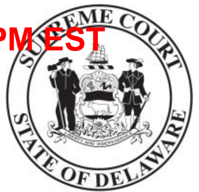
EFiled: Dec 22 2016 03:34PM EST
Filing ID 59982137
Case Number 482,2016



IN THE SUPREME COURT OF THE STATE OF DELAWARE

REDACTED VERSION
DATED: December 22, 2016

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., NABORS RED LION LIMITED, 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

THE C&J DEFENDANTS' APPELLEES' BRIEF

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 3

COUNTERSTATEMENT OF FACTS 5

I. The Board and Transaction 5

II. The solicitation process. 6

III. Almost unanimously, C&J's stockholders approve the Transaction. 8

ARGUMENT 9

I. The Court correctly applied the motion to dismiss standard and rejected Plaintiff's entire fairness allegations 9

A. Question presented 9

B. Scope of review 9

C. Merits of argument 9

1. The Court properly applied the motion to dismiss standard. 9

2. Plaintiff fails to plead that Comstock's conduct triggers entire fairness. 11

a. Comstock did not have a material self-interest. 11

b. Comstock did not engage in illicit manipulation 16

c. The Board provided active and direct oversight of the Transaction and solicitation process 20

II. The Court correctly held that the business judgment rule applies due to the stockholders' fully informed approval of the Merger. 23

A. Question presented 23

B. Scope of review 23

C. Merits of argument 23

1. The Court did not improperly shift the burden. 23

2. Plaintiff's disclosure allegations fail as a matter of law. 24

a. Plaintiff's disclosure claims related to the EBITDA estimate fail as a matter of law. 25

b. Plaintiff's disclosure claims relating to the solicitation process are deficient....................................28

III. The Court did not err in awarding injunction bond damages.......................35

A. Question presented 35

B. Scope of review 35

C. Merits of argument 35

1. Plaintiff's claims of bad faith are meritless. 36

a. The Committee was indisputably independent, qualified, and motivated to find a superior transaction. 36

b. Plaintiff's aspersions against Comstock are unsupported...37

2. Plaintiff cannot avoid payment based on disagreements with the Committee's and Morgan Stanley's analysis. 39

3. C&J did not fail to mitigate damages. 41

a. C&J acted reasonably in immediately complying with the Injunction...42

b. Plaintiff filed the bond with knowledge that C&J would immediately comply with the Injunction............45

IV. Conclusion 45

TABLE OF AUTHORITIES

Cases

Allen v. Encore Energy Partners, L.P.,
72 A.3d 93 (Del. 2013) 3, 10

Alliance Gaming Corp. v. Bally Gaming Int'l, Inc.,
1995 WL 523543 (Del. Ch.) 20

Arnold v. Society for Savings Bancorp, Inc.,
650 A.2d 1270 (Del. 1994) 30, 31

Bershad v. Curtiss-Wright Corp.,
535 A.2d 840 (Del. 1987) 29

Bhole, Inc. v. Shore Invs, Inc.,
67 A.3d 444 (Del. 2013) 42

Bomarko, Inc. v. Int'l Telecharge, Inc.,
794 A.2d 1161 (Del. Ch. 1999) 13, 16

Breedy-Fryson v. Towne Estates Condo. Owners Ass'n, Inc.,
2010 WL 718619 (Del. Ch.) 10

Brinckerhoff v. Enbridge Energy Co., Inc.,
2011 WL 4599654 (Del. Ch.) 20, 41

C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' Ret. Trust,
107 A.3d 1049 (Del. 2014) .... *passim*

Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC,
2012 WL 3201139 (Del. Ch.) 10

Corwin v. KKR Financial Holdings LLC,
125 A.3d 304 (Del. 2015) 1, 4, 23, 24

David P. Simonetti Rollover IRA v. Margolis,
2008 WL 5048692 (Del. Ch.) 29, 33, 34

Duphily v. Del. Elec. Co-op., Inc.,
662 A.2d 821 (Del. 1995) 45

Emerald Partners v. Berlin,
1998 WL 474195 (Del. Ch.) 35, 44

Emerald Partners v. Berlin,
726 A.2d 1215 (Del. 1999) 35, 41, 44

Global Naps, Inc. v. Verizon New England, Inc.,
489 F.3d 13 (1st Cir. 2007) 45

Globis Partners, L.P. v. Plumtree Software, Inc.,
2007 WL 4292024 (Del. Ch.)..26

Grobow v. Perot,
539 A.2d 180 (Del. 1988)..9

Guzzetta v. Serv. Corp. of Westover Hills,
7 A.3d 467 (Del. 2010).. 35, 41

Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P.,
2014 WL 1813340 (Del. Ch.).. 17, 39

Henkel Corp. v. Innovative Brands Holdings, LLC,
2013 WL 396245 (Del. Ch.)..42

In re 3Com S'holders Litig.,
2009 WL 5173804 (Del. Ch.).. 32, 34

In re Answers Corp. S'holders Litig.,
2012 WL 1253072 (Del. Ch.)..12

In re Best Lock Corp. S'holder Litig.,
845 A.2d 1057 (Del. Ch. 2001) 25, 26

In re CheckFree Corp. S'holders Litig.,
2007 WL 3262188 (Del. Ch.)..44

In re Cogent, Inc. S'holder Litig.,
7 A.3d 487 (Del. Ch. 2010) 32

In re Dole Food Co., Inc. S'holder Litig.,
2015 WL 5052214 (Del. Ch.).. 13, 20

In re Dollar Thrifty S'holder Litig.,
14 A.3d 573 (Del. Ch. 2010) 44

In re Gen. Motors (Hughes) S'Holder Litig.,
897 A.2d 162 (Del. 2006).. 9-10

In re Gen. Motors Class H S'holders Litig.,
734 A.2d 611 (Del. Ch. 1999) 24

In re Inergy L.P. Unitholder Litig.,
2010 WL 4273197 (Del. Ch.).. 19, 20, 41

In re KDI Corp. S'holders Litig.,
14 Del. J. Corp. L. 759 (Del. Ch. 1988) 29

In re KKR Fin. Holdings LLC S'holder Litig.,
101 A.3d 980 (Del. Ch. 2014) 24

In re Lukens Inc. S'holders Litig.,
757 A.2d 720 (Del. Ch. 1999) 26

In re Micromet Inc. S'holders Litig.,,
2012 WL 681785 (Del. Ch.)..32, 33, 34

In re MONY Grp. Inc. S'holder Litig.,
852 A.2d 9 (Del. Ch. 2004) 30, 34

In re Morton's Rest. Grp., Inc. S'holders Litig.,
74 A.3d 656 (Del. Ch. 2013) 3, 10

In re Novell, Inc. S'holder Litig.,
2013 WL 322560 (Del. Ch.)..41

In re OPENLANE, Inc. S'holders Litig.,
2011WL 4599662 (Del. Ch.)..22

In re Orchard Enterprises, Inc. S'holder Litig.,
88 A.3d 1 (Del. Ch. 2014) 31

In re Rural Metro Corp.,
88 A.3d 54 (Del. Ch. 2014) 26

In re Sirius XM S'holder Litig.,
2013 WL 5411268 (Del. Ch.)..10

In re TriQuint Semiconductor, Inc. Stockholders Litig.,
2014 WL 2700964 (Del. Ch.)..32, 33

In re Walt Disney Co. Derivative Litig.,
906 A.2d 27 (Del. 2006)..15

In re Wayport, Inc. Litig.,
76 A.3d 296 (Del. Ch. 2013) 29

Katell v. Morgan Stanley Grp., Inc.,
1995 WL 376952 (Del. Ch.)..37

King Constr., Inc. v. Plaza Four Realty, LLC,
976 A.2d 145 (Del. 2009)..15

Loudon v. Archer-Daniels-Midland Co.,
700 A.2d 135 (Del. 1997)..26

McMillan v. Intercargo Corp.,
768 A.2d 492 (Del. Ch. 2000)..22

Merrill Lynch Tr. Co., FSB v. Campbell,
2009 WL 2913893 (Del Ch.)..43

Mills Acquisition Co. v. Macmillan, Inc.,
559 A.2d 1261 (Del. 1989)..*passim*

Nokia Corp. v. InterDigital, Inc.,
645 F.3d 553 (2d Cir. 2011)..41

Orman v. Cullman,
794 A.2d 5 (Del. Ch. 2002)..15

Parnes v. Bally Entertainment, Corp.,
722 A.2d 1243 (Del. 1999)..14

Pfeffer v. Redstone,
965 A.2d 676 (Del. 2009)...9, 28

RBC Capital Mkts., LLC v. Jervis,
129 A.3d 816 (Del. 2015)...2, 21

Rosenblatt v. Getty Oil Co.,
493 A.2d 929 (Del. 1985)...25

Ryan v. Lyondell Chem. Co.,
2008 WL 2923427 (Del. Ch.)... 32, 33

Seibert v. Harper & Row, Publishers, Inc.,
1984 WL 21874, at *6 (Del. Ch.) 26

Skeen v. Jo–Ann Stores, Inc.,
1999 WL 803974 (Del. Ch.)...29

Smith v. Del. State Univ.,
47 A.3d 472 (Del. 2012).. 9, 15, 23

Solomon v. Armstrong,
747 A.2d 1098 (Del. Ch. 1999).. 11, 19, 24

Stroud v. Grace,
606 A.2d 75 (Del. 1992)..27

Teachers' Ret. Sys. of Louisiana v. Aidinoff,
900 A.2d 654 (Del. Ch. 2006) 13, 16, 21

