IN THE COURT OF CHANCERY 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, v. C&J ENERGY SERVICES, INC., JOSHUA E. COMSTOCK, RANDALL C. MCMULLEN, DARREN M. FRIEDMAN, ADRIANNA MA, MICHAEL ROEMER, C. JAMES STEWART, III, H.H. "TRIPP" WOMMACK, III, NABORS INDUSTRIES LTD., and NABORS RED LION LIMITED, Defendants.	C.A. No. 9980-CB

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION
FOR AN AWARD OF ATTORNEYS' FEES

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Plaintiff City of Miami General Employees' and Sanitation Employees' Retirement Trust ("Plaintiff") respectfully submits this memorandum in support of an award of $5 million in attorneys' fees and costs for causing, at least in part, a $250 million dollar benefit for stockholders of C&J Energy Services, Inc. ("C&J" or the "Company"), [1] $27.5 million of which is attributable to the 11.02% equity stake of C&J's former CEO Joshua E. Comstock ("Comstock").[2]

I. INTRODUCTION

This litigation, when originally filed and based on the limited expedited discovery record, was sufficiently meritorious that a former member of this Court granted an injunction based on breaches of the duty of care. Even in reversing the injunction based on legal errors relating to granting mandatory relief, the Delaware Supreme Court characterized Plaintiff's loyalty claims as "colorable." *C&J Energy Servs., Inc. v. City of Miami Gen. Empls.' & Sanitation Empls.' Ret. Tr.,* 107 A.3d 1049, 1073 (Del. 2014) ("[W]e acknowledge that there are colorable questions about the interests of certain key players . . . that have not been fully explored given the expedited nature of the proceedings").

[1] Many of the facts contained herein have been set forth in prior pleadings, filings and opinions. Plaintiff specifically cites to evidence supporting facts that were not previously presented to the Court.

[2] Comstock died on March 11, 2016. Jerry M. Comstock, Jr. serves as the Executor of Comstock's estate and was substituted as a party defendant in place of Joshua Comstock. *See* Order, *City of Miami Gen. Emps.' Sanitation Emps.' Ret. Tr. v. Comstock* , No. 9980-CB (Del. Ch. June 2, 2016).

On February 9, 2015, Nabors Industries Ltd. ("Nabors") agreed to reduce by $250 million the cash payment it was supposed to receive from C&J. The timing of the cash reduction and the substance of recommendations of ISS and Glass Lewis, both of which focus specifically on the $250 million cash reduction as a principal factor supporting approval of the revised deal, strongly suggest the cash reduction was needed to achieve stockholder support in light of the process flaws Plaintiff uncovered.

The elements needed to support awarding Plaintiff's fee and expense request are thus established. ***First***, Plaintiff's claims were meritorious when filed. Plaintiff's initial complaint alleged that Comstock, C&J's Chairman and CEO, and the rest of the C&J board of directors ("Board") breached their fiduciary duties by selling the Company to Nabors through a corrupted and incompetent sales process.[3] Over Defendants' vigorous objections, Plaintiff fought for and obtained the right to expedited discovery in an attempt to enjoin the Merger. Through those efforts, Plaintiff and its counsel learned of Comstock's manipulation of the sales process for his own benefit, including Comstock's: (1) negotiating a $2.925 billion deal without proper Board authorization; (2) changing the valuation methodology

[3] The transaction was structured as a merger of C&J with Nabors division NCPS ("Merger"), creating C&J Energy Services, Ltd. ("New C&J"). Today New C&J is in bankruptcy. It filed its petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, on July 20, 2016 in the Bankruptcy Court for the Southern District of Texas, Houston Division, jointly administered as Case No. 16-33590 (DRJ).

of NCPS to back into a deal price; (3) instructing C&J management's advisor Deloitte LLP ("Deloitte") to stop its financial and accounting due diligence after Deloitte reported negative news about NCPS's declining performance and Comstock discovered that Nabors engaged in "creative accounting" to support a higher deal price; (4) secretly signaling to Nabors that Comstock would "stretch" the multiple to 6.5x to compensate for Nabors' declining EBITDA forecasts; and (5) conditioning the Merger on Comstock receiving an employment agreement with a $19.1 million transaction bonus and severance payments of up to $220 million. Plaintiff also learned that the Board treated the Merger as a mere asset acquisition and did not appreciate that the proposed transaction was actually a sale of voting control of C&J to Nabors.

Second, Defendants cannot carry ***their burden*** to disprove that Plaintiff's effort played a causal role in the $250 million benefit. Following limited expedited discovery, Plaintiff moved to enjoin the deal. Vice Chancellor Noble granted Plaintiff's motion and ordered C&J to solicit alternative proposals for the Company in a process run by directors not promised future employment with New C&J. Although the Delaware Supreme Court reversed the injunction itself, it stated that Plaintiff had raised "colorable" loyalty claims as of that point. C&J and its Board were thus forced to confront Plaintiff's public exposure of the flawed sales process, the threat of incurring personal liability, and the elevated risk that investors would reject the deal.

As a result, the Merger was revised to reduce C&J's cash payment to Nabors by $250 million (to approximately $688 million).[4] This substantial monetary benefit conferred upon C&J and its stockholders, including Comstock, drew the attention of leading proxy advisory firms, who noted the deficiencies in the sales process but specifically relied on the $250 million payment reduction (as well as the purported absence of any competing bidders despite the previously-ordered solicitation process) in recommending that investors approve the Merger. Following those recommendations, investors approved the Merger.

