EFiled: Apr 21 2008 5:29PM EDT
Transaction ID 19500126
Case No. 2728-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: LEAR CORPORATION SHAREHOLDER LITIGATION	))	CONSOLIDATED C.A. No. 2728-VCS

THE AREP DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS THE FOURTH AMENDED CONSOLIDATED SHAREHOLDER DERIVATIVE COMPLAINT

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April 14, 2008

PUBLIC VERSION FILED:
APRIL 21, 2008

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PRELIMINARY STATEMENT

This brief is submitted in support of the motion of defendants American Real Estate Partners, L.P., AREP Car Holdings Corp., AREP Car Acquisition Corp. (together, the "AREP Entities") and Vincent J. Intrieri ("Intrieri") (together with the AREP Entities, the "AREP Defendants") to dismiss the Fourth Amended Consolidated Shareholder Derivative Complaint (the "Fourth Amended Complaint"). The Fourth Amended Complaint alleges that the board of directors (the "Board" or the "Individual Defendants") of Lear Corporation ("Lear" or the "Company") breached its fiduciary duties by approving Amendment No. 1 to the initial merger agreement (the "Amended Merger Agreement") between Lear and certain of the AREP Entities (the "Merger"). Specifically, plaintiffs allege that the Individual Defendants breached their duty of loyalty and good faith by negotiating and approving the Amended Merger Agreement, which included a provision that, in exchange for the AREP Entities agreeing to increase the merger price from $36.00 per share to $37.25 per share, provided for a cash payment of $12.5 million to the AREP Entities and the issuance to the AREP Entities of 335,570 shares of Lear's common stock in the event Lear's shareholders rejected the proposed Merger (the "No Vote Termination Fee").

As set forth here, the Fourth Amended Complaint does not state any legally sufficient claim against either Intrieri or against the AREP Entities. Specifically, the Fourth Amended Complaint does not allege that Intrieri participated in any way in the challenged decisions, and the public record states unambiguously that, because of his affiliation with the AREP Entities, he did not. The only claims asserted against the AREP Entities are for alleged aiding and abetting and for unjust enrichment. As explained herein, the Fourth Amended

Complaint fails to allege that the AREP Entities "knowingly participated" in any breach of duty. Rather, the Fourth Amended Complaint alleges arms' length negotiations between Lear and the AREP Entities, which courts have separately found to negate any claim of aiding and abetting. The unjust enrichment claim against the AREP Entities fails because the relationship between the parties was governed by a contract.

Plaintiffs allege an assortment of reasons why the Individual Defendants' negotiation and execution of the Amended Merger Agreement allegedly constituted a breach of their fiduciary duties. Plaintiffs allege that the Board knew that the $37.25 per share revised merger price was inadequate, and claim – in wholly conclusory terms – that the negotiations between Lear and Carl C. Icahn ("Icahn") were not at arm's length, that the Board failed to evaluate the likelihood that Lear's shareholders would vote against the Amended Merger Agreement, and that the Board voted in favor of the Amended Merger Agreement even though it knew that Lear's shareholders would not approve the proposed Merger and knew, or should have known, that Institutional Shareholder Services ("ISS") would recommend against the Amended Merger Agreement. But, the Fourth Amended Complaint fails to allege any particularized facts and reasonable inferences to support these claims, and in fact alleges that the negotiations between Lear and the AREP Entities were extensive and detailed. Compl. ¶¶ 172-79. Thus, plaintiffs' breach of fiduciary claim should be dismissed pursuant to Court of Chancery Rules 23.1 and 12(b)(6).

