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Case Number 593,2016 D

IN THE

Supreme Court of the State of Delaware

GAMCO ASSET MANAGEMENT INC.,

Plaintiff Below, Appellant,

v.

IHEARTMEDIA, INC., IHEARTCOMMUNICATIONS, INC., BAIN CAPITAL PARTNERS, LLC, THOMAS H. LEE PARTNERS, L.P., ROBERT W. PITTMAN, VINCENTE PIEDRAHITA, BLAIR HENDRIX, DANIEL G. JONES, OLIVIA SABINE, CHRISTOPHER TEMPLE, DALE W. TREMBLAY, and DOUGLAS L. JACOBS,

Defendants Below, Appellees,

and

CLEAR CHANNEL OUTDOOR HOLDINGS, INC.,

Nominal-Defendant Below, Appellee.

No. 593, 2016 D

COURT BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE,
C.A. No. 12312-VCS

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NATURE OF PROCEEDINGS

GAMCO appeals the dismissal of its stockholder derivative claims against Clear Channel Outdoor Holdings, Inc. ("CCOH") and related claims against CCOH's board, its majority stockholder, iHeartCommunications, Inc. ("iHC"), iHC's parent company, iHeartMedia, Inc. ("iHM"), and the majority stockholders of iHM – Bain Capital Partners, LLC ("Bain") and Thomas H. Lee Partners, L.P. ("THL," together with iHC, iHM, and Bain, the "iHeart Defendants").

GAMCO's Verified Stockholder Derivative Complaint contained two primary sets of allegations. *First*, under a contractual arrangement that predates its initial public offering, CCOH's cash is swept at the end of each day to iHC in return for an increase on the balance of an intercompany note. GAMCO claimed that the CCOH Board of Directors has a fiduciary obligation to demand repayment of that note because of iHC's debt and alleged financial difficulties. *Second*, GAMCO alleged that the Board breached its fiduciary duties by improperly approving two arm's-length transactions – the sale of non-strategic assets and a note offering – and then issuing two *pro rata* dividends in order to provide iHC with liquidity.

The Court of Chancery properly dismissed GAMCO's claims in a well-reasoned and thorough opinion. Under the binding (and unchallenged) agreements between CCOH and iHC, any cash that CCOH would receive from demanding

repayment of the intercompany note would be automatically re-swept to iHC. As a result, any demand of repayment would be futile. The court properly held that CCOH's Board had no fiduciary obligation to make a futile demand. On appeal, GAMCO does not challenge this independent basis for dismissal. That is fatal to GAMCO's appeal of its repayment demand claim.

Moreover, as the Court of Chancery held, GAMCO's repayment demand claim is barred by release and *res judicata*. Precisely the same claim was asserted by other CCOH stockholders in 2012, represented by some of the same attorneys that now represent GAMCO. CCOH appointed a Special Litigation Committee ("SLC") to investigate the claim, and the SLC brokered a forward-looking settlement that was approved by the Court of Chancery in 2013. That settlement empowered an independent committee of the CCOH Board to monitor the anticipated growth of the note and the financial condition of the parent and to demand repayment under specific, enumerated circumstances that GAMCO concedes have not arisen. GAMCO's current claim is based on a continuation of the same circumstances at issue in the prior litigation. The parties to the settlement expressly anticipated that the note would continue to grow and the parent would continue to have financial difficulties. That is exactly why they agreed to a forward-looking settlement. The 2013 settlement bars GAMCO from reasserting

the same repayment demand claim here. *Res judicata* provides another independent ground for dismissal.

With respect to GAMCO's claims regarding CCOH's asset sales and note offering, the dividends resulting from those transactions were paid *pro rata* so that all stockholders – including minority stockholders like GAMCO – were treated equally. Under *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971), Defendants' equal treatment of all stockholders entitles them to the safe harbor of the business judgment rule. That protection makes eminent sense. The iHeart Defendants have by far the largest financial stake in CCOH, and therefore have every incentive to maximize CCOH's value. GAMCO pleads no facts suggesting that Defendants acted against their own interests here.

SUMMARY OF ARGUMENT

I. Denied. The Court of Chancery properly dismissed GAMCO's repayment demand claim for three independent reasons.

First, the court held that GAMCO's repayment demand claim was not actionable because it would have been futile for CCOH's Board to demand repayment and because GAMCO had failed to allege any breach of the 2013 forward-looking settlement. GAMCO does not challenge this independent basis for the court's decision, and so that decision must be affirmed.

Second, GAMCO's repayment demand claim is based on the same operative facts as litigation brought in 2012. There, as here, the plaintiffs alleged that iHC was facing financial difficulties, that the balance on the Revolving Note was high and growing, and that a conflicted CCOH Board refused to demand repayment of the Revolving Note. The 2012 litigation was resolved by a settlement that released all claims that "are based upon, arise out of, or relate in any way, directly or indirectly," to the allegations in or subject matter of that litigation. B325-26. This broad release encompasses GAMCO's claims, which are based on the same operative facts as the prior litigation.

Third, because GAMCO's current claims are merely a continuation of the operative facts underlying the 2012 litigation, they are also barred by *res judicata*.

II. Denied. The Court of Chancery properly disposed of GAMCO's claims challenging CCOH's asset sales and note offering, and the resulting dividends, under the business judgment rule. Under *Sinclair Oil*, the declaration and payment of *pro rata* dividends – like those approved by the CCOH Board – are entitled to the presumptions of the business judgment rule because they treat all stockholders equally. The Court of Chancery has held that, notwithstanding *Sinclair Oil*, there are very narrow circumstances where a controller's desire for liquidity could trigger entire fairness review for a transaction that treated all stockholders equally. These extraordinary circumstances would be akin to a fire-sale transaction. GAMCO failed to allege any facts suggesting that the asset sale and note offering transactions that funded the dividends were tantamount to a "fire sale" or involved "a flawed sales process[ ] or an unfair price." Op. 46. Nor could it. The asset sales and the note offering were executed at arm's length with unrelated third parties.

STATEMENT OF FACTS

CCOH is a Delaware corporation that sells advertising space on outdoor advertising displays. *See* A29 ¶ 34. The individual defendants – Pittman, Piedrahita, Hendrix, Jones, Sabine, Temple, Tremblay, and Jacobs – are the eight members of the CCOH Board. *See* A27-29 ¶¶ 25-33. iHC, formerly known as Clear Channel Communications, Inc., owns approximately 90% of CCOH's stock and is an indirect wholly owned subsidiary of iHM. *See* A26-27 ¶ 20, A29-30 ¶ 35. iHM is the nation's largest owner and operator of radio stations. *See* A26 ¶ 18. Bain and THL are private equity funds that collectively control approximately 67% of iHM. *See* A27 ¶ 24.

