



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

THE LEAR DEFENDANTS' REPLY
BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS
PLAINTIFFS' FOURTH AMENDED DERIVATIVE COMPLAINT

Of Counsel:

Matthias A. Lydon
Norman K. Beck
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Attorneys for Lear Corporation

Kevin G. Abrams (#2375)
T. Brad Davey (#5094)
ABRAMS & LASTER LLP
20 Montchanin Road
Suite 200
Wilmington, Delaware 19807
(302) 778-1000
Attorneys for the Lear Defendants

Dated: May 27, 2008

TABLE OF CONTENTS

	PAGES
PRELIMINARY STATEMENT	1
ARGUMENT	3
I. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO SATISFY THE DEMAND REQUIREMENT.....	3
A. The Extremely Difficult Legal Standard For Excusing Pre-Suit Demand Under the Second Prong Of <i>Aronson</i>	3
B. Plaintiffs Have Failed To Allege Particularized Facts Excusing Demand Under The Second Prong Of <i>Aronson</i>	5
1. Plaintiffs Have Failed To Plead Bad Faith Based On A Conscious and Intentional Disregard By The Individual Directors Of Their Due Care Obligations.....	5
2. Plaintiffs Have Failed To Plead Bad Faith Based On The Individual Directors’ Conscious and Intentional Disregard Of Their Fiduciary Duty of Loyalty.....	12
3. Plaintiffs Have Failed To Plead Bad Faith Based On Waste.....	16
II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.....	23
CONCLUSION.....	25

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Alidina v. Internet.com Corp.</i> , C.A. No. 17235, 2002 WL 31584292 (Del. Ch. Nov. 6, 2002)	12, 13, 14
<i>Arnold v. Society for Sav. Bancorp, Inc.</i> , 650 A.2d 1270 (Del. 1994).....	24
<i>Aronson v. Lewis</i> , 473 A.2d 805 (Del. 1984).....	3
<i>Crescent/Mach I Partners, L.P. v. Turner</i> , 846 A.2d 963 (Del. Ch. 2000).....	12, 13, 14
<i>Dolphin Ltd. P'ship I, L.P. v. Gupta</i> , C.A. Nos. 2486, 1956, 2007 WL 315864 (Del. Ch. Jan. 22, 2007)	9
<i>Emerald Partners v. Berlin</i> , 787 A.2d 85 (Del. 2001).....	23
<i>Green v. Phillips</i> , C.A. No. 14436, 1996 WL 342093 (Del. Ch. June 19, 1996).....	16, 23, 24
<i>Highland Legacy Ltd. v. Singer</i> , C.A. No. 1566, 2006 WL 741939 (Del. Ch. Mar. 17, 2006)	4
<i>In re infoUSA, Inc. S'holders Litig.</i> , C.A. No. 1956, 2007 WL 2419611 (Del. Ch. Aug. 13, 2007)	4
<i>Kahn v. Tremont Corp.</i> , C.A. No. 12339, 1994 WL 162613 (Del. Ch. Apr. 22, 1994).....	3
<i>Kells-Murphy v. McNiff</i> , C.A. No. 11009, 1991 WL 137143 (Del. Ch. July 12, 1991)	14
<i>Khanna v. McMinn</i> , C.A. No. 20545, 2006 WL 1388744 (Del. Ch. May 9, 2006).....	4
<i>In re Lear Corp. S'holder Litig.</i> , 926 A.2d 94 (Del. Ch. 2007)	3, 15

<i>Mercier v. Inter-Tel (Delaware),</i> 929 A.2d 786 (Del. Ch. 2007)	11
<i>Official Committee of Unsecured Creditors of Integrated Health Servs.,</i> <i>Inc. v. Elkins</i> , C.A. No. 20228, 2004 WL 1949290 (Del. Ch. Aug. 24, 2004)	6, 7, 11, 24
<i>Parnes v. Bally Entm't Corp.,</i> 722 A.2d 1243 (Del. 1999)	12
<i>Sample v. Morgan,</i> 914 A.2d 647 (Del. Ch. 2007)	16
<i>Stone ex rel. AmSouth Bancorp. v. Ritter,</i> 911 A.2d 362 (Del. 2006)	4
<i>In re Walt Disney Co. Derivative Litig.,</i> 907 A.2d 693 (Del. Ch. 2006)	4
<i>In re Walt Disney Co. Derivative Litig.,</i> 825 A.2d 275 (Del. Ch. 2003)	6, 7, 11
<i>In re Walt Disney Co. Derivative Litig.,</i> 906 A.2d 27 (Del. 2006)	4, 8, 9
<i>White v. Panic,</i> 783 A.2d 543 (Del. 2001)	16

PRELIMINARY STATEMENT

This case now focuses on one thing: the agreement of the Lear Board to pay the AREP Entities a No Vote Termination Fee worth approximately \$25 million in exchange for a \$100 million increase in the merger consideration intended by the Lear Board to secure the Lear stockholders' approval of the Merger. The Lear Defendants demonstrated in their Opening Brief that this derivative action should be dismissed pursuant to Chancery Court Rules 23.1 and 12(b)(6) for two independent reasons.¹ First, Plaintiffs have not come close to stating in their fourth complaint the requisite particularized allegations to raise a reasonable doubt as to the business judgment of the Individual Defendants and, therefore, have failed to allege demand futility. Second, and regardless of their failure to excuse demand, Plaintiffs have failed to state a claim for which relief can be granted, because the "bad faith" claim is rebutted by the allegations of the pending complaint and all due care claims fail under the Company's exculpatory §102(b)(7) charter provision.

