IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER A. WINSHALL, in his capacity as the Stockholders' Representative, Plaintiff Below/Appellant/Cross Appellee, v. VIACOM INTERNATIONAL INC. and HARMONIX MUSIC SYSTEMS, INC., Defendants Below/Appellees/Cross Appellant.	No. 39, 2013 Case Below: Court of Chancery CIVIL ACTION NO. 6074-CS PUBLIC VERSION FILED: April 2, 2013

CORRECTED
OPENING BRIEF OF APPELLANT WALTER A. WINSHALL, IN HIS CAPACITY AS THE STOCKHOLDERS' REPRESENTATIVE

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NATURE OF PROCEEDINGS

This appeal challenges the grant by the Court of Chancery (Strine, C.) of a motion to dismiss Count I of Plaintiff-below Walter Winshall's three count Amended Complaint, which count asserted breach of the covenant of good faith and fair dealing. The appeal comes to the Court following the lower court's grant of summary judgment in Winshall's favor on all other counts of the Amended Complaint and as part of Defendant below Viacom International, Inc.'s cross-appeal of summary judgment entered against it. Winshall acts here, and acted in the court below, as "Stockholder's Representative" for the Selling Stockholders of Harmonix Music Systems, Inc., a highly successful corporation sold to Viacom in 2006, the sale of which spawned this and several other proceedings in the lower court.[1]

As shown below, the trial court erred when it failed to credit the well-pled allegations in the Amended Complaint, drew inferences in favor of the non-moving party, and based its analysis on an incorrect factual interpretation of a document that was outside the four corners of the Amended Complaint and presented to the trial court for the first time as an attachment to Viacom's reply brief. By doing so, the lower court committed reversible error.

This is Appellant's opening brief in support of his appeal of the lower court's dismissal of his good faith and fair dealing claim.

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[1] Winshall succeeded in an arbitral dispute concerning the amount of the earn-out payments owed to Harmonix's former stockholders by Viacom. The Chancellor confirmed the arbitral award in the amount of $84 million more for 2007 (in addition to $150 million already paid) and an award of $299 million for 2008. Viacom appealed the 2008 award and that appeal is separately before the Court as No. 513, 2012.

SUMMARY OF ARGUMENT

1. The lower court erred by failing to credit Winshall's express allegations that the Selling Stockholders had a reasonable expectation that Viacom would not manipulate Harmonix's business for the purpose of reducing their earn-out payment.
2. The lower court erred when it made a factual finding that the Selling Stockholders had no expectancy interest in the products that Harmonix offered in a new distribution agreement in 2008. The trial court improperly relied on a document outside of the pleadings submitted for the first time with Defendants' reply brief, and, in so doing, reached the wrong factual conclusion.

STATEMENT OF FACTS

A. The Merger

Harmonix is the world's leading developer of music-inspired video games, including the blockbuster *Guitar Hero* and *Rock Band* video game franchises. (A65, A67.) After the success of *Guitar Hero*, but before the introduction of *Rock Band*, Viacom acquired Harmonix in hopes of capturing a portion of the multi-billion dollar music video game market. (A67.) Pursuant to a Merger Agreement dated September 20, 2006, Viacom purchased Harmonix from its owners (the "Selling Stockholders"). (A93-A225.) The deal closed on October 27, 2006, and Harmonix became a wholly owned subsidiary of Viacom. (A68.)

As consideration for Harmonix, Viacom agreed to pay the Selling Stockholders a down payment of $175,000,000, called the "Initial Merger Consideration," *and* certain uncapped earn-out payments calculated as multiples of the firm's Gross Profit above specified thresholds. (A101-104; A107-A111.) The Merger Agreement provided for Viacom to pay to the Selling Stockholders a 2007 earn-out payment equal to 3.5 times Harmonix's Gross Profit in excess of $32 million. (A102) For 2008, the earn-out payment was 3.5 times Gross Profit in excess of $45 million. (A103.)

Gross Profit is the sum of the "Product Gross Profit" for all of Harmonix's products, which is equal to "the positive or negative difference, between (i) Net Revenue attributable to such product and (ii) the sum of all Direct Variable Costs attributable to such product." (A104-A105.) A product's Direct Variable Costs included "distribution fees" and "royalties payable to third parties," such as the distribution fees paid to the game's distributor, Electronic Arts, Inc. ("EA"). (A103.) Thus, a decrease in distribution fees would result in an increase in Gross Profit.

When the Selling Stockholders agreed to the Merger Agreement, they did so with the understanding that "Viacom would not shortchange [them] by manipulating the cost structure for Harmonix products for the purpose of reducing the Earn-Out payments due to them under the Merger Agreement." (A71.) In other words, like all earn-out recipients, the Selling Stockholders reasonably expected that Viacom would not, for the purpose of reducing the earn-out, artificially manipulate the contracts that Harmonix entered for the earn-out period. And as sophisticated parties represented by counsel who carefully negotiated the uncapped earn-out, Defendants should have understood such expectation. (A177 ("The parties hereto are sophisticated and have been represented by attorneys throughout the transactions contemplated hereby who have carefully negotiated the provisions hereof.").)

The Merger Agreement designated Appellant Winshall as Stockholders' Representative, giving him the authority to enforce the Selling Stockholders' rights under the Merger Agreement. (A174.)

B. *Rock Band*

After the merger, Harmonix launched *Rock Band*, a music-based video game that allows players to play along with the world's biggest rock artists as a virtual band with drums, bass guitar, lead guitars, and vocals. (A68-A69.) The immediate success of the game was staggering: in its first fifteen months on the market, *Rock Band* surpassed $1 billion in retail game sales in North America. (A69.)

Harmonix's Gross Profit from products other than *Rock Band* for the 2007 and 2008 periods exceeded the threshold that triggered the earn-out payments ($32 million for 2007 and $45 million for 2008). (A69.) Therefore, each $1.00 of Gross Profit from *Rock Band* in 2007 and 2008 obligated Viacom to pay the Selling Stockholders an additional $3.50 in earn-out payments. (A69.) Ultimately, the Selling Stockholders and Defendants could not agree on the proper calculation of the earn-out payments and, pursuant to the Merger Agreement, they submitted their dispute to the Resolution Accountants. (A69; A110-A111.) The Resolution Accountants concluded that the earn-out payment for 2007 was $234.4 million and $299 million for 2008. *See Viacom Int'l, Inc. v. Winshall*, 2012 WL 3249620, at *8, *18 (Del. Ch. Aug. 9, 2012).

