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Case Number 482,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF MIAMI GENERAL EMPLOYEES' AND SANITATION EMPLOYEES' RETIREMENT TRUST, on behalf of itself and on behalf of all others similarly situated, Plaintiff-Below, Appellant, v. JERRY M. COMSTOCK, JR., as Independent Executor of the Estate of Joshua E. Comstock, RANDALL C. MCMULLEN, DARREN M. FRIEDMAN, ADRIANNA MA, MICHAEL ROEMER, C. JAMES STEWART, III, H.H. "TRIPP" WOMMACK, III, THEODORE "TED" MOORE, NABORS INDUSTRIES LTD., and MORGAN STANLEY & CO. LLC, Defendants-Below, Appellees.	No. 482, 2016 Appeal from the Memorandum Opinion dated August 24, 2016 of the Court of Chancery of the State of Delaware, C.A. No. 9980-CB

APPELLANT'S MOTION FOR REARGUMENT

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Dated: March 27, 2017

Pursuant to Supreme Court Rule 18, Appellant moves for reargument of this Court's March 23, 2017 order ("Order") affirming the decision of the Court of Chancery dated August 24, 2016.[1] Reargument is proper because the Court either: (i) overlooked specific allegations in the Amended Complaint; or (ii) is *sub silentio* overruling Delaware's longstanding application of the federal materiality standard set forth in *TSC Indus., Inc. v. Northways, Inc.*, 426 U.S. 438 (1976), under which concealing an intervening proposal made after the announcement of a transaction is plainly actionable.

First, the Order states that "plaintiff has failed to plead facts supporting a rational inference that the bid [Cerberus] made would have been regarded as material. The plaintiff has pled no fact supporting the inference that the [Cerberus] bid was financially superior, much less that the bidder was willing to raise its bid to a level that was in fact superior to the Nabors deal." (Order at 2).

However, the Amended Complaint specifically alleges that Cerberus made a detailed opening bid for a majority stake in C&J that "valued C&J stock at $14.55 per share even without the synergies inherent in a transaction combining C&J with Keane. Cerberus expressed confidence that its bid constituted a superior proposal under the Merger Agreement. Indeed, on its face, and even making the baseless assumption that Cerberus's proposal offered no synergies, the proposed merger

[1] *City of Miami Gen. Employees v. Comstock*, 2016 WL 4464156 (Del. Ch. Aug. 24, 2016).

with Keane was worth more than the Acquisition." (¶17); *see also* (¶123 ("Cerberus explained that its bid valued C&J stock at $14.55 per share even without the synergies … and expressed confidence that the Board would 'determine that the [Cerberus bid], by providing immediate cash consideration to CJES shareholders and valuing the current CJES equity at a premium to market, constitutes a superior proposal under the existing agreement with Nabors.'")); (¶129 (the Cerberus bid "implied a 12% premium to the C&J stock price," which reflected the value of the previously announced Nabors deal)).

The Amended Complaint also specifically alleges that Morgan Stanley "admitted that ***Cerberus's bid was merely an opening bid and not its 'best and final' … [and] never informed Cerberus that it needed to increase its bid to approximately $17 per share before the Special Committee would engage and allow Cerberus to start due diligence.'"*** (¶129) (emphasis added). The Amended Complaint adds that "Cerberus was serious in pursuing its bid" and "executed C&J's NDA and standstill agreement and met with [C&J management]." (¶124). However, "Comstock made sure that none of the potential bidders who signed C&J's confidentiality and standstill agreement [Cerberus] ever received C&J's internal forecasts or other C&J confidential information." (¶¶16;120-121); *see also* ¶128 ("Morgan Stanley never allowed Cerberus to start its due diligence by

providing internal forecasts or management's existing and proposed operating plan, further underscoring that Morgan Stanley was simply running the clock.")).

Thus, accepting all well-pleaded allegations in the Amended Complaint as true and drawing all rational inferences in favor of the non-moving party (Order at 2), Plaintiff pleaded specific facts supporting the inference that the Cerberus bid already was, or at the very least could lead to, a superior proposal. *RBC Capital Mkts., LLC v. Educ. Loan Tr. IV*, 87 A.3d 632, 639 (Del. 2014) (citing *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC*, 27 A.3d 531, 535 (Del. 2011)). Put simply, even if the C&J directors believed that the Nabors deal was superior, it is a rational, reasonable and compelling inference that C&J stockholders would have viewed Cerebus's detailed and negotiable proposal offering a premium to C&J's then-current stock price as material when evaluating the deal with Nabors.