In their Answering Brief, Plaintiffs concede that all but three of the eleven Individual Defendants are disinterested and independent. Nonetheless, Plaintiffs assert that, notwithstanding the inconsistent allegations of the Complaint, Individual Defendants supposedly acted in bad faith by approving the Amended Merger Agreement without exercising any care and consciously acceding to the alleged self-interests of insiders.

¹ Capitalized terms used but not defined herein have the meanings set forth in the Lear Defendants' opening brief in support of their motion to dismiss Plaintiffs' fourth amended derivative complaint (the "Opening Brief"). The Opening Brief and Plaintiffs'

Plaintiffs similarly assert that the Individual Defendants' decision to approve the Amended Merger Agreement was made in bad faith because it resulted in corporate waste. Based on these allegations of bad faith, Plaintiffs argue they have rebutted the presumption of the business judgment rule, excusing demand under the second prong of *Aronson* and stating non-exculpable claims for breach of fiduciary duty and waste.

Plaintiffs' opposition, however, fails in its basic premise. Stripped of its conclusory and pejorative allegations, the Complaint simply fails to allege facts—much less the particularized facts required by Rule 23.1—to support a finding of bad faith on the part of the Individual Defendants. Instead, the well-pled, particularized allegations in the Complaint and the documents incorporated therein establish that the Individual Defendants acted on an informed and reasonable basis in approving the Amended Merger Agreement. Plaintiffs' own allegations also demonstrate that the Individual Defendants had reasonable grounds to believe the increased purchase price of \$37.25 could secure the Lear stockholders' approval of the Amended Merger Agreement. As such, far from alleging that the Individual Defendants acted in bad faith, the Complaint indicates the Individual Defendants satisfied their fiduciary obligations. Accordingly, the Complaint should be dismissed and the litigation should be concluded with a reasonable fee award to Plaintiffs' counsel.

answering brief in opposition to defendants' motions to dismiss (“Answering Brief”) are cited as “DOB ____” and “PAB _____,” respectively.

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO SATISFY THE DEMAND REQUIREMENT.

Plaintiffs admittedly failed to make demand on the Board and, therefore, must satisfy the demand futility test of *Aronson v. Lewis* in order to avoid dismissal of the Complaint. 473 A.2d 805 (Del. 1984). To excuse demand as futile under *Aronson*, a plaintiff must allege particularized facts creating a reasonable doubt that (i) a majority of the directors are disinterested and independent, or (ii) the challenged transaction was otherwise the product of a valid exercise of business judgment. *Id.* at 814. Having now conceded that all but three of the eleven Individual Defendants are disinterested and independent,² Plaintiffs are left to argue that demand is excused under the second prong of *Aronson* to avoid dismissal of this derivative action. Because Plaintiffs have not satisfied that substantial burden, the Complaint must be dismissed.

A. The Extremely Difficult Legal Standard For Excusing Pre-Suit Demand Under the Second Prong Of Aronson.

Because 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,” the second prong of *Aronson* poses a “substantial burden.” *Kahn v. Tremont Corp.*, C.A. No. 12339, 1994

² In their Answering Brief, Plaintiffs assert that the “Court need not address . . . again” the Individual Defendants’ disinterest and independence. (PAB 15 n.4). Importantly, when the Court previously addressed that issue, it determined that all but three of the Individual Defendants—Rossiter, Vandenberghe, and Intrieri—were disinterested and independent on Lear Board decisions relating to the Merger. (See DOB 22-23 & n.8 (citing *In re Lear Corp. S’holder Litig.*, 926 A.2d 94, 99 (Del. Ch. 2007))).

WL 162613, at *6 (Del. Ch. Apr. 22, 1994); *see also Highland Legacy Ltd. v. Singer*, C.A. No. 1566, 2006 WL 741939, at *7 (Del. Ch. Mar. 17, 2006). While the “second prong of *Aronson* may potentially be satisfied by recourse to multiple theories,” *Khanna v. McMinn*, C.A. No. 20545, 2006 WL 1388744, at *23 (Del. Ch. May 9, 2006), Plaintiffs here claim to have met that substantial burden based solely on allegations of a “bad faith” decision by the Lear Board. (PAB 3).³ *See also In re infoUSA Inc., S’holders Litig.*, C.A. No. 1956-CC, 2007 WL 2419611, at *1 (Del. Ch. Aug. 13, 2007) (“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.”).

In *In re Walt Disney Co. Derivative Litigation*, the Supreme Court defined bad faith as an “intentional dereliction of duty, a conscious disregard for one’s responsibilities.” 906 A.2d 27, 66 (Del. 2006) (*Disney III*). The Supreme Court provided three examples of conduct which would meet that definition:

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.

Id. at 67 (citing *In re The Walt Disney Co. Derivative Litigation*, 907 A.2d 693, 755 (Del. Ch. 2006) (*Disney II*); *see also Stone ex rel. AmSouth Bancorp. v. Ritter*, 911 A.2d 362,

³ Summarizing their demand futility argument (and overstating the allegations of the Complaint), Plaintiffs assert that “the business judgment rule has no applicability to

369 (Del. 2006) (stating that *Disney III* identifies three “examples of conduct that would establish a failure to act in good-faith”).⁴

Plaintiffs argue that they have alleged that the Individual Defendants acted in bad faith in approving the Amended Merger Agreement by (i) consciously and intentionally disregarding their duty of due care; (ii) consciously and intentionally disregarding their duty of loyalty; and (iii) committing waste. As demonstrated below, each of these arguments is unsupported by the Complaint. Considering only Plaintiffs’ well-pled, particularized allegations as required on this Motion, the Complaint not only refutes Plaintiffs’ assertion of bad faith but confirms that the Board discharged its fiduciary duties, acting on an informed and reasonable basis in approving the Amended Merger Agreement.