I. The Intercompany Agreements

Historically, CCOH was an indirect wholly owned subsidiary of iHC. *See* A29-30 ¶¶ 35-36. In November 2005, CCOH made an initial public offering of a minority share of its stock. *See* A30 ¶ 36. Before that IPO, CCOH entered into a series of Intercompany Agreements with iHC, including a Master Agreement and a Corporate Services Agreement, which included a "Cash Management Arrangement." *See* A30 ¶ 37.

These agreements give iHC substantial control over CCOH. Pursuant to the Cash Management Arrangement, iHC "manag[es] [CCOH's] excess operating cash." B87; *see* A32 ¶ 41. "[O]n a daily basis, cash from [CCOH's] domestic

operations" is consolidated and then used for CCOH's accounts payable and payroll obligations. B88; *see* A32 ¶ 41. Any remaining amounts automatically are swept "to a master account maintained by [iHC] and either invested or subsequently disbursed by [iHC] for its general corporate purposes." B87-89; *see* A32 ¶ 41. In its discretion, iHC may also choose to advance funds to CCOH. *See* B88; *see* A32-33 ¶ 42. Two revolving promissory notes, which are "demand obligations," track any funds owed by iHC to CCOH and vice versa ("Revolving Note," for the note representing amounts owed by iHC). *See* B87-89, B220-31; A32 ¶ 41.[1]

The Master Agreement requires that CCOH receive approval from iHC to acquire or dispose of assets exceeding $5 million or to incur more than $400 million of debt. *See* B94, B191-92; A32-33 ¶ 42 ("CCOH cannot seek external sources of financing."). And the Corporate Services Agreement requires CCOH to use various management services provided by iHC. *See* B84, B94-96, B105.

[1] The Court of Chancery properly relied on CCOH's public filings for the terms of the Intercompany Agreements. *See* Op. 4 n.2, 6-8. GAMCO has not argued that the court's reliance on those public filings was error, nor could it, because the agreements were integral to GAMCO's claims and were incorporated into the complaint by reference, *see* A30-33 ¶¶ 37-44, and because courts may take judicial notice of a company's public filings, *see Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013); *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006).

iHC's contractual rights to control CCOH, and the operational integration between the companies, were fully disclosed to potential investors prior to the IPO. The prospectus described the agreements, *see* B90-99, and the agreements themselves were attached to CCOH's registration statement, *see* B101-22, B131-95. The prospectus further warned investors that the agreements were "made in the context of a parent-subsidiary relationship and the terms of these agreements may be more or less favorable to [CCOH] than if they had been negotiated with unaffiliated third parties." B69.

Potential investors were also warned that CCOH could not "terminate these agreements or amend them in a manner [CCOH] deem[s] more favorable so long as [iHC] continues to own shares of [CCOH] common stock representing more than 50% of the total voting power of [CCOH] common stock." B85; *see* B95, B114. The prospectus further explained that CCOH must indemnify iHC against all liabilities arising from "any breach . . . of the Master Agreement" and any "credit support arrangement by [iHC] or any of its affiliates for [CCOH's] benefit." B92, B171.

II. The Prior Litigation Concerning the Intercompany Agreements

In 2012, CCOH stockholders brought two nearly identical derivative suits against the CCOH Board, iHC, Bain, and THL.[2] Those stockholders alleged that THL's and Bain's 2008 leveraged buyout of iHM had "saddled" iHC with a "debilitating debt load" and placed iHC "at risk of going into bankruptcy." B234-35 ¶ 3. They asserted that iHC had "forc[ed] [CCOH] and its public shareholders to become an involuntary source of capital" through the pre-IPO Cash Management Arrangement. B235 ¶ 4. They claimed that the Board's fiduciary duties obligated it to "demand immediate repayment" of the Revolving Note, which, at that time, had a balance of $650 million. *Id.* ¶ 7. And they claimed that the CCOH Board had breached its fiduciary duties by not terminating the Cash Management Arrangement or rescinding the Revolving Note. *See* B246-47, B254.

In response to these lawsuits, the Board created the SLC, composed of two independent directors (Messrs. Temple and Jacobs), and delegated full authority to the SLC "to investigate all matters related to the Litigation, review and evaluate

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[2] The two lawsuits were consolidated, and the complaint filed by the City of Pinellas Park Firefighters Pension Board was deemed the operative one. *See* B233-54. The Court of Chancery properly relied on judicial filings from the 2012 litigation, including the complaints and the settlement. *See* Op. 9-13 & n.7. GAMCO has not argued that the court's reliance on those judicial filings was error, nor could it, because those documents were integral to GAMCO's claims and were incorporated into the complaint by reference, *see* A36-39 ¶¶ 56-62, and because courts may take judicial notice of public filings. *See supra* note 1.

the findings of such investigation[,] and to take all actions as the [SLC] deem[ed] appropriate and in the best interests of the Corporation." B314. Assisted by independent counsel, the SLC conducted an eight-month investigation during which the SLC and its counsel met 40 times, interviewed 24 individuals (two twice), and reviewed thousands of documents. *See* B295.

The SLC determined that demanding repayment of the Revolving Note would be futile because "the uses that [CCOH] could make of its cash without [iHC's] consent were extremely limited" and, "unless put to a permitted use [such as issuing a dividend], any cash repaid by [iHC] as the result of a demand would be swept back to [iHC]." B281-82, B299. Moreover, the SLC found that demanding repayment could be harmful because "balances due under the [Revolving Note] constituted one of [CCOH's] principal sources of liquidity" given the constraints in the Master Agreement on CCOH's ability to borrow. B281-82, B299, B310; *see supra* p. 7.

The SLC also concluded that, although the Intercompany Agreements (including the Cash Management Arrangement) were favorable to iHC, CCOH could not legally alter or breach them "so long as [iHC] and its affiliates beneficially own more than 50% of the voting power of [CCOH] common stock." B273-74, B298-99, B309-10. The SLC found that any modifications to the Cash Management Arrangement needed to be approved by iHC's bank lenders because

there would be an event of default under the leveraged buyout credit agreement if those modifications were found to be materially adverse to the lenders. *See* B301. Such an event of default would cause billions of dollars to become due and payable immediately. *See id.* CCOH would have been liable for that amount given its indemnity agreement with iHC. *See* B298-99; *supra* p. 8.

