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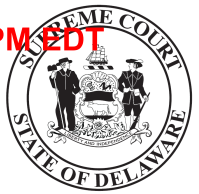

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAN COMMERCIAL LINES INC.,	)	
	)	Case No. 230, 2013
Respondent Below, Appellant	)	
	)	On appeal from the Court of
v.	)	Chancery of the State of Delaware
	)	C.A. No. 6369-VCL
IQ HOLDINGS, INC.,	)	
	)	
Petitioner Below, Appellee	)	

APPELLANT'S CORRECTED OPENING BRIEF

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Date: June 25, 2013

TABLE OF CONTENTS

PAGE

NATURE OF PROCEEDINGS...1

SUMMARY OF ARGUMENT...3

STATEMENT OF FACTS...6

I. ACLI'S DEBT OBLIGATIONS...6

A. ACLI's Revolving Credit Facility...6

B. ACLI'S Notes...8

II. NEITHER ACLI'S CREDITWORTHINESS NOR THE GENERAL INTEREST RATE ENVIRONMENT CHANGED BETWEEN THE MERGER ANNOUNCEMENT DATE AND THE MERGER DATE. 9

III. THE COST OF DEBT DETERMINATIONS BY THE PARTIES' EXPERTS AND THE COURT OF CHANCERY...11

A. The Cost of Debt Assumptions by ACLI's Expert...12

B. The Cost of Debt Assumptions by IQ's Expert...15

C. The Court of Chancery's Cost of Debt Determinations...15

ARGUMENT...18

I. THE COURT OF CHANCERY ERRED IN ADOPTING THE 7.15% YIELD-TO-WORST COST OF THE NOTES ON THE MERGER DATE. 18

A. Question Presented...18

B. Standard of Review...18

C. Merits of Argument...18

II. THE COURT OF CHANCERY’S ASSUMPTION FOR THE COST OF THE REVOLVER THAT THE LIBOR BASE RATE WOULD REMAIN AT 0.26% INTO PERPETUITY IS CLEARLY WRONG. 22

A. Questions Presented 22

B. Standard of Review 22

C. Merits of Argument 23

III. THE COURT OF CHANCERY CONTRAVENED WELL-ESTABLISHED VALUATION PRINCIPLES BY ADOPTING A SHORT-TERM PROXY FOR THE LONG-TERM COST OF THE ACLI NOTES. 30

A. Question Presented 30

B. Standard of Review 30

C. Merits of Argument 31

IV. BECAUSE ACLI COULD NOT BORROW ON THE MERGER DATE AT THE 5.84% BLENDED INTEREST RATE ADOPTED BY THE COURT OF CHANCERY, THE POST-TRIAL ORDER IS CLEARLY WRONG. 34

CONCLUSION 35

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Page(s)

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NATURE OF PROCEEDINGS

This is an appeal from a post-trial appraisal decision by the Court of Chancery that adopted cost of debt assumptions inconsistent with Section 262 of the Delaware General Corporation Law ("Section 262") and generally accepted valuation principles to appraise 250,000 shares of Respondent American Commercial Lines Inc. ("ACLI") stock held by Petitioner IQ Holdings, Inc. ("IQ") as of December 21, 2010 ("Merger Date"), the date that certain affiliates of Platinum Equity LLP ("Platinum") acquired ACLI in an all-cash merger for $33.00 per share ("Merger").

Following trial, the Court of Chancery issued a post-trial order on March 18, 2013 which relied almost exclusively on the discounted cash flow ("DCF") model used by ACLI's expert to value ACLI's stock on the Merger Date. The Court of Chancery modified only two inputs used by ACLI's expert—both relate to the cost of ACLI's debt in the weighted average cost of capital ("WACC") component of the DCF valuation. *See* A-405-13 (the "Post-Trial Order"). Although not advocated by either party's expert, the Court of Chancery instructed the parties to calculate ACLI's cost of debt by using (i) the 7.15% yield-to-worst rate of ACLI's 12.5% Senior Secured Notes due 2017 (the "Notes") on the Merger Date rather than on a date unaffected by the announcement of the proposed Merger on October 18, 2010 (the "Merger Announcement Date"); and (ii) the 0.26% one-month

LIBOR interest rate on the Merger Date plus a 3.75% margin for ACLI's revolving credit facility (the "Revolver"). The Court of Chancery's cost of debt instructions assumed, without any factual basis, that the pertinent interest rates on the Notes and one-month LIBOR base rate would remain at those levels into the perpetuity period covered by a DCF valuation. These assumptions resulted in a blended cost for ACLI's debt that is far lower than advocated by **either** party's expert and increased the appraisal value of ACLI stock by $12.19 per share (**<u>47%</u>**) from the $25.97 per share opined by ACLI's expert (A-1910) to $38.16 per share. A-1130-31.

On March 26, 2013, ACLI filed an Amended Motion for Reargument seeking review of the Court of Chancery's findings regarding ACLI's cost of debt. *See* A-754 at 66 (the "Reargument Motion"). On April 5, 2013, the Court of Chancery denied ACLI's Reargument Motion and affirmed its findings in the Post-Trial Order. *See generally* A-1124-26 (the "Reargument Order"). On April 10, 2013, the Court of Chancery entered the Final Order and Judgment (the "Judgment"), awarding $10,880,221 to IQ, comprised of $9,540,000 in principal and $1,340,221 in interest, calculated as of April 10, 2013. *See* A-1127-28 at ¶ 1. ACLI appealed the Post-Trial Order and the Judgment on May 3, 2013. On May 15, 2013, ACLI filed a Motion to Stay Judgment Pending Appeal, which the Court of Chancery granted on May 28, 2013. *See* A-1129-44; A-1148-50.

SUMMARY OF ARGUMENT

The Court of Chancery erred on four separate points relating to ACLI's cost of debt:

1. First, the Court of Chancery contravened Section 262's requirement that "fair value" be determined "exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation" by adopting the Notes' yield-to-worst rate on the Merger Date as the cost of the Notes. The yield-to-worst rate on ACLI's Notes declined from 9.6% on the last trading day prior to the Merger Announcement Date to 7.15% on the Merger Date. During this same time period, however, all of the market indicators demonstrate that interest rates were stagnant or rising and there were no facts identified at trial suggesting that any event or disclosure between the Merger Announcement Date and the Merger Date would have enabled ACLI to borrow at significantly lower rates on the Merger Date than prior to the Merger Announcement Date. To comply with Section 262's mandate that "fair value" not reflect any element of value resulting from the Merger, the Court of Chancery should have selected the 9.6% yield-to-worst rate for the Notes on the last trading day prior to the Merger Announcement Date when it was unaffected by the Merger.

2. Second, the Court of Chancery erred by concluding—on its own and contrary to both experts' recommendations—that the one-month LIBOR rate used

as the base rate for the Revolver would remain at 0.26% into perpetuity. Contrary to the Court of Chancery's unsupported assumption (*see* Post-Trial Order at ¶ 9(a)), the Federal Reserve never indicated its intention to keep rates at historically low levels into perpetuity and neither party provided the Court of Chancery any evidence supporting this faulty assumption. Market evidence on the Merger Date and the Federal Reserve's statements demonstrate that the short-term LIBOR rate was expected to remain low for an indefinite period of time and then rise. The swap market, which provided the best evidence of long-term LIBOR expectations on the Merger Date, predicted that three-month LIBOR rates would average 4.01% over the next 30 years, not the 0.26% used by the Court of Chancery.

3. Third, the Court of Chancery erred in adopting as the cost of the Notes the yield-to-worst rate as of the Merger Date because that rate reflects the Notes' expected cost over roughly 2.5 years, which is contrary to the well-established valuation principle that cost of debt should reflect a company's long-term debt costs. In contrast, ACLI's expert properly calculated the long-term cost of the Notes to be 10.83%.

4. Fourth, the record is indisputable that ACLI could not have possibly borrowed at the blended 5.84% interest rate assumed by the Court of Chancery. Immediately prior to the Merger Announcement Date and on the Merger Date, ACLI had a B credit rating, which is categorized as "highly speculative" or "junk."

The long-term yield on composite B industrial bonds for companies with the credit quality of ACLI was 8.85%. This means that a company with ACLI's credit quality should have expected on the Merger Date to be able to borrow over the long run at 8.85%, not the 5.84% directed by the Court of Chancery, which is the interest rate a company with a far superior upper medium grade "A" (5.43%) or high grade "AA" (5.98%) credit rating could expect to obtain.

STATEMENT OF FACTS

I. ACLI'S DEBT OBLIGATIONS

ACLI's capital structure prior to the Merger was weighted heavily with debt—51.4% equity and 48.6% debt. A-1933. As of the Merger Date, ACLI's debt had a face value of $369,204,000 and a market value of $404,204,000. A-1928. ACLI's actual blended cost of debt on the Merger Date was 9.48%, which is **364 basis points higher** than the Court of Chancery's 5.84% blended cost of debt assumption. *See* A-757. ACLI had two primary sources of debt: the Revolver and the Notes.[1]

A. ACLI's Revolving Credit Facility

The Joint Pretrial Stipulation and Order ("Pre-Trial Order") specified in pertinent part that the interest rate on the Revolver as of the Merger Date was "LIBOR plus 3.75%." A-120 at ¶ 7. The Pre-Trial Order did not specify the period for the LIBOR base rate (*e.g.*, one, three or six months). The Court of Chancery selected the one-month LIBOR base rate on the Merger Date because that was the rate ACLI was paying for the LIBOR loan portion of the Revolver on the Merger Date. A-1125 at ¶ 3. Throughout the litigation, neither party's expert advocated the Court of Chancery's approach of using the actual cost of the Revolver on the Merger Date. *See* A-26-62; A-63-117; A-264-99; A-300-57; A-358-81; A-382-404. The statement in the Pre-Trial Order that the cost of the

[1] A-120 at ¶¶ 6–8.