B. Plaintiffs Have Failed To Allege Particularized Facts Excusing Demand Under The Second Prong Of *Aronson*.

1. Plaintiffs Have Failed To Plead Bad Faith Based On A Conscious and Intentional Disregard By The Individual Directors Of Their Due Care Obligations.

Plaintiffs contend they have alleged various deficiencies in the Individual Defendants’ consideration of the Amended Merger Agreement. (PAB 19) Plaintiffs further contend that the Individual Defendant’s decision has “all the badges of the

this action, because Plaintiffs’ well–and specifically–pleaded Complaint states claims for bad faith breaches of fiduciary obligations, thereby excusing demand.” (PAB 3).

⁴ Plaintiffs make no allegation in the Complaint or the Answering Brief that the Individual Defendants intentionally violated applicable law. Instead, as discussed below, Plaintiffs ground their claims of bad faith primarily on the third example set forth in *Disney III* and the argument that the Individual Defendants consciously and intentionally disregarded their fiduciary duties.

exercise of *no care*.” (*Id.*) However, Plaintiffs have not come close to alleging sufficient facts to establish that the Individual Defendants acted with a conscious and intentional disregard for their fiduciary duty of care.

This Court’s decisions in *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275 (Del. Ch. 2003) (*Disney I*) and *Official Committee of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins*, C.A. No. 20228, 2004 WL 1949290 (Del. Ch. Aug. 24, 2004) are instructive as to what plaintiffs must plead to demonstrate that defendant directors “consciously and intentionally disregarded” their fiduciary duty of care, thereby establishing bad-faith. In *Disney I*, Chancellor Chandler denied the Disney directors’ motion to dismiss pursuant to Rules 23.1 and 12(b)(6), holding the plaintiffs had sufficiently alleged that the Disney directors’ conduct in approving an employment agreement and a subsequent non-fault termination (NFT) constituted bad faith. 825 A.2d at 289. Plaintiffs alleged the Disney directors approved the employment agreement without reviewing a draft of the agreement, evaluating the details of the agreement’s key provisions, or obtaining any expert advice regarding the agreement. *Id.* at 288. Plaintiffs also alleged that the Disney directors spent less than an hour considering the employment agreement and never reviewed or asked to review the final terms of the agreement. *Id.* With respect to the NFT, Plaintiffs alleged that the Disney directors failed to request a meeting to discuss the NFT, inquire about the conditions and terms of the NFT, or attempt to delay the termination to avoid payment of an enormous severance. *Id.* at 288-89.

The Chancellor determined that, if true, these allegations did “more than portray directors who, in a negligent or grossly negligent manner, merely failed to inform themselves or to deliberate adequately about an issue of material importance to their corporation.” *Id.* at 289. Instead, the allegations implied that the “defendant directors *knew* that they were making material decisions without adequate information and without adequate deliberation, and that they simply did not care if the decisions caused the corporation and its stockholders to suffer injury or loss.” *Id.* The Chancellor therefore held that plaintiffs had alleged sufficiently for Rule 23.1 demand-excusal purposes that the Disney directors “*consciously and intentionally disregarded their responsibilities.*” *Id.*

In *Integrated Health*, this Court considered defendant directors’ motion, pursuant to Rule 12(b)(6), to dismiss claims challenging their approval of numerous transactions. *Integrated Health*, 2004 WL 1949290, at *1. Because the defendant directors were protected by a §102(b)(7) exculpatory provision, the Court determined that to survive the motion to dismiss, the plaintiff was required to “plead facts that, if true, would imply that a Board ‘*consciously and intentionally disregarded its responsibilities.*’” *Id.* at *12. The Court, then, went on to hold that the plaintiff had satisfied that standard with respect to several of the challenged transactions but not with respect to others. For instance, the Court concluded the plaintiff had met that standard by alleging that director defendants had approved *ex post* a loan to two officers and directors “even though the Compensation Committee was given no explanation as to why the loans were made and the Board, without any additional investigation, deliberation, consultation with an expert, or

determination as to what the Compensation Committee’s decision process was, provided such ratification.” *Id.* (Internal quotations omitted.)

By contrast, the Court in *Integrated Health* concluded plaintiff had not met that standard with respect to revisions to the company’s compensation plan approved by the director defendants. *Id.* at *13. Plaintiff alleged that the director defendants completely abdicated their obligation to review and approve the revisions to the compensation committee’s compensation consultant. *Id.* The Court, however, noted that the consultant made a presentation to the compensation committee, which was followed by a discussion. Thus, even though the Board never discussed the revisions prior to approving them, the Court held plaintiff had failed to allege that the director defendants acted “in *more* than a grossly negligent manner.” *Id.*

Together, *Disney I* and *Integrated Health* demonstrate that in order to adequately allege that directors “*consciously and intentionally disregarded their*” fiduciary duty of care, plaintiffs must plead procedural deficiencies in the directors’ approval process that are so significant that they are tantamount to a total failure to exercise any care. The Supreme Court confirmed that approach when it expressly rejected the notion that “gross negligence (including a failure to inform one’s self of available material facts), without more, can also constitute bad faith.” *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 64-65 (Del. 2006).

