IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL SCULLY, On Behalf of himself and All Others Similarly Situated, Plaintiff, v. NIGHTHAWK RADIOLOGY HOLDINGS, INC., DAVID ENGERT, PETER Y. CHUNG, DAVID J. BROPHY, CHARLES R. BLAND, JEFF TERRILL, VIRTUAL RADIOLOGIC CORPORATION, and EAGLE MERGER SUB CORPORATION, Defendants.	)	C.A. No. 5890-VCL

OPPOSITION OF VIRTUAL RADIOLOGIC CORPORATION AND EAGLE MERGER SUB CORPORATION TO PLAINTIFF'S MOTION FOR EXPEDITED PROCEEDINGS

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Dated: October 19, 2010

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Defendants Virtual Radiologic Corporation and Eagle Merger Sub Corporation (together, "Virtual Radiologic") respectfully submit this memorandum of law in opposition to Plaintiff's Motion For Expedited Proceedings (the "Motion to Expedite").

INTRODUCTION

On September 27, 2010, the five-member NightHawk Radiology Holdings, Inc. ("NightHawk" or the "Company") board of directors, including its four non-management members, unanimously approved the acquisition of NightHawk by Virtual Radiologic in a cash transaction valued at approximately $170 million (the "Proposed Transaction"). Upon consummation of the Proposed Transaction, which is subject to stockholder approval (no vote has yet been scheduled), NightHawk stockholders will receive $6.50 per common share, which represents a *100% premium* over NightHawk's closing share price on September 24, 2010 (the last trading day prior to September 27, 2010), a *122% premium* over NightHawk's average share price for the 30 calendar days prior to September 27, 2010, and a *132% premium* over NightHawk's average share price for the 90 calendar days prior to September 27, 2010.

Notwithstanding the substantial premium to be realized by NightHawk's stockholders if the Proposed Transaction is consummated, on October 8, 2010, Plaintiff filed a Verified Class Action Complaint (the "Complaint") in this Court seeking to enjoin the Proposed Transaction. The Complaint alleges that the members of NightHawk's Board breached their fiduciary duties to NightHawk's stockholders by agreeing to sell the Company for inadequate consideration and pursuant to an unfair process (including through allegedly insufficient disclosures in a Preliminary Proxy on Schedule 14A (the

"Preliminary Proxy")) (Exhibit A hereto), filed with the U.S. Securities and Exchange Commission (the "SEC") on October 7, 2010), and that Virtual Radiologic aided and abetted such breaches.

As discussed in greater detail below, however, Plaintiff's Complaint fails to state a colorable claim, nor does it demonstrate a sufficient possibility of imminent irreparable injury justifying expedition. Specifically, the Complaint: (i) is entirely and impermissibly conclusory and does not identify a single fact calling into question the disinterestedness or independence of *any* of the NightHawk directors, much less the requisite majority of them;[1] (ii) fails to identify *any* facts suggesting that the NightHawk Board acted outside of a "range of reasonableness" (and, thus, ran afoul of its *Revlon* duties); (iii) fails to set forth a colorable disclosure claim because Plaintiff's alleged disclosure violations are either immaterial, inaccurate or already adequately disclosed; and (iv) fails to identify *any* facts suggesting that Virtual Radiologic was a "knowing participant" in (and, thus, "aided and abetted") the NightHawk Board's alleged breaches of fiduciary duty (even if those breaches were sufficiently stated (which they are not)).

In addition, there are no exigent circumstances justifying the expedited treatment that Plaintiff seeks. The Proposed Transaction includes a 30-day "go-shop" period, which is not set to expire until October 26, 2010 (and, if another bidder emerges, may be

[1] All of NightHawk's directors are stockholders themselves (*see* Preliminary Proxy (Ex. A) at 55) and, thus, share the same interest as the Company's public stockholders in maximizing the value of their shares.

extended for an additional 25 days thereafter). Nor has a special meeting of NightHawk's stockholders even been scheduled.

Simply put, there is no basis for this action to proceed on an expedited basis, and the Motion to Expedite therefore should be denied.

BACKGROUND

On September 28, 2010, one day after the Proposed Transaction was publicly announced, Sanjay Israni, purportedly a NightHawk stockholder, commenced a putative class action in the Superior Court of the State of Arizona, Maricopa County (the "Arizona Court"),[2] against NightHawk, the members of its Board of Directors and Virtual Radiologic, seeking to enjoin the Proposed Transaction and alleging, among other things, that the members of the NightHawk Board breached their fiduciary duties to NightHawk's stockholders by agreeing to sell NightHawk for inadequate and unfair consideration and pursuant to an inadequate and unfair process, and that Virtual Radiologic aided and abetted such breaches. *Israni v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-025059 (Ariz. Sup. Ct.). On October 7, 2010, plaintiff in the *Israni* action moved to expedite discovery, which motion has not yet been set for a hearing.

Between September 28 and October 7, 2010, five additional putative stockholder class actions were commenced in the Arizona Court. *See Lalone v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-028112 (Ariz. Sup. Ct.); *Watts v. Engert, et al.*, Case No. CV2010-028127 (Ariz. Sup. Ct.); *LaTorre v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-028176 (Ariz. Sup. Ct.); *Newman v. Engert, et al.*, Case No. CV2010-028262 (Ariz. Sup. Ct.); and *Yu v. Engert, et al.*, Case

[2] NightHawk is a Delaware corporation headquartered in Arizona. *See* Compl. ¶ 6.