Revolver on the Merger Date was "LIBOR plus 3.75%" is both an understatement and an over-simplification of the actual cost of the Revolver on the Merger Date. *See* A-763-65 at ¶¶ 11–13.[2]

At the time of the Merger, ACLI owed $169,204,000 on the Revolver, equivalent to the market value of that tranche of debt. A-120 at ¶¶ 6–8. Since the Revolver used a floating LIBOR interest base rate, an increase in short-term LIBOR rates would increase the cost of the Revolver. Indeed, ACLI's 2009 10-K warned investors that "[a] significant portion of our borrowings are tied to floating interest rates which may expose us to higher interest payments should interest rates increase substantially." A-1293. In this way, the Revolver's interest rates mirror

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[2] The Revolver Loan Agreement provides for borrowing by ACLI at two different interest rates depending on whether the borrowed funds relate to "LIBOR Loans" or "Base Rate Loans." A-779-1061. At the time of the Merger, LIBOR Loans comprised approximately 88.7% and Base Rate Loans represented 11.3% of the outstanding principal under the Revolver. A-798 at ¶ 13. LIBOR Loans bore interest based on a floating rate of LIBOR plus a margin of 3.75%, where "LIBOR" could be based on a one-month, three-month, or six-month LIBOR rate. A-788, 805. At the time of the Merger, ACLI used the one-month LIBOR rate for the LIBOR Loan, giving an indicated "interest rate" of 4.01% (0.26% one-month LIBOR plus 3.75% margin). A-797. The Court of Chancery required the parties to use the one-month LIBOR rate of 0.26% plus the 3.75% spread—as the cost of the entire Revolver. Reargument Order at ¶ 3. However, Section 2.06(iii) of the Loan Agreement provides that the interest paid by ACLI on the LIBOR Loans was actually higher because "all interest charges shall be computed on the basis of a year of 360 days and actual days elapsed," which results in more interest being paid than if computed on the basis of a 365 day year. A-829. The actual cost of the LIBOR Loans was 4.067% (calculated as 4.01% times 365 days divided by 360 days). A-797 at ¶ 12. Second, Base Rate Loans under the Revolver had interest floating at a "Base Rate" plus a margin of 2.75%, where the Base Rate was defined as the higher of the prime rate, the federal funds rate plus 0.5%, or the one-month LIBOR rate plus 1%. *Id.* ¶ 12. On the Merger Date, this rate was 6.00% (equal to the prime rate of 3.25% plus the 2.75% margin). *Id.* Therefore, under the Revolver Loan Agreement, the weighted average of ACLI's actual cost of debt for the Revolver was 4.29% rather than the 4.01% rate indicated by the one-month "LIBOR plus 3.75%" formulation adopted by the Court of Chancery.

the general economic trends of interest rates. Accordingly, if the LIBOR base rate for the Revolver is set for purposes of the WACC input to the DCF valuation as the swap market's expectation of three-month LIBOR over the next 30 years of approximately 4% (A-2171-72), the LIBOR base rate cost of the Revolver would be 4.0%—not the artificially low 0.26% used by the Court of Chancery.

B. ACLI's Notes

ACLI's outstanding Notes had a face value of $200 million, a market value of $235 million on the Merger Date (A-1928), a stated coupon interest rate of 12.5% per annum, and required that ACLI repay the principal in 2017. A-120 (Pre-Trial Order). The Notes were issued at an original issue discount of 95.181%.[3] Thus, when the Notes were issued on July 7, 2009, ACLI received $190,362,000, but must repay $200 million in 2017.[4] Accordingly, as ACLI reported in its SEC filings, the effective interest rate on the Notes was 13.1%—**595 basis points higher** than the Court of Chancery's 7.15% assumption.[5]

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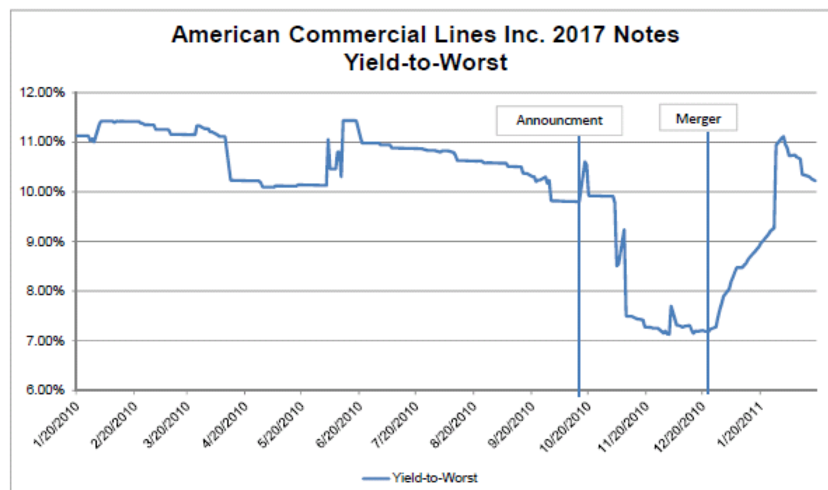
[3] A-1456. The original issue discount is the "difference between face amount and the offering price when first issued." Frank J. Fabozzi, *The Handbook of Fixed Income Securities,* at 310 (7th ed. 2006).

[4] Fabozzi at 97 (indicating that the proper measure of a total return requires that the investor specify "[a] selling price for the bond at the end of the investment horizon (which depends on the assumed yield at which the bond will sell at the end of the investment horizon")).

[5] A-1456 (Pre-Trial Order); Fabozzi at 79 ("Generally, when a bond is issued, the coupon rate is set at approximately the prevailing yield in the market" *unless* the bond "is an original-issue discount bond…."). Pursuant to the indenture agreement governing the Notes (A-1151-1272), if ACLI paid off the Notes prior to maturity in 2017, ACLI would have to pay a substantial prepayment penalty. Accordingly, both experts agreed it would not make economic sense for ACLI to refinance the Notes prior to July 15, 2013, and through that date ACLI would pay 12.5% interest. A-233 at 398:6-11; A-139 at 29:9-13. The parties' dispute over the cost of the

II. NEITHER ACLI'S CREDITWORTHINESS NOR THE GENERAL INTEREST RATE ENVIRONMENT CHANGED BETWEEN THE MERGER ANNOUNCEMENT DATE AND THE MERGER DATE.

Following the Merger Announcement Date, the yield-to-worst rate[6] for ACLI's Notes—which the Court of Chancery relied upon to calculate the cost of the Notes—fluctuated erratically, dropping from 9.6% on October 15, 2010, the last trading day prior to the Merger Announcement Date, to 7.15% on the Merger Date, as demonstrated by the chart below. A-336.



In contrast, ACLI's credit rating, the general interest rate indices, and ACLI's earnings (both reported and predicted) did not materially change between the Merger Announcement Date and the Merger Date. Between October 15, 2010

Notes arises from the assumption by the Court of Chancery that the cost of the Notes would be only 7.15% for the perpetuity period covered by the WACC input.

[6] The yield-to-worst rate is the lowest potential yield that can be received on a debt obligation without the issuer actually defaulting. The yield-to-worst rate is calculated by making worst-case scenario assumptions and calculating the returns that would be received if prepayment, call or sinking fund provisions are used by the issuer to accelerate repayment of the debt as of a particular date. A-1894-95.

and December 21, 2010 the Bloomberg composite index of B-rated bonds remained virtually unchanged (9.03% on October 15, 2010 and 8.85% on December 21, 2010). A-774; "USD Comp. (B) 20 Year," Bloomberg. Similarly, all of the interest rate indices tracked by the Federal Reserve greater than 3-months either stayed the same or *increased* between October 18, 2010 and December 21, 2010.[7] Between the Merger Announcement Date and the Merger Date, Moody's seasoned Aaa corporate bond yield ***increased*** from 4.81% to 4.98%, and Moody's seasoned Baa corporate bond yield ***increased*** from 5.85% to 6.07%. *Id.* In sum, the uncontroverted evidence is long-term interest rates were ***rising*** not falling on the Merger Date.

Between the Merger Announcement Date and the Merger Date, ACLI's creditworthiness or financial condition did not change materially. In fact, ACLI's corporate credit rating had no change between the Merger Announcement Date and the Merger Date.[8] ACLI's only significant disclosures to the market during this time period were (1) the Merger Proxy Statement, which ACLI filed with the SEC

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[7] Between October 18, 2010 and December 21, 2010 thirty-eight interest rate indices tracked by the Federal Reserve either remained the same or increased, and only eight short-term indices (*i.e.*, less than three months) decreased. *See id.* Of those interest rates that decreased, the largest reduction was the one-month rate for commercial paper which dropped by a mere 6 basis points. By comparison, while the yield-to-worst rate on the Notes decreased significantly after the Merger Announcement Date, the fourteen interest rate indices tracked by the Federal Reserve with maturities five or more years increased on average by 64 basis points. *Compare* Federal Reserve Statistical Release (Oct. 18, 2010) *with* Federal Reserve Statistical Release (Dec. 27, 2010); *see also* Ex. A (chart comparing same).

[8] Both ACLI's overall credit rating and the rating of the Notes remained steady after the Merger Announcement. A-768; A-1110.

on November 11, 2010 (A-1547-1743) and (2) ACLI's SEC Form 10-Q for the third quarter of 2010 filed with the SEC on November 5, 2010 and related earnings release (A-1444-1546). Neither expert in this litigation asserted that any of these disclosures had any impact on ACLI's cost of debt on the Merger Date.

III. THE COST OF DEBT DETERMINATIONS BY THE PARTIES' EXPERTS AND THE COURT OF CHANCERY.

The WACC input in a DCF valuation consists of the after-tax cost of the company's debt and the cost of the company's equity, weighted relative to the company's assumed capital structure.[9] Due to ACLI's substantial debt on the Merger Date, the DCF valuation of ACLI's stock is extraordinarily sensitive to the cost of debt assumption in the WACC input. Using the DCF valuation analysis prepared by ACLI's expert, a decrease of 100 basis points in the blended cost of ACLI's debt from 9.6% (the blended interest rate used by ACLI's expert) to 8.6% in the WACC calculation results in an increase in ACLI's appraised equity value of $2.69 per share. The Reargument Order requires the parties to round the WACC input to the nearest 0.1%. Reargument Order at ¶ 4. Decreasing ACLI's WACC by only 10 basis points from 10.0% (the WACC used by ACLI's expert) to 9.9% increases ACLI's equity value by $0.90 per share. The magnitude of the valuation

[9] A DCF valuation estimates a company's value by discounting future income streams. Thus, a critical aspect of the DCF model is the amount those future income streams are discounted by, which is a rate known as the WACC. *See* Aswath Damodaran, *Investment Valuation: Tools and Techniques for Determining the Value of Any Asset*, at 13 (2d ed. 1996); Tim Koller, *et al.*, *Valuation: Measuring and Managing the Value of Companies*, at 101-102 (5th ed. 2010).

impact—$12.19 per share over the $25.97 valuation by ACLI's expert—resulted from the Court of Chancery increasing ACLI's blended cost of debt by **376** basis points and decreasing ACLI's WACC by 120 basis points relative to the inputs used by ACLI's expert.