C. Viacom's Manipulation of Gross Profit

One of Harmonix's largest expenses for each unit of *Rock Band* sold was the percentage of the sale price it paid to EA for the game's distribution. (A72.) Because these expenses were Direct Variable Costs, each $1.00 reduction in the amount paid by Harmonix to EA during the earn-out period would increase Harmonix's Gross Profit under the Merger Agreement by $1.00, which in turn would increase the earn-out payments to the Selling Stockholders by $3.50.

1. The Original 2007 Distribution Agreement

The Original Distribution Agreement between Harmonix and EA was not entered until March 2007 – approximately six months after the signing of the Merger Agreement and before the release and success of *Rock Band*. (A330.) The Original Distribution Agreement left several key terms open for future negotiation and limited EA's distribution rights.

The Original Distribution Agreement secured EA's right to distribute only the first *Rock Band* video game, and that right was further limited to three video game platforms: the PlayStation 3, Xbox 360, and Nintendo Wii. (A331; A381.) The Original Distribution Agreement's royalty rates, therefore, did not govern future *Rock Band* games or versions of the original *Rock Band* made for other gaming systems.

The Original Distribution Agreement did contemplate, however, that there might be sequels to *Rock Band*. Subject to certain conditions, if Harmonix chose to develop a sequel to *Rock Band*, and EA had achieved certain sales milestones, EA would have the right to distribute those games on terms similar to the terms on which EA distributed the original *Rock Band*. The contract specifically provided for renegotiation of "terms that may be affected by substantial changes in variable costs, such as licensed content costs." (A353.) For any sequel, Harmonix and EA were required to negotiate in good faith to reach a written agreement for the sequel. If EA and Harmonix could not agree within 30 days to terms for the distribution, Harmonix was free to contact other distributors. (A353.)

It was a similar story if Harmonix decided to create a version of *Rock Band* for another gaming platform, such as PlayStation 2.

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Harmonix was required to notify EA that it was going to produce *Rock Band* for a new platform, and the parties would have 30 days to negotiate in good faith "the relevant economic and scheduling terms and conditions" on which Harmonix would grant EA distribution rights. (A351.) Again, the Original Distribution Agreement contemplated a new agreement between EA and Harmonix before EA could distribute versions of *Rock Band* for additional platforms.

The Original Distribution Agreement further provided that "EA's rights and obligations to distribute the Games Products in any country or other territory are conditioned upon the agreement by Harmonix and EA upon a Minimum Royalty Base and Minimum Sales Deduction." (A365.) The Minimum Sales Deduction in particular was a key term, the importance of which was likely to arise as *Rock Band 2* was released. The Minimum Sales Deduction is essentially the amount of money that EA was permitted to keep for itself for *Rock Band* games sold later in the product's life cycle when the retail price dropped below the original retail price of the game. (A338.)

Because these terms were not settled at the time the Original Distribution Agreement was entered, EA went into that relationship knowing that it was at risk of losing its right to distribute the original edition of *Rock Band*.

2. The 2008 Term Sheet

The open terms in the Original Distribution Agreement and the game's success gave Harmonix "an opportunity to renegotiate for a reduction of the distribution fees in 2008 if EA wanted to retain the distribution rights to *Rock Band* and its sequels." (A72.) In fact, during the course of negotiations between EA and Viacom, "EA offered Harmonix a reduction in 2008 distribution fees in order to retain the worldwide distribution rights to *Rock Band* and its sequels." (A72.)

But after *Rock Band* was released and its success became apparent, executives at Viacom became alarmed that its run-away success would lead to a large, uncapped earn-out payment for 2008. (A71-A72.) Viacom knew that for every $1.00 it saved on the sale of *Rock Band* in 2008 – including in distribution fees – it would owe the Selling Stockholders $3.50. (A72-A73.) Panicked, Viacom's senior management instructed Jeffrey Yapp, the MTV Networks executive overseeing Harmonix, to ensure that the financial benefits obtained in the subsequent negotiation of the EA contract would be structured so that not a dime would be received by the Selling Stockholders. (A72.) This scheme "was undertaken for the purpose of reducing the Earn-Out due for 2008." (A71.)

However, Mr. Yapp was reluctant to cheat the Selling Stockholders, including Harmonix's management, and did not move on the renegotiations for several months. (A74.) Dissatisfied with Mr. Yapp's failure to follow their directions in negotiating the EA contract, Viacom senior management replaced him with Wade Davis in negotiating the EA distribution agreement. (A74.) Mr. Davis was Viacom's Senior Vice President of Mergers and Acquisitions, and the executive who was responsible for negotiating the original Merger Agreement that included the uncapped earn-out payments that now proved so problematic. (A74.) Mr. Davis was under pressure from Viacom management to mitigate the effect of the costly earn-out provision that he himself had negotiated with the Selling Stockholders. (A74.)

Following Viacom's directives, Davis ignored EA's offer to reduce the distribution fees for 2008. Instead, Viacom demanded that the reduced fees not begin until 2009 (after the earn-out period ended) and asked EA to convey certain benefits to other Viacom companies such as MTV. (A74.)

As a result of Viacom's efforts, EA and Harmonix agreed to a new distribution contract in October 2008 (the "2008 Term Sheet"). (A75.) In addition to lower distribution fees beginning *after* the earn-out period, Viacom received in exchange for the continuation of high fees in 2008 a firm commitment from EA to purchase $65 million of advertising from other Viacom companies, like MTV. (A75.)

EA also agreed to pay in cash before year end 2008 amounts that were otherwise not due until later. (A75.) Viacom wanted the advance payment so that its cash position would appear stronger in its year-end financial statements, but they had no effect on the earn-out payments owed to the Selling Stockholders. (A75.)

Viacom's goal in negotiating the 2008 Term Sheet with EA was to delay, until after the earn-out period, the reduced costs that were available to Harmonix as a result of the parties entering an amended distribution agreement, thereby manipulating and reducing the 2008 earn-out payment. (A75.)