No. CV2010-028403 (Ariz. Sup. Ct.). The *Lalone*, *Watts*, *LaTorre*, *Newman* and *Yu* complaints contain allegations virtually identical to those in the *Israni* action.

On October 8, 2010, Plaintiff filed the Complaint in this Court. The Complaint alleges that the Proposed Transaction resulted from a "fundamentally unfair" process and provides for "unfair and grossly inadequate" consideration. Compl. ¶¶ 3, 43; *see also id.* ¶¶ 38-50 (similar). Plaintiff further alleges that the Preliminary Proxy "fails to provide the Company's shareholders with material information and/or provides them with materially misleading information thereby precluding the shareholders from casting an informed vote regarding the Proposed Transaction." *Id.* ¶ 52. Although the Complaint contains *no* legally sufficient allegations demonstrating that the NightHawk Board was interested, engaged in self-dealing or lacked independence, Plaintiff asserts claims against the NightHawk directors for breach of their fiduciary duties of care, loyalty, candor and good faith to the putative class, and against Virtual Radiologic for aiding and abetting such alleged breaches. *Id.* ¶¶ 55-68. Plaintiff seeks, among other things, an injunction preventing completion of the Proposed Transaction.

Plaintiff filed the instant Motion to Expedite on October 12, 2010, and contemporaneously filed a Motion For Preliminary Injunction.

ARGUMENT

The standard governing Plaintiff's request for expedited proceedings is well-settled. A plaintiff has no automatic right to expedited proceedings merely because he or she alleges that a pending transaction is unfair and seeks a preliminary injunction. As this Court has repeatedly recognized, applications for preliminary injunctive relief

"impos[e] upon [the] defendants and the public . . . extra and sometimes substantial costs." *Sonet v. Plum Creek Timber Co.*, 1998 WL 749445, at *2 (Del. Ch. Sept. 23, 1998). *See also In re 3Com S'holders Litig.*, 2009 WL 5173804, at *1 (Del. Ch. Dec. 18, 2009) ("Before the Court will grant a motion for expedition, plaintiffs must establish 'a sufficiently colorable claim and show[] a sufficient possibility of threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding'") (citation omitted).

Thus, the Court will not grant a motion for expedited proceedings unless the party seeking expedition demonstrates good cause. *See Greenfield v. Caporella*, 1986 WL 13977, at *2 (Del. Ch. Dec. 3, 1986). To make this showing, a plaintiff must: (1) articulate a sufficiently colorable claim and (2) demonstrate a sufficient possibility of imminent irreparable injury to justify imposing on the defendants and the public the additional costs of an expedited proceeding. *See 3Com*, 2009 WL 5173804, at *1; *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994). For the reasons set forth below, Plaintiff has failed to satisfy this burden.

I. PLAINTIFF HAS NOT STATED A COLORABLE CLAIM AGAINST THE NIGHTHAWK BOARD OR VIRTUAL RADIOLOGIC

A. Plaintiff Has Not Adequately Alleged That The NightHawk Board Is Interested Or Lacks Independence

As explained below, Plaintiff's Complaint does not identify a single fact calling into question the disinterestedness or independence of any of the NightHawk directors, much less the requisite majority of them. Plaintiff, therefore, has failed to overcome the

presumption of the business judgment rule, whereby the decision of a disinterested and independent board of directors, acting in good faith, is to be respected and not second-guessed by the courts.

"A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Id.* at 812; *see also Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (noting that the business judgment rule is "a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be 'attributed to any rational business purpose'"), *modified on reargument in part*, 636 A.2d 956 (Del. 1994) (citation omitted); *In re CompuCom Sys., Inc. Stockholders Litig.*, 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005) (where the business judgment rule applies, the board's judgment "'will be respected by the courts'") (quoting *Aronson*, 473 A.2d at 812). "Under the business judgment rule, the burden of pleading and proof is on the party challenging the decision to allege facts to rebut the presumption." *Solomon v. Armstrong*, 747 A.2d 1098, 1111-12 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000).

Thus, "[i]n the context of a merger, a breach of fiduciary duty analysis begins with the rebuttable presumption that a board of directors acted with loyalty and due care.

Unless this presumption is sufficiently rebutted, [the Court] must defer to the discretion of the board and acknowledge that their decisions are entitled to the protection of the business judgment rule." *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 979 (Del. Ch. 2000). In order to rebut sufficiently the presumption, a plaintiff must plead a disabling interest, lack of independence or a lack of due care on the part of a *majority* of a corporation's directors, *see Grimes v. Donald*, 673 A.2d 1207, 1216 (1996), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000),[3] which requires allegations of "*facts* as to the interest and lack of independence of the *individual members* of th[e] board." *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (emphasis in original).[4] Conclusory allegations are insufficient. *McMillan v. Intercargo Corp.*, 768 A.2d 492, 503 (Del. Ch. 2000) (citing *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720 (Del. Ch.