Third, Plaintiff's counsels' efforts easily support the requested fee award. Plaintiff and its counsel aggressively prosecuted this action, obtaining injunctive relief and using the threat of personal liability to achieve the $250 million benefit for C&J and its stockholders. There is no doubt that much has happened since the $250 million cash reduction. Of course, Plaintiff learned that besides all the process flaws until that moment, Defendants had also concealed a premium and credible takeover proposal from private equity firm Cerberus. Despite the Delaware Supreme Court's ruling that Cerberus's takeover bid was immaterial,

[4] Additionally, Nabors was required to deliver certain financial information to C&J before the close of business on March 3, 2015.

Plaintiff's efforts still warrant a fee award related to the $250 million benefit. As this Court said when considering a dispute regarding the $650,000 bond that Plaintiff's counsel were required to post, "[t]he issue in my judgment about whether or not you somehow conferred a benefit in connection with [the injunction] is for another day. And, you know, you can reserve all the rights you want to . . . take credit for that benefit and, you know, where that flows . . ." Hr'g Tr. (July 14, 2015) at 92:11-16.

Against that backdrop, the $5 million that Plaintiff seeks as fee and expense reimbursement for counsel's efforts that achieved this massive cash reduction represents just 2% of the total benefit bestowed upon C&J and its stockholders, and just 18% of the benefit attributable to Comstock's personal equity stake. Plaintiff's Motion should be granted.

II. FACTUAL BACKGROUND

A. COMSTOCK'S DISLOYALTY INFECTS THE SALES PROCESS

Plaintiff's litigation efforts uncovered the following facts.

Before the Merger, C&J was a successful growing oilfield services provider led by its founder, chairman and CEO Joshua Comstock. Comstock sought out potential acquisition opportunities, provided those deals would ensure that he continued to run the Company as Chairman of the Board and CEO. In January 2014, bankers at Citigroup Global Markets, Inc. ("Citi") proposed that Comstock cause C&J to acquire Nabors' completion and production services business by merging C&J with a Nabors subsidiary ("NCPS"), with C&J's stockholders retaining 45% of the combined entity's stock and Nabors retaining 55%.

On January 16, 2014, Comstock met with Anthony Petrello, Nabors' Chairman, to discuss Citi's proposal. The deal's core premise was Comstock expanding the size of his company while C&J stockholders sold voting control. Comstock did not tell the Board about these discussions until April 2014.

On March 5, 2014, Nabors informed Comstock that NCPS's EBITDA for 2014 and 2015 would be significantly worse than previously projected. Nabors later reduced NCPS's 2014 EBITDA projection from $463 to $412 million.

On April 3, 2014, Comstock presented the Nabors deal to the board as an acquisition of NCPS, never explaining that the deal would result in giving voting control of C&J to Nabors. Comstock did, however, inform the Board that a majority of its members would join the New C&J board, and that Nabors would guarantee their jobs for the equivalent of two staggered terms. The Board authorized Comstock to send a non-binding proposal to acquire NCPS for up to $2.6 billion. On April 4, 2014, Comstock did so. The offer letter also made clear that Nabors had to ensure the employment terms of C&J's senior management.

Several weeks later, Nabors released weak first quarter results. Without Board permission, Comstock submitted a new proposal valuing NCPS at $2.9

billion. Petrello recognized that Comstock's objective was growing his personal fiefdom and power base and ensuring payoffs for himself and C&J management, rather than getting the best deal for C&J stockholders. On April 30, 2014, Petrello promised Comstock that he was pushing aggressive employment agreements for certain executive officers, including Comstock. Comstock agreed to pay $2.925 billion.

C&J management retained Deloitte to perform due diligence. In mid-June, Deloitte informed Comstock that Nabors may have used "creative accounting" to overstate results. Comstock withheld this information from the Board and instructed Deloitte to cease work.

C&J management viewed the Nabors 2015 EBITDA estimate of $445 million as the "upside case." Management never told C&J's financial advisors this fact, and the banks used this figure as their "base case" for their fairness opinions.

The Board approved the Merger on June 24, 2014. C&J's financial advisors valued the deal at $30.76 per share, compared to C&J's then-current share price of $32.50. Citi also determined that C&J was worth $37.38 per share on a standalone basis.

Shortly before a June 24, 2014 Board meeting, Comstock sent Petrello proposed employment contracts for himself and other C&J executives. Comstock's proposed agreement included a $19.1 million success bonus, $173 million in severance payments, and $220 million in connection with an unapproved change of control transaction. Nabors rejected Comstock's demand. In response, Comstock held the transaction hostage, informing Nabors that he would not sign the deal without guaranteed employment terms for himself and C&J management. Nabors next signed a side letter satisfying Comstock's demands for supersizing of his compensation package. Defendants announced the deal on June 25, 2014.

B. PLAINTIFF'S LITIGATION EDUCATES C&J STOCKHOLDERS ABOUT THE FLAWED DEAL PROCESS

On July 30, 2014, Plaintiff filed its initial complaint seeking damages and injunctive relief for breaches of fiduciary duty. Plaintiff alleged that Defendants breached their fiduciary duties as a result of Comstock favoring his own interests at the expense of Plaintiff and the other C&J public stockholders, deficiencies in the sales process, and agreeing to sell C&J at an unfair price. *See generally*, Verified Class Action Complaint at ¶¶ 63-66, 78-79, 86-87 (July 30, 2014) Trans. ID 55810529.

