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PRELIMINARY STATEMENT

On February 9, 2007, Lear Corporation (“Lear” or the “Company”) announced that the Company’s Board of Directors (the “Board”) had entered into a merger agreement, pursuant to which certain affiliates of Carl Icahn (the “AREP Entities”) had agreed to purchase all the outstanding shares of Lear stock for \$36.00 per share (the “Initial Merger Agreement”). On July 9, 2007, Lear and the AREP Entities amended the merger agreement, increasing the purchase price to \$37.25 per share (the “Amended Merger Agreement”). In exchange for this aggregate price increase of approximately \$100 million, the Board agreed to include in the Amended Merger Agreement a \$25 million termination fee payable to the AREP Entities in the event the Lear stockholders failed to approve the Amended Merger Agreement (the “No-Vote Termination Fee”).

The Lear stockholders’ failure to approve the Amended Merger Agreement at the Company’s annual meeting on July 16, 2007 (the “Annual Meeting”) triggered the payment of the No-Vote Termination Fee. On March 19, 2008, Plaintiffs filed the Fourth Amended Consolidated Shareholder Derivative Complaint (“Complaint”)¹ against Lear, each of the eleven members of the Board (the “Individual Defendants”) and the AREP Entities. The Complaint asserts derivative claims against the Individual Defendants for breach of fiduciary duties and waste premised on their approval of the Amended Merger Agreement and No-Vote Termination Fee. The Complaint also asserts derivative claims against the AREP Entities for aiding and abetting the alleged breach of fiduciary duties

¹ The Complaint is cited herein in the form “Compl. ¶ ____.”

by the Individual Defendants. Today, Lear's stock price closed at \$24.42 per share, almost \$13.00 less than the purchase price offered by the AREP Entities.

The Complaint should be dismissed in its entirety because Plaintiffs failed to make pre-suit demand and do not allege facts that would excuse pre-suit demand under Chancery Court Rule 23.1 ("Rule 23.1"). To allege demand futility under the circumstances here, Plaintiffs must plead particularized facts creating a reasonable doubt that either (i) a majority of the Board is disinterested and independent or (ii) the Board's decision was otherwise the product of a valid exercise of business judgment. Plaintiffs have done neither, despite having had the opportunity to conduct extensive discovery.

Notwithstanding Plaintiffs' bald accusations to the contrary, the eleven-member Board is dominated by outside directors. Plaintiffs' conflict of interest charges are aimed at just three directors—the two inside directors alleged to have a financial motivation to support the transaction with the AREP Entities, and one outside director affiliated with the AREP Entities. However, Plaintiffs fail to allege with particularity any facts from which the Court could reasonably infer that any of the other eight concededly disinterested outside directors lack independence. Indeed, Plaintiffs only attempt to challenge the independence of three of the disinterested directors. In doing so, Plaintiffs merely reallege the precise facts this Court previously concluded failed to "successfully challenge" the independence of the same three disinterested directors. As such, at least eight of the eleven members of the Board are disinterested and independent.

Consequently, Plaintiffs were left with the substantial burden of arguing that demand would have been futile because, despite being disinterested and independent, the Board's decision to approve the Amended Merger Agreement is not subject to the protections of the business judgment rule. Towards that end, Plaintiffs contend that the Amended Merger Agreement was not the product of arm's length negotiation. Plaintiffs also allege that, at the time the Individual Defendants approved the Amended Merger Agreement, the Board had actual knowledge that the \$37.25 purchase price was unfair and the Lear stockholders would not approve the Amended Merger Agreement. Finally, alleging the Board failed to consider alternatives to the Amended Merger Agreement and the likelihood of approval by an investor advisory service, Plaintiffs contend the Board did not act on an informed basis in approving the Amended Merger Agreement.

These allegations, however, are conclusory and often nonsensical. There are simply no particularized facts in the Complaint to support the allegations. Instead, the particularized allegations of fact in the Complaint demonstrate that the Individual Defendants (i) engaged in protracted negotiations with the AREP Entities regarding the terms and structure of the Amended Merger Agreement; (ii) reasonably believed that the \$37.25 purchase price was fair and the Amended Merger Agreement would be approved; and (iii) otherwise, acted on an informed and reasonable basis in approving the Amended Merger Agreement. The Complaint, therefore, should be dismissed with prejudice pursuant to Rule 23.1.

For many of the same reasons, Counts I and III of the Complaint asserting claims of breach of fiduciary duties and waste against the Individual Defendants should be dismissed for failure to state a claim regardless of Plaintiffs' failure to make a pre-suit demand. Plaintiffs have failed to plead any non-conclusory allegations that the Individual Defendants acted in bad faith or in violation of their fiduciary duties. In fact, the particularized allegations of fact establish the Individual Defendants acted on an informed and reasonable basis. In any event, the exculpatory provision of Lear's Certificate of Incorporation (the "Charter") releases the Individual Directors from personal liability for breaches of the duty of care. Similarly, Plaintiffs have failed to allege facts to support the inference that no reasonable person would conclude that the Individual Directors' decision to accept the No-Vote Termination Fee provision in exchange for approximately \$100 million increase in the aggregate merger consideration made sense. Counts I and III of the Complaint, therefore, should be dismissed pursuant to Chancery Court Rule 12(b)(6).

NATURE AND STAGE OF PROCEEDINGS

Plaintiff Market Street Securities, Inc. ("Market Street") filed the original complaint in this action on February 9, 2007 on behalf of a purported class consisting of Lear's public stockholders. Market Street claimed that each of the eleven members of the Board (the "Individual Defendants"), breached their fiduciary duties by approving the Initial Merger Agreement. Market Street further claimed that the AREP Entities aided and abetted the Individual Defendants' breach of their fiduciary duties. Plaintiffs Harry Massie, Jr. and Classic Fund Management (together with Market Street, "Plaintiffs") filed separate purported class actions asserting similar claims on February 15, 2007 and February 21, 2007, respectively.

On February 22, 2007, this Court consolidated the three actions. The following day the Plaintiffs filed the Consolidated Class Action Complaint and a motion seeking a preliminary injunction prohibiting the proposed sale (the "Preliminary Injunction Motion"). On March 27, 2007, Plaintiffs filed the Amended Consolidated Class Action Complaint adding disclosure claims based on the Company's Preliminary Proxy. On March 30, 2007, Plaintiffs renewed the Preliminary Injunction Motion.

On June 15, 2007, this Court largely denied the Preliminary Injunction Motion requiring only that the Company make certain additional disclosures prior to the Annual Meeting. On July 9, 2007, Lear and the AREP Entities executed the Amended Merger Agreement. At Lear's Annual Meeting on July 16, 2007, Lear stockholders failed to

approve the Amended Merger Agreement triggering payment of the No-Vote Termination Fee.

On September 11, 2007, Plaintiffs filed the Third Amended Consolidated Class Action and Shareholder Derivative Complaint (“Third Amended Complaint”) adding derivative claims challenging the Individual Defendants’ decision to approve the payment of the No-Vote Termination Fee. Following discussions with Defendants’ counsel, on November 11, 2007, Plaintiffs filed a motion seeking leave to dismiss their class claims as moot and for leave to file the Fourth Amended Consolidated Shareholder Derivative Complaint (“Complaint”) containing solely their derivative claims. This Court granted the motion on March 5, 2008.

