

NightHawk Radiology Holdings Inc
Form DEFM14A
November 23, 2010
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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SCHEDULE 14A

(Rule 14a-101)

PROXY STATEMENT PURSUANT TO SECTION 14(a) OF THE
SECURITIES EXCHANGE ACT OF 1934

Filed by the Registrant
Check the appropriate box:

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Preliminary Proxy Statement

Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2))

Definitive Proxy Statement

Definitive Additional Materials

Soliciting Material Pursuant to §240.14a-2

NIGHTHAWK RADIOLOGY HOLDINGS, INC.

(Name of Registrant as Specified In Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

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(3) Filing Party:

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NIGHTHAWK RADIOLOGY HOLDINGS, INC.

4900 N. Scottsdale Road, 6th Floor

Scottsdale, AZ 85251

(480) 822-4000

November 22, 2010

Dear Stockholder:

You are cordially invited to attend a special meeting of the stockholders of NightHawk Radiology Holdings, Inc., which we refer to as NightHawk, to be held on Wednesday, December 22, 2010, at 8:00 AM (Mountain Time), at our headquarters, located at 4900 N. Scottsdale Road, 6th Floor, Scottsdale, AZ 85251.

At the special meeting, you will be asked to consider and vote upon the adoption of the Agreement and Plan of Merger, dated September 26, 2010, by and among Virtual Radiologic Corporation, which we refer to as vRad, Eagle Merger Sub Corporation, which we refer to as Merger Sub, and NightHawk. Pursuant to the merger agreement, Merger Sub will be merged with and into NightHawk, with NightHawk surviving as a wholly-owned subsidiary of vRad.

Assuming the holders of a majority of our issued and outstanding shares of common stock adopt the merger agreement and the merger is completed, upon completion of the merger, you will be entitled to receive \$6.50 in cash, without interest, for each share of NightHawk common stock that you own, unless you have sought and properly perfected your appraisal rights under Delaware law. The \$6.50 in cash per share to be paid pursuant to the merger agreement constitutes a premium of approximately 122% and 132% over the average closing price of our common stock for the 30 and 90 calendar days, respectively, prior to the announcement of the merger. After the merger, you will no longer have an equity interest in NightHawk and will not participate in any potential future earnings and growth of NightHawk.

Our Board of Directors has adopted a resolution unanimously approving the merger agreement. **Our Board of Directors has unanimously determined that the merger agreement and the merger are advisable, fair to and in the best interest of NightHawk and our stockholders. Our Board of Directors unanimously recommends that you vote FOR the adoption of the merger agreement.** In arriving at its recommendation, our Board of Directors carefully considered a number of factors described in the accompanying proxy statement. The merger agreement and the merger are described in the accompanying proxy statement. A copy of the merger agreement is attached as Appendix A to the accompanying proxy statement. We urge you to read carefully the accompanying proxy statement, including the appendices.

Your vote is very important, regardless of the number of shares of our common stock you own. Under Delaware law, the merger cannot be completed unless the holders of a majority of the outstanding shares of our common stock entitled to vote at the special meeting vote for the adoption of the merger agreement. **If you do not vote, it will have the same effect as a vote against the adoption of the merger agreement.**

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Whether or not you plan to attend the special meeting in person, please complete, sign, date and return promptly the enclosed proxy card. If you hold shares through a bank or brokerage firm or other nominee, you should follow the procedures provided by your bank or brokerage firm or nominee. Voting in advance will not limit your right to vote in person if you wish to attend the special meeting and vote in person. The proxy statement is being mailed to our stockholders on or about November 23, 2010.

Sincerely,

David M. Engert

President and Chief Executive Officer

NEITHER THE SECURITIES AND EXCHANGE COMMISSION NOR ANY STATE SECURITIES COMMISSION HAS APPROVED OR DISAPPROVED THE MERGER, PASSED UPON THE MERITS OR FAIRNESS OF THE MERGER AGREEMENT OR THE TRANSACTIONS CONTEMPLATED THEREBY, INCLUDING THE PROPOSED MERGER, OR PASSED UPON THE ADEQUACY OR ACCURACY OF THE INFORMATION CONTAINED IN THIS DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

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NIGHTHAWK RADIOLOGY HOLDINGS, INC.

