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Case No. 2728-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

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

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RIGRODSKY & LONG, P.A.
Seth D. Rigrodsky (#3147)
Brian D. Long (#4347)
David R. Lurie
919 N. Market Street, Suite 980
Wilmington, DE 19801
Tel.: (302) 295-5310

MOTLEY RICE LLC
Ann K. Ritter
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
Tel.: (843) 216-9000

Co-Chairs of Plaintiffs' Executive Committee

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Plaintiffs file this brief in opposition to Defendants' Motions to Dismiss their Fourth Amended Consolidated Shareholder Derivative Complaint (the "Complaint" or "Compl.") herein, asserted derivatively on behalf of Lear Corporation.[2]

NATURE AND STAGE OF THE PROCEEDINGS

This shareholder derivative action arises from the Individual Defendants' decision – at the behest of CEO Robert Rossiter – to provide Carl Icahn's AREP with the right to obtain $25 million dollars in cash and other Lear assets (the "No Vote Bonus") following a (virtually inevitable) shareholder vote rejecting Icahn's modestly revised offer to purchase the Company.

In June of last year, this Court ordered the Company to issue a Supplemented Proxy Statement disclosing to Lear's shareholders that the Board of Directors virtually ceded to CEO Rossiter responsibility to conduct the Company's sale "process" – despite Rossiter's patent conflicts of interests, thereby raising substantial "concerns about the integrity and skill of those trying to represent Lear's public shareholders." *In re Lear Corp. S'holder Litig.,* 926 A.2d 94, 118 (Del. Ch. June 15, 2007) (hereinafter, "June 15 Decision"). As this Court recognized, Rossiter and other insiders "had powerful interests to agree to a price and terms suboptimal for public investors," including Rossiter's admitted interest in securing the right to receive millions of dollars in deferred compensation. Under these circumstances, this Court observed, agreeing to a price even less than the $36 per share shareholders later rejected "might well [have made] personal

[2] Unless otherwise indicated, capitalized terms employed herein are intended to have the definitions set forth in the Complaint.

economic sense for Rossiter, when the risks to him of managing Lear as a stand-alone company [were] taken into account." *Id*. at 117.

Immediately after the Company was forced to disclose the facts surrounding Rossiter's "negotiation" with Icahn of the Initial Merger Agreement, Lear's shareholders sent an unmistakable message: the deal was going to be rejected. Major shareholders publicly announced their disapproval, as did influential proxy advisory firms, including ISS. Furthermore, the vote was running lopsidedly against the transaction.

Even after the shareholders gave the thumbs down to the $36 per share deal, however, the Individual Defendants failed to learn their lesson and take this Court's admonitions to heart. Instead, they once again chose to place insiders at the center of the negotiation of a revised deal with Icahn.

The result was a modest $1.25 per share increase in the proposed sale price – a level that both the Company's and Icahn's inquiries had shown would fail to pass muster even before it was negotiated. Despite the strongly expressed views of ISS and others that the Company needed to obtain additional concessions from the buyer – including and especially the inclusion of a public equity stub – Rossiter and the Company's other "negotiators" gained no such thing from Icahn. Furthermore, they acceded to Icahn's demand that – in return for increasing the proposed sale price to a patently deficient $37.25 per share level – Icahn be granted the right to receive the $25 million No Vote Bonus following the (inevitable) shareholder vote rejecting the revised deal.

There is no colorable explanation of why the Special Committee chose to place the Company on the hook for a $25 million payment in return for a "right" to present shareholders with a revised deal that the Board was on actual notice would be overwhelmingly rejected. The result of this abdication from fiduciary obligations was – quite predictably – damaging to the Company's shareholders. The deal was thereafter rejected by 50 percent of the Company's shareholders, and Icahn walked away with his bonus.

The Complaint, based largely on information learned during discovery in connection with the now moot class action case, pleads sufficient facts to overcome defendants' dismissal motions:

First, the business judgment rule has no applicability to this action, because Plaintiffs' well – and specifically – pleaded Complaint states claims for bad faith breaches of fiduciary obligations, thereby excusing demand. Given that the Individual Defendants were on actual notice that a majority of the Company's shareholders would reject the revised deal – leaving the Company both without a transaction and $25 million poorer -- the Individual Defendants' irrational decision to grant Icahn his No Vote Bonus constituted bad faith tantamount to a waste of corporate assets. Point I.A.1, *infra*.

Second, given that Plaintiffs have satisfied the particularized pleading standard required to avoid a demand upon Lear's Board, the Complaint necessarily satisfies the far more forgiving notice pleading standard of Rule 12(b)(6). Point I.B, *infra*.

Third, under the plain terms of Section 102(b)(7) of the Delaware Corporation Law, the Individual Defendants cannot be exculpated by charter provision from damages liabilities for either their bad faith violations of fiduciary obligations. Point I.C, *infra*.