On March 19, 2008, Plaintiffs filed the Complaint. Today, defendants Robert E. Rossiter, James H. Vandenberghe, David E. Frye, Justice Conrad L. Mallett, Jr., Larry W. McCurdy, Roy E. Parrott, David P. Spalding, James A Stern, Henry D.G. Wallace, Richard F. Wallman and Lear (collectively, the “Lear Defendants”) filed a motion to dismiss the Complaint (the “Motion”). This is their opening brief in support of the Motion.

STATEMENT OF RELEVANT FACTS

The Complaint is a model of prolixity. Through each iteration the Complaint has grown, apparently by random accretion. With ninety-two pages and more than two hundred paragraphs, the Complaint is larded with conclusory allegations. Most of these allegations are not only irrelevant to the few claims remaining in the Complaint, but have previously been found to be insufficient, or unconvincing, or unsupported by this Court in considering the Preliminary Injunction Motion.² The relevant facts alleged in the Complaint, which the Lear Defendants assume to be true solely for the purposes of the Motion and only to the extent they have been pled with the particularity required by Rule 23.1 and Delaware law, are as follows:

A. The Parties.

1. Lear and Its Independent Board of Directors.

Lear is a Delaware corporation with its principal offices in Southfield, Michigan. (Compl. ¶ 14) Lear produces interior systems for the automotive and light truck markets. (*Id.*) Seating and electronics are the Company's two core product segments. (*Id.*)

² As but one example, Plaintiffs continue to assert that the Company failed to disclose alleged deficiencies in the post-market check conducted by the Special Committee and its advisors. Plaintiffs devote nine paragraphs to a letter sent to the Company by Tata Automotive Company Systems Limited ("TATA"), a potential buyer who engaged in extended discussions with Lear during and after the post-market check, raising various complaints about the process. Having already dismissed their disclosure claims as moot, these allegations are simply irrelevant. Moreover, this Court already concluded the allegations were "not convincing." *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 106 n.2 (Del. Ch. 2007).

At all relevant times, the Board consisted of Robert E. Rossiter, James H. Vandenberghe, David E. Fry, Justice Conrad L. Mallett, Jr., Larry W. McCurdy, Roy E. Parrott, David P. Spalding, James A. Stern, Henry D.G. Wallace, Richard F. Wallman, and Vincent Intrieri. (*Id.* ¶¶ 16-26) Only two of these directors are officers of the Company. Rossiter serves as Lear's Chairman and Chief Executive Officer and Vandenberghe serves as Lear's Vice-Chairman and Interim Chief Financial Officer. (*Id.* ¶¶ 16, 26)³ Only one of the nine outside directors, Vince Intrieri, a director of AREP, is in any way interested in the transaction. (*Id.* ¶¶ 18, 30) The eight remaining outside directors—a majority of the Board—are disinterested and independent. The Board formed a special committee, comprised of three of the disinterested outside directors, McCurdy, Stern and Wallace, to consider, negotiate and make a recommendation with respect to both the Initial Merger Agreement and the Amended Merger Agreement.

2. The AREP Entities.

Defendant AREP is a Delaware limited partnership headquartered in New York, New York. (*Id.* ¶ 30) AREP is engaged in various businesses, including gaming, real estate and home fashion. (*Id.*) As the Chairman of the Board of Directors of American Property Investors, Inc., the general partner of AREP, Icahn controls AREP. (*Id.*) Defendant Vince Intrieri is a director of AREP. (*Id.*) AREP Car Holdings Corp. and AREP Car Acquisition Corp. are both Delaware corporations formed on February 1, 2007 to effect the Proposed Merger. (*Id.* ¶¶31-32)

³ Vandenberghe held the title of Interim Chief Financial Officer until October 1,

3. Plaintiffs.

Plaintiffs Classic Fund Management AG, Market Street Securities, and Harry Massie, Jr., are purported Lear stockholders. Plaintiffs currently own shares of Lear stock and have owned Lear stock “since prior to the wrongs complained of herein.” (*Id.* ¶ 13)

B. The Initial Merger Agreement.

On February 9, 2007, Lear announced the Initial Merger Agreement, pursuant to which the AREP Entities agreed to purchase all the outstanding shares of Lear common stock for \$36 per share. (*Id.* ¶ 1) The Initial Merger Agreement provided for a 45-day go-shop period, during which Lear could seek a superior bid. (*Id.* ¶ 104) In the event Lear accepted a superior bid and terminated the Initial Merger Agreement prior to the end of the go-shop period, Lear would have been required to pay AREP a termination fee of \$73,500,000 plus expenses up to \$6,000,000 (the “Termination Fee”). (*Id.* ¶ 108) If Lear accepted a superior bid after the end of the go-shop period, Lear would have been required to pay AREP a termination fee of \$85,225,000 plus expenses up to \$15,000,000 (the “Post Go-Shop Termination Fee”).

On March 27, 2007, the go-shop period ended. (*Id.*) Despite contacting a total of forty-one parties, including both strategic buyers and financial sponsors, Lear did not receive a single acquisition proposal during the go-shop-period. (*Id.*; Lear Proxy dated

May 23, 2007 (the “May 23 Proxy”) at 26, attached hereto as Exhibit A)⁴ As permitted by the Initial Merger Agreement, Lear continued discussions with certain parties who had expressed an interest in exploring a possible transaction prior to the expiration of the go-shop period, including TATA. (Compl. ¶¶ 119, 149) Although these discussions continued for almost two more months, they did not result in an acquisition proposal. (*Id.* ¶ 151)

C. The Preliminary Injunction Motion.

On February 22, 2007, Plaintiffs filed their Preliminary Injunction Motion, which they renewed shortly after the expiration of the go-shop period. First, Plaintiffs asserted that the Board had failed to disclose all material facts relevant to the stockholders’ consideration of the Initial Merger Agreement. *In re Lear Corp. S’holder Litig.*, 926 A.2d 94, 110 (Del. Ch. 2007). According to Plaintiffs, the Board failed to adequately disclose information regarding (a) the projections used by the Special Committee’s financial advisor, J.P. Morgan; (b) the market check conducted by the Special Committee and its financial advisors prior to signing the Initial Merger Agreement and during the go-shop period; and (c) Rossiter’s once-expressed interest in retiring in order to shield his personal finances, a large portion of which consisted of Lear stock and retirement benefits, from an industry downturn. *Id.* at 110-14. Second, Plaintiffs asserted that the

⁴ The May 23 Proxy and the supplement thereto, dated July 9, 2007 (the “Proxy Supplement,” attached hereto as Exhibit B) are integral to Plaintiffs Complaint, as they are the “source[s] for the merger-related facts as pled in the Complaint.” *Orman v. Cullman*, 794 A.2d 5, 16 (Del. Ch. 2002). The “undisputed facts” contained in the May

Board had breached its so-called *Revlon* duties by failing to act reasonably to secure the highest price reasonably available for the Lear stockholders. *Id.* at 110. Among other things, Plaintiffs alleged that the Board acted unreasonably by permitting Rossiter to serve as the lead negotiator. *Id.* at 115.

