EFiled: Apr 17 2017 04:59PM EDT
Filing ID 60482323
Case Number 593,2016 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GAMCO ASSET MANAGEMENT INC., Plaintiff Below-Appellant. v. iHEARTMEDIA INC., iHEARTCOMMUNICATIONS, INC., BAIN CAPITAL PARTNERS, LLC, THOMAS H. LEE PARTNERS, L.P., ROBERT W. PITTMAN, VINCENTE PIEDRAHITA, BLAIR HENDRIX, DANIEL G. JONES, OLIVIA SABINE, CHRISTOPHER TEMPLE, DALE W. TREMBLAY and DOUGLAS L. JACOBS, Defendants Below-Appellees, -and- CLEAR CHANNEL OUTDOOR HOLDINGS, INC. Nominal Defendant Below-Appellee.	No. 593, 2016 Court Below: Court of Chancery of the State of Delaware No. 12312-VCS **REDACTED, PUBLIC VERSION** **E-FILED APRIL 17, 2017**

PLAINTIFF BELOW-APPELLANT'S REPLY BRIEF

ROSENTHAL, MONHAIT & GODDESS, P.A.
Norman Monhait (DSBA# 1040)
P. Bradford DeLeeuw (DSBA# 3569)
919 N. Market Street, Suite 1401
Wilmington, DE 19801
(302) 656-4433

Counsel for Plaintiff Below-Appellant GAMCO Asset Management Inc.

March 21, 2017

TABLE OF CONTENTS

INTRODUCTION 1

I. THE TRIAL COURT ERRONEOUSLY DISMISSED THE REPAYMENT DEMAND CLAIM 5

A. ANY REPAYMENT DEMAND WOULD NOT HAVE BEEN FUTILE 5

B. THE 2013 SETTLEMENT DOES NOT RELEASE NEW BREACHES.....7

C. *RES JUDICATA* DOES NOT BAR THE REPAYMENT DEMAND CLAIM 12

II. THE TRIAL COURT ERRONEOUSLY DISMISSED THE CLAIMS ARISING FROM THE NOTE OFFERING AND ASSET SALES 15

A. *SINCLAIR OIL* DOES NOT BAR GAMCO'S CLAIMS 15

B. THE CLAIMS MEET AN EXISTING EXCEPTION TO *SINCLAIR OIL*.....17

C. THE TRIAL COURT DREW IMPERMISSIBLE INFERENCES.....19

CONCLUSION.....23

TABLE OF AUTHORITIES

Cases

Bershad v. Curtiss-Wright Corp.,
535 A.2d 840 (Del. 1987).....7

Brehm v. Eisner,
746 A.2d 244 (Del. 2000).....21

Car Carriers, Inc. v. Ford Motor Co.,
789 F.2d 589 (7th Cir. 1986).....14

Cede & Co. v. Technicolor, Inc.,
634 A.2d 345 (Del. 1993).....7, 16

Corp. Prop. Assocs. 6 v. Hallwood Grp. Inc.,
817 A.2d 777 (Del. 2003).....9

Freeman v. MML Bay State Life Ins. Co.,
445 F. App. 577 (3d Cir. 2011).....12

Gantler v. Stephens,
965 A.2d 695 (Del. 2009)..... 20, 21

Hollinger Inc. v. Hollinger Int'l, Inc.,
858 A.2d 342 (Del. Ch. 2004), *appeal denied*, 871 A.2d 1128 (Table),
2004 WL 1732185 (Del. 2004).....7

In re Answers Corp. S'holders Litig.,
C.A. No. 6170-VCN, 2012 WL 1253072 (Del. Ch. Apr. 11, 2012)..... 16, 19

In re Cornerstone Therapeutics Inc. Stockholder Litig.,
115 A.3d 1173 (Del. 2015).....21

In re General Motors (Hughes) S'holder Litig.,
897 A.2d 162 (Del. 2006).....22

In re Literary Works in Elec. Databases Copyright Litig.,
654 F.3d 242 (2d Cir. 2011).....12