D. The Court of Chancery's Decision

On May 9, 2011, Defendants Viacom and Harmonix moved to dismiss the Amended Complaint and submitted a copy of the 2008 Term Sheet.

(A237; A259-A267.) In their opening brief, Defendants made a number of arguments why Winshall's implied covenant claim was defective, but made no argument for dismissal based on the Selling Stockholders' lack of expectancy interest in the products that EA sought and secured in the 2008 Term Sheet. (A226-A258.) The Selling Stockholders then submitted their opposition brief addressing the arguments specifically raised in the Motion to Dismiss. (A268-A303.) Then, in their *reply* papers, Defendants submitted for the first time a copy of the Original Distribution Agreement and argued – also for the first time – that none of the benefits obtained by EA in the 2008 Term Sheet concerned distribution rights during the earn-out period. (A312; A327-404.)

The Court of Chancery dismissed Count I of the Amended Complaint for two reasons. First, it found that "although Viacom and Harmonix did not accept a reduction in 2008 distribution fees, neither did they take action to *increase* the 2008 fees beyond what was expected under the Original EA Agreement." (Mem. Op. at 14.) In other words, it reasoned, "Winshall does not allege that Viacom or Harmonix took any actions to undermine Harmonix's capacity to generate profit below the level reasonably expected by the parties at the time that they entered the Merger Agreement." (*Id.*) Second, the court was persuaded – based on Viacom's reply-brief argument and based on a document first submitted by Defendants in connection with their reply brief – that "it is not conceivable that the benefits conferred on Viacom and Harmonix by the renegotiation were offered in exchange for product sales in which the Selling Stockholders had a valid expectancy interest – *i.e.*, sales during 2008." (*Id.*)

ARGUMENT

I. THE AMENDED COMPLAINT ALLEGES THAT THE SELLING STOCKHOLDERS HAD A REASONABLE EXPECTATION THAT VIACOM WOULD NOT MANIPULATE HARMONIX'S COST STRUCTURE IN ORDER TO REDUCE THE EARN-OUT PAYMENT

A. QUESTION PRESENTED

Whether the Court of Chancery erred when it concluded that the Selling Stockholders had no reasonable expectation that Viacom would not manipulate Harmonix's cost structure in order to reduce the earn-out payment. This question was preserved for appeal. A278-85, A286-97. *See* A71.

B. STANDARD AND SCOPE OF REVIEW

Judgments granting motions to dismiss under Court of Chancery Rule 12(b)(6) are reviewed de novo "to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009) (quotation marks omitted).

C. MERITS OF ARGUMENT

The first reason the Court of Chancery gave for dismissing Count I for breach of the implied covenant of good faith and fair dealing was that "Viacom and Harmonix did not impair the Selling Stockholders' rights under the Merger Agreement." (Mem. Op. at 14.) In other words, it reasoned, "Winshall does not allege that Viacom or Harmonix took any actions to undermine Harmonix's capacity to generate profit below the level reasonably expected by the parties at the time that they entered the Merger Agreement." (*Id.*) This conclusion is directly contradicted by the allegations of the Amended Complaint. Winshall pled a classic claim for the breach of good-faith and fair dealing, and the Court of Chancery's attempt to identify the level of profit "reasonably expected" by the parties at the time of contracting was impermissible at the motion to dismiss stage, and its conclusion was incorrect.

1. The Amended Complaint pleads a classic claim for a breach of the covenant of good faith and fair dealing in which a contracting party exercises its discretion to take money from a counter-party.

An implied covenant of good faith and fair dealing inheres in every contract. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005). "[T]he implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Id.* (internal quotation marks omitted); *accord Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *7 (Del. Ch. Apr. 20, 2009); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity, II, L.P.*, 624 A.2d 1199, 1206 (Del. 1993) (those entrusted with discretion must "exercise that discretion in a *reasonable* manner"); *Chamison v. HealthTrust, Inc. Hospital Co.*, 735 A.2d 912, 922 (Del. Ch. 1999), *aff'd*, 748 A.2d 407 (Del. 2000) (TABLE). Under Delaware law, "a fairly pleaded claim of good faith/bad faith raises essentially a question of fact which generally cannot be resolved on the pleadings or without first granting an adequate opportunity for discovery." *Desert Equities*, 624 A.2d at 1208.

a. The Amended Complaint adequately pleads each element of a good faith and fair dealing claim.

To state a claim for relief, a plaintiff need only plead "an implied contractual obligation not to engage in certain conduct, a breach of that obligation by the defendant, and resulting damage to the plaintiff." *Amirsaleh v. Bd. of Trade of City of N.Y., Inc.*, 2009 WL 3756700, at *4 (Del. Ch. Nov. 9, 2009). The Amended Complaint adequately pleads each of the three elements.

First, the Amended Complaint repeatedly describes the specific covenant that was implied in the parties' agreement: the Selling Stockholders, in entering into the Merger Agreement, "were relying on Viacom's good faith in the performance of its contract, and on the belief that *Viacom would not shortchange the* [Selling Stockholders] *by manipulating the cost structure for Harmonix products for the purpose of reducing the earn-out payments*." (A71 (emphasis added).) This is the specific allegation the Court of Chancery found wanting — that the Selling Shareholders expected Viacom not to artificially reduce the earn-out payments. The court's failure to credit this allegation alone requires reversal.

The Amended Complaint contains other allegations that contradict the Court of Chancery's reasoning. For example, the Amended Complaint explains the structure of the earn-out payment and incorporates the Merger Agreement in which it is found. (A68; A93-A225.) The Merger Agreement entitles the Selling Stockholders to a measure of Harmonix's Gross Profit, which is a function of its revenues less its Direct Variable Costs, including distribution fees. (A104-A105; A109-A110.) Based on these allegations, Winshall was entitled to the inference that there was an implied covenant that Viacom would not divert money away from Harmonix in order to avoid its earn-out obligation. Otherwise, the promise that the Selling Stockholders secured would be illusory.[2]

Second, the Amended Complaint pleads that Viacom and Harmonix breached the covenant of good faith and fair dealing implied in the Merger Agreement by trading away an asset of Harmonix – "the worldwide distribution rights to *Rock Band* and its sequels" on all platforms – in exchange for benefits to other Viacom businesses – namely, EA's "firm commitment to purchase millions of dollars of advertising from MTV Networks and other Viacom media outlets" as well as "the acceleration of cash payments" that were "not otherwise due," both of which were "undertaken for the purpose of reducing the Earn-Out due for 2008." (A72, A75.) In addition, Viacom "ignored EA's offer to reduce the distribution fees during 2008, and instead allowed EA to continue distributing *Rock Band* in 2008 (on the basis of the low-volume fee structure that was negotiated before the 2007 release of *Rock Band*) while demanding that reduced fees not begin until 2009, after the end of the Earn-Out period." (A74.)