Wayne Cty. Emps.' Ret. Sys. v. Corti,
2009 WL 2219260 (Del. Ch.) 12, 15

Wayne Cty. Emps.' Ret. Sys. v. Corti,
954 A.2d 319 (Del. Ch. 2008) 25

Other Authorities

Del. Sup. Ct. R. 8 .... 15, 30

Del. Sup. Ct. R. 9 30

NATURE OF PROCEEDINGS

Plaintiff, a purported stockholder of C&J Energy Services, Inc. ("C&J"), appeals (1) the dismissal of its lawsuit challenging a transaction (the "Transaction") between C&J and Nabors Industries Ltd. ("Nabors"); and (2) the granting of C&J's motion to recover damages caused by an overturned injunction. The Court of Chancery (the "Court") correctly dismissed Plaintiff's amended complaint (the "Complaint") under *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), based on the following:

(1) No member of C&J's board of directors (the "Board") had a material self-interest in the Transaction, including the focus of Plaintiff's appeal: C&J's late CEO and director, Josh Comstock.

(2) Even if Comstock had a material self-interest, he did not dominate the Board or engage in illicit manipulation of its decision-making.

(3) C&J's stockholders were fully informed and approved the Transaction, with 97.6% of votes cast in favor of the Transaction.

Even accepting Plaintiff's erroneous argument that the Court must blindly accept the Complaint's allegations and inferences, Plaintiff's appeal fails. As the Court correctly held, Plaintiff's allegations are a far cry from the extreme misconduct alleged in cases that survived dismissal and—instead—more closely resemble matters that were dismissed on the pleadings. This resemblance is enhanced when, as the motion to dismiss standard requires, (a) the Complaint is limited to well-pled

allegations and reasonable inferences, and (b) documents integral to the Complaint are reviewed.

Separately, the Court found that Plaintiff's opposition to C&J's bond motion was—like its Complaint—based on an untenable interpretation of sound-bites snipped from a handful of emails. In November 2014, the Court granted a preliminary injunction requiring a special committee of the Board (the "Committee") to solicit alternative merger proposals for at least thirty days (the "Injunction"). After this Court vacated the Injunction, C&J sought to recover $542,087.89 in fees paid to directors and advisors during the solicitation process. The Court appropriately rejected Plaintiff's attacks on the solicitation. The Committee consisted of undisputedly independent directors who worked for private equity firms with large ownership interests in C&J. Thus, it should come as no surprise that—in the words of the Committee's banker (who was strongly incentivized to find a better deal)—the Committee conducted the most "broad, wide-ranging search that I have ever conducted in a go-shop scenario and certainly within the industry." B221, Bishop Dep. 240:23-241:13.

The Court properly ended Plaintiff's two-year quixotic quest to challenge a Board that this Court has already commended on two occasions. *C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' Ret. Trust*, 107 A.3d 1049 (Del. 2014); *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 856 (Del. 2015).

SUMMARY OF ARGUMENT

1. Denied. Under the motion to dismiss standard, courts need not blindly accept all allegations as true or draw unreasonable inferences in favor of the non-movant. Further, courts may consider documents integral to a complaint, and "even at the pleading stage," a court need not "draw inferences contradicting" such documents. *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013). This is particularly true where, as here, a complaint relies on "selective quotations" from "discovery taken in connection with [a] preliminary injunction application." *In re Morton's Rest. Grp., Inc. S'holders Litig*., 74 A.3d 656, 658 n.3 (Del. Ch. 2013). But even accepting Plaintiff's allegations as true, dismissal is still appropriate because Plaintiff has inadequately alleged disclosure violations and has failed to satisfy the stringent requirements for "illicit manipulation" claims.

2. Denied. The Court properly rejected Plaintiff's disclosure claims. First, C&J had no obligation to disclose additional information concerning a preliminary, non-binding indication of interest. Second, Plaintiff's disclosure allegations regarding the solicitation process amount to nothing more than disagreements with a financial advisor's analysis; such disclosure claims fail under well-settled law. Third, the proxy accurately disclosed the EBITDA projection considered by the Board and provided to C&J's financial advisors. Defendants had no obligation to disclose Plaintiff's sound-bite attacks on this projection.

3. Denied. Contrary to Plaintiff's suggestions, *Corwin* does not hold that (a) dismissal is never appropriate, or (b) Defendants had a burden to prove that the entire universe of undisclosed facts was immaterial. Instead, *Corwin* requires the Court to determine whether Defendants met their burden of establishing that the Complaint's disclosure allegations failed as a matter of law. The Court properly applied *Corwin*.

4. Denied. The Court properly awarded C&J bond damages. Plaintiff concedes that the Injunction caused C&J $542,087.89 in damages and is forced to resort to baseless arguments that C&J (1) failed to comply with the Injunction, (2) acted in bad faith, and (3) failed to mitigate damages. These arguments are wholly unsupported by Delaware precedent and the extensive record.

COUNTERSTATEMENT OF FACTS

I. The Board and Transaction.

In January 2014, C&J began exploring a potential transaction with Nabors' completion and production services business segments ("NCPS"). A147, ¶45. During the relevant time period, C&J was managed by the Board, which was comprised of Josh Comstock (C&J's co-founder, CEO, and one of its largest stockholders), Randy McMullen (C&J's CFO), and five independent directors: Darren Friedman (a manager at a private equity fund that was one of C&J's largest stockholders), Adrianna Ma (a manager at another private equity fund that was one of C&J's largest stockholders), Michael Roemer, Jim Stewart, and Tripp Wommack. A142-44, ¶¶27-33; *C&J*, 107 A.3d at 1055. The Board and C&J management faced no threat to their positions, as "C&J's share price…easily outperform[ed] both the Dow Jones Industrial Average and the S&P 500" due to "a unique strategy that sets it apart from its peers." A132, A145, ¶¶4, 40-41.

On June 24, 2014, after several months of negotiation and evaluation (including fairness opinions from Citi and Tudor), the Board entered into the Agreement and Plan of Merger (the "Merger Agreement"), in which C&J agreed to merge with NCPS, with C&J continuing as the surviving company of the combined enterprise ("New C&J"). A133, ¶5. C&J management negotiated their employment agreements with New C&J only after an agreement had been reached on the terms

of the Merger Agreement. A435-36.

II. The solicitation process.

On July 30, 2014, Plaintiff filed suit and sought to enjoin the Transaction. Op. 10-11. On November 24, 2014, the Court enjoined the Transaction for at least 30 days and ordered C&J to solicit alternative proposals. A169, ¶102; Op. 11-13; B109-11. The Court initially stayed the Injunction pending appeal and ordered Plaintiff to post a $650,000 bond, explaining that "Defendants may decide to comply with the [Injunction] and, if they do, they are entitled to the protection of the bond." B112.

On November 26, 2014, the Board met "to consider whether [C&J] should immediately comply with the [Injunction] or delay such compliance pending" appeal. B114. At the time of the meeting, the Board faced many uncertainties:

- The Merger Agreement's "End Date" allowed either party to terminate the Transaction after December 31, 2014. Nabors had declined to extend this "End Date," and C&J could unilaterally extend it only if no injunction was "in effect." A343-46, Merger Agreement §§7.1(e), 8.1(c).

- The SEC was still reviewing C&J's proxy (the "Proxy") but could have finished at any time, allowing—in the absence of the Injunction—C&J to proceed with the stockholder vote. A106 ¶2; B94-95, ¶5(a).

- This Court had not yet granted expedited appellate proceedings, and as the Court of Chancery contemporaneously noted, the timing of the appellate process was "speculative." B113; B118.

- The Injunction could be extended beyond 30 days based on an open-ended standard. A106, ¶4.

Faced with these uncertainties, the Board "unanimously resolved that it was in the

best interest of [C&J's] stockholders to proceed with the" solicitation. B114. C&J notified Plaintiff that Defendants intended to pursue their appeal and the solicitation simultaneously, and the Court lifted the stay. A108 at 1. Plaintiff then filed its bond. B119-21.

The Board established a Committee consisting of independent directors who were not designated to serve on New C&J's board—Friedman, Ma, and Stewart—to conduct the solicitation process. A172, ¶110. The Committee hired Paul, Weiss, Rifkin, Wharton & Garrison LLP ("Paul Weiss"), led by former Vice Chancellor Lamb, as its legal advisor, and Morgan Stanley & Co. ("Morgan Stanley") as its financial advisor. A437. Morgan Stanley was highly incentivized to find a better transaction, as it accepted a low base fee in exchange for a high "success fee." B134, Friedman Dep. 47:10-23; B230-33; B486-91; B219-20, Bishop Dep. 233:9-234:8.