In re Synthes, Inc. Shareholder Litigation,
50 A.3d 1022 (Del. Ch. 2012) 17, 19

LaPoint v. AmerisourceBergen Corp.,
970 A.2d 185 (Del. 2009) 13

McMullin v. Beran,
765 A.2d 910 (Del. 2000) 16, 19

N.J. Carpenters Pension Fund v. Infogroup Inc.,
C.A. No. 5334-VCN, 2011 WL 4825888 (Del. Ch. Sept. 30, 2011) 16, 19

Paramount Commc'ns Inc. v. QVC Network Inc.,
637 A.2d 34 (Del. 1994) 11

Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.,
892 F.2d 355 (4th Cir. 1989) 14

Seven Inv., LLC v. AD Capital, LLC,
32 A.3d 391 (Del. Ch. 2011) 8

Sinclair Oil Corp. v. Levien,
280 A.2d 717 (Del. 1971) ..... *passim*

Williams v. Gen. Elec. Capital Auto Lease, Inc.,
159 F.3d 266 (7th Cir. 1998) 12

Winshall v. Viacom Int'l Inc.,
76 A.3d 808 (Del. 2013) 21

Yoon v. Fordham Univ. Faculty & Admin. Ret. Plan,
263 F.3d 196 (2d Cir. 2001) 14

INTRODUCTION

The Court of Chancery erred in dismissing GAMCO's derivative Complaint on behalf of CCOH, which particularized Defendants' *prima facie* breaches of fiduciary duty owed to CCOH arising out of their use of the Company *after the 2013 Settlement* as a liquidity source to service the iHeart Defendants' $20.8 billion in debt without any corresponding benefit to CCOH.[1] As detailed in GAMCO's Opening Brief, the Court of Chancery erroneously: (1) concluded that the 2013 Settlement bars GAMCO's repayment demand claim when the release by its terms does not cover new breaches of duty – especially breaches arising from changed circumstances; and (2) analyzed the Board Defendants' use of CCOH's Note Offering and Asset Sales as vehicles to provide liquidity to the iHeart Defendants under the business judgment rule rather than the entire fairness standard – the latter of which properly governs transactions, such as these, that provide a unique benefit to the controlling entity, in this case, liquidity.

Appellees' Answering Brief ("Def. Br.") does not establish otherwise. Defendants assert, incorrectly, that any repayment demand would be futile due to the cash "sweep" in the intercompany agreements. But a demand and resulting dividend (permissible under the agreements) would have *at least* returned some value to CCOH's minority stockholders, rather than allowing the Revolving Note

[1] Capitalized terms undefined herein will have the meaning ascribed to them in Plaintiff Below-Appellant's Corrected Opening Brief, dated February 15, 2017 ("Opening Br.").

balance to remain a worthless "receivable" on the Company's balance sheet or to disappear entirely in the event of an iHC bankruptcy.

Defendants also fail to refute GAMCO's clear showing that the repayment demand claim is *not* "precisely the same claim" other CCOH shareholders asserted in 2012 and that the 2013 Settlement's release language, by its own terms, does not apply prospectively. To the contrary, GAMCO's *new* claim is based on the iHeart Defendants' failing financial condition *since* the 2013 Settlement. While the prior settlement authorized the Independent Note Committee ("INC") of the Board to demand repayment under particular circumstances, the settlement *did not* in any way relieve the Board Defendants' ongoing fiduciary duty to demand repayment if circumstances warranted – just as it did not otherwise act to limit the duties and obligations of the Board Defendants to act in the best interest of CCOH and its shareholders rather than in favor of the iHeart Defendants and their sponsors. In other words, Defendants did not, because they could not, contract away their ongoing obligations to CCOH through the settlement or otherwise immunize themselves from fresh claims based on subsequent fiduciary failings.

Defendants are likewise incorrect that this Court's decision in *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971) is a magic amulet that immunizes them from liability for the unnecessary and harmful transactions forced upon CCOH merely because minority shareholders received *pro rata* dividends funded by the

transactions. The Note Offering and Asset Sales gave iHC a unique benefit in the form of enterprise-rescuing liquidity, which was singularly necessary to iHC and only provided cash to minority shareholders as a byproduct of that need to the long term detriment of CCOH and its minority shareholders. Of course, all shareholders (including minority shareholders) could have recieved the same dividend had the Board Defendants made a repayment demand and funded the entire dividend from the repayment. That transaction would not, however, have provided iHC with liqudity that came from CCOH's borrowing capability and the value of its assets.