Given these findings, the SLC determined that the interests of CCOH and its stockholders would be best served by a forward-looking settlement that addressed the balance of the Revolving Note and iHC's liquidity position on an ongoing basis. The settlement established an Independent Note Committee ("INC") composed of independent Board members, and gave them responsibility for monitoring the Revolving Note. *See* B330. The settlement empowered the INC to demand payment of the Revolving Note and to use the proceeds to issue a dividend to all stockholders whenever one of two financial triggers is satisfied. *See* B350-52. The first trigger is based on the iHC "Liquidity Ratio," which the settlement defined as iHC's cash, cash equivalents, and borrowing availability, divided by the amount of the Revolving Note apportionable to public stockholders. B321. That trigger is focused on ensuring that iHC is projected to have enough cash to cover repayment. The trigger is met whenever that liquidity ratio falls below 2.0x or is projected to fall below 2.0x within the next three months. *See* B351. The second trigger is met whenever the portion of the Revolving Note apportionable to public

stockholders exceeds or is projected to exceed $114 million within the next three months. *See id.* iHC must provide the INC with monthly and annual reports containing confidential financial information to allow the INC to determine whether the triggers are projected to be satisfied within the next three months. *See* B330-31.

The triggers were designed to address the situation – which was anticipated by the parties and which is exactly like that alleged by GAMCO in its complaint – where the balance of the Note continued to grow and iHC continued to face financial difficulties because of its debt load. B282. The triggers permit the INC to demand repayment "at the very time that the risks" that "the non-independent directors of [CCOH] will consider the interests of the *borrower*, [iHC], above the interests of [CCOH] . . . become most compelling." *Id.*[3]

In exchange for this relief, the settlement released:

> any and all Claims that (i) have been asserted in the Derivative Action, or (ii) that could have been asserted in the Derivative Action, or in any other court action . . . from the beginning of time through the date of this Stipulation, that are based upon, arise out of, or relate in any way, directly or indirectly, to: (a) the allegations made in, or the subject matter of, the Derivative Action; (b) the matters discussed in [the SLC Findings] filed concurrently with this Stipulation; . . . (e) any potential claims relating to the subject matter of the Derivative

[3] The settlement also reduced the Revolving Note balance by $200 million, used the proceeds to fund a *pro rata* dividend, and increased the interest rate for the Revolving Note. *See* B309-10, B329-34.

> Action identified by the SLC in the course of its investigation; and/or (f) this Stipulation.

B325-26, B334-36.

No CCOH stockholder objected to the settlement, and after conducting a fairness hearing, the Court of Chancery approved it as fair and reasonable. *See* B358-64. The court noted that, although the Intercompany Agreements were "formidable," they were fully disclosed to investors and could not now be broken by CCOH. B454-55. It further found that demanding repayment of the Revolving Note would have no "utility" because the Cash Management Arrangement would cause any of the repaid cash to be re-swept to iHC. B455; *see* B438. Moreover, demanding repayment could have "spillover effects" that would outweigh any benefits of such a demand. B451. Given those realities, the court concluded that the corporate governance reforms in the settlement would provide "substantial benefits on an ongoing basis." B455-56.

III. GAMCO's Complaint

On May 9, 2016, GAMCO filed its complaint asserting breach of fiduciary duty, unjust enrichment, and corporate waste claims against Defendants. GAMCO's claims are based on two categories of allegations: (1) the CCOH Board "refus[ed] to extricate CCOH from the [Intercompany Agreements] and to reduce the Company's exposure to iHC – including the failure to demand payment on the outstanding balance on the Revolving Note" (the "Repayment Demand Claim"),

and (2) the CCOH Board [redacted] (the "Dividend Claims"). A22 ¶ 9, A43-44 ¶ 74. These allegations were based in substantial part on board minutes that GAMCO received as a result of a Section 220 demand. *See* A43-44 ¶ 74.

A. The Repayment Demand Claim

GAMCO alleged that the Revolving Note balance "has increased as the iHeart Defendants' financial health has deteriorated," and "[v]irtually all or a sizable portion of the cash swept from the Company is used for iHC's day-to-day operations or to prop up the iHeart Defendants' unsustainable capital structure." A18 ¶ 3; *see* A17 ¶ 1. GAMCO claimed that "[a]ny director acting in good faith" would "conclude that the Revolving Note balance should have been and has to be reduced or eliminated." A24 ¶ 13.

B. The Dividend Claims

GAMCO also claimed that the CCOH Board breached its fiduciary duties by selling certain non-core assets and raising cash through a note offering, and using the proceeds to issue *pro rata* dividends in January 2016 and February 2016 to "provide cash to the iHeart Defendants." A66 ¶ 132.

The January Dividend. [redacted]

See A47 ¶ 82, A148. The Board approved the note offering on November 30, 2015. *See* A48 ¶ 84, A154. The subsidiary subsequently sold $225 million of 8.75% notes to the investing public. *See* A48-49 ¶ 85; B356. CCOH used the proceeds of that offering to issue a $217.8 million *pro rata* dividend to all stockholders in January 2016. *See* A50 ¶ 89.[4]

GAMCO conclusorily alleged that the note offering had "an over-market 8.75% per annum interest rate." A50 ¶ 90. But GAMCO did not plead any facts to support its allegation that the coupon was not a market rate. Nor did GAMCO allege any irregularities in the note offering process. [redacted] *See* A158.

The February Dividend. [redacted] the CCOH Board approved the sale of advertising assets in eight non-core markets for a total of $602 million. *See* A51-53 ¶¶ 93-95, A162-67, A169-75. [redacted]

[4] The Court of Chancery properly relied on CCOH's board minutes. *See* Op. 14-18. It was entitled to do so because those board minutes were integral to GAMCO's claims and were incorporated into the complaint by reference. *See* A43-56 ¶¶ 74-101; *supra* note 1.

Although GAMCO conclusorily asserted that CCOH "divest[ed] [the] assets at suboptimal prices," A19-20 ¶ 5, it alleged no facts suggesting that CCOH did not receive fair market value or did not sufficiently market the assets. To the contrary, [redacted] The asset sales generated $602 million in cash, which was 12 times the 2015 OIBDAN for those assets, and a significantly higher multiple than CCOH's own trading multiple. *See* A51-52 ¶ 93, A163, A170 (noting the transactions "provide the Company with OIBDAN multiples that are *three to five times* above the Company's current trading multiples") (emphasis added).

IV. The Court of Chancery's Decision

A. Dismissal of the Repayment Demand Claim

The Court of Chancery dismissed GAMCO's Repayment Demand Claim on three independent grounds.

First, the court noted the "broad release" in the 2013 settlement agreement barred all claims based on the "same or similar operative facts." Op. 21-22. The court compared the allegations made in the 2012 litigation to those in GAMCO's complaint and determined that the "operative facts" – "that iHC is significantly burdened with debt and on the brink of default, that iHC uses CCOH as its primary source of liquidity and that CCOH has done nothing to demand repayment" – were the same. Op. 22, 24-28. Accordingly, the court held that GAMCO's Repayment Demand Claim was barred by the 2013 settlement. *See* Op. 28-29.