Morgan Stanley diligently contacted 82 potential partners. A437. Ultimately, only Cerberus Capital Management, L.P. ("Cerberus") submitted a non-binding, highly contingent "indication of interest" on December 11, 2014 (the "Cerberus Proposal"). A178, ¶123; A258-65, Cerberus Proposal. The Committee and its advisors thoroughly analyzed the Cerberus Proposal, compared it to the Transaction, and determined it was not reasonably likely to lead to a superior proposal. B180-220, Bishop Dep. 77:22-78:4, 105:24-106:4, 156:3-14, 237:13-19; B235-76; B143, Friedman Dep. 83:21-85:13; B116-17; A437. Cerberus admitted that "I'm not

offering necessarily a better offer here" and declined to further engage after the Committee reached this determination. B217-25, Bishop Dep. 222:8-224:19, 256:11-257:5; B140, Friedman Dep. 73:4-17. The Committee evaluated whether to further canvass the market and concluded that it had contacted any reasonably conceivable partner. B237.

On December 19, 2014, this Court vacated the Injunction, holding that the solicitation "should not have [occurred] at all" and reinstating the Merger Agreement's non-solicitation provisions. *C&J*, 107 A.3d at 1071; A189, ¶143. Under these provisions, C&J could only terminate the Transaction to enter into an *unsolicited* alternate transaction. A327-28, Merger Agreement §§6.4(a)-(b).

III. Almost unanimously, C&J's stockholders approve the Transaction.

On March 20, 2015, C&J stockholders overwhelmingly approved the Transaction and new compensation packages for C&J's executives. B347. Of the shares that voted, 97.66% approved the Transaction, constituting 81.73% of outstanding shares. *Id.*; Op. 19. The Transaction closed in March 2015. B354.

ARGUMENT

I. The Court correctly applied the motion to dismiss standard and rejected Plaintiff's entire fairness allegations.

A. Question presented

Did the Court correctly apply Court of Chancery Rule 12(b)(6) when it rejected Plaintiff's entire fairness claim? Op. 2, 42-55; B286-89; B294-317; B320-27; B509-14; B516-27; B743-87.

B. Scope of review

De novo review applies, except that Plaintiff's new allegations have been waived on appeal or—at a minimum—are reviewed under a "plain error" standard. *Smith v. Del. State Univ*., 47 A.3d 472, 479 (Del. 2012).

C. Merits of argument

1. The Court properly applied the motion to dismiss standard.

Plaintiff paints the motion to dismiss standard as so weak that the Court should have credited the Complaint's many falsehoods; but "a trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences." *Pfeffer v. Redstone*, 965 A.2d 676, 685 n.26 (Del. 2009) (quoting *Grobow v. Perot*, 539 A.2d 180, 187 n. 6 (Del. 1988)). The Court "is not required to accept every strained interpretation of the allegations proposed by the plaintiff." *In re Gen. Motors (Hughes) S'Holder Litig.,* 897 A.2d

162, 168 (Del. 2006); *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL 3201139, at *13 (Del. Ch.) (the standard is not "toothless").

To determine whether Plaintiff's allegations are well-pled and inferences are reasonable, a court may consider the full text of documents "integral" to the complaint. *Morton's*, 74 A.3d at 658 n.3 (allowing defendants to put plaintiffs' "selective quotations in context"); *Encore Energy*, 72 A.3d at 96 n.2. A document is "integral to the complaint" if "it is the 'source' of the facts pled." *In re Sirius XM S'holder Litig*., 2013 WL 5411268, at *4 (Del. Ch.). The Court may also consider "judicially noticed facts," *i.e.*, facts not subject to reasonable dispute. *Breedy-Fryson v. Towne Estates Condo. Owners Ass'n, Inc*., 2010 WL 718619, at *9 (Del. Ch.). In *Encore Energy,* for example, because the plaintiff "relie[d] upon the Proxy Statement for substantive factual allegations," 72 A.3d at 96 n.2, the court cited facts from the proxy that undermined plaintiff's "bad faith" allegations. *Id.* at 108-09.

Even if Plaintiff's allegations are credited, the Court correctly held that Plaintiff inadequately alleged the extreme set of facts required to invoke entire fairness under *Mills Acquisition Co. v. Macmillan, Inc*., 559 A.2d 1261, 1280 (Del. 1989). The Court's conclusion is only reinforced by declining to draw unreasonable inferences in Plaintiff's favor or credit allegations that contradict the documents Plaintiff relies upon.

2. Plaintiff fails to plead that Comstock's conduct triggers entire fairness.

Having failed to adequately plead that a majority of the Board was conflicted or that a conflicted director dominated the Board, Plaintiff makes a last-ditch attempt to rebut the business judgment rule by arguing that Comstock illicitly manipulated the Board, a doctrine recognized by *Macmillan*. Plaintiff's allegations are insufficient to invoke this rarely successful doctrine for three reasons:

(1) The Complaint fails to allege that Comstock suffered from a "debilitating pecuniary self-interest that [is] material to that director." *Solomon v. Armstrong,* 747 A.2d 1098, 1118 (Del. Ch. 1999), *aff'd,* 746 A.2d 277 (Del. 2000).

(2) The Complaint inadequately pleads "deliberate concealment of material information" by Comstock that "must necessarily have been motivated by an interest adverse to [C&J's] shareholders." *Macmillan*, 559 A.2d at 1279.

(3) Plaintiff fails to plead that the Board was "torpid, if not supine." *Id.* at 1280.

a. Comstock did not have a material self-interest.

The Court correctly held that the Complaint inadequately alleged that Comstock had a material self-interest. Op. 2, 20. Plaintiff alleges that Comstock was conflicted by his purported desire for a new employment agreement. A131-32, ¶1. And, though not in its Complaint, Plaintiff now asserts that Comstock was also conflicted by an "empire building" desire. OB 9.

i. Plaintiff's self-interest allegations are deficient.

As the Court properly found, Comstock's alleged self-interests—even if accepted as true—are insufficient to state a claim. Op. 46-49. The Court determined that Plaintiff's allegations "closely resemble[d]" the allegations in *Corti*, where dismissal was granted, rather than the authorities relied upon by Plaintiff. *Id.* at 47 (citing *Wayne Cty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *11 (Del. Ch.)). Specifically:

- The Complaint contains no allegation that (1) Comstock's job was in danger, (2) a hostile bidder was threatening to take over C&J management, or (3) he would be removed as an executive if the Transaction was not consummated. This "significantly alleviates the concern" that Comstock had a debilitating self-interest. Op. 48 (quoting *Corti*, 2009 WL 2219260, at *11); *compare id. with In re Answers Corp. S'holders Litig.*, 2012 WL 1253072, at *7-8 (Del. Ch.) (self-interest sufficiently alleged where CEO "knew that he would lose his job…if he did not sell the Company" and board "agreed to manipulate the sales process" to achieve liquidity event for certain directors).

- Comstock owned 10% of C&J, which incentivized him to maximize stockholder value. Op. 48-49 (citing *Corti*, 2009 WL 2219260, at *12).

- Unlike *Macmillan,* Comstock was not a "[bidder] in an auction for control of the company." Op. 49 (quoting *Corti*, 2009 WL 2219260, at *13).

Indeed, Plaintiff's allegations fell far short of the authorities it relied upon, in which material self-interests were well-pled:

- MacMillan's CEO would be the largest stockholder of the combined entity if a company (in which he had a significant interest) won the auction to acquire MacMillan. *Macmillan*, 559 A.2d at 1275-76.

- AIG's CEO was the largest stockholder of the counterparty to the challenged self-dealing transactions; AIG executives owned the remainder of the

counterparty. *Teachers' Ret. Sys. of Louisiana v. Aidinoff*, 900 A.2d 654, 658-59 (Del. Ch. 2006).

- ITI's CEO owned 100% of the merger counterparty and was a significant ITI creditor. *Bomarko, Inc. v. International Telecharge, Inc.*, 794 A.2d 1161, 1169, 1177 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000).
- Dole's CEO and controlling stockholder was purchasing Dole in a take-private transaction. *In re Dole Food Co., Inc. Stockholder Litig.*, 2015 WL 5052214, at *1 (Del. Ch.).

A1006-09. Thus, even if Plaintiff's allegations are credited, the Court was correct to find that Plaintiff failed to plead a material self-interest.[1]

ii. The Court's conclusion is even more justified if Plaintiff's unreasonable inferences are rejected.

The self-interest claim is even more deficient when limited to well-pled allegations and stripped of unreasonable inferences.

Plaintiff criticizes the Court for finding that the Complaint lacks allegations concerning the difference between Comstock's old and new employment agreements. OB 20. This criticism is not borne out by the Complaint. While Plaintiff mentions certain terms of Comstock's new agreement, the Complaint is devoid of allegations concerning his pre-existing compensation—let alone

[1] Plaintiff misinterprets the Court as holding 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." OB at 21 (quoting Op. 46-47). The Court simply said that these factors "undercut[]" Plaintiff's claim (Op. 47) and relied on a number of other factors and authorities. *Id.* at 46-53.

allegations that he needed the Transaction to secure a new agreement. Indeed, the only reasonable inference is that Comstock did not need the Transaction to secure a new employment deal. *See, e.g.,* A132, ¶4 ("C&J was earning record revenues" at the time of the Transaction).