Plaintiffs claim that a demand on the Board would have been futile. Rather than focus on the independence and disinterestedness of the Individual Defendants, plaintiffs instead allege that the Individual Defendants' actions are not protected by the business judgment rule

because they constituted a breach of their duty of loyalty. Plaintiffs, however, have failed to plead particularized facts to demonstrate such a breach. For instance, plaintiffs allege that the Board knew that Lear's shareholders would reject the proposed Merger, and yet, approved the revised transaction terms, ensuring that the AREP Entities would receive the No Vote Termination Fee. Plaintiffs do not allege any particularized facts to demonstrate that the Board knew the direction of the shareholder vote before it occurred. Not once do plaintiffs point to any instance where the Board was informed by Lear's management or Lear's proxy solicitor, MacKenzie Partners ("MacKenzie"), that the Merger was going to be rejected. In addition, plaintiffs allege that the negotiations with Icahn were not at arms' length. Not only does the Fourth Amended Complaint lack any particularized facts to support this allegation, but the allegations contained therein actually belie this allegation. The Fourth Amended Complaint details the vigorous and difficult negotiations between Lear and Icahn and demonstrates that the Amended Merger Agreement was the product of arms' length bargaining. Like these two allegations, the remaining allegations asserted by plaintiffs in support of their fiduciary duty claim fail to contain any particularized factual support. Plaintiffs have failed to demonstrate that the Amended Merger Agreement was not entered into in the good faith belief that it was the best possible deal for Lear's shareholders or that the Board's decision fell outside the protections of the business judgment rule. Consequently, plaintiffs' breach of fiduciary duty claim must fail.[1]

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[1] Plaintiffs' primary claims should be dismissed for failure to comply with Chancery Court Rule 23.1 and failure to state a claim pursuant to Chancery Court Rule 12(b)(6). The grounds for such dismissal is set forth in greater detail in the brief by the Lear Defendants, in which the AREP Defendants join.

While it is clear from the Fourth Amended Complaint that plaintiff does not have any viable breach of fiduciary duty claims against any of the defendants, plaintiff's claims against the AREP Defendants are particularly weak. As noted, Intrieri did not participate in any of the deliberations regarding the Amended Merger Agreement and did not vote in favor of the agreement. Thus, he did not participate in any of the alleged wrongdoing and could not be held to have breached his fiduciary duties. Plaintiffs' claims that the AREP Entities aided and abetted the Board's alleged fiduciary duty breach and that the AREP Entities and the Individual Defendants were unjustly enriched as a result of the Board's alleged breach are equally flimsy. Plaintiffs' aiding and abetting claim should be dismissed because the Fourth Amended Complaint does not include well-pleaded allegations that demonstrate a breach of fiduciary duty, or that the AREP Entities "knowingly participated" in such a breach – both key elements of an aiding and abetting claim. It is clear from the allegations in the Fourth Amended Complaint that the Amended Merger Agreement was negotiated at arms' length and was the result of a fair *quid pro quo*. Also, plaintiffs' unjust enrichment claim must fail because the relationship between Lear, on whose behalf plaintiffs brings these claims, and the AREP Entities is governed by contract, barring plaintiffs from bringing an unjust enrichment claim.

NATURE AND STAGE OF THE PROCEEDING

On February 9 and February 21, 2007, various purported shareholders of Lear filed complaints in the Delaware Court of Chancery asserting class action and shareholder derivative claims seeking to enjoin the purchase of Lear Corporation by the AREP Entities. A consolidated amended class action complaint was filed on February 23, 2007 under the caption *In re Lear Corporation Shareholder Litigation*, C.A. 2728-VCS (Del. Ch.). Expedited discovery ensued and a hearing on plaintiffs' motion for a preliminary injunction was held on June 8, 2007. On June 15, 2007, this Court denied plaintiffs' substantive claims for injunctive relief, but entered a limited injunction barring the holding of a shareholder vote on the Merger pending supplemental disclosures regarding the effect of the proposed transaction on Lear CEO Robert E. Rossiter's ("Rossiter") retirement benefits. On June 19, 2007, Lear complied with the Court order and provided the necessary supplemental disclosures.