Second, the court determined that GAMCO's Repayment Demand Claim "reflect[ed] a continuation of the 'common nucleus of operative facts' that were at the heart of the 2012 Litigation." Op. 37 (quoting *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 194 (Del. 2009)). Because that very claim had already been litigated and resolved in the 2012 litigation, the court held it was barred by *res judicata*. *See id.*

Third, even if GAMCO's claim had not already been resolved by the 2013 settlement, the court held GAMCO had failed to plead an actionable breach of

fiduciary duty. The court explained that CCOH "could not terminate or renegotiate" the Intercompany Agreements, nor could it breach them without facing "a potential liability of billions of dollars." Op. 31. Moreover, the court observed that CCOH "could not freely use any of the proceeds it might recover if it attempted to call the Revolving Note because iHC had the right to pre-approve any significant asset acquisition or sale," and CCOH "could not sit on the cash it received upon calling the Revolving Note . . . because any funds in excess of amounts required to satisfy accounts payable and make payroll would have to be swept back to iHC the same day they landed in CCOH's accounts." Op. 31-32. The court therefore concluded that demanding repayment of the Revolving Note "would be a futile gesture" and that the CCOH Board had no fiduciary obligation "to engage in pointless exercises." Op. 32-33.[5]

B. Dismissal of the Dividend Claims

The Court of Chancery held that GAMCO's Dividend Claims were subject to the business judgment rule and that GAMCO had failed to allege facts sufficient to overcome the presumption of that rule. *See* Op. 49-50. In so holding, the court rejected GAMCO's argument that entire fairness review should apply because iHC

[5] GAMCO contends (at 14) that the Court of Chancery found no actionable fiduciary duty claims only because the INC had not failed to implement the 2013 settlement. But that is incorrect. The Court of Chancery also held that the CCOH Board had no fiduciary obligation to engage in actions that would be futile. *See* Op. 30-33.

allegedly received a unique liquidity benefit not shared with other stockholders. The court explained that "there are 'very narrow circumstances in which a controlling stockholder's immediate need for liquidity could constitute a disabling conflict of interest irrespective of *pro rata* treatment.'" Op. 44 (quoting *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1036 (Del. Ch. 2012)). Because GAMCO had not alleged that iHC had "sacrific[ed] value either through threats, a flawed sales process, or an unfair price" to receive liquidity, the court held that GAMCO's allegations were a "far cry" from those "very narrow circumstances" that could warrant entire fairness review. Op. 46-48; *see also* Op. 46, 48 ("[T]he Complaint alleges nothing that would support the notion that the Note Offering was of the nature of a fire sale," and "the challenged transactions were arms-length transactions with third parties.").

ARGUMENT

I. The Court of Chancery Correctly Held That GAMCO's Repayment Demand Claim Was Barred By Prior Litigation.

A. Question Presented

Should this Court affirm the dismissal of GAMCO's Repayment Demand Claim where GAMCO has failed to challenge an independent ground for dismissal – the futility of demanding repayment – and where, in any case, precisely the same claim was settled and released in earlier litigation? Defendants argued this issue in their motion to dismiss. B32-46, B381-99.

B. Scope of Review

This Court reviews *de novo* the grant of a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6). *See Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010).

C. Merits of Argument

GAMCO claims (at 18) that the CCOH Board breached its fiduciary duties by failing to demand repayment under the Revolving Note when the balance of the Note continued to increase and iHC's financial condition continued to deteriorate after the 2013 settlement. The Court of Chancery rejected this claim on three independent grounds: (1) any such demand would be futile, (2) the 2013 settlement released this same claim, and (3) *res judicata* barred this same claim.

In the 2012 litigation, the plaintiffs alleged that iHC was "drowning under a massive debt load" and was using the Revolving Note as a source of liquidity but that the Board would not demand repayment because it was conflicted. B234-35. As the court explained, the parties fashioned a "forward-looking" settlement to resolve this issue for all time. Op. 28. "[T]he parties to the 2013 Settlement knew full well that the balance of the Revolving Note was going to continue to grow." *Id.* (citing B235, B430-31). They therefore included "forward-looking liquidity triggers designed to address the concern that the Revolving Note balance might continue to grow and iHC's financial condition might continue to deteriorate." *Id.*

The INC was empowered to demand repayment whenever either of two defined financial triggers was satisfied. These triggers are tied to the size of the Revolving Note and to iHC's liquidity. *See supra* pp. 11-12. The settlement thus "addresse[d] the central concern" presented in the 2012 litigation by allowing the INC to demand repayment "at the very time that the risks" that "non-independent directors . . . will consider the interests of [iHC] above the interests of [CCOH] . . . become most compelling." B282. These triggers were designed to address, and do address on an ongoing basis, precisely the same concern that GAMCO has re-raised here: that the Revolving Note would continue to grow; that iHC would continue to have significant debt; and that, as a result, iHC would continue to face financial difficulties.

1. GAMCO fails to challenge the Court of Chancery's holding that GAMCO did not plead actionable claims.

The Court of Chancery held that it would be futile for the Board to demand repayment of the Revolving Note because any amounts CCOH received would be automatically re-swept to the parent under the concededly valid Intercompany Agreements. GAMCO does not challenge this independent basis for rejecting its Repayment Demand Claim, which is therefore dispositive.

As the Court of Chancery noted, GAMCO did not allege any breach of – or failure to implement – the forward-looking settlement agreement. *See* Op. 30. Rather, GAMCO's theory is that the CCOH Board has an ongoing fiduciary obligation to demand repayment of the Revolving Note separate and apart from the forward-looking settlement. *See* GAMCO Br. 21-22. But the Intercompany Agreements – which GAMCO no longer challenges, *see id.* at 18 – sharply limit what CCOH can do with any cash from a repayment of the Revolving Note. "iHC ha[s] the right to pre-approve any significant asset acquisition or sale" by CCOH. Op. 31; *see* B94. And, most importantly, if CCOH calls the Revolving Note, "any funds in excess of amounts required to satisfy accounts payable and make payroll would have to be swept back to iHC the same day." Op. 31-32; *see* B88.

Given these constraints, the court held "there is no reasonably conceivable basis upon which GAMCO can establish that the Board has breached its fiduciary duty by adhering to the carefully-negotiated . . . 2013 Settlement." Op. 32.

Because any funds received from a demand for repayment of the Revolving Note would be re-swept up to the parent, it would be a "pointless exercise[ ]" to demand repayment. Directors do not have a fiduciary duty to engage in futile acts. Op. 33; *see also Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) (directors are not required to undertake "futile" efforts).[6]

GAMCO has not challenged this independent ground for dismissal in its opening brief. It has therefore waived any such challenge on appeal. *See* Del. Sup. Ct. R. 14(b)(vi)(A)(3); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). That alone is fatal to GAMCO's Repayment Demand Claim. *See Elite Sportswear Prods., Inc. v. N.Y. Life Ins. Co.*, 270 F. App'x 153, 154 (3d Cir. 2008) (affirming where "unappealed aspects" of decision "represent an adequate and independent ground"); *Ryan v. Gifford*, 2008 WL 43699, at *7 (Del. Ch. Jan. 2, 2008) (finding appeal would be "futile" where court's decision rested on "two independent grounds and [appellant] ha[d] not appealed the other basis for the decision").