Third, the Amended Complaint pleads that the Selling Stockholders were damaged in the amount of 3.5 times the profit that should have

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[2] According to the Court of Chancery, "[u]sing the implied covenant of good faith and fair dealing to imply an obligation to maximize those already uncapped payments is simply not in line with the reasonable expectations of the parties." (Mem. Op. at 16.) If there is an inference that can be drawn from the uncapped earn-out payments, however, it is that the non-movant Selling Stockholders expected to enjoy their full measure of the firm's Gross Profits, not that movant Viacom was free to manipulate Harmonix's bottom line.

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accrued to Harmonix's benefit in 2008 had Viacom acted as the parties expected when the Merger Agreement was signed. (A76.)

These allegations state a conceivable claim for a breach of the covenant of good faith and fair dealing and, therefore, are sufficient to sustain Count I. *See Northpointe Holdings, Inc. v. Nationwide Emerging Managers, LLC*, 2010 WL 3707677, at *5 (Del. Super. Sept. 14, 2010) (sustaining good faith and fair dealing claim in the face of a motion to dismiss where the alleged covenant was "consistent with the terms" of the agreement and the defendant's actions "are in contradiction of that purpose"). Viacom and Harmonix breached the implied covenant of good faith and fair dealing when they engaged in conduct that "frustrate[d] the 'overarching purpose' of the contract by taking advantage of their position to control implementation of the agreement's terms." *Dunlap*, 878 A.2d at 442. If these allegations do not suffice to state a claim for breach of the covenant of good faith and fair dealing, then Delaware law implies no protection for contracting parties deprived of the benefits of their bargain by counterparties that have manipulated their performance in ways the parties would have proscribed had they been contemplated before the contract was signed.

b. Courts routinely sustain similar allegations of a breach of the covenant of good faith and fair dealing.

Similar fact patterns concerning earn-out payments have been consistently sustained as sufficient to plead a good faith and fair dealing claim. *See O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188, 1195-97 (10th Cir. 2004) (applying Delaware law and holding that allegation of buyer's diversion of business to less profitable product line to avoid earn-out obligation was sufficient under heightened federal pleading standard); *MWI Veterinary Supply Co. v. Wotton*, 2012 WL 2576205, at *8 (D. Idaho July 3, 2012) (holding that allegations that buyer had purposefully and without justification suppressed product line in order to avoid earn-out payments were sufficient under heightened pleading standard); *Keating v. Applus+Technologies, Inc.*, 2009 WL 261091 (E.D. Pa. Feb. 4, 2009) (applying Delaware law and holding that allegation that buyer had delayed contract signing until after earn-out period was sufficient under heightened pleading standard); *Hodges v. MedAssets Net Revenue Sys., LLC*, 2008 WL 476140, at *6-7 (N.D. Ga. Feb. 19, 2008) (applying Delaware law and holding that allegation that buyer diverted sales from the acquired company's products to its own in order to reduce earn-out payments was sufficient under heightened federal pleading standard); *Interwave Tech., Inc. v. Rockwell Automation, Inc.*, 2005 WL 3605272, at *10-12 (E.D. Pa. Dec. 30, 2005); *see also Kuchera v. Parexel Int'l Corp.*, 719 F. Supp. 2d 121, 125-27 (D. Mass. 2010); *T.R. McClure & Co. Liquidating Trust v. TMG Acquisition Co.*, 1999 WL 692683, at *6-8 (E.D. Pa. Sept. 7, 1999) (sustaining good faith and fair dealing claim where plaintiff alleged that the buyer of a company had attempted to reduce earn-out payments by suppressing sales).

Keating, a case decided under Delaware law, is on point. The plaintiffs sold their business to defendant Applus in exchange for an earn-out based on revenue from a class of contracts Applus entered into for the next six years. *Keating*, 2009 WL 261091, at *1. Applus sought to secure a contract with the Illinois Environmental Protection Agency in the final year of the earn-out period, and the plaintiffs alleged that Applus purposefully delayed and prolonged the bidding process so that it would not secure the contract until after the earn-out period expired. *Id.* Rejecting defendants' arguments that they complied with the terms of the sales agreement, the court held that "Applus cannot avoid its contractual obligations by creating, in bad faith, an outcome that technically satisfies the express terms of the [contract], but deprives plaintiffs of their legitimate expectations. Determination of whether Applus actually engaged in the alleged conduct requires a fact-intensive inquiry not appropriate in deciding a motion to dismiss." *Id.* at *4. *Keating* is on all fours: when faced with a contract that under any other circumstances would have increased the earn-out payment, Viacom artificially altered the terms for the purpose of preventing the Selling Stockholders from receiving the fruits of their bargain.

This is not a case in which a plaintiff merely alleges that the defendant, for unrelated reasons, did not work as hard as the plaintiff had hoped in making its business a success. In *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126 (Del. Ch. 2009), for example, the defendant-acquirer had suffered serious setbacks in its overall business, which led it to reduce its investments in Squid Soap, the acquired business. *Id.* at 134-35. The Court of Chancery rejected a good faith and fair dealing claim because the complaint did not allege that defendants' conduct was undertaken in bad faith, and because the plaintiff had failed to seek a promise to make certain expenditures on Squid Soap sales (an efforts clause). *Id.* at 147-48. (The agreement in that case also required the buyer to return the company to the seller if it did not meet certain marketing and sales benchmarks, making it clear that the parties had considered and contracted precisely for what would happen if the buyer's sales and marketing efforts fell below the plaintiff's expectations. *Id.* at 132-33, 147.)