[3] *See also Blackmore Partners, L.P. v. Link Energy LLC*, 2005 WL 2709639, at *7 (Del. Ch. Oct. 14, 2005) ("The protections of the business judgment rule . . . insulate a board decision from challenge so long as a majority of the directors approving the transaction remain disinterested"); *In re Freeport-McMoran Sulphur, Inc. S'holders Litig.*, 2001 WL 50203, at *5 (Del. Ch. Jan. 11, 2001) (dismissing action where plaintiff failed to allege particularized facts establishing that majority of board was interested in transaction); *In re Frederick's of Hollywood, Inc. S'holders Litig.*, 2000 WL 130630, at *7 (Del. Ch. Jan. 31, 2000) (dismissing action where plaintiff alleged a lack of independence on the part of only one of four directors and where majority of disinterested directors approved transaction).

[4] Where nothing calls into question the disinterestedness and independence of the requisite majority of the directors, the business judgment rule may only be rebutted "in those *rare* cases where the decision under attack is 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.' The decision must be 'egregious,' lack 'any rational business purpose,' constitute a 'gross abuse of discretion,' or be so thoroughly defective that it carries a 'badge of fraud.'" *Alidina v. Internet.com Corp.*, 2002 WL 31584292, at *4 (Del. Ch. Nov. 6, 2002) (citations omitted). Even viewing the Complaint in the most favorable light, this is not one of those "rare" cases.

1999), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000)); *see also Brehm v. Eisner*, 746 A.2d 244, 257 (Del. 2000) (rejecting plaintiff's contention that board was interested or lacked independence because plaintiff's theory was "not supported by well-pleaded facts, only conclusory allegations"); *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *6 (Del. Ch. Apr. 21, 1995) ("[A] plaintiff must do more than allege that a transaction is a self-interested one in order to state a claim. He or she must as well allege some facts which if true would render the transaction unfair."), *aff'd*, 672 A.2d 35 (Del. 1996); *Lewis v. Leaseway Transp. Corp.*, 1990 WL 67383, at *5 (Del. Ch. May 16, 1990) (dismissing unfair price claim that did not "adequately allege self-dealing, lack of independence, or failure, on the part of the . . . board, to adequately inform itself"). A director's interest is disabling *only* if it is *substantial* or *material*. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1169 (Del. 1995) ("To be disqualifying, the nature of the director interest must be substantial," not merely "incidental").[5]

Here, despite his heavy pleading obligation, Plaintiff has not "mounted a challenge to the independence or disinterestedness of a majority" of the NightHawk Board. *McMillan*, 768 A.2d at 503; *see also* p. 2 n.1, *supra*. Other than the single (insufficient) allegation that NightHawk's President and Chief Executive Officer, David

[5] In particular, a plaintiff must plead that the alleged disabling interest "was of a sufficiently material importance, in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the [stockholders] without being influenced by her overriding personal interest." *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999).

Engert, "successfully negotiated an agreement whereby he will remain with the surviving entity as a highly paid consultant," Compl. ¶ 45,[6] the Complaint does not contain a *single*, non-conclusory factual allegation calling into question the disinterestedness or independence of, or even distinguishing among, *any* of the NightHawk directors. *See Grimes*, 673 A.2d at 1216 (Del. 1996) (disinterestedness or lack of independence must affect a majority of the board); *Blackmore Partners, L.P. v. Link Energy LLC*, 2005 WL 2709639, at *7 (Del. Ch. Oct. 14, 2005) (same); *In re Freeport-McMoran Sulphur, Inc. S'holders Litig.*, 2001 WL 50203, at *5 (Del. Ch. Jan. 11, 2001) (same); *In re Frederick's of Hollywood S'holders Litig.*, 2000 WL 130630, at *7 (Del. Ch. Jan. 31, 2000) (same).

In sum, "while the complaint is replete with assertions that the NightHawk directors' actions were unreasonable, imprudent, or inappropriate, it contains precious few allegations bearing on the improper motivations the defendant directors had for intentionally or in bad faith conducting a less than professional search for the best value. . . ." *McMillan*, 768 A.2d at 499. The Complaint, therefore, fails to present a colorable claim justifying expedition.

B. Plaintiff Has Failed To State A Colorable *Revlon* Claim

Plaintiff (again, in wholly conclusory fashion) alleges that the NightHawk Board, in considering and approving the Proposed Transaction, "failed to take steps to maximize

[6] As disclosed in the Preliminary Proxy: "In connection with the consummation of the merger, our President and Chief Executive Officer will enter into a six month Board advisory arrangement, pursuant to which Mr. Engert will provide advice and input as requested from time to time with respect to post-acquisition integration matters and the ongoing strategy, business and operations of the combined entity. In exchange for such advisory services, Mr. Engert will receive $60,000." Preliminary Proxy (Ex. A) at 34.

the value of NightHawk to its public shareholders, by, among other things, failing to adequately consider potential acquirers, instead favoring their own, or their fellow directors or executive officers' interests to secure all possible benefits with a friendly suitor, rather than protect the best interests of NightHawk's shareholders." Compl. ¶ 58. While Plaintiff seemingly seeks to invoke the enhanced level of judicial scrutiny of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), nothing in the Complaint suggests that the NightHawk Board acted outside a "range of reasonableness." *E.g.*, *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994) ("[A] court applying enhanced judicial scrutiny should be deciding whether the directors made a *reasonable* decision, not a *perfect* decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness").[7]

