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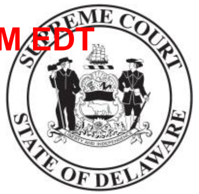

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE COUNTY EMPLOYEES' RETIREMENT FUND and CITY OF STERLING HEIGHTS GENERAL EMPLOYEES' RETIREMENT SYSTEM, derivatively on behalf of SIMON PROPERTY GROUP, INC., Plaintiffs Below, Appellants, v. MELVYN E. BERGSTEIN, LARRY C. GLASSCOCK, KAREN N. HORN, ALLAN HUBBARD, REUBEN S. LEIBOWITZ, DANIEL C. SMITH, J. ALBERT SMITH, JR., HERBERT SIMON, DAVID SIMON, and RICHARD S. SOKOLOV, Defendants Below, Appellees, and SIMON PROPERTY GROUP, INC., Nominal Defendant Below, Appellee.	No. 199, 2015 (Appeal from Court of Chancery C.A. No. 10249-VCL)

INDIVIDUAL DEFENDANTS BELOW,
<u>INDIVIDUAL APPELLEES' ANSWERING BRIEF</u>

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iv

NATURE OF THE PROCEEDINGS 1

SUMMARY OF ARGUMENT 3

COUNTER-STATEMENT OF FACTS 5

A. The Parties 5

B. The Original Award 6

C. The Prior Actions 6

D. The Committee's Evaluation, Negotiation and Approval of the Amended Award 8

E. The Dismissal of the Prior Actions 10

F. Plaintiffs' Counsel Request and Receive a Substantial Fee Award 11

G. The Commencement and Dismissal of This Lawsuit 12

ARGUMENT 15

I. THE COURT OF CHANCERY CORRECTLY APPLIED THE *RALES* STANDARD IN EVALUATING THE COMMITTEE'S APPROVAL OF THE AMENDED AWARD 15

A. QUESTION PRESENTED 15

B. SCOPE OF REVIEW 15

C. MERITS OF THE ARGUMENT 15

1. David Simon Did Not Approve the Amended Award on Behalf of SPG 16

2. The Three Non-Members of the Committee Did Not Approve the Amended Award 17

II. THE COURT OF CHANCERY CORRECTLY RULED THAT PLAINTIFFS FAILED TO DEMONSTRATE THAT THE AMENDED AWARD WAS NOT THE PRODUCT OF A VALID EXERCISE OF BUSINESS JUDGMENT 19

A. Question Presented 19

B. Scope of Review 19

C. Merits of the Argument 19

1. The Applicable Standard 20

2. The Approval of the Amended Award Was Neither Disloyal Nor in Bad Faith 23

3. The Complaint Raises No Reason to Doubt that the Committee Was Adequately Informed 24

4. Plaintiffs Have Failed to Plead a Viable Waste Claim Concerning the Escrowed Shares 29

III. THE COURT OF CHANCERY CORRECTLY RULED THAT A MAJORITY OF THE BOARD IS INDEPENDENT AND DISINTERESTED 31

A. Question Presented 31

B. Scope of Review 31

C. Merits of the Argument 31

1. Plaintiffs Cannot Show a Substantial Likelihood of Director Liability Sufficient to Excuse Demand 32

2. Plaintiffs' Unpled Allegations of Reputational Harm or the Disgorgement of Advanced Costs Do Not Excuse Demand.....33

CONCLUSION.....35

TABLE OF AUTHORITIES

CASES

Page(s)

Alidina v. Internet.com Corp.,
2002 WL 31584292 (Del. Ch. Nov. 6, 2002) 24

Aronson v. Lewis,
473 A.2d 805 (Del. 1984) ....passim

Brehm v. Eisner,
746 A.2d 244 (Del. 2000) 15, 19, 28, 31

In re Citigroup Inc. S'holder Deriv. Litig.,
964 A.2d 106 (Del. Ch. 2009) 29

Citron v. E. I. du Pont de Nemours & Co.,
584 A.2d 490 (Del. Ch. 1990) 18

Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co.,
2008 WL 4824053 (Del. Ch. Oct. 28, 2008) 5

In re Cornerstone Therapeutics Inc. Stockholder Litig.,
2015 WL 2394045 (Del. May 14, 2015) 22

In re Goldman Sachs Grp., Inc. S'holder Litig.,
2011 WL 4826104 (Del. Ch. Oct. 12, 2011) 21, 26

Green v. Phillips,
1996 WL 342093 (Del. Ch. June 19, 1996).. 29-30

Guttman v. Huang,
823 A.2d 492 (Del. Ch. 2003) 20-21

Highland Legacy Ltd. v. Singer,
2006 WL 741939 (Del. Ch. Mar. 17, 2006) 18

Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan v. Andreotti,
2015 WL 2270673 (Del. Ch. May 8, 2015).....................................15, 19, 31, 34

In re John Q. Hammons Hotels Inc. S'holder Litig.,
2011 WL 227634 (Del. Ch. Jan. 14, 2011)..16

Khanna v. McMinn,
2006 WL 1388744 (Del. Ch. May 9, 2006)...21

In re Lear Corp. S'holder Litig.,
967 A.2d 640 (Del. Ch. 2008) 21-22

MCG Capital Corp. v. Maginn,
2010 WL 1782271 (Del. Ch. May 5, 2010)...22, 30, 33

Protas v. Cavanagh,
2012 WL 1580969 (Del. Ch. May 4, 2012)...20

Rales v. Blasband,
634 A.2d 927 (Del. 1993) ....passim

Ryan v. Gifford,
918 A.2d 341 (Del. Ch. 2007) 31

Seinfeld v. Slager,
2012 WL 2501105 (Del. Ch. June 29, 2012)..30

Smith v. Van Gorkom,
488 A.2d 858 (Del. 1985) 25, 33

Steiner v. Meyerson,
1995 WL 441999 (Del. Ch. July 19, 1995) 29

Sutherland v. Sutherland,
2010 WL 1838968 (Del. Ch. May 3, 2010)... 25-26

In re Tri-Star Pictures, Inc., Litig.,
1995 WL 106520 (Del. Ch. Mar. 9, 1995) 18

Wal-Mart Stores, Inc. v. AIG Life Ins. Co.,
860 A.2d 312 (Del. 2004) 6

In re Walt Disney Co. Deriv. Litig.,
906 A.2d 27 (Del. 2006) 25

Weinberger v. Bankston,
1987 WL 20182 (Del. Ch. Nov. 19, 1987) 23

Weiss v. Samsonite Corp.,
741 A.2d 366 (Del. Ch. 1999) 5

Weiss v. Swanson,
948 A.2d 433 (Del. Ch. 2008) 17

White v. Panic,
783 A.2d 543 (Del. 2001) 20

Wood v. Baum,
953 A.2d 136 (Del. 2008) 21, 25

STATUTES

8 DEL. C. § 102(b)(7) 3, 21-22

8 DEL. C. § 220 ....13, 17

65 Del. Laws, c. 289 (1986)..21

NATURE OF THE PROCEEDINGS

This is an appeal from the Court of Chancery's order dismissing a derivative action that attacked the modification of a 2011 retention award (the "Original Award," and as modified, the "Amended Award") to David Simon, the Chief Executive Officer and Chairman of the Board of Nominal Defendant Below-Appellee Simon Property Group, Inc. ("SPG").

