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Case Number 487,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

R. A. FEUER, suing derivatively on behalf of VIACOM, INC., Plaintiff Below-Appellant, v. PHILIPPE P. DAUMAN; SUMNER M. REDSTONE; SHARI REDSTONE; GEORGE S. ABRAMS; THOMAS E. DOOLEY; BLYTHE J. MCGARVIE; CHARLES E. PHILLIPS, JR.; FREDERIC V. SALERNO; WILLIAM SCHWARTZ; CRISTIANA FALCONE SORRELL; and DEBORAH NORVILLE, Defendants Below-Appellees. and VIACOM, INC., Nominal Defendant Below-Appellee	No. No. 487, 2017 Court Below: Court of Chancery of the State of Delaware C.A. No. 12579-CB **REDACTED, PUBLIC VERSION** **E-FILED: March 19, 2018**

PLAINTIFF BELOW-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN DISMISSING THE COMPLAINT ON THE BASIS OF THE SELF-DEALING RELEASE

As set forth in Plaintiff's Opening Brief, the Court of Chancery erred in dismissing Plaintiff's Complaint based on the post-complaint affirmative defense of Viacom's general release of claims against its directors (the "Release") contained in the August 18, 2016 Confidential Settlement and Release Agreement (the "Settlement Agreement").[1] In so doing, the Court below allowed conflicted directors to unilaterally terminate ***pending*** derivative claims against themselves without *any* judicial scrutiny. That result is incompatible with fundamental principles of Delaware law, which (i) place the burden of demonstrating fairness of interested transactions on self-dealing fiduciaries; and (ii) require judicial scrutiny of corporate fiduciaries' efforts to dismiss or compromise derivative claims. *See* Pl. Br. at 31-33.

[1] Unless otherwise noted, capitalized terms shall have the meaning ascribed to them in Plaintiff's Opening Brief (cited herein as "Pl. Br."). The Answering Brief of Appellees/Defendants is cited herein as "Viacom Ans. Br." and the Defendants Below-Appellees Blythe J. McGarvie, Charles E. Phillips, Jr., Frederic V. Salerno, William Schwartz, Cristiana Falcone Sorrell And Deborah Norville's Answering Brief On Appeal is cited herein as "Director Ans. Br."

In response, Defendants assert that: (1) Plaintiff waived any argument that the Court erred by considering the Release on a Motion to Dismiss (Viacom Ans. Br. at 12-14); (2) Plaintiff's failure to participate in a separate class action and derivative lawsuit or to follow the litigation strategy of the plaintiffs in that separate litigation "reinforces the propriety of the Court of Chancery's decision below" (*id*. at 10, 17); (3) Plaintiff did not adequately allege the Release was a self-interested transaction (*id*. at 18-20); (4) the Court of Chancery's dismissal does not undermine *Zapata* (*id*. at 21-22); and (5) Plaintiff failed to meet his pleading burden to demonstrate lack of entire fairness. *Id*. at 22-24. Each of these arguments is built on the faulty premise that Plaintiff is to blame for not amending his Complaint to challenge the self-interested Release Defendants subsequently caused Viacom to execute. Viacom Ans. Br. at 1-2, 3, 10, 15-17, 21, 23.[2]

[2] While conceding that the context of the Release "could not be fully explored", Defendants also repeatedly assert that it was fair. *Id*. at 20 (asserting that "many of the director defendants agreed to surrender valuable board seats or management roles, and all agreed to surrender their own potential legal claims in connection with the mutual releases granted *to* Viacom and other released parties"); *id*. at 21 ("The Release at issue here was but one small piece of a much larger comprehensive settlement of several active and threatened litigations and disputes that had become a distraction to Viacom."); *id*. at 23 ("In any event, there is no reason to doubt that [the Settlement and Release] were [entirely fair to Viacom], because the settlement resolved distracting governance and leadership disputes, ending contentious and costly litigation."). These untested, self-serving declarations of fairness merely highlight the need for discovery into the circumstances surrounding the Release.

A. Defendants Created The Affirmative Defense Of Release After Plaintiff Filed His Complaint And The Derivative Claims Were Already Pending Against Them.

