IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

EUGENIO POSTORIVO, et al., *Plaintiffs,* v. AG PAINTBALL HOLDINGS, INC., et al., *Defendants.*	)	Consolidated C.A. No. 2991 VCP
KEE ACTION SPORTS HOLDINGS, INC. et al., *Plaintiffs,* v. EUGENIO POSTORIVO et al., Defendants.	)	C.A. No. 3111 VCP TRANSFERRED PURSUANT TO 10 *Del. C.* §1902

PLAINTIFFS' ANSWERING BRIEF
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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NATURE AND STAGE OF THE PROCEEDINGS

On or about May 4, 2007, KEE Action Sports Holdings, Inc., ("KEE" or "KEE Action, Inc.") together with certain of its affiliated entities (collectively, "Buyers") initiated an action against Eugenio Postorivo ("Postorivo"), National Paintball Supply, Inc. ("NPS" n/k/a PBS Holding Group, Inc.) and certain of its affiliates (collectively, "Sellers"), in the Superior Court of the State of Delaware in and for the New Castle County captioned *KEE Action Sports Holdings, Inc., et al v. Eugenio Postorivo, et al.*, C.A. No. 07C-05-062 PLA (the "Indemnity Action"). Plaintiffs in the Indemnity Action seek to recover under claims for breach of contract, unjust enrichment, and intentional misrepresentation.

Sellers filed a Verified Complaint in the Court of Chancery on May 29, 2007, against Buyers and amended the complaint on June 26, 2007 asserting claims for Count I – Breach of Fiduciary Duty against Defendants Raymond E. Dombrowski, Jr. ("Dombrowski") and Brent Leffel ("Leffel") on behalf of Postorivo, NPS and KEE Action, Inc., Count II – Conversion against all Defendants, Count III – Fraud against all Defendants, Count IV – Waste of Corporate Assets against Defendants Dombrowski and Leffel on behalf of KEE Action, Inc., Count V – Aiding and Abetting against all Defendants, Count VI – Civil Conspiracy against all Defendants, Count VII – Breach of Contract/Specific Performance against Defendants KEE Action, Inc., Dombrowski and Leffel, Count VIII – Breach of Good Faith and Fair Dealing against all Defendants, Count IX – Declaratory Judgment, Count X – Preliminary and Permanent Injunction, Count XI – Claim Under 8 *Del. C.* §225 for Declaratory and Injunctive Relief, Count XII – Breach of Contract, Declaratory and Injunctive Relief with Respect to Procaps Litigation (the "Complaint"). Dombrowski and

Leffel are sometimes referred to as the "Director Defendants"; KEE, Dombrowski and Leffel are collectively referred to as the "Defendants."

On June 20, 2007, the Court of Chancery granted the parties' proposed stipulation and order consolidating the Indemnity Action and the Complaint in the Court of Chancery.

On July 2, 2007, Defendants filed an answer to the Complaint and Counterclaims respecting the Procaps Litigation (as defined in the Complaint).

On July 2, 2007, Defendants filed a motion to dismiss the derivative claims of the Complaint (the "Motion"). On July 23, 2007, Defendants filed their Opening Brief in Support of the Motion ("Defendants' Opening Brief"). The only derivative counts subject to the Motion and Defendants' Opening Brief are Count I – Breach of Fiduciary Duty to KEE Action, Inc., and Count VI – Waste of Corporate Assets of KEE Action, Inc.

This is Postorivo's Answering Brief in support of his standing to bring a derivative claim on behalf of KEE Action, Inc.

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PRELIMINARY STATEMENT

Defendants make no effort to distinguish which of Plaintiffs' claims are direct and which are derivative. Nevertheless, on the face of the Complaint, the only claims that allege an injury to a corporate entity are those for breach of fiduciary duty to KEE Action, Inc. (Count I), and waste of corporate assets (Count IV).

As set forth in the Complaint, Defendants Leffel and Dombrowski caused KEE Action, Inc. to suffer significant losses and a substantial reduction in its inventory by liquidating at firesale prices the inventory acquired from NPS. Compl., ¶84. The Director Defendants wasted KEE's assets so as to fraudulently create a pretext for an indemnification claim which they in turn used to strip Postorivo of his status as a director, officer and shareholder. Compl., ¶¶84-85. The facts underlying Plaintiffs' direct and derivative claims are identical and are intrinsically intertwined so that even if the Court finds that Postorivo does not presently have standing to sue on behalf of KEE, the same evidence, the same issues and the same discovery will still be before the Court.

Generally, the policy behind the dismissal of a derivative claim operates to preclude substantive review of the act of alleged corporate wrongdoing to which the suit is ultimately directed. Under the present circumstances, however, judicial review of the firesale and subsequent events will still be necessary, even in the absence of derivative claims. The Defendants' liquidation of the inventory acquired from NPS was well below its fair market value and is at the crux of this litigation. The only party that will be damaged by not being represented before the Court in determining whether the Director Defendants committed waste is KEE.

Defendants expend a great deal of time and effort on briefing such issues as: (i) "KEE Action Sports Holdings, Inc. is not a Plaintiff in this Action, and all claims purportedly asserted by it must be dismissed"; and that (ii) Blank Rome LLP is conflicted to bring a claim on behalf of KEE. Neither of these issues need be addressed by the Court. Suffice it to say that many of the cases cited by Defendants purportedly in support of their positions were in fact brought both in the name of a nominal defendant and against the same nominal defendant - the *Cede* litigation, for example.

Defendants' Motion to Dismiss the derivative claim of waste is without merit and must be dismissed.

STATEMENT OF FACTS

The facts as alleged in Plaintiffs' Complaint that pertain to the claim of waste of KEE's assets are as follows:

A. The Parties

Nominal Plaintiff KEE Action Sports Holdings, Inc. (formerly AJ Acquisition Holdings, Inc.) ("KEE Action, Inc." or "KEE"), is a Delaware corporation with a principal place of business at 570 Mantua Boulevard, Sewell, New Jersey 08080. Compl., ¶3.

KEE Action Sports Holdings, LLC ("KEE Action, LLC") is a Delaware limited liability company also with a principal place of business at 570 Mantua Boulevard, Sewell, New Jersey 08080. Compl., ¶10. KEE Action, LLC is a wholly-owed subsidiary of KEE Action, Inc. and serves as the operating entity for the post-transaction enterprise. Compl. ¶¶51, 52, 55.