On November 10, 2015, following expedited discovery, Plaintiff moved for a preliminary injunction. Plaintiff presented the evidence it obtained in discovery regarding Comstock's conflicts of interest and manipulation of the sales process, as well as the Board's failure to understand that the deal they billed as a "stock-for-stock merger" was actually a change of control for C&J stockholders.

The former Vice Chancellor granted Plaintiff's motion, finding that the Board did not meet its *Revlon* duties because it viewed the Nabors deal as an acquisition rather than a change of control. As the Court held at the hearing granting Plaintiff's request for injunctive relief:

> [T]his is the major problem that I have encountered with this case, it is not so clear that the board approached this transaction as a sale. . . . I am satisfied that there is a plausible showing of a likelihood of success on the merits as to a breach of the duty of care, and that goes to the absence of an effort to sell.[5]

On November 25, 2015, the Court ordered C&J "through its directors who have not been designated to be directors of [New C&J] … to solicit alternative proposals" to purchase C&J for a period of 30 days. The trial court also required Plaintiff to post a $650,000 bond.[6]

The injunction order garnered significant media coverage, as did the reversal order.[7]

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[5] Tr. of Prelim. Inj. Hr'g at 9, 12-13 (Nov. 24, 2014)

[6] Order Granting Prelim. Inj. at 1 (Nov. 25, 2014)

[7] *See* Glass, Lewis & Co., *CJES Mar. 20, 2015 Merger Proxy Rept*. at 3 (Mar. 9, 2015) ("Glass Lewis Report") (discussing the rulings by the Court of Chancery and the Delaware Supreme Court) (attached as Ex. A to the Transmittal Affidavit of Mary S. Thomas ("Thomas Aff. Ex.") filed herewith; ISS Proxy Advisory Serv., *C&J Energy Servs., Inc. Proxy Rept.* at 6, 9 (Mar. 7, 2015) ("ISS Report") Thomas Aff. Ex. B; Natural Gas Week, *Delaware Court Puts C&J, Nabors Deal On Hold, Orders C&J Shopped* (Dec. 1, 2014) (discussing injunction) Thomas Aff. Ex. C ; Houston Business Journal, *Houston Energy Company Looks For Other Offers After Ruling In Nabors Deal* (Dec. 1, 2014) (same) Thomas Aff. Ex. D; The Houston Chronicle, *Judge Tells C&J Energy, Nabors To Hold Up On Merger To See If Higher Bids Emerge* (Nov. 26, 2014) (same) Thomas Aff. Ex. E; Houston

The Supreme Court reversed the Court's order on December 19, 2015. Despite stating the reasons why Delaware law would not permit the mandatory injunction issued below, the Supreme Court also detailed the numerous flaws in the process, and specifically described Plaintiffs loyalty claims as "colorable." *C&J*, 107 A.3d at 1073.

C. NABORS RESTRUCTURES THE DEAL TO GAIN INVESTOR SUPPORT

In the wake of the injunction and the serious deficiencies in the sales process and price uncovered by Plaintiff's efforts, Nabors, C&J and the Board realized that they could not achieve sufficient stockholder approval for the deal. Indeed, even without knowing that Cerberus had made a credible alternative takeover proposal at a premium to the then-current Nabors deal value, stockholders did not support the deal.

Nabors made a huge concession in the hope of securing the necessary investor support for the Merger. On February 9, 2015, just days before submitting its proxy materials and beginning its stockholder solicitation process, C&J announced that it reached agreement with Nabors to reduce by $250 million the cash portion of the consideration to be paid by C&J to Nabors upon closing the

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Business Journal, *Court Overturns Ruling, Allows $2B Energy Merger to Move Forward* (Dec. 19, 2014) (discussing reversal of injunction) Thomas Aff. Ex. F.

transaction.[8] The cash portion of the consideration declined from $938 million to $688 million and the debt incurred by the combined company to finance the cash consideration was proportionately reduced.[9] Comstock explained this substantial benefit and savings as follows:

> By reducing C&J's cash obligation by $250 million and therefore the required debt financing, our combined company will have more liquidity, lower leverage and a stronger balance sheet, which are critical, especially during a challenging time for our industry.[10]

This 27% reduction in C&J's required cash payment drew the attention of two leading proxy advisory firms – Glass Lewis & Co. ("Glass Lewis") and Institutional Shareholder Services, Inc. ("ISS"). Many institutional investors base their voting decisions on Glass Lewis's and ISS's recommendations.[11]

Notably, in their recommendations, both Glass Lewis and ISS expressed their concerns regarding the integrity of the C&J Board's sales process and

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[8] C&J Energy Servs., Inc. (Form 8-K) (Feb. 9, 2015).
[9] *Id*.
[10] *Id*. at Ex. 99.1.
[11] *See, e.g.*, *Examining the Market Power and Impact of Proxy Advisory Firms: Hearing Before the H. Comm. on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises*, 113 Cong. 1-3 (2013) (statement of Hon. Scott Garrett, United States Congressman and chairman of the Subcommittee) (available at http://financialservices.house.gov/uploadedfiles/113-27.pdf) ("many institutional investors and investment advisory firms have come to rely exclusively on proxy advisory firms to help them determine how to vote their clients' shares on literally thousands of proxy questions companies pose each and every year"; "Two firms in particular []−Institutional Shareholder Services (ISS), and Glass, Lewis & Company−account for around 97 percent of the proxy advisory industry.").

conflicts of interest which compromised the Board's ability to secure the maximum price for C&J. Both proxy advisory firms believed that the sales process had not been adequately designed to secure the best transaction reasonably available.[12] ISS stated in its report:

> Despite the fact that it was overturned by the Delaware Supreme Court, the Chancery Court decision ***raised concerns that the C&J board's efforts to obtain the best deal for C&J shareholders were less than robust*** . . . .[T]he C&J management team appears to have taken great care in securing its own interests, as evidenced by management's request for "greater assurance" regarding employment agreements prior to agreeing to the merger with Nabors.[13]

Glass Lewis similarly noted that:

> We generally believe that shareholders are best served by an open sale process designed to solicit bids from all interested parties. Here, we see that the proposed transaction follows a closed sale process through which C&J does not appear to have solicited or engaged any alternative parties regarding a potential transaction prior to entering into a definitive merger agreement with Nabors. ***As such, we are concerned that the board has not conducted an adequate pre-signing check of the market in an effort to confirm that the proposed transaction likely represents the most favorable offer reasonably available to shareholders at the present time***.[14]

Despite their concerns, Glass Lewis and ISS each recommended that stockholders vote in favor of the proposed transaction, based in large part on the $250 million reduction in the required cash payment to Nabors. ISS stated:

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[12] *See* Thomas Aff. Ex. A (Glass Lewis Report) at 3, 5; Thomas Aff. Ex. B (ISS Report) at 6, 9.
[13] Thomas Aff. Ex. B (ISS Report) at 9 (emphasis added).
[14] Thomas Aff. Ex. A (Glass Lewis Report) at 3 (emphasis added).

> The proposed transaction also became materially more appealing when the board negotiated a 27 percent reduction to the cash portion of the consideration post-announcement (even though, at $688 million, the current cash portion is almost equal to C&J's market capitalization of $707 million on March 6, 2015). If this was a transformational transaction at announcement, it is all the more significant now – but also a little less risky, at least from a balance sheet perspective, due to the reduction in cash compensation.[15]

Following the lukewarm recommendations of these proxy advisory firms, stockholders approved the transaction. The deal closed on March 24, 2015.

III. ARGUMENT

A. PLANTIFF'S COUNSEL IS ENTITLED TO ATTORNEYS' FEES

Under Delaware law, stockholder plaintiffs are entitled to recover attorneys' fees and expenses incurred when their action has conferred a benefit on the corporation or stockholder class.[16] The award of attorneys' fees under the "common" or "corporate benefit" doctrine "is founded on the equitable principle

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[15] Thomas Aff. Ex. B (ISS Report) at 10. *See* also Thomas Aff. Ex. A (Glass Lewis Report) at 3 (discussing the $250 million cash consideration reduction). Notably, the only other meaningful justification for the deal that the proxy advisors identified was the absence of any competing takeover proposals, despite the previously ordered sales process. *See* Thomas Aff. Ex. A (Glass Lewis Report) at 3; Thomas Aff. Ex.B (ISS Report) at 6. We now know that Cerberus in fact made such a proposal, which Defendants concealed. Although they prevailed in arguing that this concealment was immaterial under Delaware law, Defendants must now be estopped from saying that the absence of a competing bid was the driver in achieving stockholder approval.

[16] *Cal-Maine Foods, Inc. v. Pyles*, 858 A.2d 927, 929 (Del. 2004) (discussing '"common corporate benefit' doctrine"); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997) (same).

that those who have profited from litigation should share its costs."[17] Where litigation has conferred a benefit on a corporation or class of stockholders, "the plaintiff shareholder will be compensated for the beneficial results thus produced even in the absence of a favorable adjudication."[18] A plaintiff's entitlement to an award of attorneys' fees under the common or corporate benefit doctrine includes monetary benefits[19] and any non-monetary benefits obtained during the injunction phase of the litigation.[20] Importantly, the underpinnings of the common benefit doctrine provide that Plaintiff can collect fees against the corpus of all stockholders who benefitted from Plaintiff's efforts, here necessarily including Comstock, who owned 11.02% of C&J's pre-deal equity. *See infra* at 25-26.

To be entitled to an award of fees under the corporate benefit doctrine, an applicant must show that: (1) the action was meritorious when filed; (2) the

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[17] *Chen v. Howard-Anderson*, 2017 WL 2842185, at *1 (Del. Ch. June 30, 2017) (quoting *Goodrich v. E.F. Hutton Gp., Inc.*, 681, A.2d 1039, 1044 (Del. 1996)).

[18] *Roizen v. Multivest, Inc.*, 1982 WL 17841, at *3 (Del. Ch. Dec. 29, 1982); *see also Chrysler Corp.v. Dann*, 223 A.2d 384, 386 (Del. 1966) ("it is not an absolute necessity that monetary benefit be conferred upon the class as a whole provided the litigation, even though unsuccessful, has specifically and substantially benefitted the class").

[19] *Cal-Maine Foods*, 858 A.2d at 928-29; *United Vanguard Fund*, 693 A.2d at 1079.

[20] *In re Moneygram Int'l, Inc. S'holder Litig.*, 2013 WL 68603, at *1 (Del. Ch. Jan. 7, 2013) (fees awarded where "in response to the injunction application, the agreement governing the recapitalization was amended to provide for a non-waivable and properly structured majority-of-the minority voting condition . . . [and] defendants issued a sixteen page disclosure supplement containing a significant amount of material information").

litigation confers some benefit on the corporation or the stockholders; and (3) there is a causal connection between the litigation and the benefits conferred.[21] The Court is not required to find the causal connection with "mathematical exactitude."[22] Rather, the Court "need only conclude . . . that the [action] was, at least in part, precipitated by this lawsuit."[23] Moreover, "[o]nce it is determined that action benefitting the corporation chronologically followed the filing of a meritorious suit, the burden is upon the corporation to demonstrate 'that the lawsuit did not in any way cause their action.'"[24] As shown below, Plaintiff meets all the requirements for an award of attorney's fees.