Delaware courts have recognized that "there is no single blueprint that a board must follow to fulfill its duties" under *Revlon* and its progeny, *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989), and *Revlon* does not mandate any particular

[7] *See also Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1055 (Del. Ch. 1977) ("[*QVC*] adopts an *intermediate level of judicial review* which recognizes the broad power of the board to make decisions in the process of negotiating and recommending a 'sale of control' transaction, so long as the board is informed, motivated by good faith desire to achieve the best available transaction, and proceeds 'reasonably'").

course of action, but only that directors "take *special efforts to be well informed* of alternatives, and to approve only a transaction that seeks *reasonably* to maximize the *current value of the corporation's equity*." *Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1055 (Del. Ch. 1977). If a board's conduct satisfies these tests, then the directors' actions are entitled to the protection of the business judgment rule. *See QVC*, 637 A.2d at 45.

Here, the Complaint fails to establish that the NightHawk Board's actions fell outside a "range of reasonableness." It does not allege -- other than in the most conclusory of terms -- that the NightHawk directors: (i) were inadequately informed as to the value of NightHawk; (ii) failed to receive expert financial advice; or (iii) did not take an active role in determining whether the consideration offered by Virtual Radiologic accurately represented the current value of the Company. Without such particularized allegations, the Complaint does not set forth a valid or colorable claim under *Revlon*. *See In re Wheelabrator Techs. Inc. S'holders Litig.*, 1992 WL 212595, at *8-9 (Del. Ch. Sept. 1, 1992) (dismissing *Revlon* claim that failed to allege that directors did not possess adequate information about company's value); *cf. Kahn v. Caporella*, 1994 WL 89016, at *5 (Del. Ch. Mar. 10, 1994) (holding that directors did not act in accordance with their *Revlon* duties because they did not take an "'active and direct role'" in the process by which corporation was sold).[8]

[8] With respect to Plaintiff's purported disloyalty allegations (*see* Compl. ¶¶ 37, 45, 48), insofar as "[d]irectors' decisions must be reasonable, not perfect," "'extreme'" facts are "required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties." (continued next page)

Nor does the Complaint allege that *any* alternative -- much less a superior offer -- was available when the NightHawk Board entered into the Proposed Transaction. *See, e.g.*, *In re Santa Fe Pac. Corp. S'holder Litig.*, 1995 WL 334258, at *9 (Del. Ch. May 31, 1995) (holding that complaint failed to state a claim under *Revlon* because it did not allege that a superior transaction was available and that the board had prevented stockholders from considering it), *aff'd in part, rev'd in part on other grounds*, 669 A.2d 59 (Del. 1995); *see also In re Int'l Jensen Inc. S'holders Litig.*, 1996 WL 422345, at *2 (Del. Ch. July 13, 1996) (denying motion to expedite where, as here, plaintiffs failed to plead any facts or submit any evidence suggesting that another bidder would come forward and make a higher offer). And, the Complaint glosses over the fact that the Agreement and Plan of Merger by and among NightHawk and Virtual Radiologic (the "Merger Agreement") (*see* Preliminary Proxy (Ex. A) at App. A) provides for a 30-day "go-shop" period, during which NightHawk is permitted to initiate, solicit and encourage other acquisition proposals, and which has yet to expire (and, if another bidder emerges, may be extended for an additional 25 days). *See* Preliminary Proxy (Ex. A) at 7, 46 and

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Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243-44 (Del. 2009) (quoting *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 654-55 (Del. Ch. 2008)). "Only if they knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty." *Id.*; *see also In re NYMEX, Inc. S'holder Litig.*, 2009 WL 3206051, at *7 (Del. Ch. Sept. 30, 2009) (dismissing *Revlon* claims against a board populated by twelve of fourteen "unquestionably independent" directors because plaintiffs failed to allege "that the Board 'utterly failed to obtain the best sale price'"); *Wayne County Employees' Ret. Sys. v. Corti*, 2009 WL 2219260, at *14 (Del. Ch. July 24, 2009) (framing "the relevant question [proclaimed by *Lyondell* a]s whether the Director Defendants '*utterly failed to attempt* to obtain the best sale price,'" and dismissing *Revlon* claims against a board comprised of a majority of independent and disinterested directors) (citation omitted), *aff'd*, 996 A.2d 795 (Del. 2010). No such facts are pled in the Complaint.

A-29 (§ 5.10); *see also In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 123 & n.22 (Del. Ch. 2007) (holding that "go-shop" provision provided "a real world market check" on the transaction price, "which [wa]s unimpeded by bid-deterring factors," and stating that "no one had to discover Lear; they were invited by Lear to obtain access to key information and decide whether to make a bid").

Finally, Plaintiffs also fail to mount a colorable challenge to the Merger Agreement's deal protections, including the $6.6 million termination fee (which amounts to only 3.9% of the total transaction value) and typical "no-shop" and "matching rights" provisions (Compl. ¶¶ 47-49) -- which provisions, of course, only become operative after the conclusion of the 30-day "go-shop" period (*see id.* ¶ 48), during which the termination fee is a mere $3.7 million (or only 2.2% of the total transaction value). As Chancellor Chandler recently explained in *In re 3Com Shareholders Litigation*:

> The provisions that plaintiffs attack have been repeatedly upheld by this Court. For instance, plaintiffs complain that the no solicitation provision, the matching rights provision, and the termination fee "effectively preclude any other bidders who might be interested in paying more than HP for the Company. . . ." But this Court has repeatedly held that provisions such as these are standard merger terms, are not *per se* unreasonable, and do not alone constitute breaches of fiduciary duty. Plaintiffs here fail to explain how these provisions would prevent another bidder from making a competing offer in this case. Indeed, plaintiffs ignore the notable absence of any other interested bidders.