On June 15, 2007, this Court “largely denied” the Preliminary Injunction Motion. *Lear*, 926 A.2d at 123. The Court held that Rossiter’s concerns regarding his financial security were material and required the Board to disclose those concerns and related information prior to the Annual Meeting. *Id.* at 114. That was Plaintiffs’ lone success. The Court denied Plaintiffs’ remaining disclosure claims. *Id.* at 110-12. Similarly, while acknowledging it would have been “preferable for the Special Committee to have had its chairman ... participate with Rossiter” in the negotiations, the Court concluded that the “overall approach to obtaining the best price taken by the Special Committee appears ... to have been reasonable.” *Id.* at 117-18. In so holding, the Court noted that the “valuation information in the record, when fairly read, does not incline me toward a finding that the Lear Board was unreasonable in accepting the Icahn bid [of \$36.00 per share].” *Id.* at 122. The Court, therefore, held Plaintiffs had not demonstrated a reasonable likelihood of success on their *Revlon* claim. *Id.* at 118.

23 Proxy and the Proxy Supplement, therefore, “are incorporated by reference into the Complaint” and are properly “considered on this motion.” *Id.*

D. Lear's Efforts To Garner Stockholder Support for The Initial Merger Agreement.

In anticipation of the Annual Meeting scheduled for June 27, 2007, Lear management, with the assistance of Mackenzie Partners ("Mackenzie"), solicited stockholder support of the Initial Merger Agreement. (Compl. ¶ 160) These efforts began in earnest in late May 2007. (*Id.*) On May 30, 2007, Lear's General Counsel, Dan Ninivaggi, and two members of the Special Committee met with Institutional Shareholder Services ("ISS"). (*Id.*) During the first two weeks of June 2007, various members of Lear management met with major shareholders across the country. (*Id.*) The status of these discussions was reported to the Special Committee on a regular basis. (*Id.*)

On June 15, 2007, as discussed above, this Court issued its decision on the Preliminary Injunction Motion. (*Id.* ¶ 162) During the following week, ISS and two other investor advisory organizations, Proxy Governance and Glass Lewis & Co., announced their opposition to the Initial Merger Agreement. (*Id.*) That same week, the California State Teachers Retirement System, a Lear stockholder, wrote to Rossiter and expressed opposition to the Initial Merger Agreement. (*Id.*)

On June 21, 2007, the Special Committee met to review the proxy-solicitation efforts. (*Id.* ¶ 163) Ninivaggi informed the Special Committee that reaction from the Company's large institutional shareholders was mixed. (*Id.* ¶ 164) He also informed the Special Committee that ISS had recently issued a negative recommendation to stockholders, and he answered the directors' questions regarding the ISS position. (*Id.*) The Special Committee, who had previously been provided a copy of the ISS

recommendation, reviewed and discussed it further with Winston & Strawn, the Special Committee's legal advisor. (*Id.*) Ninivaggi then suggested postponing the stockholder vote, so that the Company might have an opportunity to address stockholder concerns regarding the transaction. (*Id.*) Following discussion, the Special Committee agreed to postpone the Annual Meeting until July 12, 2007. (*Id.*)

A week later, on June 28, 2007, the Special Committee met to receive another "report on the solicitation of proxies ... and discuss alternative actions the Committee should evaluate in connection with obtaining shareholder approval." (*Id.* ¶ 169) Ninivaggi reported that members of management and the Company's advisors had met with most of the Company's fifty largest stockholders. (*Id.* ¶ 170) Stockholder reaction continued to be mixed and "many [stockholders] thought improved transaction terms were warranted." (*Id.*)

REDACTED

The Special Committee next discussed ways to restructure the Initial Merger Agreement to gain additional stockholder support. REDACTED

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Finally, Ninivaggi reported that Icahn had raised the prospect, in a general fashion, of increasing the offer price in exchange for a No-Vote Termination Fee. (*Id.* ¶ 174) After discussion, the Special Committee concluded that McCurdy and Rossiter should seek to negotiate an increase in the per-share purchase price. (*Id.*)

E. The Negotiations Resume.

Immediately following the Special Committee meeting on June 28, Rossiter and McCurdy contacted Icahn and Intrieri. (*Id.* ¶¶ 174-75) McCurdy informed them that some improvement in the terms would likely be required to obtain stockholder approval. (Ex. B at S-7) Icahn responded that the AREP Entities were not inclined to increase the offer price, but if they did, the increase would be modest and would be tied to Lear's agreement to a No-Vote Termination Fee of between \$28 and \$42 million plus expenses. (*Id.*) McCurdy rejected that proposal but suggested the parties' advisors and management continue to discuss alternative approaches to improve the terms of the Initial Merger Agreement. (*Id.*)

On June 29, 2007, the Special Committee met to discuss the negotiations with the AREP Entities. (*Id.* at S-8) After speaking with other Board members and consulting with the Special Committee's legal and financial advisors, the Special Committee instructed McCurdy and Rossiter to contact the AREP Entities and propose a \$1.00 per share increase in the purchase price in exchange for a No-Vote Termination Fee consisting of warrants valued at \$10 million plus reimbursement of expenses up to \$10 million. (*Id.*) Rossiter and McCurdy conveyed the proposal following the meeting and Icahn rejected it. (Compl. ¶ 175)

Over the course of the next ten days, there were extensive discussions and negotiations in an effort to improve the terms of the Initial Merger Agreement and gain stockholder approval. (Compl. ¶¶ 176-80) These discussions included the possibility of offering a "public equity stub" to allow Lear's public stockholders to co-invest in the deal with the AREP Entities, which the Special Committee had previously considered. (*Id.* ¶ 171, 178) Icahn, however, refused to take a traditional approach to a public equity stub, which would have taken two months to complete as it required registering the equity and refiling with the Securities and Exchange Commission. (*Id.* ¶ 179) Icahn was simply unwilling to extend his equity commitment for that long. (*Id.*) Instead, Icahn offered to allow major shareholders to buy 30-35% of the Company in a private placement. (*Id.*) Icahn's proposal presented numerous problems, which the Board discussed at a meeting on July 3, 2007. (*Id.*) Eventually, Lear Management informed Icahn that a public stub would likely be attractive to some shareholders, but indicated that a \$1.00 bump in the

merger consideration would also be necessary to ensure all stockholders were “better off.” (*Id.*) Although Icahn responded positively, he indicated again that the AREP Entities would require a higher No-Vote Termination Fee than Lear had previously proposed on June 29, 2007. (*Id.*)

F. The Amended Merger Agreement.

Ultimately, the protracted negotiations between Lear representatives and Icahn once again focused on an increase in the merger consideration in exchange for a No-Vote Termination Fee. (*Id.* ¶ 180) On July 8, 2007, the Special Committee recommended, and the Board approved the Amended Merger Agreement, pursuant to which the purchase price was increased from \$36.00 to \$37.25 per share—an aggregate increase of approximately \$100 million. (*Id.* ¶¶ 184, 186) Under the terms of the Amended Merger Agreement, Lear was required to pay a No-Vote Termination Fee of approximately \$25 million—\$12.5 million in cash and 335,570 shares of Lear stock valued at \$37.25. (*Id.*; Ex. B at S-11) In the event the Company consummated an alternate transaction within twelve months of a stockholder no vote, the No-Vote Termination Fee would be credited toward the Post Go-Shop Termination Fee that Lear would be required to pay the AREP Entities. (Ex. B at S-28)

