreements. (Op. at 10; A168, ¶99.) In response, Comstock held the transaction hostage, threatening:

> ***I'm not prepared to sign for this transaction without guaranteed terms for myself and management team.*** A side letter was circulated and it, at a minimum, will be necessary for us to gain comfort. It's

> highly unfortunate this stance was taken at the last minute. We will not be prepared to close as it currently stands.

(A168, ¶99 (emphasis in original).)

Crediting Comstock's threat to blow-up the deal, Nabors signed a side letter satisfying Comstock's demands. (A167-A168, ¶¶97-100.) Defendants then announced the deal. (Op. at 10; A168, ¶100.)

II. THE TRANSACTION IS PRELIMINARILY ENJOINED

On July 30, 2014, Plaintiff filed its initial complaint seeking damages and injunctive relief for breaches of fiduciary duty. (A144, ¶¶33–34.) On November 10, Plaintiff moved for a preliminary injunction. (Op. at 11; A18, Dkt. 65.) Plaintiff focused on Comstock's conflicts of interest and manipulation of the sales process, while also challenging the Board's lack of understanding that the Nabors Deal was a chance of control for C&J stockholders.

The former Vice Chancellor focused on Plaintiff's argument that the Board did not meet its *Revlon* duties because the Board viewed the Nabors Deal as an acquisition, rather than a change in control. (A99, 10:5-11.) Citing C&J's exculpatory provision as preventing post-closing relief for duty of care violations, the trial court granted Plaintiff's motion and instructed the parties to submit an order. (A102, 13:12-20.)

On November 25, the trial court entered an order prepared by Defendants (Op. at 11–12; A105-A107; A169, ¶102), and at Defendants' request, stayed the injunction "pending the outcome of Defendants' appeal to the Supreme Court." (Op. at 12.) The trial court required Plaintiff to post a $650,000 bond. (Op. at 13.) The next day, the C&J Defendants asked the trial court to lift the stay so they could simultaneously run the solicitation process and seek an expedited appeal. (A108-A110; A111; A170, ¶103.)

Defendants suggested they lifted the stay to meet the Merger Agreement's initial end date. (A109; A170, ¶103.) Defendants failed to inform the trial court that they had just received a detailed inquiry from the U.S. Securities Exchange Commission that made it impossible to close by year's end, regardless of the Injunction. (A171, ¶107.) The most reasonable inference is that Defendants' favored litigation tactic involved presenting the Injunction as a crisis to be resolved by this Court on an expedited basis.

III. COMSTOCK PROTECTS THE NABORS DEAL BY UNDERMINING THE INJUNCTION AND SOLICITATION PROCESS

A. COMSTOCK UNDERMINES THE SOLICITATION PROCESS

Within hours of the Injunction's issuance, Comstock, without Board approval, issued a press release reaffirming C&J's commitment to the Nabors Deal, stating:

> [W]e disagree with the Vice Chancellor's findings and decision today, including his conclusion that under the circumstances of this transaction the Board was obligated to solicit proposals to acquire the Company before executing the merger agreement, and we intend to immediately appeal to the Delaware Supreme Court on an expedited

> basis. . . . We remain committed to this transaction and focused on closing as soon as possible.

(Op. at 14; A171-A172, ¶¶108–09.) The Board never saw or approved the release. (A172, ¶109.)

The next day, the Board formed a special committee of three directors: Darren Friedman, Adrianna Ma, and C. James Stewart, III (the "Special Committee"). (Op. at 14; A172, ¶110.) The Injunction required the Special Committee to "solicit proposals to purchase the Company (or a controlling stake in the Company) that are superior to the Proposed Transaction, as such term is defined by the Merger Agreement, for a period of 30 days from November 24, 2014." (A105-A107.)

Before forming the Special Committee, Comstock solicited his long-time friend, John Bishop of Morgan Stanley. (Op. at 15; A172-A173, ¶111.) "Bishop was aware that Comstock opposed the Court-ordered solicitation process." (*Id*.; A172-A173, ¶¶111-113.) Indeed, while negotiating the terms of the engagement for the Solicitation Process, Comstock assured Bishop that "[i]f y'all do this it is a solid in with the company." (A174, ¶114.)

Comstock next inserted C&J's General Counsel, Ted Moore, into the Solicitation Process. Moore received all Special Committee materials, attended all meetings, served as Morgan Stanley's primary contact, and informed Comstock of the Special Committee's activities. (Op. at 15; A175, ¶¶117–18.) "Through

McMullen, Comstock instructed Moore that Morgan Stanley and potential bidders for C&J would not receive confidential information, including forecasts." (Op. at 16.) Absent updated financials, Morgan Stanley realized it could not assess the then-current value of the Nabors Deal. (A177-A178, ¶¶120-122.)

B. COMSTOCK AND MORGAN STANLEY TORPEDO CERBERUS'S BID

On December 11, 2014, Cerberus submitted an alternative proposal. (Op. at 16; A178-A179, ¶123.) Cerberus offered C&J stockholders a $5.25 per share cash dividend and a 49% interest in a combination of C&J with Cerberus portfolio company Keane Energy, which would receive $175 million directly from Cerberus. (*Id.*) The Cerberus Bid valued C&J "at $14.55 per share, excluding synergies." (*Id.*) The market valued C&J, post-announcement of the Nabors Deal, at $13 per share. (A258)

Even though Cerberus would never receive nonpublic data, Comstock and Morgan Stanley made Cerberus execute a confidentiality agreement and standstill. (Op. at 16; A179.) When Bishop acknowledged the seriousness of the Cerberus Bid, Comstock berated him, reminding Bishop of his empire-building goal:

> [d]o you really believe that you can compare these companies to me and everything that I have built over the last five years? ***How can you say that you're still supportive of me*** if what you're actually doing is comparing these small companies that these sponsors have grown together with this large company that I have put together?

