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Case No. 12108-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE FREDERICK HSU LIVING TRUST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ODN HOLDING CORPORATION, OAK	)	
HILL CAPITAL PARTNERS III, L.P., OAK	)	Civil Action No. 12108-VCL
HILL CAPITAL MANAGEMENT	)	
PARTNERS III, L.P., OHCP GENPAR III,	)	
L.P., OHCP MGP PARTNERS III, L.P.,	)	
OHCP MGP III LTD., ROBERT MORSE,	)	PUBLIC VERSION
WILLIAM PADE, DAVID SCOTT, DEBRA	)	Filed June 8, 2016
DOMEYER, JEFFREY KUPIETZKY,	)	
ALLEN MORGAN, LAWRENCE NG,	)	
SCOTT JARUS, KAMRAN POURZANJANI,	)	
ELIZABETH MURRAY, TODD H.	)	
GREENE, and SCOTT MORROW,	)	
	)	
Defendants.	)	

OAK HILL DEFENDANTS' OPENING BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS THE
VERIFIED CLASS ACTION AND DERIVATIVE COMPLAINT

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
William M. Lafferty (#2755)
Kevin M. Coen (#4775)
Alexandra M. Cumings (#6146)
1201 N. Market Street
Wilmington, Delaware 19801
(302) 658-9200
Attorneys for Defendants Oak Hill Capital Partners III, L.P., Oak Hill Capital Management Partners III, L.P., OHCP GenPar III, L.P., OHCP MGP Partners III, L.P., OHCP MGP III, Ltd., Robert Morse, William Pade, and David Scott

OF COUNSEL:

David J. Berger (*pro hac vice*)
Catherine E. Moreno (*pro hac vice*)
WILSON SONSINI
GOODRICH & ROSATI, PC
650 Page Mill Road
Palo Alto, CA 94304-1050

June 1, 2016

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Defendants Oak Hill Capital Partners III, L.P., Oak Hill Capital Management Partners III, L.P., OHCP GenPar III, L.P., OHCP MGP Partners III, L.P., OHCP MGP III, Ltd., Robert Morse, William Pade, and David Scott (the "Oak Hill Defendants"), by and through their undersigned counsel, respectfully submit this Opening Brief in support of their motion to dismiss Plaintiff's Verified Class Action and Derivative Complaint (the "Complaint" or "¶").

PRELIMINARY STATEMENT

This lawsuit is the latest of Plaintiff's multiple and meritless lawsuits against ODN and its board of directors. In this action, Plaintiff[1] challenges two partial redemption payments made by ODN to Oak Hill pursuant to a mandatory redemption provision in ODN's Certificate of Incorporation that Oak Hill negotiated for and Plaintiff himself approved as a member of ODN's board of directors. As set forth in detail below, Plaintiff's claims against the Oak Hill Defendants should be dismissed for at least three reasons.

[1] Nonparty Frederick Hsu is the trustee of Plaintiff The Frederick Hsu Living Trust. They are collectively referred to herein as "Plaintiff."

First, the allegations in the Complaint make clear that, contrary to Plaintiff's flawed legal theory, ODN did not lack "legally available funds" when it made a partial redemption payment to Oak Hill. As admitted in the Complaint, ODN continues to operate, with multiple lines of businesses and millions of dollars in revenues. For this reason alone, Plaintiff's claim that ODN lacked sufficient "legally available funds" to comply with its obligations to make the partial redemption payments to Oak Hill must be dismissed.

Second, as alleged in the Complaint, the language in ODN's Certificate of Incorporation ("COI") requires ODN to redeem Oak Hill's Preferred Stock, and further provides that if ODN does not have sufficient "legally available funds" to fully redeem the Preferred Stock, then ODN must use the legally available funds it has available "to redeem the maximum possible number of such shares ratably among the [preferred shareholders]." ODN's COI then further mandates that the Company "shall take all reasonable actions (as determined by the Corporation's Board of Directors in good faith and consistent with its fiduciary duties) to generate, as promptly as practicable, sufficient legally available funds to redeem all outstanding shares of Series A Preferred Stock, including by way of

incurrence of indebtedness, issuance of equity, sale of assets, effecting a Deemed Liquidation Event or otherwise." Thus, ODN's COI creates a specific affirmative obligation on the Company and the Board to take action to generate additional funds to redeem the Company's Series A Preferred Stock. Honoring this mandatory redemption provision was not a "decision" subject to fiduciary duty (much less entire fairness) review. To the contrary, clear Delaware precedent requires that such redemptions made pursuant to this type of charter provision be reviewed with substantial deference to the Board's actions.

Third, although Plaintiff readily admits that he made a Section 220 demand for books and records relating to the redemption issue, Plaintiff ignores the documents produced pursuant to that demand that show the exemplary process ODN's directors went through before determining that ODN had sufficient funds legally available to partially redeem the Series A Preferred Stock owned by Oak Hill. Pursuant to this process, (1) ODN created a Special Committee of two directors independent of Oak Hill; (2) the Special Committee retained two separate law firms (Hogan Lovells US LLP and Potter Anderson & Corroon LLP) to advise it on both general legal issues and specific issues of Delaware law (including but not limited to

whether ODN had sufficient "legally available funds" to redeem the portion of preferred stock redeemed to-date); and (3) the Special Committee had its own independent financial advisor to assist the Committee as it considered its options. Oak Hill was not part of this process, nor did any of the directors nominated by Oak Hill interfere in the deliberations of the Special Committee. To the contrary, the Special Committee met nearly thirty times over the course of two years, as it considered the redemption provisions in the Company's charter, as well as the Company's declining business.

Any one of these reasons would be sufficient, by itself, to have the Complaint's allegations against the Oak Hill Defendants (and indeed all Defendants) dismissed as a matter of law. However, the Complaint combines these errors with numerous additional pleading defects specific to Oak Hill. For example, other than claiming that Oak Hill "called upon" the purportedly conflicted board to effectuate a "scheme," the Complaint is devoid of any factual allegation establishing that Oak Hill took any action whatsoever in connection with the partial redemptions. Nor does the Complaint plead any facts establishing that Oak Hill's designated directors took any actions to influence, interfere with, or control the work of the Special Committee. For these reason, and others described below, Plaintiff's

attempt to challenge partial redemptions required by charter provisions he approved, and whereby he received millions of dollars from Oak Hill, should be rejected.