Finally, Plaintiffs have stated valid claims for aiding and abetting the Individual Defendants' breaches of fiduciary duty, as well as for unjust enrichment, against the AREP Defendants, given that the AREP Defendants not only knew of – but also participated in and benefited from – the wrongdoing, including and especially on account of Icahn's receipt of the No Vote Bonus. Point II, *infra*.

<u>COUNTER-STATEMENT OF PARTICULARLY PLEADED FACTS</u>

The Court's June 15 Decision.[3] On June 15, 2007, this Court issued its decision granting, in part, Plaintiffs' Motion for a preliminary injunction and preventing a shareholder vote on the Initial Merger Agreement until the Company disclosed facts respecting the conflicts of interest of Rossiter.

As the June 15 Decision detailed, it was Rossiter who had come to the Company's Board with the proposal to sell Lear to Icahn, and it was Rossiter who ran the sale "process" – deciding to go ahead and negotiate a merger agreement to sell the Company to Icahn for $36 per share without an auction or even a substantial pre-agreement market check. Furthermore, the post-execution "go shop" period provided for in the Initial Merger Agreement was, as this Court observed, highly "truncated." June 15 Decision at 119.

While this Court did not find that the Individual Defendants breached their *Revlon* duties in signing on to the Initial Merger Agreement negotiated by the Rossiter team, it

[3] The Court is familiar with the events leading up to the claims Plaintiffs assert in the Complaint, which are recited in detail in the June 15 Decision. Accordingly, we address here only the relevant portions of the Court's opinion and the Individual Defendants' breaches of their fiduciary obligations to the Company and its shareholders thereafter.

recognized that the process "rais[ed] concerns about the integrity *and* skill of those trying to represent Lear's public investors." *Id*. at 118. (Emphasis added).

This was because Rossiter – who did not even inform his Company's Board of Icahn's expression of interest in buying the Company for a full week – had "powerful interests to agree to a price and terms suboptimal for public investors." *Id.* at 117. Rossiter was admittedly (and highly interested) in securing or cashnig out his multi-million dollar SRP interest, neither of which he could practicably accomplish while so long as the Company remained public. Furthermore, Rossiter (like other insiders) stood to benefit from a going private transaction because it would allow him to cash out a large portion of his Lear stock and options, while also giving Rossiter the chance to retain his management position *and* later realize a substantial profit from an ongoing stake in the Company on its later re-sale.

Given that a deal with Icahn was tailor made for Rossiter to "have his desires met," this Court observed that it "might well [have made] personal economic sense for Rossiter" to propose a sale of the Company for even less that the $36 per share price of the Initial Merger Agreement. June 15 Decision at 117.

The Court did not bar Lear from seeking shareholder approval of the initial Icahn/Rossiter deal, after disclosing the facts regarding Rossiter's interests and role. The Court stated, however, that, if shareholders concluded that the $36 per share sale price Lear's personally conflicted CEO had negotiated with Icahn did not maximize shareholder value, they could "freely communicate [their view] to others" and choose to vote against the deal or seek appraisal. June 15 Order at 80.

Shareholders Express Overwhelming Opposition to the Initial Merger Agreement. After the Company issued the Supplemented Proxy disclosing the material facts mandated by this Court, Lear's shareholders signaled their agreement with the Court that sale process had raised concerns respecting both the Individual Defendants' "integrity" and their "skill." Shareholders also were unhappy with the resulting sale terms. Thus, it soon became evident that a majority of Lear holders would not approve a sale of the Company for the $36 per share price that Rossiter had "negotiated" with Icahn.

During the week following the June 15 Decision, three investor advisory organizations, Proxy Governance, Glass Lewis & Co., as well as the highly influential ISS – whose approval both the Company and Icahn recognized was all but essential to accomplishing a deal – all announced their opposition to the Initial Merger Agreement and urged shareholders to vote against the deal. Each firm focused on the material facts at issue in this Court's June 15 Decision, expressing concern that Rossiter's personal financial interest had impaired his "negotiations" with Icahn. Compl. ¶ 162.

The message to the Company's Board from its shareholders was the same. For example, CalSTRS – a long term Lear shareholder – called and thereafter wrote to Rossiter to express its "concern" and "dismay[]" with aspects of the proposed transaction, and its view that shareholders were "being shut out of any opportunity to receive the true value for Lear." Compl. ¶ 162. CalSTRS focused on many of the same questions raised by this Court along with some others, and emphasized the:

- retention of change of control payment provisions for senior managers, despite a plan to retain their positions (and provide them with equity) after the merger;

- speed of the Board's approval of the deal struck between Icahn and Rossiter,
- extraordinarily constrained go-shop process; and
- belatedly disclosed (by order of this Court) conflicts of interest on the part of Rossiter and other insiders involved in the negotiation of the Initial Merger Agreement.

Furthermore, CalSTRS was convinced that the defective sale process had yielded an "unfair" result, and that the $36 sale price "did not reflect the underlying value of the company." For these reasons, CalSTRS said that it "would prefer that the merger not proceed," and that – if it did – the fund would choose to exercise its appraisal rights. Compl. ¶ 162.