Here, Plaintiffs appear to contend that they have alleged two deficiencies in the approval process employed by the Individual Defendants. Specifically, Plaintiffs allege that the Individual Defendants failed to (i) take meaningful steps to consider whether

stockholders would support the revised terms, and (ii) question their advisors regarding whether the No Vote Termination Fee had any basis in precedent. (PAB 19) These contentions, however, only appear in the Answering Brief; they are not contained in the Complaint.⁵ As such, these purported deficiencies cannot be considered in the context of this Motion. *See, e.g., Dolphin Ltd. P'ship I, L.P. v. Gupta*, C.A. Nos. 2486, 1956, 2007 WL 315864, *1 (Del. Ch. Jan. 22, 2007) (“The Court considers only allegations put forth in the complaints, not subsequent briefs, when it evaluates a motion to dismiss.”). Moreover, even assuming *arguendo* that these allegations were contained in the Complaint, they suggest, at best, that the Individual Defendants may have failed to consider available material facts. “Without more,” however, such allegations “cannot constitute bad faith.” *Disney*, 906 A.2d at 64-65.

Plaintiffs’ further contention that the Individual Defendants engaged in “no care” in approving the Amended Merger Agreement is similarly unavailing, as it is clearly contradicted by the allegations of the Complaint. (PAB 19). The few well-pled, particularized allegations in the Complaint as well as the documents incorporated therein establish the following with respect to the Individual Defendants’ approval process:

Meetings: Together, the Special Committee and Board met no fewer than ten times between June 14, 2007 and July 8, 2007 to discuss the Initial Merger Agreement and Amended Merger Agreement. (Compl. ¶¶ 160-61, 163, 167, 179; July 9 Proxy at 6-11).

Consideration of Stockholder Support: The Company engaged the services of a proxy solicitor, Mackenzie Partners, to assist in the solicitation of proxies and “the Special Committee received reports on the status of

⁵ Tellingly, when Plaintiffs make these allegations in the Answering Brief, they fail to provide any citation to the Complaint. (*See* PAB 19)

discussions with the Company's shareholders on June 14, 17, and 21, 2007 and periodically received additional reports on the tabulation of stockholder votes for approval of the merger agreement." (Compl. ¶ 160). On June 28, 2007, for instance, Ninivaggi informed the Special Committee, based on "comments received from shareholders and advice from [Mackenzie Partners], ... [that] the per share consideration [provided by the Initial Merger Agreement] would need to be increased by at least \$1.00 per share for the merger to be approved by shareholders." (Id. ¶ 170). On July 3, 2007, Ninivaggi again "reported to the entire Board on the progress in the discussions with ... the large shareholders." (Id. ¶ 179).

Consideration of Financial Fairness: The Special Committee and Board obtained an opinion from J.P. Morgan in connection with the Initial Merger Agreement that the merger consideration of \$36.00 per share was fair from a financial perspective. (*See id.* ¶ 161 (referencing J.P. Morgan's fairness opinion)). On June 17, 2007, JP Morgan informed the Special Committee that the "Company's revised 2007 financial forecast would not materially change JP Morgan's prior financial analysis. (*Id.* (quoting the July 9 Proxy)). When the Board met on July 6, 2007 to discuss the terms of the then-proposed Amended Merger Agreement, "a representative of JP Morgan expressed his view that nothing had caused JP Morgan to change, in any material respect, the financial analysis with respect to the valuation of the Company it performed in connection with the fairness opinion it delivered to the special committee and board of directors in February 2007." (July 9 Proxy at 10)

Consideration of Expert Advice: In addition to the expert advice of Mackenzie and J.P. Morgan, the Company also retained Evercore Partners to advise on the North American automotive industry environment in connection with the Initial Merger Agreement. (Compl. ¶ 161). Like JP Morgan, Evercore Partners reconfirmed its prior analysis to the Special Committee on June 17 and the entire Board on July 6, 2007. (*Id.*; July 9 Proxy at 10).

Consideration of the Terms of the Amended Merger Agreement: The Individual Defendants repeatedly reviewed and discussed the terms of the Amended Merger Agreement. On June 28, the Special Committee determined that the Company should seek to renegotiate the Initial Merger Agreement and authorized Rossiter and McCurdy to contact the AREP Entities. (Compl. ¶ 174). The Special Committee, collectively or through its chairman, received updates on the status of those negotiations on June 29, July 2, July 3, July 6, and July 8. (July 9 Proxy at 8-11). Similarly, the entire Board received updates on the negotiations and the evolution of the

proposed terms of the Amended Merger Agreement on July 3, July 4, July 6, and July 8. (*Id.*; Compl. ¶179) Prior to approving the Amended Merger Agreement at its meeting on July 8, the board reviewed its finalized terms with Ninivaggi and the Special Committee’s counsel, Winston & Strawn. (July 9 Proxy at 11).

These allegations simply cannot support an inference that the Individual Defendants acted in bad faith by “*consciously and intentionally disregard[ing] their*” fiduciary duty of care. *Disney*, 825 A.2d at 289. Based on the well-pled allegations, the Individual Defendants employed an approval process that was significantly more robust than the process employed by the director defendants in *Integrated Health* in approving the compensation revisions. *See Integrated Health*, 2004 WL 1949290, at *13 (plaintiff failed to plead sufficiently that the director defendants consciously and intentionally disregarded their fiduciary duty of care in approving compensation revision where the approval process was limited to the compensation committee’s consideration of a presentation by its consultation expert and involved no deliberation by the board as a whole).

Far from establishing bad-faith, the well-pled allegations of the Complaint indicate that the Individual Defendants acted on an informed and reasonable basis in approving the Amended Merger Agreement. (*See* DOB 37-38). Indeed, having determined the Merger was in the best interests of the stockholders, the Individual Defendants had a duty to take measures that could secure its implementation, including by approving the Amended Merger Agreement. *See Mercier v. Inter-Tel (Delaware)*, 929 A.2d 786, 808 (Del. Ch. 2007). (“As a matter of fiduciary duty, directors should not be advising stockholder to vote for transactions or charter changes unless the directors believe those

measures are in the stockholders' best interests. And when directors believe that measures are in the stockholders' best interests, they have a fiduciary duty to pursue the implementation of those measures in an efficient fashion.”).