4900 N. Scottsdale Road, 6th Floor

Scottsdale, AZ 85251

NOTICE OF SPECIAL MEETING OF STOCKHOLDERS

TO BE HELD DECEMBER 22, 2010

NOTICE IS HEREBY GIVEN that a special meeting of stockholders of NightHawk Radiology Holdings, Inc., which we refer to as NightHawk, will be held on Wednesday, December 22, 2010, at 8:00 AM (Mountain Time), at our headquarters, located at 4900 N. Scottsdale Road, 6th Floor, Scottsdale, AZ 85251, for the following purposes:

1. *Adoption of the Merger Agreement.* To consider and vote upon the adoption of the Agreement and Plan of Merger, dated as of September 26, 2010, by and among Virtual Radiologic Corporation, Eagle Merger Sub Corporation and NightHawk (the Proposal). Pursuant to the merger agreement, NightHawk will become a wholly-owned subsidiary of vRad, and the holders of NightHawk common stock will be entitled to receive \$6.50 in cash, without interest, per share of NightHawk common stock held by them at the effective time of the merger; and
2. *Adjournment and Postponement of the Special Meeting.* To approve the adjournment or postponement of the special meeting, if necessary or appropriate, to solicit additional proxies in support of the Proposal if there are insufficient votes at the time of the meeting to adopt the merger agreement.

Your vote is very important, regardless of the number of shares of our common stock you own. Under Delaware law, the merger cannot be completed unless the holders of a majority of the outstanding shares of our common stock entitled to vote at the special meeting vote for the adoption of the merger agreement. Even if you plan to attend the meeting in person, we request that you complete, sign, date and return the enclosed proxy card in the envelope provided and thereby ensure that your shares will be represented at the meeting if you are unable to attend. If you are a stockholder of record and wish to vote in person at the special meeting, you may withdraw your proxy and vote in person. If you sign, date and mail your proxy card without indicating how you wish to vote, your vote will be counted as a vote FOR the adoption of the merger agreement and FOR the adjournment or postponement of the special meeting, if necessary or appropriate, to solicit additional proxies.

If you fail to return your proxy or vote in person or abstain from voting, the effect will be that your shares will not be counted for purposes of determining whether a quorum is present at the special meeting and, if a quorum is present, will have the same effect as a vote against the adoption of the merger agreement.

Stockholders of NightHawk who do not vote in favor of the adoption of the merger agreement will have the right to seek appraisal of the fair value of their shares if the merger is completed, but only if they exercise their appraisal rights prior to the vote on the merger agreement and comply with all procedural requirements of Delaware law, which are summarized in the accompanying proxy statement under the caption The Merger Appraisal Rights beginning on page 36.

The merger agreement and the merger are described in the accompanying proxy statement and a copy of the merger agreement is included as Appendix A to the proxy statement.

By order of the Board of Directors,

David M. Engert

President and Chief Executive Officer

November 22, 2010

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NIGHTHAWK RADIOLOGY HOLDINGS, INC.

4900 N. Scottsdale Road, 6th Floor

Scottsdale, AZ 85251

PROXY STATEMENT FOR SPECIAL MEETING OF STOCKHOLDERS

TO BE HELD ON DECEMBER 22, 2010

We are providing these proxy materials to you in connection with the solicitation of proxies by the Board of Directors of NightHawk Radiology Holdings, Inc. for a special meeting of stockholders to be held on December 22, 2010 and for any adjournment or postponement thereof. This proxy statement provides information that you should read before you vote on the proposals that will be presented to you at the special meeting. The special meeting will be held on Wednesday, December 22, 2010, at 8:00 AM (Mountain Time), at our headquarters, located at 4900 N. Scottsdale Road, 6th Floor, Scottsdale, AZ 85251.

In this proxy statement, we refer to NightHawk Radiology Holdings, Inc. as **NightHawk**, **the Company**, **we** or **us**. We refer to Virtual Radiologic Corporation as **vRad**, and Eagle Merger Sub Corporation as **Merger Sub**.

This proxy statement and a proxy card are first being mailed on or about November 23, 2010 to holders of NightHawk common stock as of the close of business on November 11, 2010.