(A179, ¶124 (emphasis in original); Op. at 16-17.) Bishop reassured Comstock that he supported him and would support his goal of closing the Nabors Deal:

> I know this go-shop process can be a bit frustrating, especially when you have worked so hard to get the NBR deal this close to the finish line. But I want you to know that ***I am, and the MS team is, 100% supportive of you through this endeavor*** (I wasn't sure if you came away from yesterday's meeting feeling that way). I am extremely proud of what you and the C&J team have accomplished over the last 5 years, and ***our only objective is that we help you continue that success.***

(A179-A180, ¶125 (emphasis in original).)

Two days before the PI Reversal, Morgan Stanley analyzed the Cerberus Bid for the Special Committee. (Op. at 17; A182-A183, ¶¶130–31.) Even after excluding expected synergies from combining C&J with Keane, Morgan Stanley had to admit that the Cerberus Bid exceeded the then-current value of the Nabors Deal. (A182-A183, ¶131.) Moreover, even though the Board had a "fiduciary out" for any alternative that the Board "determines in good faith is more favorable to C&J's stockholders from a financial point of view than the Nabors deal," and had publicly announced that the value of the Nabors Deal was sufficient to recommend a sale of corporate control, Bishop instructed the Special Committee that any bid not offering a 30% premium to C&J's then-current stock price was inadequate. (Op. at 17–18.)[3]

That same day, this Court heard oral argument on Defendants' appeal. (A112) This Court questioned the C&J Defendants about the utility of the Merger Agreement's "fiduciary out," and the reliability of the "passive market check" predating the Injunction. (A115-A121, 48:9 through 54:2.) ***The C&J Defendants never disclosed the emergence of the Cerberus Bid to this Court.*** Two days later, this Court reversed the Injunction, "reinstating the no-shop provision in the merger agreement." (Op. at 18.) Having signed a standstill, Cerberus could neither pursue its Bid privately nor inform C&J stockholders of it. (A181, ¶128.)

C. THE C&J DEFENDANTS ISSUE A MATERIALLY MISLEADING PROXY

Despite concealing the Cerberus Bid, Defendants still struggled to garner investor support for the deal. The parties ultimately lowered C&J's payment to Nabors by $250 million. (A189, ¶145; Proxy at 74.) One week later, C&J issued the Final Proxy, misrepresenting and omitting, *inter alia*:

- the terms of the Cerberus Bid (A189-A191, ¶¶145–46);
- that the Special Committee's December 17, 2014 assessment of the competing bids valued the Nabors Deal ***including*** synergies but ***excluded*** synergies from the value of the Cerberus Bid (*id.*);

[3] Neither the Injunction nor the Merger Agreement required an alternative bid to exceed C&J's stock price by 30% before being potentially "Superior." (*Id.*)

- that Morgan Stanley's advice to the Special Committee rested on outdated and unreliable public financial data (*id.*);
- that the $445 million EBITDA estimate the Board used to endorse the Nabors Deal in June 2014 was inflated in the first instance and, by the time the Final Proxy was issued, outdated and unreliable (*id.*); and
- that Morgan Stanley unilaterally re-defined "potentially superior proposal" to require a 30% premium over C&J's stock price (*id.*), effectively rewriting the terms of the fiduciary out to insulate the Nabors Deal.

Despite waiving the stay, undermining the Injunction, and having the Nabors Deal go through as planned, Comstock refused to return $542,087.89 of the bond.[4] Instead, Comstock tried using the bond as leverage in the ongoing case, telling Plaintiff's counsel he would return the bond money if Plaintiff dropped the lawsuit. (A238.) Plaintiff's counsel rejected Comstock's effort to create a conflict between themselves and the Class. (*Id.*).

[4] Notably, Nabors rightly indicated it would not seek recovery on the bond if the deal closed, and did not do so. (A126, 9:2-19.)

ARGUMENT

I. THE TRIAL COURT ERRED IN MAKING CONTESTED FACTUAL FINDINGS AND DRAWING INFERENCES FOR DEFENDANTS

A. QUESTION PRESENTED

Did the trial court err in making contested factual findings and drawing inferences in favor of the moving parties? This issue was preserved for appeal. (A1006-A1014; A1016-A1038; A1047-1053; A195-A196, Count I.)

B. SCOPE OF REVIEW

The Court reviews *de novo* a Rule 12(b)(6) dismissal. *RBC Capital Mkts., LLC v. Educ. Loan Tr. IV*, 87 A.3d 632, 639 (Del. 2014). The trial court correctly stated that the court must "accept all well-pleaded allegations as true and draw all reasonable inferences in the plaintiff's favor." (Op. at 20); *see also RBC*, 87 A.3d at 639 (the trial court must "(1) accept all well pleaded factual allegations in the Complaint as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) [ ] not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.") (quoting *Cent. Mortg. Co. v. Morgan Stanley Mort. Capital Holdings, LLC,* 27 A.3d 531, 535 (Del. 2011)).

Moreover, rather than parse Plaintiff's claims, the court must view them holistically. *See, e.g., Dela. Cty. Empls. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1021 (Del. 2015). In sum, if the Court finds itself straining to articulate why the complaint should be dismissed, it likely should be upheld.

C. MERITS OF THE ARGUMENT

Despite correctly stating the standard, the trial court incorrectly described Plaintiff's claims, and made contested factual findings and improper inferences favoring Defendants. Each error warrants reversal.