Prior to approving the Amended Merger Agreement, J.P. Morgan advised the Board that nothing had occurred to cause J.P. Morgan to change, in any material respect, the financial analysis concerning the valuation of Lear J.P. Morgan performed in connection with the fairness opinion it delivered to the Special Committee and Board

prior to the approval of the Initial Merger Agreement. (Compl. ¶ 161; Ex. B at S-6, S-10) Similarly, Evercore advised the Board that Evercore was not aware of any fundamental change in the North American automotive industry environment since February 2007 that would have an impact on the Company. (Compl. ¶ 161; Ex. B at S-6, S-10) Additionally, J.P. Morgan, Evercore, and Winston & Strawn advised the Board that each believed the Company had negotiated actively to obtain more favorable terms and that no further improvement in the terms from the AREP Entities was likely. (Ex. B at S-10)

G. The Annual Meeting.

On July 9, 2007, after the parties executed the Amended Merger Agreement, the Company issued a supplement to its proxy statement (the "Proxy Supplement"). (*Id.* ¶ 185) The Proxy Supplement disclosed the course of negotiations that resulted in the Amended Merger Agreement and summarized the revised terms. The Proxy Supplement also informed stockholders that the Annual Meeting would be convened on July 12, 2007, but immediately adjourned until July 16, 2007, to permit the Company to solicit additional support for the Amended Merger Agreement. (Ex. B, Letter to Stockholders). On July 16, 2007, Lear stockholders failed to approve the Amended Merger Agreement. (*Id.* ¶ 190)

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO MAKE A PRE-SUIT DEMAND.

Because Plaintiffs have failed to make pre-suit demand or plead particularized facts establishing demand futility, the Complaint should be dismissed in its entirety.

A. Rule 23.1 Requires Plaintiffs To Make A Pre-Suit Demand Or Allege Particularized Facts Establishing Demand Futility.

Under Delaware law, “directors, rather than shareholders, manage the business and affairs of the corporation.” *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) (citation omitted). “This authority includes the decision whether or not to initiate litigation on behalf of the corporation.” *Highland Legacy Ltd. v. Singer*, C.A. No. 1566, 2006 WL 741939, at *4 (Del. Ch. Mar. 17, 2006). Rule 23.1, therefore, “requires that a plaintiff shareholder make a demand upon the corporation’s current board to pursue derivative claims owned by the corporation before a shareholder is permitted to pursue legal action on the corporation’s behalf.” *Jacobs v. Yang*, C.A. No. 206, 2004 WL 1728521, at *2 (Del. Ch. Aug. 2, 2004), *aff’d*, 867 A.2d 902 (Del. 2005). The demand requirement of Rule 23.1 is excused only where a stockholder “establish[es] through particularized factual allegations that a pre-suit demand on the board would have been futile.” *Highland*, 2006 WL 741939, at *4. Where a shareholder plaintiff fails to make demand or establish that such a demand would have been futile, the law does not countenance any attempt to usurp the board’s authority, and the action must be dismissed. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048-49 (Del. 2004).

Pleading demand futility is a “heavy burden” under Delaware law. *Levine v. Smith*, 591 A.2d 194, 211 (Del. 1991). In *Aronson*, the Supreme Court established a two-pronged test for evaluating claims of demand futility in a derivative suit challenging (as in this case) a board decision:

[I]n determining demand futility the Court of Chancery in the proper exercise of its discretion must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.

473 A.2d at 814; *see also Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993) (“The essential predicate for the *Aronson* test is the fact that a decision of the board of directors is being challenged in the derivative suit.”). To excuse a pre-suit demand, a shareholder plaintiff must allege particularized facts demonstrating that demand is futile with respect to each claim and each defendant. *See Jacobs*, 2004 WL 1728521, at *2-3.

The “factual particularity” requirement of Rule 23.1 is “stringent” and “differ[s] substantially from the permissive notice pleadings” typically accepted by Delaware courts. *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000); *see also Rattner v. Bidzos*, C.A. No. 19700, 2003 WL 22284323, at *7 (Del. Ch. Oct. 7, 2003) (“A critical requirement of Court of Chancery Rule 23.1 is that the complaint must allege with particularity the reasons for demand excusal.”). Plaintiffs cannot rely upon “conclusory statements or mere notice pleading” to satisfy Rule 23.1. *Id.*; *Guttman v. Huang*, 823 A.2d 492, 499 (Del. Ch. 2003). As the Supreme Court has explained:

[O]nly well-pleaded allegations of fact must be accepted as true; conclusory allegations of fact or law not supported by allegations of

specific fact may not be taken as true. A trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences.

Grobow v. Perot, 539 A.2d 180, 187 (Del. 1988); *see also Beam*, 845 A.2d at 1048 (holding that while the Court “should draw all *reasonable* inferences” in plaintiffs' favor, to be *reasonable*, such inferences “must logically flow from particularized facts alleged by plaintiff[s]”) (emphasis in original).

Here, Plaintiffs have failed to make demand on the Board. (Compl. ¶ 36) Since the Complaint challenges the Board's decision to approve the Amended Merger Agreement and the No-Vote Termination Fee, Plaintiffs must allege particularized facts establishing demand futility under either prong of the *Aronson* test. Because they have failed to meet that heavy burden, the Complaint must be dismissed pursuant to Rule 23.1.

B. Demand Is Not Excused Because Plaintiffs Have Failed To Allege Particularized Facts Creating A Reasonable Doubt That The Board Is Disinterested and Independent.

To excuse demand under the first prong of the *Aronson* test, a plaintiff must allege particularized facts creating a reasonable doubt as to the disinterest and independence of at least a majority of the directors at the time the initial complaint was filed—here, six of eleven Lear directors. *See, e.g., Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984). A director is deemed “interested” only when “divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders.” *Id.* Similarly, a director is deemed to lack independence when the director is so “‘beholden’ to an interested director ... that his or her ‘discretion would be sterilized.’” *Beam*, 845 A.2d at

1050 (quoting *Rales*, 634 A.2d at 936). Thus, the first prong of the *Aronson* test excuses demand where “a majority of the directors, because of a conflicting self-interest or because of their inability to function independently of a person having a conflict of interest, cannot be relied upon to act in furtherance of the best interests of the corporation.” *Rothenberg v. Santa Fe Pac. Corp.*, C.A. No. 11749, 1995 WL 523599, at *4 (Del. Ch. Sept. 5, 1995). Plaintiffs’ allegations, here, are wholly inadequate to establish demand futility under the first prong of *Aronson*.

1. Plaintiffs’ Complaint Concedes that the Majority of the Board is Disinterested.

The Complaint’s sole allegations of interest are directed at just three of the eleven directors—Rossiter, Vandenberghe, and Intrieri. Plaintiffs allege that Rossiter and Vandenberghe, the Board’s only inside directors, are interested because following consummation of the merger they would continue to serve as senior management “at substantial levels of compensation,” and also because the Amended Merger Agreement would, in essence, secure their retirement without forcing them to retire and forgo their salaries. (Compl. ¶28)⁵ Further, Plaintiffs allege that Intrieri is interested in the Amended Merger Agreement, because he is a close associate of Icahn, serves as Icahn’s nominee on the Board, and is a director of AREP. (*Id.* ¶ 28)

⁵ With respect to Vandenberghe’s retirement benefits, Plaintiffs allege only the following: “Vandenberghe faces a similar option [as Rossiter] and has suggested he may retire soon as well.” (Compl. ¶ 28). This is plainly insufficient to establish interest based on the retirement benefits alone.