In the face of this growing tide of opposition, on June 21, the Board chose to postpone the annual meeting for two weeks, until July 12, 2007. Compl. ¶ 164. By the time of a June 28, 2007 Special Committee meeting, however, the Individual Defendants recognized that the existing deal could not be salvaged. Lear General Counsel Ninivaggi reported that many shareholders had told the Company that substantially improved transaction terms would be required to obtain their votes. Compl. ¶ 170. The vote tally told the same story; Ninivaggi informed the Special Committee that, as of June 27, 32 percent of the voting shares opposed the deal engineered by Rossiter, while only 20 percent favored it. Compl. ¶ 170

In sum, the deal that the Individual Defendants had fought before this Court for the right to present to the Company's shareholders was – following the judicially mandated disclosures – being rejected by them.

Rossiter and other insiders participate in the re-"negotiation" of the deal with Icahn. It soon became – or should have become – clear to the Special Committee that it would take much more than a minor tweak to the initial deal terms even to hope to get Lear's shareholders on board with a revised deal.

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The Special Committee decided to try to go forward with a sale to Icahn, and to negotiate a revised deal that might pass muster with the Company's wary and skeptical shareholders. Despite the criticism it had received from both this Court and the market for the process leading to the execution of the Initial Merger Agreement, however, the Special Committee once again chose to place its critically conflicted insiders – including CEO Rossiter and his lieutenant Ninivaggi -- at the center of the negotiations, tasking them and Board member McCurdy to inform Icahn that a price increase was needed to secure shareholder support. Compl. ¶ 174.

The Special Committee was apparently untroubled with employing an officer – who this Court observed had an incentive to seek to sell the Company for less than it was worth – with trying to salvage the deal after shareholders had overwhelmingly given the thumbs down to the results of his first effort.

In the meantime, Ninivaggi was learning that his initial speculation that a small price increase might somehow suffice to garner the support of a majority of shareholders was at odds with the facts. For example, on July 2, 2007, shareholder Classic Fund informed Ninivaggi that an increase of $1.25 in the sale price (precisely what the Board later agreed to) would *not* be acceptable. Compl. ¶ 177. Another large holder, Sasco, was similarly resolute that a deal on such terms would be unacceptable. *Id.*

Ninivaggi had informed the Special Committee on June 28 that a number of shareholders were interested in seeing an equity stub included in the deal, along with a sale price increase. Compl. ¶ 171. ISS expressed particular interest in seeing an equity stub included in any potentially revised deal. Compl. ¶ 182. The Company's senior management, however, ultimately dropped the equity stub concept after meeting resistance from Icahn. Compl. ¶¶ 179, 184.

Instead, the Company's senior management settled solely for eking a small price increase out of Icahn. Icahn indicated that he would agree to increase the price by all of $1.25 per share. But Icahn was not willing to make his (doomed) revised proposal to shareholders for free. In addition to the break up fee provisions included in the Initial Merger Agreement, Icahn wanted the Company to provide him with a novel No Vote Bonus, *i.e.*, walk away money payable in the almost certain event that Lear shareholders found Icahn's nominal price increase to be unacceptable. Compl. ¶ 184.

The Special Committee and Board agreed to enter into the Revised Merger Agreement, increasing the proposed sale price to $37.25 per share in return for guaranteeing Icahn a combination of cash and stock worth $25 million (fully one quarter of the aggregate price increase) following a shareholder vote rejecting the modestly increased sale price. Compl. ¶¶ 184-85.

Neither the meeting minutes nor any other materials produced by the Company in discovery come close to explaining how and why the members of the Special Committee and Board came to conclude that it served the interest of the Company to grant Icahn the right to receive $25 million in cash and stock following an inevitable negative shareholder vote.

But the record makes clear what they did *not* do.

The Individual Defendants did *not* solicit revised and updated financial analyses from their advisors. (Unlike AREP, which obtained an updated valuation analysis from its advisor.)

The Individual Defendants apparently did *not* examine whether the No Vote Bonus was a normal course benefit to provide as an inducement to a buyer to increase its bid in the face of the certain loss of a shareholder vote. If they had done so, they would have learned that Icahn's demand was virtually without precedent.

Most importantly, there is *no* explanation of how and why the Individual Defendants might have concluded that it was economically rational to guarantee Icahn that he would be paid $25 million dollars in return for making an offer that the Company's inquiries had already shown was all but certain to go down in flames.

The Company announces the Revised Merger Agreement; shareholders immediately give it the thumbs down. The Company and Icahn's AREP entered into the

Revised Merger Agreement on July 8, 2007, and announced the new deal on July 9. Compl. ¶¶ 184-85. The news landed in the market with a resounding thud.

It took only a day for ISS to reject the Revised Merger Agreement as it had the first, and to do so in the most scathing terms. Echoing the reasoning of this Court's June 15 Decision, ISS said it was understandable "why Lear management may want to salvage the transaction. After all, going private can be especially attractive to senior executives." But, ISS observed, it was "much less understandable why the Lear board would agree to the unusual [No Vote Bonus] provision." Compl. ¶ 186.