A common theme running through most, if not all, of Defendants' arguments is that Plaintiff was required to amend his Complaint to address the Release and the context of the Release could not be fully explored because of "deficiencies in Plaintiff's pleading." Viacom Ans. Br. at 21; *see also id*. at 10, 16, 17, 18, 20, 21 (faulting Plaintiff for not amending his Complaint to address the Release).

But as Plaintiff pointed out in his Opening Brief (and Defendants simply ignored), Plaintiff had no obligation to amend his complaint to address an affirmative defense that Defendants spawned *after* Plaintiff filed his Complaint and then raised on a 12(b)(6) motion. Pl. Br. at 30 n.5 (citing *McNair v. Taylor, et. al*., 2007 WL 1218681, at *1 n.3 (Del. Super. Mar. 30, 2007) (Vaughn, J.); *see also Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) ("[A] complaint need not anticipate or overcome affirmative defenses; thus, a complaint does not fail to state a claim simply because it omits facts that would defeat [an affirmative] defense.").

Indeed, Plaintiff is not aware of a single other case (and neither Defendants nor the Court below cited such a case) where defendants granted themselves a release (or unilaterally took actions giving rise to some other affirmative defense) *after* a plaintiff asserted claims against them, and a court dismissed the claims at

the motion to dismiss stage on the basis of the subsequently created release.[3] Perhaps the most analogous case is *In re Riverstone Nat'l, Inc. S'holder Litig.*, 2016 WL 4045411, at *8 (Del. Ch. July 28, 2016) (cited by Defendants at Viacom Ans. Br. at 19, 22), where soon-to-be-director-defendants executed a merger agreement that purported to "release[] all potential liability concerning" the potential claims that soon-to-be-plaintiffs were investigating.[4] But that case is not helpful to Defendants as the Court rejected the *Riverstone* defendants' attempts to use the release as a bar to plaintiffs' claims. To the contrary, the Court held that: (i) plaintiffs adequately pled a direct claim against the defendants for orchestrating

[3] Plaintiff acknowledges that the Court of Chancery may grant a motion to dismiss a complaint on the grounds of an affirmative defense in certain circumstances; for example, when director defendants interpose a Section 102(b)(7) exculpatory charter provision as a bar to claims based on an alleged breach of the duty of care. *Malpiede v. Townson*, 780 A.2d 1075, 1090-93 (Del. 2001). But the circumstances of this case are unique because Defendants created the affirmative defense *after* Plaintiff filed his complaint. Such circumstances would be analogous to a situation where director defendants (or perhaps a controlling stockholder) caused a corporation to adopt an exculpatory charter provision *after* they were sued, *then* interposed the provision as a bar to the pre-existing claims, then faulted the plaintiff for not starting over with a new complaint to address the newly created defense.

[4] The *Riverstone* plaintiffs were investigating potential derivative claims at the time the merger transaction was announced. 2016 WL 4045411, at *5. As a result of the merger, those plaintiffs lost standing to assert those claims. The direct claims the *Riverstone* plaintiffs later asserted challenged the fairness of the merger based on the director defendants' agreement to the release/waiver provision in the merger agreement. *Id*. at *6.

a transaction that extinguished possible derivative claims, thereby obtaining a special benefit for themselves; and (ii) the appropriate standard of review was entire fairness. *Id*. at *8, 15.

Because the *Riverstone* plaintiffs' standing to assert the derivative claims they were investigating were extinguished by merger, their subsequently filed complaint necessarily addressed the release/waiver of claims in the merger agreement. But *Riverstone* hardly stands for the proposition that self-interested director defendants can, absent judicial review, unilaterally release derivative claims asserted and pending against them by a plaintiff who retains standing – or that such a plaintiff must amend his complaint to address a subsequently created affirmative defense.

Having asserted a self-interested Release orchestrated after Plaintiff filed his Complaint as an affirmative defense, the Defendants, not Plaintiff, should have had the burden of demonstrating its validity, both because it is an affirmative defense and they must demonstrate their conduct was entirely fair. At a minimum, Plaintiff was entitled to discovery into the circumstances surrounding the Release prior to dismissal. Once the notion that Plaintiff was required to amend his Complaint to address the legitimacy of an affirmative defense Defendants subsequently arranged is dispelled, Defendants' other arguments lose all vitality.

