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OUTER LIMITS:

FIDUCIARY DUTIES AND THE DOCTRINE OF WASTE

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I. INTRODUCTION

Directors have a legal obligation to act with care in managing the business of the corporation. Under Delaware law, the duty has largely evolved into a process standard. Informed decisions made by independent directors receive judicial deference. Process standards, however, can sometimes generate irrational results. The doctrine of waste, therefore, amounts to an outer boundary for decisions otherwise protected by the business judgment rule.

Although theoretically imposing limits, the doctrine of waste in practice does little to reign in board decisions. Courts rarely make a finding of waste, even when the asserted benefits are marginal or the amounts expended appear disproportionate to any benefits received. "Benefit" has also been interpreted broadly and includes past consideration as well as standard contractual provisions. Further, the courts assess the challenged amount against the size of the company, dismissing waste claims for significant payments when made by large public companies. This approach arises in large part from a judicial gloss that views judges as ill-suited to analyze the benefits of business decisions and defers to the judgment of independent directors.

This paper analyzes the application of the doctrine of waste under Delaware law. Section II discusses the history and the current test for waste. Section III discusses waste and instances where the issue is whether the corporation received a benefit. Section IV discusses waste and instances where the issue is whether the corporation overpaid. Section V explores the effectiveness of the waste doctrine.

II. THE STANDARD FOR WASTE

The duty of care has evolved into a process standard.[2] Noting that proper process can sometimes produce irrational results, the Delaware

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courts recognize that the waste of corporate assets will be actionable even if shareholders have not rebutted the presumption of the business judgment rule.[3] Waste occurs when an exchange is "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration."[4] Waste does not exist where "there is *any substantial* consideration received by the corporation, and there is a *good faith judgment* that in the circumstances the transaction is worthwhile."[5] Nor will waste occur where the matter turns out other than as shareholders and management expected;[6] nor will claims succeed based upon "flawed process."[7]

Allegations of waste must overcome difficult pleading standards. "The pleading burden on a plaintiff attacking a corporate transaction as wasteful is necessarily higher than that of a plaintiff challenging a transaction as 'unfair' as a result of the directors' conflicted loyalties or lack of due care."[8] For example, the court dismissed a claim where the plaintiff challenged a merger but failed to plead facts supporting the "conclusion that no rational person could regard the merger as sensible."[9] Further, shareholders could not plead a claim of waste simply by presenting facts indicating that compensation agreements were "generous (and, perhaps excessively so)."[10] Additionally, courts do not permit waste claims where other standards are more applicable.[11]

Early cases arose from efforts to assert that sufficient process could defeat a claim for waste. Boards sought to defend allegations by asserting that the challenged behavior had been approved by shareholders. The

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2. J. Robert Brown, Jr., *Disloyalty without Limits: "Independent" Directors and the Elimination of the Duty of Loyalty*, 95 KY. L.J. 53, 57 (2006-07). (Any residual content to the duty of care was eliminated with the universal adoption of waiver of liability provisions)

3. *See* Sample v. Morgan, 914 A.2d 647, 669 (Del. Ch. 2007); ("Conceived more realistically, the doctrine of waste is a residual protection for stockholders that polices the outer boundaries of the broad field of discretion afforded directors by the business judgment rule."); *see also* Steven C. Caywood, *Wasting the Corporate Waste Doctrine: How the Doctrine Can Provide a Viable Solution in Controlling Excessive Executive Compensation*, 109 MICH. L. REV. 111, 115 (2010) ('The corporate waste doctrine has been described as an 'equitable safety valve,' meaning that it can be used for cases where relief would be otherwise unavailable.").

4. Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000).

5. *Id.* (*quoting* Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997) (emphasis in original).

6. *See* Ash v. McCall, No. Civ.A. 17132, 2000 WL 1370341, at *8 (Del. Ch. Sept. 15, 2000) ("The fact that the merger turned out badly or, indeed, abominably for McKesson simply does not and cannot mean that approval of the merger was an act of corporate waste *at the time* the McKesson board entered into it.").

7. In general, such a claim must be "properly brought" as a claim for breach of the duty of care." *In re* NYMEX S'holder Litig., 2009 WL 3206051, at *7 (Del. Ch. Sept. 30, 2009).

8. Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 892 (Del. Ch. 1999).