Nor are the facts and allegations of this case like *Nemec v. Shrader*, which concerned the exercise of a party's bargained-for contractual call option. *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010). In *Nemec*, the board of Booz Allen exercised a contractual right under the Officers Stock Rights Plan to redeem the outstanding shares of retired officers at book value before entering a merger that caused the value of the redeemed shares to be significantly higher. *Id.* at 1124. This Court held that the call option that Booz Allen had bargained for foreclosed the claim, citing the lower court's finding that "[c]ontractually negotiated put and call rights are intended by both parties to be exercised at the time that is most advantageous to the party invoking the option." *Id.* at 1126 (*quoting Nemec v. Shrader*, 2009 WL 1204346, at *5 (Del. Ch. Apr. 30, 2009)). Here, however, no provision in the Merger Agreement gave Defendants the right to take any benefits from lowered costs for themselves in exclusion of the Selling Stockholders. In fact, whereas the Court recognized that it is the very nature of call options that they are to "be exercised at the time that is most advantageous to the party invoking the option," courts have repeatedly recognized that it is the very nature of earn-out provisions that the party with discretion must use good faith to see that the earn-out has value. *See RBS Holdings, Inc. v. Gordon & Ferguson, Inc.*, 2008 WL 782616, at *5 (S.D.N.Y. Mar. 26, 2008) ("[W]here one party to a contract grants to the other party a share in the benefits of its business, there is an implied obligation on the part of the respondents not to render valueless the right conferred by the contract." (alterations and quotation marks omitted)); *T.R. McClure & Co.*, 1999 WL 692683, at *6-8 ("[T]he Earn-Out Agreement's terms envision that [defendant] would, if feasible, act so as to generate additional purchase price consideration. It is reasonable to require that, in doing so, [defendant] act in good faith to make the parties' expectations come to fruition.").

Winshall's complaint is not that Viacom failed to maximize the earn-out. Nor is it that Viacom failed to do everything within its power to make Harmonix a success. Rather, Winshall alleges that Viacom and Harmonix acted affirmatively to thwart the expectations of the Selling Stockholders by disguising the *quid pro quo* for keeping fees high in 2008 as advertising revenue of other Viacom companies and accelerated cash payments for the purpose of avoiding earn-out obligations to the Selling Stockholders. The case is therefore no different than *Keating*, in which the defendants were alleged to have manipulated when and how the money flowed in an effort to deprive the plaintiffs of their bargain.

2. The Court of Chancery erred by equating the Selling Stockholders' "reasonable contractual expectations" under the Merger Agreement with the terms of the

Original Distribution Agreement, which did not exist when the Merger Agreement was executed.

The covenant of good faith exists precisely because the law recognizes that it is often neither desirable nor possible for parties to reduce all of their shared expectations to writing. Sometimes this is because the parties "have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations." *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986) (quoting *Corbin on Contracts* (Kaufman Supp. 1984), § 570); *accord Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1032-33 (Del. Ch. 2006). And sometimes this is because of the practical impossibility of delineating every kind of misbehavior that the parties would have agreed to prohibit if they had unlimited time and resources to negotiate all imaginable contingencies. *Amirsaleh*, 2009 WL 3756700, at *4; *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440 (Del. Ch. 2012) ("The implied covenant [of good faith and fair dealing] seeks to enforce the parties' contractual bargain by implying only those terms that the parties would have agreed to during their original negotiations if they had thought to address them.").

The nature of a good faith and fair dealing claim is that a situation arose that the parties did not foresee or consider at the time of contracting. In this case, that circumstance was Defendants' manipulation of Harmonix's Gross Profit by the negotiation of the 2008 Term Sheet. The Court of Chancery concluded that Defendants did not undermine Harmonix's capacity to generate profit below the level reasonably expected by the parties at the time they entered the Merger

Agreement. (Mem. Op. at 14.) This reasoning entirely circumvents the core inquiry of the good faith and fair dealing claim: whether the parties, at the time of contracting, would have proscribed the Defendants' manipulation of the distribution agreements *had they contemplated it*. Winshall alleged that they would have, and this covenant, so identified, is entirely consistent with the earn-out provisions of the Merger Agreement. *See RBS Holdings*, 2008 WL 782616, at *5 ("[W]here one party to a contract grants to the other party a share in the benefits of its business, there is an implied obligation on the part of the respondents not to render valueless the right conferred by the contract." (alterations and quotation marks omitted)); *T.R. McClure & Co.*, 1999 WL 692683, at *6-8 ("[T]he Earn-Out Agreement's terms envision that [defendant] would, if feasible, act so as to generate additional purchase price consideration. It is reasonable to require that, in doing so, [defendant] act in good faith to make the parties' expectations come to fruition.").

Moreover, the Court of Chancery erred by substituting the reasonable expectations that are pled in the Amended Complaint with its own estimate of the parties' reasonable expectations. In the Court of Chancery's view, the only reasonable expectation that the Selling Shareholders could have had was that the fees charged by EA would never fall below the level set in Original Distribution Agreement. But that agreement did not even exist when the Merger Agreement was signed in September 2006; it was negotiated six months later, in March 2007. Thus, the court used the wrong document by which to measure the expectations of the parties. To the extent the court engaged in any analysis at the motion to dismiss stage, it should have determined the Selling Stockholders' expectations in September 2006, when they bargained for their right to receive a measure of Harmonix's Gross Profit through 2008.

Winshall's allegations in the Amended Complaint should have ended the court's inquiry. The ultimate question in a good faith and fair dealing claim – how the parties would have addressed the unforeseen circumstance – is a question of fact to be determined after discovery. Accordingly, under Delaware law, "a fairly pleaded claim of good faith/bad faith raises essentially a question of fact which generally cannot be resolved on the pleadings or without first granting an adequate opportunity for discovery." *Desert Equities*, 624 A.2d at 1208; *see also Northbound Grp., Inc. v. Norvax, Inc.*, 2012 WL 394336, at *8-9 (N.D. Ill. Feb. 6, 2012) (reasoning that a court cannot dismiss good faith and fair dealing claim unless contract is clear that party with discretion can use it to reduce earn-out).