1. Comstock's Conflicted Interests

The trial court acknowledged that even if a majority of the Board was disinterested, the business judgment rule does not apply "in the face of illicit manipulation of a board's deliberative processes by self-interested fiduciaries." (Op. 46 (quoting *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989)); *see also Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 674 n.30 (Del. Ch. 2006) (applying entire fairness because "not only was there such deception, but the board's own lack of oversight in structuring and directing the auction afforded management the opportunity to indulge in the misconduct which occurred").

Relying almost entirely on *Wayne County Employees' Retirement System v. Corti*, 2009 WL 2219260 (Del. Ch. Jul. 24, 2009) ("*Corti*"), the trial court rejected Plaintiff's allegations of Comstock's conflicting interests. The trial court misread the Complaint and misapplied *Corti*.

First, the trial court held that Plaintiff "does not allege that [Comstock's] new compensation terms [in the Nabors Deal] would constitute a material increase from his existing ones." (Op. at 46.) This adverse inference is erroneous. As this Court observed in the PI Reversal, the Nabors Deal gave Comstock an opportunity to improve his compensation package, as his package at C&J was "less generous" and "more modest than what he stands to receive as the CEO of New C&J." *C&J*, 107 A.3d at 1064. The Complaint alleges that Comstock's proposed employment agreement with Nabors included "$19.1 million in bonuses and extensive protections ensuring his employment as Chairman and [CEO] of New C&J for at least five years." (A133-A135, ¶¶7, 10(f); A167-A168, ¶98.) The proposed employment agreement also included severance payments that "balloon from ***$173 million*** for an ordinary severance to ***$220 million*** for an unapproved change in control severance." (A167-A168, ¶98.)

The Complaint further alleges that Comstock's control and new compensation were so material that he refused to "***sign for th[e] transaction without guaranteed terms for [himself] and management team.***" (A167-A168, ¶¶97-100.) The trial court's finding that "the reasonable inference is that Comstock was using a negotiation tactic," (Op. at 48 n.92), is inconsistent with pleading standards, and unreasonable in light of other allegations, including that Nabors credited this improper threat enough to execute the side letter with the "guaranteed terms" that Comstock demanded. (A168, ¶100.)[5] Thus, unlike the insiders in *Corti*, Comstock had a material interest in securing a more lucrative employment contract that he would not have but for the Nabors Deal. *Compare Corti*, 2009 WL 2219260, at *12 ("[A]ccording to the [] Complaint, by entering into the new employment agreements [the defendant directors] waived some benefits to which they would otherwise be entitled, and [one director] agreed to a salary reduction."), *with C&J*, 107 A.3d at 1065 ("The evidence showing that Comstock was focused on his compensation casts shade on his motivations, as he ultimately secured a generous package.").

Second, the trial court incorrectly held that Comstock was only conflicted if he "pushed for the Nabors transaction to avoid a different deal that would have had a worse outcome for him" or there was a "prospect of a transfer of control to" him in a buyout. (Op. at 46-47.) "Empire building" is a conflicting interest if the "manager's primary purpose for pursuing the transaction was a desire to increase the size of the company for the manager's benefit." *Corti*, 2009 WL 2219260, at *12.

[5] The trial court's comment is confusing, as Comstock hijacking the deal as a "negotiating tactic" for his personal benefit would violate his duty of loyalty. *See Parnes v. Bally Entertainment, Corp.*, 722 A.2d 1243, 1246 (Del. 1999) (CEO refused to approve any deal unless he received personal payments).

The trial court overlooked specific allegations that Comstock pursued the Nabors Deal to fulfill his agenda of growing "***his***" company and expanding "***his***" power through strategic acquisitions. (A133-A134, ¶4; A146-A148, ¶¶42, 44, 47; A179, ¶124.) The trial court also should have assessed Comstock's post-injunction actions, including Comstock issuing an unauthorized press release supporting the Nabors Deal, tainting the Solicitation Process, and bullying Morgan Stanley when it suggested C&J should consider the Cerberus Bid. Comstock made his motive abundantly clear when asking Morgan Stanley: "How can you still say that you're still supportive of me if what you're actually doing is comparing these small companies that these sponsors have grown together with this large company that I have put together?" (A179, ¶124.) Under a fair reading of the Complaint, the Cerberus Bid undermined Comstock's personal ambitions.

2. Comstock Misled the Board

Comstock's manipulation of the Board's process further supports upholding the Complaint and allowing discovery. The trial court recognized that in *Macmillan*, "management skewed a transaction in favor of the buyout they desired by misleading the board about the auction process." (Op. at 49.) The Complaint pleads such skewing.

The Complaint alleges that in April 2014, Comstock secretly agreed to a high NCPS valuation after Petrello enticed Comstock with "aggressive" employment terms. (A154-A157, ¶¶65-71.) Instead of demanding better terms for C&J stockholders as NCPS's performance declined, Comstock "stretched" the metrics for valuing NCPS to preserve the deal he already agreed to without Board authorization. (A154-A157, ¶¶65-71; A159-A164, ¶¶77-91.) When Comstock learned that Nabors was using "creative accounting," he told Deloitte to cease due diligence. (A161, ¶82.) And, when he learned that a realistic 2015 EBITDA estimate would undermine the agreed valuation of NCPS, Comstock gave an "upside case" estimate of $445 million to Citi and Tudor, knowing they would treat that figure as the "base case." (A161-A166, ¶¶83-95.) Comstock concealed these actions from the Board. (*Id.*)

Sidestepping this alleged disloyalty, the trial court held that "the Complaint does not allege that Nabors' financials were presented to the [B]oard. Rather, it can be inferred from the Complaint that C&J management constructed its own projection for NCPS's 2015 EBITDA of $445 million based on its analysis of information received from Nabors." (Op. at 50.) This distinction is misplaced. Whether the Board perceived the $445 million figure as a Nabors number or management's estimate is irrelevant. If Comstock misled the bankers to treat as a "base case" a number he viewed as an "upside case," the "deception of the board" underlying *Macmillan* is implicated.[6]