In November of 2006, KEE Action, Inc. acquired certain assets of National Paintball Supply, Inc. ("NPS") n/k/a PBS Holding Group, Inc., a Delaware corporation, also a Plaintiff in this litigation, and assets of Pursuit Marketing, Inc. ("PMI"), a significant NPS competitor. Compl., ¶50-53.

Plaintiff Eugenio Postorivo ("Postorivo") began his paintball supply distribution business in 1989. Compl., ¶21. From a small supply company in southern New Jersey, Postorivo's enterprise became known worldwide as NPS. Compl., ¶¶4, 21-22. In the early 1990's, NPS's retail sales focus shifted to selling on a wholesale basis to paintball dealers and distributors throughout the world. Compl., ¶25.

Defendant Raymond E. Dombrowski, Jr., ("Dombrowski") has been (and remains) a managing director of Alvarez & Marsal North America, LLC ("A&M"), and through this position, he has become/been appointed as a director and/or agent of AJ Holding, Inc., and he is a Director and Officer of both KEE Action, Inc. and KEE Action, LLC. Compl., ¶14. On information and belief, Dombrowski has a law degree and a license to practice law in an unknown jurisdiction. Compl., ¶14

Defendant Brent Leffel, ("Leffel") is a principal of AJ Holding, Inc. and (on information and belief) the Chairman and a Director of, both KEE Action, Inc. and KEE Action, LLC. Compl., ¶15. Defendants Dombrowski and Leffel are collectively referred to as the "Director Defendants."

B. The Asset Purchase Agreement

As a consequence of certain market changes, Postorivo agreed to sell substantially all of NPS' assets such that they could be combined with those of PMI. Compl., ¶¶50-51. The resulting entity, KEE Action, Inc. and its affiliates are hereinafter referred to as Buyers. The acquisition of the assets by KEE was backed by a venture capital firm. Compl., ¶¶50-51. Postorivo was induced to sell NPS' assets to the new enterprise based on Leffel and Dombrowski's promises to Postorivo of a continued role as President for the new entity and a substantial involvement in both the management and the ownership of KEE. Compl., ¶52. Specifically, Postorivo was advised that KEE Action, Inc. was seeking to capitalize on the tremendous vendor and customer relationships he had forged in 17 years in the industry, his innovation, creativity, knowledge and experience in the paintball field. Compl., ¶52.

Postorivo would not have sold the assets of NPS without playing a major, integral part in the integration of the business and its daily operations. Compl., ¶53.

Postorivo was also attracted by the notion that the enterprise and new capital backing would provide different and greater resources to grow the business in limitless ways. Compl., ¶54. To solidify his involvement, and to assure protection of his continued investment in KEE Action, Inc., Postorivo wanted, and was provided as part of the deal, at least: (i) a 10% common ownership/shareholder interest in the new company, (ii) junior preferred shares with an aggregate liquidation value of Five Million Dollars, (iii) appointment to the board of directors of both KEE Action, Inc. and its wholly-owned subsidiary KEE Action, LLC, the company formed primarily to operate the merged businesses, and (iv) to maintain his day to day management of the post-merger entity. Compl., ¶55.

The terms of the APA also provided for certain indemnification rights. In pertinent part, Section 11.6 states:

> If Sellers and Stockholder fail to satisfy an indemnity claim in cash when due, then the Buyer Indemnified Parties may cause such claim to be satisfied, in whole or in part, by the forfeiture (a) first, of Junior Preferred Shares (the "Junior Preferred Equity Interest") having a value (as determined below) of up to the dollar amount of such claim, and (b) then, if such claim remains unsatisfied after such forfeiture, by the forfeiture of shares of common stock of the Buyer Parent held by Postorivo (the "Common Equity Interests") and together with the Junior Preferred Equity Interests, the "Pledged Equity Interests") having a value (as determined below) of up to the dollar amount of the remaining unsatisfied claim, subject to section 11.7 below.

Compl., ¶64.

The specific procedure for determining the fair market value of the forfeited pledged equity interests requires an action by the Board of Directors of KEE Action, Inc. In the

event of a dispute, in accordance with the APA, the parties may select an Independent Appraiser to determine such fair market value. Compl., ¶65. As the facts below demonstrate, the Director Defendants abandoned all the necessary steps mandated by the APA and in disregard of these procedural safeguards caused KEE to exercise its forfeiture rights.

C. Postorivo is Frozen Out of the Business

From virtually the first day after the asset purchase, the Director Defendants began a systematic pattern of conduct intended to freeze Postorivo completely out of the management and operations of KEE Action, Inc. Compl., ¶75. Despite all pre-transaction promises, despite Postorivo's seat on the Board of Directors of KEE Action, Inc. and KEE Action, LLC, and despite his employment agreement as the President of KEE Action, Inc., Dombrowski and Leffel completely sterilized Postorivo of all his powers. Compl., ¶76-79. Specifically, Dombrowski would openly undermine Postorivo's authority by requiring employees to report to him rather than Postorivo. Compl., ¶78. Postorivo was isolated from contact with vendors and customers with whom he had enjoyed long-term relationships, isolated from management plans and strategies, completely separated from any product development, and despite his director status, the Director Defendants refused to provide Postorivo with any meaningful financial information to monitor the company's progress. Compl., ¶79. Postorivo's offers of assistance to the Director Defendants were met with belligerence and rejection. Compl., ¶81.

Because Postorivo was completely frozen out from any management decisions, it is reasonable to infer that no board meetings took place from November 16, 2006 to May 4, 2007 when Postorivo was removed from the Board. Compl., ¶¶76-79.

Dombrowski and Leffel ran the company as they saw fit without any consultation with Postorivo and without Board involvement. Compl., ¶81. As a result of the Director Defendants running roughshod over KEE Action, Inc., the company has lost a great deal of money, has failed to reach projected financial goals since the transaction, and is being driven into the ground. Compl., ¶81. The rest of the Board appears to have acquiesced in the Director Defendants' actions by not only executing the written consent which purported to remove Postorivo as director of KEE Action, LLC, but also by acquiescing in filing an action against Postorivo predicated on a fraudulent Indemnity Claim. Compl., Exhs. F and G.

