IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TVI CORPORATION, RONAK KHICHADIA, GARY KATCHER (individually and as trustee of the GARY KATCHER GRAT), JOHN THOMPSON, T5 INVESTMENTS, LLC, WILLIAM THOMPSON, ST6, LLC, and ST7, LLC, derivatively on behalf of ICUETV, INC.,	)	
Plaintiffs,	)	
v.	)	
	)	C.A. No. 7798-VCP
BERNARD GALLAGHER, GEORGE SINGLEY, MICHAEL HUEGEL, ROBERT FERNANDEZ, PATRICK GATES, RYANN THORNTON, and MICHAEL DEBENEDICTIS,	)	
Defendants,	)	
and	)	
ICUETV, INC., a Delaware corporation.	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

Submitted: June 3, 2013
Decided: October 28, 2013

Stephen B. Brauerman, Esq., Vanessa R. Tiradentes, Esq., BAYARD, P.A., Wilmington, Delaware; Glenn S. Gitomer, Esq., Benjamin R. Picker, Esq., McCAUSLAND KEEN & BUCKMAN, Radnor, Pennsylvania; *Attorneys for Plaintiffs.*

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PARSONS, Vice Chancellor.

In this derivative action, shareholders and former directors of a closely held corporation bring breach of fiduciary duty claims against current and former directors of that corporation, including three of the corporation's founders. The plaintiffs allege that the founders dominated the board of the corporation and that, collectively, the defendants took actions that wrongfully benefitted the founders and one of the other defendant directors while injuring the corporation and its shareholders. These alleged actions include, among others, entering into and approving wasteful employment agreements between the corporation and three of the defendants, retroactively approving financing from one of the founders on preferential terms, and wrongfully removing plaintiff directors in order to prevent the founders' actions from receiving closer scrutiny. The plaintiffs seek monetary, injunctive, and declaratory relief on their claims as well as the appointment of a receiver. The action is before me on two motions: (1) the defendants' motion to dismiss the plaintiffs' derivative claims for breach of fiduciary duty, declarative and injunctive relief, and appointment of a receiver; and (2) the plaintiffs' motion for leave to amend their complaint.

This Memorandum Opinion reflects my rulings on these two motions. For the reasons that follow, I grant in part and deny in part the defendants' motion to dismiss. Specifically, I grant the defendants' motion to dismiss certain of the plaintiffs' fiduciary duty claims and a related request for declaratory judgment, and I decline to appoint a receiver *pendente lite*. I deny the defendants' motion in all other respects. Finally, I grant the plaintiffs' motion to amend in its entirety.

I. BACKGROUND[1]

A. The Parties

The plaintiffs are shareholders of the Nominal Defendant, iCueTV, Inc. ("iCueTV" or the "Company"). Specifically, they are: TVI Corporation ("TVI"), Ronak Khichadia, Gary Katcher, William Thompson ("Bill Thompson" or "Thompson") and two related entities that he controls, ST6, LLC and ST7, LLC, and John Thompson and a related entity that he controls, T5 Investments, LLC (collectively, "Plaintiffs").[2] Plaintiffs bring this action derivatively on behalf of iCueTV.

Daniel Harrington, TVI's President, was a member of the iCueTV board of directors (the "Board") from 2009 through May 31, 2012. Khichadia and Katcher served as members of the Board from the Fall of 2010 through May 31, 2012. Thompson was a member of the Board from 2008 through 2010.

Defendants Bernard Gallagher, Michael Huegel, and George Singley are founders of iCueTV (collectively, the "Founders"). Gallagher, Huegel, and Singley served on the iCueTV Board at all times relevant to the allegations in the complaint, although Huegel recently resigned. Gallagher is Chairman of the Board, Huegel was iCueTV's President and Chief Technology Officer, and Singley is the Company's Chief Operating Officer and General Counsel.

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[1] Unless otherwise noted, the facts recited herein are drawn from the well-pled allegations of Plaintiffs' Amended Complaint, together with its attached exhibits, and are presumed true for the purposes of Defendants' motion to dismiss.

[2] All references to "Thompson," without the first name specified, are to Bill Thompson.

The remaining Defendants are Robert Fernandez, Patrick Gates, Ryann Thornton, and Michael DeBenedictis, who were directors on iCueTV's Board during all times relevant to the allegations in the complaint. Fernandez and Gates continue to serve on the Board, and Gates is also iCueTV's Chief Executive Officer. DeBenedictis and Thornton served on the Board until September 1, 2012 and October 1, 2012, respectively.

B. Facts

iCueTV is a closely held corporation. Plaintiffs and their related entities, families, and friends, have funded almost 50% of iCueTV's paid-in capital. In exchange for their substantial investments in the Company, Thompson, Katcher, Khichadia, and Harrington all were given seats on iCueTV's Board near the time each of them made their initial investment. Plaintiffs assert that Gallagher, Huegel, and Singley controlled iCueTV and, in conjunction with the other Defendants, took a series of actions that harmed the Company and its shareholders. These actions included, among others, mismanaging the Company, entering into wasteful employment agreements with Huegel, Singley, and Gates,[3] wrongfully removing Thompson, Katcher, Khichadia, and Harrington from

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[3] *See* Defs.' Opening Br. Exs. B, D, E. On a motion to dismiss, the Court may consider documents both integral to and incorporated into the complaint, and documents not relied upon for the truth of their contents. *Orman v. Cullman*, 794 A.2d 5, 15–16 (Del. Ch. 2002). The Court also may consider the terms of written agreements that are integral to the complaint. *See Hillman v. Hillman*, 910 A.2d 262, 269 (Del. Ch. 2006). The employment agreements with Huegel, Singley, and Gates are integral to Plaintiffs' claims and are relevant for their legal import rather than for the truth of their contents. They are thus properly before me on Defendants' motion to dismiss.

iCueTV's Board, retroactively giving preferential treatment to monetary advances made to the Company by Gallagher, and misappropriating and diverting iCueTV's assets.

On March 7, 2012, iCueTV obtained a patent (the "Patent") for a system that would permit TV viewers to interact with program content broadcast over a subscriber network, such as cable, satellite, internet, or cellular. Plaintiffs assert that, despite attempting to market this technology for several years, iCueTV has failed to obtain any significant revenues from this or any other technology that it owns or has developed. Plaintiffs further aver that iCueTV is spending its cash reserves at a rate of about $350,000 per month. Gallagher has advised the iCueTV shareholders that, without the infusion of substantial additional capital from investors, the Company will no longer have the funds to continue operations.

Notwithstanding iCueTV's limited resources and uncertain prospects, on or about November 1, 2009, without providing notice to or obtaining approval from his fellow Board members, Huegel caused iCueTV to enter into an employment agreement with Gates as CEO. Gates's contract ran for a two-year term until October 31, 2011, after which it would renew automatically for successive one-year periods unless the Company provided written notice to the contrary at least three months before the end of a period. The contract provides Gates with, among other things, a base salary of $250,000 per year, 375,000 options to purchase Class A common stock of iCueTV, six weeks of annual paid vacation, health, dental, and life insurance, and a monthly vehicle allowance.

In December 2009, Gallagher, as iCueTV's Chairman, entered into employment agreements on behalf of the Company with Huegel and Singley, making Huegel

iCueTV's President and Chief Technology Officer and Singley its Chief Operating Officer and General Counsel. Plaintiffs allege that Gallagher did this without informing, or obtaining the prior approval of, the Board.

Huegel's employment contract runs for a six-year term from January 1, 2010 through December 31, 2015, and provides for automatic annual renewal thereafter absent three months' prior written notice to the contrary. Under the agreement, Huegel is to receive an annual base salary of $400,000, with the amount of that salary in excess of $150,000 being treated as deferred compensation, immediately payable upon iCueTV reaching specified revenue and capital targets, experiencing a change of control, or being liquidated, among other events. Huegel's contract also provides an annual bonus of not less than 50% of his base salary, 250,000 Class B stock options, six weeks of annual paid vacation, and a monthly vehicle allowance.

Singley's employment contract similarly runs for a six-year term from January 1, 2010 through December 31, 2015, with automatic annual renewal thereafter absent three months' prior written notice to the contrary. The agreement provides a $300,000 annual base salary, with the amount of that salary in excess of $125,000 being treated as deferred compensation, payable under the same terms as those specified in the Huegel agreement. Singley's contract also provides an annual bonus of not less than 50% of his base salary, 250,000 Class B options, five weeks of annual paid vacation, and a monthly vehicle allowance.

The employment agreements between iCueTV and Gates, Huegel, and Singley, respectively, all may be terminated only for cause, absent which Gates, Huegel, and

Singley are entitled to receive full salary and benefits until their terms have expired. In total, Plaintiffs allege that the Gates, Huegel, and Singley executive employment agreements represent liabilities of approximately $7 million. In addition to the benefits provided to Huegel and Singley under the employment agreements, Plaintiffs allege that they received "carried interests" of 1,513,410 and 560,520 shares of iCueTV stock, respectively. These carried interests enabled the Founders to obtain greater voting control over iCueTV.