As is customary in appraisal proceedings this action has focused on the opinions of two experts: (1) ACLI's expert, Melissa Kibler-Knoll (*see* resume at A-1911-15), on whose $25.97 per share DCF valuation (*see* A-1902) the Court of Chancery relied with changes only to two cost of debt inputs and whose opinions the Court of Chancery found "generally more credible and internally consistent" (Post-Trial Order at ¶ 6); and (2) IQ's expert David N. Fuller (*see* resume at A-2120-21), a professional expert witness that in the year prior to trial had direct involvement in 150 engagements and was "lead" on at least 100 of those engagements (A-155-56 at 96:24–97:10), and whose $45.01 per share DCF valuation (*see* A-2114) the Court of Chancery rejected, because he "revised his valuation to adopt a number of [the] positions [of ACLI's expert]" (Post-Trial Order at ¶ 6), and was not credible (*see generally* A-317-21).

A. The Cost of Debt Assumptions by ACLI's Expert

ACLI's expert used the 9.6% average market yield-to-worst rate for the Notes on October 15, 2010, the last trading day prior to the Merger Announcement

Date, as a proxy for the overall blended cost of ACLI's debt.[10] ACLI's expert selected the yield-to-worst rate for the Notes on the day prior to the Merger Announcement Date as opposed to the Merger Date to ensure that the Merger did not affect ACLI's cost of debt for purposes of the WACC input to the DCF analysis.[11] Because the yield-to-worst rate estimates ACLI's anticipated cost of the Notes over approximately 2.5 years rather than a longer period of time, ACLI's expert verified that the average market yield-to-worst rate of the Notes prior to the Merger Announcement Date was consistent with other indications of ACLI's overall long-term cost of debt, including the terms of the Revolver, the duration of the Notes and the Revolver, and the relevant interest rates on the Notes. A-220-21 at 348:14–350:1. ACLI's expert also validated the 9.6% blended cost of ACLI's debt prior to the Merger Announcement Date by comparing it to other long-term expectations for ACLI's blended cost of debt, including the expected cost of debt

[10] A-1894-95; A-221 at 351:4–351:22 (explaining that the 9.6% rate is a "proxy or benchmark" that ACLI's expert determined by "considering all of the factors relative to the expectations for the increasing interest rates over the long term.").

[11] A-221 at 352:15-20 (ACLI's expert explaining that the yield-to-worst rate for the Notes as of the day prior to the Merger Announcement Date was appropriate it "was unaffected by the transaction, with the purpose…being that I did not want to have any impact of the transaction affect the analysis of the long-term cost of debt") (emphasis added). ACLI's expert appropriately relied on the October 15, 2010 yield-to-worst rate for the Notes and the December 21, 2010 market value of the Notes because the market value of the Notes reflected the ACLI's obligation as of the Merger Date and the Notes' unaffected yield-to-worst rate indicated ACLI's long-term borrowing costs. A-229 at 383:8-14; A-230 at 384:18-22; *id.* at 386:20–389:19.

for companies with credit ratings similar to ACLI.[12]

ACLI's expert further confirmed her 9.6% blended cost of ACLI's debt by separately analyzing the Notes and the Revolver. *See* A-2194-95; A-334-35; A-237-38 at 417:7–418:14. For the Notes, ACLI's expert assumed the Notes would be redeemed in July 2013 and ACLI would subsequently enter into a similar credit facility every 7 years thereafter until 2034, based on the approximate term of the Notes. A-2194-95 ACLI's expert then quantified the yield on the Notes by calculating a default (or risk) premium over the risk-free Treasury rate as of the Merger Date subtracting the relevant risk-free Treasury rate with a similar maturity duration (0.77%) from the yield-to-worst as of the Merger Date (7.15%). *Id.* On each date ACLI's expert assumed the Notes would be refinanced, she also projected the Notes' interest rate as of that date by adding the 6.38% premium to the Treasury rate projected for that period. *Id.* ACLI's expert performed this calculation for every seven-year increment until 2034 and ultimately concluded that ACLI's Notes had a projected 30-year weighted average cost of 10.83%. *Id.*

To separately estimate the cost of the Revolver, ACLI's expert used the 30-year three-month LIBOR swap rate (4.15%) to determine the LIBOR base rate for the Revolver, added the 3.75% spread over the LIBOR base rate for the Revolver;

[12] *See* A-1933 (ACLI's expert opening report comparing ACLI, with a "B" bond rating according to Bloomberg Composite rating, with the yields for indices rated BBB+, B, A-, and BBB- from Bloomberg Composite ratings).

resulting in a total interest rate for the Revolver of 7.9%. *See* A-2172; A-2194; A-223 at 358:1–9. By separately analyzing the Notes and Revolver, ACLI's expert reached a blended cost of debt of 9.63%—remarkably similar to the 9.6% yield-to-worst rate on the Notes on the day before the Merger Announcement Date. *Id.*

B. The Cost of Debt Assumptions by IQ's Expert

IQ's expert separately determined ACLI's cost of debt for the Notes and the Revolver to derive a blended cost of debt of 7.01%. A-2194. For the Notes, IQ's expert adopted the yield-to-maturity of the Notes as of November 30, 2010—43 days after the Merger Announcement Date.[13] For the Revolver, IQ's expert derived a cost of 3.78% using the twelve-month LIBOR rate of 0.78% on the Merger Date as a proxy for the LIBOR base rate and adding the 3% premium to the LIBOR base rate charged on borrowings after Platinum refinanced the Revolver contemporaneously with the Merger. *Id; see also* JX047 at 49, 67.[14]

C. The Court of Chancery's Cost of Debt Determinations

The Court of Chancery's Post-Trial Order disregarded both experts' analyses of ACLI's cost of debt and presented an independent analysis that set ACLI's blended cost of debt at only 5.84%. As the chart below demonstrates, the Court of

[13] A-2132; A-2051 (IQ's expert testifying that he adopted the "9.26% yield to maturity, which is the yield at which that issue of bonds was trading at the time.").

[14] This Court should defer to the Court of Chancery's finding that IQ's expert was not credible because he changed his opinion, which was not "internally consistent," to match ACLI's expert. *See* Post-Trial Order at ¶ 6. Thus, unless IQ shows the Court of Chancery abused its discretion in finding IQ's expert non-credible, this Court should give no weight to his reports or testimony.

Chancery's blended cost of debt was **379 basis points** lower than ACLI's expert and **117 basis points** lower than IQ's expert.[15]

	Notes	Revolver	Blended
ACLI's Expert Cost of Debt	10.83%	4.15%	**9.63%**
IQ's Expert Cost of Debt	9.26%	3.78%[16]	**7.01%**
Court of Chancery's Post-Trial Order	7.15%	4.01%	**5.84%**

To reach this remarkably low cost of debt, the entirety of the Court of Chancery's reasoning on this critical issue is set forth below:

> The cost of debt will be the weighted average of the actual cost of the Notes and American's revolving credit facility (the "Revolver"), as of the Merger Date. Having used the market value of the Notes as of the Merger Date, the cost of debt for the Notes will be the yield to worst for the Notes as of that date, or 7.15%. The cost of the revolver will be priced as of the Merger Date at LIBOR plus 3.75%. Knoll objected to these figures because they assume that the current interest rate environment will continue. Although interest rates may eventually revert toward the mean, humans cannot predict the future, and deviations from the mean can persist for extended periods. As John Maynard Keynes is said to have observed, 'the market can remain irrational longer than you can remain solvent.' The current low-rate environment largely results from a macroeconomic experiment of epic proportions being conducted by the Federal Reserve, and that body has indicated its intent to maintain a low interest rate environment going forward. The experiment may prove that the Federal Reserve's balance sheet, resolve, and credibility have their limits, but what might happen or when cannot be known in advance by non-divine minds. The actual figures as of the Merger Date reflect the Company's cost of

[15] A-2195; A-2124; Post-Trial Order at ¶¶ 6, 9.

[16] Although IQ's expert used a higher LIBOR assumption than the Court of Chancery (0.78% vs. 0.26%), IQ's expert incorrectly assumed the cost of the Revolver was LIBOR plus 3%, rather than LIBOR plus 3.75%, as mandated by the Revolver loan agreement. *See* JX071, Sch. A at 7; JX047 at 49, 67. Had IQ's expert used the correct input of LIBOR plus 3.75% for the Revolver, his cost of the Revolver would have been 4.53%—which is higher than the Court of Chancery's assumption.

> debt at the time of the Merger, are the best indication of its cost of debt, and will be used to determine fair value.

A-411-12 at ¶ 9(a) (citation omitted). The Court of Chancery directed the parties to calculate ACLI's cost of debt by applying the 7.15% yield-to-worst rate on the Notes as of the Merger Date (**245 basis points** lower than the 9.6% yield-to-worst rate prior to the Merger Announcement Date) and assume the historically low one-month LIBOR rate on the Merger Date would remain perpetually at 0.26%. The Court of Chancery's cost of debt adjustment in the Post-Trial Order was substantially above the blended cost of debt assumption by both experts and increased the $25.97 per share valuation by ACLI's expert (*see* A-1902) to $38.16 per share—well above the $33 per share Merger price.