Plaintiffs, however, make no allegation, conclusory or otherwise, that any of the eight remaining outside directors stood to gain any personal financial benefit from the Amended Merger Agreement that would not have devolved on all Lear stockholders. Plaintiffs have thus conceded that a majority of the Board is disinterested in the Amended Merger Agreement.

2. Plaintiffs' Conclusory Allegations of Lack of Independence Fail to Impugn a Majority of the Board.

Assuming for the purposes of this Motion the sufficiency of the allegations of interest concerning Rossiter, Vandenberghe, and Intrieri, Plaintiffs must create a reasonable doubt that at least three of the remaining eight disinterested outside directors are independent of the allegedly interested directors to excuse demand under the first prong of *Aronson*. This Plaintiffs fail to do. Indeed, Plaintiffs make no attempt to challenge the independence of five of the disinterested outside directors: Mallett, McCurdy, Stern, Wallace, and Wallman.⁶ Instead, shooting for the bare minimum, Plaintiffs have made a superficial attempt to impugn the independence of Parrot, Spalding and Fry by alleging they are beholden to the inside directors as a result of

⁶ Plaintiffs allege summarily that “insiders dominate the Company’s Board.” (Compl. ¶ 28) Such a conclusory allegation is, of course, insufficient to establish that the disinterested outside directors lacked independence. *See Aronson*, 473 A.2d at 816 (“[I]n the demand futile context a plaintiff charging domination and control of one or more directors must allege particularized facts manifesting a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling. The shorthand shibboleth of dominated and controlled directors is insufficient.”) (internal quotations omitted).

personal, family and business relationships.⁷ These allegations are, in their entirety, contained in just five sentences:

The Company also employs Parrott's daughter, who earned \$126,866 in 2005. The Company also employs Michael Spalding, the brother of Defendant Spalding, as a Senior Account Manager of Lear's DaimlerChrysler Division. In 2005, the Company paid Michael Spalding \$99,442. Until February 2005, Defendant Rossiter served as a Trustee of Northwood University, of which Defendant David E. Fry is President and Chief Executive Officer. Lear actively recruits employees from Northwood and has sponsored automotive programs at Northwood.

(*Id.* ¶ 29) Reviewing these allegations in connection with the Preliminary Injunction Motion, this Court observed that Plaintiffs have "not successfully questioned" the independence of *any* of the disinterested outside directors. *Lear*, 926 A.2d at 99.⁸

The Court did so with good reason. While personal, business and family relationships "may influence the demand futility inquiry[,]...to render a director unable to consider demand, a relationship must be of a bias-producing nature." *Beam*, 845 A.2d at 1050. A non-interested director will only be deemed beholden to an interested director by virtue of such a relationship, where plaintiffs demonstrate that the non-interested director "receives a benefit 'upon which the director is so dependent or is of such subjective material importance that its threatened loss might create a reason to question

⁷ The Complaint is devoid of any allegation, particularized or otherwise, that any of the directors are beholden to Intrieri.

⁸ In keeping with their evident practice of ignoring all unfavorable aspects of this Court's decision on the Preliminary Injunction Motion, Plaintiffs omitted from the Complaint any mention of the Court's observation regarding the independence of the eight outside directors other than Intrieri. Unbelievably, despite the Court's observation, Plaintiffs continue to press the point *without augmenting in any way* the allegations

whether the director is able to consider the corporate merits of the challenged transaction objectively.” *In re infoUSA, Inc. S’holders Litig.*, C.A. No. 1956, 2007 WL 2419611, at *13 (Del. Ch. Aug. 13, 2007) (quoting *Texlon Corp. v. Meyerson*, 802 A.2d 257 (Del. 2002)). As the Supreme Court explained, “[t]o create a reasonable doubt about an outside director’s independence, a plaintiff must plead facts that would support the inference that because of the nature of a relationship ... the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director.” *Beam*, 845 A.2d at 1052. Plaintiffs’ allegations regarding Parrot, Spalding and Fry fall well short of meeting that standard.

With respect to Parrot and Spalding, Plaintiffs suggest they are beholden to the inside directors because the Company employs Parrot’s daughter and Spalding’s brother. (Compl. ¶ 29) Standing alone, however, such an allegation is insufficient to raise a reasonable doubt regarding a director’s independence. *See e.g., Calif. Public Employees’ Ret. Sys. v. Coulter*, C.A. No. 19191, 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2002) (holding that the company’s employment of an outside director’s son, when considered alone, “would be [in]adequate to raise a reasonable doubt as to [the outside director’s] disinterest or independence”). This is particularly true where, as here, the disinterested director’s family member is not employed as an executive officer of the Company and

challenging the independence of those disinterested outside directors. (*Compare* Amended Consolidated Compl. ¶ 20 *with* Compl. ¶ 29).

does not reside in the same home as the disinterested director.⁹ *In re J.P. Morgan & Chase Co. S'holder Litig.*, 906 A.2d 808, 823 (Del. Ch. 2005) (holding that outside director was independent of inside directors where the company employed the outside director's son in a non-executive capacity and the son did not live with the outside director), *aff'd*, 906 A.2d 766 (Del. 2006). Moreover, it is counterintuitive to suggest that Parrot and Spalding would agree to sell the Company to the AREP Entities in a leveraged deal, which would certainly increase the possibility of *job cuts*, solely or primarily as part of an unspoken effort to *preserve the job* of a family member located deep within the Company.

Plaintiffs' allegations concerning Fry are similarly inadequate. (See Compl. ¶ 29) Though Rossiter may have served as a trustee of Northwood University ("Northwood"), there is no allegation that he had the unilateral authority to terminate Fry's employment or alter his compensation. See, e.g., *In re Delta & Pine Land Co. S'holders Litig.*, C.A. No. 17707, 2000 WL 875421, at *8 (Del. Ch. June 21, 2000) (requiring plaintiffs show "influence or control over the employment, the livelihood, or the financial interests of the directors on an individual and personal basis" to demonstrate demand futility). Moreover, by Plaintiffs' own admission, Rossiter's tenure as a trustee of Northwood ended in February 2005. As a result, any authority Rossiter may have had over Fry by virtue of that position ended long before the events giving rise to Plaintiffs' derivative

⁹ The May 23 Proxy discloses that Parrot's daughter is employed by Lear as a junior-level materials specialist and does not live in the same household as Parrot. (Ex. A

suit. Equally fatal to Plaintiffs' claim is the failure to allege with particularity that the services provided to Northwood by Lear—in the form of recruiting Northwood students and sponsoring automotive programs at the school—are material to Northwood. *See e.g. White v. Panic*, 793 A.2d 356, 366 (Del. Ch. 2000) (rejecting challenges to outside director's independence based on payments by the company to entities affiliated with the outside directors, where the complaint contained no allegations the payments were material to the outside directors or their affiliated entities), *aff'd*, 783 A.2d 543 (Del. 2001); *Jacobs*, 2004 WL 1728521, at *6 (same). Indeed, Plaintiffs do not even attempt to describe these services in a quantitative fashion, much less approximate their value.