Plaintiff Below-Appellant Delaware County Employees' Retirement Fund ("Delaware County") and its present counsel ("Plaintiffs' Counsel") previously challenged the Original Award in the Court of Chancery, alleging that it violated SPG's 1998 Stock Incentive Plan (the "Plan") because it was not performance-based. *Louisiana Municipal Police Employees' Retirement System, et al.* v. *Bergstein, et al.*, C.A. No. 7764-VCL ("*LAMPERS*"). SPG's Compensation Committee (the "Committee") amended and restated the Original Award to include financial performance conditions, and the court dismissed the claim as moot.

Plaintiffs' Counsel—together with counsel for the plaintiff in another case challenging the Original Award on different grounds, *Shepherd* v. *Simon, et al.*, C.A. No. 7902-VCL ("*Shepherd*," and together with *LAMPERS*, the "Prior Actions")—collectively sought a $26.5 million fee award for the mooting of the Prior Actions, arguing in part that the Amended Award's performance goals saved SPG more than $26 million and constituted an "enormous," "undeniable" and

"critically important" benefit to SPG and its stockholders. The Court of Chancery found that the Amended Award benefitted SPG and its stockholders in an amount greater than $6 million and, on that basis, granted Plaintiffs' Counsel a fee award greater than $1 million. Despite their prior arguments, Plaintiffs now allege that the Amended Award's performance goals are "illusory" and that the Amended Award "ensur[ed] that Simon received (well more than) 100% of what the SPG Board promised him in the . . . Original Award." (Br. 5, 16.)

Even putting aside Plaintiffs' contradictory allegations, their Verified Derivative Complaint (the "Complaint") does not meet the stringent standard for demand futility, and the Court of Chancery correctly dismissed the Complaint under Rule 23.1. While the court rightly held that it is "more appropriate" to evaluate demand futility under the standard articulated in *Rales* v. *Blasband*, 634 A.2d 927 (Del. 1993), since the Amended Award was approved by the four-member Committee rather than the ten-member Board, it also evaluated demand futility under the standard of *Aronson* v. *Lewis*, 473 A.2d 805 (Del. 1984). As the Court of Chancery correctly ruled, the Complaint satisfies neither standard. Viewed under either *Rales* or *Aronson*'s first prong, Plaintiffs have not pled facts suggesting that half or more of SPG's directors lack independence or are not disinterested. Nor have Plaintiffs provided any basis to second-guess the Committee's business judgement under the second prong of the *Aronson* standard.

SUMMARY OF ARGUMENT

1. DENIED. Because the Amended Award was approved by the four-member Committee, rather than half or more of SPG's ten-member Board, the Court of Chancery correctly evaluated demand futility under the *Rales* standard. Mr. Simon negotiated the Amended Award in his individual capacity, as a contractual counterparty, and did not approve it on SPG's behalf or participate in the Committee's deliberations. Plaintiffs' allegation that three non-Committee members were invited to observe certain Committee meetings is irrelevant. Those directors did not vote on the Amended Award and lacked the power or authority to do so because they were not Committee members.

2. DENIED. Even if the *Aronson* standard applies (and it does not), the Court of Chancery correctly applied *Aronson*'s second prong in determining that Plaintiffs failed to allege particularized facts creating a reasonable doubt that the Amended Award was a valid exercise of business judgment. Because *Aronson*'s second prong (like its first) is directed to evaluating director liability, and SPG's charter includes an exculpatory provision adopted pursuant to 8 *Del. C.* § 102(b)(7), Plaintiffs must allege a non-exculpated breach of fiduciary duty. They have failed to do so. The Complaint does not contain particularized factual allegations suggesting any disloyal conduct on the part of any director. Moreover, it also fails to allege even an exculpated breach that would be actionable but for the

exculpatory provision, as it does not plead facts suggesting that the Committee (or, as Plaintiffs erroneously allege, the Board) was grossly negligent in approving the Amended Award. In evaluating, negotiating and approving the Amended Award, the Committee was entitled to take into account that it was amending an existing award (rather than cancelling it, a course demanded by plaintiffs in the Prior Actions even though it would have caused SPG to record approximately $32 million more in compensation expense), and that the informational basis for the Original Award has never been challenged. Finally, Plaintiffs' waste claim concerning the escrowed shares fails because, among other things, (i) the Amended Award provided admitted benefits to SPG and (ii) the plain language of the Amended Award makes clear that Mr. Simon does not possess, and has not yet earned, any of these escrowed shares, which can only be earned subject to the satisfaction of the Amended Award's performance and service-based criteria.

3. DENIED. The Court of Chancery correctly ruled that Plaintiffs failed to plead facts suggesting that half or more of SPG's ten directors are not disinterested or lack independence. The Individual Defendants do not face any prospect of personal monetary liability—let alone a substantial likelihood—in this action, nor did they face any such prospect in the Prior Actions. Plaintiffs' unpled allegations concerning potential reputational harm arising from the Prior Actions and the potential repayment of advanced costs are insufficient to excuse demand.

COUNTER-STATEMENT OF FACTS

A. The Parties

SPG is a real estate investment trust organized as a Delaware corporation and headquartered in Indianapolis, Indiana. (A16-17.) Defendants Melvyn Bergstein, Larry Glasscock, Karen Horn, Ph.D., Allan Hubbard, Reuben Leibowitz, Daniel Smith, Ph.D., J. Albert Smith, Jr., David Simon, Herbert Simon and Richard Sokolov are members of SPG's Board. (A17-19.)

Seven of SPG's ten directors are independent, non-management directors. (A17-19, 53.) Mr. A. Smith served as the Lead Independent Director during the relevant period. (A19.) Defendants Leibowitz, Hubbard, D. Smith and Bergstein served on the Committee, with Mr. Leibowitz acting as Chair. (A17-18.)

David Simon has served as SPG's CEO since January 1995, and as Chairman of the Board since 2007. (A17.) SPG's total return since Mr. Simon became CEO through December 31, 2013 was 1,617.8%—outpacing stellar performers like Berkshire Hathaway (772.1% over the same span).[1] Herbert Simon is SPG's co-founder, former CEO (1993-1995) and the Board's Chairman Emeritus. (A17.) Richard Sokolov is SPG's President and COO. (A19.)

[1] The Court may take judicial notice of SPG's stock price (available at http://finance.yahoo.com/q?s=SPG), from which this total return data is derived. *See, e.g.*, *Cnty. of York Emps. Ret. Plan* v. *Merrill Lynch & Co.*, 2008 WL 4824053, at *7 (Del. Ch. Oct. 28, 2008) (taking judicial notice of stock price); *Weiss* v. *Samsonite Corp.*, 741 A.2d 366, 375 n.26 (Del. Ch. 1999) (same), *aff'd*, 746 A.2d 277 (Del. 1999).

Under SPG's charter, its directors are exculpated from personal liability to SPG "to the fullest extent permitted" by Delaware law. (B10.) They are also indemnified by SPG "to the fullest extent permitted" under Delaware law (B9), and subject to indemnification agreements.