Tellingly, Defendants' core assertion that the business judgment rule protections make "eminent sense" in this case because the "iHeart Defendants have every incentive to maximize CCOH's value" – which Defendants cite as the reasoning underlying *Sinclair Oil* – is demonstrably false.

Finally, Defendants argue that the Court of Chancery did not improperly weigh facts or draw Defendant-favorable inferences. While the Court or Chancery concluded that GAMCO's allegations were "conclusory," the Complaint, to the contrary, alleges particularized facts that demonstrate Defendants' sole motive for the challenged transactions was to

provide emergency liquidity to iHC. The only way for the Court of Chancery to conclude these allegations were conclusory was to draw impermissible inferences from the Board's self-serving statements about [redacted]

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DISMISSED THE REPAYMENT DEMAND CLAIM

Defendants' assertion that the Court of Chancery properly dismissed GAMCO's claim that the Board Defendants breached their fiduciary duty by failing to demand a repayment under the Revolving Note as iHC's financial condition drastically deteriorated since 2013 is incorrect. A repayment demand would not have been futile and the claim is not barred by the 2013 Settlement or *res judicata* where, as here, the only fact the litigations have in common is the existence of the Revolving Note. The current claim is based on iHC's financial circumstances subsequent to the earlier litigation.

A. ANY REPAYMENT DEMAND WOULD NOT HAVE BEEN FUTILE

Defendants argue that Plaintiff's Opening Brief fails to address the Court of Chancery's holding that "it would be futile for the Board to demand repayment of the Revolving Note …" (Def. Br. at 22). The Court of Chancery, however, expressly recognized that "circumstances may arise that would require the CCOH Board, in the proper exercise of its fiduciary duties, to demand repayment of the Revolving Note" (Dec. at 33), but held that GAMCO purportedly had "not alleged the presence of those circumstances in the Complaint." *Id*.

GAMCO unquestionably addressed that holding in its Opening Brief, arguing that "the Court of Chancery erred" by ignoring Plaintiff's allegations that

"based on iHC's financial deterioration post-dating the 2013 Settlement, no CCOH Board member (controlled or otherwise) could in good faith decline to demand repayment of the Revolving Note, and otherwise take action to protect CCOH and its stockholders from the increased likelihood of an iHC default." (Opening Br. at 19). In other words, GAMCO in fact alleged the existence of "circumstances . . . that would require the CCOH Board, in the proper exercise of its fiduciary duties, to demand repayment of the Revolving Note." (Dec. at 33).[2]

The notion that any repayment demand would have been futile rests on a mischaracterization of the Intercompany Agreements. In their artful description of the "constraints" those agreements place on the Board's ability to use cash repaid under the Revolving Note (Def. Br. at 22), Defendants ignore the Board Defendants' freedom to declare a dividend and distribute any repaid funds to stockholders (just as the Board did with the proceeds of the Note Offering and Asset Sales).[3]

[2] GAMCO addressed this holding in the context of its broader argument that "The Court of Chancery Erred in Ruling That GAMCO's Post-Settlement Revolving Note Claims were Released by the 2013 Settlement and Barred By *Res Judicata*." This mirrors the analysis of the Court of Chancery, which stated its reasoning on which Defendants rely under the umbrella of its section titled "The Breach of Fiduciary Duty Claims Related to the Revolving Note Are Barred by the 2013 Settlement." *Compare* Opening Br., Argument § I (at 17), *with* Opening Br., Legal Analysis § C (at 19).

[3] Moreover, whether a repayment would necessarily be "re-swept" to iHC, as Defendants claim, is properly a question of fact for discovery.