Plaintiff next argues that Comstock's purported "threat" to halt the Transaction adequately alleges that his "compensation" was "material." OB 20. The Court correctly declined to draw this inference, particularly given that this inference contradicts documents referenced in the Complaint, which establish that (1) Comstock did not discuss the specifics of his employment agreement until after reaching an agreement on deal terms; (2) the purported "threat" occurred after the Board approved the transaction, meaning that Comstock lacked the authority to unilaterally "block" the deal; (3) the undisputedly independent/disinterested Board was aware of the so-called "threat;" and (4) Comstock's employment terms were not finalized until long after execution of the Merger Agreement.[2] A435-36; *C&J*, 107 A.3d at 1064-65.

---

[2] *Parnes* is distinguishable. OB at 21 n.5 (citing *Parnes v. Bally Entertainment, Corp.*, 722 A.2d 1243, 1245-47 (Del. 1999)). The CEO in *Parnes* demanded his "bribe" be satisfied *before* the deal was approved. *Id.*

iii. The "empire building" allegations fail for additional reasons.

Plaintiff's "empire building" assertion also fails. First, the Complaint does not allege that Comstock's "objective was empire building." OB 9 (citing A157, ¶71). The cited paragraph of the Complaint discusses "employment agreements," not empire building. Indeed, "empire building" appears only once in the Complaint—while criticizing Morgan Stanley's methodology. A139-40, ¶19. Plaintiff cannot re-write its Complaint through its opposition brief, let alone its appellate brief. *King Constr., Inc. v. Plaza Four Realty, LLC*, 976 A.2d 145, 155 (Del. 2009); *Orman v. Cullman*, 794 A.2d 5, 28 n.59 (Del. Ch. 2002). Plaintiff has waived these allegations. Del. Sup. Ct. R. 8; *Smith*, 47 A.3d at 479; *In re Walt Disney Co. Derivative Litig*., 906 A.2d 27, 55 (Del. 2006).

Even if the Court reaches this new allegation, it fails for the reasons discussed above and for additional reasons. Plaintiff's lone authority for this allegation requires the Complaint to "show that the manager's primary purpose for pursuing the transaction was a desire to increase the size of the company ***for the manager's benefit*,**" a "difficult showing to make[.]" *Corti*, 2009 WL 2219260, at *12 (emphasis added). The notion that a fiduciary breaches his duties by seeking to grow the company turns Delaware law on its head. Indeed, Plaintiff admits that "it was in

the best interests of C&J stockholders to grow C&J by making a strategic acquisition." A146, ¶42.

b. Comstock did not engage in illicit manipulation.

Plaintiff's feeble claims of "illicit manipulation" also fail. Extreme misconduct is required to allege "illicit manipulation." For example:

- In *Macmillan*, a conflicted manager improperly "tipped" a bidding company, and if that company won, management would have a significant ownership interest in the newly formed company. *Macmillan*, 559 A.2d at 1275. Management concealed this "tip" at a crucial board meeting. *Id.* at 1282.

- In *Bomarko,* the CEO of a company that desperately needed financing to avoid bankruptcy did not disclose the existence of a term sheet containing the needed financing. 794 A.2d at 1168-69. Without the financing, the board agreed to a merger in which the CEO obtained substantial ownership of the company. *Id.* at 1171. The CEO "avoided raising suspicion by waiting until after the Merger was approved before signing a deal with [the financier]." *Id*. at 1173.

- In *Aidinoff*, the company alleged $28.1 million in payments to an entity that the company's CEO "used as a vehicle to provide long-term incentive compensation to top...executives [to ensure] their fealty to him…." 900 A.2d at 659.

Even if its allegations are credited, Plaintiff does not come close to pleading such duplicity. OB 22-23 (summarizing illicit manipulation allegations). Moreover, these allegations are not entitled to the presumption of truth.

i. Valuation of NCPS

Plaintiff's claim that "Comstock secretly agreed to the high NCPS valuation after Petrello [Nabors' CEO] enticed [Comstock] with 'aggressive' employment

terms," OB at 22-23, is based upon nothing more than strained inferences that have been properly rejected by the Court of Chancery and this Court.

First, Plaintiff's claim of "secrecy" is not well-pled. The Board was undisputedly aware of the deal terms and the fact that C&J's officers would receive new employment agreements in connection with the Transaction. A435; *Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P.*, 2014 WL 1813340, at *17 (Del. Ch.) ("Plaintiff does not allege that the…board was not aware of the [CEO's] modified compensation arrangement."). Plaintiff's sound-bite non-disclosures are immaterial.

Second, Plaintiff ignores that "Comstock's offer to pay a higher multiple to make up for a lower EBITDA represents a negotiating concession on C&J's part, not an act of concealment or a misstatement of earnings." Op. 25-26. Far from "secretly agreeing" to a higher valuation as a *quid pro quo*, Comstock was merely conceding that he would pay a 6.5x EBITDA multiple (rather than 6.0x) to close the transaction at $2.925 billion. A163, ¶87.

Third, Plaintiff repeats its stale allegation that McMullen and Comstock considered the $445 million projection of NCPS' EBITDA an "upside case." OB at 24; A164, ¶90. The emails integral to this allegation disprove Plaintiff's claim because they establish—as this Court has already recognized—that McMullen's email did not contain the "upside case" sentence. *C&J*, 107 A.3d at 1061 n.54.

Rather, Comstock *added* the "upside case" sentence when forwarding the email to Nabors' CEO. *Id.* Plaintiff does not attempt to defend its distortion.

Fourth, Plaintiff also repeats its implication that Comstock halted due diligence so as not to uncover NCPS's "creative accounting." Again, when the documents integral to this allegation are reviewed—as opposed to Plaintiff's sound-bite—it is indisputable that Comstock told Deloitte to stop diligence because he was threatening to abandon the Transaction unless the deal improved for C&J's stockholders. *C&J,* 107 A.3d at 1058 n.37 & 1160 n.44.

ii. The solicitation process

Plaintiff's claims concerning Comstock's alleged illicit manipulation of the solicitation process also fail. Alleged manipulation of a December 2014 solicitation process cannot trigger entire fairness on claims concerning the Board's earlier, June 2014 approval of the Transaction. *Cf. Macmillan*, 559 A.2d at 1279 (applying entire fairness to "a business decision" when there was "illicit manipulation" of *that* decision). Nor can these allegations trigger entire fairness on Plaintiff's separate claim for alleged fiduciary duty breaches during the solicitation. As this Court previously held, the solicitation "should not have [occurred] at all," foreclosing the possibility of transacting with Cerberus (thereby negating causation) and rendering the solicitation *void ab initio*. *C&J*, 107 A.3d at 1071; *infra* n.7; *see* Ans. Br. of Morgan Stanley (filed Dec. 7, 2016) §III.C.1.

Even if Plaintiff's allegations had legal relevance, they are insufficient to satisfy this element of a *Macmillan* claim. Plaintiff primarily alleges that Comstock "tainted" the solicitation by promising future business to his "friend" at Morgan Stanley. A172-74, ¶¶111-14. A past relationship and the hope of future business do not render an advisor conflicted. *In re Inergy L.P. Unitholder Litig*., 2010 WL 4273197, at *14 (Del. Ch.); *Solomon*, 747 A.2d at 1118-19. Further, Plaintiff's inference of an illicit *quid pro quo* is unreasonable. For instance, Plaintiff excerpts an email in which Comstock told Morgan Stanley's John Bishop that "if y'all do this, it's a solid in with the company" and then surmises (without support) that the word "this" means "a biased analysis." OB 13 (quoting B230-33). But as the document integral to this allegation reveals, Comstock was attempting to convince Bishop to accept an expedited assignment—the day before Thanksgiving—for a low base fee. B230-33. Of course, Comstock recognized that the assignment—soliciting alternatives to a deal that was in active litigation and already well-known to potential suitors—was not attractive. Op. 39-40.

Similarly unreasonable is Plaintiff's inference that Comstock surreptitiously withheld material information from Morgan Stanley. As the Complaint explains, Comstock simply expressed concern about "providing any forecasts or confidential information ***to competitors***." A177, ¶120 (emphasis added). A company has a legitimate interest in protecting sensitive data until it receives serious bids,

particularly where—as here—potential bidders are competitors. *Alliance Gaming Corp. v. Bally Gaming Int'l, Inc.*, 1995 WL 523543, at *1-*3 (Del. Ch.). Further, there is no allegation that Morgan Stanley or the Committee were deceived about what information management was providing. The Complaint is far from (for instance) *Dole*, where management secretly falsified financial information and provided it to a committee. *Dole*, 2015 WL 5052214, at *1, *18-19.