Lear, ISS observed, was in a strong negotiating position when faced with an imminent shareholder rejection of the Initial Merger Agreement, "[a]fter all, the board could simply shrug its collective shoulders and blame its own shareholders for the impasse." ISS noted that, in its extensive "experience evaluating *virtually every* M&A vote involving a public company, when the target shareholder vote is at risk (and there is no third-party competitive offer), the buyer normally has two choices: (i) raise without a quid pro quo or (ii) walk away." Given this history, ISS stated, "Lear shareholders are left to wonder why its board felt so fearful that Icahn would walk that it capitulated to [Icahn's] demand for such an unusual [No Vote Bonus]." Compl. ¶ 186 (emphasis added).

ISS also noted that Lear – which appeared to be reaping the benefits of its extensive restructuring efforts – was hardly without alternatives to an Icahn acquisition; to the contrary, "a significant percentage of the company's long-term shareholders apparently have faith in the standalone option." *Id.* Furthermore, the Board itself had not undertaken a searching inquiry – "after extensive deliberation and expert advice" – that Rossiter's unilateral proposal to sell the Company offered superior value to shareholders. Indeed, had the pursuit of a sale actually been the outcome of strategic deliberation by Lear's Board, "we presume that the board would have instructed its financial advisor to embark on a pre-signing auction process designed to achieve the highest offer, and the board would be hell bent on assuring that the deal closed. *Id.* In contrast, the Lear board here simply reacted to a rather informal and unsolicited indication of interest from Icahn, then checked the market via the go-shop." *Id.*

ISS observed that "[o]ne would expect that a board that pursues such an avenue would be relatively sanguine about the deal's potential failure due to majority shareholder opposition." Instead, Lear's Board once again followed its conflicted CEO's lead and acceded to Icahn's demand for the unprecedented No Vote Bonus in return for presenting a deficient revised deal to the Company's shareholders. *Id.*

ISS's strongly negative appraisal of the Revised Merger Agreement was (entirely predictably) shared by the Company's shareholders, fully *50 percent* of whom voted against the new deal, with 20 percent voting in favor. Compl. ¶ 190. Indeed, the pace of "no" votes outstripped "yes" votes by an approximate 2 to 1 margin just before and following the Board's decision to approve the Amended Merger Agreement. Compl. ¶¶ 184, 190.

The market went on to celebrate the rejection; Lear's stock rapidly shot up well above the proposed deal price to $40 and was upgraded by a leading analyst. Compl. ¶ 191.

Icahn walks away with his No Vote Bonus; Rossiter reveals that the Company's performance had been exceeding expectations during the Icahn negotiations. Following the negative shareholder vote – in a striking parallel to his past greenmail gambits – Icahn walked away with his $25 million No Vote Bonus, and has since made no further efforts to acquire the Company, just as he walked away with large payments in return for sham takeover attempts during the 1980s. The difference here is that the Individual Defendants paid Icahn to go away under circumstances where they ostensibly had wanted him to buy the Company. In any event, as in the case of greenmail, it was the Company and its shareholders who paid the price for the misconduct of Lear's Board.

Meanwhile, on August 2, 2007, Rossiter announced that the Company's earnings performance had exceeded expectations and Lear revised its outlook for the entire fiscal year upward, reflecting "benefits from restructuring activities, ongoing cost and efficiency actions and new business globally [that] more than offset lower production in North America." Compl. ¶¶ 37, 191-92. In the following months, the Company has – as detailed in a recent shareholder presentation – continued to make "significant progress on restructuring actions," continued realizing improved financial results, and expects to realize net new business totaling $330 million during Fiscal 2008. *See* Form 8-K filed by Lear with the SEC on May 8, 2008 at 8, 22. (Attached hereto as Exhibit A).

Against this backdrop, Plaintiffs asserted their instant claims for, among other things, bad faith breaches of fiduciary obligations against the Individual Defendants, and for aiding and abetting fiduciary breaches and unjust enrichment against the AREP Defendants, set forth in the current Complaint. On April 14, 2008, all Defendants filed motions to dismiss the Complaint. This is Plaintiffs' Answering Brief in Opposition to Defendants' Motions to Dismiss.

ARGUMENT

I. PLAINTIFFS PROPERLY ALLEGE DERIVATIVE CLAIMS FOR BAD FAITH MISCONDUCT AGAINST THE INDIVIDUAL DEFENDANTS

A. Demand is Excused Because of the Individual Defendants' Affirmative Misconduct and Culpable Non-Feasance

It takes an "extreme case" of misconduct or non-feasance for a board to strip itself of the protections of the business judgment rule, and thereby excuse demand. *Greenwald v. Batterson*, C.A. No. 16475, 1999 Del. Ch. LEXIS 158, at *20 (Del. Ch. July 26, 1999). This is just such a case.