When Thompson discovered the existence of the Huegel and Singley employment agreements in December of 2009, he complained, in his capacity as a director, that those agreements never were approved by the Board. As Chair of the Board's Audit Committee, Thompson also requested an outside audit of iCueTV's financial records based on the existence of red flags that suggested financial improprieties. Plaintiffs assert that, in response to Thompson's complaints and his call for an investigation, Singley, Huegel, and Gallagher organized a Board meeting in early May of 2010, without giving notice to Thompson, at which they purported to remove Thompson from the Board.[4]

On May 20, 2010, another Board meeting was held. It was attended by Singley, Huegel, Gallagher, and Fernandez. At that meeting, Gallagher and Fernandez voted to retroactively approve Huegel's and Singley's employment agreements. Plaintiffs assert that this retroactive approval failed to meet the Company's quorum requirements. In

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[4] Harrington also was removed from the Board at that time, but he later was invited to rejoin the Board.

addition, Plaintiffs challenge Gates's employment agreement on the ground that the Board never approved it.

On February 1, 2012, John Thompson, through counsel, made a demand under 8 *Del. C.* § 220 to inspect iCueTV's books and records. The Company produced certain documents to John Thompson in response to this demand, but refused to produce copies of iCueTV's cash ledgers.

In a May 30, 2012 Board meeting, Katcher, Khichadia, and Harrington requested the formation of a committee to investigate allegations that Huegel, Singley, and possibly others had misappropriated and wasted iCueTV assets, and they also raised other concerns regarding corporate governance. On May 31, 2012, Gallagher called a special meeting of shareholders, without providing notice of its purpose to Katcher, Khichadia, and Harrington, each of whom were iCueTV shareholders. At the meeting, Katcher, Khichadia, and Harrington were removed as directors, ostensibly because Gallagher was unable to work with a contentious Board.

Despite the subsequent removal of Katcher, Khichadia, and Harrington, the May 30, 2012 Board meeting did result in director Fernandez and a founding shareholder of iCueTV, James Carpenter, being appointed as a committee to investigate certain allegations of wrongdoing. Fernandez and Carpenter thereafter recommended that Kroll Associates be retained to conduct a full investigation. Shortly after this recommendation was made, however, Gallagher determined, without further inquiry, that there was no merit to the allegations and discontinued the investigation.

Earlier, in October 2011, Gallagher had begun funding the operations of iCueTV through contributions that exceeded $3.35 million as of July 20, 2012. The Board did not approve Gallagher's funding in advance and did not specify contemporaneously the nature or terms of the funding. At the shareholder meeting held on May 31, 2012, Gallagher refused to commit to how the funding should be treated by the Company.

On July 31, 2012, the Board, which then consisted of Gallagher, Huegel, Singley, Gates, Fernandez, Thornton, and DeBenedictis, retroactively approved the funding previously provided by Gallagher. Pursuant to this approval, Gallagher was given a "Convertible Note" that permitted him, at the time of repayment, to determine whether his advances would be treated as loans or the purchase of equity. If Gallagher opted to have his advances treated as debt, he would be entitled to be repaid in full with interest before any of the equity investors in the Company would receive anything.

Plaintiffs claim that the onerous employment agreements of Singley, Huegel and Gates, and the preferential terms of Gallagher's funding to iCueTV, make it impossible for iCueTV to raise additional capital to continue operations. Plaintiffs also assert that Huegel, Singley, and possibly others have diverted and misappropriated assets of iCueTV for their own use. They specifically allege that, during the term of his full-time employment with iCueTV, Singley improperly used iCueTV's resources to run an outside law practice.

As of October 5, 2012, Gallagher had ceased funding iCueTV's operations and iCueTV had defaulted on its lease, could not make payroll, had its internet servers shut off, and was unable to fulfill various other obligations. Plaintiffs allege that Gallagher,

Huegel, and Singley now are attempting to sell or divest the assets of iCueTV, including the Patent and the Company's wholly owned subsidiary Drop Wallet, LLC, for less than fair value. According to Plaintiffs, the Founders intend to take the proceeds for themselves as purported repayment of their deferred employment compensation and Gallagher's prior loans to the Company.

C. Procedural History

On August 21, 2012, Plaintiffs filed a Verified Derivative Shareholders' Complaint (the "Original Complaint") on behalf of iCueTV. The Original Complaint included three counts against all of the Defendants for: (1) breach of fiduciary duties and waste, (2) declaratory and injunctive relief, and (3) appointment of a receiver.

iCueTV and the other Defendants promptly moved to dismiss the Original Complaint. Defendants collectively filed the opening brief in support of their motions to dismiss on October 23, 2012. They sought dismissal under both Court of Chancery Rule 23.1 for failure to allege demand futility and Rule 12(b)(6) for failure to state a claim.

On November 27, 2012, in lieu of submitting an answering brief in opposition to Defendants' motions to dismiss, Plaintiffs filed their Verified Amended Derivative Shareholders' Complaint (the "First Amended Complaint" or the "Complaint") pursuant to Court of Chancery Rule 15(aaa). In the First Amended Complaint, Plaintiffs dropped their claims against Homer Gonzalez, who apparently was not a director of iCueTV, and refined the factual allegations regarding their existing claims without adding any new counts or causes of action.

On December 17, 2012, Defendants filed a Motion to Dismiss Plaintiffs' Amended Complaint (the "Motion to Dismiss") on the same grounds as their earlier motions. Thereafter, the parties fully briefed the Motion.

On the morning of March 20, 2013, a few hours before the scheduled oral argument on that motion, Plaintiffs' counsel notified Defendants' counsel that Plaintiffs mistakenly had filed the wrong version of the First Amended Complaint four months earlier. At argument, Plaintiffs informed the Court of this mistake and of their intent to file a second amended complaint. Defendants stated that they would oppose any such amendment as untimely and contrary to Rule 15(aaa), because the amendment would not be filed until after full briefing and argument on the Motion to Dismiss had occurred.

On March 28, 2013, Plaintiffs filed a Motion for Leave to Amend (the "Motion to Amend") their First Amended Complaint. Among other things, the proposed amendment adds a fourth count to the First Amended Complaint, asserting a direct claim for fraud against Defendants Gallagher, Huegel, and Singley.

Defendants Singley, Fernandez, and DeBenedictis filed an opposition to the Motion to Amend on May 28, 2013, to which Plaintiffs replied on June 3. No other Defendant responded to the Motion to Amend.

D. Parties' Contentions

In support of their Motion to Dismiss, Defendants argue first that Plaintiffs' Complaint should be dismissed in its entirety because they have not satisfied either prong

of the *Aronson v. Lewis* test for demand futility.[5] Defendants also seek dismissal of Plaintiffs' claims under Rule 12(b)(6), because: (1) they fail to state a claim for breach of fiduciary duty or waste; (2) there is no controversy that is ripe for judicial determination as to Plaintiffs' claim for declaratory judgment; and (3) Plaintiffs have failed to plead sufficient facts to justify the extraordinary remedy of the appointment of a receiver.

Plaintiffs dispute all of Defendants' contentions and urge the Court to deny their motion to dismiss in its entirety. According to Plaintiffs, they adequately have pled demand futility by demonstrating that every member of the Board either was interested in the challenged transactions or lacked independence. They further argue that the Complaint states valid derivative claims for waste, breaches of fiduciary duty, and the appointment of a liquidating receiver, and that this action presents a ripe controversy that supports granting them declaratory relief.

As to their Motion to Amend, Plaintiffs argue that, because their amendments will not alter the claims that already have been briefed on the pending Motion to Dismiss, their request should be governed by the more liberal standards of Court of Chancery Rule 15(a) rather than Rule 15(aaa). In that regard, Plaintiffs assert that allowing them to amend their Complaint would serve the interests of justice and judicial economy, and that their motion, therefore, should be granted pursuant to Rule 15(a).

Defendants counter that Rule 15(aaa) governs in the circumstances present here, and that it prohibits a further amendment to Plaintiffs' Complaint. They also accuse

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[5] 473 A.2d 805 (Del. 1984).

Plaintiffs of undue and inexcusable delay in bringing their motion, and complain that granting the motion would be unfairly prejudicial to Defendants.

Based on the belated timing of Plaintiffs' Motion to Amend and the requirements of Rule 15(aaa),[6] I begin by addressing Defendants' Motion to Dismiss the First Amended Complaint. After discussing the appropriate disposition of that motion, I will turn to the Motion to Amend.

II. ANALYSIS

A. Motion to Dismiss

The Complaint includes three derivative claims: (1) a claim for breach of fiduciary duties and waste, (2) a claim for declaratory and injunctive relief, and (3) a claim for the appointment of a receiver.

Defendants have moved to dismiss under both Rule 23.1, due to Plaintiffs' alleged failure to demonstrate demand futility, and Rule 12(b)(6), due to Plaintiffs' alleged failure to state a claim. I consider first whether Plaintiffs adequately demonstrated demand futility and then assess whether Plaintiffs adequately pled the claims asserted in their Complaint.