More fundamentally, despite Comstock writing the words "upside case" in describing the $445 million EBITDA estimate, the trial court inferred that Comstock was merely using a "negotiating tactic." (Op. at 27n.42, 51.) The trial court cannot credit disputed affidavits outside of the Complaint. Moreover, this Court never found otherwise.[7]

The trial court also excused Comstock's tainting of the post-Injunction process. The trial court acknowledged that Comstock, with help from Moore, "prevented Morgan Stanley and any potential bidders from receiving any confidential C&J information, including forecasts," (Op. at 52), but found no disloyalty because "the Complaint alleges no deception in connection with these allegations." (*Id.*) The trial court should not make the unreasonable inference that, unless Plaintiff alleges to the contrary, the Special Committee knew of something

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[6] The trial court did not address the allegation that Comstock stopped Deloitte's work after it specifically questioned NCPS's financials. (A160-A161, ¶¶80-82.)

[7] The trial court refers to footnote 54 of this Court's PI Reversal, which merely found a sufficiently "plausible" explanation of Comstock's words to preclude mandatory relief, hardly a judicial finding of fact. *See In re Answers Corp. S'holders Litig.*, 2012 WL 1253072, at *9 n.53 (Del. Ch. Apr. 11, 2012) (noting that the court cannot rely on the preliminary injunction record on later motion to dismiss because it "may not look beyond the Complaint. The Complaint states a claim on its face . . . that is necessarily the end of the analysis.").

as atypical as a CEO withholding information from a committee's banker. Management interference with the process is at least as reasonable an inference. *See In re Dole Food Co.*, 2015 WL 5052214, at *2, (Del. Ch. Aug. 27, 2015) (Dole management "deprived the Committee of the ability to negotiate on a fully informed basis to potentially say no to the Merger."); *see also Macmillan*, 559 A.2d at 1284.

Moreover, the trial court ignored detailed allegations that Bishop's overriding loyalty to Comstock was concealed from the Special Committee and that Morgan Stanley and Comstock unilaterally imposed a "30% above the current market price" threshold for anything to qualify as "superior." (A179-A182, ¶¶125, 129.) The trial court could not properly infer (absent uncontested proof) that the Board endorsed so many anomalies in a court-ordered sales process.

II. THE TRIAL COURT ERRED IN APPLYING THE BUSINESS JUDGMENT STANDARD

A. QUESTION PRESENTED

Did the trial court err in applying the business judgment rule to the Nabors Deal, despite specifically alleged material misrepresentations in the Final Proxy? This issue was preserved for appeal. (A1006-A1016; A1028-A1038; A1040-A1054; A1058-A1061; A189-A192, ¶¶145-148; A196-A203, Counts II through VII.)

B. SCOPE OF REVIEW

This Court's review is *de novo, supra* at Argument, I.B.

C. MERITS OF THE ARGUMENT

The Complaint details misrepresentations and omissions cutting to the heart of the C&J stockholders' assessment of the Nabors Deal. Such specifically alleged disclosure issues present viable claims, and bar application of *Corwin.*

1. The Trial Court Erred in Ruling that the Cerberus Bid Terms Were Immaterial

When directors submit a merger for stockholder approval, directors "are under a fiduciary duty to disclose fully and fairly all material information within the board's control." *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992). A fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Rosenblatt v. Getty Oil Co.*, 493

A.2d 929, 944 (Del. 1985) (adopting the federal materiality standard of *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

This inquiry "does not require proof of a substantial likelihood that [the] disclosure . . . would have caused the reasonable investor to change his vote." *Id.* (quoting *TSC Indus.*, 426 U.S. at 449). Since the materiality test is objective and focuses on the reasonable investor, directors do not determine materiality by their subjective opinions. *Zirn v. VLI Corp.*, 621 A.2d 773, 779 (Del. 1993).

Disclosure claims turning on materiality typically raise factual issues not amenable to disposition at the pleadings stage. *See, e.g.*, *Branson v. Exide Elecs. Corp.*, 645 A.2d 568, 1994 WL 164084, at *2 (Del. Apr. 25, 1994) (TABLE) ("Whether or not a statement or omission . . . was material is a question of fact that generally cannot be resolved on a motion to dismiss, but rather it must be determined after the development of an evidentiary record."); *Alessi v. Beracha*, 849 A.2d 939, 949 n.68 (Del. Ch. 2004) ("In such a fact-sensitive inquiry as materiality, dismissing a complaint outright before any discovery is uncommon."); *Wells Fargo & Co. v. First Interstate Bancorp*, 1996 WL 32169, at *10 (Del. Ch. Jan. 18, 1996) ("[Q]uestion of materiality is difficult to treat as a question of law on a motion to dismiss.").[8]

[8] *See also Weiner v. Quaker Oats Co.*, 129 F.3d 310, 317 (3d Cir. 1997) (holding that "the emphasis on a fact-specific determination of materiality militates against

The Final Proxy concealed the terms of the Cerberus Bid, which offered cash directly to C&J stockholders while also infusing cash to a proposed C&J/Keane combination during a downturn in the oilfield services industry. It also omitted that Morgan Stanley calculated the Cerberus Bid as more valuable than the market's valuation of the Nabors Deal. (A189-A192, ¶¶145–48.) This information was highly material for C&J stockholders deciding their Company's fate. The trial court held that "Delaware law . . . does not require disclosing details about offers that directors conclude are not worth pursuing." (Op. at 36–37). That is wrong.