The Individual Defendants placed themselves outside the umbrella of business judgment rule protection by agreeing to grant Icahn the $25 million No Vote Bonus absent meaningful review, and indeed, under circumstances when shareholders' rejection of the Revised Merger Agreement was all but inevitable. This conduct amounted to a bad faith abdication of fiduciary duties, and resulted in the Company's entry into a transaction that was tantamount to corporate waste.[4]

A shareholder derivative plaintiff is required to allege (i) "with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors"; and (ii) the "reasons for the plaintiff's failure to obtain the action or for not making the effort." Del. Ch. R. 23.1. The standards for determining whether the facts

[4] Defendants devote much ink to addressing allegations respecting the interestedness and lack of independence of certain directors. Lear Defendants' Opening Brief in Support of their Motion to Dismiss Plaintiffs' Fourth Amended Derivative Complaint (cited as "Indiv. Def. Br. at ___"), 20-26. However, as is evident from the face of the Complaint, the Court need not address that issue again to pass upon the claims asserted in the current pleading – given that the business judgment rule *per se* has no applicability to the bad faith claims Plaintiffs assert.

alleged establish an excuse of demand are explained in *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000), and *Rales v. Blasband*, 634 A.2d 927 (Del. 1993); *see also Guttman v. Huang*, 823 A.2d 492, 500-501 (Del. Ch. 2003).

Under *Aronson*, demand is excused if the allegations create a reasonable doubt that "the challenged transaction was otherwise the product of a valid exercise of business judgment." *Brehm*, 746 A.2d at 256 (internal quotations omitted). Per *Rales*, the court is to examine whether "the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. If the derivative plaintiff satisfies this burden, then demand will be excused as futile." *Id.*

Plaintiffs' allegations amply satisfy these pleading standards.

The Individual Defendants contend that they "did not know that the Stockholders would fail to approve the Revised Merger Agreement," Indiv. Def. Br. at 34, and that they acted in good faith in approving the grant of Icahn's No Vote Bonus, Indiv. Def. Br. at 31. But the well-pleaded allegations in the Complaint – drawn from the Company's own records -- are to the contrary.

Those materials demonstrate that the Company's advisors and its officers set out to learn whether the modestly revised sale terms had a realistic chance of achieving shareholder approval. The resounding answer was no; yet the Individual Defendants chose to go forward anyway, inexplicably, and culpably.

After the Company revised its proxy statement to disclose, among other things, the Board's delegation to its self-interested CEO the responsibility to negotiate a deal with Icahn, the original transaction rapidly fell apart. ISS, along with other major analyst and advisory firms, voiced their dissatisfaction with both the sale process and the result. Compl. ¶¶ 162. CalSTRS joined other shareholders in expressing "dismay[]" with the proposed deal. Compl. ¶¶ 162.

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It also became plain to the Individual Defendants that minor tweaks could not push a revised deal through with the Company's shareholders.

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During later communications with the Company, ISS confirmed this expectation, and made it plain that a major enhancement to the deal – such as the inclusion of a public equity stub – would be required to gain its endorsement. Proxy solicitor MacKenzie -- along with Ninivaggi and others tasked to play central roles in re-"negotiating" the deal with Icahn -- soon learned from major holders such as Classic Fund and Sasco that the Company's shareholders would likewise demand substantial improvements in the deal, well above the $1.25 per share level, before contemplating a yes vote. Compl. ¶¶ 170-78.

In sum, the message Lear's Board and its Special Committee were receiving from shareholders and their representatives was clear: A modest price bump of $1.00-1.25 per share would not be sufficient to put the deal Rossiter, Ninivaggi and other insiders had initially struck for the Company back on track. Despite this information, the Company agreed to enter into a Revised Merger Agreement, at the very $1.25 per share price that shareholders like Classic Fund had said would meet with their disapproval.

If a small increase in price had been the only change in the Revised Merger Agreement, the Board's action would have been puzzling, but largely harmless. While the new deal would have been bound to meet with rejection by shareholders, the Company would only have been out the cost of another futile proxy solicitation. But the Special Committee also agreed to provide Icahn with his No Vote Bonus, ensuring that AREP would walk away with $25 million in Lear assets – fully one quarter of the aggregate increase in the offer price – if the Revised Merger Agreement was rejected by Lear's shareholders. The Individual Defendants struck this deal with Icahn, despite the evidence before them that the modest price increase would be overwhelmingly rejected, and thus that the Company would be left with no deal *and* $25 million poorer.

Defendants protest they believed the Revised Merger Agreement was a good one, and should have been approved by the Company's shareholders. This argument is unavailing. The question presented is *not* whether the shareholders *should* have followed the recommendation of Special Committee and the Company's insiders and approved the Revised Merger Agreement. Rather, it is whether there was *any reasonable chance* of the Company obtaining such approval, and thus avoiding the give away to Icahn of the $25 million No Vote Bonus. Under the well and specifically pled facts in the Complaint, the answer to that question is no.