B. The Court Could Judicially Notice The Release; It Should Have Also Recognized That, On Its Face, The Release Constituted A Self-Dealing Transaction

Plaintiff conceded that the Court had the discretion to consider the Release pursuant to D.R.E 201. Pl. Br. at 29 n.3. Plaintiff noted, however, "because the Release was, on its face, inherently a self-dealing transaction, it was incumbent upon the Court to apply judicial scrutiny to it, rather than simply giving it effect." *Id*. This is consistent with the position that Plaintiff asserted in the Court below: the Release constituted evident self-dealing. Therefore, while it "could potentially be a grounds for dismissing [Plaintiff's] claims *at summary judgment*," there needed to be "some discovery into the circumstances surrounding the Release in order for the Court to determine its validity." A342-343. The Court seemingly accepted that the Release constituted self-dealing. Opinion at 11 ("[t]his [that the Release is a self-interested transaction] may well be true. . .").

Defendants half-heartedly suggest that the Release is not self-dealing (or that Plaintiff did not adequately assert that it was self-dealing by including that assertion in an amended pleading), but they simply cannot dispute that the Release conferred a direct benefit upon each of the Individual Defendants who caused Viacom to approve it. That is classic self-dealing. Pl. Br. at 29.[5] Accordingly,

[5] Defendants also cannot dispute that the Release was the product of a settlement of wholly unrelated litigation, which did not involve any dispute over Redstone's

while the Court could take judicial notice of the Release, it also should have recognized that the Release is a self-dealing transaction, which is self-evident, and not simply accepted it at face value. Pl. Br. at 29-30.

C. Plaintiff's Failure to Consolidate his Case with a Separate Litigation that Challenged the Settlement that Contained the Release Provides no Support for Dismissal

Defendants' assertion that Plaintiff's failure to participate in a separate litigation, *In re Viacom Inc. Class B S'holder Litig.*, C.A. No 12545-CB (the "Class B Litigation"), somehow "[p]rovides [a]dditional [s]upport [f]or [a]ffirmance" or "reinforces the propriety of the Court of Chancery's decision below" (Viacom Ans. Br. at 17) is nonsensical.[6] Defendants have not cited a single case or articulated any reason why Plaintiff's failure to combine his case with a separate class action and derivative lawsuit asserting different claims, or to

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compensation, and in which some of the Individual Defendants were adverse to other Individual Defendants. *Id*. Defendants' general observations that "comprehensive settlements that include general releases are commonplace and favored" and that merely being named as a defendant to a derivative claim does not alone establish demand futility (Viacom Ans. Br. at 19, 20) do not undermine the obvious self-interested nature of the Release.

[6] In the Class B Litigation, the plaintiffs asserted, *inter alia*, that the Viacom directors breached their fiduciary duties by entering into the Settlement Agreement. *See, e.g.*, Class B Litigation Verified Amended Class Action and Derivative Complaint (D.I. 137) ("The Incumbent Director Defendants have breached their fiduciary duties by failing to protect the public stockholders and agreeing to the Settlement that allowed an incompetent Sumner Redstone to continue controlling the Company.").

follow the litigation strategy of the plaintiffs in that separate litigation is relevant to the issues before the Court.

D. The Court's Decision Is Incompatible With *Zapata* And Other Fundamental Principles Of Delaware Corporate Law

As explained in Plaintiff's Opening Brief, allowing conflicted fiduciaries to terminate derivative claims pending against them merely by causing a corporation to execute a release, without any judicial scrutiny, is inconsistent with the principles elucidated in *Zapata Corp. v. Maldonado*, 430 A.2d 779, 787-88 (Del.1981), as well as other fundamental principles of Delaware corporate law that (i) place the burden of demonstrating fairness on self-dealing fiduciaries and (ii) require judicial scrutiny of transactions in which corporate fiduciaries seek to dismiss or compromise derivative claims. *See* Pl. Br. at 31-33; *see also In re Investors Bancorp, Inc. S'holder Litig*., 2017 WL 6374741, at *1 n.2 (Del. Dec. 19, 2017) ("'Human nature being what it is, the law, in its wisdom, does not presume that directors will be competent judges of the fair treatment of their company where fairness must be at their own personal expense. In such a situation the burden is upon the directors to prove not only that the transaction was in good faith, but also that its intrinsic fairness will withstand the most searching and objective analysis.'") (*quoting Gottlieb v. Heyden Chem. Corp.*, 90 A.2d 660, 663 (1952)).