Plaintiffs have filed several amended complaints in this consolidated action. On June 7, 2007, plaintiffs filed a motion for leave to file a second amended complaint, and the Court granted that motion on June 26, 2007. On August 1, 2007, the AREP Defendants filed a motion to dismiss plaintiffs' second amended complaint as moot. On August 21, 2007, plaintiffs filed a motion for leave to file a third amended complaint, and on September 11, 2007, plaintiffs filed the third amended complaint. On November 16, 2007, plaintiffs filed a motion to dismiss the class claims asserted in the third amended complaint and seeking leave to file a fourth amended complaint. By order dated March 5, 2008, the Court dismissed the class claims in plaintiffs' third amended complaint and allowed plaintiffs to file a fourth amended complaint, established a schedule for briefing on plaintiffs' fee application for the supplemental disclosures

regarding Rossiter, and established a schedule for briefing on the defendants' motion to dismiss the Fourth Amended Complaint. On March 19, 2008, plaintiffs formally filed their Fourth Amended Complaint, asserting shareholder derivative claims that the Individual Defendants breached their fiduciary duties by entering into the Amended Merger Agreement. The Fourth Amended Complaint further alleges that the AREP Entities aided and abetted the Individual Defendants' breaches of their fiduciary duties and that the AREP Entities and the Individual Defendants were unjustly enriched as a result of those breaches.

STATEMENT OF FACTS AS ALLEGED IN THE COMPLAINT[2]

The Court is familiar with the parties to the transaction and the background of the Merger, having issued an opinion dated June 15, 2007 denying an injunction based upon plaintiffs' substantive claims but granting a limited injunction requiring supplemental disclosures regarding the Merger's effect on Rossiter's retirement benefits. In its ruling, the Court held that the Board's acceptance of the AREP Entities' bid was not unreasonable. *In re Lear Corp. S'holders Litig.*, 926 A.2d 94, 122 (Del. Ch. 2007).

Now, plaintiffs' allegations focus on the negotiation and approval of Amendment No. 1 to the initial merger agreement. Amendment No. 1 provides for an increase in the consideration payable to Lear's shareholders from $36.00 per share to $37.25 per share in exchange for the inclusion of the following provision in the initial merger agreement:

> that if the requisite stockholder vote for the merger is not obtained on or prior to July 16, 2007, subject to certain exceptions, the Company will pay [the AREP Entities] $12.5 million, issue to [the AREP Entities] 335,570 shares of the Company's common stock and increase from 24% to 27% the share ownership limitation under the waiver of Section 203 of the Delaware Corporation Law (the "DGCL") previously granted by the Company to Icahn affiliates.

Compl. ¶ 8 (quoting Supplement No. 2 to Lear Corporation's May 23, 2007 Proxy Statement (the "July 9 Supplement")).

A. The Shareholder Solicitation Effort.

In late May 2007, Lear representatives, including two members of the special committee of the Board formed to consider the sale of Lear (the "Special Committee"), met with

[2] The following facts are derived from the allegations in the Complaint, which are taken as true for the purpose of this motion to dismiss. The AREP Defendants reserve their right to contest these allegations if the case proceeds beyond the present motion to dismiss.

ISS in Washington D.C. Compl. ¶ 160. In addition, throughout the month of June, Lear's management met or held conference calls with major shareholders. *Id.* Lear representatives provided status reports on the solicitation effort at Special Committee meetings on June 14, 17, and 21, 2007. *Id.*

In response to this Court's opinion, on June 18, 2007, Lear filed Supplement No. 1 to its May 23, 2007 Proxy Statement ("Supplement No. 1"), which disclosed that Rossiter had considered retiring in November 2006, and described the proposed Merger's effect on Rossiter's retirement benefits. *Id.* ¶ 6. Along with Supplement No. 1, Lear filed a copy of the Court's June 15, 2007 opinion in a Form 8-K, along with a letter sent to Lear by potential suitor Tata Group relating its experience in the bidding process. *Id.* ¶ 6.

On June 20, 2007, ISS issued a report recommending that Lear's shareholders vote against the proposed Merger. *Id.* ¶ 7. Contemporaneously, investor advisory organizations Proxy Governance, Inc. and Glass Lewis & Co. also encouraged shareholders to vote against the deal, and institutional shareholder California State Teachers Retirement System sent a widely reported letter to Rossiter opining that the $36.00 per share offer was inadequate. *Id.* ¶ 162.