Plaintiffs Delaware County and City of Sterling Heights General Employees' Retirement Fund purport to have been stockholders at all times relevant to the claims asserted in the Complaint. (A16.)

B. The Original Award

On July 6, 2011, the Committee unanimously approved a long-term employment agreement with David Simon to secure his services until July 2019. (B24-48.) The agreement included the Original Award, a one-time retention award in the form of one million long-term incentive performance ("LTIP") units. (*Id.*) These LTIP units would be earned based solely on continued service, rather than achievement of specific performance criteria, and would vest in one-third increments on the day prior to the sixth, seventh, and eighth anniversaries of the grant date, so long as Mr. Simon remained employed by SPG. (*Id.*)

C. The Prior Actions[2]

Neither *LAMPERS* nor *Shepherd* "challenge[d] the size of the [Original

[2] This Court may take judicial notice of publicly available facts that are not subject to reasonable dispute, including the contents of court records in related proceedings. *See Wal-Mart Stores, Inc.* v. *AIG Life Ins. Co.*, 860 A.2d 312, 320 n.28 (Del. 2004); *see also* A81.

Award] on fiduciary duty grounds." (Ex. A at 62.) Rather, Delaware County and its co-plaintiff in *LAMPERS* claimed the Original Award was "invalid and *ultra vires*" for failure to comply with the Plan because it was not performance-based. (B96, 110, 111.) They sought rescission and cancellation of the Original Award and declaratory relief, but not damages.

The *Shepherd* complaint alleged that the Original Award was *ultra vires* because it violated a provision of the Plan that purportedly restricted awards to any participant to no more than 600,000 LTIP units in a calendar year. (B52-53, 77.) It further alleged that SPG made false and misleading disclosures in connection with a 2012 stockholder vote approving a Plan amendment that, among other things, increased the number of units that could be awarded to a participant in any calendar year. (B53, 72.) *Shepherd* sought rescission of the Original Award and the 2012 Plan amendment, declaratory relief, restitution from Mr. Simon and an award of damages.

On October 14, 2013, the Court of Chancery heard argument on cross-motions for summary judgment in *LAMPERS* and the *Shepherd* plaintiff's motion for partial judgment on the pleadings. (B157-397.) Then-Chancellor Strine reserved decision, emphasizing that SPG's directors "have it within their authority to act[,]" and could "deal with" the pending claims in advance of any ensuing decision, without the involvement of the plaintiffs. (B390-91.)

D. The Committee's Evaluation, Negotiation and Approval of the Amended Award

In response to the Court of Chancery's observation at the hearing, the Committee undertook to identify and implement measures that would address, and moot, the challenges raised in the Prior Actions. (A29.) Beginning in October 2013, the Committee conferred with and received guidance from legal counsel and its independent compensation consultant, Semler Brossy Consulting Group, LLC. (A29-30.) The Committee held five special telephonic meetings, and Semler Brossy attended all but the first. (A32, 34-35, 37-39.) The Chair, Mr. Leibowitz, also held separate discussions with Semler Brossy and legal counsel, and directly negotiated aspects of the Amended Award with Mr. Simon. (A29-32.)

Four of the Board's seven independent, non-management directors served on the Committee, but the others—Mr. A. Smith, Mr. Glasscock and Dr. Horn—were invited to attend its meetings as observers. (Br. 11.) Mr. A. Smith (then the Lead Independent Director) attended three meetings, and Mr. Glasscock attended one. (*Id.*) David Simon, Herbert Simon and Mr. Sokolov were not invited to attend, and did not attend, any of the five meetings. No directors other than the members of the Committee voted, or were authorized to vote, to approve the Amended Award.

The Committee exercised its good faith business judgment, in consultation with Semler Brossy and its legal advisors, in determining to modify the Original Award rather than cancelling or rescinding it. Cancellation or rescission, and the

granting of a new award, would have caused SPG to record approximately $32 million more in compensation expense, and nearly $70 million more between 2014 and 2019. (B435-36; 454-59.) The plaintiffs in the Prior Actions and their counsel were given an opportunity to comment on the terms of the Amended Award. They opted instead to insist that the Original Award be cancelled or rescinded—without identifying any practical benefit to that course—in a transparent effort to increase their potential fee award. (*See* B466-70, 485; 698-99.) The Committee correctly rejected that demand and chose a path providing favorable and efficient accounting treatment for SPG and its stockholders. (B454-59.)

On December 31, 2013, the Committee and Mr. Simon executed an Amended and Restated CEO LTIP Unit Award Agreement amending and restating the Original Award in its entirety. (B398-413.) The Amended Award imposes performance criteria as well as service-based vesting requirements, and does not award Mr. Simon LTIP units representing more than 600,000 shares in any calendar year. (*Id.*) The performance criteria are based on SPG's funds from operations ("FFO") per share, increased or decreased to give effect to, among other things, any "extraordinary, unusual or nonrecurring item[s] . . . [or] other specific unusual or nonrecurring events" ("Adjusted FFO"). (A21.)

Under the Original Award, the after-tax portion of any distributions paid on Mr. Simon's unvested LTIP units were used to purchase 46,439 shares of SPG

common stock in the open market. This stock is held in escrow, and under the Amended Award, a *pro rata* portion of these shares (and any additional shares purchased with distributions in respect of the Original Award's LTIP units before their cancellation) will be released to Mr. Simon if and only if the LTIP units are earned pursuant to the Amended Award's performance criteria and vest through satisfaction of the service conditions. (B407.) Accordingly, Mr. Simon has not yet earned any portion of these shares held in escrow (the "Escrowed Shares"). He will do so in the future only if SPG satisfies the applicable performance criteria, and, further, if the Escrowed Shares vest because Mr. Simon satisfies the service requirements set forth in the Amended Award.

E. The Dismissal of the Prior Actions

In a March 28, 2014 oral ruling, the Court of Chancery granted in part and denied in part the Individual Defendants' motions to dismiss the Prior Actions as moot. (A221-38.) It dismissed plaintiffs' claims concerning the Original Award, ruling that the Amended Award and SPG's commitments "fully mooted" those claims. (A222.) It denied dismissal on mootness grounds with respect to the *Shepherd* plaintiff's disclosure claim, but noted the possibility of curing SPG's allegedly misleading statements and omissions through a ratifying stockholder vote. (A234.) SPG put the matter to a vote of stockholders at its annual meeting held on May 15, 2014, at which stockholders voted overwhelmingly (with more

than 97.5% of shares voting cast in favor) to ratify and approve the amended version of the Plan, as well as prior amendments to the Plan (B583-85)—after extensive disclosures concerning, among other things, the Original and Amended Awards, the nature and background of the Prior Actions, and the Individual Defendants' intention to seek dismissal of the *Shepherd* Action in the event of a ratifying vote. (B525-29, 534.)[3] On July 21, 2014, the Court of Chancery dismissed *Shepherd* as moot, ruling that the stockholders' overwhelming vote "present[ed] a straightforward instance of classic stockholder ratification." (B629.)

There was no appeal from the dismissal of the Prior Actions.