Defendants offer no cogent response. Instead, they: (1) make self-serving and unverified factual assertions regarding the context and circumstances of the Release (which merely underscore the need for discovery); and (2) repeat their misguided criticism of Plaintiff for not amending his Complaint. Viacom Ans. Br. at 21-22.

E. Plaintiff Did Not Have To Plead A "Lack Of Entire Fairness"

Lastly, Defendants assert that they had no obligation to demonstrate the entire fairness of the self-dealing Release, because Plaintiff failed to satisfy his pleading burden "to invoke that standard in the first place" and "failed to even attempt to meet his threshold pleading burden." Viacom Ans. Br. at 22-24. This entire argument (except for additional self-serving factual assertions regarding the context and circumstances of the Release) rests on the proposition that Plaintiff had the obligation to amend his Complaint to address an affirmative defense that Defendants created *after* Plaintiff asserted derivative claims on behalf of Viacom

against them. That proposition is erroneous. *See* Section I (A) *supra;* Pl. Br. at 30 n.5.[7]

Under the facts of this case, dismissal should not have been granted on the face of the Release. To meet their obligation of establishing entire fairness, Defendants should be required to put before the Court in proper evidentiary form, subject to adversarial testing, facts and argument concerning the circumstances under which the Release was negotiated and executed and whether or not Viacom obtained fair consideration for relinquishing these claims. Plaintiff should have received the opportunity to develop a record on these issues.

[7] Defendants assert that dismissal would still have been appropriate "if plaintiff had amended his complaint to include the meager allegation that the [Settlement and Release] were self-interested simply because the directors were releasees thereunder." Viacom Ans. Br. at 20. The cases they cite for the entire fairness pleading burden counsel otherwise. *See, e.g.*, *In re New Valley Corp. Deriv. Litig.*, 2001 WL 50212, at *7 (Del. Ch. Jan. 11, 2001) ("All that is required [to plead entire fairness] is that the complaint give 'fair notice' of these claims. A court undertaking that analysis must afford a liberal construction to the language of the pleading."). At any rate, Plaintiff had no pleading burden under the unique procedural posture of this case. It should have been incumbent upon Defendants to demonstrate the fairness of the self-interested Release they granted themselves after Plaintiff brought this action. Indeed, as Defendants concede, "the specific facts and circumstances of the Release are all within Defendants' control" (Pl. Br. at 30) and "plaintiff had 'virtually no information concerning the circumstances of the release.'" Viacom Ans. Br. at 20.

II. THE COMPLAINT ADEQUATELY PLEADS DEMAND FUTILITY AND STATES A CLAIM FOR WASTE

Plaintiff has adequately plead demand futility under the standard articulated in *Rales v. Blasband*, 634 A.2d 927 (Del. 1993). Under *Rales*, courts evaluate whether the allegations create "a reasonable doubt that, as of the date the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." *Rales*, 634 A.2d at 934.[8] As shown below, the totality of the allegations in the Complaint cast a reasonable doubt on the Individual Defendants' ability to consider a demand impartially.

A. Demand is Excused Because the Board Acted in Bad Faith and Committed Waste

Demand is excused because Plaintiffs have alleged facts which are sufficient both to state a claim for waste and give rise to an inference that the Individual Defendants acted in bad faith. Therefore, the Individual Defendants would face a substantial risk of personal liability if they complied with a stockholder's demand

[8] Demand is excused where there is "reasonable doubt" as to the disinterestedness or independence of a majority of directors. "Reasonable doubt can be said to mean there is a reason to doubt. This concept is sufficiently flexible and workable to provide the stockholder with the 'keys to the courthouse' in an appropriate case where the claim is not based on mere suspicions or stated in conclusory terms." *Grimes v. Donald*, 673 A.2d 1207, 1217 (Del. 1996), *overruled in part on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

to pursue litigation.[9] The Complaint alleges facts demonstrating that the Individual Defendants knowingly violated their fiduciary duties and wasted Viacom's assets by compensating Sumner Redstone ("Redstone") during the Relevant Period (approximately July 2014 to May 2016) when they knew he did not fulfill his contractual obligations and was unable to provide any services to the Company.