1. Demand futility

Stockholder-plaintiffs seeking to pursue a derivative claim must meet the burden imposed by the demand requirement embodied in Rule 23.1, which provides in relevant part: "[t]he complaint shall also allege with particularity the efforts, if any, made by the

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[6] *See Braddock v. Zimmerman*, 906 A.2d 776, 783 (Del. 2006); *Stern v. LF Capital P'rs, LLC*, 820 A.2d 1143, 1144 (Del. Ch. 2003).

plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort."

Where, as here, the plaintiffs have failed to make a demand on the board of the company on behalf of which they are suing, they must demonstrate that such a demand would have been futile and, therefore, that they should be excused from having to make such a demand.[7] Where the plaintiff fails to comply with the demand requirement and fails to plead with particularity why a demand would be futile, the complaint will be dismissed.[8]

The showing that Plaintiffs must make to establish demand futility depends upon whether a given claim challenges board action or board inaction. When board action is challenged, the test for demand futility is that articulated in *Aronson v. Lewis*.[9] Under *Aronson*, the court must decide whether, given the particularized facts alleged, a "reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[10] Thus, a plaintiff has two options to establish a demand futility argument under *Aronson*. First, the plaintiff may argue that a majority of the board is either

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7 *See Beam v. Stewart*, 845 A.2d 1040, 1044 (Del. 2004); *Zapata v. Maldonado*, 430 A.2d 779, 784 (Del. 1981).

8 *See Haber v. Bell*, 465 A.2d 353, 357, 360 (Del. Ch. 1983).

9 473 A.2d 805 (Del. 1984).

10 *Id.* at 814.

interested or lacks independence from those who are interested.[11] Second, the plaintiff may allege particularized facts that demonstrate that the challenged transaction could not be an exercise of valid business judgment.[12]

By contrast, when board inaction is challenged, *Rales v. Blasband* provides the appropriate standard for assessing demand futility.[13] Under *Rales*, a plaintiff can show demand futility by creating "a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to demand."[14]

Plaintiffs allege five main categories of wrongdoing by some or all of the Defendant-directors: (1) entering into wasteful employment agreements with Huegel, Singley, and Gates; (2) retroactively giving preferential treatment to monetary advances made to the Company by Gallagher; (3) wrongfully removing Thompson, Katcher, Khichadia, and Harrington from iCueTV's Board; (4) misappropriating and diverting iCueTV's assets; and (5) failing to exercise proper oversight over the Company. Plaintiffs also assert that certain Board actions were taken without providing sufficient notice, obtaining an adequate quorum, or obtaining sufficient votes.

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11 *Levine v. Smith*, 591 A.2d 194, 205–06 (Del. 1991).

12 *Id.*

13 634 A.2d 927 (Del. 1993).

14 *Id.* at 934.

The first three of these categories challenge actions taken by iCueTV's Board. The last two, however, do not involve Board action, but rather challenges to Board inaction and to the wrongful acts of individual Defendant-directors. I analyze demand futility, therefore, under *Aronson* for the first three categories of alleged misconduct and under *Rales* for the last two categories.

The seven directors on iCueTV's Board at the time the Original Complaint was filed were Gallagher, Singley, Huegel, Gates, Fernandez, Thornton, and DeBenedictis. Between the filing of the Original Complaint on August 21, 2012 and the First Amended Complaint, *i.e.*, the operative Complaint, on November 27, 2012, Huegel, DeBenedictis, and Thornton left the Board. Plaintiffs argue that the Court should assess the futility of demand at the time of the filing of the First Amended Complaint. That argument, however, fails to take into account that all of the claims in that Complaint also were included in the Original Complaint. Because all of Plaintiffs' claims were already "in litigation" when the First Amended Complaint was filed, the composition of the Board at that time is not relevant to a Rule 23.1 demand inquiry.[15] Instead, under both *Aronson* and *Rales*, the relevant inquiry is whether demand was futile with respect to "the board in existence at the time the first complaint was filed."[16]

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15 *Braddock v. Zimmerman*, 906 A.2d 776, 786 (Del. 2006).

16 *See In re Fuqua Indus., Inc., S'holder Litig.*, 1997 WL 257460, at *12 (Del. Ch. May 13, 1997).

a. *Aronson*

The test under the first prong of *Aronson* is whether a director is incapable of evaluating the demand objectively, because he or she is interested or not independent. The plaintiff, however, will not show the directors are interested simply by stating that the directors acquiesced to the challenged action[17] or that they approved the challenged action and, therefore, are interested to the extent they would be required to sue themselves.[18] The question of interestedness usually arises where a director has a personal financial interest in the outcome of the challenged transaction rather than an interest in the mere outcome of the litigation.[19] A director will be considered interested if he or she stands to "receive a personal financial benefit from a transaction that is not equally shared by the stockholders."[20] Likewise, directors may be deemed interested where the directors undertook the challenged action to maintain control.[21]

Similarly, an independence inquiry asks whether the uninterested members of the board are dominated or beholden to the interested members in such a way that their independence and objectivity is questionable.[22] The rule in this context is that demand

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17 *See Kaufman v. Belmont*, 479 A.2d 282, 287–88 (Del. Ch. 1984).

18 *See Seminaris v. Landa*, 662 A.2d 1350, 1355 (Del. Ch. 1995) (citing *Decker v. Clausen*, 1989 WL 133617 (Del. Ch. Nov. 6, 1989)).

19 *See Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).

20 *Id.* (citing *Aronson*, 473 A.2d at 812).

21 *See Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1189 (Del. Ch. 1998).

22 *See Aronson*, 473 A.2d at 816.

will be excused "where officers and directors are under an influence which sterilizes their discretion."[23] Determining whether a director is independent is often a difficult and fact-specific inquiry.

I note at the onset that Plaintiffs' allegations of interest all were directed toward Gallagher, Huegel, Singley, and Gates. Plaintiffs have not alleged particularized facts supporting an inference that any of the other Defendant-directors, namely, Thornton, DeBenedictis, and Fernandez, were personally interested in any of the challenged transactions. I also note, however, that this does not preclude a finding that these three directors lacked independence as to those transactions.

Plaintiffs allege that the Defendant-directors breached their fiduciary duties by entering into and approving wasteful employment agreements with Huegel, Singley, and Gates, and by retroactively giving preferential treatment to monetary advances made to the Company by Gallagher. I analyze these transactions in conjunction with one another, because each involves the transfer of a financial benefit to a Defendant-director. When the challenged transactions are considered in isolation, only one director is interested in each one of them. Specifically, Huegel, Singley, and Gates are interested in their respective employment agreements and Gallagher is interested in the retroactive approval of the financing he provided to the Company.

The facts pled by Plaintiffs, however, support an inference that these transactions were interrelated. Collectively, Gallagher, Singley, and Huegel, as founders, directors,

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[23] *Id.* at 814.

and major shareholders of iCueTV, exercised significant control over the Company and its Board. Indeed, it is uncontested that the Founders had the ability to determine the composition of iCueTV's Board, because shareholders could only elect directors whom the Founders had nominated. The facts alleged in the Complaint support a reasonable inference that the Founders may have leveraged their control over the Company to benefit one another in an "I'll scratch your back, you scratch mine" type of relationship.

Gallagher, on behalf of iCueTV, entered into the employment agreements with Singley and Huegel on terms that were very advantageous to them. Each agreement included a generous compensation package that provided for significant bonuses and deferred compensation amounts. Each agreement also had a term of six years, with automatic annual renewals thereafter absent prior written notice to the contrary. In addition, the agreements could not be terminated by the Company except for "cause," which the agreements narrowly defined to require such things as "fraud or embezzlement" or "conviction of a criminal felony offense."[24]

When Thompson expressed concern that these employment agreements had never been approved by the Board and requested an outside audit of iCueTV's financial records, the Founders promptly reacted. They organized a Board meeting in early May of 2010, without providing notice to Plaintiff shareholders, at which Thompson was removed from the Board. On May 20, 2010, shortly after Thompson's removal, another Board meeting was held and attended by Singley, Huegel, Gallagher, and Fernandez. At

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[24] Defs.' Opening Br. Exs. D, E.

that meeting, Gallagher and Fernandez voted to retroactively approve Huegel's and Singley's employment agreements.

Two years later, in a May 30, 2012 Board meeting, Katcher, Khichadia, and Harrington requested the formation of a committee to investigate allegations that, among other things, Huegel and Singley had misappropriated and wasted iCueTV assets. On May 31, 2012, the very next day, Gallagher called a special meeting of shareholders, without providing notice of its purpose to Katcher, Khichadia, and Harrington. All three of those directors were removed from the Board at that meeting.

Two months later, on July 31, 2012, a Board that included Huegel and Singley proceeded to retroactively approve the previous funding provided by Gallagher. Pursuant to this approval, Gallagher was given a "Convertible Note" that would permit him to determine unilaterally whether his $3.35 million in "advances" to the Company would be treated as loans or the purchase of equity. The facts alleged by Plaintiffs support a reasonable inference that, by this time, it was already apparent to the iCueTV directors that the Company had bleak prospects. iCueTV had failed to earn any significant revenues from its intellectual property and quickly was running out of capital. Thus, for Gallagher, the option of having his advances treated as debt presented a significant financial benefit, because treatment as a creditor would mean that, in the case of insolvency, Gallagher would be repaid with interest before any equity investors would be compensated.