Having failed to successfully challenge the disinterestedness and independence of eight of the eleven directors, Plaintiffs have not established demand futility under the first prong of *Aronson*.

C. Demand Is Not Excused Because Plaintiffs Have Failed To Allege Particularized Facts Creating A Reasonable Doubt That The Board's Decision To Approve The Amended Merger Agreement Was A Valid Exercise Of Business Judgment.

Invoking the second prong of *Aronson*, Plaintiffs summarily allege that, “to the extent that the ... challenged conduct constitutes a business decision, such was made in violation of [the] duty of loyalty ... and thus is not subject to the protections of the business judgment rule.” (Compl. ¶ 194)¹⁰ Plaintiffs, however, have failed to plead

at 112). Regarding Spalding's brother, the May 23 Proxy states that he is employed “in a non-executive position (a senior account manager at one of [Lear's] division).” (*Id.*)

¹⁰ Plaintiffs also allege that demand is excused because each of the directors “faces a substantial likelihood of liability.” (Compl. ¶ 194) The “substantial likelihood of

particularized facts establishing that the Board's conduct—approving the Amended Merger Agreement—was anything other than a valid exercise of business judgment as is required by the second prong of *Aronson*. 473 A.2d at 814 (holding that demand is excused where a plaintiff pleads particularized facts creating a reasonable doubt that the challenged conduct was a valid exercise of business judgment to excuse demand).

The second prong of the *Aronson* test poses a “substantial burden, as [it] is “directed to extreme cases in which despite the appearance of independence and disinterest a decision is so extreme or curious as to itself raise a legitimate ground to justify further inquiry and judicial review.” *Greenwald v. Batterson*, C.A. No. 16475, 1999 WL 596276, at *7 (Del. Ch. July 26, 1999) (quoting *Kahn v. Tremont Corp.*, C.A. No. 12339, 1994 WL 162613, at *6 (Del. Ch. Apr. 22, 1994)). This “substantial burden” requires the plaintiff to plead particularized facts to “overcome the powerful presumptions of the business judgment rule,” which “protects decisions unless they cannot be attributed to any rational business purpose.” *In re infoUSA*, 2007 WL

liability” claim essentially raises the same issues as those addressed by the second prong of *Aronson*. See, e.g., *Carauna v. Saligman*, C.A. No. 11135, 1990 WL 212304, at *4 (Del. Ch. Dec. 21, 1990) (holding that a finding that substantial likelihood of liability exists would require a finding that the second prong of *Aronson* had been satisfied). Because Lear's certificate of incorporation contains an exculpation provision authorized by 8 *Del. C.* §102(b)(7), to establish demand futility pursuant to their claims of “substantial likelihood of liability,” Plaintiffs would have to allege with particularity that the Board failed to act in good faith. See *Stone ex rel. AmSouth Bancorp. v. Ritter*, 911 A.2d 362, 367 (Del. 2006) (holding that, where a board is protected by an exculpation provision, there is no substantial risk of liability excusing demand unless the directors engaged in conduct that was not in good faith or constituted a breach of the duty of loyalty).

2419611, at *1 (quotations omitted). In order to satisfy that substantial burden, a plaintiff must establish that the directors did not act in good faith in engaging in the challenged conduct. *See, e.g., id.* (“A plaintiff who seeks to excuse demand through the second prong of *Aronson* thus faces a task closely akin to proving that the underlying transaction could not have been a good faith exercise of business judgment.”); *Postorivo v. AG Paintball Holdings, Inc.*, C.A. Nos. 2991, 3111, 2008 WL 553205, at *8 (Del. Ch. Feb. 29, 2008) (same); *In re J.P. Stevens & Co., Inc. S’holders Litig.*, 542 A.2d 770, 780-81 (Del. Ch. 1988) (under second prong of *Aronson*, plaintiff must demonstrate the decision was “so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith”); *Bakerman v. Sidney Frank Importing Co.*, C.A. No. 1844, 2006 WL 3927242, at *9 (Del. Ch. Oct. 10, 2006) (plaintiff must plead facts “tantamount to corporate waste to satisfy the second prong of the demand futility analysis”).

Under Delaware law, “a failure to act in good-faith requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (i.e., gross negligence). *Stone ex rel. AmSouth Bancorp. v. Ritter*, 911 A.2d 362, 369 (citing *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006)). As the Supreme Court has explained:

A failure to act in good faith may be shown ... where the fiduciary *intentionally* acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the *intent* to violate applicable positive law, or where the fiduciary *intentionally* fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.

In re Walt Disney, 906 A.2d at 67 (emphasis added). Thus, a director's intentional violation of an applicable law or intentional avoidance of an affirmative duty to act is the *sine qua non* of a failure to act in good faith.

Plaintiffs rarely meet these standards. In fact, demand is excused under the second prong of *Aronson* in only the most egregious cases. See, e.g., *Ryan v. Gifford*, 918 A.2d 341, 354 (Del. Ch. 2007) (holding that "board's knowing and intentional decision" to violate stock option plan "raise[d] doubt regarding whether such decision [was] a valid exercise of business judgment" excusing demand under the second prong); *Sample v. Morgan*, 914 A.2d 647, 670 (Del. Ch. 2007) (holding that demand was excused pursuant to the second prong where Board awarded three inside directors 200,000 shares—constituting one-third of the company—for a tenth of a penny per share in exchange for their agreement to stay with the company, when the Board valued the shares at \$5.60 apiece and there was no indication the three had offers of alternate employment).

Ignoring the argumentative rhetoric and hyperbole and reading the Complaint in the best possible light, Plaintiffs allege that the Amended Merger Agreement was not the product of arm's length negotiations. (Compl. ¶ 198) Plaintiffs also contend that the Board approved and recommended the Amended Merger Agreement and No-Vote Termination Fee provision with *actual knowledge* that the \$37.25 price was inadequate and the Amended Merger Agreement would not be approved by the Lear stockholders. (*Id.* ¶¶ 192-200, 205-06) Finally, Plaintiffs allege that the Board approved the Amended Merger Agreement without considering the availability of alternatives and the likelihood

the revised terms would gain the approval of ISS. (*Id.* ¶ 201) Pled in vague, conclusory, and nonsensical terms, these allegations are not supported by particularized facts. Indeed, the allegations of particularized fact permit but one reasonable inference: the Board acted on an informed and reasonable basis in approving the Amended Merger Agreement.