F. Plaintiffs' Counsel Request and Receive a Substantial Fee Award

On May 1, 2014, Plaintiffs' Counsel sought a $17.5 million fee award for what they characterized as the "extraordinary" achievements in *LAMPERS*, through which the *LAMPERS* plaintiffs obtained "all the relief they demanded." (B542.)[4] In support, Plaintiffs' Counsel submitted an expert affidavit purporting to "determine the difference in value between the [Original] Award and the [Amended] Award," and asserting—based on a Monte Carlo analysis—that the Amended Award "provided a savings to the Company of $26,312,911[.]" (B566-

[3] At that same meeting, SPG's stockholders also voted overwhelmingly to approve an advisory vote on SPG's executive compensation, with more than 95% of shares voting cast in favor. B583-85.

[4] The *Shepherd* plaintiff's counsel sought a separate $9 million fee award. B637. Plaintiffs' counsel in the Prior Actions thus collectively sought a $26.5 million fee award.

67.) Relying on the more "credible" valuation submitted by the Individual Defendants' rebuttal expert, the court concluded that the Amended Award provided savings of approximately $6.3 million. (B722-23.)

Beyond the direct savings bestowed on SPG by the Amended Award, Plaintiffs' Counsel argued that it conferred additional therapeutic benefits because of the introduction of "performance-based" criteria:

> To that baseline [*i.e.*, the savings quantified by the parties' experts] must be added the key component of the benefit achieved: that Simon's LTIP Units are now, in fact, performance-based. Incentivizing Simon to ensure that the Company achieves certain performance-based metrics provides an undeniable, albeit not readily quantifiable, benefit to SPG's stockholders that is critically important here. Even if SPG were to achieve every single performance metric attendant to the 2013 Incentive Award, and Simon were thus entitled to all one million LTIP Units (providing the Company with nary a penny of direct savings), SPG's stockholders would have received an enormous benefit by virtue of the fact that the Company performed admirably, which will be reflected in its stock price.

(B592-93.)[5] The Court of Chancery awarded Plaintiffs' Counsel a fee in excess of $1 million. (B725.)

G. The Commencement and Dismissal of This Lawsuit

Despite having argued that the performance goals in the Amended Award saved SPG millions of dollars and constituted an "enormous," "undeniable" and

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[5] *See also* B599 (arguing that the Amended Award requires SPG to "perform to a satisfactory level" and therefore provides "a considerable and undeniable benefit to the Company's stockholders"); B560 (arguing that SPG's stockholders will receive an "enormous financial benefit" even "if SPG reaches all the [FFO] levels set out in the [Amended] Award"); *id.* (arguing that the Amended Award's performance criteria provide "hundreds of millions or even billions of dollars" of "increased value" to stockholders).

"critically important" benefit to SPG and its stockholders, Plaintiffs now attack the Amended Award as a "purportedly 'performance-based' award" that "contains sham 'performance metrics,'" rendering it "non-performance based." (A14, 26-27.) Plaintiffs allege that the Committee breached its fiduciary duties in approving the Amended Award (A49-50), and that SPG's other independent, non-management directors breached their fiduciary duties by failing to "stop" it. (A46.)[6] After requesting and receiving documents concerning the Original and Amended Awards pursuant to 8 *Del. C.* § 220, Plaintiffs filed this lawsuit without making a demand on the Board.

The Individual Defendants moved to dismiss the Complaint under Court of Chancery Rules 23.1 and 12(b)(6). SPG joined the portion of that motion seeking dismissal under Rule 23.1. In a March 27, 2015 bench ruling, the Court of Chancery granted that motion under "settled precedent," ruling that demand was not excused under *Rales*, which it deemed the "more appropriate" standard, or *Aronson*, which it applied in the alternative. (Ex. A at 58, 65-79).

Applying *Rales*, the court concluded that Plaintiffs had not raised a doubt as to the independence of any of the independent, non-management directors other than Dr. Smith (although emphasizing that Dr. Smith "might show later . . . that he,

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[6] When provided with the terms of the proposed Amended Award before its implementation, plaintiffs in the Prior Actions did not challenge the performance criteria or propose alternative criteria. *See supra* p. 8-9.

in fact, was independent and he, in fact, did act independently"). (*Id*. at 65-68.) The court also rejected Plaintiffs' argument that the Board was interested because it derived a unique or personal benefit from mooting the Prior Actions, holding that the mooting actions did not suggest a disqualifying interest because the Board did not face a "sufficient risk of personal liability" in the Prior Actions. (*Id*. at 72.) The court rejected Plaintiffs' "reframed" (and unpled) contention that the Board was motivated by concerns over reputational harm or the potential repayment of advanced fees, scenarios that were both "exceedingly remote." (*Id*. at 72-73.)

Applying *Aronson* in the alternative, the court ruled that Plaintiffs failed to satisfy the first prong, because they did not plead facts suggesting that at least half of the Board (or of the Committee, which approved the Amended Award) was not disinterested and independent. (*Id*. at 73-75.) As to *Aronson*'s second prong, Plaintiffs did not allege particularized facts suggesting that the Amended Award was approved in bad faith or otherwise supporting a non-exculpated claim. (*Id*. at 75-76.) Regarding the informational basis for the Amended Award, the court ruled that the Committee was "entitled to consider a variety of factors" in amending the Original Award, including the existence of the Original Award and whether the Amended Award was "more favorable than th[at] baseline . . . ." (*Id*. at 76-77.)

The Court of Chancery did not reach the Individual Defendants' contention that Plaintiffs failed to state a claim. (*Id*. at 64.)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY APPLIED THE *RALES* STANDARD IN EVALUATING THE COMMITTEE'S APPROVAL OF THE AMENDED AWARD.

A. QUESTION PRESENTED:

Did the Court of Chancery correctly apply the *Rales* standard, rather than the *Aronson* standard, to the approval of the Amended Award by the four-member Committee of the ten-member Board? This issue was preserved below. (A94; B749-54.)

B. SCOPE OF REVIEW:

This Court's review of determinations of demand futility under Court of Chancery Rule 23.1 is *de novo* and plenary. *Brehm* v. *Eisner*, 746 A.2d 244, 254 (Del. 2000). Because Rule 23.1 requires that allegations be pled with particularity, this Court "need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences." *Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan* v. *Andreotti*, 2015 WL 2270673, at *25 (Del. Ch. May 8, 2015) (quotation omitted).

C. MERITS OF THE ARGUMENT:

As Plaintiffs concede, only the four Committee members, who make up less than half of the ten-member Board, approved the Amended Award. (Br. 11.) Thus, demand futility is assessed under the *Rales* standard. *See generally Rales*, 634 A.2d at 933-34. In an effort to avoid *Rales*, Plaintiffs argue that the directors

approving the Amended Award on SPG's behalf include (i) David Simon, who negotiated the Amended Award with Committee on his own behalf, at arm's-length and represented by independent counsel, and (ii) three directors, not on the Committee, who were invited to its meetings as observers, but had no authorization to vote on approval of the Amended Award and are not alleged to have done so. This Court should reject Plaintiffs' arguments.