Among other facts, the Complaint alleges:

- Redstone was hospitalized in the summer and fall of 2014 and suffered a brain injury. Compl. ¶ 28 (A36). Redstone [redacted] Compl. ¶¶ 29-31 (A36-37). Redstone could not communicate with stockholders in November 2014. Compl. ¶ 32 (A37).
- The Compensation Committee [redacted] Compl. ¶¶ 36-37 (A39). The Board [redacted] Compl. ¶¶ 33, 39 (A38,40). The Board refused to [redacted] The Board re-nominated him in 2015 and 2016, while also completely misrepresenting his abilities to shareholders. Compl. ¶¶ 36-43, 61 (A39-42, 49).
- Redstone [redacted] Compl. ¶¶ 44, 45 (A42-43). Press articles throughout the spring of 2015, and a lawsuit filed

[9] *See Sandys v. Pincus*, 2016 WL 769999, at *12 (Del. Ch. Feb. 29, 2016) (overruled on other grounds) (noting that a director may have a personal interest in considering a plaintiff's litigation demand because the director otherwise faces a substantial risk of liability in the litigation).

in November 2015, made public Redstone's mental and physical incapacity. Compl. ¶¶ 46-48, 50-51 (A43-46).

- On April 9, 2015, Redstone's estate planning attorney, Adam Streisand, e-mailed his concerns about Redstone's medical condition becoming public which would then cause Viacom to have to remove him as an officer and director and stop paying him compensation. Compl. ¶ 46 (A43).
- Defendant Dauman submitted a court declaration in November 2015 that Redstone was engaged and active, but months later (when convenient to advance his own personal agenda), he retracted the statements and stated that at that time he submitted them "in order to help his longtime friend and colleague maintain his choice of healthcare agent." Compl. ¶ 53 (A46-47).
- [redacted] (A96-99).
- [redacted] (A100-105).
- [redacted] *Id.*
- The Board continued to compensate Redstone and re-nominated him to the Board despite knowing he could not make "independent, analytic inquiries." Compl. ¶¶ 60, 61 (A49).
- The Board paid Redstone $2 million for fiscal year 2015, and claimed he was no longer eligible for a bonus because of his "reduced responsibilities", knowingly misrepresenting his actual inability to provide any services to the Company. Compl. ¶ 57 (A48).
- Expert opinions confirmed Redstone was unfit. Compl. ¶ 67 (A51).

- Redstone resigned in February 2016 and was appointed as Chairman Emeritus. Compl. ¶¶ 63, 66 (A50-51). Dauman allowed him to get paid in this role despite having visited him in March 2016 and finding that Redstone was totally non-responsive. Compl. ¶¶ 68, 72 (A51-52).

Redstone's own allegations in the Redstone Abuse Lawsuit confirm Plaintiffs' allegations regarding his incapacity. *See* Redstone Abuse Lawsuit (A238-274); Pl. Br. at 25-27.[10] Redstone asserts his capacity was so diminished that "[b]y the spring of 2014, Holland and Herzer were in near total control of [his] life." A247. He claims that on May 19, 2014, Holland and Herzer manipulated him to sell all of his vested holdings of Viacom and CBS securities and to authorize transfers of $45 million to each of them. A249-50. By September 2014, he "required around-the-clock nursing care" and he was unable "to initiate communication or articulate more than the most basic responses. A253. These allegations are entirely inconsistent with the fiction that Redstone was contemporaneously providing useful services to Viacom. Additionally, notwithstanding plaintiff's highly specific demands for documents pursuant to 8 *Del. C.* §220, including a specific request for Board Materials concerning "Sumner Redstone's performance of any duties or responsibilities as Executive Chairman of

[10] Plaintiff attached to his Answering Brief in the Court of Chancery a copy of the complaint filed on behalf of Redstone in the Redstone Abuse Lawsuit (A238-274) and asserted that the Court could take judicial notice of the filing of the Redstone Abuse Lawsuit, and the allegations made therein by or on behalf of Redstone, as judicial admissions not subject to contradiction or explanation (A222).

the Board of Viacom,” [redacted] Compl. ¶¶ 2, 7, 96 (A24-25, 27, 60).