On June 21, the Executive Committee of the Board and the Special Committee met to review Lear's proxy-solicitation efforts. *Id.* ¶ 163. At this meeting, Lear's General Counsel, Dan Ninivaggi ("Ninivaggi"), updated the committees on the Court's opinion, reported that major shareholders' reaction to the Merger was "mixed," and answered questions regarding ISS's negative recommendation. *Id.* ¶ 164. The Special Committee approved a draft shareholder letter dated June 21, 2007 responding to issues raised by ISS, and agreed to postpone the shareholder vote on the Merger from June 27, 2007 until July 12, 2007. *Id.* The June 21 letter to

shareholders was attached to a Schedule 14A Proxy Statement filing by Lear on June 22, 2007. *Id.* ¶ 7.

B. The Special Committee Decides to Renegotiate.

On June 28, 2007, the Special Committee met, and after receiving advice from its advisors and senior management of Lear, requested that the Chairman of the Special Committee, Larry McCurdy ("McCurdy"), and Rossiter approach Icahn to try to elicit a higher offer price. *Id.* ¶ 167. REDACTED

REDACTED

At this same meeting, Ninivaggi informed the Special Committee that representatives of the AREP Entities had raised "in a general way" the prospect of increasing the purchase price in exchange for a break-up fee in the event that Lear's shareholders rejected the proposed Merger. *Id.* ¶ 174. The Special Committee agreed that McCurdy and Rossiter should request an increased price from Icahn as soon as possible. *Id.*

C. The Renegotiation.

On June 29, 2007, McCurdy and Rossiter conveyed their request for a price bump to Icahn, who promptly rejected it. *Id.* ¶ 175. According to Ninivaggi's notes from an update to the Board on July 3, 2007, Ninivaggi met with Icahn on July 1, 2007, and Icahn ultimately agreed to reconsider Lear's request for a per-share price increase if Lear would agree to a break-up fee and could "demonstrate meaningful [shareholder] support." *Id.* ¶ 176. Ninivaggi approached major Lear shareholders, and left with the impression "that it would be difficult to move large shareholders for a $1.00 per-share bump." *Id.* ¶ 178.

In response, Icahn raised the possibility of adding a "public stub" whereby Lear's shareholders could co-invest in the deal. *Id.* Icahn, however, was unwilling to take a "traditional approach" to a public equity stub, which would require negotiating an amended merger agreement, re-filing with the Securities and Exchange Commission ("SEC") and registering the equity, and would likely take two months to complete. *Id.* ¶ 179. Instead, Icahn proposed offering Lear's major shareholders a minority stake in a private placement at the same buy-in price. *Id.* Icahn's proposal was discussed at length at the July 3, 2007 Board meeting. *Id.* Eventually, Lear's management expressed to Icahn that a $1.00 price bump was necessary even with a public equity stub, to which Icahn responded positively, but reiterated that he would require a break-up fee in the event of a negative shareholder vote. *Id.*

Between June 28 and July 9, Lear and the AREP Entities explored several alternative deal structures. *Id.* ¶¶ 172-179. In particular, Lear and the AREP Entities considered the following modifications to the Merger:

REDACTED

- Increasing the purchase price in exchange for a break-up fee in the event Lear's shareholders did not approve the Merger (*Id.* ¶ 174);

- Offering a "public stub" under which public shareholders could co-invest in the deal (*Id.* ¶ 178); and

- Offering select large shareholders the opportunity to buy up to 30-35% of Lear's equity in a private placement. (*Id.* ¶ 179).

As a result of these lengthy and difficult negotiations, on July 8, 2007, Lear and the AREP Entities entered into Amendment No. 1 to the initial merger agreement, which provided for a $1.25 increase in the price to be paid to Lear's shareholders (to $37.25), in exchange for the No Vote Termination Fee. *Id.* ¶ 1. On July 9, Lear announced the Amended Merger Agreement and filed the July 9 Supplement. On July 16, 2007, Lear's shareholders voted to reject the Merger. *Id.* ¶ 190.