Second, if the Court did not overlook these allegations, then it is overruling, *sub silentio*, decades-old Delaware precedent adopting the federal materiality standard, under which a credible intervening proposal is material.

Delaware has long held that upon providing partial disclosure of a competing bid, as C&J did here, fiduciaries must fairly and accurately characterize that bid. *Arnold v. Soc'y for Savings Bancorp, Inc.*, 650 A.2d 1270, 1280-81 (Del. 1994) (omission of key information about competing bid is material – even if bid

is "highly speculative and contingent" – where existing disclosures were partial and incomplete); *see also In re Orchard Enter., Inc. S'holder Litig.*, 88 A.3d 1, 23 (Del. Ch. 2014) (same).

There also is no debate that a credible post-deal-announcement intervening bid is material under the federal standard and must be disclosed. *See, e.g., Jewel Companies, Inc. v. Pay Less Drug Stores Nw., Inc.*, 741 F.2d 1555, 1564 (9th Cir. 1984) ("Even after the merger agreement is signed a board may not, consistent with its fiduciary obligations to its shareholders, withhold information regarding a potentially more attractive competing offer"); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1295 (2d Cir. 1973) ("[W]hen endorsing one offer, [management] must inform stockholders of any better ones."); *see also Keyser v. Commonwealth Nat'l Fin. Corp.*, 675 F. Supp. 238, 253 (M.D. Pa. 1987) (denying summary judgment because reasonable minds could differ over materiality of undisclosed details of a withdrawn offer); *Wetter v. Caesars World, Inc.*, 541 F. Supp. 68, 73 (D.N.J. 1982) ("[t]he failure to mention [a reasonably realistic alternative] in the proxy statement would be a material omission [and] [w]e consider such an offer could be of importance to a shareholder in determining how to vote the proxy"); *U.S. Smelting, Refining and Mining Co. v. Clevite Corp.*, 1968 WL 2140, (1969-70 Transfer binder) Fed.Sec.L.Rep. (CCH) ¶ 192,691 (N.D. Ohio 1968) ("[w]hen shareholders are being called upon by management to approve a particular merger proposal

there would appear to be no information of greater materiality to him than that relating to other definitive merger proposals available to the corporation."); Corporate Acquisitions §4:59 (2016) ("Information [regarding] a higher competing offer [] must be highlighted in the proxy statement…"); *see also* Trans ID 59049651.

If the Court intended to cause Delaware to adopt a stricter materiality standard than the standard applicable to the exact same claim in federal courts, Plaintiff submits that such a significant ruling should be made expressly, and not *sub silentio*.

This is particularly the case here. If a credible intervening bid is not material for pleading purposes, then most (if not all) of the omissions deemed material in prior Delaware cases would fail Delaware's new materiality standard. *Compare* Order at 2 (affirming that a credible intervening bid is not material) *with Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1989) (tip given to already leading bidder deemed material); *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 860 (Del. 2015) (omission that banker did not use Wall Street consensus in valuation deemed material and misleading and commenting that ISS and Glass Lewis interpreted the misleading disclosure in their recommendations).[2]

[2] Although the Court rejected the Motion by the National Conference on Public Employees Retirement Systems to file an Amicus Brief attaching ISS and Glass Lewis reports about the Transaction, it is a rational inference that proxy

WHEREFORE, Appellant respectfully requests that the Court grant its Motion for Reargument.

Dated: March 27, 2017

Respectfully submitted,

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advisors and stockholders consider it important that a credible private equity firm like Cerberus made an intervening and financially superior bid.

CERTIFICATE OF SERVICE

I, Michael J. Barry, hereby certify that on March 27, 2017, I caused a copy of the foregoing to be served to all counsel below via File and Serve*Xpress*:

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This motion complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2010.

2. This motion complies with the type-volume limitation of Rule 14(d)(i) because it contains 1,198 words, which were counted by Microsoft Word 2010.

Dated: March 27, 2017

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CERTIFICATION OF COUNSEL

Pursuant to Rule 18, I hereby certify that Appellant's Motion for Reargument is brought in good faith and not for delay.

Dated: March 27, 2017

Respectfully submitted,

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[PROPOSED] ORDER

Having reviewed Appellant's Motion for Reargument, it is hereby

ORDERED that the Motion is GRANTED.

IT IS SO ORDERED this _____ day of _____, 2017.

_____
Justice