Accordingly, the Oak Hill Defendants request that Plaintiff's Complaint be dismissed with prejudice.

DOCUMENTS TO BE CONSIDERED IN CONNECTION WITH THIS MOTION

The Statement of Facts below is based on (1) the allegations in the Complaint, taken as true solely for the purpose of this motion; (2) documents explicitly cited or relied on by Plaintiff in the Complaint; and (3) four documents produced in response to Plaintiff's Section 220 demand. The Oak Hill Defendants respectfully submit that the Court can and should consider these documents in connection with their motion to dismiss for the following reasons.

A. The Court Can Consider Documents Cited or Relied On in the Complaint.

It is axiomatic that the Court can consider documents directly cited or relied on in the Complaint, and can consider them in their entirety (i.e., not just the portions selected by the plaintiff). *See, e.g.*, *In re BJ's*

Wholesale Club S'holders Litig., 2013 WL 396202, at *9 n.79 (Del. Ch. Jan. 31, 2013) ("When a plaintiff expressly refers to and heavily relies upon documents in her complaint, these documents are considered to be incorporated by reference into the complaint." (quoting *Freedman v. Adams*, 2012 WL 1345638, at *5 (Del. Ch. Mar. 30, 2012), *aff'd*, 58 A.3d 414 (Del. 2013))). The following two documents, which are attached as Exhibits A and C to the ODN Defendants' Opening Brief, are directly quoted or relied on in the Complaint, and therefore can be considered by the Court.

Ex. A	May 24, 2013 email from Frederick Hsu to Todd Greene	¶ 72
Ex. C	ODN's Certificate of Incorporation (Restated January 15, 2009)	¶¶ 2, 35

B. The Court Can Consider Documents Produced in Response to Plaintiff's Section 220 Demand.

The Oak Hill Defendants also submit that the Court can consider four documents that were produced by the Company in response to Plaintiff's Section 220 demand, but not specifically quoted or referenced in the Complaint. As the Court noted in *Amalgamated Bank v. Yahoo!, Inc.*, 132 A.3d 752, 796 (Del. Ch. 2016), documents produced pursuant to a

Section 220 demand may be subject to the incorporation by reference doctrine. The Oak Hill Defendants recognize that *Yahoo!* involved a specific order conditioning defendants' further Section 220 production on such documents' incorporation by reference into any later-filed complaint. However, the Court's reasoning in *Yahoo!* should apply in this case.

In *Yahoo!*, the Court noted that requiring documents produced in response to plaintiff's Section 220 demand to be incorporated into the complaint "helps balance [defendants'] rights against those of the plaintiff by recognizing that the production as a whole should provide the basis for any follow-on complaint, not just a handful of isolated documents or emails." Such a policy properly prevents plaintiffs from using a Section 220 demand to "seize on a document, take it out of context, and insist on an unreasonable inference that the court could not draw if it considered related documents." *Id.* at 798.

Here, Plaintiff's stated purpose for his Section 220 demand was to "investigat[e] mismanagement by the Company's board of directors" relating to "whether sufficient legally available funds existed from which to make lawful redemption payments to Oak Hill." ¶ 94. Plaintiff used his Section 220 demand to obtain source material for his Complaint, and the

documents produced are necessarily integral to his claims (e.g., ¶¶ 49, 51-52, 54, 56, 58-59, 63-66, 68-69, 77-79, 80-87). Plaintiff, however, has selected certain documents from the Section 220 production, while ignoring other documents that contradict his allegations. The Oak Hill Defendants are asking the Court to consider Plaintiff's handpicked documents in their proper context.

For these reasons, the Court can and should consider the following four documents, which ODN produced to Plaintiff on the enumerated pages of its response to Plaintiff's Section 220 demand, attached as Exhibits to the Transmittal Affidavit of Kevin M. Coen ("Aff."):

Ex. 6	September 25, 2012 Special Committee Minutes	ODN220-00000240
Ex. 7	February 27, 2013 Board Minutes	ODN220-00000300
Ex. 8	August 15, 2014 Special Committee Minutes	ODN220-00000406
Ex. 9	August 21, 2014 Special Committee Minutes	ODN220-00000409

STATEMENT OF FACTS

A. Oak Hill's Initial Investment in ODN.

Plaintiff Frederick Hsu and Defendant Lawrence Ng founded Oversee, the predecessor to the Company, in 2000. ¶ 27. On December 20, 2007, Oversee and Oak Hill entered into a series of agreements, pursuant to which Oversee became a wholly owned subsidiary of the Company and Oak Hill agreed to purchase $150 million worth of ODN Series A Preferred Stock. ¶ 30. As a result of Oak Hill's investment, Mr. Hsu received tens of millions of dollars from Oak Hill. *See* ODN Opening Br. Ex. A (noting that Oak Hill's investment was used to "provide liquidity" to Mr. Hsu).

B. The Terms of the Certificate of Incorporation.

In connection with Oak Hill's investment, the Company adopted certain revisions to its Certificate of Incorporation to require the Company to redeem Oak Hill's investment at the original $150 million issue price out of "funds legally available therefor." ¶ 3. Approximately a year later on January 15, 2009 (i.e., more than seven years before Plaintiff filed its Complaint in this case), the COI was amended to require that:

> "If the funds of the Corporation legally available for the redemption of shares of Series A Preferred Stock on any Redemption Date are insufficient to

> redeem the total number of shares of Series A Preferred Stock to be redeemed on such date: (i) those funds which are legally available will be used to redeem the maximum possible number of such shares . . . , and (ii) ***the Corporation thereafter shall take all reasonable actions (as determined by the Corporation's Board of Directors in good faith and consistent with its fiduciary duties) to generate, as promptly as practicable, sufficient legally available funds*** to redeem all outstanding shares of Series A Preferred Stock, ***including by way of incurrence of indebtedness, issuance of equity, sale of assets, effecting a Deemed Liquidation Event or otherwise***."

ODN Opening Br. Ex. C, at 1 (emphasis added).

The COI also provides that "at any time thereafter when additional funds of the Corporation are legally available for the redemption of shares of Series A Preferred Stock such funds will immediately be used to redeem the balance of the shares which the Corporation has become obliged to redeem on any Redemption Date, but which it has not redeemed." ODN Opening Br. Ex. C, at 1.

C. Oak Hill Acquires Common Stock Resulting in Majority Ownership of ODN and Mr. Hsu Files a Lawsuit Challenging the Transaction.