1. **The Board Did Not Believe That The \$37.25 Purchase Price Was Unfair At The Time It Approved the Amended Merger Agreement.**

Plaintiffs first contend that the Board acted in bad-faith and in breach of the duty of loyalty by approving the Amended Merger Agreement while knowing the \$37.25 purchase price was unfair. (*Id.* ¶ 12, 100, 196, 201) This conclusory allegation is based on a single comment made by Vandenberghe at an automotive industry conference on October 31, 2007. (*Id.* ¶ 12) Referencing an opinion expressed by one of Lear's large stockholders, Richard Pzena, shortly after the Board approved the Initial Merger Agreement, Vandenberghe stated:

Hey, I do want to add to that, though. You mentioned [Pazena]. We went out and saw them after this was all over. By the way, there was never a fight between us and Pazena. Yes, he's a--yes, he likes Lear, invested in Lear, and we want them as friends--always have wanted them as friends. We didn't have any difference of opinion [with Pazena]. He thought the stock was worth \$60--so did we. We just couldn't get it at the time. That was the problem ... we were faced with at [the] time. But, no, there's no issue between them and us. They're--I think they're continuing to buy. In fact, they just recently made a--increased their stake.

(Final Transcript, Lear Corp. at Gabelli & Company, Inc. Auto Aftermarket Symposium dated October 31, 2007 at 9, attached as Exhibit C; Compl. ¶ 12)¹¹

From this statement, Plaintiffs ask the Court to take a monumental leap and infer that Vandenberghe and the rest of the Board had actual knowledge that the Lear stock was worth \$60, when the Board recommended the \$37.25 price in the Amended Merger Agreement. (Compl. ¶¶ 12, 100, 196, 201) This is absurd. Such an inference would take Vandenberghe's comments completely out of context. Vandenberghe was not commenting on the value of the Company. As the statement itself makes plain, Vandenberghe was attempting to reassure the market that Lear was on friendly terms with one of its large stockholders. Similarly, to make that inference, the Court would also have to assume that the Board, comprised of a majority of disinterested and independent directors, unanimously approved the Initial Merger Agreement and Amended Merger Agreements with the knowledge that they were selling the Company for approximately 60% of its true value. Even on a motion to dismiss, Plaintiffs are not entitled to such an unreasonable inference. *See Grobow*, 539 A.2d at 187 ("A trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences.").

Plaintiffs have failed to allege particularized facts to support the allegation that the Board knew that Lear stock was worth \$60 per share at the time they approved either the

¹¹ In the Complaint, Plaintiffs omitted the first five sentences of Vandenberghe's statement. Plaintiffs having incorporated the transcript of Vandenberghe's comments by

Initial Merger Agreement or the Amended Merger Agreement. In fact, the opposite is true. The particularized facts set forth in the Complaint indicate the Board reasonably believed the \$37.25 purchase price was fair. As the Complaint acknowledges, the Special Committee's advisors, J.P. Morgan and Evercore, informed the Board prior to the approval of the \$37.25 purchase price that nothing had happened since approval of the Initial Merger Agreement that altered, in any material respects, their opinions regarding the valuation of the Company and the North American automotive industry environment, respectively. (Compl. ¶ 161) Those opinions, of course, were significant factors in the Board's decision to accept the AREP Entities \$36.00 offer and approve the Initial Merger Agreement. Moreover, at least since the Board approved the Initial Merger Agreement, if not before, potential bidders knew the Company was for sale. The Company, however, did not receive a single acquisition proposal, much less a proposal superior to the Initial Merger Agreement. (*Id.* ¶¶ 119, 138, 151) Finally, the Board was well aware that this Court had already concluded that \$36.00 per share was reasonable. *Lear*, 926 A.2d at 123 (“[T]he \$36 per share price appears as a reasonable one on this record, when traditional measures of valuation, such as the DCF, are considered.”). The only reasonable inference that can be drawn from these particularized facts is that the Board had a reasonable basis to believe that the \$37.25 purchase price was fair.

reference, the Court may consider its complete text. *McAllister v. Kallop*, C.A. No. 12856, 1993 WL 104626 (Del. Ch. Mar. 19, 1993).

2. The Board Negotiated The Amended Merger Agreement On An Arm's Length Basis.

Plaintiffs also allege that the Amended Merger Agreement was not the product of arm's length negotiations, but was designed by the Board and the AREP Entities to "arbitrarily ... cap the market price of the Company and obtain its assets and business at the lowest possible price." (Compl. ¶ 198) The Complaint, however, establishes that the Amended Merger Agreement was the subject of extended and difficult negotiations and was approved by the Board on an informed basis. The Complaint indicates that the Board considered several alternatives to the Amended Merger Agreement, including (i)

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, (ii) offering a public equity stub to allow Lear's public stockholders to co-invest in the deal (*id.* ¶ 178), and (iii) offering an equity stub to several large stockholders through a private placement, (*id.* ¶ 179). Moreover, the Complaint outlines a protracted back-and-forth negotiation between Lear and the AREP Entities of the two critical terms of the Amended Merger Agreement—the amount of the price increase and the amount and form of the No-Vote Termination Fee. (*Id.* ¶¶ 174-76, 179, 183) *See, supra*, Sections E & F.

In an effort to sidestep their own admissions as to these arm's length negotiations, Plaintiffs criticize the Board for entrusting Rossiter and McCurdy, the Special Committee's chairman, with negotiating the terms of the Amended Merger Agreement. (Compl. ¶ 168) According to Plaintiffs, Rossiter's conflict should have precluded him from participating in the discussions and McCurdy's involvement was inappropriate

simply because he was “intimately involved in *discussions* with Rossiter about” the subject of his conflict of interest. (*Id.*) (emphasis added) On that flimsy basis, Plaintiffs suggest that allowing McCurdy and Rossiter to lead negotiations somehow contravenes this Court’s decision on the Preliminary Injunction Motion. In fact, in utilizing this approach, the Special Committee was following the guidance supplied by this Court. *See Lear*, 926 A.2d at 117 (“I believe it would have been preferable for the Special Committee to have had its chairman ... participate with Rossiter in the negotiations with Icahn.”). The Complaint is simply devoid of any particularized facts to support the fanciful notion that the Amended Merger Agreement was the product of a broad conspiracy among disinterested and independent directors and the AREP Entities, a third-party acquiror.

3. The Board Did Not Know that the Stockholders Would Fail to Approve the Amended Merger Agreement.

Plaintiffs also allege that the Board approved the Amended Merger Agreement knowing that it would be voted down by the Lear stockholders and, consequently, with knowledge that Lear would be required to pay the AREP Entities the No-Vote Termination Fee. (Compl. ¶ 9, 11, 201) According to Plaintiffs, by doing so, the Board breached its fiduciary duties of good faith and loyalty, because the Board knew that the Company would not receive any tangible benefit as a result of entering into the Amended Merger Agreement. (*Id.*) In essence, Plaintiffs suggest the Board’s decision to approve the Amended Merger Agreement amounts to waste. (*Id.* ¶¶ 207-08)

Here again, however, Plaintiffs have failed to allege with particularity the factual premise for their claim, as to the Board's supposed knowledge that the Amended Merger Agreement would not be approved by the stockholders. (*See id.* ¶ 201) The factual premise of Plaintiffs' claim also is contradicted by Plaintiff's own Complaint. The thrust of Plaintiffs' Complaint, albeit based on conclusory and wholly unsupported allegations, is that the Board was conspiring to cap the market price of the Company and sell it to the AREP Entities at the lowest possible price for the benefit of the inside directors. (*Id.* ¶¶ 110, 189, 198) Plaintiffs, however, then pivot 180 degrees and allege the Board agreed to pay the AREP Entities approximately \$25 million with the actual knowledge that it would not achieve its supposed ultimate aim—selling the Company at the lowest possible price. (*Id.* ¶¶ 9, 11, 201) Making Plaintiffs' claim even more far-fetched, Plaintiffs have failed to allege that any director other than Intrieri was interested in the payment of the No-Vote Termination Fee.