9. Id.

10. TVI Corp. v. Gallagher, C.A. No. 7798-VCP, 2013 WL 5809271, at *17 (Del. Ch. October 28, 2013).

11. *See* Hampshire Grp., Ltd. v. Kuttner, C.A. No. 3607-VCS, 2010 WL 2739995, at *35 (Del. Ch. July 12, 2010) (concluding waste claim should be dismissed because the essence of the violation was really a breach of the duty of loyalty by knowingly permitting an illegal practice and not corporate waste).

courts, however, found that process in the form of shareholder ratification would not protect a board from allegations of waste. "An unconscionable deal between directors personally and the corporation they represent could not become conscionable merely because most of the stockholders were either indifferent or actually in sympathy with the directors' scheme."[12] Proper process provided legal benefits but did not eliminate the claim.[13]

Nonetheless, these early cases set a high bar for the application of waste. Courts viewed themselves as ill equipped to determine "the relationship of the value received by the corporation to the benefit bestowed."[14] As a result, value or benefit was primarily "a matter of judgment on the part of the person who must pay for them" and required deference "to decisions of directors and stockholders."[15] Nonetheless, payments may grow "so disproportionately large as to be unconscionable and constitute waste."[16]

III. WASTE AND CORPORATE BENEFIT

Waste can arise where the corporation received no benefit in a transaction. In those circumstances, any payment is excessive. Courts have addressed the issue in the context of past consideration, the failure to maximize tax benefits in a transaction, and benefits arising from the inclusion of standard provisions in severance contracts.

A. Past Consideration

Early cases presumed that companies did not benefit from past consideration "since the amount of the salary to the executive had been fixed by previous agreement and the services had been performed."[17] Early exceptions, however, developed. Past consideration sufficed for payments made "pursuant to an implied contract" and "amounts awarded that were not unreasonable in view of the services rendered."[18] As the court concluded in *Blish v. Thompson Automatic Arms Corporation:* "[T]he services rendered by the executive were unusual in character and extraordinary, from which the corporation received great gains and prof-

12. Gottlieb v. Heyden Chemical Corp., 90 A.2d 660, 665 (Del. 1952).
13. Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962) (clarifying that disinterested shareholder approval shifted burden to shareholders "to convince the court that no person of ordinary, sound business judgment would be expected to entertain the view that the consideration was a fair exchange for the value which was given.").
14. *Id.* at 610.
15. *Id.*
16. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 138 (Del. Ch. 2009).
17. Blish v. Thompson Automatic Arms Corp., 64 A.2d 581, 606 (Del. 1948).
18. *Id*. at 588-89 (citing Osborne v. United Gas Improvement Co., 46 A.2d 208, 211 (PA 1946).

its; therefore, the retroactive feature of the executive's increases in salary . . . were proper under the second exception as noted above."[19]

In *Zupnick v. Goizueta,*[20] shareholders challenged an award of options to the CEO of Coca Cola on the basis of past performance.[21] Under the leadership of the CEO, the company gained $69 billion in market value.[22] The court cited to the exception in *Blish* and upheld the award because of the "remarkable increase in market value" of Coca Cola during the CEO's tenor.[23]

More recent cases, however, have largely eliminated any limits on the use of past consideration to justify additional compensation. Extraordinary efforts are no longer necessary. In *Zucker v. Andreessen,* [24] the departing CEO received a severance package valued at $40 million or more.[25] The board in part justified the amount on the basis of past performance.[26] Rather than show dramatic growth, however, the facts showed an absence of "significant loss."[27] The court found this sufficient to defeat a claim for waste.[28]

Courts have acknowledged other benefits that can justify payments on the basis of past consideration. Such payments may encourage an employee to continue his or her employment. Severance, even if not legally required, "may serve as a signal to current and future employees that they, too, might receive extra compensation at the end of their tenure if they successfully serve their term."[29] The payments may also ensure "a smooth and harmonious transfer of power, securing a good relationship with the retiring employee, preventing future embarrassing disclosure and lawsuits."[30] Indeed, the failure to pay severance may "undermine[] efforts to attract outside executive talent."[31]

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19. *Blish*, 64 A.2d at 606 (concluding services were extraordinary "largely because of [the CEO's] business acumen and constant efforts" which "sprung [the company] from the steps of poverty to a successful and internationally known arms corporation" in just two and one-half years with $11,000,000 in net profits).

20. Zupnick v. Goizueta, 698 A.2d 384 (Del. Ch.1997).

21. *Id.* at 385.

22. *Id*.

23. *Id. at* 388.

24. Zucker v. Andreessen, C.A. No. 6014-VCP, 2012 WL 2366448, at *1 (Del. Ch. June 21, 2012).

25. *Id*.

26. *Id*. at 9.

27. *Id.* at *9 ("Plaintiff does not allege that the Company suffered significant losses during [the CEO's] tenure as CEO or that he otherwise was an ineffectual executive," and finding that under these circumstances "at least some portion of [the CEO's] severance could represent 'reasonable' compensation for his successful past performance.").

28. *Id.* at *10 (justifying dismissal of waste action not just because of the past performance but also because of the contractual releases the CEO provided to the coming as part of his severance agreement).

29. Seinfeld v. Slager, Civil Action No. 6462-VCG, 2012 WL 2501105, at *6 (Del. Ch. June 29, 2012).

30. *Id.*

31. *Zucker*, 2012 WL 2366448, at *9.