On or about October 2, 2009, Mr. Ng entered into a common stock purchase agreement with Oak Hill (the "Ng-Oak Hill Transaction"). *See* ¶ 33. Pursuant to the proposed terms of the Ng-Oak Hill Transaction, Mr. Ng would sell a portion of his remaining shares of common stock to Oak Hill for approximately $24,000,000. *Id.* As a result of the Ng-Oak Hill Transaction, Oak Hill acquired a substantial amount of common stock, in addition to its preferred stock, resulting in a majority interest in the Company. ¶ 5.

On October 22, 2009, while the ODN Board (including a committee of disinterested directors) was still evaluating the Ng-Oak Hill Transaction, Mr. Hsu commenced an action in the Court of Chancery against ODN and Mr. Ng (C.A. No. 5016-VCP), challenging the propriety of the transaction. Aff. Ex. 1.[2] On October 27, 2009, the Ng-Oak Hill Transaction closed. *See* ¶¶ 33-34.

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[2] The Court can take judicial notice of Delaware court filings. *See Pulieri v. Boardwalk Props. LLC*, 2015 WL 691449, at *4 n.24 (Del. Ch. Feb. 18, 2015) ("Delaware Rules of Evidence 202(d)(1)(B) permits the Court to take judicial notice of 'records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this State.'").

D. Mr. Hsu Voluntarily Dismisses His Lawsuit with Prejudice, Sues Again in California, and His Claims Are Dismissed with Prejudice.

On November 5, 2009, Mr. Hsu voluntarily dismissed his Court of Chancery action with prejudice. Aff. Ex. 2.

On July 27, 2011, Mr. Hsu commenced another action in the California Superior Court in the County of Los Angeles (the "California Action") challenging the same facts and circumstances as the Court of Chancery Action, which Mr. Hsu had voluntarily dismissed with prejudice over a year-and-a-half earlier. Aff. Ex. 4.[3] In 2013, the California Superior Court dismissed the California Action with prejudice on the basis of *res judicata*. Aff. Ex. 3. The dismissal was later affirmed on appeal. Aff. Ex. 5.

[3] Defendants do not request judicial notice of the California Superior Court filings, as they are presented for the limited purpose of reciting the relevant history, and are not necessary to any legal argument presented herein. *See Pulieri*, 2015 WL 691449, at *4 n.24 (declining to take judicial notice of the truth of the content of state court filings, but using them to recite the "relevant background facts").

E. The Board Establishes a Special Committee of Independent Directors to Consider Oak Hill's Redemption Right, and Makes Partial Redemptions in 2013 and 2014.

In August 2012, in recognition of the Company's obligations under its COI and in anticipation of the first date by which Oak Hill could exercise its right to redemption pursuant to the COI, ODN's Board of Directors authorized the establishment of a Special Committee of directors independent of Oak Hill in order to consider issues related to the potential redemption right. ¶¶ 49-50. After discussion and deliberation by the Board, the Board appointed Messrs. Morgan and Jarus as the Special Committee members. They were neither members of management, holders of Preferred Stock, or representatives of the holders of Preferred Stock. ¶¶ 18, 20, 49.

The Special Committee was authorized to consider various transactions that might be appropriate in light of the redemption right, including a recapitalization, divestiture, or financing. ¶ 51. The Board bound itself not to proceed with any such transaction without the Special Committee's favorable recommendation. ¶ 52.

The Special Committee retained sophisticated legal and financial counsel to advise it. The law firms of Hogan Lovells US LLP and

Potter Anderson & Corroon LLP were retained to advise the Special Committee on both general legal issues and specific issues of Delaware law. In addition, the Special Committee retained its own independent financial advisors, Spring Creek Advisory Group LLC. Aff. Ex. 6, at 1.

Over the course of the next 25 months, the Special Committee met 29 times to discuss a wide variety of issues. These discussions included, for instance, consideration of various credit facilities that might be open to the Company (¶ 58), divestiture opportunities (¶ 51), the Company's business strategy and financial outlook (Aff. Ex. 6, at 1-2), potential recapitalization transactions (¶ 51), and a renegotiation of Oak Hill's redemption rights (¶ 58).

In addition to the above actions, the Special Committee successfully negotiated a forbearance agreement with Oak Hill in February 2013. ¶ 64. Pursuant to this agreement, Oak Hill agreed to forbear its right to any further redemption payments until December 31, 2013. ¶ 66.

In considering whether to authorize any redemption, the Special Committee received advice from both its legal and financial advisors. Aff. Ex. 7, at Ex. A, at Ex. A at 1 (nested exhibits). It examined a calculation of the Company's current surplus, considered the Company's ongoing capital

needs, and determined that legally available funds existed to make a $45 million redemption. Aff. Ex. 7, at Ex. A at 2. The redemption was authorized by a vote of the Board, with the Oak Hill designee present at the meeting abstaining, on February 27, 2013. Aff. Ex. 7, at Ex. A at 2-3.

Throughout the latter half of 2013 and first nine months of 2014, the Special Committee met numerous additional times to consider whether any further partial redemption could be made, consistent with the Company's obligation to immediately make such redemption "[a]t any time thereafter when additional funds of the Corporation are legally available." ODN Opening Br. Ex. C, at 1. During this time period, the Special Committee obtained Oak Hill's agreement to numerous further extensions of the forbearance agreement. ¶ 75.

As before, in connection with its consideration of an additional partial redemption, the Special Committee received advice from its legal and financial advisors, considered the Company's surplus, and its ongoing capital needs. Aff. Ex. 8. Notably, the Special Committee concluded that the proposed $40 million further partial redemption was "significantly less than the amount of funds that likely would be 'legally available'" for

redemption. Aff. Ex. 9, at 2. Oak Hill nonetheless expressed its willingness to take less than what it was contractually entitled to redeem. *Id*.

In September 2014, the Company redeemed an additional $40 million of Oak Hill's Preferred Stock. ¶ 88. The 2013 and 2014 redemptions are referred to herein as the "Partial Performance."

F. Mr. Hsu's 220 Request and the Current State of the Business.

In January 2016, Mr. Hsu served a books and records demand pursuant to title 8, section 220 of the Delaware General Corporation Law. Among the stated purposes of the demand was to "evaluat[e] whether sufficient legally available funds existed from which to make . . . redemption payments" and to "investigat[e] mismanagement by the Company's board." ¶ 94. Shortly thereafter, the Company provided nearly 500 pages of documents, including the Company's bylaws, stockholder, director and officer lists, and financial statements. ¶ 95. The Company's Section 220 production also included the minutes of the Board and Special Committee from 2011 to 2014.