2009 WL 5173804, at *7 (Del. Ch. Dec. 15, 2009) (citations omitted).[9]

[9] *See also In re Cogent, Inc. S'holder Litig.*, 2010 WL 3894991, at *9, 10 (Del. Ch. Oct. 5, 2010) (rejecting allegations that (i) "no-shop" and "matching rights" provisions are unreasonable because "[p]otential suitors often have a legitimate concern that they are being used merely to draw others into a bidding war" and, thus, require "some level of assurance that [t]he[y] will be given adequate (continued next page)

For all of these reasons, Plaintiff has failed to state a colorable claim under *Revlon* and its progeny.

C. Plaintiff's Disclosure Claims Are Not Colorable

Plaintiff bears the burden of pleading and proving his claim of material omissions. *Solomon*, 747 A.2d at 1128. Plaintiff can meet this burden only by showing "a *substantial* likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable stockholder." *Id.* at 1128 (citation omitted) (emphasis added); *see also In re Cogent, Inc. S'holder Litig.*, 2010 WL 3894991, at *16 (Del. Ch. Oct. 5, 2010) ("Directors do not need to disclose,

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opportunity to buy the seller, even if a higher bid later emerges," and (ii) a termination fee equal to 3% of equity value, but 6.6% of enterprise value, was unreasonable because "[a] termination fee of 3% is generally reasonable" and because "[t]ermination fees are not unusual in corporate sale or merger contexts" and "[n]othing in the record suggests that the Termination Fee here has deterred or will deter any buyer"); *In re Dollar Thrifty S'holder Litig.*, 2010 WL 3503471, at *31 (Del. Ch. Sept. 8, 2010) (refusing to enjoin transaction with "no-shop" and "matching rights" provisions because they were neither preclusive nor unreasonable); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1017 (Del. Ch. 2005) (finding termination fee of 3.75% of transaction value reasonable and stating that "neither a termination fee nor a matching right is *per se* invalid. Each is a common contractual feature that, when assented to by a board fulfilling its fundamental duties of loyalty and care for the proper purpose of securing a high value bid for the stockholders, has legal legitimacy"); *State of Wisconsin Inv. Bd. v. Bartlett*, 2000 WL 238026, at *9 (Del. Ch. Feb. 24, 2000) (holding that deal protection provisions are permitted absent director interest or other breaches of fiduciary duty); *In re IXC Commc'ns, Inc. S'holders Litig.*, 1999 WL 1009174, at *2, 6 (Del. Ch. Oct. 27, 1999) (holding that "no solicitation" provisions "are common in merger agreements and do not imply some automatic breach of fiduciary duty"); *Golden Cycle, LLC v. Allan*, 1998 WL 892631, at *17 (Del. Ch. Dec. 10, 1998) ("Delaware law recognizes the propriety in appropriate circumstances of reasonable and proportionate termination fee/expense reimbursement . . . in merger agreements"); *In re JP Stevens & Co. S'holders Litig.*, 542 A.2d 770, 783 (Del. Ch. 1988) (holding that deal protection provisions such as termination fees are "reasonably conventional").

however, all information about a particular subject, or even information that is simply helpful if it does not meet the above standard") (citation omitted); *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, at *9 (Del. Ch. June 21, 2001) ("Delaware law does not require disclosure of 'all available information' simply because available information 'might be helpful.' The plaintiff has the burden of demonstrating materiality") (citations omitted); *Skeen v. Jo-Ann Stores, Inc.*, 1999 WL 803974, at *4 (Del. Ch. Sept. 27, 1999) ("[A] lenient standard for materiality poses the risk that corporations will 'bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decision making'") (citation omitted), *aff'd*, 750 A.2d 1170 (Del. 2000); *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *15 (Del. Ch. Mar. 7, 1991) (where "'arm's-length negotiation has resulted in an agreement which fully expresses the terms essential to an understanding by shareholders of the impact of the merger, it is not necessary to describe all the bends and turns in the road which led to that result'") (citation omitted); *Abrons v. Marée*, 911 A.2d 805, 813 (Del. Ch. 2006) ("Delaware courts must 'guard against the fallacy that increasingly detailed disclosure is always material and beneficial disclosure'") (citation omitted).[10]

[10] *See also N.J. Carpenters Pension Fund v. InfoGroup, Inc.*, C.A. No. 5334-CC (Del. Ch.), June 24, 2010 tr. (Exhibit C hereto), at 55-56, 63 (acknowledging that InfoGroup, Inc., as a publicly traded company, "has federal securities law requirements with respect to the disclosures that it must make in connection with this transaction," and that "if [it] hadn't satisfied those obligations in some way, that [it] would be sued in some federal court right now with respect to those alleged disclosure problems," and stating that "federal security disclosure law poses an obligational issue. Our disclosure law, if you are holding directors to the standard and you are finding them deficient, I'm just a little dubious of the proposition that directors are sitting by candlelight and drafting these proxy statements").

