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Case No. 9710-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAMES B. JONES, On Behalf of Himself and All Other Similarly Situated Stockholders, and Derivatively On Behalf of CHENIERE ENERGY, INC.,

Plaintiff,

v.

CHARIF SOUKI, H. DAVIS THAMES, MEG A. GENTLE, R. KEITH TEAGUE, GREG W. RAYFORD, JEAN ABITEBOUL, VICKY A. BAILEY, G. ANDREA BOTTA, NUNO BRANDOLINI, KEITH F. CARNEY, JOHN M. DEUTCH, DAVID I. FOLEY, RANDY A. FOUTCH, PAUL J. HOENMANS, DAVID B. KILPATRICK, WALTER L. WILLIAMS, and CHENIERE ENERGY, INC.,

Defendants.

C.A. No. 9710-VCL

PLAINTIFF'S BRIEF IN SUPPORT OF EXPEDITED PROCEEDINGS

BARRACK, RODOS & BACINE
Daniel E. Bacine
Jeffrey W. Golan
Julie B. Palley
Two Commerce Square
2001 Market Street, Suite 3300
Philadelphia, PA 19103
Tel.: (215) 963-0600
-and-
Alexander Arnold Gershon
Michael A. Toomey
425 Park Avenue, Suite 3100
New York, NY 10022
Tel.: (212) 688-0782

Counsel for Plaintiff James B. Jones

ANDREWS & SPRINGER LLC
Peter B. Andrews (No. 4623)
Craig J. Springer (No. 5529)
3801 Kennett Pike, Bldg. C, Ste 305
Wilmington, DE 19807
Tel.: (302)-504-4957
Fax: (302)-397-2681

Counsel for Plaintiff James B. Jones

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Plaintiff James B. Jones ("Plaintiff"), on behalf of himself and all other similarly situated stockholders of Cheniere Energy, Inc. ("Cheniere" or the "Company"), and derivatively on behalf of Cheniere, respectfully moves the Court for an order granting Plaintiff's motion for expedited proceedings, narrowly tailored expedited discovery, and the scheduling of a preliminary injunction hearing to preliminarily enjoin Cheniere's June 12, 2014 stockholder vote (the "2014 Stockholder Vote") until: (i) the Court declares the February 1, 2013 stockholder vote (the "2013 Stockholder Vote") on the 2011 Plan (defined below) void; and (ii) the Board makes corrective disclosure regarding the Special Meeting Proxy Statement (defined below), the 2013 8-K (defined below), and the 2014 Proxy Statement (defined below).

PRELIMINARY STATEMENT

In *Licht v. Storage Tech. Corp.*, C.A. No. 524-N, 2005 Del. Ch. LEXIS 64, *1-2 (Del. Ch. May 13, 2005), this Court recognized that an unbroken line of Delaware precedent dating back to 1989 has held that abstentions will be counted as "no" votes "against" a proposal, absent a company's articles of incorporation or bylaws expressly providing otherwise.

As set forth in Plaintiff's Verified Class Action and Derivative Complaint (the "Complaint"), the members of Cheniere's board of directors (the "Board"), violated the bylaws of the Company (which are a contract between the directors,

officers, corporation and shareholders), and breached their fiduciary duties to the Company and its stockholders by improperly awarding to Cheniere officers, employees, consultants, and themselves, certain stock awards under the Company's 2011 Incentive Plan ("2011 Plan"), despite the fact that the 2013 Stockholder Vote permitting such awards did not receive the required majority vote.

Causing further injury and irreparable harm to Plaintiff and the Company's stockholders, the Board also breached its duty of disclosure. On December 31, 2012, the Board furnished to stockholders and filed a proxy statement with the Securities and Exchange Commission ("SEC") regarding a special stockholder meeting of Cheniere stockholders to be held on February 1, 2013 (the "Special Meeting Proxy Statement"). The Special Meeting Proxy Statement falsely told stockholders that abstentions are not "taken into account" with regard to the stockholder vote to increase the 2011 Plan share reserve from 10 million shares to 35 million shares, in contradiction of both the Company's own bylaw and authority under Delaware law. Thereafter, on February 4, 2013, the Company filed an 8-K with the SEC (the "2013 8-K") falsely telling stockholders that "stockholders voted in favor" of this 25 million share increase when, in fact, the Company did not receive the majority required by Cheniere's own bylaw and Delaware law.