Finally, the Complaint inadequately links Comstock with the alleged issues in Morgan Stanley's analysis. For instance, the Opening Brief asserts that "Morgan Stanley and Comstock" used a flawed methodology, but the Complaint only attributes this action to Morgan Stanley. OB 25 (citing A179-82, ¶¶125-29). Regardless, these allegations pertain to quibbles with a financial advisor's analysis, which will not support an illicit manipulation claim. *Brinckerhoff v. Enbridge Energy Co., Inc.*, 2011 WL 4599654, at *10 (Del. Ch.), *aff'd*, 67 A.3d 369 (Del. 2013); *Inergy*, 2010 WL 4273197, at *16.

c. The Board provided active and direct oversight of the Transaction and solicitation process.

Finally, the Complaint does not mention any failure by the Board to provide "active and direct oversight" of Comstock, a key to pleading illicit manipulation. *Macmillan,* 559 A.2d at 1279. The Board's oversight is a marked departure from cases in which courts have found a "torpid" or "supine" board:

- In *RBC,* board members did not receive any valuation information until three hours before approving the deal. 129 A.3d at 845.

- In *Macmillan,* the board completely "remove[d] themselves from the design and execution of an auction," inevitably allowing insiders to manipulate the process. 559 A.2d at 1281.

- In *Aidinoff,* the board "never conducted market surveys or any valuation technique to gauge the fairness of…fees [paid to another entity]." 900 A.2d at 664. Nor did they "participate in any way in negotiating the…transactions." *Id.*

Plaintiff does not—and cannot—claim that the Board abdicated its responsibilities at all, let alone to the extent present in these decisions. Indeed, Plaintiff has not appealed the rejection of its allegations that directors other than Comstock breached their fiduciary duties. *Compare* A150-51, ¶54 *with* OB 19-22.

Plaintiff's lawsuit thus boils down to a claim that a majority-independent/disinterested Board and numerous professionals improperly favored the Transaction so that *another person* (Comstock) could get a new employment agreement. But Delaware law will not presume that the Board, Committee, Citi, Tudor, Morgan Stanley, former Vice Chancellor Lamb, and others were willing to jeopardize their reputations so that Comstock could secure his unthreatened tenure:

> The complaint fails to set forth facts indicating why the disinterested board majority would sell out [the company's] stockholders simply so as to secure [the CEO's] employment—an employment that could have been secured, according to plaintiffs, simply by continuing to manage the company under its existing business plan.

McMillan v. Intercargo Corp., 768 A.2d 492, 504 (Del. Ch. 2000); *In re OPENLANE, Inc. S'holders Litig*., 2011WL 4599662, at *5 (Del. Ch.).

II. The Court correctly held that the business judgment rule applies due to the stockholders' fully informed approval of the Merger.

A. Question presented

Did the Court err in dismissing Plaintiff's claims due to the stockholders' fully informed approval of the Transaction? Op. 2, 21-40; B289-90; B332-44; B515; B528-38; B743-87.

B. Scope of review

De novo review applies, except that Plaintiff's new allegations have been waived on appeal or—at the very least—are reviewed under a "plain error" standard. *Smith*, 47 A.3d at 479.

C. Merits of argument

The Court correctly held that "the business judgment presumption applies" to the Transaction because it was "approved by an uncoerced, fully-informed vote of [C&J's] stockholders" and not subject to entire fairness review. Op. 54 (citing *Corwin*, 125 A.3d at 312-13). Plaintiff criticizes the Court's application of *Corwin* on two grounds, neither of which has merit.

1. The Court did not improperly shift the burden.

Plaintiff incorrectly argues in conclusory fashion that the "trial court erroneously placed the burden of avoiding the *Corwin* doctrine on Plaintiffs [sic]." OB 39. Plaintiff does not—and cannot—explain how the Court "placed the burden" on Plaintiff.

Although directors "bear the burden of establishing that the [proxy] disclosed all material facts," this does not mean that dismissal at the pleadings stage is never appropriate. OB 39 (quoting *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 999 (Del. Ch. 2014)). Indeed, *Corwin* and other matters have dismissed claims upon finding that "defendant satisfied [the] burden of establishing that [the] stockholder vote was fully informed." *KKR*, 101 A.3d at 999 n.81; *Solomon*, 747 A.2d at 1127-32; *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 616-17 (Del. Ch. 1999).

Plaintiff seems to suggest that, in addition to refuting its pleadings, Defendants had to prove that the universe of undisclosed information did not include a single material fact—an impossible task for any defendant. OB 39. Placing the "burden" on defendants simply requires them to establish that a plaintiff's omission allegations are deficient. *KKR*, 101 A.3d at 999 ("[Plaintiff's] disclosure challenges are without merit and thus…defendants have established that the stockholder vote was fully informed."). The Court correctly applied that burden here. Op. 20, 24.

2. Plaintiff's disclosure allegations fail as a matter of law.

Plaintiff incorrectly argues that the Court erred in rejecting its omission claims. OB 26-36. An omission is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

Rosenblatt v. Getty Oil Co., 493 A.2d 929, 945 (Del. 1985). The Court correctly determined that Plaintiff's disclosure allegations failed as a matter of law.

a. Plaintiff's disclosure claims related to the EBITDA estimate fail as a matter of law.

Plaintiff argues that the Court erred in "dismissing Plaintiff's claim relating to the Final Proxy's disclosure of $445 million in estimated 2015 NCPS EBITDA." OB 34. According to the Complaint, the Proxy failed to disclose that this estimate was "(a) the result of Comstock agreeing with Petrello that he would use a 6.5 multiple to get a deal done, thereby providing both C&J and Nabors with a $450 million target; or (b) C&J's management's 'upside case.'" A190-91, ¶146. The Court did not err in rejecting Plaintiff's allegations for four reasons.

First, Plaintiff ignores the Court's recognition that the Proxy merely disclosed the projections "that [were] considered by the [Board] and also provided to C&J's financial advisors in connection with the Merger." Op. 24 (quoting A459, Proxy at 96), 28 (same). Plaintiff does not—and cannot—contend that the Board considered a different EBITDA projection. Thus, even if "Nabors told KPMG" a different EBITDA (OB 35) or if C&J referred to $445 million as an "upside case" in an email chain (OB 34), the EBITDA disclosure is not "misleading." *Wayne Cty. Emps.' Ret. Sys. v. Corti*, 954 A.2d 319, 332 (Del. Ch. 2008) (finding projections immaterial where plaintiff had not established "that the…board relied on [them]"); *In re Best*

Lock Corp. S'holder Litig., 845 A.2d 1057, 1075 (Del. Ch. 2001) (dismissing disclosure claims; "[r]easonable shareholders could draw any necessary inference regarding the currency of the valuations from the disclosed information").[3]

Second, even crediting Plaintiff's allegations, Defendants were not required to disclose Plaintiff's characterization of the facts. "Proxy materials are only required to disclose all germane *facts*. They need not include opinions or possibilities, legal theories or plaintiff's characterization of the facts." *Seibert v. Harper & Row, Publishers, Inc.*, 1984 WL 21874, at *6 (Del. Ch.) (emphasis in original) (granting motion to dismiss); *Best Lock*, 845 A.2d at 1074; *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997); *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *14 (Del. Ch.) (granting motion to dismiss); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 736 (Del. Ch. 1999) (rejecting disclosure allegations that "do no more than reflect the plaintiffs' substantive allegations of wrongdoing"), *aff'd sub nom.*, *Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000). Plaintiff's allegations concerning the EBITDA estimate are predicated on snippets taken from emails, which cannot form the basis of a

[3] *Rural Metro* is inapposite because its proxy (a) did not explain that it was simply disclosing the information provided to the board (as is present in the Proxy and the Opinion); and (b) contained objectively "false information" regarding the conflicted banker's fairness opinion analysis—far different than Plaintiff's allegations about undisclosed sound-bites concerning a projection. OB 35 (citing *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 104 (Del. Ch. 2014)).

disclosure claim under these authorities. A190-91, ¶146. Notably, Plaintiff does not want disclosure of the full context of these emails—Plaintiff only demands disclosure of its mischaracterizations. *Id.*

Third, Plaintiff's allegations are not entitled to a presumption of truth, and the inferences it draws are not reasonable. *See supra* §I.C.1. For example, Plaintiff baldly alleges that the $445 million estimate was "the result" of Comstock providing a "target" by agreeing to value NCPS using a 6.5x EBITDA multiple. A190, ¶146. The Court properly held that this illogical claim lacks allegations necessary to support itself. Op. 26-27. Plaintiff does not contest these holdings. With respect to the "upside case" allegation, the emails that are integral to this allegation disprove Plaintiff's claim. *Supra* §I.C.2.b.i.

Fourth, Plaintiff cannot create a disclosure claim against C&J's directors and officers based on what "Nabors told KPMG" about NCPS' estimated EBITDA. OB 35. Delaware law requires the disclosure of "material information within the board's control." *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992). Plaintiff attempts to overcome this well-settled principle by arguing that *C&J's officers* also had a disclosure duty, but the Complaint contains no allegation that the Board *or C&J's officers* had knowledge of Nabors' communications with KPMG. OB 35-36; Op. 30. Plaintiff also argues that the Board "learned about the KPMG report through this litigation" (OB 36), but this allegation does not appear in the Complaint and, at

any rate, is not a reasonable inference. *Pfeffer*, 965 A.2d at 687 (affirming dismissal because the complaint "conclusorily assert[s] that the…Directors would (or must) have been told [the omitted] information").

b. Plaintiff's disclosure claims relating to the solicitation process are deficient.

i. Defendants had no duty to disclose additional information regarding the Cerberus bid.