Lear's stock trades below $25.00 per share today and has traded in the range of $20.00 and $31.68 since November 20, 2007.

ARGUMENT

I. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED FOR FAILURE TO SATISFY COURT OF CHANCERY RULE 23.1.

As a threshold matter, plaintiffs' derivative claims must be dismissed for failure to make a pre-suit demand on the Board. The AREP Defendants adopt and incorporate into this opening brief the arguments asserted by Lear and the other Individual Defendants (the "Lear Defendants") in their opening brief in support of their motion to dismiss that the Fourth Amended Complaint should be dismissed based upon plaintiff's failure to make a pre-suit demand on the Board.[3]

II. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED PURSUANT TO COURT OF CHANCERY RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM.

Even if demand were excused in this case, the Fourth Amended Complaint should be dismissed for failure to state a claim under Court of Chancery Rule 12(b)(6).

A. The 12(b)(6) Pleading Standard.

Dismissal of a complaint is proper under Court of Chancery Rule 12(b)(6) when the allegations of the complaint fail to allege facts that would entitle the plaintiff to any relief. *See, e.g., Solomon v. Pathe Comm'n Corp.*, 672 A.2d 35, 38 (Del. 1996); *In re Santa Fe Pacific*

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[3] Intrieri would not be a part of the demand excused analysis because he did not participate, due to his affiliation with the AREP Entities, in any of the deliberations or the vote by the Board to approve the Amended Merger Agreement. *See* Lear Corp. DEF14A dated July 9, 2007, at S-3 (Ex. A hereto). This Court may take judicial notice of Lear's SEC filings. *See Solomon v. Armstrong*, 747 A.2d 1098, 1121 n.72 (Del. Ch. 1999) ("[I]t is well settled that where certain facts are not specifically alleged (or in dispute) a Court may take judicial notice of facts publicly available in filings with the SEC.").

Corp. S'holder Litig., 669 A.2d 59, 65 (Del. 1995). The Court's review of the legal sufficiency of the claims on a motion to dismiss is generally limited to the well-pleaded allegations in the complaint, viewing those facts and all reasonable inferences drawn therefrom in the light most favorable to the plaintiffs. *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993). However, neither inferences nor conclusions of fact unsupported by allegations of specific facts contained in a complaint are accepted as true. *Solomon*, 672 A.2d at 38; *In re Santa Fe*, 669 A.2d at 65-66; *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988). Moreover, a court "need not blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiffs' favor unless they are reasonable inferences." *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999), *aff'd sub nom.*, *Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000). Under these established Delaware standards, Counts I-III set forth in the Fourth Amended Complaint should be dismissed for failure to state a cognizable claim.

B. Count I Of The Fourth Amended Complaint Fails To State A Claim.

Count I of the Fourth Amended Complaint alleges that the Individual Defendants breached their fiduciary duties of good faith and loyalty in connection with the negotiation and approval of the Amended Merger Agreement. Compl. ¶ 201. As stated above, the AREP Defendants adopt and incorporate the Lear Defendants' demand futility arguments asserted in their opening brief. Based upon those arguments, it is clear that plaintiffs have failed to allege facts or have only asserted conclusory allegations that the Individual Defendants breached their

fiduciary duties in negotiating and approving the Amended Merger Agreement.[4] Thus, Count I of the Fourth Amended Complaint should be dismissed for failure to state a claim.

C. Count II Of The Fourth Amended Complaint Fails To State A Claim.

1. The Elements Of An Aiding And Abetting Claim.

A valid claim for aiding and abetting a breach of fiduciary duty requires: (1) the existence of a fiduciary relationship; (2) the fiduciary breaching its duty; (3) a defendant, who is not a fiduciary, knowingly participating in that breach; and (4) damages to the plaintiff resulting from the concerted action of the fiduciary and the nonfiduciary. *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch.).