While approximately 90% of any dividend would go to iHC, such a dividend would nevertheless ensure that at least *some* of iHC's outstanding debt would be repaid and returned to CCOH's minority stockholders, rather than disappear in an eventual iHC bankruptcy. Thus, unlike in *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840 (Del. 1987), where the Court found it would be futile for a board to attempt an auction process where the company's 65% stockholder had already decided to effect a cash-out merger, the CCOH Board has the ability to advance the interests of the Company and its minority stockholders, rather than only the interests of its controlling stockholder. Indeed, this was the CCOH's Board's unyielding duty. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) ("the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally.") (citation omitted); *Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 387 (Del. Ch. 2004), *appeal denied*, 871 A.2d 1128 (Table), 2004 WL 1732185 (Del. 2004) ("controlling stockholders have no inalienable right to usurp the authority of boards of directors that they elect.").

B. THE 2013 SETTLEMENT DOES NOT RELEASE NEW BREACHES

Defendants incorrectly argue that the release contained in the 2013 Settlement bars Plaintiff's current claim that is based on post-settlement facts.

(Def. Br. 24-30). The plain language of the release, which applied to claims that could have been asserted "from the beginning of time through the date of this Stipulation" (¶23; A353-354), is unambiguous and must control here. *See, e.g.*, *Seven Inv., LLC v. AD Capital, LLC*, 32 A.3d 391, 396 (Del. Ch. 2011) ("[W]here the language of the release is clear and unambiguous, it will not be lightly set aside.") (alteration in original) (quotation omitted). This release language clearly does not affect claims that arise after the date of the Stipulation.

Defendants insist that the same core operative facts underlie both the 2012 Litigation and the current repayment demand claim. (Def. Br. 25). However, the only key fact that remains the same is the existence of the Revolving Note itself. Whether the Board at any time breaches its fiduciary duties by failing to make a repayment demand under the terms of the Revolving Note is a highly fact intensive inquiry that necessarily depends on the financial state of iHC and the balance of the Revolving Note. Thus, it is possible both that the Board *did not* breach its duties prior to the 2013 Settlement based on the financial state of iHC at that time, but that the Board Defendants *did* breach their duties based on subsequent circumstances that existed when this Action was filed (or vice versa). A finding that the Board did or did not breach its fiduciary duties in 2012 would have no bearing on whether the Board Defendants breached their fiduciary duties in 2016.

The 2012 litigation asserted breaches of fiduciary duty based on the financial state of iHC prior to the filing of that litigation, while this Action asserts breaches of fiduciary duty based on the financial state of iHC in the years that followed the 2013 Settlement. Since this inquiry necessarily turns on the facts that emerged in that distinct, later time period, GAMCO's repayment demand claim in this Action could not have been brought in the 2012 litigation.

Defendants essentially argue that the parties to the 2013 Settlement intended to eliminate the Board's fiduciary duty to demand repayment under the Revolving Note, no matter how far iHC's financial condition deteriorated, so long as the INC complied with the narrow contractual terms of the 2013 Settlement. *See* Def. Br. 26-28, 30. This greatly misstates the settlement parties' express intent, or indeed, what a settlement may accomplish.

As the parties made clear at the time, the 2013 Settlement was not intended to lessen or change the Board's fiduciary duties in any manner whatsoever. *Corp. Prop. Assocs. 6 v. Hallwood Grp. Inc.*, 817 A.2d 777, 779 (Del. 2003) (When determining whether a release covers a claim, "the intent of the parties as to its scope and effect are controlling.") (quotation omitted).

As the plaintiffs explained in their application for final settlement approval:

> [T]he Settlement is not intended and does not eliminate the [ ] Board's ability (or obligation) to demand immediate repayment of some or all of the outstanding

> Loan balance if such action would otherwise be required by the Board's fiduciary duties. (A269).

The 2012 plaintiffs reiterated this point at the settlement hearing:

> [T]here is nothing in this settlement that lets [the Board] off the hook to say, 'Well, gee, now we don't have to regularly reassess the amount of cash there.' It's not like, okay, as long as you're under this threshold, you don't have to give it back. You always have to be mindful of your fiduciary duties. (A320).