D. The Waste of KEE Action, Inc.'s Assets

On or about March 28, 2007, KEE Action, Inc. sent a notice of indemnification to Postorivo under the APA which purported to put Postorivo on notice of Defendants' claims that Postorivo had, among other things, (a) excessively valued certain NPS inventory (the "Inventory"), (b) failed to disclose certain "liabilities", and (c) transferred to the purchasers certain intellectual property alleged to infringe upon certain patents in violation of certain representations and warranties under the APA. ("Indemnification Claims"). The Indemnification Claims Notice was signed by Leffel. Compl., ¶82.

With respect to the Inventory, Leffel's letter alleged significant discrepancies between the "book value" of the Inventory underlying the asset valuation for the APA and the "fair market value" asserted by Defendants post-closing. For example:

Type of Inventory	Book Value	Defendants alleged "value"
NPS Europe Bad Paint	$442,230	$195,804
NPS Guns	$1,209,442	$0
Empire Trucks	$281,136	$0
NPS Reboxed Paint	$354,896	$305,565
NPS Closeout Paint	$337,512	$200,545
Old Paint	$451,541	$242,580
NPS Defective Write-off	$379,174	$0
NPS Defective	$146,010	$0
NPS Selling Below Cost	$467,051	$198,452
NPS Soft Goods	$1,189,408	$254,855
Other Inventory	$6,632,873	$3,222,951

Compl., ¶84.

The Indemnification Claims demonstrate excessive write-downs by Dombrowski and Leffel to the point of liquidation firesale prices - and the conduct of business in a way that was wholly inconsistent with NPS' past business practices. Compl. ¶84. Moreover, the Indemnification Claims do not arise from any misrepresentations by Postorivo in conjunction with the sale of the assets. *Id.* The Director Defendants' choice to close out certain brands, rather than sell the Inventory for profit, does not amount to a misrepresentation. Compl. ¶84. In fact, it is further believed that the Director Defendants' course of action was dictated, not by profit motive, but instead by a desire to show to their

lenders an artificially formulated balance sheet that would present a skewed financial picture of the company after the merger of assets. Compl., ¶84.

Postorivo and NPS responded to the Indemnification Claims on April 17 and May 4, 2007, respectively, in which they denied the claims asserted in the notice of indemnification. Compl. ¶85, Exh. E. Therein, they noted, *inter alia*, that Leffel and Dombrowski had provided no supporting data to justify the figures that were supplied for each subcategory of Inventory claimed. *Id.* Furthermore, Postorivo and NPS noted that not only had the pre-asset sale inventory been confirmed by NPS personnel, but also that the Buyers had conducted their own due diligence with respect to that same inventory without issue. Compl., ¶85.

Dombrowski and Leffel manufactured the Indemnification Claims as part of their grand scheme to freeze out and eliminate Postorivo; to obtain all of the hard work, intellectual property, and customer and vendor relationships forged by Postorivo over 17 years of business operations, without having to compensate Postorivo as an employee, or provide to him the financial benefits of the Common Shares and Junior Preferred Shares that he bargained for in the APA and related transactions. All of Defendants' actions were taken as part of the scheme, and not as an exercise of legitimate business judgment. Compl., ¶86. It is reasonable to infer that since Postorivo was kept in the dark about the liquidation of NPS' inventory, so were the other Directors. Yet, they fully acquiesced in the Director Defendants' actions and must have consented to the filing of the Superior Court action against Postorivo based on the contrived Indemnity Claims.

It is also clear that the Indemnification Claims were manufactured to justify the taking and assumption of all of NPS' assets, including the extensive intellectual property, customer/vendor relationships, and even the relationships with NPS' employees, only to later completely shut Postorivo out of the business, and more importantly to Defendants, out of the industry. In essence, Defendants took the assets without paying for them, and proceeded to eliminate Postorivo from further involvement with the new enterprise and future competition. Compl., ¶87.

Compounding the insult is the fact that the Director Defendants are trying to "recoup their losses" at Postorivo's added expense through the Indemnification Claims. Indeed, upon information and belief, Dombrowski either independently, or in conjunction with one or more Defendants, intentionally dumped, at less than fair market value, much of the NPS inventory in order to meet certain compensation benchmarks contained in his employment agreement, and now, he is attempting to recoup those monies by pursuing the claim against Postorivo. Compl. ¶72. Thus, some or all of KEE Action, Inc.'s inventory claims underlying the Indemnification Claims are simply a fabrication to cover Dombrowski's own fraudulent activities. Compl., ¶88.

E. Postorivo is Ousted as a Director and Officer

On May 4, 2007, the Director Defendants' fraudulent scheme culminated in the filing of a lawsuit against Postorivo, NPS and related entities seeking to recover damages predicated by the Indemnification Claims. Compl., ¶91, Exh. F. On the same day, Postorivo received another letter signed by Leffel purporting to remove him from the Boards of KEE Action, Inc. and KEE Action, LLC. Compl., ¶93, Exh. G. The removal

resolution on behalf of KEE Action, Inc. was executed by all of the remaining directors. *See id*. This is the only "removal" document that bears the signatures of any directors other than Leffel and Dombrowski. Based upon the manner in which Leffel and Dombrowski ran the business from the time of the asset purchase, it is evident that the Board has not independently assessed any financial information or formed its own judgment concerning the actions taken by Leffel and Dombrowski. Much like Postorivo, the Board was not consulted or involved in the firesale of KEE's assets, in the drafting or approving of the Indemnity Claims, or the filing of the Superior Court complaint. Yet, the Board clearly acquiesced in Director Defendants' conduct. Effectively, the Board's conduct is beholden to the actions of Dombrowski and Leffel. Compl., ¶122.

F. Postorivo is Defrauded of his Stock

Despite the specific procedures mandated by the APA respecting the parties' indemnification rights, appraisal rights, and the Buyers' ability to exercise their rights under the pledge agreements, the Director Defendants without any determination of the fair market value and seemingly without any involvement of the Board of Directors, unilaterally caused KEE to exercise its forfeiture rights and strip Postorivo of his shareholdings. Compl., ¶112, Exh. I. Again, similar to other correspondence purportedly on behalf of KEE, the Notice of Transfer of Shares is signed by Leffel. Compl., Exh. I.