Nor would GAMCO have been able to present a meritorious challenge to this holding. The Intercompany Agreements plainly impose the restrictions cited by the Court of Chancery. *See supra* pp. 6-7, 10-11, 13. Indeed, in the 2012

[6] iHC can stand on its contract rights and has no obligation to allow CCOH to use any cash it receives as a result of demanding repayment of the Revolving Note. *See* Op. 32 n.48 (citing cases); *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1174-75 (Del. 1988).

litigation, the SLC specifically investigated whether the "cash that . . . come[s] back in response to calling the note" is exempt from being re-swept but "could not find any basis" to support such an exemption. B426-27, B437; *see* B299. Likewise, the Court of Chancery found at the 2013 settlement fairness hearing that there would be no "utility" in demanding repayment because the cash automatically would be re-swept. B438, B455. Because such a repayment demand clearly would be futile, the Board did not breach any fiduciary duty by failing to undertake that pointless exercise.

2. The 2013 settlement release bars GAMCO's claims.

The 2013 settlement agreement included a broad release "intended to accord the defendants 'global peace.'" *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 433 (Del. 2012). That release covered claims that "have been asserted" in the 2012 litigation and claims that "could have been asserted" in the 2012 litigation "that are based upon, arise out of, or relate in any way, directly or indirectly, to . . . the allegations made in, or the subject matter of," the 2012 litigation. B325-26. This release therefore barred any future suit based on the same "operative facts." *See* Op. 22 & n.33 (citing *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1146-47 (Del. 2008)). This is a second independent basis to reject GAMCO's Repayment Demand Claim.

The Court of Chancery correctly held that GAMCO's Repayment Demand Claim was barred by this release. The operative facts underlying the complaint in the 2012 litigation and GAMCO's complaint here – "iHC is significantly burdened with debt and on the brink of default[;] . . . iHC uses CCOH as its primary source of liquidity[;] and . . . CCOH has done nothing to demand repayment" – are the same. *See* Op. 22, 28 (citing A17-18 ¶¶ 1-3, A22 ¶ 9, A23 ¶ 11, A36-37 ¶¶ 56-58, A39-41 ¶¶ 63-67; B234-35 ¶¶ 3, 7, B245 ¶ 54). Indeed, after comparing the 2012 complaint and GAMCO's complaint side-by-side, the court concluded that GAMCO's complaint "model[ed] the allegations made by the derivative plaintiffs in 2012." Op. 24-27. GAMCO even admits in its complaint that the "[p]laintiffs in the 2012 Litigation also alleged that CCOH's Board breached its duties by refusing to demand repayment on the note" and had alleged "concern[s]" about the size of the Revolving Note and iHC's financial condition. A37 ¶ 58; *see* A36-37 ¶ 56 (noting the 2012 plaintiffs sought "relief requiring the Board to demand repayment").

Moreover, as the court explained, the very purpose of the 2013 settlement was to resolve any claim that the same conduct was continuing, which is precisely what GAMCO's Repayment Demand Claim is. *See* Op. 28. The parties to the settlement specifically contemplated that the balance of the Revolving Note might continue to grow and that iHC's financial situation might continue to deteriorate.

See id. (citing B314 (settlement stating that "[CCOH] anticipates that the balance on the Note will increase to over $1.0 billion in the next few years")). In seeking approval of the settlement, the SLC explained that the settlement "addresses the central concern presented by Plaintiffs' Complaints – the growth of the [Revolving] Note balance" – by, among other things,

> address[ing] the potential for conflicts by providing that *in the event [iHC's] near-term financial position materially deteriorates* or the [Revolving] Note balance reaches a defined limit, a newly formed committee of [CCOH's] independent directors will be able to exercise the demand feature on its own[ ] and . . . requir[ing] [iHC] to provide those directors with the information needed to fulfill that obligation.

B282 (emphasis added); *see also* B283-85. And, in approving the settlement, the Court of Chancery found these corporate governance reforms provided "substantial benefits on an *ongoing basis*," B456 (emphasis added), because those reforms addressed the concerns underlying the Repayment Demand Claim going forward.

GAMCO's arguments that the settlement release does not apply to the Repayment Demand Claim all fail. *First*, GAMCO argues (at 19-22) that "the plain language of the release" does not prohibit claims based on facts that postdate the settlement. But the settlement release contains no such timing limitation. Rather, the release applies to claims that are "based upon, arise out of, or relate in any way" to the allegations in the 2012 litigation. B326. As the court properly concluded here, the operative facts alleged by GAMCO also "were the foundation of the plaintiff's claims in 2012." Op. 29. GAMCO's claim is a continuation of

the same facts and same concerns and same legal issue that were raised and resolved in the prior litigation. It is therefore the same "claim."

GAMCO misconstrues the phrase "from the beginning of time through the date of this Stipulation." B325-26. That language limits the scope of the release to claims that "could have been asserted" by the date of the settlement. B325. GAMCO's claim (at 22) that the Board must demand repayment because of iHC's "financial difficulties and the enormous amount outstanding under the Revolving Note" not only "could have been asserted," but *was actually asserted* in the 2012 complaint and was "at the heart of the 2013 Settlement." Op. 29. The very purpose of the settlement was to resolve that claim. *See* Op. 28.[7]

Under GAMCO's erroneous interpretation of the release, the settlement would be illusory and meaningless, and subject to collateral attack immediately after approval. The parties to the settlement "knew full well that the balance of the Revolving Note was going to continue to grow," *id.*, which is why they created a forward-looking settlement. And yet GAMCO's interpretation would allow "any CCOH stockholder [to] initiate[ ] derivative litigation against the CCOH Board . . . before the ink was even dry on the 2013 Settlement based on the logic that iHC's

[7] GAMCO also relies (at 21-22) on self-serving statements by plaintiffs' counsel in the 2012 litigation. Those statements cannot defeat the plain language of the settlement agreement. *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

financial condition had continued to worsen [and] the balance of the Revolving Note had continued to grow." Op. 29. In fact, at oral argument, GAMCO claimed that it could have reasserted the claim that the Board should demand repayment of the Revolving Note the very "next day" after the 2013 settlement was approved. B650. This "absurd interpretation" of the settlement agreement violates basic principles of contract interpretation. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160-61 (Del. 2010); *see O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) (refusing to adopt interpretation that rendered contract terms "illusory and meaningless"). No party would ever enter into a settlement if the claim just settled could be reasserted the very next day.