1. David Simon Did Not Approve the Amended Award on Behalf of SPG.

The Court of Chancery correctly ruled that Mr. Simon, in his capacity as a "contractual counterparty[,]" did not take part in the Committee's approval of the Amended Award. (Ex. A at 74-75.) Plaintiffs assert that the court erred because Mr. Simon's participation was "essential" and he "worked with the [] Committee" to structure the Amended Award (Br. 14-15)—but the same could be said of *any* contractual counterparty in *any* arm's-length negotiation. Plaintiffs do not and cannot allege that Mr. Simon approved the Amended Award on SPG's behalf or participated in the Committee's decision-making process. *See, e.g.*, *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2011 WL 227634, at *7 (Del. Ch. Jan. 14, 2011) (holding director who "did not participate in the approval of the Merger as a director" did not breach any fiduciary duty). Plaintiffs have cited no authority

holding that at least half of a board approved a transaction based on the inclusion of a director who approved his own compensation agreement as a counterparty.[7]

2. The Three Non-Members of the Committee Did Not Approve the Amended Award.

Plaintiffs also contend that three independent directors who were *not* on the Committee should nevertheless be deemed to have approved the Amended Award, because, Plaintiffs claim, they "actively participated" in the Committee's decision to approve the Amended Award, but then "declined to vote" or "decided not to vote on the matter." (Br. 2, 9, 13-14.)[8] Plaintiffs' argument fails for two reasons.

First, despite receiving documents in response to their Section 220 demand, Plaintiffs have not pled any facts suggesting that any of these directors "actively participated" in the Committee's decision. They have stated the opposite: that these directors "chose to *stay silent*" (A46 (emphasis added)), and "refus[ed] to act . . . ." (Br. 14). Given that the Committee did not breach any duty in amending the Original Award, *see* Section II.C.2-4, *infra*, there was no basis for these directors to "act." In any case, on the face of the Complaint, these directors did not play a

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[7] *Weiss* v. *Swanson*, 948 A.2d 433 (Del. Ch. 2008), the sole case cited by Plaintiffs on this point (*see* Br. 15 n.11), held nothing of the sort. In *Weiss*, the *Aronson* standard applied because the plaintiff alleged that the CEO/director and the three members of the compensation committee "approved" the challenged option grants on behalf of the corporation. 948 A.2d at 438, 440. Further, the board in *Weiss* consisted of five total members, so the approval of the three compensation committee members was alone sufficient for *Aronson* to apply. *Id*. at 440.

[8] Plaintiffs persist in inaccurately alleging that Dr. Horn "actively participated" in the amendment of the Original Award (Br. 9), yet appear to have abandoned that contention in advocating the application of the *Aronson* standard. *Compare* A162-65 *with* Br. 13-14. The Individual Defendants nevertheless include Dr. Horn herein in an abundance of caution.

role in approving the Amended Award. *See In re Tri-Star Pictures, Inc., Litig.*, 1995 WL 106520, at *2 (Del. Ch. Mar. 9, 1995). The fact that one of them observed one, and another observed three, of the Committee's meetings (Br. 11) does not alter this result, as such limited observation does not amount to active participation in the Committee's decision-making process. *See Highland Legacy Ltd.* v. *Singer*, 2006 WL 741939, at *7-8 (Del. Ch. Mar. 17, 2006); *Citron* v. *E. I. du Pont de Nemours & Co.*, 584 A.2d 490, 499 n.12 (Del. Ch. 1990).

Second, these directors did not "decline[] to vote" or "decide[] not to vote on the matter." (Br. 2, 13-14.) Rather, as non-members of the Committee, they had no authority to vote on the Amended Award and therefore did not need to abstain from any such vote. The cases cited by Plaintiffs, involving directors otherwise entitled to vote on board action choosing to abstain from a final vote (*id*. at 14 n.9), are thus inapposite. There is no basis to infer that SPG's directors "manipulate[d] the standard of review" (*id*. at 14); rather, the record shows that the Committee made compensation decisions, as it had consistently done in the past. (*See, e.g.*, B24-48.)

II. THE COURT OF CHANCERY CORRECTLY RULED THAT PLAINTIFFS FAILED TO DEMONSTRATE THAT THE AMENDED AWARD WAS NOT THE PRODUCT OF A VALID EXERCISE OF BUSINESS JUDGMENT.

A. QUESTION PRESENTED:

If the *Aronson* standard applies (and it does not), did the Court of Chancery correctly apply *Aronson*'s second prong in ruling that Plaintiffs failed to plead particularized factual allegations showing that the Amended Award was not the product of a valid exercise of business judgment? This issue was preserved below. (A93-123; B754-64; Ex. A at 14-18, 47-48.)

B. SCOPE OF REVIEW:

This Court's review of determinations of demand futility under Court of Chancery Rule 23.1 is *de novo* and plenary. *Brehm*, 746 A.2d at 254. Because Rule 23.1 requires that allegations be pled with particularity, this Court "need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences." *Ironworkers*, 2015 WL 2270673, at *25 (quotation omitted).

C. MERITS OF THE ARGUMENT:

Although *Rales* applies, Plaintiffs urge that demand is excused under *Aronson*'s second prong. But Plaintiffs have not alleged, as they must for purposes of that test, particularized facts creating a reasonable doubt that the Amended Award is "protected by the business judgment rule." *Brehm*, 746 A.2d at 258. They have not alleged particularized facts suggesting that the Amended Award was

the result of disloyal conduct or that the Committee was not adequately informed. Nor have they adequately pled that SPG received "absolutely nothing" in return for the provisions of the Amended Award concerning the Escrowed Shares. (Br. 23.)

1. The Applicable Standard

Under *Aronson*'s second prong, Plaintiffs must plead particularized facts raising a reasonable doubt that the Amended Award "was otherwise the product of a valid exercise of business judgment." *Aronson*, 473 A.2d at 814. This prong is "something of a last resort that, in extreme circumstances, provides the court with the basis to review a transaction despite the appearance of otherwise independent and disinterested fiduciaries." *Protas* v. *Cavanagh*, 2012 WL 1580969, at *9 (Del. Ch. May 4, 2012). It imposes a "heavy burden" on a plaintiff where, as here, a majority of the board is disinterested and independent. *Id.*; *see also White* v. *Panic*, 783 A.2d 543, 551-52 (Del. 2001).