Thus, as part of a contrived and organized conspiracy to obtain the assets of NPS at the expense of Postorivo and then eliminate Postorivo, by May 14, 2007, less than six months after obtaining the assets of NPS on November 17, 2006, the Defendants

systematically stripped Postorivo of his employment, his role as a director of the company, and his significant ownership in the company. Compl., ¶113.

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QUESTIONS PRESENTED

1. Whether the fraudulent taking of Postorivo's shares as a result of a wasteful liquidation sale of KEE Action, Inc.'s assets at firesale prices confers standing on Postorivo to pursue a derivative claim of waste on behalf of KEE under *Lewis v. Anderson*, and at the same time seek the return of his shares?

2. Whether Postorivo can adequately represent KEE's shareholders despite having to simultaneously defend against KEE's Indemnity Claims and pursue his wrongful termination claim?

ARGUMENT

I. UNDER THE APPLICABLE LEGAL STANDARD, THE COURT SHOULD DENY DEFENDANTS' MOTION TO DISMISS THE DERIVATIVE CLAIMS.

The standard applicable to a motion to dismiss pursuant to Chancery Court Rule 12(b)(6) is well-settled. *Kohls v. Kenetech Corp.*, 791 A.2d 763, 767 (Del. Ch. 2000), *aff'd*, 794 A.2d 1160 (Del. 2002). The Court should not grant such a motion unless "it appears with 'reasonable certainty' that the plaintiff could not prevail on any set of facts that can be inferred from the pleading." *Id.; see In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991); *In re Paxson Commc'n Corp. S'holders Litig.*, 2001 WL 812028, at *3 (Del. Ch.). In deciding a motion to dismiss for failure to state a claim, the Court must "assume the truthfulness of all well-pleaded allegations of the complaint and . . . give the pleader the benefit of all reasonable inferences that can be drawn from its pleading." *In re USACafes, L.P. Litig.*, 600 A.2d at 43; *see Kohls*, 791 A.2d at 767; *In re Paxson*, 2001 WL 812028, at *3. An allegation, though vague and lacking in detail, is nevertheless "'well-pleaded' if it puts the opposing party on notice of the claim being brought against it." *Daisy Constr. Co. v. W.B. Venables & Sons, Inc.*, 2000 WL 145818, at *1. (Del. Supr.); *Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, *7 (Del. Ch.), *quoting In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006). As shown below, the allegations of the Complaint state adequate claims for breach of fiduciary duty and waste by the Director Defendants and the Motion should be denied.

II. COUNT IV OF THE COMPLAINT STATES A COGNIZABLE CLAIM FOR WASTE.

Under Delaware law, "a wrong to the incorporated group as a whole that depletes or destroys corporate assets and reduces the value of the corporation's stock gives rise to a derivative action." *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1188 (Del. 1988). In the context of a claim for waste of corporate assets, this Court has defined the test for waste as "whether 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 paid." *Orloff v. Shulman*, 2005 WL 3272355, at *11 (Del. Ch.). The test has also been characterized as "an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997).

This Court has not hesitated to deny motions to dismiss waste claims where particularized facts such as here, demonstrate a reasonable doubt as to transactions "substantially below market," *Orloff*, at *11, or those that are "troublingly low." *Id.* at *12. (refusing to dismiss claims that defendants rented properties for less than fair market value); *see, e.g., Andreae v. Andreae*, 1992 WL 43924 (Del. Ch.) (denying motion to dismiss claim that Board's decision to sell corporate assets at 50% of the original premium constituted waste); *Avacus Partners, L.P. v. Brian*, 1990 WL 161909 (Del. Ch.) (denying motion to dismiss and finding "a litigable case of waste" where facts alleged Infotech paid over ten times fair market value for a large block of stock and also paid 100 times the price paid a year earlier for control of a second company); *Stein v. Orloff*, 1985 WL 11561 (Del. Ch.) (denying motion

to dismiss waste claims premised on pre-existing options on which the option price was reduced without any consideration).

Here, Plaintiffs allege in particularized fashion Defendants' conduct in liquidating NPS' inventory at firesale prices as the fraudulent predicate to Defendants' assertion of the Indemnity Claims against Postorivo, Defendants' subsequent exercise of KEE's rights under the pledge agreement, Defendants' revocation of Postorivo's stock, its removal of Postorivo as a director and termination of him as an employee. Indeed, the Complaint sets forth in detail Defendants' liquidation of inventory acquired from NPS at prices ranging from 14%, 21%, 41-42%, 48% and 56% below market to the tune of over $5.25 million in losses. Compl. ¶83 and Exhs. D and E (Defendants' Indemnity Notice and Plaintiffs' Response). Moreover, the Complaint alleges Defendants' wholesale write-off of other inventory valued at over $2 million only months before. *Id.* These detailed allegations are sufficient to create litigable issues of Defendants' waste of corporate assets. The Director Defendants utilized KEE's assets to pursue their own agendas and in doing so committed waste. Because waste of corporate assets is necessarily also a breach of fiduciary duty by the Director Defendants, Postorivo must be permitted to pursue Counts I and IV against Dombrowski and Leffel on behalf of KEE.

III. KEE ACTION, INC. IS A PROPER NOMINAL PLAINTIFF ON THE CLAIM FOR THE WASTE OF ITS ASSETS BY THE DIRECTOR DEFENDANTS.

In *Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984), the Delaware Supreme Court observed that at its base, a derivative claim is a property right owned by the nominal corporate defendant. (Emphasis supplied). *Feldman v. Cutaia*, 2007 WL 2215956, at *6 (Del. Ch.) (citing *Lewis v. Anderson*, at 1044). Hence, it is often the case that in a matter involving

both direct and derivative claims, the corporation appears on both sides as a nominal plaintiff and defendant. *See Carlson v. Hallinan*, 925 A.2d 506 (Del. Ch. 2006) (in matter involving both direct and derivative claims CR Services Corp. was both a plaintiff and a defendant). Contrary to Defendants' position, such a situation is neither inappropriate nor unusual in the Delaware Court of Chancery.