Plaintiff's alleged disclosure deficiencies fall into two categories: (i) the alleged failure of the Preliminary Proxy to include certain additional background information relating to the Proposed Transaction; and (ii) the alleged failure of the Preliminary Proxy to include and/or explain certain underlying information considered by NightHawk's financial advisor, Morgan Stanley & Co. Incorporated ("Morgan Stanley"). *See* Compl. ¶¶ 51-54. But, as explained below (and as more fully discussed in NightHawk's and the NightHawk directors' opposition to the Motion to Expedite (which Virtual Radiologic incorporates herein by reference)), the information that Plaintiff claims was omitted from the Preliminary Proxy is inaccurate, not material or already adequately disclosed.

First, with respect to the alleged omission of certain background information, while Plaintiff contends that the Preliminary Proxy should contain additional detail, *see* Compl. ¶¶ 51-53, the Preliminary Proxy already contains a sufficiently detailed, nearly daily account of the circumstances and events leading up to the announcement of the Proposed Transaction. *See* Ex. A at 17-24. Nothing more is required. *See, e.g.*, *Cogent*, 2010 WL 3894991, at *18 ("While directors must give stockholders an accurate, full, and fair characterization of the events leading up to a board's decision to recommend a tender offer, Delaware law does not require a play-by-play description of every consideration or action taken by a Board, especially when such information would tend to confuse stockholders or inundate them with an overload of information"); *see also Lukens*, 757 A.2d at 736 ("[W]hy the board chose not to take particular courses of action" is "plainly not material"); *Abrons*, 911 A.2d at 813 ("Consistent and redundant facts do not alter the total mix of information, nor are insignificant details and reasonable assumptions

material"); *McMillan v. Intercargo Corp.*, 1999 WL 288128, at *9 (Del. Ch. May 3, 1999) ("It is difficult to understand how the identities of the companies that did *not* express an interest in purchasing [the target] and that did *not* make an offer could be significant to [the target's] stockholders considering whether or not to accept the only offer . . . on the table"); *Skeen*, 1999 WL 803974, at *7 ("Where an expression of interest does not lead to a firm offer, the board has no obligation to disclose the specifics of the expression. . . . [S]hareholders are not entitled to a 'play-by-play' description of merger negotiations").

Second, with respect to the alleged omission of certain underlying information considered by Morgan Stanley, *see* Compl. ¶ 53, Delaware courts long have held that directors have no obligation to disclose all facts considered by investment bankers, so long as they provide a reasonable summary of the banker's analysis. *See, e.g., In re JCC Holding Co. S'Holders Litig.*, 843 A.2d 713, 721 (Del. Ch. 2003) (stating that mere "quibble with the substance of a banker's opinion does not constitute a disclosure claim"); *see also Steamfitters Local Union 447 v. Walter*, C.A. No. 5492-CC (Del. Ch.), June 21, 2010 tr. (Exhibit B hereto), at 6-10 (denying expedition, in part, because the Court was "not convinced that there is a colorable claim of a disclosure violation that would warrant expedition based on the particular facts that were disclosed here, and that were used by Goldman Sachs in arriving at its ultimate conclusions"); *3Com*, 2009 WL 5173804, at *3 (similar). As Vice Chancellor Strine explained in *JCC*:

> The penalty for providing a full summary of the work of an investment banker that sets forth an informative description of the reasoning that led the banker to issue its fairness opinion would be subjection to a disclosure suit if the plaintiff can plausibly argue that the banker made subjective judgments in its valuation analysis that could be considered erroneous and that could have materially affected the outcome of its fairness determination. This is a perverse incentive system at odds with our law's encouragement of informative disclosure of the valuation analyses underlying fairness opinions supporting board recommendations of mergers. The JCC board's duty was simply to make fair disclosure of the material facts in its possession bearing on the fairness of the merger it was putting before the stockholders. By setting forth a fair summary of the valuation work Houlihan in fact performed, the board met its obligation under our law.

843 A.2d at 721-22 (footnote omitted); *see also In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *16 (Del. Ch. May 4, 2005) (declining to order disclosure of "raw data behind" financial advisors' summaries), *aff'd*, 897 A.2d 162 (Del. 2006); *Skeen*, 1999 WL 803974, at *6 ("disclosure of methodologies and analyses used by an investment banker have generally been held by the Court of Chancery not to be material"); *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1073 (Del. Ch. 2001) ("Delaware courts have held repeatedly that a board need not disclose specific details of the analysis underlying a financial advisor's opinion") (citations omitted).