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SUMMARY TERM SHEET

*This summary term sheet presents selected information in this proxy statement relating to the merger and may not contain all of the information that is important to you. To understand the merger and the transactions contemplated by the merger agreement fully, you should carefully read this entire document as well as the Agreement and Plan of Merger attached hereto as Appendix A, which we refer to as the merger agreement. For instructions on obtaining more information, see *Where You Can Find More Information* on page 59. We have included page references to direct you to a more complete description of the topics presented in this summary.*

The Special Meeting (see page 14)

Date, Time and Place. The special meeting of NightHawk stockholders will be held on Wednesday, December 22, 2010, at 8:00 AM (Mountain Time), at our headquarters, located at 4900 N. Scottsdale Road, 6th Floor, Scottsdale, AZ 85251.

Matters to be Considered. At the special meeting, you will be asked to consider and vote on a proposal to adopt the merger agreement. You may also be asked to vote to adjourn the special meeting, if necessary or appropriate, to solicit additional proxies in support of the proposal to adopt the merger agreement.

Record Date and Quorum. You are entitled to vote at the special meeting if you owned shares of our common stock at the close of business on November 11, 2010, which we have set as the record date for the special meeting. The presence, in person or by proxy, of holders of record of a majority of the outstanding shares of our stock entitled to vote on the matters to be presented at the special meeting will constitute a quorum.

Required Votes. Adoption of the merger agreement requires the affirmative vote of a majority of the outstanding shares entitled to vote on the merger.

Voting. Even if you plan to attend the meeting in person, we request that you complete, sign, date and return the enclosed proxy card and thereby ensure that your shares will be represented at the meeting if you are unable to attend. If your shares are held in street name by a bank or brokerage firm, your bank or brokerage firm forwarded these proxy materials, as well as a voting instruction card, to you. Please follow the instructions on the voting instruction card to vote your shares.

Parties to the Merger (see page 16)

NightHawk Radiology Holdings, Inc., or NightHawk, is a Delaware corporation leading the transformation of the practice of radiology by providing high-quality, cost-effective solutions in the United States. NightHawk provides a complete suite of solutions, designed to increase efficiencies and improve the quality of patient care and the lives of radiologists. NightHawk's team of U.S. board-certified, state-licensed, and hospital-privileged physicians are located in the United States, Australia, and Switzerland. They provide services 24 hours a day, 7 days a week, to nearly 1,500 sites.

NightHawk's principal executive offices are located at 4900 N. Scottsdale Road, 6th Floor, Scottsdale, AZ 85251, and its telephone number is (480) 822-4000.

Virtual Radiologic Corporation, or vRad, is a Delaware corporation that combines a management and technology organization with affiliated medical practices to function as a national radiology practice working in partnership with local radiologists and hospitals to optimize radiology's pivotal role in patient care. Delivering access to extensive subspecialty coverage, vRad contributes to improved quality of patient care. And with its

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next-generation technology, vRad enhances productivity, helping to lower the overall cost of care while expediting time to diagnosis and treatment. Upon completion of the merger, NightHawk will be a direct wholly-owned subsidiary of vRad.

vRad's principal executive offices are located at 11995 Singletree Lane, Suite 500, Eden Prairie, Minnesota 55344, and its telephone number is (952) 595-1100.

Eagle Merger Sub Corporation, or Merger Sub, was formed by vRad solely for the purpose of acquiring NightHawk. Upon completion of the merger, Merger Sub will cease to exist.

Merger Sub's principal executive offices are located at 11995 Singletree Lane, Suite 500, Eden Prairie, Minnesota 55344, and its telephone number is (952) 595-1100.

The Merger (see page 17)

If the merger is completed, Merger Sub will be merged with and into NightHawk, with NightHawk continuing as the surviving corporation.

If the merger is completed, the following will occur:

your shares of NightHawk common stock will be converted into the right to receive \$6.50 in cash per share, without interest;

all of the equity interests in NightHawk will be owned directly by vRad;

you will no longer have any interest in our future earnings or growth;

we will no longer be a public company and our common stock will no longer be traded on the Nasdaq Global Market; and

we will no longer be required to file periodic and other reports with the Securities and Exchange Commission.