A plaintiff's burden is satisfied only in the "rare case[]" where a business decision is "so egregious on its face that board approval cannot meet the test of business judgment, and a *substantial likelihood of director liability* therefore exists." *Aronson*, 473 A.2d at 815 (emphasis added). *Aronson*'s second prong, like the first, is thus directed to prospective director liability. *Id.*; *see also Guttman* v. *Huang*, 823 A.2d 492, 500 (Del. Ch. 2003) (holding that *Aronson*'s second prong excuses demand where a board majority is disinterested and independent if

"the threat of liability to the directors required to act on the demand is sufficiently substantial to cast a reasonable doubt over their impartiality.").[9]

Aronson predated the enactment of 8 *Del. C.* § 102(b)(7) in 1986, *see* 65 Del. Laws, c. 289, §§ 1-2 (1986), and thus does not address the effect of an exculpatory provision. As this Court has subsequently held, however, where *Aronson*'s "second . . . prong is implicated," plaintiffs challenging board action must "plead[] a *non-exculpated* claim against the directors based on particularized facts." *Wood* v. *Baum*, 953 A.2d 136, 140-41 (Del. 2008) (emphasis in original); *see also In re Goldman Sachs Grp., Inc. S'holder Litig.*, 2011 WL 4826104, at *12, *15 (Del. Ch. Oct. 12, 2011) ("Goldman's charter has a 8 *Del. C.* § 102(b)(7) provision, so gross negligence, by itself, is insufficient basis upon which to impose liability. The Plaintiffs must allege particularized facts creating a reasonable doubt that the directors acted in good faith."); *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 647-48 (Del. Ch. 2008) ("[T]he plaintiffs cannot sustain their complaint even by pleading facts supporting an inference of gross negligence; they must plead a non-exculpated claim."); *Guttman*, 823 A.2d at 502 (holding that, under *Aronson*'s second prong, a complaint must "set[] forth particularized facts that plead a non-

[9] Plaintiffs quote from *Khanna* v. *McMinn*, 2006 WL 1388744, at *25 n.201 (Del. Ch. May 9, 2006), for a contrary proposition (Br. 24), but fail to acknowledge the *very next* sentence of the court's cursory (and footnoted) dicta: "The crucial factor [under both *Rales* and *Aronson*], however, would seem to be questions of the potential for personal liability which affect capacity to consider demand." 2006 WL 1388744, at *25 n.201 (citations omitted).

exculpated claim of breach of fiduciary duty against a majority of the board”). This ensures judicial “respect” for the “authorized policy choice” of Delaware corporations and their stockholders in enacting exculpatory charter provisions. *Lear*, 967 A.2d at 652.[10] An exculpatory provision fixes a standard for determining whether the director decision at issue is sufficiently egregious to satisfy *Aronson’s* rigorous second prong, and therefore remains directly relevant to the requisite judicial inquiry. The Court of Chancery thus properly considered the Board’s “102(b)(7) protection” under *Aronson*’s second prong. (Ex. A at 76.).

As a fallback, Plaintiffs argue that an exculpatory provision should not support dismissal of a complaint seeking nonmonetary relief. (Br. 26.) Plaintiffs cite no authority supporting that proposition in the context of demand futility (*id.*), and for good reason: “[A] request for equitable relief does not subject defendants to the type of personal liability necessary to excuse demand.” *MCG Capital Corp.* v. *Maginn*, 2010 WL 1782271, at *21 (Del. Ch. May 5, 2010) (rejecting argument that demand is futile as to duty of care claim despite Section 102(b)(7) provision “because the complaint requests injunctive relief…”).

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[10] *See also In re Cornerstone Therapeutics Inc. Stockholder Litig.*, 2015 WL 2394045, at *9-10 (Del. May 14, 2015) (discussing origin and purpose of Section 102(b)(7)). Plaintiffs’ discussion of *Cornerstone*, and their observation that it “did not overrule *Aronson*” (Br. 25), is irrelevant since *Cornerstone* did not concern demand futility.

2. The Approval of the Amended Award Was Neither Disloyal Nor in Bad Faith.

The Court of Chancery correctly rejected (and did not "disregard[]") Plaintiffs' allegation that, in approving the Amended Award, the Committee was not disinterested because it was "*solely*" motivated by a desire to moot the Prior Actions (Br. 16-19), concluding that the Board did not face a "sufficient risk of personal liability" in the Prior Actions. (Ex. A at 72.)

Plaintiffs repeatedly assert that the Committee's "primary objective" in approving the Amended Award was to eliminate a "substantial threat of personal liability" facing the Individual Defendants. (A13, 15, 27, 29, 34, 41, 44-46.) But Plaintiffs' conclusory repetition does not alter the facts. The Committee members faced no prospect of personal liability in *LAMPERS*, because the relief sought in the operative complaint was rescission of the Original Award and cancellation of the LTIP units awarded to David Simon—*it did not seek monetary damages*.[11]

Plaintiffs' theory also fails because a board's willingness to curtail litigation and avoid additional expense is not suggestive of disloyalty or faithlessness. Whether to defend, settle or moot a lawsuit is a paradigmatic business judgment. *See Weinberger* v. *Bankston*, 1987 WL 20182, at *3 (Del. Ch. Nov. 19, 1987).

[11] The *Shepherd* complaint sought damages, but the plaintiff's motion for partial judgment on the pleadings, pending when the Amended Award was approved, did not seek monetary relief other than against David Simon. B155, B156.1-156.2. Moreover, there is no allegation in this case that any action taken to moot *Shepherd* breached any duty to SPG or its stockholders.

Plaintiffs' contention is particularly ill-founded in this case, as then-Chancellor Strine emphasized that the Individual Defendants had the "authority to act" on their own to "deal with" the claims asserted in the Prior Actions. (B390-91.) There was no disloyalty or bad faith in following the court's suggestion.[12]

3. The Complaint Raises No Reason to Doubt that the Committee Was Adequately Informed.

Plaintiffs' claim that the Board failed to adequately consider the merits or substantive terms of the Amended Award implicates only the duty of care and cannot excuse demand. In any event, the Court of Chancery properly rejected that claim. (Ex. A at 73-78.) The Committee held five special meetings and consulted with Semler Brossy and legal counsel in setting the performance metrics for the Amended Award. (A32, 34-35, 37-39.) Plaintiffs cite neither reason nor authority suggesting that the Committee, in amending the Original Award to provide SPG with "direct savings" and the "undeniable, albeit not readily quantifiable, benefit" of "[i]ncentivizing Simon to ensure that [SPG] achieves certain performance-based metrics" (B592-93), was required to obtain an estimate of *how much* SPG would save. Plaintiffs' attack on the information received or process undertaken by the Committee fails as a matter of law for three reasons:

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[12] Plaintiffs cite *Alidina* v. *Internet.com Corp.*, 2002 WL 31584292 (Del. Ch. Nov. 6, 2002) (Br. 19), for the proposition that a breach of the duty of loyalty may consist of acquiescing in an unfair deal to benefit a controlling stockholder. Setting aside that David Simon is not a controlling stockholder, the Board's conduct bears no resemblance to that in *Alidina*, where directors allowed the company's CEO "complete control over the negotiation of a self-dealing transaction" in which he acquired an interest in a subsidiary. 2002 WL 31584292, at *8.

First, in challenging the sufficiency of the informational basis for the Committee's action, Plaintiffs allege, at most, a breach of the duty of care. *See Smith* v. *Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985); *Sutherland* v. *Sutherland*, 2010 WL 1838968, at *10 (Del. Ch. May 3, 2010). Given the exculpatory provision in SPG's charter, this claim fails under *Aronson*'s second prong. *See* Section II.C.1, *supra*. Plaintiffs' conclusory assertions of bad faith (*see, e.g.*, Br. 35) fail to state a claim. Such a claim requires particularized pleading of deliberate wrongdoing by the directors, such as having "'actual or constructive' knowledge that their conduct was legally improper." *Wood*, 953 A.2d at 141 (quotation omitted). Here, no well-pled allegations suggest that the Committee's selection of particular performance targets constituted knowing wrongdoing. *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64-65 (Del. 2006) (rejecting contention that bad faith can be inferred from directors' alleged failure to adequately inform themselves).