The documents produced pursuant to Mr. Hsu's Section 220 request reflect that—nearly two years after the Partial Performance—ODN

continues its operations. It maintains several business lines and generates millions in annual revenues. ¶¶ 10, 92.

Since the Partial Performance, and despite the fact that $65 million of its original $150 million investment has not been redeemed, Oak Hill has not taken any additional steps to date to require a further redemption.

JOINDER

The Oak Hill Defendants join in each of the arguments made by the ODN Defendants[4] in their motion to dismiss, in each of the arguments made by Lawrence Ng in his motion to dismiss, and in each of the arguments made by ODN in its motion to dismiss.

[4] The ODN Defendants are: Debra Domeyer, Jeffrey Kupietzky, Allen Morgan, Scott Jarus, Kamran Pourzanjani, Elizabeth Murray, Todd H. Greene, and Scott Morrow.

ARGUMENT

I. THE REDEMPTION PAYMENT WAS LAWFUL.

A. Honoring a Mandatory Redemption Provision Is Not a "Decision" Subject to Entire Fairness Review.

Plaintiff's challenge to the Partial Performance is, in reality, a challenge to Plaintiff's own decision to cause ODN to accept Oak Hill's investment in 2007. It was *that* decision—not any decision made subsequent to Oak Hill's investment—that imposed a mandatory redemption obligation on ODN. The Partial Performance simply represents fulfillment of an obligation undertaken by ODN in connection with Oak Hill's investment in the Company. While the 2007 decision to accept Oak Hill's investment could have been subject to fiduciary duty review, the Partial Performance is not.

Instead, as the Delaware Supreme Court recognized in *Klang v. Smith's Food & Drug Centers, Inc.*, 702 A.2d 150 (Del. 1997), review of a board's action in determining "funds legally available" is subject to a deferential standard that falls outside the traditional fiduciary duty rubric. *Klang* involved the repurchase of stock, including three million shares of preferred stock, *from the controlling stockholder and his family*. *Id*. at 152.

The court in *Klang* held that the court may defer to the board's measurement of surplus unless plaintiff can show that the "directors 'failed to fulfill their duty to evaluate the assets on the basis of acceptable data and by standards which they are entitled to believe reasonably reflect present values.' In the absence of bad faith or fraud on the part of the board, courts will not 'substitute [our] concepts of wisdom for that of the directors.'" 702 A.2d at 155-56 (alteration in original) (citation omitted).[5] *Klang* did not apply a fiduciary review, much less entire fairness, to its evaluation of the redemption.

The sole question facing the ODN Board in 2013 and 2014 was whether the Partial Performance would "violat[e] Section 160 or other statutory or common law restrictions, including the requirement that the corporation be able to continue as a going concern and not be rendered insolvent by the distribution." *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 988 (Del. Ch. 2010), *aff'd*, 37 A.3d 205 (Del. 2011). With

[5] In an article written just a few years ago, Chief Justice Strine cited *Klang* as one example of cases in which Delaware courts upheld "the redemption payments to the preferred against challenges by the common." Leo E. Strine, Jr., *Response: Poor Pitiful or Potently Powerful Preferred?*, 161 U. Pa. L. Rev. 2025, 2031 (2013).

regard to that question, the Court consistently has held that "in the absence of bad faith, fraud, or an abuse of discretion, the Court of Chancery does not substitute its concept of wisdom for that of the directors, but instead defers to the board's measurement of surplus." *Teachers' Ret. Sys. v. Anschutz*, C.A. No. 444-N, at 166-67 (Del. Ch. June 1, 2004) (TRANSCRIPT) (Aff. Ex. 10). Specifically, in discussing a plaintiff's attempt to apply fiduciary duty law to a redemption, the Court has stated:

> And I think that may misinterpret what the concept of business judgment means in that setting. I don't think it's using business judgment in the sense of a fiduciary standard of review. I think it's using business judgment in the sense of this is a situation where it is a judgment-laden exercise, and therefore, the policy rationales that cause a Court not to substitute its own judgment for those of directors, particularly when you're talking about the degree to which cash flow is available to pay a redemption obligation effectively, or a return of capital to an equity security, come into play.

TCV VI, L.P. v. TradingScreen Inc., C.A. No. 10164-VCL, at 1260 (Del. Ch. Feb. 19, 2016) (TRANSCRIPT) (Aff. Ex. 11). In short, when analyzing the Board's action in authorizing the Partial Performance, the concept of "fiduciary duty" has no place.

Other Delaware cases are consistent with *Klang* in ***not*** applying a fiduciary duty analysis to certain board actions, especially those involving a pre-existing contractual duty. For example, the Court previously has rejected an attempt to "state a breach of fiduciary duty claim by arguing that [a company's] board should have caused the corporation to commit a breach of contract." *Hokanson v. Petty*, 2008 WL 5169633, at *1 (Del. Ch. Dec. 10, 2008). In *Hokanson*, a corporation accepted a preferred stock investment of $1,000,000 in exchange for, among other things, a call option for the investor that would allow the investor to purchase all of the corporation's outstanding securities. Four years later, the investor exercised the call option, which the corporation's board effected through approval of a merger agreement—a decision that typically would be subject to fiduciary duties. Plaintiffs brought suit, alleging that the board's approval of the option-facilitating merger agreement was a breach of fiduciary duty. Importantly, the plaintiffs did not challenge the initial investment; they only challenged the approval of the merger agreement. Then-Vice Chancellor Strine granted defendants' motion to dismiss because the corporation's board "had very little, if any, discretion regarding the Merger in light of [the corporation's] contractual obligations under the Buyout." *Id.* at *5; *see also*

In re Sirius XM S'holder Litig., 2013 WL 5411268, at *6 (Del. Ch. Sept. 27, 2013) (citing *Hokanson* to dismiss a fiduciary duty claim based on a failure to adopt a poison pill because "the Sirius board was contractually precluded from blocking Liberty Media from acquiring more shares in the open market"). Like the redeeming investor in *Hokanson*, Oak Hill was not even an ODN shareholder—much less a controlling one—at the time ODN, with Plaintiff's approval, undertook its redemption obligations in 2007.