In appraising the value of ACLI's stock on the Merger Date under Section 262, the Court of Chancery's DCF analysis used cost of debt assumptions that were (1) affected significantly by the Merger Announcement Date in contravention of Section 262; (2) not supported by the facts; (3) inconsistent with well-established valuation principles; (4) not advocated by either expert; (5) lower than the blended cost of debt assumptions of both experts; and (6) not realistically available to ACLI on the Merger Date based on its credit rating.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN ADOPTING THE 7.15% YIELD-TO-WORST COST OF THE NOTES ON THE MERGER DATE.

A. Question Presented

Whether the Court of Chancery's use of the 7.15% yield-to-worst cost of ACLI's Notes on the Merger Date contravened the requirement under 8 *Del. C.* § 262(h) that "fair value" be determined "exclusive of any element of value arising from the accomplishment or expectation of the merger…." A-96; A-221 at 352:10–353:3; A-251:470:6–11; A-333-34; A-766.

B. Standard of Review

It is well established that this Court reviews *de novo* a trial court decision implicating the statutory construction of DGCL § 262.[17] Here, the Court of Chancery misapplied Section 262 when it "determine[d] the fair value of the [petitioner's] shares" in a manner that included an "element of value *arising from the accomplishment or expectation of the merger*" by adopting the yield-to-worst cost of the Notes directly affected by the Merger. 8 *Del. C.* § 262(h) (emphasis added). Because the dispute over the cost of the Notes implicates the application of Section 262, the Court should review it *de novo*.

C. Merits of Argument

[17] *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 216-17 (Del. 2010); *M.P.M. Enters., Inc. v. Gilbert,* 731 A.2d 790, 795 (Del. 1999); *M.G. Bancorporation, Inc. v. Le Beau,* 737 A.2d 513, 524 (Del. 1999).

Contrary to Section 262's express requirement that "fair value" be determined "exclusive of any element of value arising from the accomplishment or expectation of the merger,"[18] the Court of Chancery relied on the 7.15% yield-to-worst cost of the Notes on the Merger Date directly affected by the Merger. Post-Trial Order at ¶ 9(a). The Post-Trial Order wholly and inexplicably ignores that after the Merger Announcement the Notes' yield-to-worst rate plummeted from 9.6% on the day before the Merger Announcement Date, to 7.15% on the Merger Date primarily as a result of the Merger. This resulted in an unrealistically low indicator of the Notes' long-term cost for valuation purposes and substantially increased the appraised value of ACLI's stock. Post-Trial Order at ¶ 9(a).

Consistent with Section 262, Delaware courts routinely and properly exclude elements of value arising from a merger or the expectation of a merger in appraisal proceedings. For example, Delaware courts exclude considerations that would result from synergies following a merger[19] and look to the company's unaffected,

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[18] 8 *Del. C.* § 262(h). *See ONTI, Inc. v. Integra Bank,* 751 A.2d 904, 909-10 (Del. Ch. 1999) ("[I]n an appraisal proceeding, a corporation must be valued 'as an operating entity by application of traditional value factors, weighted as required, but without regard to post-merger events….'") (quoting *Cavalier Oil Corp. v. Harnett,* 564 A.2d 1137, 1144 (Del. 1989)); *Ryan v. Tad's Enters.,* 709 A.2d 682, 702 (Del. Ch. 1996) ("The discounted cash flow valuation model … does *not* incorporate any values caused by unrelated, independent post-merger events.") (emphasis in original); *see also* Bradford Cornell, *Corporate Valuation*, at 172-74 (1993) ("When calculating a company's WACC, the business being appraised must be considered in isolation.").

[19] *See, e.g., ONTI, Inc.,* 751 A.2d at 912-13 (refusing to adjust for control premium resulting from merger and refusing to consider actual post-merger performance of company); *Kleinwort Benson Ltd. v. Silgan Corp.,* 1995 WL 376911, at *3 (Del. Ch. June 15, 1995) ("[T]his Court has rejected the use of a control premium derived from merger and acquisition data because the

pre-merger announcement stock price to determine its fair value or fair price—much like how ACLI's expert looked to the yield-to-worst cost of the Notes immediately prior to the Merger Announcement Date rather than when it was affected by the Merger Announcement—as the Court of Chancery did.[20]

Here, the only credible explanation for the dramatic reduction in the yield-to-worst cost of ACLI's Notes shortly after the Merger Announcement Date is the Merger. There is no other explanation for the yield-to-worst rate on the Notes to drop by 245 basis points over slightly more than two months since during the same time period (1) ACLI's credit rating did not change;[21] (2) the interest rate indices tracked by the Treasury Department for 3-months or longer either rose or remained unchanged and the indices less than 3-months remained materially unchanged; *see also* Ex. A (chart comparing same)); (3) ACLI's reported and predicted earnings did not materially change;[22] (4) the Bloomberg composite index of B-rated bonds was virtually unchanged (9.03% on October 15, 2010 and 8.85% on December 21,

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control premium incorporates post-merger value.").

[20] *See, e.g., Matter of Appraisal of Shell Oil Co.,* 1990 WL 201390, at *29 (Del. Ch. Dec. 11, 1990) (noting that "the price 'immediately preceding an offer, *i.e.,* on the day prior to the offer announcement, is the appropriate starting point'") (citing *Gibbons v. Schenley Indus., Inc.,* 339 A.2d 460, 468 (Del. Ch. 1975) (same); *Cinerama, Inc. v. Technicolor, Inc.,* 663 A.2d 1156, 1178 (Del. 1995) (affirming Court of Chancery's comparison of the "unaffected" market price of stock to the negotiated merger price).

[21] A-768 (Bloomberg report showing ACLI had a B credit rating). Likewise, the B+ rating on the Notes remained steady between the Merger Announcement and the Merger Date. A-1110 (Bloomberg report showing ACLI's bond rating was B+).

[22] Although ACLI's Q3 2010 earnings exceeded ACLI's projections, they did not materially affect ACLI's overall EBITDA for 2010 or the five-year projections disclosed in the Merger Proxy Statement because the increase in Q3 2010 earnings merely resulted from the accelerated receipt of revenues a quarter early. A-1867 at 56:16–22.

2010) (A-774; "USD Comp. (B) 20 Year," Bloomberg); (5) Moody's seasoned Aaa corporate bond yields ***increased*** from 4.81% to 4.98% (*id.*); and (6) Moody's seasoned Baa corporate bond yields ***increased*** from 5.85% to 6.07% (*id.*). Neither expert asserted that the Proxy Statement or the Q3 2010 10-Q impacted ACLI's creditworthiness or reflected a change in ACLI's prospects.

The Court of Chancery also ignored the testimony of both experts that the yield-to-worst cost of the Notes on the Merger Date did not reflect ACLI's cost of the Notes into perpetuity. ACLI's expert testified that she "wouldn't have looked at the yield-to-worst on [the Merger Date]…because that number was much lower than…what the long-term cost of…debt capital were for this company."[23] Likewise, IQ's expert testified that he would not have used the 7.1% yield-to-worst cost of the Notes on the Merger Date because he "thought that the 9.2 percent debt rate was a better proxy for the long-term rate because it assumes…that you'll go out to 2017."[24] For these reasons, the Court should reverse the Post-Trial Order's adoption of the Merger Date's 7.15% yield-to-worst rate for the Notes and direct the Court of Chancery to consider that the proper cost of the Notes is the 9.6% yield-to-worst rate that preceded the Merger Announcement Date.

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[23] *See* A-251 at 470:6–11; A-2195 (ACLI's expert calculating the long-term cost of the Notes as 9.63%); A-1987 at 47:20–24 (ACLI's expert testifying that she used the yield-to-worst rate as of the Merger Announcement to "look at the value of ACLI prior to and unaffected by the transaction"); A-221 at 352:13–20 (same).

[24] A-180-181 at196:13–197:6.

II. THE COURT OF CHANCERY'S ASSUMPTION FOR THE COST OF THE REVOLVER THAT THE LIBOR BASE RATE WOULD REMAIN AT 0.26% INTO PERPETUITY IS CLEARLY WRONG.

A. Questions Presented

Whether the Court of Chancery's use of the 0.26% one-month LIBOR rate to set the LIBOR base rate for the Revolver contravened the requirement that a trial court's factual findings must be "sufficiently supported by the record and [] the product of an orderly and logical deductive process." *Levitt v. Bouvier,* 287 A.2d 671, 673 (Del. 1972). A-97-98; A-179 at 190:13–192:15; A-220 at 349:1–5; A-222 at 355:18–356:7; A-230 at 390:6–10; A-335-36; A-766.

B. Standard of Review

This Court may substitute its own findings of fact where "the findings below are clearly wrong and the doing of justice requires their overturn."[25] This Court's independent review is "less deferential to any error that may be found in the Court of Chancery's logic and computation than it is to matters of discretion or the weighing of credibility." *Enserch Corp. v. MacLane Gas Co., L.P.,* 1993 WL 541911, at *2 (Del. Nov. 18, 1993). The Court of Chancery's effective determination that the Federal Reserve intended to keep LIBOR perpetually at 0.26% is entitled to less deference because it did not relate to witness credibility and does not result from any evidence presented at trial.

[25] *Levitt,* 287 A.2d at 673 (citing *Application of Del. Racing Ass'n,* 213 A.2d 203 (Del. 1965); *see also Levin v. Smith,* 513 A.2d 1292, 1301 (Del. 1986) (holding that the trial court's findings and inferences drawn therefrom were "clearly wrong and that justice requires a different result").