2. Plaintiffs Have Failed To Plead Bad Faith Based On The Individual Directors' Conscious and Intentional Disregard Of Their Fiduciary Duty of Loyalty.

Plaintiffs also argue that, in approving the Amended Merger Agreement, the concededly independent and disinterested Individual Defendants acted in bad faith by acquiescing to the self-interested desires of Rossiter and demonstrated an intentional disregard for their fiduciary duty of loyalty. (PAB 21). In so arguing, Plaintiffs rely on a line of cases—including *Alidina v. Internet.com Corp.*, C.A. No. 17235, 2002 WL 31584292 (Del. Ch. Nov. 6, 2002) and *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 984 (Del. Ch. 2000)—in which this Court has held that, notwithstanding the approval by disinterested, independent and informed directors, the transaction benefiting another director was so facially egregious as to be inexplicable on any ground other than bad faith. (*Id.*) Those decisions only demonstrate the deficiencies of Plaintiffs' allegations. *See also Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, (Del. 1999) (denying Rule 12(b)(6) motion to dismiss where plaintiff had alleged facts so egregious that the boards decision was “essentially inexplicable on any ground other than bad faith”).

In *Internet.com*, plaintiffs alleged that Alan Meckler—the CEO, board member and 26 percent shareholder of Mecklermedia—demanded a sweetheart side deal in exchange for his approval and support of the proposed sale of Mecklermedia that benefited Meckler at the expense of the company's stockholders. *Internet.com*, 2002 WL 31584292, at *2-

3. In the side deal, Meckler allegedly obtained an 80.1 percent interest in one of Mecklermedia's wholly owned subsidiaries at a grossly unfair price. *Id.* at *1. Though the subsidiary was valued at \$22.5 million at the time of the side deal, that valuation was allegedly "a function of the amount Meckler was willing to pay for his equity interest." *Id.* at *2. Just five months later, the subsidiary completed an initial public offering and sold 3,400,000 shares of common stock for approximately \$47 million—more than twice the value assigned to the subsidiary in Meckler's side deal. *Id.* at *3. Plaintiffs further alleged that the independent and disinterested board members "knew Meckler allegedly sought out an interested merging partner, dictated the terms of the [sale], secured a valuable asset of the Company at a grossly unfair price, and diverted funds away from the Company to himself." *Id.* at 6. The Court concluded that plaintiffs had sufficiently pled that "the directors' acquiescence to this process, passive or otherwise, was beyond the bounds of reasonableness" to avoid dismissal pursuant to Rule 12(b)(6), because Meckler's alleged conduct was "so egregious that the [directors] likely could not have approved [the sale] in good faith." *Id.*

Similarly, in *Crescent/Mach*, Jim Turner—the CEO, Chairman and controlling stockholder of Dr. Pepper Bottling Holdings ("Holdings")—allegedly entered into ten "side deals" in connection with the proposed sale of Holdings that "conferred substantial benefits to him that [were not] available to Holdings' minority stockholders." *Crescent/Mach*, 846 A.2d at 970, 982. In particular, plaintiffs alleged that Turner conditioned the sale of Holdings on the "side deals," which he used to divert to himself cash that should have been paid to all Holdings stockholders in consideration for the sale. *Id.*

at 982-83 & n.48. Based on these allegations, the Court denied a motion to dismiss pursuant to Rule 12(b)(6) and concluded that “Turner’s alleged breach of his fiduciary duties was so egregious that [it] tainted the entire merger process.” *Internet.com*, 2002 WL 31584292, at *5 (discussing *Crescent/Mach*). By allegedly acquiescing in Turner’s self-interested negotiations and side deals and approving the merger at an unfair price, the Court held the complaint adequately alleged that the remaining independent directors “acted intentionally and in bad faith to enable [Turner] wrongfully to benefit at the corporation’s expense,” demonstrating an indifference to their duty of loyalty. *Crescent/Mach*, 846 A.2d at 981-83.⁶

Here, unlike in *Internet.com* and *Crescent Mach*, there are no specific allegations that any of the eight disinterested and independent Individual Defendants acquiesced to Rossiter’s negotiation of the Amended Merger Agreement. Instead, the Complaint acknowledges that while Rossiter participated in the final round of negotiations with the AREP representatives, he was accompanied and supervised by McCurdy, the chairman of the Special Committee. (Compl. ¶¶ 167-68). The Individual Defendants, thus, adhered to the guidance provided by this Court in its opinion on the Preliminary Injunction

⁶ *Kells-Murphy v. McNiff*, on which Plaintiffs also rely, is similarly inapposite. (PAB 21). In *Kells-Murphy*, the Court concluded that plaintiffs had rebutted the presumption of business judgment and pleaded demand excusal by alleging that the board of Applied Data, Inc. (“ADI”) permitted ADI’s CEO, Chairman and controlling stockholder to arrange the sale of the company, control the allocations of the sale proceeds, and allocate 38 percent of the sale proceeds to himself directly through pretextual side deals. C.A. No. 11009, 1991 WL 137143, at *2-3 (Del. Ch. July 12, 1991). As in *Internet.com* and *Crescent/Mach*, these allegations of faithless conduct on the part of a controlling insider far outstrip the allegations of interest on the part of

Motion. (DOB 34). Similarly, there are no specific allegations that Rossiter conditioned his support of the Amended Merger Agreement on the receipt of any benefits—monetary or otherwise—at the expense of the Company’s stockholders.