Taken together, these facts raise the reasonable possibility that the Founders had a tacit understanding pursuant to which each would support preferential compensation and

reimbursement packages for the others, and each also would join the others in causing the removal of any directors who questioned the Founders' financial interactions with the Company. As a result, there is reasonable cause to believe that all three of the Founder-directors were interested in the Huegel and Singley employment agreements and the retroactive approval of Gallagher's advances to the Company.

For similar reasons, there is cause to believe that Gates was interested in the challenged transactions that benefitted the Founders, and that the Founders shared a reciprocal interest in Gates's employment agreement. While Gates was serving on the Board of iCueTV, Huegel offered him a generous employment agreement, on behalf of iCueTV, that was similar to the agreements Gallagher later offered to Singley and Huegel, although Gates's agreement had an initial term of only two years and did not include deferred compensation rights. Gates later voted retroactively to approve treating Gallagher's previous financing of the Company as a convertible note. These allegations provide a reasonable basis for inferring that Gates may have operated under the same mutual understanding as existed among the Founders, and, therefore, was interested in the challenged transactions.

Even if Gates was not interested in the challenged transactions that benefitted the Founders, there is reason to believe that he and the other non-founder members of the Board lacked independence with respect to those transactions, because they were under the control and domination of the Founders. In the demand futility context, a plaintiff charging domination and control of one or more directors must allege particularized facts

manifesting "a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling."[25]

There is no dispute that the Founders exercised significant control over iCueTV, including by having the authority to determine the composition of its Board. Against that backdrop, Plaintiffs have pled facts supporting an inference that the Founders would remove any directors on the Board who opposed or inconvenienced them. Thompson was removed, at a Board meeting organized by the Founders, shortly after protesting the employment agreements entered into by the Company, through Gallagher, with Huegel and Singley, and requesting an outside audit of iCueTV's financial records in the face of red flags that suggested financial improprieties. Katcher, Khichadia, and Harrington similarly were removed after they requested the formation of a committee to investigate allegations that Huegel, Singley, and possibly others had misappropriated and wasted iCueTV assets. Gallagher quickly terminated the investigation and called a meeting to remove Katcher, Khichadia, and Harrington the very next day, citing his inability to work with a contentious board.

Based on reasonable inferences drawn from the facts alleged in the Complaint that the Founders would remove any directors who opposed them, Plaintiffs have raised a reasonable doubt that the non-Founder Board members (Gates, Fernandez, Thornton, and DeBenedictis) were beholden to the Founders as of the filing of the Original Complaint. "[W]here officers and directors are under an influence which sterilizes their discretion,

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[25] *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984).

they cannot be considered proper persons to conduct litigation on behalf of the corporation. Thus, demand [as to such individuals] would be futile."[26]

Defendants argue that Gates could not have lacked independence as of August 21, 2012, when the Original Complaint was filed, because, as of that date, he was guaranteed to receive his salary and benefits for at least another year. This assertion, however, is not sufficient to rebut the reasonable doubt raised by Plaintiffs as to Gates's independence. Even with the one-year guarantee, Gates still may have been swayed by a desire to remain an officer and director of the Company and to continue receiving the benefits and salary associated with those positions for longer than a year.

Plaintiffs, therefore, have raised a reasonable doubt as to whether at least a majority of the Board of iCueTV at the relevant time was disinterested and independent with respect to the Huegel, Singley, and Gates employment agreements, as well as the retroactive approval of Gallagher's financing. Thus, Plaintiffs have established demand futility under prong one of *Aronson* with respect to their challenges to those transactions.

For similar reasons, I also find that Plaintiffs have established demand futility with respect to their challenges to the removal of Thompson, Katcher, Khichadia, and Harrington from iCueTV's Board. The circumstances surrounding the removals of each of these directors support an inference that the Founders orchestrated these removals to maintain their control over the Board, as well as to insulate their financial dealings with the Company from unwanted scrutiny. The Founders, therefore, were interested in these

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[26] *Id.* at 814.

removals. As discussed above, Plaintiffs have raised a reasonable doubt that the remaining members of the Board (Gates, Fernandez, Thornton, and DeBenedictis) were beholden to the Founders. Plaintiffs thus have demonstrated demand futility under prong one of *Aronson* as to their challenges to the removals of Thompson, Katcher, Khichadia, and Harrington from the Board.

The two-pronged test for demand futility under *Aronson* is disjunctive, meaning that if either part of the test is satisfied, then a plaintiff will be excused from making a demand.[27] Having found demand excused under the first prong of *Aronson* as to the challenged financial transactions and the removal of certain directors, I need not consider prong two. Furthermore, I note that prong two is reserved for those "rare cases [in which] a transaction may be so egregious on its face that [disinterested and independent] board approval cannot meet the test of business judgment, and a substantial likelihood of director liability exists."[28]

b. *Rales*

When derivative claims are evaluated under the *Rales* test, "demand is excused only where particularized factual allegations create a reasonable doubt that, as of the time the complaint was filed, the board of directors could have properly exercised its

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[27] *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 820 (Del. Ch. 2005) *aff'd*, 906 A.2d 766 (Del. 2006).

[28] *Aronson*, 473 A.2d at 815.

independent and disinterested business judgment in responding to a demand."[29] A board exercises its independent and disinterested business judgment in responding to a demand when it does so "free of personal financial interest and improper extraneous influences."[30] Extraneous influences that raise a reasonable doubt as to whether a director could have exercised his or her independent business judgment include domination by an interested party[31] and a substantial risk of personal liability.[32]

Plaintiffs allege two categories of misconduct by Defendants that did not involve board action and that, therefore, should be evaluated under *Rales*. Specifically, Plaintiffs allege that Huegel, Singley, and possibly others misappropriated iCueTV's assets, and that the Board failed to exercise proper oversight over the Company.

With respect to Plaintiffs' misappropriation claim, Plaintiffs have succeeded, at a minimum, in demonstrating a substantial risk of personal liability as to Singley. They have alleged that, during the term of his full-time employment with iCueTV, Singley used iCueTV's resources to run an outside law practice. An officer or director's duty of loyalty requires them scrupulously to place the interests of the corporation and

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29 *Braddock v. Zimmerman*, 906 A.2d 776, 785 (Del. 2006) (citing *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)).

30 *Rales*, 634 A.2d at 935.

31 *Aronson*, 473 A.2d at 816.

32 *Rales*, 634 A.2d at 936.

shareholders that they serve before their own.[33] Accepting as true Plaintiffs' well-pled factual allegations, there is, therefore, a substantial risk that Singley will be found liable for breaching his duty of loyalty to iCueTV by diverting its resources for his own benefit. At least one of the Founders of iCueTV, Singley, therefore, would have had a disabling conflict of interest in responding to a demand by Plaintiffs at the time the Original Complaint was filed.

As determined in the preceding section, Plaintiffs have alleged sufficient particularized facts to support an inference that the non-Founder members of iCueTV's Board were beholden to the Founders. There is thus a reasonable doubt that Gates, Fernandez, Thornton, and DeBenedictis would have been able to exercise independent and disinterested business judgment in responding to a demand as to the misappropriation claim at the time the Original Complaint was filed. This conclusion is buttressed by the fact that Katcher, Khichadia, and Harrington were removed from the Board the day after they requested the formation of a committee to investigate allegations that Huegel, Singley, and possibly others, had misappropriated and wasted iCueTV's assets. I therefore find that demand was excused as to Plaintiffs' misappropriation claims.

For similar reasons, I find that demand was excused as to Plaintiffs' claim that the Defendant-directors failed to exercise proper oversight over iCueTV. Plaintiffs allege particularized facts indicating that, on several occasions, directors of iCueTV were

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[33] *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (citing *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (1939)).

removed from the Board as a result of their requests for greater oversight and monitoring of the Company. Specifically, Thompson, the Chairman of the Audit Committee, was removed shortly after requesting an outside audit of iCueTV's financial records in the face of suspected financial improprieties. Similarly, Katcher, Khichadia, and Harrington were removed after requesting the formation of a committee to investigate allegations that Huegel, Singley, and possibly others had misappropriated and wasted iCueTV assets. These allegations in the Complaint support a reasonable inference that the suppression of the requests for greater oversight and monitoring were motivated by the self-interest of the Founders, who wanted to avoid closer scrutiny of their financial dealings with one another and with iCueTV.

Thus, the Founders were interested with respect to the alleged failure of the Board to exercise proper oversight over the Company. As has been determined, Plaintiffs' factual allegations also create a reasonable inference that the remaining members of the Board, including Gates, were beholden to the Founders. Therefore, as to Plaintiffs' claim that the Defendant-directors failed to exercise proper oversight over the Company, Plaintiffs have raised a reasonable doubt that "as of the time the complaint was filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."[34] Demand as to that claim is therefore excused.