B. Tax Benefits

Boards have "no general fiduciary duty to minimize taxes."[32] Delaware courts therefore reject allegations of waste based upon such claims at least where boards have a business justification for the transaction at issue.[33]

In *Haber v. Bell*,[34] the plaintiffs alleged waste when the company altered a benefit plan following changes in the law.[35] The amendments resulted in the loss of tax deductions for employee stock options. To sustain a claim for waste, the court found that plaintiffs needed to show that the board lacked the authority to adopt the amendments or "that the options [were] of such gross disparity of consideration as to make Board approval appear to be of the type no reasonable businessman could approve."[36] Having failed to make the requisite showing, the court dismissed the claim.[37]

Similarly, courts will not sanction a board for failing to obtain tax benefits where doing so results in the loss of flexibility in awarding compensation. In *Freedman v. Adams,*[38] the plaintiff asserted that "by failing to structure the cash bonuses as tax-deductible compensation," the board cost the company "tens of millions of dollars " under Section 162(m) of the IRC.[39] That provision limited the deductibility of cash bonuses above $1 million to those structured as "performance-based compensation."[40] By failing to qualify under the provision, the company, shareholders alleged, effectively "gave a gift to the federal government for which it received no consideration."[41]

The court noted that the failure to qualify under the provision was designed to avoid being "constrained" in awarding compensation and provide increased flexibility. "The Board believed that it received consideration for forgoing the tax deductions, namely, the flexibility to set executive compensation without any constraints imposed by a § 162(m) plan."[42] Such a justification defeated the claim for waste.

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32. *Seinfeld*, 2012 WL 2501105, at *3 (*citing* Freedman v. Adams, C.A. No. 4199-VCN, 2012 WL 1345638, at *12 (Del. Ch. Mar. 30, 2012).
33. Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155, 169 (Del. Ch. 2014) (in challenge to whether there was any corporate benefit to the non-deferral of interest on debt notes, court allowed the waste claim to proceed citing to the complaint that "the Board could have charted a course that would result in the Company never having to pay anything").
34. Haber v. Bell, 465 A.2d 353 (Del. Ch. 1983).
35. *Id*. at 359.
36. *Id.* (*citing* Saxe v. Brady, 184 A.2d 602 (1962)).
37. *Id*.
38. Freedman v. Adams, C.A. No. 4199-VCN, 2012 WL 1345638, at *1 (Del. Ch. Mar. 30, 2012).
39. 26 U.S.C. § 162(m)(4)(C) (2012).
40. *Id.*
41. *Freedman*, 2012 WL 1345638, at *14.
42. *Id.*

One case did find that the failure to obtain tax benefits under Section 162(m) could result in waste. In *Resnik v. Woertz*,[43] the company allegedly failed to reapprove a compensation plan in a timely fashion and, as a result, could not deduct payments under Section 162(m).[44] The complaint alleged that the plan allowed for payments of up to $90,250,000.00 per board member.[45] As a result, the inability to deduct payments under the plan could result in "substantial and avoidable tax liability."[46] The court found that "no person of ordinary sound judgment could view the benefits received in the transaction as a fair exchange for the consideration paid by ADM."[47]

In general, therefore, the failure to maximize tax benefits will not constitute waste, at least where the underlying transaction has a business purpose. *Resnik* amounts to an exception. One court, however, explained away the decision by emphasizing both the magnitude of the lost tax deductions and that the "compensation plan at issue [in *Resnick*] . . . introduced elements of excessive compensation, director interestedness, and a lack of candor not present in the instant case."[48]

C. Contractual Benefits

Courts have also found benefit in the form of routine provisions that appear in severance agreements. These include extensions of the period of confidentiality for information possessed by the departing officer, non-disparagement clauses, and obligations to cooperate. Similarly, releases from liability constitute benefit.

In *Zucker v. Andreessen,*[49] the board approved a severance agreement in part based upon the officer's willingness to agree to a release from liability against the company.[50] Plaintiffs alleged that the release had little value since the company had grounds to terminate the official for cause.[51] The court, however, disagreed, finding that the company benefited from the execution of the waiver.[52] The officer may not have acquiesced to "for cause" dismissal and "[c]reative counsel advocating on [the officer's] behalf could have claimed that he, in fact, was entitled

43. Resnik v. Woertz, 774 F. Supp. 2d 614 (D.C. Del. 2011).
44. *Id*. at 619.
45. *Id.* at 633.
46. *Id*.
47. *Id.*
48. *Freedman*, 2012 WL 1345638, at *15. Courts have also been less likely to find waste where a transaction eliminated a corporate benefit that was speculative. *See* In re Limited, Inc., No. Civ.A. 17148-NC, 2002 WL 537692, at *8 (Del. Ch. Mar. 27, 2002).
49. Zucker v. Andreessen, C.A. No. 6014-VCP, 2012 WL 2366448 (Del. Ch. June 21, 2012)
50. *Id*. at *3.
51. *Id.*, 2012 WL 2366448, at *8 (alleging that "the Board could have avoided paying [CEO] severance under the Company's general executive officer severance policy by terminating him for Cause.")
52. *Id*.