That Oak Hill *later* acquired a controlling interest in ODN does not change the analysis. Indeed, to paraphrase *Hokanson*, at the time of the Partial Performance, ODN "had very little, if any, discretion regarding the [Partial Performance] in light of [ODN's pre-existing] contractual obligations under the [redemption provision]." *See* 2008 WL 5169633, at *5.

B. Application of Entire Fairness Review to the Redemption Would Violate Investor Expectations and Would Contradict the Court's Analysis in *ThoughtWorks*.

In *ThoughtWorks*, the Court did not address fiduciary duty issues in rejecting plaintiffs' argument that a board improperly determined a lack of funds legally available for a redemption, notwithstanding that a

holder of 94% of that company's common stock sat on the board. 7 A.3d at 976. In addressing why the Court's decision did not upset "the settled commercial expectations of investors and issuers," the Court noted the understood possibility of investors taking equity stakes to insist on "additional protections, such as a springing right to board control." *Id.* at 990, 991. If an investor took up the Court's suggestion, and negotiated for a "springing right to board control" to enforce a redemption provision, only to face an entire fairness review for each decision regarding "funds legally available" made by that board, a key basis for the Court's decision in *ThoughtWorks* would ring hollow. As discussed above, such a result would run contrary to clear Delaware precedent.

This litigation is a perfect example of the importance of such clear precedent for companies and investors alike. This is especially true for companies, such as ODN, that voluntarily and affirmatively accept investments at key points in their development timeline in exchange for redemption commitments supported by enforcement mechanisms such as those suggested by the Court in *ThoughtWorks*. Should the Court follow Plaintiff's suggestion—contrary to *Klang*—and hold that any redemption of a majority stockholder's preferred stock pursuant to a mandatory redemption

obligation is subject to entire fairness review, founders such as Mr. Hsu will simply be given a method to tax—through effectively mandatory litigation—the value of a previously negotiated redemption right. That simply is not Delaware law.

C. The Pled Facts Demonstrate That the Redemption Did Not Jeopardize ODN's Ability to Remain a Going Concern.

Even if there were room for fiduciary review of the Partial Performance (which there is not), Plaintiff has not pled any facts even suggesting that the Board rightfully could have refused to make the Partial Performance. As discussed in the ODN Defendants' Opening Brief at Section I(A), ODN had statutory surplus to make the redemption.

Moreover, to the extent the common law prohibits redemptions that would destroy a company's ability to continue as a going concern, the Court has noted that it is appropriate only to look a "reasonable period of time into the future when assessing [a corporation's] ability to continue as a going concern." *TCV VI, L.P. v. TradingScreen Inc.*, 2015 WL 1598045, at *7 n.41 (Del. Ch. Feb. 26, 2015). Plaintiff does not allege *any facts* showing that ODN has not continued as a going concern. It has been over three years

since ODN made the first redemption and over a year and a half since ODN made the second redemption payment. As Plaintiff admits, ODN continues to operate several business lines generating annual revenues in the millions. ¶ 92. By any objective measure, ODN has been able to conduct its operations, and has done so while maintaining resources sufficient to fend off any threat of liquidation.[6]

D. Entire Fairness Should Not Apply to the Non-Redemption Transactions.

Plaintiff claims that the Company took certain business decisions in order to satisfy its redemption obligations, which decisions Plaintiff apparently disagrees with in retrospect. *See, e.g.*, ¶ 89 (criticizing the Company's decision to sell its Vertical Markets retail component); ¶ 77 (disagreeing with the 2014 decision to sell the Domain Monetization business to an outside acquirer).

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[6] Moreover, even if the facts pled in the Complaint did not themselves demonstrate that the redemption payments were lawful, for the reasons set forth in Section I of the ODN Defendants' Opening Brief, the *Klang* standard is satisfied here.

As a threshold matter, for the reasons more fully explained in Section II of the ODN Defendants' brief, Plaintiff fails to plead facts sufficient to show that these decisions were part of an improper "scheme" to hoard cash for the sole purpose of satisfying the mandatory redemption obligation and harming the common stockholders. For example, Plaintiff does not, because he cannot, allege that Oak Hill was on both sides of any of these transactions. Nor does he allege that Oak Hill received any special payment as a result of the decisions. Such transactions regularly receive the benefit of the business judgment rule. *See, e.g.*, *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1035 (Del. Ch. 2012) (where the benefits of a transaction are shared *pro rata* between controlling and minority stockholders, the decision is "docked within the safe harbor created by the business judgment rule.")

The mere fact that the challenged decisions were followed by a redemption event does not render them subject to entire fairness review. If that were the case, absurd results would follow. Boards would be faced with the prospect of entire fairness review for ***any*** decision that—years later—could be viewed as resulting in the "funds legally available" to make a redemption. Such a retrospective application of entire fairness review to

potentially years' worth of board decisions would effectively require that board members predict whether a given decision may later be determined to have allowed the company to comply with a mandatory redemption obligation.

But even assuming that the sale of two of ODN's business lines and the alleged cessation of acquisition activity were motivated by ODN's acknowledgement of its upcoming obligation to redeem Oak Hill's shares, such actions are not only entirely consistent with the COI, they are required by it. The COI did not just obligate ODN to redeem Oak Hill's stock out of existing legally available funds. It obligated the Board to do more. The Board was to take "***all reasonable actions (as determined by the Corporation's Board of Directors in good faith and consistent with its fiduciary duties) to generate, as promptly as practicable, sufficient legally available funds*** to redeem all outstanding shares of Series A Preferred Stock, ***including by way of incurrence of indebtedness, issuance of equity,***

sale of assets, effecting a Deemed Liquidation Event or otherwise." ODN Opening Br. Ex. C, at 1 (emphasis added).[7]

Plaintiff also fails to mention that, as a member of the Board at the time, he expressly approved these very obligations. Indeed, Plaintiff was a substantial beneficiary of the terms of the Preferred Stock, as he received tens of millions of dollars from Oak Hill as a result of its investment in ODN because a portion of the proceeds of this investment went to purchase Plaintiff's common stock. ODN Opening Br. Ex. A.

II. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST ANY OAK HILL DIRECTOR

As set forth above, Plaintiff fails to plead facts sufficient to show that there was anything unlawful or improper about the Partial Performance. But even if that were not the case, Plaintiff's claim for breach of fiduciary duty against Messrs. Pade, Morse and Scott (the "Oak Hill Directors") fails for independent reasons.