1. Plaintiff's Action Was Meritorious When Filed

In assessing whether a lawsuit was meritorious when filed, the Court examines whether the plaintiff "possessed knowledge of provable facts which held out some reasonable likelihood of ultimate success."[25] There need not be an

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[21] *Chen*, 2017 WL 2842185, at *1; *United Vanguard Fund*, 693 A.2d at 1079*; Cal-Maine*, 858 A.2d at 929; *Chrysler Corp.*, 223 A.2d at 387.

[22] *La. State Emp's. Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *6 (Del. Ch. Sept. 19, 2001).

[23] *Id.*

[24] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989) (quoting *Allied Artists Picture Corp. v. Baron,* 413 A.2d 876, 880 (Del. 1980)); *see also La. State Emp's. Ret. Sys.*, 2001 WL 1131364, at *5 ("The defendants bear the burden to demonstrate that *no* causal connection existed between the initiation of the lawsuit and any later benefit to the shareholders.") (emphasis in original).

[25] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 851 (Del. Ch. 1998); *see also Chrysler Corp.*, 223 A.2d at 387.

absolute assurance of ultimate success, but only "some reasonable hope."[26] Whether a lawsuit is meritorious "is properly determined as of the commencement of the lawsuit and not by developments thereafter."[27]

Here, Plaintiff stated meritorious claims as measured at the time the original complaint was filed. In granting Plaintiff's motion for preliminary injunction, the Court necessarily found that there was more than "some reasonable hope" of Plaintiff prevailing – the Court found a probability of success on the merits.[28] Neither the later reversal of the preliminary injunction nor the later dismissal of Plaintiff's second amended complaint undermines the merits of the original complaint as measured at the time of its filing (and as of the grant of the preliminary injunction and the $250 million cash payment reduction).[29]

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[26] *Id.*

[27] *Allied Artists Pictures Corp.,* 413 A.2d 876, 879 (Del. 1980(.

[28] Order Granting Prelim. Inj. (Nov. 25, 2014); Tr. of Prelim. Inj. Hr'g at 8 (Nov. 24, 2014) ("In order to earn a preliminary injunction, the plaintiff must demonstrate a reasonable probability of success on the merits."); *see also In re Netsmart Techs., Inc. v. S'holders Litig.,* 924 A.2d 171, 191-92 (Del. Ch. 2007) (injunctive relief requires finding that plaintiff has a reasonable probability of success on the merits of its claims).

[29] *See Tandycrafts*, 562 A.2d at 1164 (awarding attorneys' fees in suit to enjoin annual meeting where "[i]njunctive relief was . . . denied and the annual meeting ensued as scheduled", finding that the "correction of the proxy material conferred a clear benefit to all shareholders expected to vote at the pending meeting"); *Allied Artist Pictures*, 413 A.2d at 879 ("the fact that here the plaintiff lost in the summary judgment proceeding does not prevent an award as a legal matter on the basis of a lack of merit. . . . [T]he meritorious determination should be made with reference to the state of the action at the time of filing.").

2. The Litigation Conferred A $250 Million Benefit Upon C&J And Its Stockholders

After Plaintiff uncovered facts the Delaware Supreme Court described as raising "colorable" questions about loyalty, Defendants faced the prospect of ongoing litigation and personal liability, as well as the possibility that the Merger would not occur or be substantially delayed. Defendants understood that investors might not support the Merger when taking into account the deficiencies in the negotiations and sales process detailed in Plaintiff's briefing to the Court.

Defendants saw one clear road to addressing Plaintiff's claims about deficiencies in the sales process and unfair price, garnering investor support and consummating the Merger – Defendants restructured the deal to substantially lower C&J's required payment to Nabors, reducing C&J's cash payment by $250 million (to approximately $688 million).[30] As Comstock explained, this substantial reduction in the debt financing provided New C&J with "more liquidity, lower leverage and a stronger balance sheet …."[31]

3. The Benefits Are Causally Related To This Litigation

Where, as here, the benefits conferred chronologically follow the filing of the lawsuit, the corporation "has the burden to show that 'no causal connection existed between the initiation of the suit and any later benefit to the

[30] C&J Energy Servs., Inc. (Form 8-K) (Feb. 9, 2015).
[31] *Id*. at Ex. 99.1.

stockholders.'"[32] In other words, C&J "must demonstrate that the . . . suit 'did not in any way cause [C&J's] action[s].'"[33]

Defendants cannot show that the litigation had no causal role whatsoever in creating the $250 million monetary benefit conferred on C&J stockholders. While there is no scientific method to quantify the causal effect of Plaintiff's counsel's efforts, the circumstances support finding that those efforts had a role in obtaining the $250 million reduction in C&J's required payment to Nabors.