Furthermore, as ISS observed, the Individual Defendants did not take *any* meaningful steps to consider whether the revised terms offered sufficient value to the shareholders who had given a thumbs down to the initial deal. Thus, the record does not indicate that its members searchingly questioned the Special Committee's legal or financial advisers or took any other steps to satisfy themselves that the No Vote Bonus grant to Icahn had a basis in precedent, let alone was reasonably required under the circumstances of the imminent failure of a shareholder vote. As ISS later noted, if the Individual Defendants had undertaken such an inquiry, they would have learned that the No Vote Bonus was highly unusual, and indeed unprecedented.

The Individual Defendants' decision has all the badges of the exercise of *no* care, *i.e.*, an egregious departure from the high standards of diligence required of a director in connection with the sale of a public company. *Aronson,* 473 A.2d at 812 (directors must consider "all material information reasonably available to them" in determining whether sale terms maximize shareholder value); *accord Paramount Commc'ns, Inc. v. QVC Network, Inc.,* 637 A.2d 34, 43 & n.13 (Del. 1994) (in sale of control transaction, board has obligation to make informed decision as to whether terms offer best value reasonably available to shareholders); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161 (Del. Ch. 1999); *Smith v. Van Gorkum*, 488 A.2d 858, 872-73 (Del. 1985).

Indeed – given the near certainty of a negative shareholder vote -- the Individual Defendants' grant of the No Vote Bonus to Icahn was effectively unsupported by consideration, and accordingly tantamount to corporate waste. *See generally In re The Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 74 (Del. 2006) (transaction works waste where the "exchange 'was so one sided that no business person or ordinary, sound judgment could conclude that the corporation has received adequate consideration'"); *Sample v. Morgan*, 914 A.2d 647, 670 (Del. Ch. 2007) ("doctrine of waste . . . allows a plaintiff to pass go at the complaint stage even when the motivations for a transaction are unclear by pointing to economic terms so one-sided as to create an inference that no person acting in a good faith pursuit of the corporation's interests could have approved the terms").

Finally, it is important to consider the key roles that Rossiter, Ninivaggi and other insiders played in the "negotiation" of the revised terms, despite this Court's prior admonitions. As ISS observed in voicing its rejection of the Revised Merger Agreement, it is easy to understand why Icahn asked for the No Vote Bonus. He likely did not wish to vote against himself; furthermore, the No Vote Bonus ensured that AREP would walk away from the all but certain rejection of the deal with a great deal of money in its pocket. It is also easy to understand why insiders, including Rossiter and his lieutenant Ninivaggi were more than happy with the revised deal terms. As ISS noted, "going private can be especially attractive to senior executives." Compl. ¶ 186. As this Court further recognized, Rossiter had compelling personal reasons to favor a deal, including the desire to cash out his SRP. Jun 15 Opinion at 98, 117. Accordingly, Rossiter – whose close associate Ninivaggi was playing a central role in the negotiations – had every `personal economic incentive to encourage a roll of the dice with Lear's money in the hope (however remote) that the Company's shareholders might vote for the deal.

Because insiders participating in the sale process were laboring with conflicts providing them with incentives to act against the Company's interests, however, the Individual Defendants were under an all the more stringent duty to scrutinize the Revised Merger Agreement and its No Vote Bonus provision with care. The very fact that they signed on to such a patently unfair transaction in the face of the record of unfairness before them demonstrates that the Individual Defendants fell down on the job.

This Court has long recognized that a board of directors' knowing or recklessly uninformed decision to accede to the self-interested desires of corporate officers amounts to bad faith. See, *e.g.*, *Alidina v. Internet.com Corp.,* C.A. No. 02-17235, 2002 Del. Ch. LEXIS 156 (Del. Ch. Nov. 6, 2002) (court upheld claims against independent directors of company who knew: (i) that company's CEO sought merger partner to whom he could dictate the terms of deal; (ii) that he secured valuable asset of company at grossly inadequate price; and (iii) this diverted funds away from company); *Crescent/Mach I Partners, L.P., v. Turner*, 846 A.2d 963, 982 (Del. Ch. 2000) (board not entitled to presumption of a valid business judgment where plaintiffs alleged board acquiesced in chairman & CEO's self-interested negotiations and approved a merger at an unfair price); *Kells-Murphy v. McNiff*, 1991 Del. Ch. LEXIS 127, at *3-4 (Del. Ch. July 12, 1991) (presumption of valid business judgment rebutted by allegations that board acquiesced in allowing majority shareholder, CEO, and chairman of board to allocate proceeds from sale of property and other company assets to himself to detriment of minority shareholders).

The same reasoning holds true here.

B. *The Complaint Adequately States Claims Against the Individual Defendants.*

The standard for pleading an excuse of demand under Rule 23.1 is substantially more rigorous than that for stating a claim for relief under Rule 12(b)(6). Accordingly, where – as here – a complaint adequately pleads the excuse of demand, the pleading *a fortiori* satisfies the requirements of stating a claim for breach of fiduciary duty against the Individual Defendants. *See, e.g., In re Chrysler Corp. S'holders Litig.*, C.A. No. 11873, 1992 Del. Ch. LEXIS 152, at *17 (Del. Ch. July 27, 1992); *Chrysogelos v. London*, C.A. No. 11,910, 1992 Del. Ch. LEXIS 61, at *21 (Del. Ch. March 25, 1992).