Plaintiff's extensive reliance on *In re Netsmart Technologies, Inc. Shareholders Litigation*, 924 A.2d 171 (Del. Ch. 2007) -- including for the factually erroneous proposition that NightHawk's alleged failure to disclose the projections underlying Morgan Stanley's discounted cash flow analysis "deprived [NightHawk's stockholders] of the information material to their decision to cast their vote for or against the Merger" (Motion to Expedite at 8, 10) -- is entirely misplaced. Indeed, following a seven-page discussion of the analyses undertaken by Morgan Stanley and a description of the precise

metrics it employed, the Preliminary Proxy discloses a summary of the financial projections that Morgan Stanley received from NightHawk management (including projections of revenue, adjusted gross profit, adjusted EBITDA and adjusted EPS for the years 2010 through 2015) (*see* Preliminary Proxy (Ex. A) at 32-33), which is consistent with this Court's recent precedent. *See, e.g.*, *3Com*, 2009 WL 5173804, at *3 ("Plaintiffs in this case have . . . failed to assert a colorable reason as to why management should be required to provide full versions of the projections underlying the already disclosed summaries. 3Com management has made the Proxy more accessible to investors by summarizing the financial information relied on in connection with the Merger. Moreover, an adequate and fair summary of the work performed by Goldman is included in the proxy. I am reluctant to require full disclosure of the projections underlying such summaries as I do not believe it would alter the total mix of available information and may even undermine the clarity of the summaries") (internal footnote omitted).[11]

Finally, Plaintiff's allegation that the Preliminary Proxy fails to disclose information that "is necessary for shareholders to evaluate and properly assess the credibility of the various analyses performed by Morgan Stanley and relied upon by the Board in recommending the Proposed Transaction," Compl. ¶ 53, is flatly inconsistent

[11] *See also Ryan v. Lyondell Chem. Co.*, 2008 WL 2923427, at *20 n.120 (Del. Ch. July 29, 2008) ("In this case, the *Pure Resources* standard is satisfied by the Proxy's summary of the Management Case financial projections, which explicitly sets forth Lyondell's EBITDA estimates through 2011, and the other disclosures concerning the key assumptions underlying the various valuation exercises performed by Deutsche Bank (except as otherwise discussed herein), the descriptions of those valuation exercises, and the ranges of values thereby generated"), *rev'd on other grounds*, 970 A.2d 235 (2009).

with this Court's prior decisions. *See In re Checkfree Corp. S'holders Litig.*, 2007 WL 3262188, at *2 (Del. Ch. Nov. 1, 2007) ("A disclosure that does not include all financial data needed to make an independent determination of fair value is not . . . per se misleading or omitting a material fact") (citations omitted); *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *11 (Del. Ch. Nov. 30, 2007) (directors need not provide "information to permit stockholders to make 'an independent determination of fair value'") (citations omitted).

In sum, the NightHawk directors have complied with their disclosure obligations under Delaware law, and Plaintiff has not stated a colorable disclosure claim.

D. Plaintiff Has Not Pled A Colorable "Aiding And Abetting" Claim Against Virtual Radiologic

Under Delaware law, in order to plead a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must properly plead an underlying breach of fiduciary duty claim. *In re Gen. Motors*, 2005 WL 1089021, at *29 (dismissing claim for aiding and abetting after determining that no breach of fiduciary duty existed). For the reasons set forth above, Plaintiff has not stated a colorable claim for breach of fiduciary duty against the NightHawk directors and, thus, his aiding and abetting claim against Virtual Radiologic must fail. *See Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *8 (Del. Ch. July 23, 2010) ("Because 'no cognizable breach of fiduciary duty claim is stated,' the aiding and abetting claim also fails"); *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *21 (Del. Ch. Dec. 1, 2009) ("One cannot aid and abet a breach of fiduciary duty, however, where no duty has been breached in the

first place"); *Globis*, 2007 WL 4292024, at *15 (similar); *Gen. Motors*, 2005 WL 1089021, at *29 (similar).

In any event, even assuming, *arguendo*, that Plaintiff has in fact pled a colorable claim against the NightHawk directors (which he has not), Plaintiff still must proffer facts (as opposed to bare conclusions) that Virtual Radiologic "knowingly participated" in any alleged breach. As Vice Chancellor Strine recently explained in *Morgan v. Cash*:

> Th[e "knowing participation"] rule protects acquirors, and by extension their investors, from the high costs of discovery where there is no reasonable factual basis supporting an inference that the acquiror was involved in any nefarious activity. . . . That is, the long-standing rule that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism. . . . Under our law, both the bidder's board and the target's board have a duty to seek the best deal terms for their own corporations when they enter a merger agreement. To allow a plaintiff to state an aiding and abetting claim against a bidder simply by making a cursory allegation that the bidder got too good a deal is fundamentally inconsistent with the market principles with which our corporate law is designed to operate in tandem.

2010 WL 2803746, at *8 (Del. Ch. July 16, 2000); *see also N.J. Carpenters Pension Fund v. InfoGroup*, C.A. No. 5334-CC (Del. Ch.), June 24, 2010 tr. (Ex. C), at 77-78 (on motion for preliminary injunction, *sua sponte* dismissing aiding and abetting claim because the complaint did not "tell [the court] how [the acquirer] knowingly participated in the alleged breaches of duty," and stating that a plaintiff is "required to allege more facts about how [the acquirer] actually engaged knowingly, knowing that these breaches

were occurring, and they actually aided and abetted them, encouraged them, or allowed them, or permitted them to happen").[12]

Here, Plaintiff makes only the conclusory and speculative allegations that: (i) Virtual Radiologic "ha[s] acted and [is] acting with knowledge of, or with reckless disregard to, the fact that the Individual Defendants are in breach of their fiduciary duties to NightHawk's public shareholders, and ha[s] participated in such breaches of fiduciary duties;" and (ii) Virtual Radiologic "knowingly aided and abetted the Individual Defendants' wrongdoing alleged herein," and, "[i]n so doing, . . . rendered substantial assistance in order to effectuate the Individual Defendants' plan to consummate the Proposed [Transaction] in breach of their fiduciary duties." Compl. ¶¶ 66, 67. Such barebone allegations are not sufficient to sustain an aiding and abetting claim. *See Morgan*, 2010 WL 2803746; *InfoGroup* (Ex. C), at 77-78; *Gen. Motors*, 2005 WL 1089021, at *23.