Absent this litigation and Plaintiff obtaining injunctive relief, C&J's required payment would not have been reduced and investors may have voted against the Merger. Indeed, this $250 million reduction in C&J's payment drew the attention of leading proxy advisory firms who were analyzing the proposed Merger. Glass Lewis and ISS each cited serious concerns over the integrity of the sales process and the conflicts of interest which compromised the Board's ability to secure the maximum price for C&J. However, Glass Lewis and ISS found that their concerns were counter-balanced by the $250 million reduction in C&J's

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[32] *Cal-Maine*, 858 A.2d at 929 (quoting *Allied Artists Pictures*, 413 A.2d at 880).
[33] *Id. See also Tandycrafts*, 562 A.2d at 1167 ("It was thus incumbent upon Tandycrafts to demonstrate that there was no causal connection between the suit and the subsequent action."); *accord United Vanguard Fund*, 727 A.2d at 850, 852 ("Delaware law entitles the plaintiffs to a presumption that a causal connection existed between the initiation of litigation and a benefit later conferred on the corporation in a situation where actions taken by the defendant after the filing of the complaint render asserted claims moot. . . . I find that the defendants have failed . . . to establish the complete absence of any causal relationship between the litigation and their actions rendering moot the plaintiffs' claims.").

required payment, and the proxy firms specifically cited and relied on this payment reduction in recommending that investors vote in favor of the Merger.[34] Accordingly, not only did the litigation confer a substantial monetary benefit on C&J and its stockholders – the litigation also precipitated a revision to the Merger which drew sufficient investor support for the Merger to be approved.

Under these circumstances, Defendants cannot rebut the presumption that the $250 million benefit obtained here was causally related to this litigation.

B. THE $250 MILLION BENEFIT IS AKIN TO A COMMON FUND WHICH WOULD SUPPORT A FAR HIGHER AWARD

In cases where litigation results in a monetary benefit, the Court typically applies a percentage of that benefit in determining the appropriate amount of fees to award. As explained in *Julian v. Eastern States Constr. Services, Inc.*

> When the benefit [achieved in the litigation] is quantifiable, such as where the plaintiff's litigation secured a significant financial benefit for the corporation 'that they probably could not have achieved otherwise,' courts typically apply a 'percentage of the benefit' approach.[35]

[34] *See* Thomas Aff. Ex. A (Glass Lewis Report), at 3; Thomas Aff. Ex. B (ISS Report), at 10.

[35] 2009 WL 154432, at *2 (Del. Ch. Jan. 14, 2009) (quoting *Franklin Balance Sheet, Inv. Fund v. Crowley,* 2007 WL 2495018, at *8, 10 (Del. Ch. Aug. 30, 2007)).

The $250 million reduction in C&J's cash payment is a monetary benefit that is akin to a common fund.[36] In instances where a plaintiff has litigated the case through expedited discovery and a Supreme Court appeal, even if the case had not been litigated one step further, a fee award of 15-25% of the cash benefit would be readily supported by precedent.[37]

The requested award of $5 million in fees and expenses represents just 2% of the $250 million benefit. Plaintiff seeks this modest amount because it recognizes that it cannot divorce the subsequent proceedings entirely, and because an award of $5 million (which includes significant expenses and takes into account

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[36] *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1250-53 (Del. 2012) (awarding attorneys' fees following creation of a common fund which resulted from ruling that defendants overpaid in an acquisition and that acquired entity must reduce the purchase price by returning to acquirer "such number of its shares as are necessary" to remedy to overpayment).

[37] *See, e.g., Gatz v. Ponsoldt*, 2009 WL 1743760, at *3 (Del. Ch. June 12, 2009) (awarding 33% and finding that it was "within the range of reasonable fee awards in other class action cases"); *In re TD Banknorth S'holders Litig.*, C.A. No. 2557-VCL, at 12-14 (Del. Ch. June 25, 2009) (ORDER) (awarding 27.5% of the $50 million settlement fund, plus nearly $1 million in expenses for pre-trial settlement); *In re ACS S'holders Litig.,* Cons. C.A. No. 4940-VCP (Del. Ch. Aug. 24, 2010) (ORDER) and Stip. of Settlement at 16 (Del. Ch. May 19, 2010) (awarding 25% plus expenses out of $69 million settlement fund); *In re Chaparral Resources, Inc. S'holders Litig.,* Cons. C.A. No. 2001-VCL (Del. Ch. Mar. 13, 2008) (ORDER) (awarding attorneys' fees of $12,250,000, or 33% of $36,780,554 settlement, and expenses of $1,089,298.10); *Del Monte,* Tr. at 57 (awarding $23.3 million in aggregate fees and expenses, and observing that the amount "represents approximately 25 percent of the $89.4 million consideration, which is an appropriate percentage.")

the $650,000 bond that Plaintiff's counsel posted) should be seen as a modest and easily approved recovery under the circumstances.

C. THE TIME PLAINTIFF'S COUNSEL INVESTED IN THE MATTER FULLY SUPPORTS AN AWARD OF $5 MILLION

The time and effort of counsel serves as a "backstop check" on the reasonableness of a fee award.[38] This factor has two separate components – time and effort – with effort being the more important factor.[39]

From commencement until February 9, 2015, Plaintiff's counsel here expended 6,524.55 hours in the prosecution of this action. *See* Thomas Aff. Ex. G (Affidavit of Mary S. Thomas) at ¶ 4; and Thomas Aff. Ex. H (Affidavit of Mark Lebovitch) at ¶ 3. The services provided by Plaintiff's counsel included: investigating the relevant facts, drafting detailed complaints, engaging in expedited discovery (including reviewing thousands of documents, taking several depositions and working with an expert), researching applicable law, drafting briefs, and presenting argument in this Court and the Delaware Supreme Court.[40]

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[38] *Franklin Balance Sheet, Inv. Fund v. Crowley*, 2007 WL 2495018, at *14 (Del. Ch. Aug. 30, 2007); *see also In re Del Monte Foods S'holders Litig.*, 2011 WL 2535256, at *12 (Del. Ch. June 27, 2011) (time and effort serves as a "cross-check").