C. *The Company's Certificate of Incorporation Does Not Shield Any of the Individual Defendants From Liability.*

Defendants' contention that the non-officer Individual Defendants can escape damages liability on account of the exculpatory provision in Lear's Certificate of Incorporation is without merit.[5] Section 102(b)(7) of the Delaware General Corporation Law permits exculpation only for violations of the duty of care – and does not bar damages claims for the commission of corporate waste nor for the bad faith breaches of duty at issue here. *See Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001) ("The purpose of Section 102(b)(7) was to *permit shareholders* . . . to adopt a provision in the certificate of incorporation to exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care, *but not for duty of loyalty violations, good faith violations and certain other conduct.*" (Emphasis added)).

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[5] Even if the exculpation argument had merit, it would be unavailing to insiders like Rossiter, insofar as the statute only applies to the conduct of "directors," *not* officers.

In addition, where – as here – a complaint sufficiently alleges a breach of fiduciary duties based on a failure of the directors to act in good faith, the pleading presents a question of fact respecting whether the directors have engaged in non-exculpatable conduct that cannot be determined at the pleading stage. *Desert Equities, Inc. v. Morgan Stanley Leverage Equity Fund*, 624 A.2d 1199, 1208-9 (Del. 1993); s*ee also Emerald Partners,* 787 A.2d at 91-92 (holding exculpation provision such as that authorized by § 102(b)(7) is in the nature of an affirmative defense); *In re Emerging Commc'ns, Inc. S'holders Litig.*, C.A. No. 16415, 2004 Del. Ch. LEXIS 70, at *145-146 (Del. Ch. May 3, 2004) (stating that it is burden of director defendants to demonstrate that they are entitled to protections of relevant charter provision).

Moreover, the Individual Defendants' contention that they could not have acted disloyally is misplaced. Here, the Individual Defendants were disloyal to Lear by failing to carry out their duties in good faith in connection with a momentous change of control transaction, where directors' duties are at their highest level. As this Court has observed, "[a] director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest. . . It does no service to our law's clarity to continue to separate the duty of loyalty from its own essence; nor does the recognition that good faith is essential to loyalty demean or subordinate that essential requirement." *Guttman*, 823 A.2d at 506 n.34. This is because there can be no situation in which a director can act in subjective bad faith towards the corporation and act loyally. Accordingly, the reason for the disloyalty is irrelevant, the underlying conscious action not in the corporation's best interest does not make it faithful, as opposed to faithless. *Id.*

II. THE COMPLAINT STATES AIDING AND ABETTING AND UNJUST ENRICHMENT CLAIMS AGAINST THE AREP DEFENDANTS

The Complaint more than adequately states aiding and abetting claims against the AREP Defendants, arising from the knowing participation of Icahn's associates in the Individual Defendants' breaches of their obligations the Company and its shareholders. The Complaint likewise states a claim for unjust enrichment against the AREP Defendants because of their receipt of the No Vote Bonus.

A. The Complaint States a Claim for Aiding and Abetting Breaches of Fiduciary Duties

To sustain an aiding and abetting a breach of fiduciary duty claim, a plaintiff needs to allege facts establishing the: (i) existence of a fiduciary relationship; (ii) fiduciary's breach of her duty; and (iii) defendant's knowing participation in the breach. *In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59, 72 (Del. 1995) (citing *Weinberger v. Rio Grande Indus., Inc.*, 519 A.2d 116, 131 (Del. Ch. 1986)).[6] The first two elements have been addressed above, while the AREP Defendants' scheme to aggrandize themselves through the Individual Defendants' misuse of corporate assets amply satisfies the final element.[7]

Delaware has long recognized that aiding and abetting liability may lie in a case like this one where the activities of a purchaser amount to "more than simple arm's-length negotiations." *In re USACafes, L.P. Litig.*, 600 A.2d 43, 56 (Del. Ch. 1991);

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[6] "[K]nowing participation need not be pleaded with particularity." Instead, "liberal notice pleading" is sufficient to survive a motion to dismiss. *Jackson Nat'l Life Ins. Co. v. Kennedy,* 741 A.2d 377, 391-92 (Del. Ch. 1999).

[7] The above arguments respecting the excuse of demand apply equally to Plaintiffs' claims against the AREP Defendants.

Jackson Nat'l Life Ins. Co., 741 A.2d at 393. To properly establish "knowing participation," plaintiffs may allege facts demonstrating that a defendant "knowingly [went] along with a diversion of money," *Crescent/Mach I Partners*, 846 A.2d at 990, or that the defendant was benefited by the breach of fiduciary duty, s*ee Carlton Inv. v. TLC Beatrice Int'l Hldgs, Inc.,* C.A. No. 13950, 1995 Del. Ch. LEXIS 140, at *50-51 (Del. Ch. Nov. 21, 1995).