Counsel for the CCOH Special Litigation Committee agreed that, irrespective of the 2013 Settlement, "the [CCOH] board always has the right before the triggers set forth in the settlement are hit to demand repayment of all or a portion of the due from balance." (A328).

Yes, the parties did contemplate the balance of the Revolving Note would continue to grow, but that is why they did not intend to eliminate or lessen the Board's fiduciary duties to act in the face of such growth. Instead, the 2013 Settlement created contractual liquidity triggers that would enable the INC to demand a repayment on behalf of CCOH without the approval of the full Board. This ability was established because a majority of CCOH's directors were (and are) beholden to iHC, and public stockholders could not (and cannot) trust them to act in the Company's best interests when those interests are in contrast to the interests of iHC. This contractual mechanism ensured CCOH's public stockholders had a quick and easy recourse to redress breaches of fiduciary duties

in certain defined circumstances without the need to pursue expensive and uncertain litigation. However, it did nothing to lessen the Board's fiduciary duties to act in other situations.[4]

The fact that this settlement structure would permit stockholders to sue the day after the 2013 Settlement was approved is not "absurd," as Defendants claim (Def. Br. 27-28), so long as such a lawsuit were premised on changed financial circumstances at iHC, like the decline that has occurred over the last several years. (¶¶63-67; A39-41). If, the day after the 2013 Settlement was approved, iHC's financial condition had suddenly deteriorated to the extent it has over the last several years and the Board had failed to make a repayment demand, the Board would have breached its fiduciary duties regardless of the 2013 Settlement. Likewise, if the 2012 litigation had been tried to judgment favorable to defendants, that judgment would not preclude a CCOH shareholder from bringing a new derivative action based on iHC's subsequent financial circumstances. Defendants cannot receive more protection from the 2013 Settlement than they would have received had they successfully litigated the earlier case.

[4] Moreover, even if the parties to the 2013 Settlement intended to limit the Board's fiduciary duties going forward, such an agreement would be invalid and unenforceable as corporate directors cannot contract away their fiduciary duties. *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994) ("To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable.").

Furthermore, the cases Defendants cite for the proposition that a settlement can release claims based on future events (Def. Br. at 28-29) are readily distinguishable. *See In re Literary Works in Elec. Databases Copyright Litig*., 654 F.3d 242 (2d Cir. 2011) (class members to the release at issue had the option to opt out of the release as to claims for future use of copyrighted material and any adjudication in the initial action would necessarily determine whether future use of such material was permissible as new facts would not affect a liability determination); *Freeman v. MML Bay State Life Ins. Co.*, 445 F. App. 577 (3d Cir. 2011) (release at issue specifically stated claims that "hereafter may exist" and claims based on "future" costs or charges were released); *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266 (7th Cir. 1998) (release covered claims at issue despite the fact that damages had not occurred by the time of the release because the underlying misconduct had occurred prior to the release).

C. *RES JUDICATA* DOES NOT BAR THE REPAYMENT DEMAND CLAIM

Defendants' argument that *res judicata* bars the repayment demand claim (Def. Br. 31-33) fails for the same reason their release argument fails – the breaches of fiduciary duty underlying the claim are predicated solely on the emergence of new facts that postdate the 2013 Settlement. The doctrine of *res judicata* "serves to prevent a multiplicity of needless litigation of issues by limiting parties to one fair trial of an issue or cause of action which has been raised or

should have been raised in a court of competent jurisdiction." *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 192 (Del. 2009) (citation omitted).

While the nature of the claims the two litigations assert are similar, as the Court of Chancery noted (Dec. at 23-27), the pleaded facts supporting the claims are substantively and temporally distinct. Once again, the only common fact between the 2012 Litigation and the repayment demand claim is the existence of the Revolving Note itself, which GAMCO is not challenging. As noted above, the validity of any claim for breach of duty related to the failure to demand a repayment under the Revolving Note can only be assessed through a careful consideration of the financial state of iHC and the balance of the Revolving Note at the time the claim is made. Here, the repayment demand claim could not have been raised in the 2012 Litigation because the claim is predicated on the significant deterioration of the financial state of iHC during the time between the 2013 Settlement and the filing of this Action. (¶¶63-67; A39-41). The financial state of iHC at the time of the 2012 litigation is irrelevant to the claim Plaintiff is pursuing in this action. Since the current financial state of iHC did not exist at the time the 2012 Litigation was filed, the two cases do not share a sufficient common nucleus of operative facts.