IV. POSTORIVO HAS STANDING TO ASSERT CLAIMS FOR BREACH OF FIDUCIARY DUTY AND WASTE.

It is well established that to maintain a shareholder derivative suit, a plaintiff must be a shareholder at the time of the filing of the suit and must remain a shareholder throughout the litigation. Ch. Ct. R. 23.1; *Kramer v. W. Pac. Indus., Inc*., 546 A.2d 348, 354 (Del. 1988), *citing Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984). The Delaware Supreme Court, however, set forth two exceptions to the general rule that only a current shareholder has standing to maintain a derivative action: (1) if the transaction itself is the subject of a claim of fraud, being perpetrated merely to deprive shareholders of the standing to bring a derivative action; or (2) if the transaction is in reality merely a reorganization which does not affect plaintiff's ownership in the business enterprise. *Lewis*, at 1046. This case falls squarely within the first exception articulated by the Delaware Supreme Court. Because Defendants' exercise of the Pledge Agreement based on the wasteful firesale of NPS' inventory was invoked merely to deprive Postorivo of his standing to bring a derivative action, and was fraudulent in and of itself, the Court must apply the exception under *Lewis* and recognize Postorivo's standing.

Defendants perpetrated the fraud which predicates the waste claims so as to freeze Postorivo out and oust him as a shareholder and a director so as to eliminate his shareholder status and deprive him of the standing to bring a derivative claim. It is the wasteful

depletion of KEE's assets – formerly NPS' assets – that Defendants used to manufacture a fraudulent indemnity claim against Postorivo so as to exercise KEE's rights under the pledge agreements.

Defendants fail to address this exception and instead erroneously rely on *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, for the proposition that because Postorivo is a former shareholder his "sole remedy" is a direct cause action. (Defendants' Op. Br., at pp.16-17). Defendants quote *Cede* for the proposition that "[s]tanding to pursue a derivative claim for injury to the corporate entity should not be confused with the right of a former shareholder claimant to assert a timely filed private cause of action premised upon a claim of unfair dealing, illegality, or fraud. No one would assert that a former owner suing for loss of property through deception or fraud has lost standing to right the wrong that arguably caused the owner to relinquish ownership or possession of the property." *Cede*, at 1188. First, Postorivo has already brought direct claims against the Defendants for loss of property through Defendants' deception and fraud. Second, the claim of waste is derivative, not direct. Defendants' contention that "procedural requirements of standing developed to control derivative actions have no relevance to individual shareholder suits claiming a private wrong". *Cede*, at 1188, is inapplicable to the present factual situation.

Despite Postorivo's ouster as a shareholder resulting from Defendants' fraudulent conduct, Delaware law recognizes that when the very transaction in question was effectuated so as to deprive someone of derivative standing, the Court will permit the suit to go forward. Moreover, because the factual predicate underlying the waste claim and most of the Plaintiffs' direct claims is identical, the Defendants' conduct in selling off KEE's assets at

wasteful below market firesale prices will inevitably undergo judicial scrutiny. With the derivative claim in place, KEE will remain a nominal plaintiff and will benefit from any recovery for Defendants' wasteful conduct.

A. Postorivo is an Adequate Derivative Plaintiff.

A plaintiff seeking to maintain derivative claims must satisfy the adequacy of representation requirements implicit in Court of Chancery Rule 23.1. *See Bakerman*, 2006 WL 3927242, at *10. "[A] derivative plaintiff serves in a fiduciary capacity as representative of persons whose interests are in the plaintiff's hands and the redress of whose injuries is dependent upon her diligence, wisdom and integrity." *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 129 (Del. Ch. 1999). The burden to show a "substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders" lies with the Defendants. *Emerald Partners v. Berlin*, 564 A.2d 670, 674 (Del. Ch. 1989).

The Court may consider a number of factors in determining whether a plaintiff is adequate: (1) economic antagonism between the representative and the class; (2) the remedy sought by plaintiff in the derivative litigation; (3) indications that the named plaintiff was not the driving force behind the litigation; (4) plaintiff's unfamiliarity with the litigation; (5) other litigation pending between plaintiff and defendants; (6) the relative magnitude of plaintiff's personal interest as compared with his interest in the derivative litigation and plaintiff's vindictiveness toward defendants; and (7) the degree of support plaintiff was receiving from the shareholders he purported to represent. *Bakerman*, at * 11, *citing In re Fuqua Indus.*, 752 A.2d at 130; *see also Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983) (noting exception that "the fact that the plaintiff may have interests which go beyond the interests of

the class, but are at least co-extensive with the class interest, will not defeat his serving as a representative of the class").

Notably, and contrary to Defendants' position that Postorivo lacks the support of the other shareholders, "a derivative claim may be maintained, however, without the support of a majority of ownership or even the support of the entire minority." *Bakerman*, at *13 (holding that even if it turns out that the plaintiff is the only member disadvantaged by the transaction, then there could not be a better representative to pursue the appropriate remedies on behalf of the entity).

The following analysis of each of the *Fuqua* factors demonstrates that Postorivo is an adequate derivative representative to pursue the waste claim on behalf of KEE Action, Inc.

1. KEE Must Be Compensated For The Waste of Its Assets.

If Postorivo is disallowed to proceed on the derivative claim of waste, KEE will be denied an opportunity to recover for the losses it sustained as a result of the Director Defendants' action in liquidating KEE's inventory. Surely, if Postorivo succeeds in his direct claims for fraud, breach of contract and/or breach of implied covenant, the resulting findings would also support waste and breach of fiduciary duty as to KEE Action, Inc. Yet, if Postorivo is not permitted to sue on its behalf, KEE will not be able to recover for the wrongful conduct of its directors. The gravity of such a result is axiomatic. The only party that will suffer should these derivative claims be dismissed is KEE.

2. Postorivo Is The Driving Force Behind This Action.

Defendants do not address any concerns that Postorivo is not the driving force of this litigation. In fact, Postorivo is personally vested in pursuing these derivative claims as

the proof of the waste claim also requires the return of Postorivo's shares fraudulently seized as a result of the Indemnity Claims. Because Postorivo is also personally vested in bringing these derivative claims he is an adequate representative who will vigorously pursue the claims on behalf of KEE.