to severance under [the company's] general executive officer severance plan notwithstanding the expense report violations."[53]

The court took a different view of the value of standard contract terms in *In re Citigroup.*[54] Shareholders filed a derivative action alleging that the directors engaged in waste by approving a severance package for the retiring CEO.[55] The CEO would "receive $68 million upon his departure from Citigroup, including bonus, salary, and accumulated stockholdings.[56] The agreement also provided that the CEO would receive "an office, an administrative assistant, and a car and drive for the lesser of five years or until he commences full time employment with another employer."[57]

The letter agreement memorializing the package "contemplated that [the CEO] would sign a non-compete agreement, a non-disparagement agreement, a non-solicitation agreement, and a release of claims against the Company."[58] The court held that the presence of these provisions were not enough to warrant dismissal of the plaintiff's claims.[59] "Without more information . . . there is reasonable doubt as to whether the letter agreement meets the admittedly stringent 'so one sided' standard or whether the letter agreement awarded compensation that is beyond the 'outer limit' described by the Delaware Supreme Court."[60]

In one case, shareholders argued that the structure of a contract resulted in waste. In *Brehm v. Eisner*,[61] the plaintiff brought a derivative suit alleging that the Board committed waste by entering into an employment agreement that "was structured to 'incentivize' [the officer] to seek an early non-fault termination."[62] The contract did so by providing for greater compensation the earlier the officer departed.[63] The court, however, emphasized that "the size and structure of executive compensation are inherently maters of judgment."[64] The fact that the agreement paid the officer more for early dismissal was of no consequence in determining waste because "the former Board determined that in order to attract [the officer] to Disney, Disney would have to offer him a highly

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53. *Id.* at *8 (noting that general releases also avoided the possible costs the company would need to incur to defend any claim including "considerable costs of time, resources, and negative publicity in the interim").

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

55. *Id.* at 110.

56. *Id.* at 138.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 137.

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

62. *Id.* at 263.

63. Essentially, "the contract gave Ovitz an incentive to find a way to exit the Company via a non-fault termination as soon as possible because doing so would permit him to earn more than he could by fulfilling his contract." *Id.* at 251.

64. *Id.* at 263.

attractive compensation package."[65] In return, the officer left his current position as chairman of another company.[66]

Ordinary contract provisions can, therefore, provide a corporation with benefit. The court in *Citibank*, however, indicated that these provisions may not always be sufficient to justify substantial payments.[67] Indeed, one commentator suggested that the case "may weaken the heavy burden imposed by *Brehm*" and "open the door for a successful shareholder claim of excessive executive compensation."[68]

D. Conclusion

When confronting claims of waste, courts analyze what benefit the company received from the challenged transaction. Courts impose a highly deferential standard in determining whether a corporation has received something of benefit.

IV. WASTE AND EXCESSIVE PAYMENT

Claims for waste may also occur where the company makes payments disproportionate to the benefit received. These allegations arise most often in the context of executive compensation, overpayment for services, and sale of undervalued assets. Waste can also occur through the payment of an excessive price in an acquisition of another company.[69] Given the presence of a benefit, courts rarely second-guess whether the amount paid was excessive and routinely defer to the judgment of the board.

A. Vendor Payments

Allegations of waste have arisen with respect to the amount paid to consultants or other advisors. In *Highland Legacy Ltd. v. Singer,*[70] a stockholder "alleged that the directors committed corporate waste by paying exorbitant fees and warrants" to two financial advisory firms.[71] The challenged services involved the payment of $3 million for consultation on financial and restructuring matters following the company's

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65. *In re* Walt Disney Co. Derivative Litig., 731 A. 2d 342, 362 (Del. Ch. 1998) (reversed on other grounds by Brehm v. Eisner, 746 A.2d 244 (Del. 2000)).

66. *Id.* ("In exchange for providing [the officer] the compensation package under the terms of the Employment Agreement, [the officer] agreed to leave his position as chairman of CAA to become president of Disney.").

67. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 138 (Del. Ch. 2009).

68. Steven C. Caywood, *Wasting the Corporate Waste Doctrine: How the Doctrine can Provide a Viable Solution in Controlling Excessive Executive Compensation*, 109 MICH. L. REV. 111, 119 (2010).

69. *In re* Nat'l Auto Credit, Inc. S'holders Litig., 2003 WL 139768 at *13 (Del. Ch. Jan. 10, 2003) (noting acquisition "raised serious eyebrows" because of "the sheer magnitude of the purchase price" and the open question as to "whether [the company] was purchasing anything, other than a shelter" for the CEO).