Recommendation of our Board of Directors; Reasons for the Merger (see page 25)

Our Board of Directors determined that the merger is substantively and procedurally fair to our stockholders. In reaching this conclusion, our Board of Directors considered, among other factors, the following:

the Board of Directors' review of historical information concerning NightHawk's business, financial performance and condition, results of operations, technological and competitive position, as well as our business and strategic objectives;

current financial market conditions and historical market prices, volatility and trading information with respect to NightHawk's common stock, as well as views of equity analysts regarding NightHawk;

the fact that the \$6.50 per share to be paid pursuant to the merger agreement constitutes a significant premium over the market price of our common stock, including:

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a premium of approximately 122% over the average closing price of our common stock for the 30 calendar days prior to announcement of the merger;

a premium of approximately 132% over the average closing price of our common stock for the 90 calendar days prior to announcement of the merger; and

a premium of 100% over the closing price of our common stock on the trading day immediately prior to the announcement of the merger;

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the Board of Directors' belief that the merger will result in greater value to our stockholders than the value that could be generated from other strategic alternatives available to us, including the option of remaining independent and pursuing our current strategic plan or making strategic acquisitions, taking into account the potential risks and uncertainties associated with each of such alternatives as compared to the liquidity and certainty of value provided by the \$6.50 per share in cash to be paid to our stockholders pursuant to the merger agreement;

the terms of the merger agreement, which were the product of arms-length negotiations between the Board of Directors and our advisors, on the one hand, and vRad and its advisors, on the other hand, including, without limitation:

the representations and warranties of us, vRad and Merger Sub;

that the merger is not subject to a financing condition and that vRad obtained debt commitment letters for the full amount of the aggregate merger consideration;

that the merger agreement permits us to seek specific performance by vRad and Merger Sub of their obligations under the merger agreement; and

that the merger agreement (i) provides for a post-signing go-shop period, during which we may, subject to certain requirements, solicit alternative proposals, (ii) allows NightHawk to respond to solicitations from third parties, subject to certain requirements, after the go-shop period, and (iii) at any time prior to the adoption of the merger agreement by the NightHawk stockholders, allows NightHawk to terminate the merger agreement to accept a superior proposal upon payment of a termination fee, all of which our Board of Directors believed were important in ensuring the merger would be substantively fair to our stockholders; see *The Merger Agreement - Acquisition Proposals by Third Parties* beginning on page 48;

the Board of Directors' belief that the termination fees and expense reimbursement provisions in the merger agreement (described below under the section *The Merger Agreement - Acquisition Proposals by Third Parties* beginning on page 48) (i) are reasonable in light of the overall terms of the merger agreement and the benefits of the merger, (ii) are within the range of similar precedent transactions and (iii) would not prevent a competing proposal;

the fact that the merger is subject to the adoption of the merger agreement by the holders of a majority of the outstanding shares of our common stock;

the fact that our stockholders who do not support the merger may seek appraisal of the fair value of their shares under Delaware law; and

the oral opinion of Morgan Stanley rendered to the Board of Directors on September 26, 2010, subsequently confirmed in writing, to the effect that, as of that date, based upon and subject to the limitations, qualifications and assumptions set forth in the written opinion, the \$6.50 per share to be received by holders of shares of Company common stock pursuant to the merger agreement was fair from a financial point of view to such holders. The summary of Morgan Stanley's opinion in this proxy statement is qualified in its entirety by reference to the full text of its written opinion, which is included as Appendix B to this proxy statement and sets forth, among other things, the assumptions made, procedures followed, matters considered and limitations on the scope of the review undertaken by Morgan Stanley in rendering its opinion.

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Our Board of Directors unanimously approved the merger agreement and determined that it is advisable, fair to and in the best interest of NightHawk and our stockholders. **Our Board of Directors unanimously recommends that you vote FOR the adoption of the merger agreement.**

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Opinion of the Financial Advisor to NightHawk (see page 27)

Morgan Stanley & Co. Incorporated, or Morgan Stanley, was engaged by the Company to provide it with financial advisory services in connection with the potential sale of the Company. At the meeting of the Board of Directors on September 26, 2010, Morgan Stanley rendered its oral opinion, subsequently confirmed in writing, that, as of that date, based upon and subject to the limitations, qualifications and assumptions set forth in the written opinion, the \$6.50 per share to be received by holders of shares of Company common stock pursuant to the merger agreement was fair from a financial point of view to such holders.

The full text of the written opinion of Morgan Stanley, dated September 26, 2010, which sets forth among other things, the assumptions made, procedures followed, matters considered and limitations on the scope of the review undertaken by Morgan Stanley in rendering its opinion, is attached as Appendix B. Stockholders are urged to, and should, read the opinion carefully and in its entirety. Morgan Stanley's opinion is directed to the Board of Directors and addresses only the fairness, from a financial point of view, of the consideration to be received by the holders of shares of Company common stock pursuant to the merger agreement, as of the date of the opinion. Morgan Stanley's opinion does not address any other aspect of the transactions contemplated by the merger agreement and does not constitute a recommendation as to how any such holder should vote at the special meeting of stockholders or whether any such holder should take any other action with respect to the merger. The summary of the opinion of Morgan Stanley set forth below under "The Merger" is qualified in its entirety by reference to the full text of the opinion.