The cases Defendants cite to argue the repayment demand claim and the claims asserted in the 2012 Litigation share a common nucleus of operative facts

(Def. Br. at 32) are likewise readily distinguishable. *See Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355 (4th Cir. 1989) (claims in second lawsuit alleged wrongdoing that either began prior to the first lawsuit or wholly occurred prior to the first lawsuit); *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986) (the second lawsuit relied on substantially the same factual allegations as the first lawsuit and merely advanced different legal theories of liability); *Yoon v. Fordham Univ. Faculty & Admin. Ret. Plan*, 263 F.3d 196 (2d Cir. 2001) (the second lawsuit was based on the same factual allegations as the first lawsuit and merely advanced different legal theories of liability).

II. THE TRIAL COURT ERRONEOUSLY DISMISSED THE CLAIMS ARISING FROM THE NOTE OFFERING AND ASSET SALES

Defendants' assertions that the Court of Chancery properly dismissed GAMCO's claim that the Board Defendants breached their fiduciary duty by approving the Note Offering and Asset Sales to the detriment of CCOH is likewise incorrect. [redacted] – a need the minority did not share.

A. *SINCLAIR OIL* DOES NOT BAR GAMCO'S CLAIMS

Sinclair Oil does not, as Defendants contend, dispose of GAMCO's claims arising from the Note Offering, Asset Sales and resulting dividends. (Def. Br. at 34). Nor is *Sinclair Oil* "indistinguishable" from this case. (Def. Br. at 35). While certainly nuanced, the Complaint's allegations establish elements this Court found lacking in *Sinclair Oil*, namely the "self-dealing" inherent in the unique benefit provided to iHC and the [redacted] (¶¶74-76, 78-99; A43-55).

In this regard, GAMCO alleges a manner of "self-dealing" not present in *Sinclair Oil*. [redacted] (¶¶78-81, 88; A45-47, 49-50). Such emergency liquidity was a unique benefit based on

the particular (and divergent) needs of iHC.[5] Contrary to Defendants' argument (Def. Br. at 35-36), the fact that the controller in *Sinclair Oil* was not desperate for cash to ensure its very survival such that it would entirely decline to consider the interests of the subsidiary or minority shareholders distinguishes *Sinclair Oil* from the type of self-dealing alleged here. At bottom, the nature of the benefit to iHC did not devolve upon CCOH or all shareholders in the same way. *Cede & Co.*, 634 A.2d. at 345, 363.

Relatedly, Defendants' argument that GAMCO has not "alleged that undertaking the asset sales, note offering, and dividends caused CCOH to forgo any particular opportunity" (Def. Br. at 36) is demonstrably incorrect. [redacted]

[5] *See, e.g.*, *McMullin v. Beran*, 765 A.2d 910, 921-23 (Del. 2000) (applying entire fairness standard where controller "initiated and timed the Transaction to benefit itself because [it] needed cash to fund [an] acquisition" and shareholders would have benefitted from a more deliberative process); *N.J. Carpenters Pension Fund v. Infogroup Inc.*, C.A. No. 5334-VCN, 2011 WL 4825888, at *10 (Del. Ch. Sept. 30, 2011) ("While all of the shareholders received cash in the Merger, *liquidity* was a benefit unique" to the 37 percent owner who forced the same due to the desperate need for liquidity); *In re Answers Corp. S'holders Litig.*, C.A. No. 6170-VCN, 2012 WL 1253072, at *7 (Del. Ch. Apr. 11, 2012) (allegations, among other, that all shareholders "received cash in the Merger, [but] *liquidity* was a benefit unique to" the company was adequate to alleges defendants were interested).

[redacted] (¶¶78-79; A45-46) in favor of the costly Note Offering (¶90; A50) and unnecessary (from CCOH's perspective) Asset Sales (¶93; A51-52).