Plaintiff argues that Defendants had a duty to disclose "the terms of the Cerberus [Proposal]" (OB 28), the "reasons for its rejection" (OB 30), and "that Morgan Stanley calculated the Cerberus Bid as more valuable than the market's valuation of the [Transaction]" (OB 28).[4] This argument fails for four reasons.

First, Plaintiff did not plead these disclosure claims. While the Complaint generically alleges that the Proxy "omitted information about the Cerberus bid," the only omitted information about the Cerberus Proposal identified in the Complaint is "that Cerberus's alternative bid included a $5.25 per share immediate cash dividend for C&J stockholders." A140-41, A190-91, ¶¶22, 146. Indeed, Plaintiff never alleged that Morgan Stanley even *performed* the omitted calculation. Plaintiff's

[4] Plaintiff asserts that defendants concealed the Cerberus non-binding indication of interest from this Court. OB 2, 4 and 6. Nothing could be further from the truth. The issue before this Court was whether or not the Court of Chancery properly issued the Injunction and the Cerberus proposal had no bearing on that issue. This is another example of plaintiff grasping at straws. Moreover, this issue was not properly raised below.

citations for this allegation say nothing about the purported calculation. OB 31 (citing A179, ¶124); OB 33 n.10 (citing A182-83, ¶131). Rather, Plaintiff repeatedly alleges that Morgan Stanley *never performed* such a calculation. A139-40, A184-85, A188, ¶¶19-21, 134, 141. Plaintiff waived these allegations. *Supra* §I.C.2.a.iii.

Second, the Court correctly held that Defendants had no duty to disclose information concerning a non-binding indication of interest that an independent committee rejected. Op. 36-37. Plaintiff challenges this holding by relying on four non-Delaware authorities (OB 28) but fails to cite *Bershad v. Curtiss-Wright Corp.*, in which this Court held that "[e]fforts by public corporations to arrange mergers are immaterial…as a matter of law, until the firms have agreed on the price and structure of the transaction." 535 A.2d 840, 847 (Del. 1987). Several opinions are in accord with *Bershad* and the Opinion:

- "Where an expression of interest does not lead to a firm offer, the board has no obligation to disclose the specifics of the expression." *Skeen v. Jo–Ann Stores, Inc.*, 1999 WL 803974, at *8 (Del. Ch.), *aff'd*, 750 A.2d 1170 (Del. 2000); *In re KDI Corp. S'holders Litig.*, 14 Del. J. Corp. L. 759, 770 (Del. Ch. 1988); *In re Wayport, Inc. Litig.*, 76 A.3d 296, 309 (Del. Ch. 2013).

- "[W]here a board has not received a firm offer or has declined to continue negotiations with a potential acquirer because it has not received an offer worth pursuing, disclosure is not required." *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *3, *11-12 (Del. Ch.) (proxy disclosed a "definitive" firm offer from an interested party but not "non-binding indications of interest" from two other interested parties).

Cerberus' proposal was an "indication of interest" and not a "firm offer" because,

A178-79, ¶123; A180, ¶126; A262, Cerberus Proposal, at 5

Defendants thus had no duty to disclose the requested details concerning the Cerberus Proposal.[5]

Plaintiff's reliance on *Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994), is misplaced. *Arnold* involved a firm, all-cash offer for one piece of a company that was 37% higher than the final deal price for the entire company. *Id.* at 1281-82. In contrast, the Complaint does not allege any "nondisclosure of genuine offers for a subsidiary above the value of the actual transaction." *In re*

---

[5] Based on an internet search, Plaintiff argues "since 2012, at least 44 selling companies received a post-announcement competing bid," and in "every single one of these instances, the terms of the competing bids were disclosed." OB 31 n.9. This is a new argument that was not properly preserved for appeal, and the information upon which it is based is not in the record below. Del. Sup. Ct. R. 8, 9. Further, Plaintiff seems to have run a search designed to find only transactions where competing deal terms were disclosed, as demonstrated by the fact that the Transaction was not included in the search results. Pl.'s Compendium, Tab 2. Also, it is impossible to calculate how many merger parties did not disclose a competing proposal *at all*. Finally, even if nondisclosure were "atypical," Delaware law is clear that rejected indications of interest are immaterial.

MONY Grp. Inc. S'holder Litig., 852 A.2d 9, 30 (Del. Ch. 2004) (refusing to apply *Arnold*). Cerberus' interest in a potential cash-and-equity deal, which the independent Committee determined would be inferior to the Transaction (despite its strong financial interest in finding a superior proposal), stands in stark contrast to the unambiguously superior and firm all-cash offer in *Arnold*.[6]

Third, the Proxy *does* disclose the "reasons for [the] rejection" of Cerberus' indication of interest. OB 30. As the Proxy explains, "[a]fter evaluating the acquisition proposal with Morgan Stanley and Paul Weiss, the Special Committee determined that such acquisition proposal was not reasonably likely to lead to a superior proposal in accordance with the terms of the Merger Agreement." A437.

Fourth, Plaintiff's unpled allegations concerning Morgan Stanley's "calculation" are not entitled to a presumption of truth because the Complaint and materials referenced therein disprove the notion that Morgan Stanley calculated the Cerberus Proposal as more valuable than the Transaction. Morgan Stanley's "materials reflect that the transaction between the Company and Nabors creates more potential value to the Company's stockholders from a financial point of view than would the Cerberus proposal." B236. Indeed, Plaintiff alleges that Morgan

---

[6] *In re Orchard Enterprises, Inc. Stockholder Litigation* is similarly distinguishable and, further, involved an objectively false misrepresentation, which is not alleged here. 88 A.3d 1, 22-23 (Del Ch. 2014).

Stanley calculated the *Transaction* as more valuable than the Cerberus Proposal. A182-87, ¶¶131-140.

For these reasons, the Court did not err in dismissing Plaintiff's disclosure claims regarding the Cerberus Proposal.[7]

ii. Disagreements with Morgan Stanley's analysis cannot create a disclosure obligation.

Plaintiff also argues that the Court erred in dismissing claims that the Proxy failed to disclose supposed shortcomings in Morgan Stanley's analysis of the Cerberus Proposal. OB 16-17, 31-33. But as a matter of law, disputes with a banker's substantive analysis cannot form the basis of a disclosure claim. *In re Micromet Inc. S'holders Litig.*, 2012 WL 681785, at *13 (Del. Ch.); *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *3, *6 (Del. Ch.); *In re TriQuint Semiconductor, Inc. Stockholders Litig.*, 2014 WL 2700964, at *4 (Del. Ch.); *Ryan*

[7] Plaintiff also incorrectly takes issue with the Court's conclusion that the reversal of the Injunction "provides *another reason* why the details of the Cerberus transaction did not need to be disclosed." Op. 37 (emphasis added); OB 36. Because the Cerberus Proposal was solicited, C&J could *never* have entered into an agreement with Cerberus. A328, Merger Agreement §6.4(b)(C) (permitting C&J to terminate the Transaction to pursue an *unsolicited* proposal). As Plaintiff concedes, this Court's reversal "prevent[ed] even a superior proposal from proceeding." A137-38, ¶16. Thus, over-disclosure of the Cerberus Proposal may have confused stockholders by giving the false appearance that it was a viable alternative. *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 511 (Del. Ch. 2010).

v. Lyondell Chem. Co., 2008 WL 2923427, at *19 n.117 (Del. Ch.), *rev'd on other grounds*, 970 A.2d 235 (Del. 2009).

Plaintiff's disclosure allegations epitomize mere disputes with Morgan Stanley's analysis. OB 16-17 (citing A189-91, ¶¶145-46). According to Plaintiff, the Proxy should have disclosed that Morgan Stanley (1) "valued the [Transaction] including synergies but excluded synergies from the value of the Cerberus Bid," (2) relied on "outdated and unreliable public financial data," and (3) "unilaterally re-defined 'potentially superior proposal' [as] a 30% premium over C&J's stock price." OB 16-17 (citing A189-91, ¶¶145-46). Plaintiff essentially concedes that these are simply disputes with Morgan Stanley's analysis. OB 32-33.

Plaintiff fails in its two attempts to escape this well-settled principle. First, Plaintiff suggests that its criticisms should have been disclosed because Morgan Stanley was allegedly conflicted. OB 33.[8] But none of the decisions cited above turned on a determination that the advisor was not conflicted—rather, they involved allegations that the financial advisor was conflicted. *Micromet*, 2012 WL 681785,

[8] Plaintiff argued at the dismissal stage—but not on appeal—that Defendants should have *disclosed* Morgan Stanley's alleged conflicts. The Court properly rejected this disclosure allegation. Op. 38-40. **First**, Plaintiff has inadequately alleged a conflict. *Supra* §I.C.2.b.ii. **Second**, Morgan Stanley did not provide a fairness opinion but, instead, advised on a solicitation process that "should not have [occurred] at all." *C&J*, 107 A.3d at 1071; *Simonetti*, 2008 WL 5048692, at *14 (proxy should disclose material conflicts concerning the "author[] of the fairness opinion" due to the importance of fairness opinions).

at *10; *TriQuint*, 2014 WL 2700964, at *5. Even assuming a legal basis for Plaintiff's argument, its allegations concerning Morgan Stanley's supposed conflict are not entitled to a presumption of truth. *Supra* §I.C.2.b.ii.