[7] The unusual nature of this language, which goes beyond the redemption provisions previously considered by the Court in *ThoughtWorks* and *TradingScreen*, underscores its significance.

As a threshold issue, ODN's COI includes an exculpatory provision pursuant to title 8, section 102(b)(7) of the Delaware General Corporation Law. *See* ODN Defendants' Opening Brief at 27 n.9. As a result, the only non-exculpated fiduciary claim that Plaintiff could assert against the Oak Hill Directors is a breach of the duty of loyalty, including an action taken in bad faith, which requires scienter. *See, e.g.*, *In re GM Co. Derivative Litig.*, 2015 WL 3958724, at *12 (Del. Ch. June 26, 2015) ("[T]o demonstrate bad faith, 'a plaintiff must also plead . . . facts that demonstrate that the directors acted with scienter, *i.e.*, that they had "actual or constructive knowledge" that their conduct was legally improper.'" (citation omitted)), *aff'd*, 133 A.3d 971 (Del. 2016). Plaintiff's allegations fail this requirement for multiple reasons.

First, as to the Partial Performance, Plaintiff does not allege any facts showing that the Oak Hill Directors were improperly involved in approving the Partial Performance. On the contrary, Plaintiff implicitly concedes that the Oak Hill Directors recused themselves from the approval

of any redemption event. ¶ 69.[8] Plaintiff acknowledges that all recommendations to approve a redemption were made by the Special Committee and authorized by the rest of the ODN Board, without the vote of the Oak Hill Directors. ¶¶ 52, 81, 86-87.

While Plaintiff attempts to draw various speculative connections between one of the Oak Hill Directors and a member of the Special Committee (¶¶ 39, 50, 54), Plaintiff does not allege that any of the Oak Hill Directors did anything to improperly influence any member of the Special Committee. The mere alleged existence of potential social or professional ties between Mr. Pade and a Special Committee member is not enough to plead a breach of the duty of loyalty, absent concrete steps to use those alleged ties as a means of improperly swaying the Special Committee. *See In re Alloy, Inc.*, 2011 WL 4863716, at *1 (Del. Ch. Oct. 13, 2011) (dismissing fiduciary duty claims). In *Alloy*, plaintiffs challenged a merger approved by a special committee. Among other claims, plaintiffs argued that two directors, who had not served on the special committee and had not

[8] Plaintiff also admits that Oak Hill Director Morse stepped down from ODN's Board in September 2013, and had nothing to do with the second redemption event. ¶ 74.

participated in the approval of the merger, had breached their fiduciary duties by "dominat[ing] the remaining directors, who collectively comprised the Special Committee, and improperly influenc[ing] [a] fairness opinion, thereby infecting the entire transaction process with their conflict of interest." *Id.* at *7. The Court noted that plaintiffs failed to make any factual allegations that the interested directors exercised any improper influence over the special committee:

> Plaintiffs have not alleged that any such threat occurred here. Rather, they allege only that management was "in a *position* to threaten" the Special Committee. These averments, standing alone, represent nothing but "conclusory allegations unsupported by specific facts" and are not sufficient to state a claim.

Id. at *9. Accordingly, the Court dismissed the breach of fiduciary duty claims.

Second, equally unavailing is Plaintiff's claim that Mr. Pade influenced the ODN management and the members of the Special Committee by virtue of his service on ODN's Compensation Committee (along with ODN's co-founder, Ng). ¶ 16. For instance, Plaintiff claims that Mr. Pade served on the Compensation Committee when it approved management bonuses that included incentives in connection with a liquidity

event. ¶ 48. Plaintiff pleads no facts that Mr. Pade approved such bonuses in bad faith or with the actual knowledge that such a bonus would be improper—because it was not. On the contrary, as discussed below, Plaintiff concedes that building ODN's liquidity reserves could be an appropriate action. Moreover, given the Company's redemption obligations in the COI, it would have been reasonable for the Board to incentivize management to meet those obligations. Plaintiff pleads no facts showing that the amount was excessive or disproportionate with reasonable industry practice, or that liquidity event incentives are by themselves improper.

Plaintiff similarly fails to allege facts supporting his claim that Mr. Pade acted in bad faith by influencing the Special Committee members by means of their compensation. Instead of facts, Plaintiff relies on rhetoric, arguing that the Special Committee's compensation was "exorbitant." ¶¶ 53, 104. Plaintiff does not plead, however, any facts that would show the purported "bad faith" of the compensation decisions. He does not quantify the work required of the Special Committee members, such as the expertise involved, how similar efforts are compensated in the industry, the number of meetings attended, the documents reviewed, or any facts showing that the compensation was disproportionate with the Special Committee's activity.

Nor does Plaintiff allege facts regarding what information or advisors the Compensation Committee relied on in making its determinations. Once again, Plaintiff's claim is nothing more than a disagreement with the Compensation Committee over how much compensation the Special Committee should receive. This is insufficient to plead bad faith. *See In re Goldman Sachs Grp., Inc. S'holder Litig.*, 2011 WL 4826104, at *14 (Del. Ch. Oct. 12, 2011) (that plaintiffs disagreed with directors' choice of employee compensation plan was "irrelevant" and did not indicate the "scienter" necessary for bad faith), *aff'd sub nom. SEPTA v. Blankenfein*, 44 A.3d 922 (Del. 2012).[9]

Third, as to the other challenged actions of the Oak Hill Directors, Plaintiff's only allegation against the directors appointed by Oak Hill is their general participation in Board decisions approving ODN's alleged strategy of generating liquidity. ¶¶ 42-43, 85, 124. Plaintiff pleads

[9] By setting the Special Committee's compensation up front, the Compensation Committee eliminated "the rather obvious question of how a Special Committee member might act when he suspected that potential compensation might hinge on the answer he were to give." *In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *5 n.52 (Del. Ch. Dec. 21, 2005).

no facts showing that such participation constituted a breach of the duty of loyalty. For instance, none of the Oak Hill Directors are alleged to have received any exclusive personal benefit from the alleged asset sales. Nor does Plaintiff plead any facts showing that any of the Oak Hill Directors were acting in bad faith, i.e., with the actual knowledge that their actions were improper.[10] In fact, Plaintiff himself concedes that a strategy of cash accumulation is not in and of itself a breach of fiduciary duty: the Complaint admits that liquidity generation is appropriate, for instance, as a precursor to acquisitions or a dividend distribution. ¶¶ 9, 141.[11] In short, Plaintiff's claim boils down to a disagreement with how ODN's cash reserves were used—i.e., in part, to make the 2013 and 2014 redemptions.