A long line of Delaware cases supports the AREP Defendants' liability for aiding a breach of fiduciary duty in the present circumstances. In *Crescent/Mach I Partners*, through side agreements with the defendant acquirer of a company, an insider of the seller garnered the right to obtain a large equity interest in the successor corporation, after demanding that he receive "special treatment." *Crescent/Mach I Partner*s, 846 A.2d at 971, 990 n.88. The Court found that the acquirer's agreement to facilitate the insider's patent scheme to violate his duty of loyalty established an inference of "knowing participation" in a breach. *Id*. at 990; *see also Zirn v. VLI Corp*., C.A. No. 9488, 1989 Del. Ch. LEXIS 83 (Del. Ch. July 17, 1989) (prospective buyer used knowledge of insiders' potential exposure to suit for breach of fiduciary duty to induce insiders to favor buyer at expense of company; court found that aiding and abetting claim was stated).

In this case, the AREP Defendants acknowledge that Icahn demanded the right to receive the $25 million No Vote Bonus in return for the "benefit" of increasing their offer for the Company by $100 million. Furthermore, the AREP Defendants were intimately involved in the efforts to survey shareholders' opinions and views respecting the terms of the revised deal. Indeed, it was the AREP Defendants – not the Company – that spearheaded the communications with ISS, and thereby learned of ISS' express interest in the inclusion of the type of public equity stub that Icahn was omitted from the revised transaction.

In sum, the AREP Defendants were demonstrably on notice that the modest enhancements Icahn was offering would not be nearly sufficient to garner a majority shareholder vote in favor of the Revised Merger Agreement, and thus that the Company's payment of the No Vote Bonus was equally certain. Put otherwise, the AREP Defendants knew that they were inducing the Individual Defendants to hand over $25 million of the Company's money to Icahn for no meaningful consideration. These allegations of culpable knowledge are more than sufficient to sustain a claim against the AREP Defendants.

B. The Complaint States a Claim for Unjust Enrichment

Under Delaware law, the elements of a claim for unjust enrichment are: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification[,] and (5) the absence of a remedy provided by law." *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 585 (Del. Ch. 1998). Accordingly, to obtain restitution, plaintiffs are "required to show that the defendants were unjustly enriched, that the defendants secured a benefit, and that it would be unconscionable to allow them to retain that benefit." *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999). "[R]estitution is permitted even when the defendant retaining the benefit is not a wrongdoer." *Id.*

As explained, the AREP Defendants' knowingly participated in the Individual

Defendants breaches of duty. As result, the Company was impoverished to the tune of $25 million. It would be unjust for these defendants to keep any financial benefits they secured as a result of the inevitable non-approval of the Revised Merger Agreement.[8]

CONCLUSION

For all the reasons stated herein, we respectfully submit that the Court should deny Defendants' motions to dismiss the Fourth Amended Complaint herein.

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RIGRODSKY & LONG, P.A.

By: ***/s/ Brian D. Long***
Seth D. Rigrodsky (#3147)
Brian D. Long (#4347)
David R. Lurie
919 North Market Street,
Suite 980
Wilmington, DE 19801
Tel: (302) 295-5310

MOTLEY RICE LLC
Ann K. Ritter, Esquire
Badge Humphries, Esquire
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
Tel.: (843) 216-9000

Co-Chairs of Plaintiffs' Executive Committee

[8] The AREP Defendants' argument that a claim for unjust enrichment can only exist in the absence of a contractual relationship (AREP Defs. Br. at 18) is a red herring. As explained, the AREP Defendants participated in a scheme that all but ensured that the Revised Merger Agreement would be nullified.

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ, LLP
Daniel W. Krasner, Esquire
Gregory M. Nespole, Esquire
Paulette S. Fox, Esquire
Matthew M. Guiney, Esquire
770 Madison Avenue
New York, NY 10016
Tel.: (212) 545-4657

KAHN GAUTHIER SWICK, LLC
Michael A. Swick, Esquire
650 Poydras Street, Suite 2150
New Orleans, LA 70130
Tel.: (504) 455-1400

Members of Plaintiffs' Executive Committee

STURMAN LLC
Deborah Sturman, Esquire
1212 Madison Avenue
New York, NY 10016
Tel.: (212) 784-6263

CHIMICLES & TIKELLIS, LLP
Pamela S. Tikellis, Esquire (#2172)
Robert J. Kriner, Jr., Esquire (#2546)
A. Zachary Naylor, Esquire (#4439)
Scott M. Tucker, Esquire (#4925)
One Rodney Square
Wilmington, DE 19899
Tel.: (302) 656-2500

LAW OFFICES OF MARC S. HENZEL
Marc S. Henzel, Esquire
273 Montgomery Avenue, Suite 202
Bala Cynwyd, PA 19004
Tel.: (610) 660-8000

BERNSTEIN LIEBHARD
& LIFSHITZ, LLP

U. Seth Ottensoser, Esquire
10 East 40th Street
New York, NY 10016
Tel.: (212) 779-1414

Plaintiffs' Counsel