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[34] *Rales*, 634 A.2d at 934.

In summary, I have determined, under both *Aronson* and *Rales*, that demand futility has been established because of the interest of the Founders and Gates in the contested transactions, as well as the lack of independence of Gates and the other directors. Thus, none of Plaintiffs' claims are subject to dismissal for Plaintiffs' failure to make a demand to the Board.

2. Sufficiency of Plaintiffs' claims

Defendants also seek dismissal of Plaintiffs' claims under Rule 12(b)(6), for their alleged failure to state a claim. The standard under Rule 12(b)(6) is less stringent than that under Rule 23.1.[35] Thus, a complaint that survives a motion to dismiss pursuant to Rule 23.1 also will survive a 12(b)(6) motion to dismiss, "assuming that it otherwise contains sufficient facts to state a cognizable claim."[36] A decision under Rule 23.1, however, determines only whether a majority of the board could consider a demand disinterestedly and independently, or whether the challenged action is otherwise not a valid exercise of business judgment. A Rule 12(b)(6) motion, by contrast, requires the court to determine whether the complaint states a claim as to each challenged count.[37]

Pursuant to Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle

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35 *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

36 *McPadden v. Sidhu*, 964 A.2d 1262, 1270 (Del. Ch. 2008).

37 *See id.* at 1273.

the plaintiff to relief. As recently reaffirmed by the Supreme Court,[38] "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[39] That is, when considering such a motion, a court must:

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[40]

This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[41] If the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.[42] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-

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38 *See Winshall v. Viacom Int'l, Inc.*, 2013 WL 5526290, at *4 n.12 (Del. Oct. 7, 2013).

39 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011) (footnote omitted).

40 *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

41 *Id.* at 537 & n.13.

42 *Id.* at 536.

moving party."[43] Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.[44]

The Complaint includes three derivative claims: (1) a claim for breach of fiduciary duties and waste, (2) a claim for declaratory and injunctive relief, and (3) a claim for the appointment of a receiver. I address each of these claims in turn.

a. Fiduciary duty claims

Delaware recognizes two central fiduciary duties adhering to corporate directors: the duty of care and the duty of loyalty.[45] Corporate directors have several other fiduciary obligations that are derivative of the duties of care and loyalty. These include obligations to exercise proper oversight and monitoring over the corporate entity they serve, to candidly disclose information to shareholders under certain circumstances, and to avoid wasting corporate assets. As to their claim for breach of fiduciary duties, Plaintiffs allege, in shotgun fashion, violations of all of the above-mentioned duties and obligations – namely, the duties of care and loyalty, and the obligations to exercise proper oversight, disclose information to shareholders, and avoid waste.

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43 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

44 *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation).

45 *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006); *see generally*, William M. Lafferty, Lisa A. Schmidt, and Donald J. Wolfe, Jr., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PENN ST. L. REV. 837 (2012).

Under Delaware law, corporate directors are entitled to the protection of the business judgment rule. The business judgment rule is a presumption that, when making a business decision, the directors of a corporation act "on an informed basis, in good faith and in the honest belief that the action taken [is] in the best interests of the company."[46] As a result of the business judgment presumption, decisions by a board of directors will be respected by the courts absent an abuse of discretion.[47] "The burden is on the party challenging the decision to establish facts rebutting the presumption."[48]

1. Breach of the duty of care

The duty of care requires directors to inform themselves, before making a business decision, of all material information reasonably available to them,[49] including alternatives to the course of action being considered.[50] Director liability for breaching the duty of care "is predicated upon concepts of gross negligence."[51]

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46 *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (citations omitted).

47 *Id.*

48 *Id.*

49 *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005) (citing *Aronson*, 473 A.2d at 812), *aff'd*, 906 A.2d 114 (Del. 2006).

50 *Id.* (citing *UIS, Inc. v. Walbro Corp.*, 1987 WL 18108, at *2 (Del. Ch. Oct. 6, 1987)).

51 *Aronson*, 473 A.2d at 812.

Plaintiffs allege that Defendants breached their duty of care by "failing to make business decisions that are in the best interests of the Corporation and its shareholders."[52] The duty of care, however, is a process-oriented duty, and merely alleging that Defendants made poor business decisions does not rebut the business judgment rule or state a claim for breach of the duty of care. The Complaint does not allege any specific facts to support an inference that Defendants' decisionmaking process was grossly negligent or uninformed. Instead, the core of Plaintiffs' allegations are that the Defendants made decisions that were self-interested and motivated by bad faith. Such claims, however, invoke the duty of loyalty, not the duty of care. I therefore grant Defendants' motion to dismiss Plaintiffs' claim for breach of the duty of care.

I also note that the directors of iCueTV are exculpated from personal monetary liability for violations of the duty of care by the Eighth Article of the Company's Amended and Restated Articles of Incorporation,[53] adopted pursuant to 8 *Del. C.* § 102(b)(7). On a motion to dismiss, Delaware courts may take judicial notice of the terms of a corporation's governing certificate of incorporation.[54] I do so here, and find that, even if Plaintiffs had stated a valid claim for breach of the duty of care, they would

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52 Am. Compl. ¶ 58.a.

53 On October 15, 2013, at the request of the Court, counsel for Defendants supplied the Court with a certified copy of the Amended and Restated Articles of Incorporation of iCueTV, filed with the Secretary of State on May 23, 2007.

54 *In re Baxter Int'l, Inc. S'holders Litig.*, 654 A.2d 1268, 1270 (Del. Ch. 1995).

have been unable to pursue money damages against the Defendant-directors on that claim.

2. Breach of the duty of loyalty

The duty of loyalty is a corporate fiduciary's duty scrupulously to put the interests of the corporation and its shareholders before his or her own.[55] As stated in *Guth v. Loft*, the Delaware Supreme Court's touchstone decision on the duty of loyalty, "[c]orporate officers and directors are not permitted to use their position of confidence to further their private interests. . . . The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest."[56]

A director will be considered conflicted with respect to a board decision if (i) the director stands to receive a benefit that is not shared by the corporation's stockholders as a whole,[57] or (ii) the director is controlled by or beholden to another party.[58] This is coextensive with the test for interestedness and lack of independence under the first prong of *Aronson*.[59] If a majority of directors on the board at the time a decision was

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55 *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (citing *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (1939)).

56 5 A.2d 503, 510 (Del. 1939).

57 *See, e.g., Gantler v. Stephens*, 965 A.2d 695, 706–08 (Del. 2009); *Aronson*, 473 A.2d at 812.

58 *See, e.g.*, *In re Primedia Inc. Deriv. Litig.*, 910 A.2d 248, 256–57 (Del. Ch. 2006); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *33–35 (Del. Ch. May 3, 2004).

59 *See Aronson v. Lewis*, 473 A.2d 805, 814–15 (Del. 1984).

made are conflicted in this manner, the board will not qualify for the presumption of the business judgment rule in making that decision.[60] Moreover, once the rule has been rebutted, the burden shifts to the defendant directors, the proponents of the challenged transaction, to prove to the trier of fact the "entire fairness" of the transaction to the shareholder plaintiffs.[61]

As previously discussed, particularized factual allegations in the Complaint give rise to a reasonable possibility that the Founders had a mutual understanding pursuant to which each would support preferential compensation and reimbursement packages for the others, while simultaneously retaliating against any directors who questioned the Founders' financial interactions with the Company. As a result, there is reasonable cause to believe that all three Founders, *i.e.*, Gallagher, Huegel, and Singley, were interested in the Huegel and Singley employment agreements, the retroactive approval of Gallagher's advances to the Company, and the removal of the Plaintiff-directors, Thompson, Khichadia, Katcher, and Harrington. There is also reason to believe that Gates was complicit in this arrangement. According to the Complaint, he was hired on preferential terms and proceeded to vote in favor of retroactively approving Gallagher's advances to the Company on terms favorable to Gallagher. It is reasonably conceivable, therefore,

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60 *See id.* at 812.

61 *Nixon v. Blackwell*, 626 A.2d 1366, 1376–77 (Del. 1993); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

that all four of these directors were interested with respect to any votes they made on the preceding matters.

The facts alleged in Plaintiffs' Complaint also support a reasonable inference that Gates and the other three non-Founder directors on the Board (Fernandez, Thornton, and DeBenedictis) were controlled by the Founders. The Founders appeared to exercise absolute authority as to who would serve on the Board. All four Plaintiff-directors were removed from the Board after voicing concerns about the Founders' financial dealings with the Company and requesting an independent investigation. Under these circumstances, it is reasonably conceivable that the independent discretion of the non-Founder board members had been sterilized.

For these reasons, I conclude that it is reasonably conceivable that a majority of the Board members who voted in favor of the challenged board actions either were personally interested in the decision or were controlled by a party who was so interested. Plaintiffs thus have demonstrated that they may be able to prove that the challenged transactions are not subject to the business judgment rule, and that, instead, those transactions must be shown by Defendants to have been entirely fair. Because Defendants conceivably might fail to make this showing, I deny Defendants' Motion to Dismiss Plaintiffs' claims for breach of the duty of loyalty as to these contested transactions.