Finally, on April 28, 2014, the Board furnished to stockholders and filed a

proxy statement with the SEC regarding the June 12, 2014 annual meeting of Cheniere stockholders (the "2014 Proxy Statement"). In connection with Proposals 3 and 4, which would increase the 2011 Plan share reserve by another 30 million shares, the 2014 Proxy Statement contains several false claims that the stockholders voted to increase the 2011 Plan share reserve from 10 million shares to 35 million shares. The Board is thus withholding material information for stockholders, inhibiting their ability to cast an informed vote on Proposal 3 and Proposal 4 in the 2014 Proxy Statement.

The Wall Street Journal reported on May 30, 2014, that the proposal to place an additional 30 million shares into the stock reserve for the 2011 Plan would be valued at $1.9 billion based on the Company's current stock price, more than all the revenue Cheniere has generated since 2008. The article further noted, among other things, that a well-known proxy advisory firm, Glass Lewis & Co., has concluded that the proposed compensation plan could be excessive and dilute existing stockholders' stake by 12%, and that another advisory firm, Egan-Jones Proxy Services, recommends that stockholders reject the board's proposal. Given the contentious nature of these votes, it would be improper to allow Proposal 3 and Proposal 4 to go forward now without corrective disclosures to ensure stockholders' views on these matters are properly recorded.

Accordingly, Plaintiff seeks expedited proceedings and the scheduling of an

injunction hearing prior to the June 12, 2014 stockholder meeting to: (i) declare the 2013 Stockholder Vote void; and (ii) enjoin the 2014 Stockholder Vote until corrective disclosures are made to the Company's Special Meeting Proxy Statement, 8-K, and2014 Proxy Statement.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY[1]

A. Souki And The Executive Defendants Receive Generous Awards

On April 29, 2014, it was reported that Charif Souki ("Souki"), Cheniere's Chief Executive Officer ("CEO"), received compensation of over $141 million in 2013, on top of the $57 million he received in 2012, for total compensation exceeding $198 million for two years. ¶ 19. It was similarly reported that H. Davis Thames ("Thames"), Meg A. Gentle ("Gentle"), R. Keith Teague ("Teague"), Greg W. Rayford ("Rayford"), and Jean Abitebol ("Abitebol") (collectively, the "Executive Defendants") received total compensation exceeding $130 million in the last two years. *Id*.

The vast majority of Souki's and the Executive Defendants' compensation was obtained through the issuance of restricted stock awards under the 2011 Plan. Souki in 2012 and 2013 received 9.5 million restricted shares under the 2011 Plan with a value of $175,810,000, based on the market prices on the dates of the grants. ¶ 20, 21. The Executive Defendants received restricted stock awards under the

[1] Citations to "Compl. ¶ ___" refer to the Verified Class Action and Derivative Complaint filed by Plaintiff on May 29, 2014.

2011 Plan totaling approximately 6.1 million restricted shares with a value of $111,886,000, based on the market prices on the dates of the grants. *Id*. As alleged in the Complaint, most of these shares should never have been awarded because a majority of Cheniere's stockholders did not approve the increase of 25 million additional shares to the 2011 Plan share reserve that supposedly supported them. ¶ 22.

As of April 15, 2014, the Compensation Committee had granted 27,197,536 shares under the 2011 Plan to Souki, the Executive Defendants, employees and consultants of Cheniere. *Id*. However, ***17,197,536 of these shares, should not have been awarded since Cheniere's stockholders did not approve them.*** *Id*.

B. Amendment 1 to the 2011 Plan Did Not Receive the Requisite Majority Stockholder Vote

The 2011 Plan is a Company compensation plan that was originally approved by a majority of Cheniere's stockholders on June 16, 2011, with a share reserve of 10 million shares. ¶ 23

However, as of December 31, 2012, as a result of the compensation paid to the Company's executives, employees, Board, and consultants to that point, only 100,000 shares remained of the 10 million shares originally approved under the 2011 Plan. ¶ 24. On this same date, undeterred by the compensation provided to that point, the Compensation Committee approved an additional aggregate grant of 17.4 million shares of restricted stock to employees under the 2011 Plan, and

600,000 shares of restricted stock to a consultant of the Company. ¶ 25. Since there were almost no shares left in the 2011 Plan's share reserve to cover these grants, it was necessary for the Company to request stockholder approval of an increase to the share reserve under the terms of the 2011 Plan. *Id*.