Second, Plaintiff argues that its criticisms of Morgan Stanley must be disclosed because the Proxy had no summary of Morgan Stanley's work, whereas the proxy in *3Com* disclosed a summary of the advisor's fairness opinion analysis. *See* OB 33 n.11. This distinction *hurts* Plaintiff. The duty to disclose a "fair summary" of financial analysis arises when a company (1) is touting a fairness opinion to encourage stockholders to approve the transaction at issue and/or (2) has included partial details about analysis that are misleading without additional details. *See TriQuint*, 2014 WL 2700964, at *4; *Simonetti*, 2008 WL 5048692, at *9; *MONY Grp.*, 852 A.2d at 25. It is undisputed that (1) Morgan Stanley provided no fairness opinion, and (2) the Proxy does not provide any misleading details concerning Morgan Stanley's analysis. Thus, there is *less* of a basis to require disclosure of Plaintiff's "challenge[s] to the methodology employed by" Morgan Stanley. *Micromet*, 2012 WL 681785, at *13.

III. The Court did not err in awarding injunction bond damages.

A. Question presented

Should the Court have awarded C&J bond damages for costs resulting from the wrongful Injunction? Op. 2, 56-66; B80-89; B457-73; B475-84; B585-646.

B. Scope of review

Where, as here, the Court made factual determinations concerning recovery under a bond, this Court reviews only to determine whether the Court "abused its discretion." *Guzzetta v. Serv. Corp. of Westover Hills*, 7 A.3d 467, 469 (Del. 2010). Plaintiff misreads *Emerald Partners v. Berlin* and incorrectly states that *de novo* review applies. The appeal in *Emerald Partners* "involve[d] the formulation and application of legal principals," not a review of factual findings. 726 A.2d 1215, 1224 (Del. 1999).

C. Merits of argument

C&J was entitled to damages "proximately caused" by the Injunction. *Id.* at 1227. Further, "there exists a rebuttable presumption that Defendants may recover provable damages suffered as a result [of the Injunction]." *Emerald Partners v. Berlin*, 1998 WL 474195, at *3 (Del. Ch.), *aff'd*, 726 A.2d 1215 (Del. 1999).

Plaintiff does not contest that the Injunction caused C&J $542,087.89 in damages. Op. 59. Instead, Plaintiff appeals the Court's rejection of Plaintiff's three

affirmative defenses to C&J's bond motion. The Court did not err—let alone abuse its discretion—in rejecting these defenses.

1. Plaintiff's claims of bad faith are meritless.

Plaintiff argues that C&J "acted in bad faith" and "inequitabl[y]" because Comstock purportedly "co-opted the entire Solicitation Process." OB 43-44. Plaintiff's claims against Comstock fail as a matter of law. *Supra* §I.C.2. This conclusion is strengthened when the bond record is analyzed.

a. The Committee was indisputably independent, qualified, and motivated to find a superior transaction.

Plaintiff's conspiracy theory is inconsistent with the incentives and conduct of the undisputedly independent Committee, which consisted of the three directors that Plaintiff requested. B100, ¶2. Friedman and Ma were accomplished managers at private equity firms with significant interests in C&J, and Stewart was a longtime industry executive. B141-42, Friedman Dep. 77:17-78:3. With its significant ownership interests, the Committee "would be happy to get a higher offer for the company." B146, Friedman Dep. 97:12-20. "[I]f anyone was going to have a better offer, we were more than willing to listen to it, because that would be good for...our investors and all our shareholders." B141-42, Friedman Dep. 77:17-78:3. The Committee members are presumed to "act to maximize the value of their own

investments." *Katell v. Morgan Stanley Grp., Inc.*, 1995 WL 376952, at *12 (Del. Ch.).

Validating this presumption, the Committee and Morgan Stanley (who also had a strong incentive to find a superior transaction) contacted "everyone possible" who "might even have an inkling" of interest in acquiring C&J. B218-19, Bishop Dep. 229:22-230:3. While a typical process would involve contacting "10 or 15" potential buyers, the Committee contacted 82. B220, Bishop Dep. 234:13-24. As Bishop testified, "this is the most broad, wide-ranging search that I have ever conducted in a go-shop scenario and certainly within the industry." B221, Bishop Dep. 240:23-241:13.

b. Plaintiff's aspersions against Comstock are unsupported.

Plaintiff dragged C&J through a year of discovery in a desperate search for evidence of bad faith. In the end, Plaintiff did not even attempt to impugn the Committee, and the Court did not abuse its discretion in finding that Comstock did not "co-opt" the solicitation process.

<u>Communications with Morgan Stanley</u>. As explained above, Plaintiff's interpretation of the "solid in" email is unreasonable. *Supra* §I.C.2.b.ii. Morgan Stanley did not interpret the email as asking for biased analysis. B173, B196, Bishop Dep. 47:21-48:15, 141:4-24. And the Committee—not Comstock—selected

Morgan Stanley because Friedman had a positive prior work experience with Bishop. B132, Friedman Dep. 40:8-21.

The Court was similarly within its discretion in rejecting Plaintiff's interpretation of a later email in which Bishop told Comstock that he was "100% supportive of you through this endeavor." B234. In that email, Bishop explains that he was showing "support" by "run[ning] a tight objective go-shop process." *Id.* As Bishop explained, he was telling Comstock that the "truth is going to set you free" because "the best thing that we can do is to objectively analyze every offer that could potentially come in and...run a process that is going to stand up in a court of law." B196-97, Bishop Dep. 138:14-141:24, 142:14-143:20.

The terms of Morgan Stanley's retention further undermine Plaintiff's interpretations. The Committee and Comstock negotiated for Morgan Stanley to receive a significant "success-based" fee so that it was "very incentivized to find a higher proposal." B134, Friedman Dep. 47:10-23; B232; B486-91. As Bishop explained:

> [A]ll of our incentive was around trying to sell the company to...[s]omeone other than Nabors…the difference is—call it 15, 20 million dollars in fees versus $350,000 in fees.

B219-20, Bishop Dep. 233:9-234:8.

<u>Moore's involvement in the process</u>. Plaintiff failed to establish that Comstock sent Ted Moore (C&J's General Counsel) to "taint" the Committee's

process. The record reveals that Moore was involved in the process to oversee C&J's legal interests during a precarious situation in which it was running a solicitation process while some—but not all—of the Merger Agreement had been superseded by the Injunction. B131, Friedman Dep. 34:6-18; B176-77, Bishop Dep. 61:11-62:15; B492-95.[9] The record reveals that the Committee—not Moore or Comstock—ran the process. B130-44, Friedman Dep. 33:16-34:22, 39:22-40:21, 43:21-44:20, 47:10-23, 49:2-50:15, 55:12-22, 73:4-74:15, 77:6-16, 83:21-85:13, 89:5-17; B218-21, Bishop Dep. 229:22-230:3, 240:23-241:13; B237.

Comstock's compensation. Cerberus stated that it would provide Comstock the same compensation as he was set to receive in the Transaction, further defeating Plaintiff's theory that Comstock scuttled the Cerberus Proposal to line his pockets. B193, Bishop Dep. 126:14-20.

2. Plaintiff cannot avoid payment based on disagreements with the Committee's and Morgan Stanley's analysis.

Plaintiff next argues that "C&J failed to comply with the injunction" because "C&J never meaningfully compared the value of the Cerberus Bid to the value of the [Transaction] for C&J stockholders." OB 44. This argument fails for two reasons.

[9] *Hamilton Partners*, 2014 WL 1813340, at *16 (dismissing claim where a company's CEO "injected himself into every discussion of the Special Committee").

First, the Court did not err in finding that the record does not support Plaintiff's assertion. Morgan Stanley—and, more importantly, the Committee—compared the transactions in multiple respects. *See, e.g.*, B180-220, Bishop Dep. 77:22-78:4, 105:24-106:4, 156:3-14, 237:13-19; B236 (the "Committee asked Morgan Stanley to compare the financial value of the Cerberus proposal to the financial value of the Nabors transaction."); B250; B253 (comparing the *pro forma* entities that would result from the Cerberus and Nabors transactions); B259; B143, Friedman Dep. 83:21-85:13; B16. This analysis revealed that the Cerberus Proposal offered C&J stockholders a 9% discount while the Transaction offered a 28% premium. *Infra* n.10; B225, Bishop Dep. 256:11-257:5. Cerberus declined to further engage after the Committee concluded that its proposal was inferior to the Transaction. B217, Bishop Dep. 222:8-224:19; B140-43, Friedman Dep. 73:4-17, 85:3-13; B117.