70. Highland Legacy Ltd. v. Singer, No. Civ.A. 1566-N, 2006 WL 741939 (Del. Ch. Mar. 17, 2006).

71. *Id*. at *1.

emergence from bankruptcy.[72] In addition, the consultant received "warrants to purchase hundreds of thousand of shares" allegedly worth tens of millions of dollars.[73] The court held that the waste claim fell "far short of meeting the stringent requirements of the waste test."[74]

Similarly, an increase in payments from $50,000 to $100,000 per month between the company and a consultant did not constitute waste even when coupled with allegations that the same parties controlled both entities.[75] A "shared expenses fee," the amount was paid as compensation for "overhead expenses," including "rent, utilities, insurance, employee benefits, and the salaries of employees".[76] The court concluded that a reasonable person would find that the company received "adequate consideration" for the payments."[77]

The court also dismissed a claim for waste alleging overpayment to vendors for services in *Zutrau v. Jansing*.[78] There, the plaintiff alleged that the CEO authorized transactions in which the company overpaid one vendor by $9,000 and another by $57,000.[79] The court noted that, to sustain a claim for waste, a plaintiff "must show that virtually no consideration was received in the relevant exchange."[80] Moreover, the burden would not be met merely by "compar[ing] the amounts . . . charged during [the plaintiff's] tenure at [the company] with what [the company] charged in later years." [81] With respect to one of the increases, the CEO offered "undisputed testimony that [the company] needed to increase the services . . . to meet competition" from another company.[82]

Not all claims for waste involving vendors have, however, failed. In *Quadrant Structured Products,*[83] the court allowed a claim to proceed that challenged fees paid under a services agreement and software license.[84] Shareholders alleged that, after a change in control, the services

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72. *Id.* at *2.

73. *Id.*

74. *Id.* at *7. (holding waste claim failed where "[t]he complaint merely alleges that the firms were overcompensated" and the complaint "does not alleged that [the financial advisory firms] were hired for other than a legitimate business purpose or that they failed to perform tasks for which they were retained.")

75. Kates v. Beard Research, Inc., Civil Action No. 1480-VCP, 2010 WL 1644176, at *1 (Del. Ch. Apr. 23, 2010).

76. *Id.* at *2.

77. *Id.* (holding waste claim not sufficiently alleged where increase in fee for overhead expense was associated with the business growing "from four to twelve" employees and then from twelve to sixteen employees during the relevant period).

78. Zutrau v. Jansing, C.A. No. 7457-VCP, 2014 WL 3772859 (Del. Ch. July 31, 2014).

79. *Id.* at *21.

80. *Id.*

81. *Id.* (noting plaintiff merely "compared the amounts that [the] company charged during her tenure ...with what it charged in later years" which was insufficient evidence of waste where defendant "offered undisputed testimony that [the company] need to increase the services it obtained from vendors".)

82. *Id.*

83. Quadrant Structured Prods. Co., Ltd. v. Vertin, 102 A.3d 155 (Del. Ch. 2014).

84. *Id*. at 193.

provided under the services agreement "substantially diminished" and, as a result, the "fees should have decreased."[85] Shareholders, however, asserted that instead the fees "climbed dramatically and far exceeded market rates."[86] Recognizing that "excessive fees could fall so far beyond market standards as to amount to waste," the court found that "while that seems improbable, it is reasonably conceivable."[87]

B. Compensation Payments

Generous compensation packages will generally not constitute waste. As one court noted, "amount alone is not the most salient aspect" when determining waste.[88] The courts have therefore upheld the grant of stock options worth tens of millions of dollars,[89] a cash bonus of $1.8 million,[90] and a severance payment of $40 million.[91] The court has acknowledged that waste will not occur even when the severance appeared "extremely rich or altogether distasteful" so long as approved by "disinterested and independent" directors.[92]

Nor will the court necessarily find waste even when the evidence suggests that the payments exceeded those of peer companies. In *Cambridge Retirement System v. Bosnjak,* [93] plaintiffs alleged waste where the company paid compensation equivalent to 25% of the company's yearly revenue.[94] The complaint alleged that this compensation exceeded payments by eleven other companies in the same industry and with similar market capitalizations.[95] The court did not, however, find the evidence compelling and dismissed the claim for waste.[96]

The court did allow a case of waste involving benefits to the CEO to go forward in *In re INFOUSA*.[97] There, shareholders challenged a variety of expenditures alleged to have benefited the CEO.[98] These "included the