C. Merits of Argument

Contrary to market evidence regarding long-term expectations for LIBOR rates, statements by the Federal Reserve, the opinions of both experts and without providing citations to any factual support, the Court of Chancery held that one-month LIBOR would remain at 0.26% (the short-term rate on the Merger Date) into perpetuity because the Federal Reserve "has indicated its intent to maintain a low interest rate environment going forward." Post-Trial Order at ¶ 9(a). The record, however, does not support the Court of Chancery's assumption that the Federal Reserve had so indicated. The Federal Reserve's intent was not addressed in any testimony by any fact or expert witness, any brief submitted to the Court of Chancery, or any expert report. The Court of Chancery reached this conclusion entirely on its own and did not even provide any citations supporting its conclusion. The Court of Chancery's unsupported prognostication of U.S. interest rates is especially problematic because prior to the Merger Date, the Federal Reserve **did not** express its intention to keep interest rates low into perpetuity.[26] To the contrary, as of the Merger Date, Federal Reserve Chairman Ben S. Bernanke had most recently stated to Congress that the Federal Reserve intended

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[26] In the months leading up to the Merger Date, the Federal Reserve consistently indicated that it "continues to anticipate that economic conditions…are likely to warrant exceptionally low levels for the federal funds rate for an **extended period**" and not into perpetuity. *See, e.g.,* Press Release, Board of Governors of the Federal Reserve System (Dec. 14, 2010) (same); Press Release, Board of Governors of the Federal Reserve System (Nov. 3, 2010) (same); Press Release, Board of Governors of the Federal Reserve System (Sept. 21, 2010) (same).

to keep interest rates low for an undefined "extended period," but "[a]t some point…the Committee will need to begin to remove monetary policy accommodation to prevent the buildup of inflationary pressures. *When that time comes, the Federal Reserve will act to increase short-term interest rates….*"[27] Accordingly, the Court of Chancery's assumption that one-month LIBOR will remain at 0.26% into perpetuity lacks a factual predicate.

While ACLI agrees that "humans cannot know the future," the fact that predictions may not always be perfect does not permit the Court of Chancery to turn a blind eye to the incontrovertible evidence demonstrating that the market did not believe one-month LIBOR would remain at its historically low[28] 0.26% rate

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[27] July 21, 2010 Congressional Transcript of Bernanke Report to Congress at 7 (emphasis added). *See also* Minutes, Federal Open Market Committee, (Sept. 21, 2010) at 8 ("[T]he Committee was prepared to provide additional accommodation if needed to support the economic recovery and to return inflation, over time, to levels consistent with its mandate. Such an indication accorded with the members' sense that such accommodation may be appropriate before long . . ."); Minutes, Federal Open Market Committee, (Nov. 2-3, 2010) at 9 ("[T]he Committee will employ its policy tools as necessary to support the economic recovery and to help ensure that inflation, over time, is at levels consistent with its mandate."); *id.* at 10 (Federal Open Market Committee member arguing "it was not appropriate to indicate that economic and financial conditions were 'likely to warrant exceptionally low levels of the federal funds rate for an extended period…"); Ben S. Bernanke, Chairman, Federal Reserve, Remarks at the Annual Meeting of the Rhode Island Public Expenditure Council (Oct. 4, 2010) ("In the longer term, a rising level of government debt relative to national income is likely to put upward pressure on interest rates…."); Janet L. Yellen, Vice-Chair Federal Reserve Committee for Economic Development, Remarks at the Committee for Economic Development 2010 International Counterparts Conference (Dec. 1, 2010) (same); William C. Dudley, President, Federal Reserve Bank of New York, Address at Fordham University School of Law (Oct. 5, 2009) (transcript available at 15 Fordham J. Corp. & Fin. L. 357, 385 (2010) ("[W]e are going to remove the monetary policy accommodation at some point.").

[28] *See* A-2172 (ACLI's expert stating in her rebuttal report that the one-year LIBOR rate was "a historically low rate that was not expected to prevail over the long-term"); A-220 at 349:1–5 (The 2010 "interest rate environment was far lower than what long-term expectations were for

into perpetuity.[29]

Oddly, the Court of Chancery specified in the first sentence of ¶ 9(a) of the Post-Trial Order that "[t]he cost of debt will be the weighted average of the **actual cost** of the Notes and [ACLI]'s revolving credit facility (the "Revolver"), as of the Merger Date." Post-Trial Order at ¶ 9(a) (emphasis added). The Post-Trial Order inconsistently reiterated the "actual cost of debt" directive in nearly identical language in the last sentence of paragraph 9(a). However, the Post-Trial Order directed that ACLI's cost of debt should be valued based on the 7.15% yield-to-worst rate for the Notes and a one-month LIBOR base rate (0.26%) plus 3.75% producing a weighted cost of debt of 5.84%. *Id.* In Delaware appraisal practice, the actual cost of debt means the interest rate the company was actually paying at the time of the merger.[30] ACLI's actual cost of the Notes (13.1%) and the

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interest rates at the time."); A-230 at 390:6–10 ("So there was definitely an expectation in the marketplace that if you waited until 2013…you were definitely going to be refinancing at a higher rate."); A-2049 at 172:24–173:2 (IQ's expert testifying that "LIBOR was at a low level compared with where it had been…in the past."); A-179 at 190:20–24 (same).

[29] Association of Insolvency and Restructuring Advisors, *Certificate in Distressed Business Valuation,* Chapter 2, at 27 ("A company which has a large amount of debt booked when interest rates were low can't contend that it has a low cost of debt on a market basis if the overall level of interest rates in the economy have risen or its risk of default has increased.").

[30] A-376-77 (citing *In re Emerging Commc'ns, Inc. S'holders Litig.,* 2005 WL 1305745 (Del. Ch. June 4, 2004) and *Gilbert v. M.P.M. Enters., Inc.,* 1998 WL 229439 (Del. Ch. Apr. 24, 1998)); *Finkelstein v. Liberty Digital, Inc.,* 2005 WL 1074364, at *26 (Del. Ch. Apr. 25, 2005) (IQ calculating the appropriate rate of interest by including the "actual cost of borrowing for [the company] as evidenced by its existing debt instruments at the time of the merger"). *See* Jesse A. Finkelstein and Travis Laster, *Appraisal Rights in Mergers and Consolidations* at A-32 (2003) ("The cost of debt in the WACC equation generally should be based on the corporation's actual cost of debt."); Jesse A. Finkelstein & John D. Hendershot, *Appraisal Rights in Mergers and Consolidations,* at A-45 (2010) (same); Folk on the Delaware General Corporation Law § 262.10

Revolver (4.29%) on the Merger Date yield a pre-tax weighted cost of debt of 9.41% substantially higher than 5.84% set by the Court of Chancery. *See* Dkt. 96 at ¶ 1.

Neither party advocated for a cost of debt consistent with the Court of Chancery's instructions. In fact, the Court of Chancery's holding that the one-month LIBOR interest rate would remain at 0.26% into perpetuity is inconsistent with well-established valuation authorities[31] and ignores a mountain of contrary evidence—including the testimony of both experts.[32] For example, Blue Chip

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(2013) (same); R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations § 9.45[B][1] (same).

[31] *See, e.g.,* Shannon Pratt & Roger Grabowski, *Cost of Capital: Applications and Examples,* at 692-3 (4th ed. 2010) ("The cost of debt capital should reflect the expected average interest rates over a long period of time."); Aswath Damodaran, *Applied Corporate Finance,* at 398 (3d ed. 2011) (same); Timothy Koller, *et al., Valuation: Measuring and Managing the Value of Companies,* at 232 (5th ed. 2010) (same); *see also Matter of Appraisal of Shell Oil Co.,* 1990 WL 201390, at *37 (same).

[32] A-220 at 349:1–5; A-176 at 177:15–16. *Accord*, Paul Krugman, "Trending Toward Deflation," N.Y. TIMES (July 11, 2010) ("What I take from this is that deflation isn't some distant possibility—it's already here by some measures, not far off by others…. [T]here isn't some magic boundary effect when you cross zero; falling inflation is raising real interest rates and making debt problems worse as we speak."); Greg McBride, CFA, "Interest rates to rise eventually," BANKRATE.COM (Mar. 30, 2010) ("Despite forecasts of a more tepid pace of economic recovery in 2010 and subdued inflation continuing throughout the year, it is only a matter of time before the Federal Reserve resorts to their primary tool of monetary policy and begins to boost interest rates. Maybe it happens late in 2010, maybe not until 2011. But eventually, it will happen."); Olivier Coibion & Yuriy Gorodnichenko, "When will the Fed raise interest rates? Reconciling Taylor rule and financial market forecasts," VOX (Mar. 1, 2010) ("One indication of when interest rates are expected to start rising comes from the Fed Funds Futures market [which] is pricing in Fed rate hikes that will take the Fed funds rate to around 0.75% by the end of 2010…. The market view is thus that the zero bound on interest rates will stop binding by the end of this year…."); Michael R. Rosenberg, "Financial Conditions Watch: Global Financial Market Trends & Policy," BLOOMBERG, at 14 (Nov. 19, 2010) (indicating that long-term Treasury rates were much higher than short-term Treasury rates); Michelle L. Barnes & N. Aaron Pancost, "The Sensitivity of Long-Term Interest Rates," at 17 (Federal Reserve Bank of Boston Working Paper No. 10-7, 2010) (suggesting that the impact and effects of

Financial Forecasts observed that "[i]n the short-run, the consensus thinks Treasury yields are likely to remain near current levels, or perhaps even retreat a bit, supported by massive demand from the Fed. However, yields are expected to be rising again by early spring…." Blue Chip Financial Forecasts, Vol. 29, No. 12, at 1 (Dec. 1, 2010). Similarly, in a survey of 17 economists, CNN Money found that "economists expect the Fed funds rate…to remain near 0% for at least another year" and all of the economists surveyed believed that the Federal Reserve would act to increase interest rates by 2013. Chris Isidore, "Economists: Fed won't raise rates until 2012," CNNMONEY.COM (Dec. 23, 2010). Furthermore, during trial ACLI's expert explained that at the time of the Merger the swap market projected a substantially higher three-month LIBOR over a 30-year period.[33] Therefore, ACLI's expert concluded that the proper long-term base rate cost of the Revolver was the 4.15% 30-year LIBOR swap rate, which contractually binds parties that exchange short-term floating payments based on the three-month LIBOR in return

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monetary policy shocks are contained to the short-term).