It has long been black-letter law that a board's preference for one deal over another does not alter the materiality of disclosing viable alternatives when soliciting stockholder decision. *See, e.g., Jewel Cos., Inc. v. Pay Less Drug Stores Nw., Inc.*, 741 F.2d 1555, 1564 (9th Cir. 1984) ("Even after the merger agreement is signed a board may not, consistent with its fiduciary obligations to its

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a dismissal on the pleadings" and that the issue of materiality is "for the trier of fact"); *KB Partners I, L.P. v. Pain Therapeutics, Inc.*, 2015 WL 7760201, at *7-8 (W.D. Tex. Dec. 1, 2015) ("Materiality is a mixed question of fact and law," and does not serve as a grounds for dismissal except in the rare instances when the alleged misstatements and omissions are "so obviously unimportant to a reasonable investor" that reasonable minds could not differ on the question of their importance.); *Ark. Pub. Empl. Ret. Sys. v. GT Solar Int'l, Inc.*, 2009 WL 3255225, at *8 (D.N.H. 2009) ("'The existence of a material omission is usually a question for the trier of fact,' securities fraud claims should not be dismissed for failure to plead that element unless the court can 'say as a matter of law the complaint fails to raise a reasonable inference that [there] was a material omission.'") (citing *Miss. Pub. Emps.' Ret. Sys v. Boston Scientific Corp.*, 523 F.3d 75, 87 (1st Cir. 2008)).

shareholders, withhold information regarding a potentially more attractive competing offer"); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1295 (2nd Cir. 1973) ("[W]hen endorsing one offer [management] must inform stockholders of any better ones."); *see also Wetter v. Caesars World, Inc.*, 541 F. Supp. 68, 73 (D.N.J. 1982) ("[T]he failure to mention [a reasonably realistic proposal] in the proxy statement would be a material omission [and] [w]e consider such an offer could be of importance to a shareholder in determining how to vote the proxy."); *U.S. Smelting, Ref. and Mining Co. v. Clevite Corp.*, 1968 WL 2140, at *31 (N.D. Ohio June 17, 1968) ("[W]hen shareholders are being called upon by management to approve a particular merger proposal there would appear to be no information of greater materiality to him than that relating to other definitive merger proposals available to the corporation.").

At the least, Defendants' concealment of the Cerberus Bid terms warrants discovery. The Final Proxy reports only that a third party "submitted an acquisition proposal to C&J on December 11, 2014. After evaluating the acquisition proposal with [advisors], the Special Committee determined that such acquisition proposal was not reasonably likely to lead to a superior proposal." (A437.) Defendants' partial disclosure of the Cerberus Bid is misleading. "[T]he omission of key information about a competing bid is material—even if the bid is 'highly speculative and contingent'—where a proxy statement contains partial and incomplete disclosures about the bidding history." *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 23 (Del. Ch. 2014) (quoting *Arnold v. Soc'y Savs. Bancorp, Inc.*, 650 A.2d 1270, 1280-81 (Del. 1994)).

Moreover, having provided partial disclosure of the Cerberus Bid, Defendants were then required to provide stockholders with an accurate and fair characterization of the bid terms, including the reasons for its rejection. *Arnold*, 650 A.2d at 1281. C&J stockholders could place significance on the mixed cash and stock offer from a major private equity firm, which facially was worth more than the Nabors Deal. *Id.* (upholding disclosure claim based on omission of competing bid offering greater value than proposed deal).

The trial court evidently overlooked *Arnold* and additional precedent that Plaintiff specifically cited to support its disclosure claims. (*See* A1058-A1061.) The trial court instead cited authority distinguishable from the allegations made in this case. In *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *10 (Del. Ch. Jun. 27, 2008), plaintiff argued that the defendants' reasons for rejecting bids during a pre-announcement sales process were material. The court dismissed because (i) the board disclosed the range of initial bids, and why the bidders were ultimately whittled down to the acquirer; and (ii) "[t]he [p]lainiff has failed to demonstrate that any previously rejected bidder put forward what could be characterized as approaching a firm offer." *Id.* at *11-12. Omitting non-firm offers while disclosing the range of unaccepted offers contrasts sharply with Defendants' omissions about the Cerberus Bid terms, and the atypical conduct of the Solicitation Process, as discussed below.[9]

The trial court's reliance on *Skeen v. Jo-Ann Stores, Inc.*, 1999 WL 803974 (Del. Ch. Sept. 27 1999), *aff'd*, 750 A.2d 1170 (Del. 2000), was also misplaced. There, plaintiffs alleged claims of omitted information about third-party expressions of interest made "during the year preceding the Merger." *Id*. at *7. The *Skeen* court concluded that, "[b]ecause no firm offer was made, the board had no duty to disclose any of the specifics of [the company's] negotiations with that entity." *Id*. at *8. Here, after the Board publicly announced that it recommended selling at the value of the Nabors Deal, Cerberus presented a serious offer, which the Special Committee's own advisors valued as being facially better than the Nabors Deal. (A179, ¶124.) C&J stockholders were denied the chance to assess this alternative.

[9] Notably, the "Background of the Merger" section of a typical deal proxy identifies the financial terms of competing offers during the process, stating things like: "Company A offered $XX, Company B offered $YY," and so on. Indeed, according to FactSet, since 2012, at least 44 selling companies received a post-announcement competing bid was disclosed. In ***every single one of these*** instances, the terms of the competing bids were disclosed, either by the target board or the bidder. (*See* Compendium to Appellant's Opening Brief, Spreadsheet of Deals.) C&J's concealment of the Cerberus Bid terms was atypical, and should not be encouraged.