[redacted] 280 A.2d at 722 ("the plaintiff could point to no opportunities which came to [the subsidiary]."). [redacted] For this reason, Defendants' argument that GAMCO's allegations are merely "conclusory" and thus application of the entire fairness standard here would render *Sinclair Oil* meaningless (Def. Br. at 37) overreaches.

B. THE CLAIMS MEET AN EXISTING EXCEPTION TO *SINCLAIR OIL*

Defendants' reliance on *In re Synthes, Inc. Shareholder Litigation*, 50 A.3d 1022 (Del. Ch. 2012) for the prospect that controlling stockholders who have the largest financial stake and thus a "natural incentive" to ensure a transaction maximizes the corporation's value (Def. Br. at 37) demonstrates the fallaciousness of Defendants' argument and why the Court of Chancery's reliance on *Sinclair Oil* and *Synthes* (Dec. at 44-46) was erroneous. Here the Court need not analyze Defendants' incentive or speculate on whether they were motivated to maximize

CCOH's value, it need only look at the *actual* nature of the transactions they consummated. The transactions did not benefit CCOH in any tangible way by, for example, allowing it to use the proceeds for corporate purposes or expansion. Rather, the transactions rather deprived CCOH and its minority shareholders of the Company's demonstrable growth opportunities in favor of a liquidity grab by iHC.

In this regard, Defendants' argument that GAMCO advocates for an exception to *Sinclair Oil* that would "swallow the rule" (Def. Br. at 38) is incorerct. *Sinclair Oil* already recognizes that "intrinsic fairness" is applied where the "parent has received a benefit to the exclusion and at the expense of the subsidiary." 280 A.2d at 720. While iHC and CCOH were here not on opposite sides of a transaction in the traditional sense, the challenged Note Offering and Asset Sales *did* involve an exchange of value between parent and subsidiary, namely CCOH relinquished value to its controlling shareholder so that iHC could receive the return benefit of addressing its liquidity crisis.

Moreover, as discussed above, here the allegations of "self-dealing" are demonstrably more acute than in *Sinclair Oil*. [redacted] (¶¶88, 94-95, 100; A49-50, 52-53, 55). This differs markedly from the dividends in *Sinclair Oil* that were funded

from the subsidiary's existing surplus to satisfy the parent's non-critical "need for cash" to fund exploration. And here the Complaint alleges particularized facts identifying the opportunities CCOH lost. In other words, here GAMCO's claims satisfy an *existing* exception to *Sinclair Oil's* general rule applying business judgment.

Defendants' related arguments that GAMCO's allegations do not meet the "narrow circumstances" for application of entire fairness recognized by *Synthes* because the Complaint purportedly does not allege "crisis" or "fire sale" type conditions ignores the plain language of the Complaint. Defendants' attempt to distinguish *McMullin, N.J. Carpenters,* and *Answers Corp.* fails for the same reason. The Complaint alleges that the transactions were initiated under severe financial stress on iHC and that [redacted] – basically the same type of critical fire sale conditions and poorly-explored transactions present in those cases.

C. THE TRIAL COURT DREW IMPERMISSIBLE INFERENCES

Defendants merely reiterate the Court of Chancery's erroneous finding that the Complaint's allegations concerning the Note Offering and Asset Sales are "conclusory." (Def. Br. at 42-43). This is unavailing where, as here, GAMCO's Opening Brief clearly established that the court's ruling was grounded in impermissible fact-weighing and Defendant-favorable inferences.

As set forth in GAMCO's opening brief, the Complaint pleads, among other things, that: (i) the iHeart Defendants' financial crisis was escalating (¶¶63, 67; A39-40, 41); (ii) [redacted] (¶¶85-88; A48-50); (iii) [redacted] (¶¶78-79; A45-46); and (iv) CCOH retained no proceeds of the transactions and no other objective for them was ever discussed (¶¶85-88, 99; A48-50, 54-55).