[33] A-223 at 358:1–9 ("LIBOR fixed-for-floating swaps were 4.15 percent in cost…which represents an expectation as to the long-term cost of LIBOR rather than the sub-1 percent current rates…."). LIBOR swap rates represent contractual rates between sophisticated market participants (commonly large banks) whereby one party commits to pay another party a fixed monthly rate (on a notional principal balance) over the term of the contract in exchange for receiving future payments of the (floating) 3-month LIBOR rate. *See* A-222 at 355:22–356:5 (ACLI's expert stating that "[t]here are a number of different benchmarks that one can use [to determine how short-term LIBOR rates are expected to perform over the long term]. And on that I have…look[ed] at swap rates, where there are financial instruments available in the market where certain individuals, rather than having a floating LIBOR rate over time, will want to swap that risk out…with a fixed rate, so one can…, on a long-term basis, fix a LIBOR rate.").

for long-term fixed payments.[34]

In addition, ACLI's expert did not rely solely on the swap market to reach her conclusion; rather she considered "long-term interest rate projections for Treasuries,"[35] the current yield curve on forward Treasury rates,[36] and the "[a]verage historical LIBOR rate over the last 20 years,"[37] all of which confirmed her conclusion that the market predicted the one-month LIBOR interest rate would be much higher in the future—near the selected estimate of 4.15% into the long-term, not 0.26% as the Court of Chancery concluded. Likewise, IQ's expert recognized that the one-month LIBOR rate did not reflect LIBOR expectations over a long period of time and therefore relied on the one-year LIBOR rate of 0.78% based on the inaccurate assumption that the one-year LIBOR rate accurately predicted LIBOR into perpetuity.[38]

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[34] A-2172 at n.51 (ACLI's expert adopting in her rebuttal report, "a 30-year LIBOR swap rate of 4.15% per Federal Reserve H.15 Release.").

[35] A-2172-23 (ACLI's expert stating in her rebuttal report, "[l]onger-term Treasury rates were expected to exceed 4.0% by 2013 and 5.0% over the longer term.") (citing 2011 Economic Report of the President, Blue Chip Economic Indicators as of Oct. 2010, Bloomberg).

[36] A-2172 (ACLI's expert stating in her rebuttal report that the "upward sloping" yield on Treasury rates indicated that "future interest rates [were] expected to be higher than current short-term rates."); A-252 at 475:4–15 (same); *see also* Shannon Pratt & Roger Grabowski, *Cost of Capital: Applications and Examples,* at 62 (4th ed. 2010) ("The interest rate should be consistent with the financial condition of the subject business's average ratios. If the business's debt has a debt rating, one can estimate the cost of debt using a yield curve analysis. If the business's debt is not formally rated, you must estimate a credit rating.").

[37] A-2171-72 at n.49 (ACLI's expert finding in her rebuttal report that the historical LIBOR rate was "approximately 4.0%"—3.74% higher than the Court of Chancery's adopted 0.26% one-month LIBOR rate) (citing Bloomberg).

[38] *See* A-2124 (IQ's expert stating in his opening report that "[w]e applied a rate of 12-month Libor plus 300 basis points as the market rate for the revolving credit facility…."); A-179 at

Thus, no matter what direction one turns for alternate guidance, including the swap market, historical data, forecasts by economists, market pricing of financial instruments, statements by the Federal Reserve or the experts' testimony in this case, all of the pre-Merger evidence supports the conclusion that the Court of Chancery erred in concluding that one-month LIBOR would remain at 0.26% into perpetuity. Accordingly, this Court should reverse this aspect of the Post-Trial Order and direct the Court of Chancery to consider that the cost of the Revolver is the longer-term proxy for the LIBOR rate of 4.15% plus the 3.75% margin.

192:13–16 (IQ's expert testifying he used "one year LIBOR plus 300 basis points" to determine the cost of the Revolver A-2049 at 172:10–18 (IQ's expert testifying he believed it was "appropriate to use a one-year LIBOR premium into perpetuity" for the Revolver).

III. THE COURT OF CHANCERY CONTRAVENED WELL-ESTABLISHED VALUATION PRINCIPLES BY ADOPTING A SHORT-TERM PROXY FOR THE LONG-TERM COST OF THE ACLI NOTES.

A. Question Presented

Whether the Court of Chancery's adoption of the Notes' yield-to-worst rate on the Merger Date reflected ACLI's cost of the Notes over a short period of time in contravention of the well-established valuation principle that a company's cost of debt should reflect the long-term, rather than short-term, cost of borrowing. A-96-97; A-180-81 at 195:13–197:12; A-220 at 348:14–49:6; A-221 at 355:10–17; A-222-23 at 355:10–360:24; A-334-35; A-397-98; A-766.

B. Standard of Review

Where the appellant claims that the trial court "erred in formulating or applying legal precepts," the Supreme Court reviews the issue *de novo*.[39] It is a well-established legal principle that the Court of Chancery must use valuation methods generally accepted by the financial community in applying Section 262.[40] Here, the Court of Chancery failed to use valuation methods generally accepted by

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[39] *See, e.g., Rapid-Am. Corp. v. Harris,* 603 A.2d 796, 804 (Del. 1992) (reviewing *de novo* the Court of Chancery's exclusion of a control premium in Section 262 appraisal proceeding); *M.G. Bancorporation, Inc. v. Le Beau,* 737 A.2d 513, 524 (Del. 1999) (reviewing *de novo* the Court of Chancery's "interpretation and application of the mandates in Section 262").

[40] *See, e.g., M.G. Bancorporation, Inc.,* 737 A.2d at 521 ("Proof of value can be established by any techniques or methods that are generally acceptable in the financial community and otherwise admissible in court, subject only to our interpretation of 8 *Del. C.* § 262(h)."); *Cavalier Oil Corp. v. Harnett,* 1988 WL 15816, at *19 (Del. Ch. Feb. 22, 1988) (same) (citing *Weinberger v. UOP, Inc.,* 457 A.2d 701, 713 (Del. 1983); *Cede & Co. v. JRC Acquisition Corp.,* 2004 WL 286963, at *2 (Del. Ch. Feb. 10, 2004) (same); *Kahn v. Household Acquisition Corp.,* 591 A.2d 166, 174 (Del. 1991) (same).

the financial community when it used the yield-to-worst rate of the Notes with a 2.5 year time horizon to determine the long-term cost of the Notes. This Court should therefore review *de novo* the Court of Chancery's selection of a short-term period to set the cost of the Notes.

C. Merits of Argument

The Court of Chancery erred by adopting the 7.15% yield-to-worst cost of the Notes on the Merger Date because—as both experts recognized—that represents ACLI's borrowing cost under the Notes over a 2.5 year period rather than into perpetuity.[41] It is well established in the financial community that cost of debt used for a WACC in a DCF valuation should reflect expected average interest rates over a long period of time.[42] Delaware courts have likewise applied the principle that the cost of debt should reflect the company's long-term weighted average interest rate.[43] Despite this well-established principle, the Court of

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[41] *See* Post-Trial Order at ¶ 9(a) (finding the interest rate for the Notes is 7.15%); A-176 at 178:2–179:2, A-180 at 195:22–197:12 ("I thought the 9.2 percent debt rate was a better proxy for the long term rate [than the yield-to-worst] because it assumes in its calculation that you'll go out to 2017. And the horizon on the long term notes calculated at 7.1 percent. The yield-to-worst is only a two and a half-year period. And that's why I didn't use it as the cost of debt…."); A-220 at 348:19–349:1 ("One of the things in the analysis of the cost of debt…was an understanding of where the current cost of debt was versus the long-term expectations…. [W]hat I'm trying to get when I'm looking at cost of debt is the expectation of what ACLI's cost of debt is going to be over the long-term.").

[42] A-1991 at 88:15–20 (ACLI's expert testifying that "the theoretical justification for a weighted average cost of capital is that you are looking for long-term rates to match the long-term nature of the essentially perpetual projections which you are valuing."); A-221 at 355:10–17 ("The valuation literature is fairly universal on this point that what you're looking at in determining a WACC is long-term costs of debt and equity.").

[43] *See generally Matter of Appraisal of Shell Oil Co.,* 1990 WL 201390, at *36-*37 (rejecting

Chancery inexplicably adopted the yield-to-worst cost of the Notes on the Merger Date, which both experts concluded was inappropriate due to its short-term 2.5 year horizon.

Unlike the Court of Chancery, ACLI's expert properly rejected the yield-to-worst cost of the Notes on the Merger Date to account for the fact that it only represented ACLI's cost of the Notes for 2.5 years. To estimate ACLI's cost of the Notes into perpetuity, ACLI's expert extrapolated the cost of the Notes over 30 years and assumed the Notes would be refinanced every 7 years, consistent with the terms of the Notes.[44] Through this long-term calculation and considering the upward sloping yield on Treasury rates, ACLI's expert concluded for purposes of the appraisal litigation that ACLI's cost of the Notes was 10.83%. A-2195.

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analysis that relied solely on short-term floating rate basis without considering cost of borrowing for company's normal, long-term obligations); *Hintmann v. Fred Weber, Inc.,* 2000 WL 376379, at *7 (Del. Ch. Apr. 4, 2000) (applying the weighted average of interest rates on long-term and short-term debt for purposes of WACC and pre-judgment interest to determine the company's cost of debt).

[44] A-2195 (ACLI's expert's rebuttal report correcting IQ's expert's cost of debt calculations). IQ erroneously argued in its opposition to Respondent's Reargument Motion that ACLI's expert based her cost of debt solely "on her own assumptions." A-1099 at ¶ 11. However, as this paragraph discusses and as discussed in further detail above, ACLI's expert relied on objective market criteria to determine ACLI's cost of debt. Further, IQ incorrectly argued that ACLI's expert admitted that 7.15% was the "realistic" cost of the Notes (A-1101 at ¶ 15), despite ACLI's expert's repeated indications that 7.15% represented only a short-term spot rate for the Notes and her explicit adoption of a long-term rate that projected the cost of the Notes over 30 years. *See* A-2195 (ACLI's expert projecting the cost of the Notes over 30 years); A-2172 ("The cost of debt capital should reflect the expected average of interest rates over a long period of time."); A-237-38 at 417:4–418:11 (ACLI's expert detailing how she projected the cost of the Notes based on objective economic indicators such as the "projections of treasuries that are being authored by the blue chip economic reports…"); A-249 at 466:19–24 ("I used the yield, because the yield is the benchmark that I chose to represent the long-term cost of debt….").