[39] *Del Monte*, 2011 WL 2535256, at *12-13.

[40] Plaintiff expended significant time, effort and expense after the Merger closed, but those items are not part of this fee application.

As explained in *Del Monte*, more important than the hours is "what plaintiffs' counsel actually did." In this case, "the answer is 'quite a bit!'"[41] Counsel respectfully submit that the services they rendered were of a high quality – indeed so high that a member of this Court believed the record sufficient to meet the burden to obtain a preliminary injunction. In all events, the services rendered were of a quality that could have been provided only by lawyers who are well-qualified and highly experienced in prosecuting stockholders litigation, particularly given the frenetic schedule of the pre-closing phase of this litigation.

Plaintiff's counsel also expended their time efficiently. As reflected in the affidavits of counsel, they invested substantial time and expenses to prosecute this action, and the requested fees and costs are reasonable when viewed in comparison to counsel's total hours and expenses. At Plaintiff's counsel's current hourly billing rates, the "lodestar" value of their time from the inception of the case through February 9, 2015 is $3,248,752.75. *See* Ex. G, Thomas Aff. at ¶ 4; Ex. H, Lebovitch Aff. at ¶ 3.

The requested $5 million in attorneys' fees (inclusive of expenses) represents an hourly rate of $497.93 (lower when considering that counsel's costs

[41] 2011 WL 2535256, at *13.

are included in their total $5 million request). The $497.93 hourly rate is well below the implied hourly fee awards in other cases.[42]

Additionally, the $5 million fee, when compared to Plaintiff's lodestar of $3,248,752.75, represents just over a 1.54 times multiplier. This is well below the lodestar multiplier of fees awarded by the Court of Chancery in many cases.[43]

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[42] *See, e.g., In re GSI Commerce, Inc. S'holder Litig.,* C.A. No. 6346-VCN at 20-25 (Del. Ch. Nov. 15, 2011) (TRANSCRIPT) (finding case was "vigorously litigated" and awarding fee which amounted to approximately $1900 per hour); *Berger v. Pubco Corp.,* 2010 WL 2573881, at *1 (Del. Ch. June 23, 2010) (awarding fee which translated to an average hourly rate of $3,450, which "is nestled within the range of hourly rates found among Court of Chancery monetary-benefit cases" and noting the benefit was realized "only at the conclusion of lengthy and thorough litigation by counsel"); *In re Genentech, Inc. S'holder Litig.,* C.A. No. 3911-VCS at 8 (Del. Ch. July 9, 2009) (TRANSCRIPT) (awarding fee of over $5,400 per hour); *Seinfeld v. Coker*, 847 A.2d 330, 339 (Del. Ch. 2000) (finding "counsel performed at the highest professional level" and awarding in excess of $2,600 per hour*). See also La. Municipal Police Employees' Ret. Syst. v. Crawford*, C.A. No. 2635-CC (Del. Ch. June 8, 2007) (ORDER) (approving $20 million attorneys' fee award, equating to lodestar multiplier of approximately 6.5 and implied hourly rate of approximately $2,783.22); *Franklin Balance Sheet*, 2007 WL 2495018, at *14 (awarding fee with implied hourly rate of $4,023); *Loventhal v. Silverman*, C.A. No. 306-N (Del. Ch. Aug. 19, 2004) (ORDER) (awarding fee and expenses implying approximately $2,400 per hour); *In re AXA Fin. Inc. S'holders Litig.*, 2002 WL 1283674, at *7 (Del Ch. May 22, 2002) (fee award represented implied hourly rate of more than $2,630); *In re NCS Healthcare S'holders Litig.,* 2003 WL 21384633, at *3 (Del. Ch. May 28, 2003) (fee represented hourly rate of approximately $3,030 per hour); *Dagron v. Perelman,* C.A. No. 15101-CC, at 49, 51 (Del Ch. Aug. 29, 1997) (TRANSCRIPT) (awarding fee equivalent of $3,500 per hour).

[43] *See, e.g., In re Genentech*, at 7, 42, 48, (TRANSCRIPT) (awarding a fee where "the multiple of the lodestar is something like 11.3" following "hard fought litigation" and "in light of the difficulty of the issues"); *La. Mun. Police Employees' Ret. Sys. v. Crawford*, C.A. No. 2635-CC (Del. Ch. June 8, 2007) (ORDER) (commenting on the "vigorous discovery" and the "great deal of effort"

D. THE CONTINGENT NATURE OF THE FEE AND STANDING OF PLAINTIFF'S COUNSEL SUPPORT THE FEE REQUEST

Plaintiff's counsel undertook this representation on a contingency basis, with the understanding that they would devote many hours of hard work to the prosecution of this litigation without any assurance of receiving compensation for their services, or even reimbursement of out-of-pocket expenses. Additionally, due to the high burden (and rare occurrence) of enjoining the Merger, Plaintiffs' counsel faced a very real risk that they would not obtain any relief and could not recover anything.[44] Delaware courts recognize that where, as here, counsel's compensation is contingent on achieving a successful result, a premium over counsel's hourly rate is appropriate.[45] Indeed, in this very case, Plaintiff's counsel took immense risks and are entitled to fair compensation for their efforts and

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put into the case by plaintiff's counsel and awarding a lodestar multiplier of 6.5); *In re Digex, Inc. S'holder Litig.*, C.A. No. 18336, at 141-47 (TRANSCRIPT) (Del. Ch. Apr. 6, 2001) (noting that the "case involved complex legal questions and required acute legal skills" and awarding a fee representing a lodestar multiplier of 9).