Second, GAMCO incorrectly asserts (at 22-23) that, if "the 2013 Settlement released claims based on future events, it would be overbroad and unenforceable." But it is well settled that, " '[i]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions . . . , a court may permit the release of a claim based on the identical factual predicate as that underlying the [settled] claims . . . even though the claim was not presented and might not even been presentable in the [prior] action.' " *Phila. Stock Exch.*, 945 A.2d at 1146 (quoting *Nottingham Partners v. Dana*, 564 A.2d 1089, 1106 (Del. 1989)). Accordingly, parties may settle claims based on future events so long as those future events are based on the same operative facts as the litigation being settled. *See In re Literary*

Works in Elec. Databases Copyright Litig., 654 F.3d 242, 248 (2d Cir. 2011) (because prior suit "contemplate[d] . . . alleged future injuries," settlement could release claims for "future infringements . . . giving rise to independent claims of relief"); *Freeman v. MML Bay State Life Ins. Co.*, 445 F. App'x 577, 580 (3d Cir. 2011) (plaintiff cannot "plead around" a settlement release "merely by asserting that some facts associated with his claim occurred" after the prior settlement); *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 274 (7th Cir. 1998) (settlement may release claims that are "not ripe" if such claims are "closely enough related" to the claims at issue in the settlement, including where "circumstances show[ ] that [prior plaintiffs] . . . had known of, and intentionally resolved, the potential dispute that might have existed"). That is precisely the case here, where GAMCO's Repayment Demand Claim is based on the "same operative facts" – a growing Note balance and iHC's alleged worsening financial condition – as the 2012 claim.

Philadelphia Stock Exchange is not to the contrary. There, this Court considered whether certain claims were "based on the 'same operative facts' or 'identical factual predicate' as the claims for relief that [were] asserted in the [prior] complaint." 945 A.2d at 1147. This Court concluded that the claims at issue were "the subject of claims of wrongdoing" in the prior litigation, and thus could be barred by the settlement. *Id.* at 1148. In dicta, this Court stated that,

because settlements may release claims based only on the "same set of operative facts as the underlying action," settlements may not release "claims based on a set of operative facts that will occur in the future." *Id.* at 1146. The Court did not suggest, however, that a settlement release is prohibited from covering the same set of "operative facts" that simply continue over time, as is the case here.

Third, GAMCO argues (at 19-20) that, despite the settlement, the CCOH Board retains the fiduciary duty to demand repayment of the Revolving Note. But GAMCO's position would render the settlement illusory by allowing GAMCO to bring the same claim settled in 2013 immediately after the settlement. *See supra* p. 27-28. Here, the Board has complied with its fiduciary duties by implementing and adhering to a forward-looking settlement. GAMCO provides no reason why complying with the settlement does not fully satisfy the Board's fiduciary obligations; nor does it challenge the terms or implementation of the settlement. GAMCO merely repeats its allegations that the Revolving Note balance continues to grow and iHC's financial condition continues to deteriorate. But those were precisely the circumstances the settlement was designed to, and did, address. In any event, as noted above, as an independent ground for rejecting this argument, any such demand would be futile because the cash would be re-swept to the parent. *See supra* pp. 22-24.

3. *Res judicata* bars GAMCO's claims.

"*Res judicata* exists to provide a definite end to litigation, prevent vexatious litigation, and promote judicial economy." *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191-92 (Del. 2009) (footnotes omitted). It applies when a five-part test is satisfied. *See id.* at 192. The only part of that test in dispute is whether "the original cause of action or the issues decided was the same as the case at bar." *Id.*; *see* Op. 34-35. This part is satisfied when current and prior claims "derive from a common nucleus of operative fact." *LaPoint*, 970 A.2d at 193. The Court of Chancery correctly held that this part of the test was satisfied for the same reasons that the settlement barred GAMCO's attempt to bring new claims based on the same "operative facts" as the 2012 litigation. *See* Op. 36-37.

GAMCO argues (at 24-25) that *res judicata* does not apply to its Repayment Demand Claim because it is "solely concerned with the balance of the Revolving Note and iHC's financial condition ***following*** [the] 2013 Settlement." As the Court of Chancery concluded, this "argument reads a bit like alternative history and does not square with [GAMCO's] own description of the 2012 Litigation in its Complaint." Op. 36. GAMCO's own complaint "acknowledge[d] the claims in the 2012 Litigation that sought to hold the CCOH Board accountable for refusing to take any steps to protect CCOH from the iHeart Defendants' worsening financial crisis" by demanding repayment of the Revolving Note. *Id.*; *see* A37

¶ 58 ("Plaintiffs in the 2012 Litigation also alleged that CCOH's Board breached its duties by refusing to demand repayment on the note and allowing the amounts owed to escalate," despite "concern[s]" about the size of the Revolving Note and iHC's financial condition.). GAMCO's Repayment Demand Claim therefore "reflects a continuation of the 'common nucleus of operative facts' that were at the heart of the 2012 Litigation." Op. 37.

Where – as here – subsequent litigation is based on additional facts that are merely a continuation of the operative facts underlying the prior suit, *res judicata* applies. *Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355, 359 (4th Cir. 1989) (barring claims based on "events that occurred after" the prior suit because those claims were a "continu[ation]" of the prior suit); *see Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 596 n.10 (7th Cir. 1986) ("[I]t is sufficient that there is some chronological overlap and that the two complaints arise out of the same common nucleus of operative fact."); *see also Yoon v. Fordham Univ. Faculty & Admin. Ret. Plan*, 263 F.3d 196, 201 (2d Cir. 2001).[8]

[8] The authority on which GAMCO relies (at 24-25) is readily distinguishable. *See LaPoint*, 970 A.2d at 194-95 (claims underlying second suit "did not ripen until a final adjudication of" the first suit and settlement was not forward looking as here); *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006) (holding that second suit "rested entirely upon facts that did not arise until after the first [suit]," and those "new facts g[a]ve rise to a quite different legal theory"); *see also Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 384 (2d Cir. 2003) (recognizing that "claim preclusion may apply where some

Res judicata also applies because the 2013 settlement was specifically "intended to govern future, related transactions between the parties." *Hatch v. Boulder Town Council*, 471 F.3d 1142, 1150-51 (10th Cir. 2006); *see also* 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4409 (2d ed. 2002). Indeed, Defendants would have had "no incentive" to implement forward-looking corporate governance reforms if those reforms were "subject to renewed attack" immediately after the approval of the prior settlement, as GAMCO has argued. *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 289 (2d Cir. 2000). And such renewed attacks are exactly what GAMCO seeks. *See* B650 (claiming the Board could be sued for not demanding repayment "the next day" after settlement).

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of the facts on which a subsequent action is based post-date the first action but do not amount to a new claim").

II. The Court of Chancery Correctly Held That GAMCO's Dividend Claims Were Barred By The Business Judgment Rule.

A. Question Presented

Did the Court of Chancery correctly hold that the business judgment rule applied to the asset sales, note offering, and resulting *pro rata* dividends? Defendants argued this issue in their motion to dismiss. *See* B46-51, B399-406.