85. *Id.*
86. *Id.* at 169 (noting fees increased from $14 million in 2009 to $23.5 million in 2010).
87. *Id.* at 193.
88. Zucker v. Andreessen, C.A. No. 6014-VCP, 2012 WL 2366448, at *10 (Del. Ch. June 21, 2012).
89. Zupnick v. Goizueta, 698 A.2d 384, 385 (Del. Ch.1997) (noting the Board awarded the Coca-Cola CEO options to purchase one million shares of the corporation's stock exercisable ten years from the issuance date which was April 19th, 1995).
90. Seinfeld v. Slager, Civil Action No. 6462-VCG, 2012 WL 2501105, at *7 (Del. Ch. June 29, 2012)
91. *Zucker*, 2012 WL 2366448, at *10.
92. *Id.*
93. Cambridge Ret. Sys. v. Bosnjak, C.A. No. 9178-CB, 2014 WL 2930869 (Del. Ch. June 26, 2014).
94. *Id*. at *3.
95. *Id.* at *10.
96. *Id.* (noting that allegations the compensation was excessive relative to other similar healthcare companies "raise questions concerning the fairness of the outside directors' compensation," but do not "rise to the level necessary to establish a complete failure of consideration or that the director defendants authorized an exchange that was so one-sided that no reasonable business person could conclude" that adequate consideration was received.).
97. *In re* INFOUSA, Inc. S'holders Litig., 953 A.2d 963 (Del. Ch. 2007).
98. *Id*. at 971.

lease of aircraft and office space for personal use, the provision of a yacht, and a collection of luxury and collectible cares that would leave James Bond green with envy."[99] In allowing the case to go forward, the court relied on one instance where the shareholders alleged payments that appeared to provide little or no benefit to the corporation.[100]

Substantial payments to a CEO can also meet the requirements of waste, at least where accompanied by allegations that the payments represented compensation for the CEO's leadership of a "passive corporation."[101] In *In re National Auto Credit, Inc. Shareholders Litigation*, the plaintiffs alleged that the board committed waste when the board adopted an employment agreement for the CEO.[102] The court refused to dismiss the waste claims.[103] In analyzing the compensation, the court noted "[i]t is not the mere allegation that [the CEO] is being compensated some threshold amount that permits the Plaintiffs' waste claim to proceed; instead, it is that [the CEO] is being paid a large sum of money to be the head of what essentially is a passive corporation."[104]

Courts will also provide careful scrutiny of compensation packages that have the potential to entrench management but otherwise provide the company with little benefit. In *Sample v. Morgan*,[105] plaintiffs alleged that defendants received "nearly a third of the company's voting power" and had "their taxes paid for them by the company, which had to go into debt in order to bestow that beneficence."[106] At the same time, the company apparently received little benefit as a result of the arrangement. As the court noted: "[T]he company got the three executives to stay without any indication that the three had offers to go elsewhere." [107] In rejecting the motion to dismiss, the court stated "[i]f giving away nearly a third of the voting and cash flow rights of a public company for $200 in order to retain managers who ardently desired to become firmly entrenched just where they were does not raise a pleading stage inference of waste, it is difficult to imagine what would."[108]

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99. *Id*.

100. As one example, shareholders alleged that the company purchased a skybox at the University of Nebraska-Lincoln Football Stadium from the CEO, which failed to discount the asset to reflect "the value of tickets that mature at the same the same time that a baby born at the time of the transaction would be legally able to buy beer from a stadium vendor." *Id.* at 1002. The court proclaimed, "[a] reasonable person might well consider this a sweetheart deal for [the CEO]," but that adequate consideration lacked. *Id.*

101. *In re* Nat'l Auto Credit, Inc. S'holders Litig., No. Civ.A. 19028, 2003 WL 139768, at *14 (Del. Ch. Jan. 10, 2003).

102. *Id.* at *6.

103. *Id.* at *13–14.

104. *Id.* at *14,

105. Sample v. Morgan, 914 A.2d 647 (Del. Ch. 2007).

106. *Id.* at 670.

107. *Id.*

108. *Id*. at 652.

V. EMPIRICAL ANALYSIS

This section examines the reported cases addressing waste.[109] The analysis shows that waste claims are infrequent. Since 2000, Delaware has decided 52 waste cases.[110] Executive compensation and overpayment for services dominate these cases. Most cases for waste (29) involve allegations of payment amount beyond acceptable market standards. Significant payments alone will not be enough. Instead, they must be coupled with other factors such as a decline in responsibilities associated with the payments.

Only ten cases survived a motion to dismiss.[111] Most involved allegations of excessive compensation. Courts may find waste where there is some evidence of a possible conflict of interest. For example, in *Telxon v. Bogomolny* and *In re National Auto Credit, Inc.*, the plaintiffs alleged both waste and duty of loyalty violations, which the court did not dismiss.[112] Further, In *Seinfeld v. Coker*, the board allegedly made payments of $300,000 to directors of an acquired company for no consideration.[113] It appears that waste is best brought when the conduct appears egregious enough to trigger a violation of fiduciary duty along with waste.