2. The Trial Court Erroneously Ruled that the Conduct of the Sales Process Immaterial

The trial court ruled that even if the solicitation process was material, "questions concerning the integrity of that process logically would have ceased to be meaningful to stockholders" following the PI Reversal. (Op. at 38.) This finding is factually and legally wrong. The conduct of the sales process cuts directly to whether investors would accept the Board's recommendation. *See, e.g., In re Comverge, Inc. S'holders Litig*., C.A. No. 368-VCMR, at 10 (Del. Ch. Oct. 31, 2016) (denying summary judgment because issues of material fact remained as to whether an omission concerning the CEO's instruction to restrict a competing bidder's due diligence was material); *Dole,* 2015 WL 5052214, at *29 ("[A]n important element of an effective special committee is that it be fully informed in making its determination. [Fiduciaries must] disclose fully all the material facts and circumstances surrounding the transaction.") (citations omitted).

The trial court dismissed Plaintiff's allegations about Morgan Stanley's distortion of the Cerberus Bid as mere "quibbles" with Morgan Stanley's work. (Op. at 36). The trial court's dismissive view of disclosure obligations diverges from Delaware law, particularly in light of the allegations that Morgan Stanley: (i) contrived a 30% premium-to-market definition of "superior proposal" inconsistent with the Merger Agreement's "fiduciary out" provision; (ii) knowingly gave unreliable advice because it was denied nonpublic information, (iii) ignored

Cerberus Bid synergies while exaggerating synergies to the Nabors Deal; (iv) timed the go-shop to coincide with the appeal; and (v) expressed loyalty for Comstock's obsession with closing the Nabors Deal. (A180-A188, ¶¶126-141.)

Stockholders deserved to know that Morgan Stanley never fairly compared the Cerberus Bid against the Nabors Deal,[10] because Comstock had his bankers ignore the synergies with Cerberus while using stale synergy and financial calculations for the Nabors Deal. (A190-A191, ¶146.)[11] Delaware law requires full disclosure of these unusual assumptions and facts underlying a sales process. *See, e.g., In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011) (holding that Delaware courts "require[] full disclosure of investment banker compensation and potential conflicts" and "examine[] banker conflicts closely to determine whether they tainted the directors' process"); *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 104 (Del. Ch. 2014) (Failures to disclose banker conflicts in the proxy, and that banker's precedent transaction analysis provided to board was false are actionable.).

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[10] Even though it excluded expected synergies from combining C&J with Keane, Morgan Stanley had to admit that the Cerberus Bid exceeded the then-current value of the Nabors Deal. (A182-A183, ¶131.)

[11] The trial court's "quibbles" comment relied on *In re 3Com S'holders Litig.*, which is completely inapposite because the disclosure of banker's valuations in that case showed "the final range of value estimates for each analysis[.]" 2009 WL 5173804, at *6 (Del Ch. Dec. 18, 2009).

In sum, information concerning Morgan Stanley's assessment of the Cerberus Bid and Nabors Deal, including its unusual "30% premium" guidance to the Special Committee, would significantly alter the "total mix" of information for C&J stockholders. The trial court erred by finding that information immaterial.

3. The Trial Court Erroneously Validated the Final Proxy's Use of the $445 Million NCPS 2015 EBITDA Estimate

The trial court erred in dismissing Plaintiff's claim relating to the Final Proxy's disclosure of $445 million in estimated 2015 NCPS EBITDA. The Final Proxy's disclosure of this figure was misleading without also disclosing that: (i) it was inflated from the outset; and (ii) it was knowingly stale and unreliable at the time the Final Proxy was issued. (A190-A191, ¶146.)

The trial court recognized Plaintiff's allegation that "the 'upside case' for NCPS's 2015 EBITDA was $445 million according to McMullen." (Op. at 8-9.) The trial court, however, rejected Plaintiff's allegation, ruling that "the Supreme Court found that the $445 million estimated EBITDA figure represented 'management's expected or base case' and that Comstock inserted the reference to an 'upside case' as 'a negotiating tactic.'" (Op. at 9 n.4, 27.) This Court never made any final finding based on the preliminary record before it at the time.[12]

[12] The trial court's error is compounded considering that this Court's core jurisprudential point in reversing the mandatory injunction was that, absent a full record, a trial court cannot make final findings.

Even if this Court "found" evidence conflicting with Plaintiff's view of the record on this issue, Plaintiff has the right to contest this issue in subsequent discovery. *See, e.g., In re Sauer-Danfoss, Inc. S'holder Litig.*, 2016 WL 297812, at *3 (Del. Ch. Jan. 22, 2016) (Even "[a]t the summary judgment stage, the court cannot permissibly decide between the two possible inferences.").

The trial court next justified the disclosure of the $445 million EBITDA figure as follows: "even if it were true that management viewed $445 as an upside case, the board was not made aware of that view according to the Complaint, and thus it would have been misleading to characterize it as such in the proxy when describing the information the board was provided." (Op. at 28.) This is misplaced. The disclosure issue in the Final Proxy turns on what stockholders were told when their votes were solicited. Whether the Board was told that it received bad information is irrelevant. Fraud on the board in June 2014 (as Plaintiff alleged occurred with respect to the $445 million EBITDA figure) is no justification to perpetuate the same fraud on the stockholders in March 2015. *See In re Rural Metro Corp.*, 88 A.3d at 104 (finding breach when false information given to board was repeated in the proxy statement).

Similarly, the trial court dismissed the fact that the Final Proxy listed $445 million even though Nabors told KPMG it estimated 2015 EBITDA at $376 million. (Op. at 29) The trial court rationalized that the Board never heard of

Nabors' comments to KPMG, erroneously focusing on Board knowledge for disclosure purposes, rather than C&J's management, which also has disclosure duties. Moreover, the trial court conflated pre-injunction disclosures with the Final Proxy. Even if the Board's ignorance about the KPMG report excused publishing an unreliable EBITDA figure in the pre-injunction draft proxy, the Board could not reasonably claim the same ignorance in February 2015, months after it learned about the KMPG report through this litigation. *See, e.g.*, *In re Wayport, Inc. Litig.*, 76 A.3d 296 (Del. Ch. 2013) (Defendant assumes a duty to update a statement to the extent that subsequent events rendered its representation materially misleading) (citing RESTATEMENT OF TORTS Section 551); *see also Flaa v. Montano*, 2014 WL 2212019 (Del. Ch. May 29, 2014); *Koehler v. NetSpend Holdings, Inc.*, 2013 WL 2181518, at *16-17 (Del. Ch. May 21, 2013) (finding directors breached their fiduciary duties by relying on a unreliable fairness opinion).