Likewise, IQ's expert recognized that the yield-to-worst cost of the Notes only had a 2.5 year horizon and therefore instead relied on the significantly higher yield-to-maturity of 9.26%, without adjusting for future fluctuation, to determine the cost of the Notes.[45] IQ's expert argued that the market's perception of the cost of the Notes confirmed his 9.26% cost of the Notes.[46] However, as ACLI's expert explained, the 9.26% cost of the Notes used by IQ's expert was incorrect because (i) it relied on the November 30, 2010 yield-to-maturity rate rather than the Merger Date as he claimed, and (ii) ACLI could not have refinanced the Notes on the Merger Date without incurring extremely high costs.[47] Because the Court of Chancery improperly used a short duration assumption to set the cost of the Notes in contravention of the accepted valuation technique of using a long-term cost of debt assumption, this Court should set aside this aspect of the Post-Trial Order.

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[45] A-139 at 30:13–24 ("Q. Remind me what cost of debt you used to figure out how much the company would pay for the money it obtained to refinance the notes in July 2013. A. That will be the yield maturity on the notes, which was 9.26 percent…. I didn't assume a change in interest rates, increases or decreases between the valuation date and a refinance date.").

[46] A-138 at 28:6-15 ("[T]he market's yield on these bonds indicated a cost perceived by the market of about 9.2 percent").

[47] A-223 at 360:2–360:3 ("He was using a yield to maturity as of November 30th in that assumption."); *id.* at 360:6-9 ("While [ACLI] would have possibly had an ability to [refinance the Notes on the Merger Date], it would have been extremely expensive to refinance those, given the make-whole premium [of approximately $67 million] that would have been required….").

IV. BECAUSE ACLI COULD NOT BORROW ON THE MERGER DATE AT THE 5.84% BLENDED INTEREST RATE ADOPTED BY THE COURT OF CHANCERY, THE POST-TRIAL ORDER IS CLEARLY WRONG.

ACLI's credit rating on the Merger Date confirms the inappropriateness of the Court of Chancery's prescribed 5.84% blended cost of debt. A-766; *see* A-776; A-1088-89. ACLI could not have achieved a long-term weighted cost of debt of 5.84%—364 basis points lower than ACLI's actual cost of debt on the Merger Date (9.48%). On the Merger Date, ACLI had a "B" or "junk" credit rating.[48] On the Merger Date, the composite B industrial bond had a long-term yield of 8.85%. A-774. Thus, companies with credit ratings similar to ACLI's borrow at a blended cost of debt of 8.85%, at best. The Court of Chancery has noted that the corporate bond yield is an appropriate source for estimating a company's cost of debt.[49] In

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[48] *See* A-768 (Bloomberg report showing ACLI had a B credit rating from June 25, 2009 through February 24, 2013); A-1067 (S&P Ratings Definitions indicating that a "B" credit rating is categorized as highly speculative or junk). IQ's opposition to Respondent's Reargument Motion incorrectly argues that S&P's credit rating for ACLI was "both irrelevant and inaccurate." A-1102. However, it is well established within the financial community that bond ratings and bond yields are inextricably linked. *See, e.g.,* Tim Koller, *et al., Valuation: Measuring and Managing the Value of Companies,* 258-59 (5th ed. 2010) (yield-to-maturity can be determined by comparing a company's credit rating on unsecured long-term debt with the average yield-to-maturity on a long-term bonds portfolio the same credit rating); Aswath Damodaran, *Damodaran on Valuation,* at 64 (2d ed. 2006) ("The most widely used measure of a firm's default risk is its bond rating…."). IQ also asserted that it was more appropriate to analyze each debt instrument separately. A-1102. IQ noted that S&P rated the Notes as B+ and then speculated that the Revolver rating must have been higher. However, one does not need to speculate as to the Revolver's rating because S&P determined ACLI's overall credit rating was B.

[49] *See, e.g., Lane v. Cancer Treatment Ctrs. of Am., Inc.,* 2004 WL 1752847, at *30 (Del. Ch. July 30, 2004) (relying on Moody's Baa Corporate Bond Yield as of merger date to determine the cost of debt); *In re Radiology Assocs., Inc. Litig.,* 611 A.2d 485, 492 (Del. Ch. 1991) (determining cost of debt "by taking the interest rate of A-rated industrial bonds for the week of [the merger], according to Standard & Poor's bond guide (9.8%)…").

contrast, the Court of Chancery's blended rate of 5.84% is consistent with a credit rating of "A" (upper medium grade) and "AA" (high grade), which as of the Merger Date had long-term yields of 5.43% and 5.98%, respectively. A-770-71.[50] Thus, this Court should reverse the Court of Chancery's plainly inaccurate finding of the blended cost of debt and direct the Court of Chancery to consider that ACLI's cost of debt on the Merger Date was the 9.6% rate selected by ACLI's expert, which more accurately reflects ACLI's actual cost of borrowing.

CONCLUSION

For the reasons stated herein, ACLI requests that this Court reverse the Court of Chancery's cost of debt findings and instruct the Court of Chancery to consider adopting a blended cost of debt of 9.6%, representing the 10.83% cost of the Notes and the 7.90% cost of the Revolver identified by ACLI's expert.

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Dated: June 25, 2013

[50] *Grimes v. Vitalink Commc'ns Corp.,* 1997 WL 538676, at *12 (Del. Ch. Aug. 28, 1997) (refusing to apply "short-term rates [to determine cost of debt for calculating pre-judgment interest] because respondent has not shown that these rates…were available to respondent").

POST-TRIAL ORDER

EFiled: Mar 18 2013 04:21PM EDT
Transaction ID 51192184
Case No. 6369-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IQ HOLDINGS, INC.,	)	
Petitioner,	)	
v.	)	C.A. No. 6369-VCL
AMERICAN COMMERCIAL LINES INC.,	)	
Respondent.	)	

POST-TRIAL ORDER

WHEREAS an affiliate of Platinum Equity, LLC acquired respondent American Commercial Lines Inc. ("American" or the "Company") by merger (the "Merger");

WHEREAS on December 21, 2010, the effective date of the Merger (the "Merger Date"), the shares of American common stock were converted into the right to receive $33.00 per share;

WHEREAS petitioner IQ Holdings, Inc. ("IQ") held 250,000 shares of American common stock, dissented from the Merger, and perfected its appraisal rights;

WHEREAS the Court held trial on October 1-2, 2012, heard testimony from two expert and two fact witnesses, and has considered the presentations of counsel;

NOW THEREFORE, this 18th day of March, 2013, the Court finds and orders as follows:

1. American is a diversified inland marine transportation company headquartered in Jeffersonville, Indiana. The Company operates two lines of business, transportation and manufacturing. In the transportation segment, American operates over

2,000 barges on the inland waterways of the United States. In the manufacturing segment, American operates one of the largest inland shipyards in the United States, designing and manufacturing vessels for American's transportation business and third party customers. American's business model has proven robust, navigating several economic cycles during its nearly 100 year operating history.

2. "An appraisal proceeding is a limited legislative remedy intended to provide shareholders dissenting from a merger on grounds of inadequacy of the offering price with a judicial determination of the intrinsic worth (fair value) of their shareholdings." *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1186 (Del. 1988). Fair value is determined by valuing the business as a going concern. *Id.* In considering expert evidence, the Court has "discretion to select one of the parties' valuation models as its general framework or to fashion its own" and need not conduct an analysis "that is completely separate and apart from the valuations performed by the parties' expert[s] . . . ." *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 525-26 (Del. 1999) (footnotes omitted).

3. IQ relied on expert testimony from David N. Fuller. American relied on expert testimony from Melissa K. Knoll. Both experts employed the same basic valuation methods: comparable companies, comparable transactions, and discounted cash flow. Each method is a conceptually valid approach.

4. On the facts of this case, both experts' comparable company analyses are insufficiently reliable. "[The] utility of a comparable company approach is dependent on the similarity between the company the court is valuing and the companies used for

comparison." *Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *8 (Del. Ch. May 20, 2004) (internal quotation marks omitted). American has two lines of business, navigating barges over inland waterways and shipbuilding. The comparable companies identified by the experts were insufficiently comparable to American.

a. Fuller used four companies. Knoll used Fuller's four plus three more. Of the four shared companies, Kirby Corporation is similar to American, but not closely similar. The other three are not comparable because their businesses are driven by different macroeconomic forces. Alexander & Baldwin, Inc. and Horizon Lines, Inc. are oceanic carriers. K-Sea Transportation Partners L.P. almost exclusively carries refined petroleum products. Research analysts do not consider Alexander & Baldwin, Horizon, and K-Sea to be peers of American. JX 31, 35. American did not list any of the three as a competitor in its SEC filings. *See e.g.*, JX 6, 14.

b. Knoll's three additional companies are not sufficiently comparable. International Shipholding Corp. is an oceanic carrier. SEACOR Holdings Inc. operates six lines of business, including servicing the offshore energy industry and trading in commodities. Rand Logistics, Inc. is thinly-traded and considerably smaller than American.

c. A relative valuation methodology based on a sample set of one (Kirby) is insufficiently indicative of fair value, particularly when comparability is weak.

5. On the facts of this case, both experts' comparable transactions analyses are insufficiently reliable. *See Highfields Capital, Ltd. v. AXA Fin., Inc.*, 939 A.2d 34, 54 (Del. Ch. 2007) (rejecting comparable transactions analysis that was "dated," "not

directly comparable," and omitted a "highly probative transaction"). Knoll identified six transactions spanning a period from 2006 to 2009. Two were purchases of minority stakes; another had incomplete information. Fuller relied on two transactions. Indicating their lack of confidence in this methodology, Knoll and Fuller gave it weights of only 20% and 10%, respectively.

6. On the facts of this case, both experts' discounted cash flow analyses are sufficiently reliable to use in determining fair value. Knoll's analysis generally was more credible and internally consistent, and Fuller revised his valuation to adopt a number of her positions. Knoll's discounted cash flow analysis therefore will be used as the basic valuation framework, subject to the rulings that follow on the disputes over its inputs.