The court below committed reversible error by failing to credit the well-pled allegations of the Amended Complaint.

II. THE COURT OF CHANCERY ERRED WHEN IT CONCLUDED THAT THE PURPOSE OF EA'S OFFER TO REDUCE ITS FEES IN 2008 WAS SOLELY TO SECURE ADDITIONAL DISTRIBUTION RIGHTS AFTER 2008.

A. QUESTION PRESENTED

Whether the lower court failed to draw all inferences in favor of the non-moving party when it concluded that the purpose of EA's offer to reduce its fees in 2008 was solely to secure additional distribution rights after 2008. This question was preserved. A286-98, A442, A461, A465-66. *See also* A72.

B. STANDARD AND SCOPE OF REVIEW

Judgments granting motions to dismiss under Court of Chancery Rule 12(b)(6) are reviewed de novo "to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Gantler*, 965 A.2d at 703 (quotation marks omitted).

C. MERITS OF ARGUMENT

One mistaken factual determination drove the Court of Chancery's opinion: Despite the clear allegation that "EA offered Harmonix a reduction in 2008 distribution fees" (A72.), the court concluded that the purpose of EA's offer was solely to secure rights to Harmonix products sold after the earn-out period. (Mem. Op. at 18 ("Winshall seeks to have the Selling Stockholders receive increased earn-out payments based on assets – products to be sold after 2008 that EA wished to distribute – in which the Selling Stockholders had no contractual expectancy.").) However, the Amended Complaint put Defendants on notice of Winshall's allegation that "the huge and immediate success of *Rock Band* following its November 2007 launch gave Defendants an opportunity to renegotiate for a reduction of distribution fees in 2008 if EA wanted to *retain* the distribution rights to *Rock Band* and its sequels." (A72 (emphasis added).) In fact, "EA offered Harmonix a reduction in 2008 distribution fees in order to *retain* the worldwide distribution rights to *Rock Band* and its sequels. (A72 (emphasis added).) The word "retain" clearly implies (if it does not overtly allege) that EA's continued distribution rights in 2008 were in doubt. The Court of Chancery should have drawn an inference (if not credited the averment) in favor of Winshall – and given Winshall an opportunity to prove – that EA offered to reduce distribution fees for 2008 products because it wanted to secure or shore-up the rights to continue distributing those products in 2008.

In effect, the Court of Chancery concluded that not only had EA secured all the distribution rights for Harmonix products in 2008, but that, as a factual matter, EA did not even perceive a risk to its distribution rights that would lead it to make concessions to Harmonix to continue distributing its products in 2008. Nothing in the Amended Complaint suggests that EA had, as the Court of Chancery concluded, locked up the rights to all *Rock Band* products on the market through 2008. This should have been the end of the inquiry.

1. The Court of Chancery should not have relied on the Original Distribution Agreement submitted for the first time with the reply brief.

The Original Distribution Agreement should not have been considered in connection with Defendants' motion to dismiss. Nevertheless, the Court of Chancery not only relied on it, but improperly drew inferences from it in favor of Defendants, rather than Winshall. On a motion to dismiss, the Court of Chancery may only rely on documents outside the complaint in two limited circumstances: "The first exception is when the document is integral to a plaintiff's claim and incorporated into the complaint. The second exception is when the document is not being relied upon to prove the truth of its contents." *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) (citations omitted). Neither exception applies in this case. The Original Distribution Agreement was neither integral to Winshall's claim nor incorporated by reference into the Amended Complaint. Although the Amended Complaint briefly referred to it, it is not the contract upon which Winshall sues, and it is not discussed at length or quoted at all in the Amended Complaint. It therefore should not have been considered by the Court of Chancery. By rule, before a court can consider a document outside of the pleadings, such as the Original Distribution Agreement, it must convert the motion to one for summary judgment, and permit the non-moving party an opportunity for discovery. *Id.* at 613. There is no dispute that the Court of Chancery did not afford that opportunity to Winshall in this case and permit him discovery on EA and Viacom's negotiations over the 2008 Term Sheet.

The Original Distribution Agreement was first submitted to the court with Defendants' *reply* brief. (A312.) Winshall pled in the Amended Complaint generally that Harmonix had an opportunity, in 2008, to negotiate a new distribution agreement with EA and that it was in a strong position because of the blockbuster-status of *Rock Band*. (A72.) The idea that Winshall should have anticipated and explained in the Amended Complaint the contents of the Original Distribution

Agreement (to which none of the Selling Stockholders was a party) is inconsistent with Delaware's firmly-established notice-pleading principles. To be sure, and as explained more fully below, the Court of Chancery was wrong in its interpretation of the distribution agreements. But it committed a more fundamental error when it analyzed and relied upon the new document and Defendants' new arguments in its decision. *See Thor Merritt Square, LLC v. Bayview Malls LLC*, 2010 WL 972776, at *5 (Del. Ch. Mar. 5, 2010); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *4 (Del. Ch. Oct. 19, 2006) ("Under the briefing rules, a party is obliged in its motion and opening brief to set forth all of the grounds, authorities and arguments supporting its motion [and] should not hold matters in reserve for reply briefs."); *Criden v. Steinberg*, 2000 WL 354390, at *4 (Del. Ch. Mar. 23, 2000).

After Defendants submitted the Original Distribution Agreement with their reply brief, the Court of Chancery analyzed the technical, 75-page document and came to the incorrect conclusion that EA had secured the rights to distribute all the *Rock Band* products throughout the earn-out period (through December 31, 2008). In response, Plaintiff's counsel explained at oral argument why, even considering the Original Distribution Agreement, EA was required to reach a new agreement with Harmonix to sell its products in 2008.

First, counsel explained that Harmonix and EA's failure to agree on important price terms in the Original Distribution Agreement allowed Harmonix to terminate the Original Distribution Agreement. (A442.) The parties' agreement on those terms was a condition precedent to EA's distribution rights under the agreement. (A365.) The Court of Chancery excluded this argument because it "was never fairly made in the Amended Complaint or in Winshall's brief in opposition to Viacom and Harmonix's motion to dismiss." (Mem. Op. at 22.)