A month later, the Company convened a special meeting and requested stockholder approval of an increase of 25 million shares to the 2011 Plan's share reserve through the Special Meeting Proxy Statement. ¶ 26. The 2013 Stockholder Vote to nearly triple the 2011 Plan's share reserve was decidedly more contentious than the vote in 2011 to originally approve the 2011 Plan. ¶ 27. The Company reported that 77 million shares (or 45%) voted in favor of the proposal, while 58 million voted against the proposal, and 36 million abstained from casting a vote. *Id*. Had the Company counted these abstentions as "no" votes, as required by the Company's bylaw and Delaware law, the proposal would ***not*** have passed. *Id*. Soon afterward, on February 4, 2013 the Company issued the false and misleading 2013 8-K claiming that "stockholders voted in favor of Amendment No. 1 to the [2011] Plan." ¶¶ 2, 28.

C. Cheniere's Bylaw Required A Majority Vote To Increase The 2011 Plan's Share Reserve And Abstentions To Count As "No" Votes

On February 1, 2013, the date stockholders voted on the proposal to increase

the 2011 Plan's share reserve by 25 million shares, Cheniere's bylaw § 2.7 read as follows:

> Each Stockholder shall be entitled to one vote for each Share held of record by such Stockholder. Except as otherwise provided by law or the Certificate of Incorporation, when a quorum is present at any meeting of Stockholders, ***the vote of the record holders of a majority of the Shares entitled to vote thereat, present in person or by proxy, shall decide any question brought before such meeting***.

(Emphasis added.) ¶ 29.

This bylaw is essentially identical to the default rule in Delaware which provides that, unless the bylaws or certificate of incorporation hold otherwise,

> In all matters other than the election of directors, ***the affirmative vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders***;

8 Del. C. § 216(2) (emphasis added). ¶ 30.

Until very recently, Cheniere has always regarded this bylaw as requiring that abstentions be counted as "no" votes with regard to every vote except for stockholder votes to appoint directors, *i.e.*, the Delaware default standard. ¶ 37. Then, in 2011, Cheniere began to represent in its proxy statements that for other matters, not dealing with director elections, "Abstentions and broker non-votes represented by submitted proxies will not be taken into account…." ¶ 39. The reason for this 2011 decision is unclear, but Cheniere did not modify its bylaw until 2014 to allow for such a change in the counting of abstentions. *Id*. Nor did it

make any changes to the bylaws before the 2013 Stockholder Vote. Thus, the 2013 Stockholder Vote to increase the 2011 Plan's share reserve by 25 million shares did not gain the requisite majority needed for passage. ¶ 42.

On April 3, 2014, Cheniere's Board adopted the Amended and Restated Bylaws of Cheniere Energy, Inc. (the "Restated Bylaws"). ¶ 45. This was the first restatement of Cheniere's bylaws since 2004. *Id.* In the 8-K disclosing this change filed with the SEC on April 9, 2014, the Company explained that it had made a change "to provide how abstentions and broker non-votes will be treated." *Id*. Indeed, the Restated Bylaws entirely deleted the language from § 2.7 that directly tracked the Delaware default rule – 8 Del. C. § 216(2) – and which explained stockholder "voting." *Id*. Now, § 2.8 of the Restated Bylaws provides, at best, a confusing change to how the Company would count abstentions in upcoming stockholder votes, as follows (emphasis added):

> ***On any matter where a minimum or other vote of stockholders is provided by the Certificate of Incorporation, these Bylaws, the rules or regulations of any stock exchange applicable to the Corporation, or applicable law or pursuant to any regulation applicable to the Corporation or its securities***, such minimum or other vote shall be the required vote on such matter (with the effect of ***abstentions and broker non-votes to be determined based on the vote required***). ***All other matters*** presented to the stockholders at a meeting at which a quorum is present for which no minimum or other vote is called for by the Certificate of Incorporation, these Bylaws, the rules or regulations of any stock exchange applicable to the Corporation, or applicable law or pursuant to any regulation applicable to the Corporation or its securities, other than for the election of Directors, shall be decided by the affirmative vote of the holders of a majority in voting power of the

> shares of stock entitled to vote on the matter, present in person or by proxy (with ***abstentions counting as votes against the matter and broker non-votes not counting as shares entitled to vote on the matter***).

Id.

While § 2.8 of the Restated Bylaws is far from clear, it appears to allow the Company, as of April 3, 2014, to not count abstentions as "no" votes "[o]n any matter where a minimum or other vote of stockholders is provided by the Certificate of Incorporation, these Bylaws, the rules or regulations of any stock exchange applicable to the Corporation, or applicable law or pursuant to any regulation applicable to the Corporation or its securities." ¶ 46.