An action of waste is difficult to sustain given the "no ordinary business person" standard. More recent cases, however, may suggest a shift in the approach. The court in *Quadrant Structured Products Co. Ltd v. Vertin* allowed the case to go forward based upon a challenged to the structure of the transaction. [114] The court agreed that a claim for waste was made where "the board could have charted a course" that would result in the company deferring certain interest payments.[115] In addition, the court agreed that a claim for waste was stated as a result of allegations that certain fees exceeded market standards. In dealing with executive compensation, the court recently took a position that also indicates liberalization in application. In the recent past, boards authorized substantial compensation based upon such benefits certain contractual releases from liability. *In re Citigroup*[116], however, may signal a reduced patience with this approach. Despite the broad language in *Zucker v.*

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109. *See infra* Appendix B.

110. In determining the number of waste cases, I used a number of keyword searches in WestlawNext including such phrases as "corporate waste," and "ATLEAST(4)(waste)" to generate an exhaustive list of waste cases. To verify the list of cases I ran additional searches that included "waste" and key terms often found such as "fiduciary duty."

111. *See infra* Appendix A.

112. *See* Telxon Corp. v. Bogomolny, 792 A.2d 964, 974-76 (Del. Ch. 2001); *In re* Nat'l Auto Credit, Inc. S'holders Litig., No. Civ.A. 19028, 2003 WL 139768, at *1 (Del. Ch. Jan. 10, 2003).

113. *See* Seinfeld v. Coker, 847 A.2d 330, 331 (Del. Ch. 2000).

114. Quadrant Structured Prods. Co., LTD. v Vertin, 102 A.3d 193 (Del. Ch. 2014).

115. *Id*.

116. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 138 (Del. Ch. 2009).

Andreessen[117], the *Citigroup* court indicated that the same basic contractual terms in a severance agreement used in *Zucker*, which formed the basis of the court's reasoning to dismiss the waste claim, did not automatically justify the dismissal of a claim for waste in *Citigroup*.[118]

117. Zucker v. Andreessen, C.A. No. 6014-VCP, 2012 WL 2366448, at *1 (Del. Ch. June 21, 2012).
118. *Citigroup*, 964 A.2d at 137.

APPENDIX A: WASTE CASES SINCE 2000 NOT DISMISSED ON A MOTION TO DISMISS

Case:	Challenged Transaction	Result
1. *Seinfeld v. Coker*, 847 A.2d 330 (Del. Ch. 2000).	Plaintiffs challenged the payment by the corporation to past directors in the amount	The case settled.
2. *Telxon Corp. v. Bogomolny*, 792 A.2d 964 (Del. Ch. 2001).	Plaintiffs challenged the board's decision to grant the chairman of the board a stock	The court denied the defendant's motion to dismiss and found that the complaint
3. *In re National Auto Credit, Inc. Shareholders Litigation*, 2003 WL 139768 (Del. Ch. Jan. 10, 2003).	Plaintiffs challenged a series of interlocking transactions including decision to acquire another company and paying the CEO to manage the combined entity	Defendant's motion to dismiss waste claims was denied. The parties settled on December 24th, 2002.
4. *Actrade Financial Technologies Ltd. v. Aharoni*, 2003 WL 22389891 (Del. Ch. October 17, 2003).	Plaintiffs alleged that the sole director and officer of the company dispersed funds with no legitimate business purpose.	Defendant's motion to dismiss waste claim denied. Parties stipulated to dismissal of the case on April 5, 2004.
5. *Orloff v. Shulman*, 2005 WL 3272355 (Del. Ch. Nov. 23, 2005).	Plaintiff challenged a series of third party transactions as well as the undervaluing and mismanaging real estate leases and properties.	Motion to dismiss claims denied. The parties settled on March 6, 2008.
6. *Sample v. Morgan*, 914 A.2d 647 (2007).	The plaintiff caused the company to go into debt in order to give a tax-free grant of nearly a third of the company's voting power and dividend stream to existing managers; court determined that motivation was "unclear" and characterized the payments as "extraordinary."	Defendant's motion to dismiss waste claims denied. The parties settled on August 5, 2008.
7. *In re InfoUSA, Inc.*, 953 A.2d 963 (Del. Ch. 2007).	Plaintiff alleges that the company allowed a series of related-party transactions and improper benefits to flow to CEO from a board that was dominated and controlled by him.	Defendant's motion to dismiss waste claims denied. The parties settled on November 7, 2008 and the CEO paid the company 9 million dollars over a five-year period.
8. *Weiss v. Swanson*, 948 A.2d 433 (Del. Ch. 2008).	Plaintiff challenged the company's decision to grant timed stock options and that the grants were approved by the board without any valid corporate purpose.	Plaintiff stated a claim of waste; Defendant's motion denied. The parties settled on April 28, 2011.
9. *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009).	Plaintiff alleged that Directors engaged in waste by approving compensation package for retiring CEO where the benefit was standard provisions in the severance agreement.	Plaintiff demonstrated that demand was futile and their waste claim was not dismissed. The parties stipulated to the dismissal of the case on February 23, 2012.
10. *Quadrant Structured Products Co., LTD. v Vertin*, 102 A.3d 155 (Del. Ch. 2014).	Plaintiff challenges the non-deferral of interest on Junior notes as well as the fees paid under services agreements and software licenses.	Court found that the complaint did state a claim for waste. The case is ongoing.