Plaintiffs assert an additional breach of the duty of loyalty by Huegel and Singley, claiming that both directors misappropriated assets of iCueTV. Plaintiffs aver that Singley diverted iCueTV's resources to run an independent law practice during the same

period that he was employed by iCueTV. As to Huegel, however, Plaintiffs do not allege any specific facts to support their claim that he misappropriated or diverted iCueTV's resources. Based upon the facts alleged, I find that it is reasonably conceivable that Plaintiffs could prevail on their misappropriation claim against Singley, but not against Huegel. Therefore, I grant Defendants' Motion to Dismiss as to the misappropriation claim against Huegel, and deny it as to Singley.

3. Failure to exercise proper oversight

Violation of a board of directors' obligation to exercise proper oversight requires: (1) that "directors utterly failed to implement any reporting or information system or controls," or (2) that directors, "having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[62] Success on this claim requires the plaintiff to demonstrate a "sustained or systemic failure of the board to exercise oversight."[63] Failure to exercise proper oversight, therefore, has been described as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[64]

Plaintiffs have pled no specific facts to support an inference that Defendant directors utterly failed to implement any reporting or information system or controls. To

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62 *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

63 *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996)

64 *Caremark*, 698 A.2d at 967; quoted in *Stone*, 911 A.2d at 372.

the contrary, Plaintiffs acknowledge that the Board maintained an audit committee and created an *ad hoc* investigative committee on at least one occasion, to investigate claims of potential misappropriation and waste of iCueTV's assets. Plaintiffs arguably do allege facts, however, raising an inference that the reports of these monitoring and investigative committees were not given the weight that they deserved, and that Plaintiff-directors were removed from the Board as a result of their calls for greater oversight.

In late 2010, Thompson, who was the ostensible Chair of the Board's Audit Committee, requested an outside audit of iCueTV's financial records in the face of suspected financial improprieties. Shortly after making this request, Thompson was removed from the Board. Similarly, in a May 30, 2012 Board meeting, Katcher, Khichadia, and Harrington requested the formation of a committee to investigate allegations of the diversion, misappropriation, and waste of iCueTV's assets by several of the Founders. A committee was formed to investigate the allegations of wrongdoing. It recommended that Kroll Associates be retained to further the investigation. Within a day after this recommendation was made, however, Gallagher, without further inquiry or investigation, determined that there was no merit to these allegations and that an independent investigation would not be pursued. In the same timeframe, Katcher, Khichadia, and Harrington also were dismissed from the Board.

Plaintiffs' allegations bolster their claims that Defendant-directors, and the Founders in particular, were engaged in self-serving transactions that they wanted to prevent from receiving greater scrutiny. Nonetheless, I conclude that Plaintiffs have failed to state a separate claim for failure to exercise oversight. Success on this claim

requires the plaintiff to demonstrate a general and systemic failure by a Board of Directors to oversee and monitor the operations of a company.[65] Plaintiffs have raised an inference that the Defendants did not respond appropriately to specific oversight recommendations by Plaintiff-directors and various iCueTV committees. In previous sections of this Memorandum Opinion, I have found that Plaintiffs have stated a claim as to all of the specifically challenged Board or director actions that form the basis of their failure of oversight claim, such as the misappropriation of the Company's assets by Singley, under the rubric of a breach of the duty of loyalty. Even considering those challenged actions, however, the facts alleged in the Complaint do not support an inference that, as to these and other matters more generally, such as compliance risk or the possible lack of an appropriate accounting system, Defendants had wholly "disable[d] themselves from being informed of risks or problems requiring their attention."[66] For this reason, I grant Defendants' Motion to Dismiss as to Plaintiffs' claim for failure to exercise proper oversight.

4. Failure to disclose

A board of directors' obligation to disclose information to shareholders "serves the ultimate goal of informed stockholder decision making" but "is not a full-blown disclosure regime like the one that exists under federal law."[67] The obligation is a

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65 *Caremark*, 698 A.2d at 971.

66 *Stone*, 911 A.2d at 370.

67 *Clements v. Rogers*, 790 A.2d 1222, 1236 (Del. Ch. 2001).

"specific application of the general fiduciary dut[ies] owed by directors,"[68] and, accordingly, can be regarded as an extension of the duties of care and loyalty.

The obligation to disclose information only arises under certain circumstances and is not a freestanding duty of transparency in the operation of a corporation. Rather, "fiduciary liability for misdisclosure requires that the material misstatement or omission by a fiduciary be in connection with the solicitation of shareholder action, such as a tender, a vote, a consent or a withholding of the same."[69]

Plaintiffs allege that Defendants breached their disclosure obligations by "undertaking transactions with the Corporation resulting in their own personal financial gain without . . . proper disclosure."[70] These transactions include entering into generous executive employment agreements with Gates, Singley, and Huegel, and retroactively approving Gallagher's financing of the Company and treating it as a convertible note.

Plaintiffs do not allege, however, that these failures of disclosure occurred in conjunction with any specific request for shareholder action, "such as a tender, a vote, [or] a consent." Thus, Plaintiffs have failed to state a claim for breach of the obligation to disclose information to shareholders.

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68 *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

69 *See Uni-Marts, Inc. v. Stein*, 1996 WL 466961, at *6 (Del. Ch. Aug. 9, 1996).

70 Am. Compl. ¶ 58.b.

5. Engaging in corporate waste

Plaintiffs allege that Defendants committed corporate waste by "agreeing to pay excessive compensation and stock grants to Huegel, Singley, and Gates."[71] Under Delaware law, directors have a duty to avoid wasting corporate assets. Delaware courts have described the standard for corporate waste as onerous, stringent, extremely high, and very rarely satisfied.[72] To recover on a waste claim, a plaintiff has the burden of proving that a transaction was "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration."[73] Thus, a claim of waste will be sustained only in the rare, "unconscionable case where directors irrationally squander or give away corporate assets."[74]

I have determined that the challenged employment agreements are properly before me on this Motion to Dismiss.[75] After reviewing them, I have concluded that Plaintiffs cannot succeed on their waste claims as to those agreements. In exchange for the compensation and benefits Huegel, Singley, and Gates received under the agreements,

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71 *Id.* ¶ 58.e.

72 *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 74 (Del. 2006); *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 656 (Del. Ch. 2008); *In re Nat'l Auto Credit, Inc. S'holders Litig.*, 2003 WL 139768, at *14 (Del. Ch. Jan. 10, 2003); *Criden*, 2000 WL 354390, at *3.

73 *In re Walt Disney*, 906 A.2d at 74 (quoting *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000)).

74 *Id.*

75 *See supra* note 3.

they each agreed to take on important roles within the Company, offering their leadership and management expertise. Gates assumed the role of Chief Executive Officer, Huegel agreed to serve as President and Chief Technology Officer, and Singley undertook the roles of Chief Operating Officer and General Counsel. Each also committed to provide specified services for the Company, such as "supervis[ing] and direct[ing] the Company's officers and personnel,"[76] "supervis[ing] and direct[ing] the Company's technology efforts and development,"[77] and "monitor[ing] and render[ing] advice concerning matters involving corporate governance."[78]

iCueTV thus received substantial consideration in exchange for the compensation and benefits that it offered to Huegel, Singley, and Gates under their agreements. Furthermore, much of the compensation that Huegel and Singley stood to receive from their agreements was deferred and would be payable only upon the satisfaction of certain conditions, such as iCueTV reaching specified revenue and capital targets, experiencing a change of control, or being liquidated. These types of deferred compensation terms are commonplace in fledgling companies such as iCueTV. Thus, while iCueTV's employment agreements with Huegel, Singley, and Gates are generous (and, perhaps, excessively so), on the facts alleged, I do not consider it reasonably conceivable that Plaintiffs could show that they are "so one sided that no business person of ordinary,

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[76] Defs.' Opening Br. Ex. B (Gates agreement).

[77] *Id.* Ex. D (Huegel agreement).

[78] *Id.* Ex. E (Singley agreement).

sound judgment could conclude that the corporation has received adequate consideration."[79]

Plaintiffs also have failed to state a claim that the transfer of "carried interests" or stock grants to Huegel and Singley constituted waste. Plaintiffs do not allege that those transfers involved a complete failure of consideration. While Plaintiffs aver that Huegel and Singley "apparently invested nothing in iCueTV,"[80] they do not plead, even in conclusory fashion, that no other type of consideration was obtained in exchange for the stock grants, such as a commitment from Huegel and Singley to supply their time and effort. Bare allegations regarding the transfer of stock interests, without any allegations regarding a corresponding failure of consideration, do not state a claim for waste.

b. Injunctive and declaratory relief

Plaintiffs also seek declaratory and injunctive relief in connection with their breach of fiduciary duty claims. In their briefs and at argument, Defendants did not challenge Plaintiffs' claim for injunctive relief. I deny the Motion to Dismiss, therefore, to the extent it pertains to that claim. Moreover, the "claim" is more in the nature of a request for relief, as opposed to an independent cause of action.