Most striking, however, is the wide gap between Rossiter’s interest in the Merger and the alleged conduct of Turner and Meckler. Turner and Meckler demanded side deals to obtain substantial monetary benefits that otherwise would have inured to the benefit of the company’s stockholders. Rossiter’s interests in the Merger simply do not come close to rising to that level. While the Court concluded that Rossiter’s personal motivations for the Merger were material and, accordingly Rossiter’s role in the AREP negotiations should be disclosed, the Court did not find that Rossiter’s separate economic interests in the Merger constituted a breach of the duty of loyalty, much less an egregious breach of the duty of loyalty. *Lear*, 926 A.2d at 114, 117-18. In fact, Plaintiffs suggest that Rossiter’s interests were typical of those of any senior executive involved in a going-private transaction. (Compl. ¶ 186). Indeed, if Rossiter’s interests here were so egregious that the Individual Defendants could not approve the Amended Merger Agreement in good faith, it is unlikely that any board of directors could approve in good faith a going-private transaction with a financial sponsor. For all of these reasons, Plaintiffs have failed to allege that the Individual Defendants acted in bad faith by intentionally disregarding their duty of loyalty in approving the Amended Merger Agreement.

Rossiter. Moreover, the Court’s conclusion in *Kells-Murphy* was heavily influenced by its determination that the remaining members of the ADI board were not independent. *Id.*

3. Plaintiffs Have Failed To Plead Bad Faith Based On Waste.

Finally, Plaintiffs contend that the Individual Defendants' decision to approve the Amended Merger Agreement constituted bad faith because it amounted to waste. Waste is akin to bad faith. "The wording of the test [for waste] implies as much, as it condemns as wasteful a transaction that is on terms so disparate that no reasonable person acting in good faith could conclude the transaction was in the corporations best interest." *Sample v. Morgan*, 914 A.2d 647, 669-70 (Del. Ch. 2007); *see also White v. Panic*, 783 A.2d 543, 554 n.36 (Del. 2001) ("The standards for corporate waste and bad faith by the board are similar."). The test for waste is "extreme" and "rarely satisfied, because if a reasonable person could conclude the board's action made business sense, the inquiry ends and the complaint will be dismissed." *Green v. Phillips*, C.A. No. 14436, 1996 WL 342093, at *5 (Del. Ch. June 19, 1996). "[I]n essence," Plaintiffs must allege "particularized facts showing that the corporation ... gave away assets for no consideration." *Id.*

Plaintiffs contend that the Individual Defendants approved the Amended Merger Agreement with the knowledge that it would not be adopted by the Lear stockholders and, as a consequence, bound the Company to pay the No Vote Termination Fee without receiving anything in exchange. (PAB 3, 9-10 15-19; *see* Compl. ¶¶ 9, 11, 195) Like Plaintiffs' larger opposition to the Motion, this contention fails in its basic premise: the particularized allegations of the Complaint do not support an inference that the Individual Defendants knew the Amended Merger Agreement would be rejected by the Lear

stockholders when they approved the No Vote Termination Fee. (DOB 35-36) As a consequence, the Complaint falls well short of pleading waste.

Plaintiffs' contention that the Individual Defendants knew the Amended Merger Agreement would fail to garner stockholder approval appears to be based on three purported allegations. First, Plaintiffs argue the Individual Defendants knew the Amended Merger Agreement was doomed to defeat because the Special Committee received a report on June 28, 2007 indicating that 32 percent of the outstanding shares had already been voted against the deal (the "June 28 Status Report"). (PAB 17; Compl. ¶ 170). Plaintiffs simply ignore the obvious fact that the no votes reflected in the June 28 Status Report were cast in connection with the \$36 Initial Merger Agreement and not the \$37.25 Amended Merger Agreement. When the Lear Board approved the Amended Merger Agreement on July 8, the Individual Defendants obviously understood that Lear stockholders who had already voted against the Initial Merger Agreement would have an opportunity to vote in favor proposed Merger after the Individual Defendants obtained the \$1.25 per share increase in the purchase price. Thus, the June 28 Status Report provided no indication as to the level of Lear stockholder support for the Amended Merger Agreement.

Second, Plaintiffs argue that the Individual Defendants knew that the Amended Merger Agreement would be voted down by stockholders based on communications with two stockholders—Classic Fund and Sasco—after receiving the June 28 Status Report. (PAB 17; Compl. ¶ 177). Plaintiffs are evidently confused about the content of those communications. In the previous version of the complaint—the Third Amended

Complaint, Plaintiffs alleged that Classic Fund and Sasco informed the Company on July 2, 2007 that they would not support the Amended Merger Agreement if it included only “a \$1 per share increase in consideration.” (Third Amended Compl. ¶ 191). Now, however, the Complaint includes the same allegation, except Classic Fund and Sasco are reported to have indicated that they would not support the Amended Merger Agreement if it included only “a \$1.25 per share increase in consideration.” (Compl. ¶177).