[redacted] Given these well-pleaded facts, the Court of Chancery *was not permitted* to discount these allegations or draw competing inferences from extrinsic facts. *See Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) ("On a motion to dismiss, the Court of Chancery was not free to disregard that reasonable inference, or to discount it by weighing it against other, perhaps

contrary, inferences that might also be drawn.").[6] To the extent that the trial court relied on self-serving statements by the Board Defendants putatively justifying the transactions (Def. Br. at 43), competing inferences that may be drawn from these statements, if any, are properly resolved in discovery.[7]

For these reasons, the Court of Chancery's reliance on the Board Defendants' self-serving statements in the meeting minutes (Dec. at 47-49) to draw Defendant-favorable inferences was reversible error. *See Gantler*, 965 A.2d at 708-709, 714 (reversing the Chancery Court's dismissal on a motion to dismiss because, *inter alia*, the court improperly applied the business judgment rather than entire fairness standard and drew inferences favoring defendants). Tellingly, Defendants do not directly answer this argument.

Instead, Defendants present the red-herring argument that the Court of Chancery was permitted to consider the whole contents of the Board minutes because they were incorporated by reference in the Complaint.[8] (Def. Br. at 43-

---

[6] Defendants' reliance on *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (Def. Br. at 42) is misplaced. Unlike the instant Complaint, which concisely pleads particularized facts taken from CCOH's internal Board minutes – and largely unchallenged by Defendants – in Brehm the complaint was a "blunderbuss of a mostly conclusory pleading." *Id*. at 267.

[7] *See, e.g.*, *In re Cornerstone Therapeutics Inc. Stockholder Litig.*, 115 A.3d 1173, 1186-87 (Del. 2015) ("when a complaint pleads facts creating an inference that . . . directors approved a conflicted transaction for improper reasons, and thus, those directors may have breached their duty of loyalty, the pro-plaintiff inferences that must be drawn on a motion to dismiss counsels for resolution of that question of fact only after discovery.").

[8] GAMCO has never argued that the Chancery Court was prohibited from considering the entirety of Board minutes cited in the Complaint. For this reason, *Winshall v. Viacom Int'l Inc.*, 76 A.3d 808, 818 (Del. 2013) (Def. Br. at 43), which stands for the unremarkable proposition

44). GAMCO's challenge is to the Court of Chancery's Defendant-favorable inferences impermissibly drawn from the documents that credited certain undetailed and self-serving statements by the Board over the Complaint's particularized and credible allegations – *not* the fact the court considered the documents.[9]

that a court is entitled to consider documents incorporated by reference into a complaint, is inapposite.

[9] *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006) (Def. Br. at 44) is similarly inapposite. Here the Chancery Court did not review the extrinsic documents to see whether GAMCO "misstated or mischaracterized" the Board minutes, and indeed Defendants have never argued any such misstatement or mischaracterization.

CONCLUSION

For the reasons set forth in GAMCO's Opening Brief demonstrating that the Court of Chancery erred in dismissing the Complaint's well-pleaded allegations that Defendants breached their fiduciary duties to CCOH and the Company's minority shareholders, which Defendants have not refuted in their Answering Brief that merely rehashed the erroneous Decision as set forth above, GAMCO respectfully asserts that the Decision should be reversed and the case remanded to the Court of Chancery for further proceedings.

ROSENTHAL, MONHAIT & GODDESS, P.A.

/s/ Norman M. Monhait
Norman M. Monhait (#1040)
P. Bradford deLeeuw (#3569)
919 Market Street, Suite 1401
Citizens Bank Center
Wilmington, DE 19801
(302) 656-4433
nmonhait@rmgglaw.com
Attorneys for Plaintiff Below-Appellant

OF COUNSEL:

Vincent R. Cappucci
Andrew J. Entwistle
Joshua K. Porter
ENTWISTLE & CAPPUCCI LLP
299 Park Avenue, 20th Floor
New York, NY 10171

Mark Lebovitch
Christopher J. Orrico
John Vielandi
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020

Ned Weinberger (Bar No. 5256)
LABATON SUCHAROW LLP
300 Delaware Avenue, Suite 1340
Wilmington, DE 19801

March 21, 2017