2. There Was No Breach of Fiduciary Duty.

As stated above in Section I of the Argument, the Individual Defendants did not breach their fiduciary duties by negotiating and approving the Amended Merger Agreement. Because there was no breach, the aiding and abetting claims asserted against the AREP Entities must be dismissed. *See In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995); *Globis Partners, L.P.*, 2007 WL 4292024, at *15 (Del. Ch.) (dismissing aiding and abetting claim because complaint failed to state a claim for an underlying breach of fiduciary duty); *Yanow v. Scientific Leasing Inc.*, 1991 WL 165304, at *11 (Del. Ch.) (dismissing aiding and abetting claim because no underlying breach of fiduciary duty by directors had been established).

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4 Plaintiff's breach of fiduciary duty claims against Intrieri must fail because he did not participate in any of the deliberations regarding the Amended Merger Agreement and did not vote in favor of the agreement.

3. Plaintiffs Fail To Adequately Allege "Knowing Participation" by AREP.

Even if plaintiffs could establish that the Individual Defendants breached their fiduciary duties, the allegations against the AREP Entities fail to state an aiding and abetting claim. To properly plead the second element of aiding and abetting – "knowing participation" – a plaintiff must allege facts "that would tend to establish, at a minimum, knowledge by the third party that the fiduciary was endeavoring to breach his duty to his ... shareholders or other beneficiaries of his duty." *Greenfield v. Tele-Communications, Inc.*, 1989 WL 48738, at *3 (Del. Ch.). "Knowing participation requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach." *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2000).

If knowing participation is not plainly evident from the allegations in a complaint, a court "can infer a non-fiduciary's knowing participation *only* if a fiduciary breaches its duty in an inherently wrongful manner, *and* the plaintiff alleges specific facts from which that court could reasonably infer knowledge of the breach." *Nebenzahl v. Miller*, 1996 WL 494913, at *7 (Del. Ch.) (emphasis added). *Accord Greenfield,* 1989 WL 48738, at *3 (explaining that the terms of a transaction must be "egregious" or "so suspect as to permit, if proven, an inference of knowledge of an intended breach of trust").

Plaintiffs have neither alleged that the Individual Defendants breached their duty in an inherently wrongful manner (indeed, this Court previously declined to enjoin the shareholder vote on the initial merger agreement under which Lear's shareholders were to receive $1.25 *less* for their shares, *In re Lear Corp. S'holders Litig.*, 926 A.2d 94 (Del. Ch.

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2007)), nor have plaintiffs alleged specific facts from which the Court could reasonably infer that the AREP Entities had knowledge of such a breach by the Individual Defendants. The allegations in the Fourth Amended Complaint demonstrate that the Amended Merger Agreement was the result of a fair *quid pro quo* by which the AREP Entities bumped their offer to $37.25 in exchange for the No Vote Termination Fee.

Because the allegations of the Fourth Amended Complaint demonstrate that Icahn and Lear negotiated the Amended Merger Agreement at arms' length, the AREP Entities could not, and did not, "knowingly render aid and assistance to the [Lear] Defendants in their breaches of fiduciary duty." Compl. ¶ 203. "[E]vidence of arm's length negotiations with fiduciaries *negate[s]* a claim of aiding and abetting, because such evidence *precludes* a showing that the defendants knowingly participated in the breach by the fiduciaries." *In re General Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *26 (Del. Ch.) (emphasis added) (citing *In re Frederick's of Hollywood, Inc. S'holders Litig.*, 1998 WL 398244, at *3 n.8 (Del. Ch.)).

Plaintiffs do not allege that the AREP Entities participated in the Board's meetings or the Special Committee's meetings, or otherwise interjected themselves into the process by which the Board approved the Amended Merger Agreement in any manner other than as an arms' length bidder. Indeed, the allegations in paragraphs 165 through 185 show that the negotiations were vigorous, thus negating any allegations of knowing participation in a breach of fiduciary duty. In late June and early July, Icahn and Lear considered various alternative deal structures, including, but not limited to, REDACTED (Compl. ¶ 172), transactions with a "public stub" in which Lear's public shareholders could co-invest in the deal

(*Id.* ¶ 178), and transactions where Lear's large shareholders would be offered the opportunity to buy up to 30-35% of Lear's equity in a private placement. *Id.* ¶ 179.