Regardless of which allegation is accurate,⁷ these alleged communications are inadequate to support an inference that the Individual Defendants knew the Amended Merger Agreement would not be adopted by the Lear stockholders. These communications, as with all communications with sophisticated stockholders, are a form of negotiation.⁸ Neither Classic Fund nor Sasco had anything to gain from confirming

⁷ Notably, the sequence of the negotiation alleged in the Complaint corroborates Plaintiffs’ previous allegation that the details of the proposed Amended Merger Agreement, which Sasco and Classic Fund allegedly stated they would not support, included a per-share price increase of only \$1.00, not \$1.25. According to the Complaint, on July 1, 2007, Icahn and Ninivaggi discussed at length shareholder support for merger at \$36.00 or \$37.00 (*not* \$37.25) per share. (Compl. ¶177). When Icahn stated on July 1, 2007 that he would reconsider increasing the purchase price in exchange for a break-up fee if Lear could demonstrate stockholder support, Ninivaggi undertook to talk to Classic Fund and other stockholders regarding their potential support for the Merger with a price increase. (*Id.*) The alleged communications with Sasco and Classic Fund occurred the next day. (*Id.*) Immediately following those communications, Ninivaggi “reported to Icahn that it would be difficult to move large shareholders for a *\$1 per share bump*.” (*Id.* ¶ 178 (emphasis added)). Plaintiffs’ current allegation that Sasco and Classic fund stated they would not support the Amended Merger Agreement with \$1.25 per share price increase makes no sense in light of their allegations regarding the conversations between Ninivaggi and Icahn that prompted the communications with Sasco and Classic Fund and the subsequent discussions of the results of those communications.

⁸ The inference that these communications were negotiation-like is confirmed by the Plaintiffs’ allegations that Classic Fund’s statement that it would not support a \$1.25 price increase was in the context of settlement discussions. As this Court well knows,

their support for the Amended Merger Agreement if it included a price increase of \$1.00 or \$1.25 per share. By indicating that they would not support the Amended Merger Agreement, however, Classic Fund and Sasco could keep the pressure on the Company and the AREP Entities to make further improvements to the proposed transaction. The Company's communications with Classic Fund and Saco, even if taken at face value, establish at best that only those stockholders would not support the Amended Merger Agreement. (See Compl. ¶ 177). The opposition of two stockholders is obviously insufficient to support an inference that the Board approved the Amended Merger Agreement with the actual knowledge that an absolute majority of the Company's stockholders would inevitably reject the Amended Merger Agreement. (See Compl. ¶ 201).⁹

Third, Plaintiffs contend that the Individual Defendants approved the Amended Merger Agreement with the knowledge that it would be rejected because Institutional Shareholder Services ("ISS") previously had informed the Company that it would not recommend the Amended Merger Agreement unless the purchase price was increased by \$1.50 to \$2.00 per share and included a public equity stub. The Individual Directors,

neither plaintiffs nor defendants are likely to accept the opening bid in settlement discussions.

⁹ The equivocation and inconsistency of Plaintiffs' critical allegation on the Board's supposed actual knowledge of a certain no vote is illustrated by the Plaintiffs' reference in the Answering Brief to the "virtually inevitable" no vote (PAB 1), the "all but inevitable" no vote (PAB 15), the "near certainty of a negative shareholder vote" (PAB 19), and the Board's effort to negotiate a revised deal with Icahn that "might pass muster" with the Lear stockholders (PAB 8).

Plaintiffs argue, knew that ISS' recommendation was essential to gaining stockholder approval. (PAB 17). This contention, however, is wholly unsupported by the Complaint.

The Complaint fails to allege even in conclusory fashion that, prior to the Lear Board's approval of the Amended Merger Agreement, ISS ever informed the Company whether it would recommend or oppose the Amended Merger Agreement. (See Compl. ¶¶ 180-82). Similarly, though the Complaint alleges in conclusory fashion that "ISS' endorsement of the Amended Merger Agreement was essential to its prospects of approval by Lear shareholders" (Compl. ¶183), there is no allegation—conclusory or otherwise—that the Individual Defendants knew or believed ISS' recommendation to be essential. In fact, the particularized allegations contradict that conclusion. The Complaint provides the following summary of a report provided to the Individual Defendants by Ninivaggi on June 28, 2007:

In Ninivaggi's opinion, based on comments received from shareholders and advice from the Company's proxy solicitor, Mackenzie Partners ("Mackenzie"), and the Company's financial advisors, the per share consideration would need to be increased by at least \$1.00 per share for the merger to be approved by shareholders. Mr. Ninivaggi also indicated that MacKenzie believed that for the Initial Merger Agreement to receive the recommendation of [ISS], an improvement in the consideration of between \$1.50 and \$2.00 per share may be required.

(Compl. ¶ 170 (emphasis added)). Plaintiffs therefore admit that the Individual Defendants received informed advice that, even though securing the ISS recommendation might require a \$1.50-\$2.00 price increase, the Lear stockholder approval could be obtained following only a \$1.00 price increase.

The particularized allegations of the Complaint admit that the Individual Defendants did not know on July 8 the anticipated outcome of the Lear stockholder vote on the Amended Merger Agreement and, therefore, the Lear Board must be presumed to have acted with a good faith desire to use the \$100 million increase in the Merger consideration to induce stockholder approval of the desired transaction. On June 28, the Board was told that the merger consideration would have to be increased by at least \$1.00 per share for the Merger to be approved. (Comp. ¶ 170). On July 1, Icahn agreed to consider increasing the merger consideration if Lear could “demonstrate [meaningful] stockholder support.” (*Id.* ¶ 176.) Although Classic Fund and Sasco rejected a potential \$1.00 price increase (*Id.* at ¶ 177), the Company continued discussions with the large stockholders (*see id.* ¶¶ 176,179). On July 7-8, Lear representatives were trying to assuage the “reservations” expressed by ISS regarding the proposed Amended Merger Agreement. (*Id.* ¶ 181).