3. Of All Other Shareholders, Postorivo Is Most Familiar With The Facts Underlying The Waste Claim.

Of all other shareholders of KEE Action, Inc., Postorivo is without doubt the most knowledgeable person respecting both the industry and the facts underlying the claim of waste. At the crux of the waste claim is the liquidation at firesale prices of the inventory acquired by KEE from NPS. Postorivo not only supervised the pre-transaction due diligence on NPS inventory, but also certified that the inventory was conducted in accordance with NPS' past business practices. *See* Compl. Exh. F (Superior Court Complaint, Exh. E thereto (closing certificates)). Defendants do not suggest another shareholder has greater knowledge of the company which owned the inventory or the Company's business practices in accordance with which the sale was supposed to take place. Rather, Defendants rely entirely on the fact that other minority shareholders to date appear not to support Postorivo. Defs.' Op. Br. at p. 3. As discussed above, that fact alone is not dispositive nor is it properly before the Court. What is important, is that Postorivo, as the former owner of the inventory in dispute, has the most information and also the most expertise in valuing the inventory and pursuing the claim of waste.

4. Defendants Were First to Initiate Other Litigation.

Defendants rely extensively on the fact that Postorivo and KEE Action, Inc. are adverse in litigation aside from the derivative claim which is the subject of the Defendants'

Motion. Defendants' reliance on *Scopas Technology Co. v. Lord*, 1984 WL 8266 (Del. Ch), is misplaced because the Court in *Scopas* unequivocally held that "where, as here, the corporate defendant initiated the other litigation, this factor is not significant." *Scopas*, at *2. In *Scopas*, the company brought an action against its former director and officer for breach of fiduciary duty in fact for making a loan in the name of the company without the knowledge or authorization by the Board of Directors. In support of this holding, the *Scopas* Court cited *Vanderbilt v. Geo-Energy, Ltd*., 725 F.2d 204 (3d Cir. 1983), a ruling in which the Third Circuit Court of Appeals reversed a lower court finding of disqualification of the plaintiff-shareholder by reason of other litigation between the parties where that litigation was initiated by the corporation. The *Vanderbilt* court stated that:

> [L]ess weight should be given to a corporate defendant's claim for the disqualification of the representatives of the shareholder class where the corporate defendant was the one who initiated the litigation about which it now complains. While there may be some circumstances in which a suit brought by a corporation against a shareholder creates, in that shareholder, interests significantly antagonistic to the shareholder class, normally he who is the first to enter the courthouse door and thereafter forces others to follow should not be permitted to use his own litigiousness as a basis to preclude others from suing him.

Vanderbilt, at 208 (emphasis added).

The predicate for the Indemnity Action brought by KEE in Superior Court was the wasteful liquidation of KEE's assets which was fraudulently used by the Director Defendants to drum up a claim against Postorivo and NPS. As such, Postorivo's defense of that action and the counterclaims filed to combat the fraud perpetrated by the Director Defendants should not be viewed under the present circumstances as disqualifying. Otherwise, Defendants will be permitted to both strip a shareholder of his ownership

interest, waste corporate assets, and at the same time preclude the shareholder from righting the wrong perpetrated both on the shareholder and the corporation. Consistent with the reasoning in *Scopas* and *Vanderbilt*, this Court must not view the existence of other litigation among the parties as disqualifying. Particularly because it is the Director Defendants' conduct that predicated both the Indemnity Action and the derivative claim of waste.

5. Postorivo and KEE's Interests In Proving Waste Are Identical.

Postorivo's goals in prosecuting the derivative claims for waste are aligned with his goals in prosecuting the direct claims, and both benefit KEE. In *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.*, 1985 WL 21129 (Del. Ch.), a plaintiff seeking to bring a derivative action was simultaneously pursuing a hostile tender offer for the company. In weighing the factors and analyzing the competing interests, the Court held that "[w]hether the difference in long term goals creates the type of economic friction or antagonism which precludes effective representation must be measured against the primary purpose of the litigation.… Since [Plaintiff] cannot compromise or settle its derivative claims without Court approval as required by Chancery Rule 23.1, there is little risk that it will use the mere existence of this litigation to the ultimate prejudice of other shareholders." *MacAndrews*, at *14.

Defendants correctly point out that in *Scopas* the Court dismissed Lord's derivative claims, finding that the disparity between "Lord's interest in his personal claims as compared with his interest in the derivative suit . . . creates a strong potential for the derivative suit to be used merely as leverage, and not pursued with the same vigor as his direct claims." *Scopas*, at *3. Def. Op. Br. p. 20. That, however, is not the case here. Postorivo gains no leverage by pursuing the waste claim on behalf of KEE. Moreover, as already stated, because the

facts underlying the waste claim and Postorivo's fraud claim are identical, he will pursue both with "the same vigor." Enforcement of the terms of the APA and related agreements will right the wrongs done to Postorivo as well as benefit KEE by making it whole. In large part, Postorivo was induced into the sale of assets because he was promised both an ownership interest and an active managerial role in the combined enterprise. Compl. ¶¶52-55. As such, Postorivo and KEE's long-term goals are synonymous and certainly not adverse to one another. The current litigation is indicative only of the ill-will borne by the Director Defendants against Postorivo and their desire to defraud Postorivo of all consideration promised him under the APA. That hardly creates a conflict between KEE Action, Inc. and Postorivo, particularly since KEE has been significantly injured as a result of the Director Defendants' actions in ousting Postorivo.

6. There is No Evidence of Vindictiveness Against KEE.

Other than the existence of the litigation, already addressed above, Defendants fail to show any evidence of vindictiveness by Postorivo against KEE. As such, this factor is inapplicable to the Court's determination of Postorivo's adequacy to serve as a derivative representative.

In sum, because Postorivo's direct claim of fraud and the derivative claims of waste and breach of fiduciary duty are inextricably intertwined, Postorivo's pursuit of the claims on behalf of KEE is entirely parallel with KEE's interests in recovering from the Director Defendants. Postorivo will pursue these claims with the same vigor and diligence as his direct claims because the same factual discovery underlies both sets of claims. Similarly, as the litigation initiated on KEE's behalf and predicated on the Director Defendants'

fraudulent Indemnity Claims against Postorivo was the first-filed action, Postorivo must be permitted to defend himself. As such, this factor cannot be the sole disqualifying reason. Weighing all the foregoing factors, it is without doubt that Postorivo is an adequate derivative representative.