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[10] In fact, the Complaint is devoid of ***a single allegation of fact*** with regard to any conduct of Mr. Scott or Mr. Morse. And for the reasons set forth herein, the allegations as to Mr. Pade are unavailing.

[11] Notably, a dividend distribution—which Plaintiff admits would have been an appropriate use of the cash reserves—would also have required ODN to enjoy a surplus or a net profit, squarely contradicting Plaintiff's claim that the redemption of Oak Hill shares was improper because ODN did not have adequate surplus. *See* 8 Del. C. § 170(a).

III. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY AND/OR AIDING AND ABETTING AGAINST OAK HILL.

Plaintiff claims that Oak Hill breached its fiduciary duty as a controlling stockholder in connection with the 2013 and 2014 redemptions, or in the alternative, that Oak Hill aided and abetted breaches of fiduciary duty by the individual defendants.[12] ¶¶ 126-137. Both theories fail.

A. Plaintiff Fails To Plead A Breach of Fiduciary Duty by Oak Hill.

The basis of Plaintiff's allegations against Oak Hill is that Oak Hill "called upon" ODN's board to implement a "liquidation strategy." ¶ 36. Plaintiff pleads no specifics about what directives—if any—Oak Hill gave, what actions it took to implement this purported "strategy," or what conduct it engaged in, other than exercising its contractual right to redemption.

[12] To state a claim for aiding and abetting a breach of fiduciary duty, Plaintiff is required to plead: "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007).

This type of conclusory allegation is insufficient to state a claim. *See Thermopylae Capital Partners, L.P. v. Simbol, Inc.*, 2016 WL 368170, at *12 (Del. Ch. Jan. 29, 2016) (dismissing claims that purported controlling stockholder "conspired . . . to use [the corporate] machinery to create and reap the benefit of an option to purchase preferred shares below market price" because plaintiff had failed to plead more than conclusory allegations to support such an inference).

Plaintiff also insinuates—without any factual or legal basis—that there was something inherently improper in Oak Hill's negotiating the terms of the redemption events with ODN just because Oak Hill was a controlling shareholder. "Delaware law does not, however, . . . impose on controlling stockholders a duty to engage in self-sacrifice for the benefit of minority shareholders." *Synthes*, 50 A.3d at 1040-41 ("[T]he controller [does not have] to subrogate his own interests so that the minority stockholders can get the deal that they want."). That is even more true in Oak Hill's case, where Oak Hill's right arose as part of a contractual agreement—an agreement that was negotiated with Plaintiff and led to Plaintiff receiving tens of millions of dollars. *Supra* at 27. The terms of the preferred stock allowed ODN to receive a capital infusion of $150 million at

a critical time and, in exchange, allowed Oak Hill certain rights of redemption. These rights did not arise because of Oak Hill's status as a controlling shareholder, but predated and were independent of Oak Hill's acquisition of a majority of company stock.

As the Court explained in *Solomon v. Pathe Communications Corp.*, 1995 WL 250374, at *5 (Del. Ch. Apr. 21, 1995), *aff'd*, 672 A.2d 35 (Del. 1996), "[a] controlling shareholder is not required to give up legal rights that it clearly possesses; this is certainly so when those legal rights arise in a non-stockholder capacity." In *Pathe*, the controlling shareholder was a secured creditor and had commenced foreclosure proceedings against the company it controlled. The Court held that foreclosure did not constitute a breach of the duty of loyalty, because "[e]ven if the consequences of that foreclosure were, for example, to render the value of the minority Pathe stock worthless, the secured creditor would have no obligation to forego or delay exercising its legal rights as a creditor." *Id.* The same is true here, where Plaintiff admits that Oak Hill was entirely within its rights to cause ODN to comply with its contractual obligations to facilitate redemption. *See* ¶ 35. If the simple decision to negotiate a forbearance agreement with ODN were enough to plead a breach of fiduciary duty claim, then other preferred

stockholders with a mandatory redemption would be incentivized to enforce their mandatory redemption rights through bringing enforcement proceedings before negotiating forbearance agreements as part of a subsequent settlement discussion—a waste of both investor and court resources.

B. Plaintiff Fails to Plead Aiding and Abetting Against Oak Hill.

First, as discussed above and in the ODN Defendants' Opening Brief at Sections I, II, and III, Plaintiff has failed to assert a breach of fiduciary duty by any defendant. *Supra* at Section II. Without any fiduciary duty breach in which to participate, the aiding and abetting claim against Oak Hill must be dismissed as well. *See Veloric v. J.G. Wentworth, Inc.*, 2014 WL 4639217, at *19 (Del. Ch. Sept. 18, 2014) (dismissing aiding and abetting claim).

Second, the Court has previously held that, to the extent that Oak Hill is held to have been a fiduciary, it cannot face aiding and abetting liability. *See In re Ezcorp Inc.*, 2016 WL 301245, at *31 (Del. Ch. Jan. 25, 2016) (dismissing aiding and abetting claim because "[a]s a general rule, '[i]f a defendant has acted in a fiduciary capacity, then that defendant is

liable as a fiduciary and not for aiding and abetting'" (second alteration in original) (citation omitted)); *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 204 (Del. Ch. 2014) (same).

Finally, Plaintiff's claim fails for a more fundamental reason: the Complaint lacks any factual allegations showing that Oak Hill committed or knowingly participated in a breach. As the Supreme Court has explained, "[k]nowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach." *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001). The "knowledge" standard for liability is, even in the model penal code, the "second highest state of scienter." *Singh v. Attenborough*, – A.3d –, 2016 WL 2765312, at *2 (Del. May 6, 2016). In *Malpiede*, the Court held that "[u]nder this standard, a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting." 780 A.2d at 1097.