On April 28, 2014, less than a month after the Board made this change to Cheniere's "abstention" rules, Cheniere's Board proposed another increase to the 2011 Plan's share reserve in the 2014 Proxy Statement. ¶ 47. Proposal 4, which has been submitted for a June 12, 2014 stockholder vote, would increase the 2011 Plan share reserve by another 30 million shares. *Id*. Proposal 3, which has been submitted for the same meeting, requests a stockholder vote to approve the 2014-2018 Long-Term Incentive Compensation Program and is dependent on the approval of Proposal 4 and the increase to the 2011 Plan share reserve. *Id*. Both of these proposals include several false or misleading statements, *inter alia*, claiming that stockholders approved Amendment 1 to the 2011 Plan at the 2013 Stockholder Vote. ¶¶ 49-52.

On May 29, 2014, Plaintiff filed his Complaint with the Court alleging claims for breach of contract, breach of fiduciary duty, and unjust enrichment against the Director Defendants.[2] Plaintiff additionally alleges that the Director Defendants breached their fiduciary duty of candor and loyalty by making false or misleading statements in the Special Meeting Proxy Statement and 8-K, and that the 2014 Proxy Statement contains material omissions regarding the events discussed *supra*. As such, Plaintiff now seeks expedited proceedings and declaratory relief rendering the 2013 Stockholder Vote on the 2011 Plan void. Plaintiff also seeks injunctive relief enjoining Proposal 3 and Proposal 4 in the 2014 Proxy Statement until corrective disclosures can be made to stockholders regarding these events.

ARGUMENT

Delaware courts have broad discretion to grant expedited proceedings and do so freely to ensure the interests of justice are served. *Box v. Box*, 697 A.2d 395, 399 (Del. 1997) ("Delaware courts are always receptive to expediting any type of litigation in the interests of affording justice to the parties.") "In order to grant a motion for expedited proceedings, the court merely needs to find that the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a

[2] The "Director Defendants" means Souki, the Executive Defendants, and Vicky A. Bailey, G. Andrea Botta, Nuno Brandolini, Keith F. Carney, John M. Deutch, David I. Foley, Randy A. Foutch, Paul J. Hoenmans, David B. Kilpatrick, and Walter L. Williams.

threatened irreperable injury." *Alpha Natural Res., Inc. v. Cliffs Natural Res., Inc.* C.A. No. 4133-VCL, 2008 Del Ch. LEXIS 214, at *7 (Del. Ch. Nov. 6, 2008) (quotation marks omitted). Importantly, a plantiff need not make such a showing on all of his claims. If one of his claims meets the standard, expedited proceedings may be granted. *See TCW Tech. Ltd. P'ship v. Intermedia Commc'ns., Inc.*, C.A. No. 18336, 2000 Del Ch. LEXIS 186, at *7 (Del Ch. Oct. 2, 2000). Here, Plaintiff easily meets this standard.

A. Plaintiff States Colorable Claims

A colorable claim is "essentially a non-frivolous cause of action." *In re K-Sea Transp. Partners L.P. Unitholders Litig.*, C.A. No. 6301-VCP, 2011 Del. Ch. LEXIS 90, at *14 n.8 (Del. Ch. June 10, 2011). In determining whether a plaintiff has pled colorable claims, the court "is not required or able on [a motion to expedite] to judge the merits or even the legal sufficiency" of the claims. *Giammargo v. Snapple Bev. Corp.*, C.A. No. 13845, 1994 Del. Ch. LEXIS 199, at *5-6 (Del. Ch. Nov. 15, 1994); *see also Cnty. of York Empls. Ret. Plan v. Merrill Lynch & Co.*, C.A. No. 4066-VCN, 2008 Del. Ch. LEXIS 162, at *21 (Del. Ch. Oct. 28, 2008) (noting that "[m]otions to expedite require something of an almost superficial factual assessment in order to determine whether imposing the burdens resulting from expedition is warranted."). In this case, Plaintiff has not only stated

colorable claims, he has alleged claims that are strong and highly likely to prevail on a fuller record.

1. Plaintiff's Claims for Breach of Contract Are Sufficiently Colorable

As a threshold matter, the Board is in breach of contract with the Company and its stockholders. As explained in detail below, a company's bylaws have been held to form a contract between and among a Delaware corporations, its directors, officers and stockholders. *See Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013). Defendants failed to abide by this contract because Cheniere's bylaws required that abstentions were to be counted as votes "against" the February 1, 2013 proposal to increase the 2011 Plan share reserve.

a) Until April 3, 2014, Cheniere's Bylaw § 2.7 Was Substantially Identical to the Delaware Default Stockholder Voting Rule

8 Del. C. § 216 permits corporations to adopt stockholder voting requirements through their "certificate of incorporation or bylaws," but in the absence of such rules (and relevant to this action), the Delaware default is

> In all matters other than the election of directors, the affirmative vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders;

Id.