Second, counsel explained that the Original Distribution Agreement did not guarantee EA the right to distribute *Rock Band 2* and that Harmonix was allowed to demand new terms based on the changes in the cost structure of *Rock Band 2*. (A465.) Indeed, the cost structure had in fact changed permitting Harmonix to demand concessions before signing the final agreement giving EA the right to distribute *Rock Band 2*. (A461; A465-A466.) The Court of Chancery did not consider this fact in its written decision. The court's failure to consider either argument was error.

It is worth pausing to note what is required under Delaware's notice-pleading regime: "a short and plain statement of the claim showing that the pleader is entitled to relief." Ct. Ch. R. 8(a)(1). "In alleging a breach of contract, a plaintiff need not plead specific facts to state an actionable claim." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003). The Amended Complaint complied with this standard. It described in general terms that the Selling Stockholders were entitled to enjoy a measure of Harmonix's Gross Profit, that Harmonix negotiated a new distribution agreement with EA, that EA in fact offered lower distribution fees in 2008 as a result of these negotiations, and that Viacom intervened and diverted benefits to outside of the earn-out calculation. This is exactly what Rule 8 envisions.

2. **EA needed to reach a new agreement to distribute *Rock Band 2* in 2008, and was required to grant Harmonix concessions based on increased royalty costs.**

The Court of Chancery's reliance on the Original Distribution Agreement demonstrates precisely why extraneous documents cannot be considered on a motion to dismiss. Contrary to the inferences that it drew, EA needed to reach a new, written agreement with Viacom to distribute *Rock Band 2* in 2008, and, based on the document, EA had good reason to be insecure about its continuing rights to distribute other *Rock Band* games during the earn-out period.

The Original Distribution Agreement created technical rules for what would happen if Harmonix chose to create a sequel for *Rock Band*:

> If EA has achieved the Sequel Threshold at the time of such notification, then EA shall have the sole exclusive right to reproduce, assemble and sell such Sequel, on terms substantially similar to the terms of this Agreement applicable to Game Products (*provided that the Parties may revisit and renegotiate terms that may be affected by substantial changes in variable costs, such as licensed content costs*), and the Parties shall negotiate in good faith a separate written agreement therefor; provided that if EA does not agree with Harmonix on such separate written agreement to sell the Sequel within thirty (30) days after Harmonix's delivery to EA of a proposed written agreement to govern the reproduction, assembly and/or sale of such Sequel . . . then Harmonix may engage third parties to reproduce, assemble and sell such Sequel.

(A353 (emphasis added).) Importantly, EA did not have the right to distribute *Rock Band 2* under the Original Distribution Agreement. It had a leg up on other distributors, but the parties needed to negotiate and reach a new agreement before *Rock Band 2* could be distributed by EA for the holiday season of 2008. (A353.) EA therefore had to reach an agreement with Harmonix to distribute *Rock Band* 2, and the huge success of *Rock Band* gave EA every incentive quickly to secure an agreement with Harmonix.

Further evidencing EA's need to sign a new agreement, the Original Distribution Agreement gave Harmonix the express right to demand concessions in light of changing costs. (A353.) It was intended to and did give Harmonix the right to reduce its distribution fees where other costs of making *Rock Band* changed. And, as explained at oral argument below, Harmonix incurred a substantial increase in the royalties it had to pay for the music that made the *Rock Band* games so popular, permitting it to invoke its contractual right to demand concessions. (A461; A465-A466.)

Rock Band 2 was not the only *Rock Band* game that EA sold in 2008 that was outside the terms of the Original Distribution Agreement. On the face of the Original Distribution Agreement, EA had not secured the right to sell versions of *Rock Band* made for PlayStation 2. (A331) But the 2008 Term Sheet contemplated *Rock Band* games to be released for that system in 2008. (A263-A264.) Under the Original Distribution Agreement, EA had the option to distribute *Rock Band* games for other platforms, but only if EA could agree with Harmonix on the "relevant economic and scheduling terms" through good faith negotiations. (A351.)

At the very least, these contractual provisions are ambiguous, and it was improper for the lower court to resolve contractual ambiguities at the pleading stage. *See VLIW Tech.*, 840 A.2d at 614-15 ("In deciding a motion to dismiss, the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions. Dismissal, pursuant to Rule 12(b)(6), is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law.") (footnote omitted).

The Court of Chancery was therefore wrong when it concluded that "[i]t is undisputed that EA had rights to the *Rock Band* products that entered the market during the earn-out period – *Rock Band* and its sequel *Rock Band 2.*" (Mem. Op. at 19.) Although the Original Distribution Agreement gave some opportunities for EA to participate in the sales of new *Rock Band* products, it conditioned those rights on the parties reaching an agreement, and specifically allowed Harmonix to negotiate different price terms from the original *Rock Band* to account for changing costs. One can infer from the Amended Complaint and the release dates for *Rock Band 2* in September and October 2008 that it was the development of *Rock Band 2* that caused EA and Harmonix to begin negotiating the 2008 Term Sheet in the early part of 2008. (A74, A75; A263.)

3. EA's distribution rights under the Original Distribution Agreement were at significant risk because the parties had failed to agree on key terms.

During oral argument, Plaintiff's counsel provided another reason why EA needed to negotiate a new distribution agreement with Harmonix for products released in 2008 – EA and Harmonix had never negotiated some key aspects of the original distribution agreement. Specifically, the "Minimum Royalty Base" and the "Minimum Sales Deduction" terms remained open. (A440; A441.) The Original Distribution Agreement clearly provided that "EA's rights and obligations to distribute the Games Products in any country or other territory are conditioned upon the agreement by Harmonix and EA upon a Minimum Royalty Base and Minimal Sales Deduction." (A365.)

The Original Distribution Agreement contemplated two "Price Bands" for *Rock Band*, Price Band A and Price Band B. (A388; A403.) The Minimum Sales Deduction was essentially the amount of money that EA could keep for itself for *Rock Band* games sold in "Price Band B," or those units that were sold at a certain percentage below the launch price. (A388.) Thus, as the price of *Rock Band* began to come down (for example when *Rock Band 2* was ready to launch in fall 2008), the amount of money that EA would derive from sales was not yet set.