There simply are no particularized allegations to support a reasonable inference that the Board knew the stockholders would vote down the Amended Merger Agreement following the \$1.25 increase in the purchase price. As Plaintiffs concede in the Complaint, the Board in fact evaluated the likelihood of shareholder approval. For instance, the Complaint alleges that on June 28, 2007, the Board received an update on the status of the solicitation of proxies. (*Id.* ¶¶ 169-70) According to the Complaint, Ninivaggi informed the Board that in his opinion,

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For the same reasons, Plaintiffs' allegations fail under a corporate waste analysis. "To allege a claim of waste sufficiently to satisfy the pleading requirements of Rule 23.1, the complaint must demonstrate particularized facts that the consideration received by the corporation was 'so inadequate that no person of ordinary sound business judgment would deem it worth that which the corporation has paid.'" *Benerofe v. Cha*, C.A. No. 14614, 1996 WL 535405, at *6 (Del. Ch. Sept. 12, 1996) (quoting *Grobow*, 539 A.2d at 189). "That is 'an extreme test, very rarely satisfied by a shareholder plaintiff,' because 'if under the circumstances any reasonable person might conclude that the deal made sense, then the judicial inquiry ends.'" *Zupnick v. Goizueta*, 698 A.2d 384 (Del. Ch. 1997) (quoting *Steiner v. Meyerson*, C.A. No. 13139, 1995 WL 441999, at *1 (Del. Ch. July 18, 1995)). "In essence," Plaintiffs must allege "particularized facts showing that

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the corporation ... gave away assets for no consideration.” *Green v. Phillips*, C.A. No. 14436, 1996 WL 342093, at *5 (Del. Ch. June 19, 1996).

Plaintiffs have not alleged particularized facts to suggest the Board, in approving the Amended Merger Agreement, “gave away assets for no consideration.” Instead, the particularized facts alleged in the Complaint indicate that the Board had a reasonable basis to believe that a purchase price of \$37.25 per share would garner sufficient stockholder support to approve the Amended Merger Agreement. The Board, therefore, agreed to exchange the possibility of paying approximately \$25 million for the possibility of receiving approximately \$100 million. Certainly, a “reasonable person *might* conclude that the deal made sense.” *Green*, 1996 WL 342093, at *5 (emphasis added).

4. The Board Did Not Breach Its Duty of Care in Approving the Amended Merger Agreement.

Finally, Plaintiffs allege that demand is excused because, supposedly in approving the Amended Merger Agreement the Board failed to consider (i) available alternatives to pursuing the deal with the AREP Entities, and (ii) the likelihood of a negative recommendation from ISS on the Amended Merger Agreement and its effect on the shareholder vote. (Compl. ¶¶ 194-96, 201) These conclusory allegations are either contradicted or not supported by the Complaint. As discussed above, the Complaint alleges that the Board considered a number of alternatives to the Amended Merger Agreement. *See, supra*, Section I.C.2. Similarly, the Complaint plainly asserts that Lear management met with the Company’s large stockholders and advisors in an effort to determine the amount the consideration would need to be increased by in order to garner

stockholder approval. (Compl. ¶¶ 160, 164-66, 170, 177)

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(*Id.*) The Complaint is devoid of any particularized facts to support an inference that the Board failed to consider this information, much less that the Board did so intentionally.

At best, these conclusory allegations, if true, might establish a good-faith breach of the duty of care. Such a claim, however, is insufficient to excuse demand. *Stone*, 911 A.2d at 369 (“[A] failure to act in good faith requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (i.e., gross negligence).”). The claim is also subject to dismissal under Court of Chancery Rule 12(b)(6), as the Company’s certificate of incorporation contains a provision authorized by 8 Del. C. §102(b)(7) exculpating the Individual Defendants from personal liability for breaches of the duty of care. *See, e.g., Malpiede v. Townson*, 780 A.2d 1075, 1079 (Del. 2001) (holding that a similar §102(b)(7) provision “bars any claim for money damages against the director defendants based solely on the board’s alleged breach of its duty of care”).

Because Plaintiffs have failed to plead particularized facts to establish that the Board’s approval of the Amended Merger Agreement was not a good-faith exercise of business judgment, demand is not excused under the second prong of *Aronson*.

II. COUNTS I AND III OF THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Regardless of Plaintiffs' failure to make pre-suit demand, Counts I and III of the Complaint should be dismissed pursuant to Chancery Court Rule 12(b)(6).

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

Rule 12(b)(6) requires the Court to dismiss a complaint if it does not show that "the pleader is entitled to relief." *In re Coca Cola Enters., Inc. S'holders Litig.*, C.A. No. 1927, 2007 WL 3122370, at *3 (Del. Ch. Oct. 17, 2007) (citation omitted). Only well-pled allegations are assumed to be true; the Court need not accept conclusory assertions that are unsupported by specific facts. *In re Gen. Motors (Hughes) S'holders Litig.*, 897 A.2d 162, 168 (Del. 2006). These standards require dismissal of Counts I and III of the Complaint.

B. Plaintiffs Have Failed To State A Claim For Breach Of Fiduciary Duty.

In Count I of the Complaint, Plaintiffs allege the Individual Defendants breached their fiduciary duties in approving the Amended Merger Agreement. This Court has noted that "to survive a Rule 12(b)(6) motion, a complaint alleging breach of fiduciary duty must plead facts supporting an inference of breach, not simply a conclusion to that effect." *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007). Where, as here, the defendants are shielded by an exculpatory provision, a claim for breach of fiduciary duty should be dismissed if the "facts alleged in the complaint do not state a cognizable claim that the directors acted in their own personal interests rather than in the best interests of the stockholders." *Malpiede*, 780 A.2d at 1085. As discussed above, Plaintiffs have

failed to plead facts to support their conclusory allegations that the Individual Defendants acted in bad faith and in violation of their duty of loyalty. Count I of the Complaint, therefore, should be dismissed.

C. Plaintiffs' Have Failed To State A Claim For Waste.

Count III of Complaint also fails to state a claim. There, Plaintiffs, piggy-backing on their other deficient claims, assert that the AREP Entities have been unjustly enriched as a result of the Individual Defendants' breaches of fiduciary duties. Plaintiffs further allege that the Individual Defendants' decision to approve the Amended Merger Agreement amounts to waste. As discussed above in Section I.C.3, Plaintiffs have failed to plead facts sufficient to state a claim for waste against the Individual Defendants. A "reasonable person acting in good faith could conclude" that the Individual Defendant's decision to exchange the possibility of paying approximately \$25 million pursuant to the No Vote Termination Fee provision for the possibility of receiving approximately \$100 million in additional merger consideration for the Company's stockholders was in the Company's "best interest." *Sample*, 914 A.2d at 669-70. Count III of the Complaint, therefore, also should be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs have not met the heavy burden of pleading particularized facts sufficient to establish demand futility. Accordingly, the Complaint should be dismissed with prejudice.

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