From March 1, 2005 until April 3, 2014, Cheniere's bylaws were substantially identical to the default Delaware rule. To demonstrate, bylaw § 2.7 read as follows:

> Each Stockholder shall be entitled to one vote for each Share held of record by such Stockholder. Except as otherwise provided by law or the Certificate of Incorporation, when a quorum is present at any meeting of Stockholders, ***the vote of the record holders of a majority of the Shares entitled to vote thereat, present in person or by proxy, shall decide any question brought before such meeting***.

As Vice Chancellor Noble determined in *Licht v. Storage Tech. Corp., et al.*, 2005 Del. Ch. LEXIS 64, at *13, the Delaware standard "looks to a majority of shares (1) present or represented at the meeting and (2) entitled to vote." On this basis, the *Licht* Court held that bylaws with these same terms (such as former bylaw § 2.7) have the "same standard" and are governed by the same interpretation. *Id.* at *12-24.

b) Cheniere's Former Bylaw § 2.7 Required That Defendants Count Abstentions as "No" Votes

Dating back to 1989, there is an unbroken line of Delaware authority explaining that bylaws such as former bylaw § 2.7 require that abstentions count as "no" votes.

First, in *Berlin v. Emerald Partners*, 552 A.2d 482 (Del. 1989), the Supreme Court confronted the question as to whether shares for which the broker received no instruction on a non-discretionary matter were to be counted as "voting power

present" in determining the absolute number of shares present and entitled to vote on the proposal. This reference to "voting power present" came from the company's certificate of incorporation and led the Court to analogize the company's voting requirement to the default Delaware rule – 8 Del. C. § 216. The Supreme Court held that under Delaware law, the proxies for which no instructions to vote had been given, i.e. "broker non-votes,"[3] were limited proxies that did not give voting power to the proxy holder, and therefore should not be counted as part of the voting power present with respect to that proposal. *Id*. at 493.

The Supreme Court in *Berlin* did not apply the same analysis to abstentions. In fact, the Supreme Court specifically included abstentions in the calculation of "voting power present" when it described the number of shares voted as to each proposal at the meeting:

> The inspectors of election at the stockholders meeting counted 10,513,703 (11,843,661 minus 1,329,958) shares as voting power on Proposal One, with 9,934,172 of these shares voted in favor of the proposed merger, 432,796 opposed, ***and 146,735 abstained***. On Proposal Two, all 11,834,661 shares represented voted, with 11,151,902 shares voted in the affirmative, 485,912 voted against, ***and 161,747 abstained***.

Id. at 491 (emphasis added).

[3] Although the *Berlin* court does not call these proxies for which no instructions to vote "broker non-votes," the Chancery Court later clarified that is the proper term for such proxies. *See North Fork Bancorporation v. Toal*, 825 A.2d 860, 866 (Del. Ch. 2000) ("In *Berlin*, the Delaware Supreme Court addressed the question whether a class of proxy cards known as 'broker non-votes' were 'voting power present'")

In sum, the Supreme Court distinguished "broker non-votes," which it did not count as part of the "voting power present," from "abstentions," which it considered as both "voting power present" and (because they were not counted "in favor" of the proposal) as a *de facto* vote against the proposal. *See also* R. FRANKLIN BALOTTI & JESSE A. FINKLESTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS, § 7.25 ("Although the treatment of abstentions was not explicitly addressed in *Berlin*, the affirmance of the inspectors' calculations may provide important guidance. The inspectors included abstentions in the determination of voting power present, which resulted in the treatment of abstentions as the equivalent of 'no' votes.")

Following *Berlin*, the Court of Chancery made this point even more clear. In *Hammersmith v. Elmhurst-Chicago Stone Co.*, 1989 WL 99129 (Del Ch. Aug. 17, 1999), the Court was asked to determine whether shares held in a trust should be counted for the purposes of determining voting power present. An Illinois court had entered an order stating that the shares held in the trust could not be voted unless both trustees agreed on how to vote. *Id.* at *1. The trustees failed to agree how to vote the shares, and the 160 shares held by the trust were considered by the inspector of elections as present for purposes of determining a quorum, but "not entitled to vote" for purposes of determining whether the amendments to the bylaws had received the affirmative vote of a majority of the shares present and

entitled to vote at the meeting.