The omission of a key price term renders a contract unenforceable. *Hindes v. Wilmington Poetry Soc'y*, 138 A.2d 501, 503 (Del. Ch. 1958) (contract unenforceable where royalty rate was to be set in future); *Most Worshipful Prince Hall Grand Lodge of Free & Accepted Masons of Del., Inc. v. Hiram Grand Lodge Masonic Temple, Inc.*, 80 A.2d 294, 295 (Del. Ch. 1951); 1 Richard A. Lord, Williston on Contracts § 4:29 (4th ed. 2012). The Court of Chancery therefore erred when it concluded that, from this omission, it could not "plausibly infer . . . that the failure to have locked in Exhibit L to the Original EA Agreement gave Viacom a clear right to terminate the contract." (Mem. Op. at 23.) It is certainly "conceivable," drawing all reasonable inferences in favor of Winshall, that EA was concerned about its ability to distribute *Rock Band* in the future after failing to agree with Harmonix on how much money it was to receive for distributing the game once the price declined. And the lower court should have inferred that EA was worried about its right to distribute *Rock Band* in light of the impending release of *Rock Band 2* in 2008, when the price of the original game was likely to decline.

Even if Harmonix's right to negotiate a new distribution agreement for *Rock Band 2* and its right to terminate the Original Distribution Agreement are in dispute, it does not foreclose the possibility that EA granted valuable concessions to eliminate any uncertainty as to those rights. The resolution of a bona fide dispute over an agreement is valid consideration. *See, e.g.*, *Richards Constr. Co. v. Air Conditioning Co. of Hawaii*, 318 F.2d 410, 413-14 (9th Cir. 1963). The Court of Chancery itself recognized that commercial parties value the opportunity to "shore up" legal rights that are unclear or might be subject to dispute. Much of the focus of the Court of Chancery's opinion was on another *Rock Band* game based on the music of The Beatles, called *The Beatles: Rock Band*, which might or might not have been a "sequel" under the terms of the Original Distribution Agreement. Harmonix was already developing the game when the 2008 Term Sheet was signed and planned to launch it in September 2009. (Mem. Op. at 7-8.) After opining that "[i]t is clear on the face of the Original EA Agreement that *Rock Band 2* would be a Sequel, but not entirely clear that a derivative game involving a specific band, such as *The Beatles: Rock Band*, would be," it concluded that the chief motivation of EA in pursuing the 2008 Term Sheet was a "guaranteed right to *The Beatles: Rock Band*." (Mem. Op. at 5, 20.) It makes no sense that it would be "conceivable" for EA to agree to new terms to "shore up" the rights to one game but not another. The lower court's own reasoning required it to infer that EA sought to shore up its rights to *Rock Band* and *Rock Band 2* when it negotiated the 2008 Term Sheet.[3]

In short, it simply cannot be determined on the pleadings what EA sought and what EA received during the renegotiation of the distribution agreement. It was error for the Court of Chancery to try to do so here. *See Vanderbilt Income & Growth Assocs.*, 691 A.2d at 613 ("On a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents." (citations omitted)). In *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531 (Del. 2011), this Court considered a similar error. Central Mortgage had purchased certain mortgage servicing rights from Morgan Stanley, but soon discovered that the related mortgages were not of the quality promised. *Central Mortg.*, 27 A.3d at 534. Central Mortgage pled that it had given contractually adequate notice (as required by the purchase agreement) to Morgan Stanley for each defective loan and a contractually adequate opportunity to cure. *Id.* at 538. It also pled that it had previously forwarded to Morgan Stanley files for the defective loans it received from the federal agencies that purchased

[3] The Court of Chancery also suggested that the "key concession" that EA sought was to impose an "obligation to develop and launch *The Beatles: Rock Band*," which Harmonix was not required to do under the Original Distribution Agreement. (Mem. Op. at 20.) But this is no less true of *Rock Band 2*. When the parties began their negotiations in mid 2008, *Rock Band 2* was only in development, just as *The Beatles: Rock Band* was at the time the 2008 Term Sheet was executed. Moreover, it is implausible that EA would seek, and Harmonix would give, a promise to develop a game that Harmonix did not plan to develop already (not to mention the fact that Harmonix was already developing *The Beatles: Rock Band* when it executed the 2008 Term Sheet).

them. *Id.* The Court of Chancery determined that this method of notice was defective because Central Mortgage "did not point out to Morgan Stanley where the representations and warranties in the [agreement] had been violated." *Id.* at 536. In reversing the judgment, this Court held that "[w]hether this notice was sufficient as a matter of fact is an inquiry more appropriate for a later stage of the proceeding." *Id.* at 538.

More to the point, a plaintiff is not required to disprove every potential obstacle that could arise in its path to relief, which is precisely what the Court of Chancery asked Winshall to do when it began relying upon documents outside of the Amended Complaint. As this Court recently said: "it may, as a factual matter, ultimately prove impossible for the plaintiff to prove his claims at a later stage of a proceeding, but that is not the test to survive a motion to dismiss." *Central Mortg.*, 27 A.3d at 536. Accordingly, Winshall is entitled to discovery to prove that Harmonix had an opportunity to reduce its Direct Variable Costs because of EA's desire to secure the distribution rights to all *Rock Band* products sold (including *Rock Band 2*) on all platforms (including PlayStation 2) in 2008.

CONCLUSION

The Amended Complaint alleges a scheme by Viacom *for the purpose of* avoiding earn-out payments that it promised to the Selling Stockholders. In exchange for Harmonix's business, Viacom promised the Selling Stockholders a multiple of Harmonix's Gross Profit for two years. After Viacom concluded that it had made a bad deal for itself, Viacom negotiated an agreement with EA that maintained higher costs during the earn-out period – for the purpose of deflating Harmonix's profits – in exchange for substantial consideration that would not affect the earn-out payment. Under the facts alleged, Viacom's behavior deprived Selling Stockholders of the benefit of their bargain. The conduct described in the Amended Complaint, if proven, would surely require condemnation under Delaware law, however narrowly the covenant of good faith and fair dealing is circumscribed.

For all the foregoing reasons, the judgment of the Court of Chancery dismissing Count I of the Amended Complaint should be reversed, and that count remanded to proceed to discovery.

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