II. THERE IS NO THREAT OF IRREPARABLE HARM

Plaintiff cannot show irreparable harm where, as here, he has not articulated a colorable claim. *See McMillan*, 1999 WL 288128, at *4; *see also Liang v. Cohen*, C.A. No. 5721-VCL (Del. Ch.), Aug. 19, 2010 tr. (Exhibit D hereto) (denying motion to

[12] *See NYMEX*, 2009 WL 3206051, at *12 (finding plaintiffs' conclusory assertion that "as participants," defendant acquirers "are aware of the Director Defendants' breaches of fiduciary duties and in fact actively and knowingly encouraged and participated in said breaches in order to obtain the substantial financial benefits that the Acquisition would provide at the expense of NYMEX's shareholders" to be insufficient to state an aiding and abetting claim); *see also Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001) (holding that "a bidder's attempts to reduce the sale price through arm's length negotiations cannot give rise to liability for aiding and abetting").

expedite because "there isn't irreparable harm sufficient to merit the scheduling of an expedited proceeding . . . where you have around-the-edges type disclosure, . . . deal reporter-tell me more-let me ask the follow-up-question-type disclosure," and stating that "it just doesn't make sense in terms of the interests of stockholders to have a rushed, expedited, abbreviated proceeding that really only serves to set up a disclosure-based settlement, when, in fact, you could have a meaningful post proceeding in which there could be actual briefing over whether these claims survive a motion to dismiss"); *cf. State of Wisconsin Inv. Bd. v. Bartlett*, 2000 WL 238026, at *9 (Del. Ch. Feb. 24, 2000) (denying preliminary injunction because it was "unlikely that the plaintiff can show at a hearing on the merits that . . . [the alleged omission was] material" and, thus, "plaintiff will not be subject to irreparable harm if the vote goes forward as scheduled").

Second, there is no exigency. The Merger Agreement's "go-shop" period is ongoing and no stockholder vote has even been scheduled.

Third, because money damages are available to redress Plaintiff's price claim (his primary claim), expedition is inappropriate. *See, e.g., Wand Equity Portfolio II L.P. v. AMFM Internet Holding, Inc.*, 2001 WL 167720, at *3 (Del. Ch. Feb. 7, 2001) (denying motion for expedited proceedings because "it appears from the complaint and the moving papers, to a reasonable certainty, that an award of money damages could fully and adequately compensate the plaintiffs for any injury they might suffer"); *In re Int'l Jensen Inc. S'holders Litig.*, 1996 WL 422345, at *2 (Del. Ch. July 13, 1996) (denying motion for preliminary injunction because "damages would make the public shareholders whole"); *Herd v. Major Realty Corp.*, 1989 WL 997170, at *2 (Del. Ch. Nov. 8, 1989)

(refusing to hear preliminary injunction motion because "complete relief" in the form of money damages was available); *cf. In re CNX Gas Corp. S'holders Litig.*, 2010 WL 2349097, at *21 (Del. Ch. May 25, 2010) (holding that plaintiff "ha[s] not shown any threat of irreparable harm" because "a post-trial award of money damages would . . . be a sufficient remedy").

Finally, stockholders are not irreparably harmed when, as here, they are fully informed and can accept or reject the proposed merger consideration. *See, e.g.*, *McMillan*, 1999 WL 288128, at *4 (declining to expedite proceedings because fully informed stockholders can decide whether or not to tender their shares). Additionally, the Merger Agreement provides for appraisal rights. *See* Preliminary Proxy (Ex. A) at 35. This Court has emphasized that:

> [T]he ability of shareholders to vote in a fully-informed fashion, and the availability of appraisal rights to any shareholders that may be dissatisfied with the merger consideration, shape the limits of the appropriate judicial intervention. Ultimately, the equities tip in favor of this Court staying its hand and allowing fully-informed, disinterested shareholders to be heard on the merits of this transaction, *especially given the tempering power of the appraisal remedy*.

La. Municipal Police Employees' Ret. Sys. v. Crawford, 918 A.2d 1172, 1185 (Del. Ch. 2007) (emphasis added).

CONCLUSION

In short, notwithstanding Plaintiff's complete failure to plead any facts from which the Court could reasonably infer a breach of fiduciary duty by the NightHawk Board, or that Virtual Radiologic aided and abetted any alleged breach, Plaintiff seeks to enjoin the Proposed Transaction before NightHawk's stockholders have the opportunity to decide for themselves whether to accept or reject the merger consideration. There is simply no basis for this action to proceed under the circumstances, much less on an expedited basis. The Motion to Expedite should therefore be denied in its entirety.

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Dated: October 19, 2010