Rather than disputing the fact that Redstone is incapable of rendering any services to Viacom, Defendants seem to dispute the time frame when his incapacity began, arguing that the Complaint alleges it was July 2014, as opposed to May 2014, based on the Redstone Abuse Lawsuit. *See* Viacom Ans. Br. at 25. When Redstone himself, admits that by May 2014 he was easily duped and unable to handle his own personal financial affairs, it cannot be credibly maintained that, at the same time, he was capable of providing “guidance and support” and “overall leadership and strategic direction” to a large corporation. A91.

Plaintiff’s allegations are sufficient to state a claim for waste. A claim of waste “entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade.” *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del Ch. 1997) (denying motion to dismiss waste claim). While it is difficult to plead a waste claim, it is not impossible. It is well settled that “the discretion of directors in setting executive compensation is not unlimited. Indeed, this Court was clear when it stated that ‘there is an outer limit’ to the board’s discretion to set executive

compensation, 'at which point a decision of the directors on executive compensation is so disproportionately large as to be unconscionable and constitute waste.'" *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009) (quoting *Brehm*, 746 A.2d at 262 n.56). "When pled facts support an inference of waste, judicial nostrils smell something fishy and full discovery into the background of the transaction is permitted." *Sample v. Morgan*, 914 A.2d 647, 670 (Del. Ch. 2007) (noting that the doctrine of waste "allows a plaintiff to pass go at the complaint stage even when the motivations for a transaction are unclear by pointing to economic terms so one-sided as to create an inference that no person acting in a good faith pursuit of the corporation's interests could have approved the terms.").

The payments to Redstone during the Relevant Period state a claim for waste since Redstone did not provide any services to the Company. *See, e.g.*, *In re EZCORP Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245 (Del. Ch. Jan. 25, 2016) (denying motion to dismiss waste claim). By wholly ignoring Redstone's complete failure to meaningfully participate, physically and mentally, as an officer and a director of Viacom, while collecting millions of dollars in salary and bonuses, the Board acted in bad faith and consciously disregarded their

fiduciary duties.[11] The directors who attended Board meetings could not reasonably have overlooked Redstone's absence and incapacity, and that he had not been fulfilling his responsibilities for an extended period. But instead of taking action, the Board went so far as to re-nominate Redstone to the Board in 2015 and 2016, either failing to take into account the information known to them, or consciously deciding to nominate a mentally incapacitated person as a director. Compl. ¶¶ 43, 61(A42, 49).[12]

Defendants contend that because the Complaint makes no allegation that Redstone was not performing his duties prior to July 1, 2014, Plaintiff's challenge

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[11] Only after Redstone's incapacity became public with the Herzer lawsuit in November 2015, which claimed that he could not "talk intelligibly, walk, write, use a computer or phone," (Compl. ¶ 51(A45-46)), did the Board even begin to address Redstone's capacity to work and to serve as Executive Chairman. Even then, the Board [redacted]

[12] Defendants also attempt to justify the award of compensation, by claiming the approximately $3 million awarded to Mr. Redstone in 2015 and 2016 were paid . . . "at least in part, in recognition of his historical role as Viacom's founder and of his many years of service, and based on concerns about [redacted] Viacom Ans. Br. at 26. This argument seems to acknowledge that Redstone was not providing the services to Viacom that his contract specified, and retrospectively, seeks to justify payments to him on alternative grounds. Other than when Redstone was paid for a few months as Chairman Emeritus, [redacted]