7. The first dispute is over the treatment of certain cost savings, known as the "Strategic Initiative Savings," included in management's projections. JX 74. Contemporaneous management projections are often used as the starting point for a discounted cash flow analysis. *See e.g.*, *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, *14 (Del. Ch. May 3, 2004). Fuller accepted management's projections. Knoll eliminated half of the Strategic Initiative Savings, thereby squeezing margins, reducing free cash flow, and lowering the ultimate valuation. Post-merger litigation adjustments are viewed skeptically, but American and Knoll provided persuasive reasons for the modifications.

a. First, the market check that American conducted shows that actual buyers did not fully credit the undiscounted projections. During a 40-day go-shop period, American reached out to 86 potentially interested bidders and signed confidentiality

agreements with 13 of them. If the projections had been taken at face value, then any of the 13 would have concluded that the Company represented a profitable investment opportunity at values north of the $33.00 per share Merger price. No topping bid emerged. This fact implies that sophisticated financial players facing both the incentive and discipline of the profit motive did not view the undiscounted projections as reasonably achievable.

b. Second, the proxy statement disclosed two versions of the management projections, one incorporating all of the Strategic Initiative Savings and a second incorporating one-third of the cost savings. JX 37. Although the latter version was prepared by American's banker, the two sets of projections clearly represented an upside case and a downside case. If the upside case had been credible, then American would be more valuable on a standalone basis, and American's stockholders would not have approved the Merger. Instead, they accepted the $33.00 per share Merger price. As with the market behavior of bidders, the informed decision of investors with their own money at risk implies that the undiscounted projections were not reasonably achievable.

c. Third, the evidence at trial established that the full amount of the Strategic Initiative Savings was unlikely to be achieved. The savings relied on four initiatives: implementing scheduled service, reducing insurance claims, reducing maintenance expense, and improving sales mix. Tr. 281-82. American's Vice President and Controller, Mark A. Noltemeyer, testified credibly that it was highly unlikely that American could achieve scheduled service, a model in which barges would operate with railway-like precision at fixed times. American previously tried scheduled service and

failed, as have other barge companies. Noltemeyer explained persuasively that the bottlenecks and uncertain volumes at tow points that are endemic to river travel prevent barge operators from guaranteeing the timeliness of service. Sara E. Bryant, American's Director of Financial Planning and Analysis, testified credibly that the full amount of the maintenance and insurance expense savings was unlikely to be achieved, because the projected lower repair costs and insurance claims overlapped with and double-counted benefits contemplated elsewhere that would result from the capital investment in a newer fleet. By adjusting the projections, Knoll appropriately adopted a position between the full upside case and the downside case presented in the proxy statement, albeit closer to the latter.

d. Knoll's modified projections therefore will be used in the discounted cash flow analysis to determine fair value.

8. The parties disagree about how to value American's debt. The main dispute is over American's Senior Secured Notes (the "Notes"). Valuation literature is in substantial accord that the market value of debt is the appropriate starting point. *See* Shannon P. Pratt, *et al.*, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* 224 (5th ed. 2007) ("The market value of debt, as of the valuation date, is then subtracted from the [market value of invested capital] to arrive at the market value of equity."); Jerald Pinto, *et al.*, *Equity Asset Valuation* 381 (2d ed. 2010) ("The value of equity is the value of the firm minus the market value of its debt: Equity value = Firm value – Market value of debt . . . . [The values of debt and equity] are the current market values of debt and equity, not their book or accounting values."); Aswath Damodaran,

Damodaran on Valuation 3 (2nd ed. 2006) ("We also believe that, notwithstanding conventional practice, using the market value of debt (even when it is estimated) is better practice than using book value of debt."). Knoll used the market value of the Notes. Although Fuller's more elaborate calculation plausibly described how American might ultimately handle the debt, he could not persuasively explain why the market has not priced in this expectation. The experts agreed that the market for the Notes was efficient, that participants were rational, and that the market was informed about the refinancing risk. *See* Tr. 195-96, 385-86. This is not a case where there is a good reason to depart from the market price. *See Henke v. Trilithic Inc.*, 2005 WL 2899677, at *11 (Del. Ch. Oct. 28, 2005) (using face value of debt where company could not take advantage of market price, which therefore was not indicative of fair value); *Application of Vision Hardware Grp., Inc.*, 669 A.2d 671, 672 (Del. Ch. 1995) (positing same), *aff'd*, 676 A.2d 909 (Del. 1996); *see also Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *14 (Del. Ch. Aug. 19, 2005) (declining to use market price in entire fairness action where company was near insolvency). Even Fuller expected American to refinance in accordance with market expectations. Because the market price is reliable, market value is the appropriate measure of the debt.

9. The following inputs will be used for the WACC calculation.

a. The cost of debt will be the weighted average of the actual cost of the Notes and American's revolving credit facility (the "Revolver"), as of the Merger Date. *Cf. Emerging Commc'ns,* 2004 WL 1305745, at *16 (adopting as "reasonable" the "actual observed cost of debt"). Having used the market value of the Notes as of the

Merger Date, the cost of debt for the Notes will be the yield to worst for the Notes as of that date, or 7.15%. The cost of the revolver will be priced as of the Merger Date at LIBOR plus 3.75%. Knoll objected to these figures because they assume that the current interest rate environment will continue. Although interest rates may eventually revert towards the mean, humans cannot predict the future, and deviations from the mean can persist for extended periods. As John Maynard Keynes is said to have observed, "The market can remain irrational longer than you can remain solvent." The current low-rate environment largely results from a macroeconomic experiment of epic proportions being conducted by the Federal Reserve, and that body has indicated its intent to maintain a low interest rate environment going forward. The experiment may prove that the Federal Reserve's balance sheet, resolve, and credibility have their limits, but what might happen or when cannot be known in advance by non-divine minds. The actual figures as of the Merger Date reflect the Company's cost of debt at the time of the Merger, are the best indication of its cost of debt, and will be used to determine fair value.

b. Knoll's estimate of 0.80 will be used for American's unlevered beta. Knoll considered several estimates of beta before relying on the Barra predicted beta, which fell at the midpoint of these estimates. Less persuasive was Fuller's reliance on a single beta—an adjusted Bloomberg beta—that assumed mean reversion to the market beta of one. Mean reversion is a sound concept in the abstract, but the specific mean-reverting path must be justified on the facts. Fuller could not offer evidence supporting a mean-reverting beta for American. *See* Tr. at 202 (Fuller replying "no" when asked if there was evidence supporting mean reversion in American's beta).

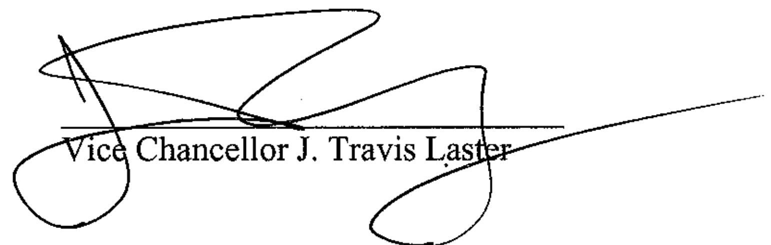
c. Knoll's estimates of 5.5% and 2.67%, will be used for the equity risk premium and the small company stock premium, respectively. In arriving at the equity risk premium, Knoll considered several sources, including Duff & Phelps, Ibbotson Associates, and Pratt & Grabowski. JX 58. In arriving at the small company stock premium, Knoll used an average of the eighth and ninth deciles of the small stock premiums listed in an Ibbotson Associates report. *Id.* Her reasons were persuasive. Fuller used stale information and the eighth decile small stock premium based on his own valuation, rather than available market valuation.

10. Terminal year cash flows will be normalized using Knoll's adjustment. In a given company's life cycle, rote normalization may or may not be appropriate after the traditional five year projection period. Here, normalization is appropriate because American is a stable, mature company, where much of the business activity is contractual, recurring, and predictable.

11. Compound interest will be due on the resulting fair value determination from the Merger Date, compounded quarterly at the legal rate, taking into account any adjustments in the underlying Federal Discount rate. *See* 8 *Del. C.* § 262(h).

12. Each party will bear its own costs.

13. Within 10 days, the parties shall submit a Final Order and Judgment that implements these post-trial rulings.



Vice Chancellor J. Travis Laster

FINAL ORDER
&
JUDGMENT

EFiled: Apr 10 2013 04:10PM EDT
Transaction ID 51721015
Case No. 6369-VCL

IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE

IQ HOLDINGS, INC., Petitioner, v. AMERICAN COMMERCIAL LINES INC., Respondent.	)	C.A. No. 6369-VCL

FINAL ORDER AND JUDGMENT

WHEREAS, an affiliate of Platinum Equity, LLC acquired respondent American Commercial Lines Inc. ("American" or the "Company") by merger (the "Merger");

WHEREAS on December 21, 2010, the effective of the Merger (the "Merger Date"), the shares of American common stock were converted into the right to receive $33.00 per share;

WHEREAS, petitioner IQ Holdings, Inc. ("IQ") held 250,000 shares of American common stock, dissented from the Merger, and perfected its appraisal rights;

WHEREAS, the Court held trial on October 1-2, 2012, heard testimony from two expert and two fact witnesses, and has considered the presentations of counsel;

WHEREAS, the Court issued its post-trial decision on March 18, 2013, in which it determined the valuation framework and inputs to be used to calculate the fair value of American as of the Merger Date;

WHEREAS, application of the valuation framework and inputs specified by the post-trial decision results in a fair value of American of $38.16 per share as of the Merger Date;

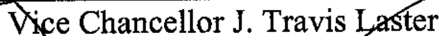
NOW, THEREFORE, this 10th day of April, 2013, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. American shall pay IQ $10,880,221.00, comprised of $9,540,000.00 in principal and $1,340,221.00 in interest, calculated as of April 10, 2013;

2. IQ is entitled to post-judgment interest at 5% over the Federal Reserve Discount Rate, compounded quarterly, beginning April 10, 2013 until paid;

3. This Order and Final Judgment may be enforced by the issuance of writs of execution substantially in the form and with the same effect as those used in the Delaware Superior Court, as provided in Court of Chancery Rule 69(a).

4. This Order and Final Judgment may be entered by the Office of the Prothonotary of New Castle County in the same manner and form and in the same books and indexes as judgments are entered in the Superior Court, as provided in 10 *Del. C.* § 4734.



Vice Chancellor J. Travis Laster