B. Postorivo Never Consented to or Acquiesced in the Liquidation of KEE's Assets.

Defendants contend that because Postorivo was a director of both KEE Action, Inc. and KEE Action, LLC "he participated in, ratified or otherwise acquiesced to the alleged misconduct he now challenges." Defendants' Op. Br. at p. 3. After the Director Defendants completely froze Postorivo out of any managerial role in KEE, this position is untenable. There are numerous examples of how Dombrowski and Leffel isolated Postorivo, including the following: (1) they refused to provide Postorivo with any financial information so as to enable Postorivo to track the performance of the company (Compl. ¶94); (2) they publicly belittled Postorivo and advised employees not to report to him (Compl. ¶78); (3) they refused to include Postorivo in any vendor/customer negotiations and meetings (Compl. ¶76); and (4) they isolated Postorivo from any internal meetings regarding marketing, research and development, account or reporting. Compl. ¶¶ 76-79.

An essential element of acquiescence is "that the acquiescing party shows unequivocal approval of the transaction." *Bakerman,* at *18, *quoting In re Best Lock S'holder Litig.*, 845 A.2d 1057, 1080-81 (Del. Ch. 2001). Postorivo never approved the liquidation or dumping of KEE's valuable inventory at firesale prices. Rather, he categorically contested the propriety of such irresponsible waste of KEE's assets. Compl. ¶¶85-86 and Exh. E. (Plaintiffs' May 4, 2007 response to Indemnification Notice).

Defendants maintain that Postorivo somehow ratified the Director Defendants' conduct by which they fraudulently asserted that Postorivo owed KEE millions of dollars and then used the very same Indemnity Claim as the predicate to: (i) fire Postorivo; (ii) remove him as a director and (iii) strip him of his stock. That Postorivo unequivocally acquiesced in his own downfall is beyond the pale. The fact that Defendants advocate this position is evidence in and of itself that KEE's Board is beholden to Dombrowski and Leffel and is incapable of making an independent assessment of their wasteful and fraudulent conduct.

C. Policy Considerations Support Postorivo's Standing to Pursue KEE's Waste Claim

Delaware courts generally adhere to the test articulated in *Lewis v. Anderson* because of important policy considerations that formulate the practical and theoretical underpinnings of a derivative action. *Feldman v. Cutaia*, 2007 WL 2215956, at *6 n.28 (Del. Ch.). These policy considerations support Postorivo's standing to pursue the waste claim.

The practical considerations are particularly important because "derivative actions involve a plaintiff who is enforcing rights of a separate entity; without ownership it is difficult to explain why a plaintiff has a right to bring a derivative claim." *Feldman*, at *6, *citing Strategic Asset Mgmt., Inc. v. Nicholson*, 2004 WL 2847875, at *2 (Del. Ch.). Ownership in KEE Action, Inc., and full and active participation in the management of the combined business, was one of the most significant components of the consideration bargained for by Postorivo under the APA in exchange for certain of NPS' assets. Because Postorivo's stock in KEE Action, Inc. was taken fraudulently and without regard to the rules set forth in the APA, his standing to bring a derivative claim of waste on behalf of KEE should not be

affected. It is entirely consistent with the foregoing practical policy considerations that Postorivo be permitted to pursue this action on behalf of KEE simultaneously with the direct claims seeking recovery of his stock in light of his continued aligned interest in KEE's success.

The practical policy considerations similarly pose no issue to Postorivo's derivative standing. As this Court has observed, the Court must ensure that "the derivative plaintiff is representative of the shareholders and has incentive to pursue the litigation in the best interests of the shareholders and ... to prevent 'strike suits.'" *Strategic Asset Mgmt*, at *2. Postorivo's incentive in pursuing this litigation and demonstrating waste of KEE's assets is intrinsically intertwined with the pursuit of his direct claims, namely breach of fiduciary duty and fraud in showing that Director Defendants wasted KEE's inventory at firesale prices so as to manipulate KEE's financials and drum up an indemnity claim against Postorivo. The proof is in the pudding. By showing that Dombrowski and Leffel have concocted this scheme to oust Postorivo and at the same time benefit themselves by reaching certain compensation benchmarks, they injured the very entity they are entrusted to protect. In other words, if it is proven that the pretext for the Indemnity Claim is fraudulent, KEE necessarily suffered an injury and its assets were necessarily wasted by the Director Defendants.

In sum, the policy considerations that underlie the Court's determination of the derivative standing support Postorivo's pursuit of the waste claim on behalf of KEE Action, Inc. This is particularly the case here, where the same evidence of the Director Defendants' wrongful conduct underlying the derivative claims will be directly relevant to Postorivo's

direct claims. *See Alabama By-Products Corp. v. Neal*, 588 A.2d 255 (Del. 1991) (finding evidence of unfair dealing by majority shareholder relevant in appraisal proceeding even though claims for unfair dealing would not be litigated).

V. THE FACTS ALLEGING WASTE OF KEE'S CORPORATE ASSETS AS A FRAUDULENT PRETEXT FOR DEFENDANTS' INDEMNITY CLAIMS AGAINST POSTORIVO ARE SUFFICIENT TO SHOW DEMAND FUTILITY.

The standard for determining whether a derivative complaint adequately alleges demand futility under Rule 23.1 is whether taking the well-pleaded facts as true, the allegations raise a reasonable doubt as to: (i) director disinterest and independence, and (ii) whether the directors exercised proper business judgment in approving the challenged transaction. *Grobow v. Perot*, 539 A.2d 180, 186 (Del. 1988); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

Defendants contend that "[t]he Complaint in this case contains no particularized facts whatsoever to establish demand futility." (Defendants' Op. Br. p. 23). The Complaint, however, specifically identifies the monetary basis for the waste claim and the facts supporting a reasonable doubt that Dombrowski and Leffel exercised any business judgment in conducting a liquidation of NPS' assets at firesale prices (Compl., ¶¶82-87), or that the rest of the Board exercised any business judgment in acquiescing in such conduct. Indeed, the Complaint states that the Director Defendants' conduct regarding the Inventory "demonstrates excessive write-downs by Defendants – to the point of liquidation firesale prices – and the conduct of business in a way inconsistent with NPS's past business practices." Compl., ¶84. Postorivo estimates the damages to KEE as a result of Defendants' waste to be in excess of $9 million. Compl., ¶83. What is further troubling about

Defendants' conduct is that the Indemnification Claim which attempts to collect from Postorivo the alleged deficiency caused by Defendants' firesale is nothing more than the pretext for Postorivo's freeze-out. Compl., ¶87. Such obvious waste of corporate assets of KEE cannot be said to have been protected by the business judgment rule. Because the rest of the Board of Directors appear to have acquiesced in Leffel and Dombrowski's conduct of the liquidation at firesale prices and removal of Postorivo as a director, they are beholden to the Director Defendants and are lacking in independent judgment.[1] The particularized factual allegations which the Court must accept as true, demonstrate the utter lack of any business judgment in liquidating valuable inventory so as to oust a minority shareholder, strip him of his shareholdings and remove him from the Board of Directors.