Plaintiff essentially complains that Morgan Stanley (a) "inexplicably exclud[ed] synergies" when analyzing the Cerberus Proposal and (b) told the Committee to target a 30% premium when evaluating alternative proposals. OB 44. The Court was within its discretion in rejecting these criticisms.[10] Further, the

[10] Synergies: Morgan Stanley excluded synergies from its analysis of *both* the Cerberus and Nabors transactions, so it was apples-to-apples. B253 n.3. Synergies were referenced only in one line of the Transaction analysis. B259; B205, Bishop Dep., 176:16-22.

"analysis that an investment banker undertakes" is "properly within the discretion of the investment banker." *Enbridge Energy,* 2011 WL 4599654, at *10; *Inergy,* 2010 WL 4273197, at *16; *In re Novell, Inc. S'holder Litig.,* 2013 WL 322560, at *12 (Del. Ch.).

Second, Plaintiff cannot avoid its obligations under the bond based on disputes with the Committee's evaluation of the Cerberus Proposal, as established by Plaintiff's own authorities:

- *Nokia Corp. v. InterDigital, Inc.* required only that a party's expenses be incurred "in connection with its ***effort to*** comply." 645 F.3d 553, 556-59 (2d Cir. 2011) (emphasis added).

- *Emerald Partners* held that a wrongly enjoined party may recover damages "caused by" an injunction. 726 A.2d at 1226.

- *Guzzetta* explained that the purpose of an injunction bond is to "protect a party that is wrongfully enjoined." 7 A.3d at 471.

3. C&J did not fail to mitigate damages.

Plaintiff finally argues that "C&J failed to mitigate its damages" because it simultaneously complied with the Injunction while appealing it, rather than sitting idly during the 2014 appellate process. OB 44-45. Plaintiff's argument fails and is

30% premium: Morgan Stanley estimated that the Transaction provided a 28% premium to C&J's stock price; thus, it was reasonable to seek a 30% premium. *See* B236 ("the industry decline implied a 30-40% decline in the estimated value of the [Transaction] since the signing of the deal"); B259 (explaining that, at a 30% decline in value, the Transaction is worth $15.10/share, a 28% premium to the current trading price of $11.76). Further, the Committee considered numerous other factors when evaluating the Cerberus Proposal. B236-37; B143, Friedman Dep. 85:3-13

particularly remarkable given Plaintiff's former contention that C&J's stockholders would be irreparably harmed unless the solicitation process occurred immediately. B54-55; B99-101 (no stay in Plaintiff's proposed order).

a. C&J acted reasonably in immediately complying with the Injunction.

The Court did not err in finding that it was "eminently reasonable" for C&J to spend "half a million dollars in the face of an injunction threatening to halt a nearly $3 billion transaction." Op. 60. Only a "reasonable effort to mitigate...damages" is required. *Bhole, Inc. v. Shore Invs, Inc.*, 67 A.3d 444, 451-52 (Del. 2013). A party need not take "imprudent risk" or "accept...uncertainty" in mitigating damages. *Henkel Corp. v. Innovative Brands Holdings*, LLC, 2013 WL 396245, at *5 (Del. Ch.).

Nabors could unilaterally terminate the Transaction unless the Injunction was reversed or satisfied by the "End Date." A343-46, Merger Agreement §§ 7.1(e), 8.1(c). On the date the Injunction was entered (the Tuesday before Thanksgiving), C&J had only 36 days until the End Date. A106, ¶¶1, 4. C&J asked Nabors to extend the End Date, but Nabors declined. B149. Thus, C&J had 36 days to (i) conduct a 30-day solicitation and (ii) defend against any effort to extend the Injunction, which the Injunction permitted (and Plaintiff had already insinuated that it would attempt to do). B103. Judged "in light of circumstances as they then

existed, not with the benefit of hindsight," *Merrill Lynch Tr. Co., FSB v. Campbell,* 2009 WL 2913893, at *9 (Del Ch.), C&J acted reasonably by immediately complying with the Injunction instead of throwing caution to the wind.

Plaintiff argues that "Nabors never intended to terminate" based primarily on a Comstock email following his request for an extension to Nabors' CEO:

> Fyi – no dice on extension. His goal is to keep pressure on the close. He will extend if/when absolutely needed.

B149. The Court did not abuse its discretion in refusing to read this email as a binding commitment by Nabors not to terminate. Op. 62. Indeed, the email reflects that Nabors had *refused to commit* to an extension; nothing Nabors' CEO said could be enforced by C&J, and Nabors could have used the End Date as a negotiating tool. As Friedman explained, "We knew that Nabors potentially could change the date, [but] [w]e had no control over that, so why risk [it]?" B146, Friedman Dep. 93:25-94:21.

Plaintiff next argues that "SEC review prevented the [Transaction] from closing in 2014." OB 45. This argument conflates the End Date with the closing date. C&J could unilaterally extend the End Date if the SEC was still reviewing the Proxy on December 31, 2014, but only if no injunction was "in effect." A343-45, Merger Agreement §7.1(e) (absence of an injunction is a "condition" to closing), §8.1(c) (C&J can extend the End Date, but only if "all of the conditions to Closing,

other than [SEC review and the stockholder vote] have been satisfied"). Thus, regardless of whether the Transaction could have *closed* on December 31, Nabors could terminate if an injunction was "in effect" after December 31.

Further, even if Plaintiff could establish that there was "no additional risk" created by the End Date (OB 45), there are other legitimate business reasons why C&J was prudent to spend 0.019% of the Transaction value on the solicitation instead of sitting idly during the appellate process. Injunctions are costly because they create "uncertainty and delay," leave parties in "limbo," and "impose significant costs on the shareholders...in the form of the lost time value of money and lost opportunity costs." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 617-18 (Del. Ch. 2010); *In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *4 (Del. Ch.). These and other factors led C&J to simultaneously comply with and appeal the Injunction regardless of the "End Date" issue. B94 ¶5. Because Plaintiff does not appeal these issues, its mitigation argument fails. *See Emerald Partners,* 1998 WL 474195, at *4 (when a merger is improperly enjoined, a company can incur recoverable expenses "work[ing] diligently to complete the merger as soon as possible" and "maintain[ing], as much as possible, the company's 'preparedness' for the merger.").

b. Plaintiff filed the bond with knowledge that C&J would immediately comply with the Injunction.

Finally, because Plaintiff posted the bond with full knowledge that C&J would simultaneously appeal and run the solicitation, Plaintiff cannot argue that C&J's decision extinguished Plaintiff's liability. In order to qualify as a superseding cause, C&J's decision "must have been neither anticipated nor reasonably foreseeable by" Plaintiff. *Duphily v. Del. Elec. Co-op., Inc*., 662 A.2d 821, 829 (Del. 1995). Plaintiff filed its bond with full knowledge that C&J would simultaneously comply with and appeal the Injunction:

Date/Time	Event
11/26/14 9:16am	The Court explains that, despite having stayed the Injunction pending appeal, "Defendants may decide to comply with the order and, if they do, they are entitled to the protection of the bond." B112.
11/26/14 2:29pm	C&J requests that the Court lift the stay so that it can pursue the appeal and the required solicitation process simultaneously. A108-10.
11/26/14 3:00pm	The Court enters an order lifting the stay. A111.
11/26/14 3:31pm	Plaintiff posts a bond of $650,000. B121.

Plaintiff thus "made a business judgment that it was willing to incur the 'cost' of a possibly wrongful injunction...." *Global Naps, Inc. v. Verizon New England, Inc.*, 489 F.3d 13, 21 (1st Cir. 2007).

IV. Conclusion

For the foregoing reasons, the decisions below should be affirmed.

POTTER ANDERSON & CORROON LLP

By: /s/ Stephen C. Norman
Stephen C. Norman (#2686)
Michael A. Pittenger (#3212)
Jaclyn C. Levy (#5631)
1313 North Market Street
Wilmington, DE 19899-0951
(302) 984-6000

Attorneys for C&J Energy Services, Inc. and Defendants 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, and H.H. "Tripp" Wommack, III

OF COUNSEL:

Michael C. Holmes
Manuel G. Berrelez
Craig E. Zieminski
Meriwether T. Evans
Bryan U. Gividen
Meredith S. Jeanes
VINSON & ELKINS LLP
2001 Ross Ave., Ste. 3700
Dallas, Texas 75201
(214) 220-7700

DATED: December 7, 2016

1239790

<u>**CERTIFICATE OF SERVICE**</u>

I hereby certify that on December 22, 2016, a true and correct copy of the within document was served by *File & ServeXpress* on the following attorneys of record:

Stuart M. Grant, Esquire
Mary S. Thomas, Esquire
Diane Zilka, Esquire
GRANT & EISENHOFER, P.A.
123 Justison Street
Wilmington, Delaware 19801

William M. Lafferty, Esquire
Susan W. Waesco, Esquire
Richard Li, Esquire
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 N. Market Street
Wilmington, Delaware 19801

Ashley R. Altschuler, Esquire
John L. Reed, Esquire
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, Delaware 19801

/s/ Stephen C. Norman
Stephen C. Norman (#2686)