to Mr. Redstone's fiscal year 2014 bonus is inadequate. Viacom Ans. Br. at 25. This argument not only ignores Redstone's allegations in the Redstone Abuse Lawsuit, but misses the point that it was incumbent upon the Joint Committee to evaluate Redstone's performance in 2014, based on goals and objectives set by the Compensation Committee from the year prior, in order to properly determine his eligibility for a bonus payment. Compl. ¶¶ 35, 37 (A38-39). Had they conducted a true evaluation of Redstone's actual performance in 2014, they would have concluded that he was ineligible for such a large bonus payment. Compl. ¶¶ 37, 38 (A39-40). Redstone's inability to achieve his 2014 pre-established goals or otherwise to perform any service of value for Viacom after May 2014 was apparent, but they still awarded him a $10 million bonus. Compl. ¶¶ 33, 37, 38 (A38-40).[13] These allegations plead that the bonus award, particularly in the face of Defendants' knowledge of Redstone's failings, was not made in good faith.

B. The Complaint States A Claim For Waste

As set forth above, Plaintiff's complaint adequately alleges that demand is excused because the Individual Defendants acted in bad faith and committed waste. Such allegations are also sufficient to state a claim against the Individual Defendants for waste. *See Citigroup*, 964 A.2d at 139 ("The standard for pleading

[13] Redstone's bonus for the prior year, when he was not incapacitated, was only $8.5 million. B169.

demand futility under Rule 23.1 is more stringent than the standard under Rule 12(b)(6), and 'a complaint that survives a motion to dismiss pursuant to Rule 23.1 will also survive a 12(b)(6) motion to dismiss, assuming that it otherwise contains sufficient facts to state a cognizable claim.'") (quoting *McPadden v. Sidhu*, 2008 WL 4017052, at *7 (Del. Ch. Aug. 29, 2008)).

The fact that Viacom's certificate of incorporation exculpates the company's directors for breaches of duty of care pursuant to 8 *Del. C.* § 102(b)(7) (*see* Viacom Ans. Br. at 25 n. 7; Director Ans. Br. at 16) does not bar Plaintiff's claims. Section 102(b)(7) does not exculpate directors from bad faith acts or omissions, including the intentional acting against the corporation's interest, or the intentional dereliction of duty or conscious disregard for one's responsibilities, all of which constitute a breach of the fiduciary duty of loyalty. *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001); *In re Walt Disney Co. Deriv. Litig*., 906 A.2d 27, 67 (Del. 2006). Having stated a claim for waste, Plaintiff has adequately alleged that the Individual Directors acted in bad faith. *See Citigroup*, 964 A.2d at 139 n.113; *In re Walt Disney Co. Deriv. Litig*., 907 A.2d 693, 749 (Del. Ch. 2005) ("The Delaware Supreme Court has implicitly held that committing waste is an act of bad faith.") (citing *White v. Panic*, 783 A.2d 543, 553-55 (Del. 2001)).

III. THE COMPLAINT STATES A CLAIM FOR UNJUST ENRICHMENT AGAINST SUMNER REDSTONE

Defendants also assert that Count II of Plaintiff's Complaint, which asserts a claim for unjust enrichment against Redstone, should be dismissed because he had an employment contract with the Company. Viacom Ans. Br. at 29. However, Redstone's employment contract did not mandate or specify the amount of compensation Redstone was awarded, as a significant portion of his compensation was discretionary and determined annually. (A317, 322-23).

Plaintiff simply asserts that because of the other directors' wrongful conduct, Sumner received more compensation than to which he was entitled. Unjust enrichment is "'the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.'" *Ryan v. Gifford*, 918 A.2d 341, 361 (Del. Ch. 2007) (citing *Schock v. Nash*, 732 A.2d 217, 232-33 (Del. 1999)). "A defendant may be liable 'even when the defendant retaining the benefit is not a wrongdoer' and 'even though he may have received [it] honestly in the first instance.'" *Id.*; *see also Robert J. Casey, II v. James R. Moffett, et al. and Freeport-McMoran, Inc.*, C.A. No. 12554-VCL (Del. Ch. Mar. 31, 2017; filed June 13, 2017) at 44-45 ("[U]njust enrichment would suggest that if the directors provided the benefit to [corporation's ex-CEO and Chairman] in violation of their fiduciary duties, that equity could claw back the benefit for the company.").

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff's Opening Brief, Plaintiff respectfully submits, the Court of Chancery's Opinion should be reversed and the case should be remanded to the Court of Chancery for further proceedings.

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