A. Leffel and Dombrowski are Neither Disinterested, Nor Independent.

Under Delaware law, to be disinterested "means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally. Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *In re J.P. Morgan Chase & Co.*, 906 A.2d 808, 821 (Del. Ch. 2005), *aff'd*, Del., 906 A.2d 766 (2006), quoting *Aronson v. Lewis*, 473 A.2d 805, 812, 816 (Del. 1984).

[1] The demand is futile not because of the Board's practices in the face of Dombrowski and Leffel's waste of KEE's assets, rather, the rest of the Board fully acquiesced in the Director Defendants' conduct as evidenced by the execution of the written consent removing Postorivo as director of KEE action, LLC. Compl., Exh. G. Such acquiescence negates the need to provide the Board with an opportunity to rectify the wrong. The Board already had the opportunity to right the wrong, but instead KEE Action, Inc. filed suit against Postorivo predicated on the fraudulent Indemnity Claim.

Respecting Defendant Dombrowski, the Complaint alleges that because of Dombrowski's compensation arrangement, he intentionally caused KEE to "dump" at less than fair market value much of NPS' inventory "in order to meet certain compensation benchmarks." Compl., ¶89. These allegations create substantially more than the required reasonable doubt that Dombrowski acted in the best interests of KEE or with any business judgment at all. Similarly, Leffel's overt animosity towards Postorivo and his clear loyalty to Dombrowski renders him neither disinterested nor independent. Compl., ¶¶75-81, 84, 89.

The non-defendant directors' acquiescence in Leffel and Dombrowski's removal of Postorivo as director (predicated on the liquidation of inventory) raises a reasonable doubt regarding the independence of the non-defendant directors of KEE Action, Inc. and a specter that their discretion was sterilized by Leffel and Dombrowski's influence. Because much of management and specifically the inventory liquidation decisions rested with Dombrowski and Leffel and did not involve the board, the non-defendant directors did not independently assess the information or form their own judgment concerning these actions, effectively rendering their conduct beholden to the actions of Dombrowski and Leffel. Compl., ¶122. As such, demand must be excused and Postorivo must be permitted to maintain the waste and breach of fiduciary duty claims on behalf of KEE Action, Inc.

B. Waste of KEE's Assets At Firesale Prices Is Not Protected By The Business Judgment Rule.

In considering whether a challenged action was a product of a business judgment, a court considers factors such as whether the directors: (i) informed themselves of material information; (ii) considered expert opinions; (iii) provided board members with adequate and timely notice of the transaction and its purpose before the board meeting; or (iv) adequately

inquired into the reasons for or terms of the transaction. *Bakerman*, 2006 WL 3927242, at *9, *citing Ash v. McCall*, 2000 WL 1370341, at *19 (Del. Ch). KEE's directors have taken none of the foregoing steps.

Moreover, in conjunction with the closing of the APA, Defendants "had conducted their own due diligence with respect to the same inventory without issue." Compl., ¶85. As such, a reasonable inference can be drawn that the post-transaction liquidation at firesale prices was performed with full knowledge of both the pre-transaction valuation performed by NPS and of the due diligence conducted by the Defendants themselves. [emphasis supplied] Compl., ¶85. Defendants' selling off of the inventory further illustrates that Defendants were fully aware that the liquidation of the inventory at firesale prices would create deficiencies and financial difficulties for KEE in not meeting certain financial benchmarks. Yet, the Director Defendants took no steps to safeguard the interests of KEE and in doing so have stripped their actions of any presumptions of business judgment.

The cases cited above in support of the viability of Plaintiffs' claim for waste, at 16-17, also stand for the proposition that, assuming the allegations of the Complaint to be true, the board is not protected by the business judgment rule in the face of particularized allegations of (a) the sale of corporate assets at substantially below the value they were purchased for, and (b) the wholesale write down of assets to zero, notwithstanding the purchase of the those same assets only months earlier. *See Orloff v. Shulman*, 2005 WL 3272355, at *11 (Del. Ch.) (explaining that one way to show doubt that the challenged transaction was otherwise the produce of a valid exercise of business judgment is to allege waste); *Andreae v. Andreae*, 1992 WL 43924, at *6-7 (Del. Ch.) (finding "plaintiffs have borne

their burden . . . of alleging facts which, if true, reasonably raise the doubt that a diversion of one-half of the premium portion of the sale price of the corporation to Frank Andreae was the result of a valid exercise of business judgment"); *Avacus Partners, L.P. v. Brian*, 1990 WL 161909, at *8 (Del. Ch.) (focusing on the second prong of the *Aronson* test and concluding "that the pleading does raise a reasonable doubt that the Comtex Exchanges and the WNW Merger constituted waste and hence were not the product of a valid business judgment" where "Avacus has alleged specific facts that quantify the alleged inadequacy of the consideration received"); *Stein v. Orloff*, 1985 WL 11561, at *4 (Del. Ch.) (finding "allegations of waste of corporate assets are, however, sufficient to raise a reasonable doubt that the challenged transactions were the product of a valid exercise of business judgment").

Thus, if the Court concludes that the Complaint states a claim for waste or breach of fiduciary duty then the Court must also find, at the pleading stage, reasonable doubt that the Board properly exercised its business judgment. *See Orloff*, at *13 ("Although there may be legitimate reasons that explain such a disparity between the alleged market price and the price Weinstein collected, the size of the gap between the two numbers means that the Court cannot say that a claim for waste or breach of fiduciary duty could not be proven at trial.").

./v.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.

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