Second, Plaintiffs fail to state a claim even for breach of the duty of care, based on the lack of a Monte Carlo analysis estimating the amount by which the changes to the award would decrease the likelihood of Mr. Simon earning the award or the resulting reduction in its value. In determining whether to cancel or modify the Original Award (and the consequences of that decision on SPG's accounting treatment) and selecting the Amended Award's performance criteria

and targets, the Committee engaged in a careful process that included five meetings and consultation with both Semler Brossy and its legal advisors.

Plaintiffs' apparent disagreement with the selection of the performance metric under the Amended Award (Br. 5 n.4) and the negotiated performance targets (*id*. at 8-9) does not suggest that the Committee was grossly negligent in choosing them. Delaware law requires only that fiduciaries make informed decisions; it does not require them to commission or receive any particular written analysis (or even retain advisors, as the Committee did here) before acting. *See Goldman Sachs*, 2011 WL 4826104, at *15-16 (rejecting allegation that compensation decisions were made on an uninformed basis: "At most, the Plaintiffs' allegations suggest that there were other metrics not considered by the board that might have produced better results. The business judgment rule . . . does not require perfection or the consideration of every conceivable alternative."); *see also Sutherland*, 2010 WL 1838968, at *9-10. Plaintiffs' allegations confirm that the performance targets were not arbitrary, but rather based on specific growth rates relative to SPG's historic FFO. (A33.) That concession is more than enough to defeat any claim that the Committee failed to exercise due care.

Plaintiffs fare no better in alleging that the Committee was grossly negligent in selecting Adjusted FFO as the performance metric under the Amended Award. Plaintiffs allege that David Simon can purportedly "manipulate the Company's

achievement of the performance metrics" through "corporate actions, such as retiring debt early, that can be used to manipulate SPG's Adjusted FFO[.]" (A36-37; Br. 5 n.4, 10.) Plaintiffs are wrong. Adjustments to FFO are "made by the Committee" and are not subject to management's prerogative, and they operate "to *exclude* the effect of any extraordinary, unusual or nonrecurring item" such as early debt retirement. (A36 (emphasis added).) Retiring debt early *reduces* FFO; the adjustment to FFO removes the effect of this non-recurring item. Using Adjusted FFO thus ensures that, subject to the Committee's discretion, early debt retirement or other extraordinary events will not affect the FFO performance measures on which the Amended Award is based. Plaintiffs' subjective disagreement with the use of Adjusted FFO is not suggestive of gross negligence.

Finally, as the Court of Chancery correctly ruled, it was "legitimate" for the Committee to consider the existing Original Award as a "baseline." (Ex. A at 77.) That award afforded contractual rights upon which David Simon was entitled to rely and insist. (*Id.*) The Committee was entitled to consider the compensation "promised" to Mr. Simon and to take account of, among other factors, whether SPG would "live[] up to its promises." (*Id.*) Compared to the baseline of the Original Award (the economic terms of which the Prior Actions did not challenge), SPG plainly benefited through Mr. Simon's willingness to place SPG's (and its stockholders') interests before his own personal economic interests by negotiating

with the Committee at arm's-length and agreeing to condition the award on the performance criteria and other terms of the Amended Award.

The Committee had previously determined that an award to David Simon of one million LTIP units was an appropriate level of compensation. In approving the Amended Award, the Committee reconfirmed that as an appropriate "ceiling" on the LTIP units that he might earn. Given the "great deference" afforded directors in determining executive compensation, *Brehm*, 746 A.2d at 263, the Committee had no obligation to cancel the Original Award rather than amend it, or to quantify the number of LTIP units that might not vest under the Amended Award.[13]

Plaintiffs' only response is that the Original Award was allegedly illegal, and did not contain performance metrics. (Br. 20-21.) But Plaintiffs do not explain why either point has anything to do with the informational basis for the Committee's decision. Plaintiffs have never claimed that the Original Award was not made on an informed basis or that it was "illegal" for any reason other than an alleged violation of the Plan terms—or that the lack of performance goals made the Original Award too costly, or that the cost of the award rendered it "illegal."[14]

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[13] Plaintiffs note that the Original Award was worth approximately $120 million when granted, and the Amended Award was worth more than $150 million as of year-end 2013. Br. 1, 20. The increase is due to the appreciation in SPG's stock on Mr. Simon's watch. Ex. A at 60.

[14] Plaintiffs cite three opinions from the merger context for the general proposition that a board has a continuing obligation to reevaluate a pending transaction, and its voting recommendation to stockholders, before a stockholder vote. Br. 18 & n.12. These cases are inapposite, because the Original Award was not a proposed transaction but an existing, enacted obligation as to which no stockholder action was contemplated.

4. Plaintiffs Have Failed to Plead a Viable Waste Claim Concerning the Escrowed Shares.

Plaintiffs argue that demand is excused under the second prong of *Aronson* because they have raised a reasonable doubt as to whether the provisions of the Amended Award concerning the Escrowed Shares constitute waste, *i.e.*, a "gift" to Mr. Simon for "no consideration." (Br. 21-22.) The Court of Chancery correctly rejected that argument. (Ex. A at 78.)[15]

The provision concerning the Escrowed Shares is only one component of the Amended Award. Plaintiffs cannot challenge one aspect of a broader transaction, considered in isolation, as corporate waste. *See Steiner* v. *Meyerson*, 1995 WL 441999, at *6 (Del. Ch. July 19, 1995). Plaintiffs do not and cannot allege that the Amended Award as a whole constituted waste. SPG "clearly got something" under the Amended Award, in part because it provided direct savings that the Court of Chancery "priced in the neighborhood of $6 million." (Ex. A at 78-79.)

Moreover, Plaintiffs' allegations that David Simon was permitted to "retain" the Escrowed Shares (Br. 22) and that they are "not tied to future performance" (Br. 23) are contradicted by the plain language of the Amended Award. Mr. Simon does not possess, and has not yet earned, any of the Escrowed Shares, which can

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[15] A plaintiff asserting a waste claim must establish "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 136 (Del. Ch. 2009) (quotation omitted). "That extreme test is rarely satisfied, because if a reasonable person could conclude the board's action made business sense, the inquiry ends and the complaint will be dismissed." *Green* v. *Phillips*, 1996 WL 342093, at *5 (Del. Ch. June 19, 1996).

only be earned subject to the satisfaction of the Amended Award's performance and service-based criteria. (B407.) This case thus bears no resemblance to *Green*, in which the benefits at issue were not "tied in any way to any consideration that [the beneficiary] must provide in return." 1996 WL 342093, at *5.