In sum, the trial court misconstrued Plaintiff's factual allegations and misinterpreted applicable disclosure law, warranting reversal.

4. Reinstating the No-Shop Provision Does Not Excuse Material Misrepresentations and Omissions

The trial court further (and erroneously) excused Defendants' nondisclosures by finding that "the reversal of the preliminary injunction reinstated the no-shop provision and thus prevented the board from pursuing the Cerberus [Bid] further." (Op. at 37–38.) Whether the Board's options vis-à-vis Cerberus were limited by the no-shop cannot obviate its duty of disclosure. Indeed, the imperative of informing the stockholders about the Cerberus Bid only increased if the Board believed the no-shop provision prevented it from deciding whether to change their recommendation on the Nabors Deal. If the Board was unable to help the stockholders maximize value directly, disclosing the Bid's terms to let stockholders help themselves became more, not less, important.

At bottom, Defendants did not want to disclose the Cerberus Bid because doing so would put the Nabors Deal at risk. The PI Reversal's reinstatement of the no-shop clause did not excuse disclosure violations.

D. THE TRIAL COURT'S APPLICATION OF *CORWIN* WAS LEGALLY ERRONEOUS AND CREATES BAD POLICY

The trial court's erroneous application of the *Corwin* doctrine to apply the business judgment rule to Plaintiff's breach of duty claims is an independent basis to reverse the Opinion.

1. Background on *Corwin*

The Opinion rests on an expansive and erroneous interpretation that *Corwin* provides for "ratification" of undisclosed misconduct, precluding meritorious stockholder claims and rewarding concealment by disloyal actors. This Court should clarify that *Corwin* is not intended to do that.

Importantly, the trial court made plain that, but for its view of *Corwin*, this case would proceed to discovery:

> [The Complaint's] allegations presumably would be sufficient to sustain a claim under the enhanced scrutiny standard of *Revlon* but, as explained above, that standard is not applicable to a post-closing action for damages where the transaction has been approved by an uncoerced, fully-informed vote of the stockholders.
>
> Because the Nabors transaction is not subject to entire fairness review and the business judgment presumption applies under *Corwin*, plaintiff's fiduciary duty claims against the C&J directors must be dismissed.

(Op. at 54.)

The *Corwin* plaintiffs challenged KKR's all-stock acquisition of a publicly traded limited liability company (the "LLC") created to finance KKR's buyouts. KKR influenced the LLC through a management agreement, but KKR held less than 1% of the LLC's equity. *Corwin*, 125 A.3d at 306-07. All LLC investors bought and held their LLC shares with full knowledge of the management agreement's limits on the LLC's ability to sell to anyone but KKR, and KKR's potential interests in any transaction. *Id.*

In affirming the dismissal of LLC investors' claims, this Court held that "a fully informed, uncoerced vote of the disinterested stockholders" triggers the business judgment standard of judicial review for breach of fiduciary duty claims, rather than the enhanced scrutiny that would otherwise apply to board decisions in a change of control under either *Revlon* or *Unocal*. *Id.* at 309.

Recognizing that applying the business judgment standard could limit stockholders' pursuit of meaningful fiduciary duty claims, this Court limited its ruling: "if troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked." *Id.* at 312.

Defendants seeking to lower judicial review from enhanced scrutiny to the business judgment rule "bear the burden of establishing that the [proxy] disclosed all material facts." *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 999 (Del. Ch. 2014), *aff'd, Corwin*, 125 A.3d at 304. Placing the burden on defendants conformed to longstanding precedent, as "Delaware law does not make it easy for a board of directors to obtain 'ratification effect' from a stockholder vote. The burden to prove that the vote was fair, uncoerced, and fully informed falls squarely on the board." *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, at 898-99 (Del. Ch. 1999), *quoted with approval in Corwin*, 125 A.3d at 312 n.27.

The Court of Chancery recently and, correctly, described the allocation of burden as follows:

> Although a plaintiff generally bears the burden of proving a material deficiency when asserting a duty of disclosure claim, a defendant bears the burden of demonstrating that the stockholders were fully informed when relying on stockholder approval to cleanse a challenged transaction.

In re Comverge, Inc., C.A. No. 7368-VCMR, at 6–7 (citing *Corwin*, 101 A.3d at 999); *id.* at 8 (holding that stockholders were not fully informed of material facts, "taking all reasonable inferences Plaintiffs' favor and considering that Defendants bear the burden of proving that [] stockholders were fully informed in this case")

The *Corwin* case was dismissed because "all of the objective facts regarding the board's interests, KKR's interests, and the negotiation process, were fully disclosed." *Corwin*, 125 A.3d at 312. Had the trial court properly applied *Corwin* to this case, it would inevitably hold that Defendants failed to carry ***their burden*** to show that the stockholders were "fully informed" when voting on the Nabors Deal. The trial court erroneously placed the burden of avoiding the *Corwin* doctrine on Plaintiffs.