One trustee challenged the report of the inspector, arguing that because the co-trustees had full authority to vote, but they did not vote only because they could not agree, "the failure to vote the trust shares, like any other abstention, counts as a 'no' vote with the result that the bylaw amendments were defeated." *Id.* at *3. The Court disagreed and, relying on the *Berlin* holding, held that the difference between abstentions and the action of the trustee who challenged the vote was that

> [t]he word 'abstain' is defined as 'to withhold oneself from participation, to forebear or refrain voluntarily . . ..' Webster's International Dictionary (2d ed). Here, there has been no voluntary decision not to vote. To the contrary, Charles, Sr. stated at the meeting that he would have voted the trust shares in favor of the proposed amendment. He was unable to do so because George, Sr. did not agree to vote the trust shares in that fashion

Id. In other words, abstentions are "voluntary decision[s] not to vote," and as such they must be counted both as "entitled to vote" and as *de facto* "no" votes. This distinguishes "abstentions" from situation where "there has been no voluntary decision not to vote," which are similar to "broker non-votes." *See N. Fork Bancorp., Inc.*, 825 A.2d at 866.

Accordingly, the default rule in Delaware has been that abstentions count as "no" votes, while broker non-votes do not count either for or against the proposal:

> Based on *Berlin* and *Hammersmith*, the standard set forth in Section 216(2) has been interpreted to mean that in determining whether a proposal has passed in a circumstance where the vote is required "a majority of the shares present and entitled to vote on the subject

> matter," abstentions, but not broker non-votes, are to be treated as shares present and "entitled to vote on the subject matter." Applying that standard, an abstention would be counted as a "no" vote, and a broker non-vote would reduce the absolute number (although not the percentage) of the affirmative votes needed for approval.

R. FRANKLIN BALOTTI & JESSE A. FINKLESTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS, § 7.25 (emphasis added).

Finally, in 2005, in a situation that is nearly identical to the present one, Vice Chancellor Noble determined that a Company that had the "same standard" in their bylaws as the Delaware default standard properly counted abstentions as "no" votes in determining that a stockholder proposal failed to gain majority approval. *Licht v. Storage Technology Corp.*, 2005 Del. Ch. LEXIS 64. In *Licht*, the Court reviewed the *Berlin* and *Hammersmith* decisions and held:

> If a shareholder is at a shareholders' meeting and abstains, the shares owned by that shareholder are fairly characterized as both present and entitled to vote. That the shareholder may voluntarily decide not to vote those shares either affirmatively or negatively, *i.e.*, to abstain, does not alter the fact that the shares are present at the meeting and are entitled to vote, thereby constituting "voting power present." The holder of a proxy, as agent of the shareholder and thus "standing in the shoes" of the shareholder, has voting power through the proxy and implements, on behalf of his principal, the shareholder's voluntary decision not to vote "for" or "against," *i.e.*, to abstain. Thus, the voting power of the shares is the same as if the shareholder were present in person. It is for this reason that the Plaintiff's resort to the dictionary is unavailing. "Abstention" is defined as the "withholding of a vote." The proxy holder, with instructions to abstain, was directed to withhold both affirmative and negative votes from a particular matter. The proxy holder, however, was present, with express direction as to how to act for his principal; presumably, that was how the shareholder would have acted if the shareholder had attended the

meeting.

Id. at *21 (citations omitted).

Thus, when a company adopts the Delaware default standard in its bylaws, as Cheniere did with former bylaw § 2.7,

> the vote necessary for effective stockholder action upon a transaction is the affirmative vote of a majority of the voting power present and entitled to vote on the subject matter. Thus, abstentions are in effect negative votes. For example, where a quorum of 100 votes is present, effective action occurs only where 51 votes are cast in its favor. A resolution receiving only 50 affirmative votes is defeated, no matter whether the remainder are negative votes or abstentions.

2 DAVID A. DREXLER, LEWIS S. BLACK & A. GILCHRIST SPARKS, III, DELAWARE CORPORATION LAW AND PRACTICE, § 25.06.

c) Cheniere's Bylaws Are a Contract and the Defendants Cannot Violate Them

The Supreme Court recently explained that

> Shareholder voting rights are sacrosanct. The fundamental governance right possessed by shareholders is the ability to vote for the directors the shareholder wants to oversee the firm. Without that right, a shareholder would more closely resemble a creditor than an owner. Shareholders have limited opportunities to exercise their right to vote.

EMAK Worldwide, Inc. v. Kurz, 50 A.3d 429, 433 (Del. 2012). The right to have votes counted correctly is an intrinsic part of this "sacrosanct" right. As such, the failure of Defendants to count the February 1, 2013 correctly violated this right.