[44] *See, e.g., Del Monte*, 2011 WL 2535256, at *13 (contingency risk plaintiffs' counsel undertook in refusing the "relatively safe course of settling routinely for disclosures" constituted the "assumption of *bona fide* contingency risk" and "supports an award at the higher end of the range'); *In re Emerson Radio S'holder Deriv. Litig.*, 2011 WL 1135006, at *6 (Del. Ch. Mar. 28, 2011) ("plaintiffs' counsel here did not get into the case with an obvious and well-marked exit in sight. The defendants litigated vigorously, had strong defenses, and could have forced the plaintiffs to go the distance. Accordingly, in undertaking this representation, plaintiffs' counsel incurred true contingent fee risk.").

[45] *See Chrysler Corp.v. Dann*, 223 A.2d 384, 389 (Del. 1966) (affirming award of attorneys' fees in part "in consideration of the contingent nature of the litigation").

achievements on behalf of C&J stockholders, for whom counsel fought to the very end (absorbing the bitter and costly loss from the Supreme Court's ultimate March 23, 2017 summary affirmance of the dismissal of this Action).[46]

Plaintiffs' counsel are known to this Court and are experienced in representing stockholders in transactional and corporate governance litigation. The fees sought reflect their standing, experience and the benefits they delivered to the Class. Plaintiffs' counsel had to, and did, employ their full set of skills in hard-fought litigation against a formidable team of defense lawyers, including some of the preeminent corporate representatives in the world.

E. COMSTOCK'S ESTATE SHOULD BE JOINTLY LIABLE FOR FEES

As explained above, this litigation conferred substantial benefits on C&J and its stockholders, by obtaining a $250 million reduction in C&J's payment and thereby garnering the institutional investor support necessary for the Merger to be approved. *See supra* at 13-15. At the time of the Merger, Comstock was one of

[46] Plaintiff respectfully submits that it would be harmful precedent and create a poor incentive to deny a fee award that was earned as of February 2015 based on the dismissal of the action about two years later, as that would pressure stockholders' counsel to drop cases once any benefit is achieved rather than continue to litigate colorable claims, for fear that a later loss would eliminate the chance to be compensated for previously achieved benefits.

the top shareholders of the Company, having beneficial ownership of 6,099,110 shares.[47] Thus, Comstock was one of the primary beneficiaries of this litigation.

At the close of the Merger, there were 55,343,483 outstanding shares of C&J, of which Comstock owned 11.02%. The $250 million payment reduction constituted a benefit of $4.52 per share ($250 million divided by 55,343,483). Therefore, Comstock reaped a monetary benefit of $27,567,977 as a result of this litigation.[48]

Having Comstock satisfy any award of attorneys' fees comports with the "common fund" theory of fee shifting, which has at its core the basic principle that the recipient of the benefit should pay counsel for the benefit.[49] Courts have held that where the benefit inures to a class of stockholders in general, fees may be paid "from the corporate treasury as a convenient substitute for payment by the stockholders themselves, the assets of the corporation being a fund belonging to the stockholders in common."[50] Here, to the extent Defendants use C&J's later bankruptcy to disclaim this "convenient substitute," any awarded fees can, and

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[47] *See* C&J Energy Servs., Inc. at 230 (Form S-4/A) (Feb. 12, 2015) and C&J Energy Servs., Inc. (Form 4) (Mar. 26, 2015).
[48] $4.52 x 6,099,110 = $27,567,977.
[49] *See In re Dunkin' Donuts S'holders Litig.,* 1990 WL 189120, at * 3-4 (Del. Ch. Nov. 27, 1990) (discussing common fund and corporate benefit doctrines and stating that "the underlying premise of both doctrines [is] that those benefited should compensate whoever causes the benefit").
[50] *In re First Interstate Bancorp Consol. S'holders Litig.,* 756 A.2d 353, 360 (Del. Ch. 1999) (internal quotation and citation omitted).

should, be paid by Comstock, the stockholder who benefited the most from this litigation, under the principle of unjust enrichment.[51]

As explained in *First Interstate* "fee shifting is an equitable device . . . not properly or easily confined to rigid, predictable circumstances."[52] In that case, the Court required the post-merger corporation to pay the attorneys' fees because "it [was] more fair to require [that surviving corporation] to pay a fee to plaintiffs' counsel than to deny them any fee at all" and because "no other source of payment [was] available."[53] Here, it is "more fair" to require Defendants generally, including Comstock's estate, to pay any awarded attorneys' fees than to deny Plaintiff and its counsel any fee at all. Accordingly, to the extent the other Defendants disclaim responsibility, Comstock's estate should be ordered to satisfy any attorney fee award.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that Plaintiff's counsel be awarded fees and costs of $5 million.

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[51] Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Fleer v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988); *see also Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 585 (Del. Ch. 1998). Allowing Comstock, the key player in the improper merger negotiations and breaches of fiduciary duty, to retain (or his estate to retain) the benefits of Plaintiff's efforts, certainly would be inequitable.

[52] 956 A.2d at 362.

[53] *Id*.

Dated: July 19, 2017

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CERTIFICATE OF SERVICE

I, Mary S. Thomas, hereby certify that, on July 19, 2017, I caused a copy of *Plaintiff's Brief in Support of its Motion for an Award of Attorneys' Fees* to be filed and served to all counsel below via File and Serve*Xpress*:

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