2. The Trial Court's Expansion of *Corwin* Creates Dangerous Policy

The trial court's application of *Corwin*, at least on the extreme set of facts alleged in the Complaint, creates bad incentives and policy. While limiting the societal harm from nonmeritorious claims is an important objective underlying *Corwin*, the rules of judicial review should not invite abusive conduct or leave meaningful wrongdoing unaccountable. The Court should reverse the application of *Corwin* here and confirm that Delaware law still permits meaningful loyalty claims to be tested through discovery.

Ruling that the C&J stockholder vote was "fully informed" and thus effective in cleansing alleged misconduct makes little sense when the conduct itself was never actually disclosed. Put another way, shareholders cannot ratify what they are never told. Material omissions preclude application of the *Corwin* doctrine.

The *Corwin* decision rested on the premise that investors knew, from the time of their investment, the nature of the LLC's relationship with KKR, which was the basis for the claims at issue. Here, absent disclosure of the Cerberus Bid terms and Defendants' unusual performance of the Solicitation Process, no investor had any basis to infer such unique facts and circumstances. Omissions like these cannot provide the type of "cleansing" disclosure that could warrant insulating Comstock and Morgan Stanley despite their having tainted the Board's process. If the Court of Chancery's narrow view of materiality is upheld, corporate parties—particularly those engaged in intentional wrongdoing—gain an incentive to conceal harmful facts in order to avoid accountability.

An affirmance here sets up a very dangerous situation. The PI Reversal suggests that there will typically be no pre-closing injunction absent another bidder on the scene. *C&J*, 107 A.3d at 1070. The Court of Chancery has interpreted the PI Reversal as limiting expedited discovery because pre-closing relief is rarely available. *Corwin* says that if a stockholder vote was informed, there is no enhanced scrutiny post-closing, because the business judgment rule applies and claims are typically dismissed. *Corwin*, 125 A.3d at 308-09. The Opinion interprets the law to preclude judicial review in the face of undisclosed disloyalty.

The effect of affirming the trial court's ruling is to say stockholders will not get discovery (either before or after closing), even in the face of significant allegations of wrongdoing and material omissions.

III. THE TRIAL COURT ERRED IN AWARDING C&J DAMAGES AGAINST THE INJUNCTION BOND

A. QUESTION PRESENTED

Did the trial court erroneously award C&J damages against the injunction bond? This issue was preserved for appeal. (A239-A250.)

B. SCOPE OF REVIEW

The Court reviews *de novo* the grant of damages from an injunction bond. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del. 1999).

C. MERITS OF THE ARGUMENT

C&J is not entitled to damages from the injunction bond.

First, C&J failed to comply with the Injunction, acted in bad faith, and engaged in unfair and inequitable conduct. *Nokia Corp. v. InterDigital, Inc.*, 645 F.3d 553, 560 (2d Cir. 2011) ("[T]he purpose of an injunction bond [is] to cover the costs and damages incurred as a result of ***complying with*** a wrongful injunction.") (emphasis added); *see also Guzzetta v. Serv. Corp. of Westover Hills*, 7 A.3d 467, 471 (Del. 2010); *Emerald Partners*, 726 A.2d at 1226.

Here, the Injunction required the Special Committee "to solicit alternative proposals to purchase the Company (or a controlling stake in the Company) that are superior to the Proposed Acquisition, as such term is defined by the Merger Agreement." (A106.) The Merger Agreement defined "Superior Proposal" as a "bona fide" proposal that "is more favorable to the stockholders of [C&J] ***from a***

financial point of view." The Injunction thus required Comstock to stay out of the Solicitation Process and the Special Committee to compare whether a bid was financially more favorable to C&J stockholders than the Nabors Deal.

Comstock, however, co-opted the entire Solicitation Process, contravening the Injunction in bad faith. (*See supra* at Statement of Facts, III.) Moreover, C&J never meaningfully compared the value of the Cerberus Bid to the value of the Nabors Deal for C&J stockholders. Rather, Morgan Stanley handicapped alternative proposals by inexplicably excluding synergies and requiring that alternative proposals represent at least a 30% premium over C&J's then-current stock price (which already reflected the market assessment of the Nabors Deal). In other words, neither Morgan Stanley nor the Special Committee ever performed an apples-to-apples comparison as required by the Injunction. Thus, C&J's failure to comply with the Injunction in good faith warrants reversal and a return of the bond funds.

Second, C&J failed to mitigate its damages. *See, e.g., Emerald Partners*, 726 A.2d at 1225; *Coyne-Delany Co., Inc. v. Capital Dev. Bd. of the St. of Ill.*, 717 F.2d 385, 392 (7th Cir. 1983) ("A good reason for not awarding [injunction bond] damages would be that the defendant had failed to mitigate damages."); *Triumph v. Ward*, 2011 WL 6754044, at *4 (N.D. Ill. Dec. 22, 2011) (same). Specifically, C&J voluntarily chose to lift the stay (which it had requested in the first instance) as a litigation tactic and, thus, proceed on parallel tracks: compliance with the Injunction concurrent with an expedited appeal seeking the reversal of the Injunction.

The trial court erroneously found that it was reasonable to proceed on parallel tracks because if C&J lost on appeal, (i) Nabors could have been in a position to walk away from the transaction, and (ii) Nabors could have sought to scuttle the deal. (Op. at 60-63.) The record, however, shows that Nabors never intended to terminate the deal and that C&J and Nabors knew that SEC review prevented the Nabors Deal from closing in 2014. Because C&J knew that there was no additional risk in leaving the stay in place, C&J failed to mitigate its damages when it voluntarily (and strategically) complied with the Injunction.

CONCLUSION

The Opinion should be reversed, with costs.

Dated: November 16, 2016

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CERTIFICATE OF SERVICE

I, Mary S. Thomas, hereby certify that on November 16, 2016, I caused a copy of the *Corrected Appellant's Opening Brief* to be filed and served to all counsel below via File and Serve*Xpress*:

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