Moreover, since the method of counting these votes was established in the Company's bylaws, the failure to correctly count these votes constituted a breach of contract.

Last year, then-Chancellor Strine reaffirmed,

> In an unbroken line of decisions dating back several generations, our Supreme Court has made clear that the bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders

Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 955 (Del. Ch. 2013) (citing *Airgas, Inc. v. Air Products & Chemicals, Inc.*, 8 A.3d 1182, 1188 (Del. 2010) and *Lawson v. Household Finance Corp.*, 152 A. 723, 726 (Del.1930)). Chancellor Strine went on to explain that this contract bound not only the corporation itself, but also the "directors, officers, and stockholders." *Chevron*, 73 A.3d 934, 939 & n.7.

A similar situation to the case at bar was addressed by the Northern District of Ohio in *Fradkin v. Ernst*, 571 F. Supp. 829 (N.D. Ohio 1983). In *Fradkin*, 571 F. Supp. at 841, the Court held that a compensation plan was "null and void," *id.* at 852, because the shareholder vote approving it did not gain the necessary majority vote that was required by the Company's Code of Regulations, Ohio's equivalent of bylaws,[4] which required that matters pass by a majority of the shares "eligible

[4] CoBancorp Inc., SEC No-Action Letter, 1996 WL 80498, at *8 (Feb. 22, 1996) ("the Company's Code of Regulations [is] the Ohio General Corporation Law

to vote," not simply shares "present at the meeting." *See also CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 234 (Del. 2008) ("Bylaws, by their very nature, set down rules and procedures that bind a corporation's board and its shareholders. In that sense, most, if not all, bylaws could be said to limit the otherwise unlimited discretionary power of the board.")

Based on the above, Cheniere did not gain majority approval of the February 1, 2013 proposal to increase the 2011 Plan share reserve by 25 million shares. As a result, this Court should declare this share reserve increase and all shares that have been granted on behalf of it null and void.

Applying the above precedent, Plaintiff states a colorable claim that the Board is in breach of contract to the Company and its stockholders by failing to count abstentions as "no" votes in the Company's 2013 Stockholder Vote on the 2011 Plan. Expedited proceedings and the scheduling of a preliminary injunction hearing is necessary to determine whether the prior increase to the share reserve in the 2011 Plan as a result of the 2013 Stockholder Vote is valid, or void, in contravention of Company's own bylaws and Delaware law.

2. Plaintiff's Claims for Breach of Fiduciary Duty Are Sufficiently Colorable

The Board also breached its fiduciary duties to the Company and its stockholders by awarding at least 17,197,536 shares to the Company's CEO, the

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equivalent of Bylaws").

Executive Defendants, other Company employees and consultants, and to themselves under the 2011 Plan, despite the fact that the 2013 Stockholder Vote to permit these awards did not receive the required majority vote. *See In re Novell, Inc. S'holder Litig.*, C.A. No. 6032-VCN, 2013 Del. Ch. LEXIS 1, at *24-25 (Del. Ch. January 3, 2013) ("A director acts in bad faith when he or she "intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his or her duties") (quotation markets and citation omitted). Plaintiff has stated a sufficiently colorable claim that the Board breached its fiduciary duty to the Company and its stockholders by awarding the illegal stock grants, and that the Board and Executive Defendants, including the Company's CEO, will be unjustly enriched as a result of these illegal awards. Plaintiff has further stated a sufficiently colorable claim that the CEO, Executive Defendants, Director Defendants, and other Company employees and consultants should disgorge all such compensation distributed to them as a result of this improper share increase.

3. Plaintiff States a Sufficiently Colorable Claim That The Board Breached Its Duty of Disclosure

It is well established that "directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action." *Arnold v. Soc'y for Sav. Bancorp., Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (citations omitted). Information is material and must be disclosed if there is a "substantial likelihood that the

disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (1985) (citing *TSC Industries Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1979)).

Here, the Board filed materially false and/or misleading proxies and the 2013 8-K. These false disclosures include the Special Meeting Proxy Statement's representation that abstentions would not be counted with regard to Amendment 1 to the 2011 Plan, the 2013 8-K's false disclosure that stockholders had "voted in favor" of Amendment 1, and several statements in the 2014 Proxy Statement claiming that Amendment 1 to the 2011 Plan had received majority approval. The 2014 Proxy Statement is further misleading because it does not disclose the Board's actual motive in amending the bylaw, which Plaintiff asserts was done, at least in part, to conceal that the 2013 proposal to increase the share reserve did not obtain majority support of the Company's shareholders.