Ultimately, these negotiations led to agreement on an increased purchase price (to $37.25 per share) in exchange for the No Vote Termination Fee. *Id.* ¶ 183. Simply put, under the terms of the Amended Merger Agreement, Lear and the AREP Entities each provided more consideration to try to complete a transaction. The Amended Merger Agreement was the result of a freely negotiated *quid pro quo*. Accordingly, the aiding and abetting claim must fail because the facts alleged make no suggestion that the AREP Entities knowingly participated in a breach of fiduciary by the Individual Defendants when the parties negotiated and entered into the Amended Merger Agreement.

D. Count III Of The Fourth Amended Complaint Fails To State A Claim.

"Courts developed unjust enrichment as a theory of recovery to remedy the absence of a formal contract." *Bakerman v. Sidney Frank Imp. Co.*, 2006 WL 3927242, at *18 (Del. Ch.). When unjust enrichment is alleged, Delaware courts "engage in a threshold inquiry to determine whether a contract already governs the parties' relationship." *Reserves Dev. LLC v. Severn Sav. Bank*, 2007 WL 4054231, at *11 (Del. Ch.). If the parties' rights are governed by a contract, then the claim of unjust enrichment must be dismissed. *See MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *5 (Del. Ch.) ("Of cardinal significance is whether a contract already governs the parties' relationship. In short, if there is a contract between the complaining party and the party alleged to have been enriched unjustly, then the contract remains "the measure of [the] plaintiff's right."); *Bakerman*, 2006 WL 3927242, at *18 ("When the

complaint alleges an express, enforceable contract that controls the parties' relationship . . . a claim for unjust enrichment will be dismissed."); *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del. Ch.) (dismissing an unjust enrichment claim "when the existence of a contractual relationship [was] not controverted").

Plaintiffs purport to bring their claims on behalf of Lear, based on the payment of $25 million to the AREP Entities pursuant to the provisions of a contract – namely, the Amended Merger Agreement. Specifically, the Fourth Amended Complaint alleges that "[a]s a result of the breaches of fiduciary duties (and the aiding and abetting thereof), the AREP Entities have been unjustly enriched at the expense of the Company and its shareholders." Compl. ¶ 89. Lear, as a party to the contract with the AREP Entities, has no claim of unjust enrichment against the AREP Entities; as a necessary consequence, plaintiffs cannot bring such a claim derivatively on behalf of Lear against the AREP Entities.

Alternatively, if plaintiffs are claiming that the AREP Entities and the Individual Defendants have been unjustly enriched by the Board's decision to enter into the Amended Merger Agreement, rather than the payment of the No Vote Termination Fee pursuant to that agreement, plaintiffs' unjust enrichment claim also must fail. To establish a claim for unjust enrichment, plaintiffs must establish the following elements: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *Reserves Dev. LLC*, 2007 WL 4054231, at *11. Plaintiffs' unjust enrichment claim fails because they have failed to establish an "absence of justification" for the Board's decision to enter into the Amended Merger Agreement. As detailed above, the Board agreed to Amendment No. 1 only on the condition that

the AREP Entities would agree to increase the merger price by $1.25 per share. Thus, the alleged enrichment received by the AREP Entities, the No Vote Termination Fee, was justified by the increase in the merger price. Also, as described above, plaintiffs have failed to allege well-pleaded facts that demonstrate that, even if the terms of the Amended Merger Agreement were fair, that the Board should not have entered into Amendment No. 1. Specifically, plaintiffs have only asserted conclusory allegations that the Board knew that Amendment No. 1 was unnecessary because Lear's shareholders were not going to approve the proposed Merger even with the increased merger price. Accordingly, plaintiffs' unjust enrichment claim must fail.

CONCLUSION

For the reasons stated herein, the AREP Defendants' Motion to Dismiss should be granted.

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April 14, 2008

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