When the Lear Board approved the Amended Merger Agreement on July 8, Plaintiffs do not allege that there had been any change in the June 28 advice to the Individual Defendants regarding the potential favorable impact of a \$1.00 price increase. Plaintiffs admit that as of July 8 ISS had not stated its position on the Amended Merger Agreement. Lear secured the \$1.25 increase after Icahn said he would bump only if Lear demonstrated meaningful stockholder support for an improved deal. Plaintiffs have no specific allegations whatsoever that any Lear director believed or was informed at any time during June 28 through July 8 that the Lear stockholders would not approve a new deal with a \$100 million increase in the merger consideration. Tellingly, Plaintiffs do not

allege specifically what the Individual Defendants were told or believed at the July 8 Board meeting about the prospects for the Lear stockholder vote on the Amended Merger Agreement, the advice on the stockholder vote to the Board by the Company's multiple outside advisors, or the positions of the Company's stockholders on a \$37.25 proposal. The natural inference from the \$1.25 increase by Icahn is that Lear convinced him that there was a meaningful opportunity to secure stockholder approval for the Amended Merger Agreement. These omissions and admissions in Plaintiffs' allegations are plainly inconsistent with and rebut any contention that the Lear Board supposedly had actual knowledge on July 8 that the Amended Merger Agreement was doomed to rejection by the Lear stockholders.

In sum, the few particularized allegations in the Complaint fail to even suggest that the Individual Defendants knew that the stockholder vote would be lost when the Lear Board approved the Amended Merger Agreement. Rather, the particularized allegations of the Complaint permit only one inference—that the Board had a reasonable basis to believe in the exercise of their business judgment that an increase of \$1.25 per share might be sufficient to garner stockholder approval of the Amended Merger Agreement. In fact, the Complaint expressly concedes that the negotiation of the Amended Merger Agreement revived the possibility of the Merger. (*See* Compl. ¶ 195 (stating that “but for the Individual Defendants’ last minute efforts to negotiate an entirely new deal ... the deal would have been dead”)). Ultimately, the Board agreed to exchange the possibility of paying approximately \$25 million in the form of the No Vote Termination Fee for the possibility that the Company would secure Lear stockholder

approval of a desirable strategic transaction and the Lear stockholders would receive approximately \$100 million in increased merger consideration. Under those circumstances, “a reasonable person could conclude the board’s action made business sense,” and Plaintiffs claim for waste must fail. *Green*, 1996 WL 342093, at *5.

II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

The Complaint fails to state a claim, much less a non-exculpable claim, and should be dismissed. As demonstrated above and in the Opening Brief (DOB 33, 35-36), the well-pled, particularized allegations are wholly inconsistent with Plaintiffs’ contention that the Individual Defendants approved the Amended Merger Agreement in bad faith. Rather, the allegations in the Complaint indicate that the Individual Defendants complied with their fiduciary obligations in all respects, acting on an informed and reasonable basis in approving the Amended Merger Agreement and with reasonable grounds to believe that the increased purchase price of \$37.25 could garner stockholder approval. (*Id.*). As such, Plaintiffs have failed state a claim for breach of fiduciary duty.

To the extent Plaintiffs’ are raising a standalone claim “no care” claim, any such allegations should also be dismissed. As explained in the Opening Brief, the Company’s certificate of incorporation contains a provision authorized pursuant to § 102(b)(7) exculpating the Individual Defendants from personal liability for breaches of the duty of care. (*Id.* at 38). Relying on *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001), Plaintiffs contend that the exculpatory provision does not protect directors from liability for bad faith breaches of fiduciary duty. (PAB 22). Though a correct statement of the

law, it has little relevance here in light of Plaintiffs' demonstrated failure to allege bad-faith conduct on the part of the Individual Defendants.

In the absence of bad faith or other non-exculpable conduct, this Court regularly dismisses claims for breach of fiduciary duty of care at the pleading stage where the directors are shielded from liability by an exculpatory provision. *See, e.g., Green*, 1996 WL 342093 at *7 (dismissing breach of fiduciary duty claim pursuant to Rule 12(b)(6) based on § 102(b)(7) provision, because there were “no well-pleaded allegations” calling into question the directors' loyalty and good faith and distinguishing *Emerald Partners* on that basis); *see also Integrated Health*, 2004 WL 1949290, at *12 (dismissing exculpated claims pursuant to Rule 12(b)(6), where the defendant directors protected by §102(b)(7) provision). Therefore, any claim against the Individual Defendants for solely breach of the duty of care should be dismissed.¹⁰

¹⁰ Plaintiffs also contend that the exculpatory provision is “unavailing to insiders like Rossiter, insofar as the statute only applies to the conduct of ‘directors,’ *not* officers.” (PAB 22 n.5). This argument might have some merit if the Complaint alleged any claims against the insiders in their capacity as officers. The Complaint, however, only purports to allege claims against the Individual Defendants—including the two Lear directors who are also officers, Rossiter and Vandenberghe—in connection with their approval of the Amended Merger Agreement. (Compl. ¶¶ 197-208). Rossiter and Vandenberghe could only approve the Amended Merger Agreement in their capacity as directors. As such, Rossiter and Vandenberghe are entitled to the full protection of the exculpatory provision in the Lear charter. *See Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1288 (Del. 1994) (holding that a defendant who was both an officer and a director was shielded from liability by a § 102(b)(7) provision where plaintiffs “failed to highlight any specific actions [the defendant] undertook as an officer (as distinct from actions as a director)”).

CONCLUSION

For the reasons set forth above and in the Opening Brief, the Motion should be granted and the Complaint dismissed in its entirety.

Of Counsel:

Matthias A. Lydon
Norman K. Beck
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600
Attorneys for Lear Corporation

/s/ Kevin G. Abrams
Kevin G. Abrams (#2375)
T. Brad Davey (#5094)
ABRAMS & LASTER LLP
20 Montchanin Road
Suite 200
Wilmington, Delaware 19807
(302) 778-1000
Attorneys for the Lear Defendants

Dated: May 27, 2008