We encourage you to read the opinion of Morgan Stanley described above carefully in its entirety for a description of the assumptions made, procedures followed, matters considered and limitations on the scope of the review undertaken in connection with such opinion.

Interests of our Directors and Officers in the Merger (see page 34)

Our directors and officers have interests in the merger that are different from, or in addition to, the interests of our stockholders generally. These interests include the acceleration and cash-out of options and restricted stock units, the right to continued indemnification and insurance coverage by the surviving corporation after the merger and a six-month advisory agreement with David M. Engert, our director, President and Chief Executive Officer.

Appraisal Rights (see page 36)

Pursuant to Section 262 of the General Corporation Law of the State of Delaware, if you do not vote in favor of the adoption of the merger agreement and you instead follow the appropriate procedures for demanding and perfecting appraisal rights as described on pages 36 through 39 and in Appendix C, you will receive a cash payment for the fair value of your shares of NightHawk common stock, as determined by a Delaware Court of Chancery, instead of the \$6.50 per share merger consideration to be received by our stockholders pursuant to the merger agreement. The fair value of NightHawk common stock may be more than, less than or equal to the \$6.50 merger consideration you would have received for each of your shares pursuant to the merger agreement if you had not exercised your appraisal rights.

Generally, in order to exercise appraisal rights, among other things, you must:

not vote in favor of adoption of the merger agreement; and

make a written demand for appraisal in compliance with Delaware law prior to the vote of our stockholders to adopt the merger agreement.

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Abstaining or voting against the adoption of the merger agreement will not perfect your appraisal rights under Delaware law. Appendix C to this proxy statement contains the Delaware statute relating to your appraisal rights. **If you want to exercise your appraisal rights, please read and carefully follow the procedures described on pages 36 through 39 and in Appendix C. The Delaware statute governing appraisal rights is very complex and we urge you to consult with your own legal counsel in the event you decide to exercise your appraisal rights. Failure to take all of the steps required under Delaware law will result in the loss of your appraisal rights.**

Certain Material U.S. Federal Income Tax Consequences of the Merger (see page 40)

The receipt of \$6.50 in cash by our stockholders for each outstanding share of our common stock will generally be a taxable transaction for U.S. federal income tax purposes. Each of our stockholders generally will recognize taxable gain or loss, measured by the difference, if any, between the stockholder's amount realized in the merger of \$6.50 per share, and the tax basis of each share of our common stock owned by such stockholder. Stockholders should consult their own tax advisors to determine the particular tax consequences to them (including application of any U.S. federal non-income, foreign, state, local or other tax laws) of the merger.

Litigation Related to the Merger (see page 42)

Beginning on September 28, 2010, several purported class action lawsuits were filed on behalf of the Company's stockholders in the Superior Court of Maricopa County, Arizona, docketed as *Israni v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-025059, *LaLone v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-028112, *La Torre v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-028176, *Watts v. Engert, et al.*, Case No. CV2010-028127, *Newman v. Engert, et al.*, Case No. CV2010-028262, and *Yu v. Engert, et al.*, Case No. CV2010-028403. On October 8, 2010, another purported class action lawsuit on behalf of the Company's stockholders was filed in Delaware Chancery Court, docketed as *Scully v. NightHawk Radiology Holdings, Inc., et al.*, Case No. 5890-VCL (the Delaware Action), and plaintiff Scully amended his complaint on October 29, 2010. On October 22, 2010, an additional purported class action lawsuit on behalf of the Company's stockholders was filed in the United States District Court for the District of Arizona, docketed as *Clayton v. Engert, et al.*, Case No. 2:10-CV-02274-NVW (the Arizona Federal Action). The complaints name the Company, each of the members of our Board of Directors, certain of our officers, and vRad as defendants.