B. Scope of Review

This Court reviews the grant of a motion to dismiss *de novo*. *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011). This Court does not "accept conclusory allegations unsupported by specific facts." *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011).

C. Merits of Argument

1. Under longstanding precedent, the business judgment rule applies to *pro rata* dividends.

This Court's decision in *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971), disposes of GAMCO's claim. In *Sinclair Oil*, stockholders of a subsidiary challenged the parent's actions in causing the subsidiary to issue a *pro rata* dividend to all stockholders. *See id.* at 720-21. This Court held that the business judgment rule applied unless there was "self-dealing," which "occurs when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in

such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary." *Id.* at 720. Because the dividend was paid *pro rata*, the parent "received nothing from [the subsidiary] to the exclusion of its minority stockholders," and the business judgment rule applied. *Id.* at 721-22.

Sinclair Oil is indistinguishable from this case. Using funds from arm's-length transactions with unrelated parties, CCOH issued *pro rata* dividends. iHC therefore received nothing "to the exclusion of, and detriment to," other stockholders. *Id.* at 720. All stockholders – including GAMCO – received a "proportionate share" of the dividend. *Id.* at 721-22. GAMCO's Dividend Claims are therefore subject to the business judgement rule. *See* Op. 45-46, 49-50; *Ivanhoe Partners v. Newmont Mining Corp.*, 533 A.2d 585, 597, 602 (Del. Ch. 1987) (applying *Sinclair Oil* and the business judgment rule to a *pro rata* dividend funded by asset sales). And, as the Court of Chancery held, GAMCO offered no allegations sufficient to overcome the presumptions of the business judgment rule. *See* Op. 49-50. GAMCO does not challenge that ruling on appeal.

GAMCO is unable to distinguish *Sinclair Oil* in any meaningful way. *First*, GAMCO argues (at 31) that, unlike in *Sinclair Oil*, the dividends here were "self-dealing" transactions because they provided iHC with "liquidity." But that same argument was made in *Sinclair Oil* and rejected. There, plaintiffs argued that the

dividends "resulted from an improper motive – Sinclair's need for cash." 280 A.2d at 721; *see also id.* ("Sinclair caused these dividends to be paid during a period when it had a need for large amounts of cash."). This Court explained that "[t]he motives for causing the declaration of dividends are immaterial unless the plaintiff can show that the dividend payments resulted from improper motives and amounted to waste." *Id.* at 722. The Court further held that a parent's "need for cash" is not an improper motive. *Id.*; *see also Ivanhoe*, 533 A.2d at 602 (dividends "further [the] legitimate business objective[ ] of . . . permit[ting] shareholders to realize immediately a portion of the corporation's value"). The same holds true here.

Second, GAMCO argues (at 31) that *Sinclair Oil* is different because GAMCO has alleged that "the CCOH Board abandoned a long-term growth strategy." But the plaintiffs in *Sinclair Oil* made those same allegations. They claimed that "the dividend payments drained [the subsidiary] of cash to such an extent that it was prevented from expanding." 280 A.2d at 722. This Court held those allegations were insufficient to trigger entire fairness review because they did not amount to self-dealing – *i.e.*, that the parent "usurped [a] business opportunity belonging to" the subsidiary. *Id.*

Here, GAMCO has not even alleged that undertaking the asset sales, note offering, and dividends caused CCOH to forgo any particular opportunity, let alone

that iHC engaged in self-dealing by usurping a potential opportunity from CCOH. In fact, the Court of Chancery held that the CCOH Board "identified and considered benefits from the transactions apart from avoiding liquidity problems for the iHeart Defendants, including the optimization of non-core assets for the benefit of stockholders." Op. 49. If the mere conclusory allegation that a company forwent unspecified potential transactions were sufficient to trigger entire fairness review – as GAMCO argues – then *Sinclair Oil* would be meaningless. Every board that approves a dividend faces a business decision of whether to invest that cash or to return it to stockholders.

2. This Court should not create a broad exception to *Sinclair Oil*.

In *In re Synthes, Inc. Shareholder Litigation*, 50 A.3d 1022 (Del. Ch. 2012), the Court of Chancery explained the wisdom of *Sinclair Oil*'s longstanding rule. "Controlling stockholders . . . have the largest financial stake in [a] transaction and thus have a natural incentive" to ensure the transaction maximizes the corporation's value. *Id.* at 1035; *see Iroquois Master Fund Ltd. v. Answers Corp.*, 105 A.3d 989, 2014 WL 7010777, at *1 n.1 (Del. 2014) (Table) ("When a large stockholder supports a [transaction] and receives the same per share consideration as every other stockholder, that is ordinarily evidence of fairness, not of the opposite."). "[T]herefore, if one wishes to protect minority stockholders, there is a good deal of utility to making sure that when controlling stockholders afford the

minority pro rata treatment, they know that they have docked within the safe harbor created by the business judgment rule." *Synthes*, 50 A.3d at 1035. "If, however, controlling stockholders are subject to entire fairness review when they share the premium ratably with everyone else, they might as well seek to obtain a differential premium for themselves." *Id.* at 1035-36.[9]

GAMCO effectively asks this Court (at 29-31) to recognize a broad, new exception to *Sinclair Oil* because it has alleged that the "sole purpose" of the dividends was to "funnel[ ] cash to iHC" to provide "iHC the unique benefit of liquidity." That exception would swallow the rule. As the Court of Chancery explained, when a controlling stockholder allows a company to engage in a transaction that provides the controller with cash, "that means [the controller] wants and likely needs the cash." Op. 45 n.96. That is true with *any* dividend declaration by a controlled company. Therefore, under GAMCO's proposed exception to *Sinclair Oil*, plaintiffs would be able to sidestep the business judgment rule and challenge every dividend declared by any company with a controlling stockholder. This broad exception would not only undercut the

[9] *See also Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 188 (Del. Ch. 2014) ("[E]qual treatment of stockholders operates as a presumptive safe harbor."); *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 662 (Del. Ch. 2013) (same).

substantial benefits of *Sinclair Oil*'s venerable rule, but it was also explicitly rejected in *Sinclair Oil* itself. *See* 280 A.2d at 721-22.

To be sure, the Court of Chancery has held that there may be "very narrow circumstances in which a controlling stockholder's immediate need for liquidity could constitute a disabling conflict of interest irrespective of pro rata treatment," thereby warranting entire fairness review. *Synthes*, 50 A.3d at 1036; *see* Op. 44-46. But the Court of Chancery has stopped far short of the broad exception advanced by GAMCO. The very narrow "circumstances would have to involve a crisis, fire sale" type transaction initiated by the controller "to meet its own idiosyncratic need for immediate cash." *Synthes*, 50 A.3d at 1036; *see* Op. 46, 48; *Morton's*, 74 A.3d at 666-67. Such circumstances might "elevate th[e] fundamentally implausible idea" that "rational economic actors have chosen to short-change themselves" to "reasonably conceivable." *Larkin v. Shah*, 2016 WL 4485447, at *16 (Del. Ch. Aug. 25, 2016); *see Synthes*, 50 A.3d at 1035-36.