As to their claims for declaratory relief, Plaintiffs seek a declaratory judgment that: (1) the employment agreements of Huegel, Singley, and Gates are void and

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79 *In re Walt Disney*, 906 A.2d at 74 (quoting *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000)).

80 Am. Compl. ¶ 26.

unenforceable; (2) that Gallagher's funding of iCueTV is to be treated as a capital investment at $2 per share; and (3) that Defendants have wasted, misappropriated, and diverted the corporation's assets.

The availability of a declaratory judgment in any particular case involves the exercise of judicial discretion. In order for the Court to grant a declaratory judgment, the case must involve an "actual controversy" between parties with real and adverse interests, and the controversy must be "ripe" for judicial determination.[81] In determining whether a case is ripe for determination, the Court must engage in "a practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten [as well as] the prospect of future factual development that might affect the determination to be made."[82]

Defendants argue that Plaintiffs have alleged no facts demonstrating that they have a real interest or that the controversies they seek declaratory relief for are ripe for determination. In making this argument, Defendants largely rely on their assertion that Plaintiffs have failed to state a claim for breach of fiduciary duty regarding the objects of the requested declaratory judgment, *i.e.*, the Huegel, Singley, and Gates employment agreements, the Gallagher financing, and the alleged waste and misappropriation of iCueTV's assets by certain directors.

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81 *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1238–39 (Del. Ch. 1987).

82 *Id.* at 1239.

Contrary to Defendants' assertions, however, I have determined that Plaintiffs have stated cognizable claims for breach of fiduciary duties as to most of these challenged transactions. Plaintiffs also have alleged that Defendants failed to fulfill certain procedural prerequisites for valid board action, such as notice and quorum requirements, in connection with their retroactive approval of the employment agreements and the Gallagher financing. It is reasonably conceivable, therefore, that Plaintiffs may succeed in demonstrating that Defendants did not comply with mandatory notice and quorum requirements in taking the contested board actions. This would likely make those actions void or voidable and provide an additional basis for granting Plaintiffs the declaratory relief that they request.

I therefore find that this case involves an "actual controversy," between parties with real and adverse interests. I further conclude that the controversy presented here is ripe, in that it is not contingent on any future factual occurrences, and Plaintiffs have demonstrated an interest in the prompt resolution of the questions they present. Whether or not the Court grants the declaratory relief requested may have a direct effect on Plaintiffs' share of any payout resulting from the expected liquidation or sale of iCueTV. For these reasons, I deny Defendants' motion to dismiss Plaintiffs' request for a declaratory judgment in all respects, except as it relates to the claim that Defendants wasted iCueTV's assets.

c. Appointment of a receiver

Based on Defendants' allegedly ongoing breaches of their fiduciary duties, Plaintiffs seek appointment of a custodian or receiver for iCueTV. Specifically, Plaintiffs

request that a custodian or receiver be appointed to: (1) direct and supervise iCueTV's business and affairs pending a decision on the merits of Plaintiffs' claims; (2) sell off for fair value the Company's assets; and (3) distribute the proceeds from that sale in accordance with the creditors' and shareholders' interests as determined by the Court.

The appointment of a receiver lies within the sole discretion of the Court.[83] Under 8 *Del. C.* § 291, "[w]henever a corporation shall be insolvent, the Court of Chancery, on the application of any creditor or stockholder thereof, may, at any time, appoint 1 or more persons to be receivers of and for the corporation." The appointment of a receiver is appropriate if the company is insolvent and there exist "special circumstances" and "some real beneficial purpose will be served."[84]

The Court considers two separate tests in determining insolvency under Section 291. A corporation can be found to be insolvent where either: (1) its liabilities exceed its assets, or (2) it is unable to pay current obligations in the ordinary course of business.[85] In their Complaint, Plaintiffs pled that iCueTV has defaulted on its lease, cannot make its payroll, and has had its internet servers shut off. These allegations, which must be

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83 *Banet v. Fonds de Regulation*, 2009 WL 529207 (Del. Ch. Feb. 18, 2009) (*citing Velcut Co. v. United States Wrench Mfg. Co.*, 141 A. 801 (1928)).

84 *Keystone Fuel Oil, Inc. v. Del-Way Petroleum, Co.*, 3 Del. J. Corp. L. 575, 577 (Del. Ch. Jun. 16, 1977).

85 *Banet*, 2009 WL 529207, at *3 (*citing Prod. Res. Gp., LLC v. NCT Gp., Inc.*, 863 A.2d 772, 782 (Del. Ch. 2004)).

accepted as true on a motion to dismiss, support an inference that iCueTV is insolvent under the second definition of insolvency.[86]

Furthermore, it is reasonably conceivable that Plaintiffs will be able to demonstrate the existence of special circumstances that entitle them to the appointment of a receiver. Specifically, I have determined that Plaintiffs may be able to show that the Founders of iCueTV engaged in a bad faith scheme to award themselves preferential compensation and reimbursement packages to the detriment of investors. If Plaintiffs prevail on their breach of fiduciary duty claims, this Court may determine that appointment of a receiver is appropriate to ensure that any remaining corporate assets are preserved and appropriately distributed to creditors and shareholders.

Plaintiffs have not shown, however, that appointment of a receiver is necessary pending a decision on the merits of Plaintiffs' claims. The Court already has granted a stipulated *status quo* order, effective as of October 1, 2012, prohibiting Defendants from selling any of iCueTV's principal assets, repaying any unfunded amounts due under the Huegel or Singley employment agreements, or repaying any amounts loaned by Defendants to iCueTV, without first providing twenty days written notice to Plaintiffs. This notice period would provide adequate time for Plaintiffs to bring an expedited challenge before this Court to any such action contemplated by Defendants.

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[86] In their briefing, Defendants also concede that iCueTV is insolvent. Defs.' Opp'n to Pls.' Mot. to Am. 6 n.3.

For these reasons, I deny Defendants' Motion to Dismiss as to Plaintiffs' claim for the appointment of a custodian or receiver, but decline to appoint a receiver *pendente lite*, because Plaintiffs have not shown such relief to be necessary or appropriate.

B. Motion for Leave to Amend

The First Amended Complaint contains three derivative claims and no direct claims. Roughly contemporaneously with the oral argument on Defendants' Motion to Dismiss, Plaintiffs sought leave to amend their First Amended Complaint (the "Motion to Amend"), by replacing it with their proposed Second Amended Verified Derivative Shareholders and Direct Action Complaint ("Proposed Second Amended Complaint").[87] The Proposed Second Amended Complaint adds a direct claim for fraud and a section containing facts relevant to that claim, and includes several other less significant changes. Plaintiffs assert that they intended to include the direct claim and these other changes in the First Amended Complaint, but that they accidentally filed an incorrect version of that complaint, which did not include these matters. Plaintiffs further aver that they did not realize this error until shortly before oral argument on the Motion to Dismiss, which is why they waited until the day of the argument to notify the Court and opposing counsel of their error. Defendants oppose Plaintiffs' motion. I turn next, therefore, to the Motion to Amend.

Court of Chancery Rule 15(a) is the default rule governing amendment to pleadings. It provides that a "party may amend the party's pleading . . . by leave of [the]

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[87] Pls.' Mot. to Am. Ex. A.

Court . . . and leave shall be freely given where justice so requires." When a party seeks to amend its pleading in response to a motion to dismiss, however, Court of Chancery Rule 15(aaa) governs.[88] The purpose of this rule is "to curtail the number of times that the Court of Chancery [will be] required to adjudicate multiple motions to dismiss the same action."[89] Rule 15(aaa) accomplishes this objective by requiring "plaintiffs, when confronted with a motion to dismiss . . . to elect to either: stand on the complaint and answer the motion; or, to amend or seek leave to amend the complaint before the response to the motion [is] due."[90] Rule 15(aaa) makes this decision significant by specifying that, if a plaintiff chooses to oppose a motion to dismiss rather than to amend their complaint, "any subsequent dismissal pursuant to the motion is with prejudice, unless the court finds for good cause that dismissal with prejudice would not be just under all the circumstances."[91]

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88 Rule 15(aaa) provides, in relevant part, that: "a party that wishes to respond to a motion to dismiss under Rules 12(b)(6) or 23.1 by amending its pleading must file an amended complaint, or a motion to amend in conformity with this Rule, no later than the time such party's answering brief in response to either of the foregoing motions is due to be filed. In the event a party fails to timely file an amended complaint or motion to amend under this subsection (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) or 23.1, such dismissal shall be with prejudice . . . unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances."

89 *Braddock v. Zimmerman*, 906 A.2d 776, 783 (Del. 2006).

90 *Id.*

91 *Id.*

In cases where a motion to dismiss has been filed, this Court has interpreted Rule 15(aaa) as allowing amendments or motions for leave to amend "in only two situations: (i) before the due date of a brief responding to the motion to dismiss, and (ii) after the court decides that dismissal is warranted."[92] In the first scenario, the motion is governed by the liberal standards of Rule 15(a). In the second scenario, the motion is governed by Rule 15(aaa), which requires a showing of good cause why dismissal with prejudice would not be just under all the circumstances. There is also a third possibility that Rule 15(aaa) does not explicitly address, namely, the filing of a motion to amend, following resolution of a motion to dismiss, as to claims that either survived dismissal or were not within the purview of the motion to dismiss. A motion to amend under these circumstances presumably would be subject to review under Rule 15(a).