The lawsuits allege, among other things, that our Board of Directors breached fiduciary duties owed to our stockholders by failing to take steps to maximize stockholder value or to engage in a fair sale process when approving the proposed merger with vRad. The complaints also allege that the Company and vRad aided and abetted the members of our Board of Directors in the alleged breach of their fiduciary duties. We believe the lawsuits are without merit and intend to defend against them vigorously. There can be no assurance, however, with regard to the outcome of these lawsuits.

Treatment of Common Stock, Stock Options and Restricted Stock (see page 43)

Common Stock. At the effective time of the merger, each share of our common stock outstanding immediately prior to the effective time of the merger (other than shares held by vRad, Merger Sub and their affiliates and stockholders who have perfected and not withdrawn a demand for appraisal rights under Delaware law) will be automatically cancelled and converted into the right to receive \$6.50 in cash, without interest.

Stock Options. Prior to the effective time of the merger, each outstanding stock option to purchase our common stock will vest in full. Each stock option to purchase our common stock outstanding at the effective time of the merger will be cancelled and converted into the right to receive, as soon as reasonably practicably after the effective time of the merger, an amount in cash equal to (i) the number of shares subject to such option multiplied by (ii) the excess (if any) of \$6.50 over the exercise price per share of such option, without interest.

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and less applicable withholding taxes. If the exercise price per share of an option to acquire our common stock equals or exceeds the \$6.50 per share merger consideration, such option will be cancelled without payment.

Restricted Stock Units. As of the effective time of the merger, each outstanding restricted stock unit will be cancelled and converted into the right to receive, as soon as reasonably practicable following the effective time of the merger, \$6.50 per underlying share, without interest and less any applicable withholding taxes.

Acquisition Proposals by Third Parties (see page 48)

The merger agreement provides that until 12:01 a.m., New York time, on October 26, 2010, which we refer to as the go-shop period, we are permitted to solicit, initiate and encourage other acquisition proposals and provide non-public information to third parties pursuant to a confidentiality agreement no less favorable to us than our confidentiality agreement with vRad. After 12:01 a.m., New York time, on October 26, 2010, which we refer to as the no-shop period start date, and until the effective time of the merger or, if earlier, the termination of the merger agreement, we are prohibited from soliciting, initiating or encouraging other acquisition proposals or providing non-public information to third parties with respect to any acquisition proposal. Notwithstanding these restrictions, and subject to certain requirements set forth in the merger agreement, after the go-shop period, we may provide confidential information: (i) until 12:01 a.m., New York time, on November 20, 2010, to a party, which we refer to as an excluded party, who has made a written acquisition proposal prior to the no-shop period start date (and such proposal has not yet been withdrawn, terminated or expired) that our Board of Directors determines in good faith, after consultation with its independent financial advisor and outside legal counsel, constitutes a superior proposal, and who we have identified to vRad within two business days after the no-shop period start date to be an excluded party, and (ii) to a third party in response to an unsolicited acquisition proposal and we are permitted to engage in discussions and negotiations with such third party if (A) our Board of Directors determines in good faith that the failure to take such action would be inconsistent with its fiduciary duties, (B) our Board of Directors determines that the acquisition proposal is, or would reasonably be expected to lead to, a superior proposal and (C) prior to taking such action, we execute a confidentiality agreement with such third party with terms no less favorable than those contained in our confidentiality agreement with vRad. In addition, if we receive an unsolicited acquisition proposal, we must promptly notify vRad of the proposal's material terms. The go-shop period has expired and no party was identified as an excluded party.

Conditions to the Merger (see page 52)

Completion of the merger depends upon the parties meeting or waiving a number of conditions, including:

the adoption of the merger agreement by holders of a majority of the outstanding shares of NightHawk common stock entitled to vote on the adoption;

the expiration or termination of the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act, which we refer to as the Hart-Scott Rodino Act or the HSR Act, and the obtainment of all regulatory clearances in any relevant jurisdiction;

the absence of any law or governmental injunction prohibiting the consummation of the merger;

the accuracy of the parties' representations and warranties to the extent such inaccuracy results in or would reasonably be likely to result in a material adverse effect on such party, as that term is defined in the merger agreement, and the parties' compliance with the covenants and agreements set forth in the merger agreement;

the absence of a material adverse effect on NightHawk since December 31, 2009, except as otherwise specifically disclosed to vRad prior to the date of the merger agreement; and

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our payment obligations under our existing credit agreement, other than indemnification obligations and other contingent liabilities that survive repayment of the loans under the credit agreement shall have been paid in full.

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