The Court of Chancery properly held that GAMCO had not alleged such extreme circumstances here. Despite receiving documents in response to its Section 220 demand, GAMCO did not allege a fire sale or anything close. Instead, it offered nothing more than conclusory allegations (refuted by the very board minutes on which it purported to rely) that CCOH received "suboptimal prices" from the asset sales and had borrowed money at "over-market" rates. A19-20 ¶ 5,

A50 ¶ 90. GAMCO provided no factual allegations from which it could be inferred that there was a "fire sale," nor did it identify any deficiency in the process for the note offering and asset sales that could raise questions about the prices received. *See* Op. 46-47 (no well-pled allegations that iHeart Defendants competed with minority stockholders "by sacrificing value through either threats, a flawed sales process, or an unfair price"). That failure is not surprising, because the note offering and asset sales indisputably were arm's-length transactions and, therefore, presumptively consummated at market value. *See Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 357 (Del. Ch. 2004) ("The fact that a transaction price was forged in the crucible of objective market reality . . . is viewed as strong evidence that the price is fair.").[10]

None of the cases on which GAMCO relies applied entire fairness review to circumstances like those here. Rather, each applied entire fairness review only after finding well-pled allegations akin to a fire sale. For example, in *McMullin v. Beran*, 765 A.2d 910 (Del. 2000), the controlling stockholder "unilaterally negotiate[d]" a merger, placed "cash restrictions on potential bidders," imposed "time constraints" on the board's decision, and the board approved the merger after

[10] [redacted] The Court of Chancery held that this "relatively modest accommodation on price hardly reflects the kind of 'fire sale' that has prompted" entire fairness review. Op. 47. GAMCO does not raise this issue on appeal.

a single meeting. *Id.* at 921-22. Based on those well-pled allegations, this Court held the plaintiffs had plausibly alleged a breach of the duty of care – a theory that GAMCO has not raised – because there had been a fire sale in which the controller "sacrific[ed] some of the value of [the company], which might have been realized in a differently timed or structured agreement." *Id.* at 921.

And in *New Jersey Carpenters Pension Fund v. infoGROUP, Inc.*, 2011 WL 4825888 (Del. Ch. Sept. 30, 2011), the plaintiffs claimed that the controlling stockholder "forced [a] Merger on the Company at an inopportune time and utilizing a flawed and inadequate sales process." *Id.* at *2. The plaintiffs supported that claim with specific factual allegations that the board's chairman had stated that "market conditions would make it difficult to obtain a good price," that the company's independent advisor had discouraged the company from "pursu[ing] a sales transaction in [this] environment," and that, in the rush to complete the transaction, the board "failed to pursue a potentially higher offer" from a competing bidder "despite [its] overtures." *Id.* at *3, *6; *see also In re PLX Tech. Inc. S'holders Litig.*, C.A. No. 9880-VCL, at 10, 14-15, 17-18 (Del. Ch. Sept. 3, 2015) (Transcript) (discussing that board relented to hedge fund's pressure for "quick fire sale," despite company's greater stand-alone value, and engaged in weak process without "any meaningful effort to explore higher offers"); *In re Answers Corp. S'holders Litig.*, 2012 WL 1253072, at *2-3, *7 & n.46 (Del. Ch.

Apr. 11, 2012) (alleging board ordered "quick market check" for buyout that board's financial advisor stated "was not a 'real' market check" and company's CEO "would lose his job unless he completed a change of control transaction").[11] GAMCO alleges no facts similar to those in these cases sufficient to trigger entire fairness review.

3. The Court of Chancery did not inappropriately weigh facts.

GAMCO argues (at 34-36) that the Court of Chancery erred by "weighing [the] facts and drawing . . . inferences in favor of Defendants." To the contrary, the court held that GAMCO failed to plead non-conclusory *factual* allegations sufficient to trigger entire fairness review. *See* Op. 46-50 ("The Complaint's conclusory allegations . . . are . . . lacking in factual support."). That conclusion was sufficient grounds to dismiss GAMCO's claims. *See Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000) ("[C]onclusory allegations are not considered as expressly pleaded facts or factual inferences.").

[11] The remaining two cases cited by GAMCO are inapposite because the controller stood on both sides of the transaction, and thus minority stockholders did not receive *pro rata* treatment. *See In re Ezcorp Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, at *6 (Del. Ch. Jan. 25, 2016) (challenging consulting arrangement between company and an affiliate of the controlling shareholder); *In re Activision Blizzard, Inc. S'holder Litig.*, C.A. No. 8885-VCL, at 112-13, 115-16 (Del. Ch. June 6, 2014) (Transcript) (noting controller received proceeds from its own sale of assets).

Although it was not necessary to the outcome, the court also noted that GAMCO's conclusory allegations are contradicted by the very board minutes on which those allegations were based. *See, e.g.*, A43 ¶ 74. For example, contrary to GAMCO's conclusory allegation of "suboptimal prices," A19-20 ¶ 5, the board minutes GAMCO cited reflect that the prices for the asset sales were "twelve times the 2015 OIBDAN for the assets and significantly higher than CCOH's own trading multiple,"

The board minutes also contradict GAMCO's "conclusory allegation that the CCOH Board focused only on a need to provide liquidity to the iHeart Defendants." Op. 48. The minutes show that the Board considered the "negative consequences for CCOH should the iHeart Defendants be forced into bankruptcy" and the benefit to CCOH of "the optimization of [selling] non-core assets." Op. 48-49 (citing A151, A170).

Under the incorporation by reference doctrine, a plaintiff "may not reference certain documents outside the complaint and at the same time prevent the court from considering those documents' actual terms." *Winshall v. Viacom Int'l Inc.*, 76 A.3d 808, 818 (Del. 2013). Rather, courts may look at the actual documents to

ensure the plaintiff has not "misstated or mischaracterized" them. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006). The Court of Chancery did precisely that. *See Morton's*, 74 A.3d at 658 n.3 (holding discovery material upon which plaintiffs' complaint "plain[ly] reli[ed]" was incorporated into the complaint by reference).

CONCLUSION

The decision of the Court of Chancery should be affirmed.

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CERTIFICATE OF SERVICE

I, David E. Ross, hereby certify that on March 15, 2017, I caused a true and correct copy of the foregoing *Public Version of Appellees' Answering Brief* to be served through File & Serve*Xpress* on the following counsel of record:

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