Following *Malpiede*, the Court has repeatedly held that an inference of arm's-length negotiations defeats any claims of collusion. *See, e.g.*, *Morgan v. Cash*, 2010 WL 2803746, at *4 (Del. Ch. July 16, 2010) ("a bidder's attempt to reduce the merger price through arm's-length

negotiations cannot give rise to liability for aiding and abetting"); *In re GM (Hughes) S'holder Litig.*, 2005 WL 1089021, at *26 (Del. Ch. May 4, 2005) ("This Court has consistently held that 'evidence of arm's-length negotiation with fiduciaries negated a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries.'" (citation omitted)), *aff'd*, 897 A.2d 162 (Del. 2006). For instance, in *Morgan*, then-Vice Chancellor Strine examined plaintiff's allegations and noted that they supported an inference of arm's-length negotiation of a merger agreement. 2010 WL 2803746, at *6-7. The Court held that plaintiff's claim that the third party acquirer was exploiting directors' conflicts of interests was mere "speculation" that was unsupported by any plausible facts. *Id.*

The same is true here. For instance, Plaintiff admits that ODN obtained several forbearances from Oak Hill, on multiple occasions. ¶¶ 63-64, 66, 75. Plaintiff's own allegations similarly indicate that some of Oak Hill's proposed terms were rejected by the Special Committee. ¶¶ 56, 58-59. Perhaps most tellingly, and again, as explicitly alleged in the Complaint, Oak Hill did not redeem all its preferred shares and had to accept smaller, iterative redemption events. ¶¶ 70, 87-88. By contrast, there are no

allegations of collusion between Oak Hill and any of the Special Committee members. Plaintiff's conclusory allegations that Oak Hill "caused" or "called upon" the Board to take certain actions are insufficient. ¶¶ 8, 36, 49; *see In re Crimson Expl. Inc. Stockholder Litig.*, 2014 WL 5449419, at *27 (Del. Ch. Oct. 24, 2014) (dismissing aiding and abetting claim where only allegations were "conclusory"). As the Court noted in *Morgan*,

> It is hardly unusual for corporate boards to be comprised of representatives of preferred stockholders, who often bargain for representational rights when they put their capital up in risky situations. Notably, those capital investments often end up benefiting common stockholders by helping corporations weather tough times. . . . [T]he long-standing rule that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism.

2010 WL 2803746, at *7-8.

Because there are no factual allegations suggesting improper collusion—indeed all facts are to the contrary—Plaintiff's claim fails.

IV. PLAINTIFF FAILS TO STATE A CLAIM FOR WASTE OR UNJUST ENRICHMENT AGAINST ANY OAK HILL DEFENDANT

Plaintiff also purports to assert waste claims against all defendants and unjust enrichment claims against Oak Hill. Both claims fail.

To plead waste adequately, Plaintiff is required to show "a transfer of corporate assets that serves no corporate purpose[,] or for which *no consideration at all* is received." *Protas v. Cavanagh*, 2012 WL 1580969, at *9 (Del. Ch. May 4, 2012) (emphasis added) (citation omitted). "Where, however, the corporation has received '*any substantial* consideration' . . . a finding of waste is inappropriate, even if hindsight proves that the transaction may have been ill-advised." *Id.* Here, Plaintiff fails to plead any facts showing that ODN did not receive any consideration at all in exchange for the challenged transactions.

Plaintiff first claims that ODN's selling of various assets amounted to corporate waste. ¶ 141. Plaintiff readily admits, however, that each of the asset sales generated cash for the Company. ¶¶ 43, 55, 77. While Plaintiff claims that ODN ended up selling those assets for less than what it had paid for them (¶ 43), Plaintiff makes no allegation that ODN

could have obtained more for those assets. Indeed, Plaintiff neglects to plead what the value of the sold assets was at the time of their sale by ODN. While Plaintiff is free to disagree with the Board's decisions to sell those assets, the Court made it clear in *Protas* that, "[i]t is not sufficient [for a valid waste claim] that the plaintiff simply disagrees with the merits of the challenged transaction, or even that a reasonable person might have acted differently." 2012 WL 1580969, at *9.

Plaintiff similarly fails to plead waste with respect to the redemption events (*see* ¶ 141), but fails to acknowledge that the Partial Performance benefitted the common stockholders and the Company because the redemptions reduced the remaining mandatory redemption amount. In similar circumstances, in *Protas*, the Court held that plaintiff waste claim had to be dismissed because the company's repurchase of preferred shares eliminated its obligation to pay a dividend to which holders of preferred stock would have been entitled. 2012 WL 1580969, at *10-11.

The unjust enrichment claim against Oak Hill must be dismissed, as well, because it is predicated on a finding of breach of duty or waste against Oak Hill. ¶¶ 151-152. If the Court were to make such a finding, the unjust enrichment claim would add nothing to already available

remedies. If, on the contrary, the challenged transactions are found to be valid, the unjust enrichment claim necessarily fails. Where, as here, the unjust enrichment claim adds nothing to the Complaint, it is the "routine[]" practice of the Court to dismiss such claims. *See, e.g.*, *Ezcorp*, 2016 WL 301245, at *32 (dismissing unjust enrichment claims); *Veloric*, 2014 WL 4639217, at *19-20 & n.109 (same).

CONCLUSION

For each of the foregoing reasons, and the reasons set forth in the briefs concurrently filed by ODN, the ODN Defendants and Lawrence Ng, the claims against the Oak Hill Defendants should be dismissed.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ William M. Lafferty

William M. Lafferty (#2755)
Kevin M. Coen (#4775)
Alexandra Cumings (#6146)
1201 N. Market Street
Wilmington, Delaware 19801
(302) 658-9200

Attorneys for Defendants Oak Hill Capital Partners III, L.P., Oak Hill Capital Management Partners III, L.P., OHCP GenPar III, L.P., OHCP MGP Partners III, L.P., OHCP MGP III, Ltd., Robert Morse, William Pade, and David Scott

OF COUNSEL:

David J. Berger (*pro hac vice*)
Catherine E. Moreno (*pro hac vice*)
WILSON SONSINI
GOODRICH & ROSATI, PC
650 Page Mill Road
Palo Alto, CA 94304-1050

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2016, the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

P. Clarkson Collins, Jr.
Lewis H. Lazarus
Nicolas Krawitz
MORRIS JAMES LLP
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, DE 19899-2306

Colm F. Connolly
Jody Barillare
MORGAN LEWIS & BOCKIUS LLP
1007 North Orange Street, Suite 501
Wilmington, DE 19801

Kurt M. Heyman
Samuel T. Hirzel, II
PROCTOR HEYMAN ENERIO LLP
300 Delaware Avenue, Suite 200
Wilmington, DE 19801

A. Thompson Bayliss
April Ferraro
ABRAMS & BAYLISS LLP
20 Montchanin Road
Suite 200
Wilmington, DE 19807

/s/ Alexandra M. Cumings
Alexandra M. Cumings (#6146)