In *Malone v. Brincat*, 722 A.2d 5, 10 (Del. Ch. 1998), the Court observed that "directors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder violate their fiduciary duty . . . ." *See also generally ODS Techs., L.P. v. Marshall*, 832 A.2d 1254, 1259 (Del. 2003) (director's duty of candor requires disclosure of all material facts in a non-misleading manner). Expedited discovery and the scheduling of a preliminary

injunction hearing, before the 2014 Stockholder Vote, is necessary to ensure corrective disclosure of this information.

B. Plaintiff And The Class Will Be Irreparably Harmed Absent Expedited Proceedings

Plaintiff and other non-affiliated shareholders of Cheniere will suffer irreparable harm absent the Court granting expedited proceedings since, among other reasons, the vote on Proposal 3 and Proposal 4 is less than two weeks away. First, injury is irreparable when there is a "threat of an uninformed stockholder vote." *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1090 (Del. Ch. 2004). The Court has a preference to remedy duty of disclosure violations through "a specific remedy such as an injunction" rather than through "a substitutionary remedy such as damages." *Gilmartin v. Adobe Res. Corp.*, C.A. No. 12467, 1992 Del. Ch. LEXIS 80, *43 (Del. Ch. Apr. 6, 1992). "It is appropriate for the court to address material disclosure problems through the issuance of a preliminary injunction that persists until the problems are corrected. Otherwise this Court is forced to engage in an inprecise and inefficent method by which to remedy disclosure deficiencies." *ODS Techs., L.P.*, 832 A.2d at 1262-63 (Del. Ch. 2003) (internal quotations markets omitted).

Here, the Special Meeting Proxy Statement, the 8-K, and the 2014 Proxy Statement disclose false information regarding the failure to count abstentions as "no" votes in connection with the 2013 proposal to increase the share reserve by 25

million shares and omit material information affecting "the total mix of information available" to stockholders, thereby disabling the Company's stockholders from casting an informed vote on Proposal 3 and Proposal 4 in the 2014 Proxy Statement. *Rosenblatt*, 493 A.2d at 937. There is a substantial threat of irreparable harm to Plaintiff and other stockholders of Cheniere, and to the Company itself, if Plaintiff is not granted expedited proceedings and the opportunity to enjoin the 2014 Stockholder Vote until: (i) the Court rules on whether the 2013 Stockholder Vote on the 2011 Plan gained a majority under the bylaw in place at that time and the Delaware default rule; and (ii) corrective disclosures are made.

C. Defendants Face No Prejudice From Expedited Discovery

An order expediting discovery is necessary and appropriate here because the vote is less than two weeks away - the 2014 Stockholder Vote is set for June 12, 2014. Balancing the equities between Plaintiff and Defendants, "ordering full and complete disclosure to enable stockholders to make an informed decision" and requiring "a short delay . . . [to] allow additional disclosure is a fairly simple task." *David P. Simonetti Rollover IRA v. Margolis*, 2008 Del. Ch. LEXIS 78, *47 (Del. Ch. June 27, 2008). Defendants will not suffer any significant prejudice from the Court's entry of an order expediting these proceedings and granting limited expedited discovery. Plaintiff anticipates that very narrowly tailored discovery

will be necessary to complete the factual record in anticipation of his motion for a preliminary injunction.[5]

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant his [Proposed] Order, allowing expedition of these proceedings as well as discovery, and scheduling, at the Court's earliest convenience, a hearing on Plaintiff's motion for a preliminary injunction before the June 12, 2014 stockholder meeting.

[5] Plaintiff has propounded and served narrowly tailored Requests for the Production of Documents upon all Defendants, a copy of which is attached hereto.

Dated: May 30, 2014

Respectfully submitted,

BARRACK, RODOS & BACINE
Daniel E. Bacine
Jeffrey W. Golan
Julie B. Palley
Two Commerce Square
2001 Market Street, Suite 3300
Philadelphia, PA 19103
Tel.: (215) 963-0600

-and-

Alexander Arnold Gershon
Michael A. Toomey
425 Park Avenue, Suite 3100
New York, NY 10022
Tel.: (212) 688-0782

Counsel for Plaintiff James B. Jones

ANDREWS & SPRINGER LLC
By: /s/ *Peter B. Andrews*
Peter B. Andrews (No. 4623)
Craig J. Springer (No. 5529)
3801 Kennett Pike, Building C, Suite 305
Wilmington, DE 19807
Tel.: (302)-504-4957
Fax: (302)-397-2681
Counsel for Plaintiff James B. Jones