Plaintiffs filed their Motion to Amend after argument on the Motion to Dismiss, but before this Court ruled on that motion. A motion to amend filed at this point in the proceedings typically would not be considered properly before the Court, because, among other reasons, it would not yet be clear whether any claims would be dismissed and, consequently, which standards should govern any requested amendments.[93] For this reason, I did not consider Plaintiffs' Motion to Amend in deciding Defendants' Motion to Dismiss. To avoid requiring a re-filing of the Motion to Amend and incurring needless

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92 *See Stern v. LF Capital P'rs, LLC*, 820 A.2d 1143, 1144 (Del. Ch. 2003).

93 *See id.* at 1146.

delay and additional expense, however, I now consider the Motion to Amend and treat it as if it had been submitted after my disposition of the Motion to Dismiss.

A threshold question is which procedural standard to apply in determining whether to grant the Motion to Amend. For the most part, the Motion seeks only to add a new direct claim for fraud against Defendants Huegel, Singley, and Gallagher and various allegations relevant to that claim. The Proposed Second Amended Complaint includes several other minor changes, but only one of them relates to the claims that have been dismissed in response to Defendants' Motion to Dismiss.

The Proposed Second Amended Complaint adds one sentence that is relevant to Plaintiffs' misappropriation claim against Huegel. In my analysis of the Motion to Dismiss, I determined that Plaintiffs had not alleged any specific facts to support their claim that Huegel had misappropriated assets of iCueTV. On that basis, I decided to grant the Motion to Dismiss as to that aspect of the misappropriation claim. In the Proposed Second Amended Complaint, however, Plaintiffs allege that "Huegel . . . used his iCueTV credit card to pay large amounts of personal expenses."[94] If these alleged actions are proven to be true, Plaintiffs conceivably could prevail on their misappropriation claim against Huegel. With the addition of this factual allegation,

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[94] Pls.' Mot. to Am. Ex. A ¶ 35.

therefore, Plaintiffs' misappropriation claim against Huegel would meet the minimal threshold needed to survive a motion to dismiss.[95]

In these circumstances, I find that the proposed addition of a new direct claim for fraud and other secondary changes that would not have influenced my decision to grant certain portions of the Motion to Dismiss should be assessed under Rule 15(a). By contrast, the addition of the particularized factual allegation regarding the misappropriation claim against Huegel would affect my decision to dismiss that claim and, therefore, should be assessed under Rule 15(aaa).

In the context of a motion to amend under Rule 15(a), this Court has held that "[a] party should be granted leave freely to amend its complaint, unless there is evidence of bad faith, undue delay, dilatory motive, undue prejudice or futility of amendment."[96] With respect to a motion to amend under Rule 15(aaa), the same factors remain relevant, but a threshold question exists as to whether there are grounds for deviating from the usual practice of dismissing the defective claim, as previously pled, with prejudice. Pursuant to Rule 15(aaa), the Court will make the dismissal without prejudice only if "good cause [is] shown . . . that dismissal with prejudice would not be just under all the circumstances."

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95 *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011); *Winshall v. Viacom Int'l, Inc.*, 2013 WL 5526290, at *4 n.12 (Del. Oct. 7, 2013).

96 *Fox v. Christina Square Assoc., L.P.*, 1995 WL 405744, at *2 (Del. Ch.) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

As previously mentioned, Plaintiffs assert that they thought their direct claim and the other changes incorporated in their Proposed Second Amended Complaint were included in the First Amended Complaint, but that they accidentally filed an incorrect version of that document that did not contain them. Defendants challenge the credibility of Plaintiffs' explanation. Plaintiffs' position is corroborated, however, by the fact that their brief in opposition to Defendants' Motion to Dismiss specifically refers to a direct action for fraud in a "Count II."[97] Yet, there is no claim for fraud in the First Amended Complaint as filed, let alone in Count II. By contrast, the second cause of action in the Proposed Second Amended Complaint is a direct action for fraud.

Furthermore, Defendants argued in their opening brief in support of their Motion to Dismiss that Plaintiffs had "ma[d]e nothing more than conclusory allegations that Huegel . . . diverted and misappropriated assets of iCueTV."[98] In response to this argument, Plaintiffs asserted in the counter-statement of facts in their answering brief that, "Huegel used his iCueTV credit card to pay large amounts of personal expenses,"[99] and cited to paragraph 35 of the First Amended Complaint. In the document as filed, however, paragraph 35 contained no allegation as to Huegel's purported

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97 Pls.' Answering Br. 1.

98 Defs.' Opening Br. 21.

99 Pls.' Answering Br. 6.

misappropriation. But, paragraph 35 of the Proposed Second Amended Complaint does contain the relevant factual allegation.[100]

Based on this evidence from the briefing on the Motion to Dismiss, I am persuaded that Plaintiffs' counsel mistakenly did file an incorrect version of the First Amended Complaint, and that the Proposed Second Amended Complaint substantially represents the version they intended to file. I also find credible Plaintiffs' counsel's representation that they did not realize this error until shortly before argument on the Motion to Dismiss. I thus find that: (1) there is good cause for concluding that it would not be just under all the circumstances here to dismiss Plaintiffs' misappropriation claim as to Huegel with prejudice; and (2) the Motion to Amend was not prompted by bad faith or a dilatory motive.

Defendants nonetheless argue that Plaintiffs brought their motion with undue delay, and that granting it would cause Defendants to suffer undue prejudice. Defendants complain that they already have briefed and prepared argument for two motions to dismiss, and Plaintiffs' additional allegations could have been addressed in the more recent motion had they been made in a timely manner. Lastly, Defendants contend that the new fraud claim is futile as to the non-Founder directors, because that claim is directed only at Gallagher, Huegel, and Singley. While the latter point may be true, it is of no moment. If anything, it shows that the non-Founder Defendants will not be prejudiced by the addition of the fraud claims.

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[100] Pls.' Mot. to Am. Ex. A ¶ 35.

The Court acknowledges with chagrin Plaintiffs' carelessness in filing the wrong version of the First Amended Complaint and in failing to realize that mistake sooner. Plaintiffs disclosed their error on the heels of its discovery, however, and promptly filed their Motion to Amend thereafter. Given that this case is still at an early stage and no discovery has been conducted, I find that there has been no undue delay.

I also find that Defendants will not suffer undue prejudice if the Motion to Amend is granted. Granting the Motion will not require Defendants to redo any past briefing in any material respect, as the primary change in the Proposed Second Amended Complaint is the addition of an entirely new claim. Furthermore, denying the Motion to Amend as to the new claim would not benefit Defendants substantially, because Plaintiffs likely could re-file the new direct claim in a separate complaint, as a distinct cause of action from their derivative claims. Finally, I am mindful that Delaware has "a strong preference for deciding cases on the merits, rather than on procedural grounds."[101]

I also consider it unlikely that permitting the addition of the proposed new allegation of misappropriation by Huegel would be unduly prejudicial to Defendants. There is no evidence that the insertion of this fact in the First Amended Complaint would have caused Defendants to alter materially their briefing of this issue. Defendants used the same arguments for dismissal of the misappropriation claims against Huegel and Singley, namely, that any allegations of misappropriation were conclusory. I rejected

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[101] *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *5 (Del. Ch. Oct. 19, 2006) (citing *One Va. Ave. Condo. Ass'n of Owners v. Reed*, 2005 WL 1924195, at *7 n.35 (Del. Ch. Aug. 8, 2005)).

that argument as to Singley because the First Amended Complaint did allege certain specific facts as to him. Moving forward, the additional burden of having to address a similar misappropriation claim against Huegel is minimal.

I have determined, therefore, that there has been no showing of bad faith, undue delay, dilatory motive, undue prejudice, or futility of amendment as to the Motion to Amend. Based also on the early stage of these proceedings, I therefore conclude that the interests of justice and equity weigh in favor of allowing the amendments that Plaintiffs have requested. I thus find that Plaintiffs have made the necessary showings under both the relatively lenient standard of Rule 15(a) and the more stringent standard of Rule 15(aaa), and grant Plaintiffs' Motion to Amend in its entirety.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I partially grant Defendants' Motion to Dismiss and dismiss with prejudice Plaintiffs' claims for breach of the duty of care, failure to disclose, and corporate waste. I further dismiss with prejudice Plaintiffs' request for a declaratory judgment that Defendants have wasted iCueTV's assets, and I decline to appoint a receiver *pendente lite*. In addition, I dismiss without prejudice Plaintiffs' claim against Huegel in the First Amended Complaint for misappropriation of iCueTV's assets. In all other respects, Defendants' Motion to Dismiss is denied.

I also grant Plaintiffs' Motion to Amend in its entirety.

IT IS SO ORDERED.