Far from providing an incremental $7 million "retroactive cash bonus" to Mr. Simon (Br. 21), the Amended Award imposes performance criteria that reduce the likelihood he will receive the Escrowed Shares, and thus reduce their value to him. As the release of the Escrowed Shares to Mr. Simon is conditioned upon SPG's future performance and future service conditions, neither of which have yet occurred, the Escrowed Shares cannot be construed as "retroactive" compensation. Even if Plaintiffs' characterization were accurate, the Escrowed Shares would not support a waste claim, as Delaware courts do not second-guess independent directors' compensation determinations, even where they concern compensation for services rendered. *See Seinfeld* v. *Slager*, 2012 WL 2501105, at *4-6 (Del. Ch. June 29, 2012); *MCG Capital*, 2010 WL 1782271, at *20. The Complaint thus pleads no facts that would meet the waste standard.[16]

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[16] Plaintiffs state that the Court of Chancery "previously . . . found" that the provision of the Amended Award concerning the Escrowed Shares "bestowed no benefit on SPG whatsoever." Br. 3. That assertion references a passage in the Court of Chancery's fee order in the Prior Actions (*id*. at 22 (quoting A245)), in which the court rejected the *LAMPERS* plaintiffs' contention that the Escrowed Shares were effectively cancelled or surrendered (B567-68), ruling that "[t]he escrowed shares were neither cancelled nor surrendered . . . ." A245. The court had no occasion to consider whether the provisions of the Amended Award concerning the Escrowed Shares conferred other benefits, including non-quantifiable benefits, on SPG.

III. THE COURT OF CHANCERY CORRECTLY RULED THAT A MAJORITY OF THE BOARD IS INDEPENDENT AND DISINTERESTED.

A. QUESTION PRESENTED:

Did the Court of Chancery correctly apply the *Rales* standard—or, to the extent applicable, the first prong of the *Aronson* standard—in determining that a majority of the Board is independent and disinterested? This issue was preserved below. (A92-124; B739-48; Ex. A at 12-18.)

B. SCOPE OF REVIEW:

This Court's review of determinations of demand futility under Court of Chancery Rule 23.1 is *de novo* and plenary. *Brehm*, 746 A.2d at 254. Because Rule 23.1 requires that allegations be pled with particularity, this Court "need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences." *Ironworkers*, 2015 WL 2270673, at *25 (quotation omitted).

C. MERITS OF THE ARGUMENT:

Under *Rales*, demand is excused only if a majority of the board is interested in the alleged wrongdoing, is not independent, or would face a "substantial likelihood" of liability if suit were filed. *Rales*, 634 A.2d at 936. Similarly, the inquiry under the first prong of *Aronson* is whether "a majority of the board is disinterested or independent…." *Ryan* v. *Gifford*, 918 A.2d 341, 352 (Del. Ch. 2007). Plaintiffs have not come close to satisfying this test.

1. Plaintiffs Cannot Show a Substantial Likelihood of Director Liability Sufficient to Excuse Demand.

Plaintiffs argue that the Court of Chancery erred by considering whether the Committee faced a substantial likelihood of liability in this case sufficient to excuse demand (Br. 27-29) or whether a majority of the Board faced a substantial likelihood of liability in the Prior Actions (Br. 29-30). But the court's focus followed directly from Plaintiffs' own allegations. Plaintiffs cannot tenably complain that the court addressed, and rejected (Ex. A at 74), their allegations in exactly the manner Plaintiffs advanced them. Plaintiffs alleged specific conflicts for only four of SPG's ten directors (A47-48), and directed their remaining demand futility allegations to the purported threat of liability facing the Committee in this action (A43-47) and facing a majority of the Board in *LAMPERS* (A44-45).[17]

The Committee, composed of independent, non-management directors, faces no likelihood of liability for amending a pre-existing service-based award to include performance criteria—an amendment that all agree benefitted SPG and its stockholders. *See* Sections II.C.2-4, *supra*. Plaintiffs do not contend that Committee members received any part of the Amended Award or were beholden to Mr. Simon; thus, Plaintiffs' challenge to the Committee's business judgment, or

[17] Plaintiffs criticize the Court of Chancery for focusing on the independence and disinterestedness of the Committee (Br. 27-29), but their own argument acknowledges that—with three of ten directors concededly not independent—demand futility turns on Plaintiffs' infirm allegations regarding the "members of the Compensation Committee . . . ." *Id.* at 29.

the sufficiency of its process, asserts at most an alleged breach of the duty of care, *see Van Gorkom*, 488 A.2d at 872-73, as to which the members of the Committee face no potential personal liability. Further, the Individual Defendants (except, possibly, for David Simon) do not face any substantial likelihood of personal liability because the primary relief Plaintiffs seek in this action is rescission of the Amended Award and cancellation of the Escrowed Shares and LTIP units granted to Mr. Simon. (A54.) *See MCG Capital*, 2010 WL 1782271, at *21.

2. Plaintiffs' Unpled Allegations of Reputational Harm or the Disgorgement of Advanced Costs Do Not Excuse Demand.

In opposing dismissal in the Court of Chancery, and on appeal, Plaintiffs argue that the Individual Defendants were conflicted because of a concern—not referenced in the Complaint—over potential "personal, social and reputational harms" if found to have breached their fiduciary duties. (Br. 33.)[18] Plaintiffs' contention that the Court of Chancery "fail[ed] to consider" this unpled allegation (Br. 33) is baseless. The court made clear that nonmonetary considerations can excuse demand (*id*. at 30-31), but rejected Plaintiffs' argument about reputational harm on the grounds that the Board relied on the advice of counsel in approving the Original Award, making the prospect of such harm "exceedingly remote." (Ex.

[18] Plaintiffs claim that their Complaint alleges with particularity that the Board faced a risk of "adverse personal consequences" in *LAMPERS* (Br. 34 (citing A27-28, 44-45))—but the Complaint does not contain that phrase. The four cited pages of the Complaint reference the Board's prospective "liability" six times but do not mention reputational harm. A27-28, 44-45.

A at 72-73.) The court relied in part on then-Chancellor Strine's observation that the *LAMPERS* plaintiffs were not "really argu[ing]" that the "independent" Board knowingly violated any stockholder voting right, but was "advised by qualified counsel" and, to the extent that the Board "might have gotten it wrong," it would have been the result of "bad advice," not bad faith. (B348.)[19] Moreover, the absence of any real threat to the Individual Defendants' reputations is confirmed by the Board's approval of robust disclosures, in connection with the May 2014 stockholder vote on the amended Plan, detailing the challenges to the Original Award and SPG's actions to moot those challenges. (*See* B525-29.)

Plaintiffs also argue that the Committee members were conflicted in approving the Amended Award due to the threat of being required to repay advanced attorneys' fees if found to have acted in bad faith. (Br. 34-35.) Again, the Complaint does not allege this as a basis for a conflict, and Plaintiffs cite no case in which such a hypothetical obligation, even if pled, was sufficient to excuse demand. Nor do Plaintiffs plead any facts suggesting that any director faced a realistic threat of being found in bad faith based on the *LAMPERS* record. (B348.)

[19] Plaintiffs contend that this inference was "wholly inappropriate in the context of a motion to dismiss under Rule 12(b)(6)." Br. 35. The Court of Chancery did not dismiss the Complaint under Rule 12(b)(6), but under Rule 23.1. The court need not accept Plaintiffs' unreasonable and counterfactual inference. *Ironworkers*, 2015 WL 2270673, at *25.

CONCLUSION

For the foregoing reasons, Plaintiffs' appeal should be denied and the Court of Chancery's judgment dismissing the Complaint should be affirmed.

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Dated: July 8, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2015, a true and correct copy of the foregoing was served by *File & ServeXpress* upon the following counsel of record:

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