APPENDIX B: REPORTED CASES ADDRESSING WASTE

1. *Wagner v. Selinger*, 2000 WL 85318 (Del. Ch. Jan. 18th, 2000).
2. *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).
3. *Hills Stores Co. v. Bozic*, 769 A.2d 88 (Del. Ch. 2000).
4. *State of Wisconsin Inv. Bd. V. Bartlett*, 2000 WL 238026 (Del. Ch. Feb. 24, 2000).
5. *Leung v. Schuler*, 2000 WL 264328 (Del. Ch. Feb. 29, 2000).
6. *Criden v. Steinberg*, 2000 WL 354390 (Del. Ch. Mar. 23, 2000).
7. *Ash v. McCall*, 2000 WL 1370341 (Del. Ch. Sept. 15, 2000).
8. *Seinfeld v. Coker*, 847 A.2d 330 (Del. Ch. 2000).
9. *Parnes v. Bally Entertainment Corp.*, 2001 WL 224774 (Del. Ch. Feb. 23, 2001).
10. *White v. Panic*, 783 A.2d 543 (Del. 2001).
11. *Telxon Corp. v. Bogomolny*, 792 A.2d 964 (Del. Ch. 2001).
12. *In re The Student Loan Corp. Derivative Litigation*, 2002 WL 75479 (Del. Ch. Jan. 8, 2002).
13. *In re Limited, Inc.*, 2002 WL 537692 (Del Ch. Mar. 27, 2002).
14. *California Public Employees Retirement System v. Coulter*, 2002 WL 31888343 (Del. Ch. Dec. 18, 2002).
15. *Zimmerman ex rel. Priceline.com, Inc. v. Braddock*, 2002 WL 31926608 (Del. Ch. Dec. 20, 2002).
16. *In re National Auto Credit, Inc. Shareholders Litigation*, 2003 WL 139768 (Del. Ch. Jan. 10, 2003).
17. *President and Fellows of Harvard College v. Glancy*, 2003 WL 21026784 (Del. Ch. Mar. 21, 2003).
18. *Actrade Financial Technologies Ltd. V. Aharoni*, 2003 WL 22389891 (Del. Ch. Oct. 17, 2003).
19. *Official Committee of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins*, 2004 WL 1949290 (Del. Ch. Aug. 24 2004).
20. *Grenko v. Wussler*, 2004 WL 3048776 (Del. Ch. Oct. 27, 2004).
21. *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693 (Del. Ch. 2005).
22. *Orloff v. Shulman*, 2005 WL 3272355 (Del. Ch. Nov. 23, 2005).
23. *Laties v. Wise*, 2005 WL 3501709 (Del. Ch. Dec. 14, 2005).
24. *Highland Legacy Ltd. v. Singer*, 2006 WL 741939 (Del. Ch. Mar. 17, 2006).
25. *Oliver v. Boston University*, 2006 WL 1064169 (Del. Ch. Apr. 14, 2006).

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APPENDIX B: REPORTED CASES ADDRESSING WASTE CONTINUED

26. *Khanna v. McMinn*, 2006 WL 1388744 (Del. Ch. May 9, 2006).
27. *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27 (2006).
28. *Blue Chip Capital Fund II Ltd. Partnership v. Tubergen*, 906 A.2d 827 (Del. Ch. 2006).
29. *Sample v. Morgan*, 914 A.2d 647 (2007).
30. *In re INFOUSA, Inc.*, 953 A.2d 963 (Del. Ch. 2007).
31. *Conrad v. Blank,* 940 A.2d 28 (Del. Ch. 2007).
32. *Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 553205 (Del. Ch. Feb. 29, 2008).
33. *Weiss v. Swanson*, 948 A.2d 433 (Del. Ch. 2008).
34. *In re Lear Corp. Shareholder Litigation*, 967 A.2d 640 (Del. Ch. 2008).
35. *Thorton v. Bernard Technologies, Inc*, 2009 WL 426179 (Del. Ch. Feb. 20, 2009).
36. *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009).
37. *Sutherland v. Sutherland*, 2009 WL 857468 (Del. Ch. Mar. 23, 2009).
38. *Binks v. SDL.net, Inc.*, 2010 WL 1713629 (Del. Ch. Aug. 18, 2009).
39. *eBay Domestic Holdings, Inc. v. Newmark*, 2009 WL 3205674 (Del. Ch. Oct. 2, 2009).
40. *In re Dow Chemical Co. Derivative Litigation*, 2010 WL 66769 (Del. Ch. Jan. 11, 2010).
41. *Kates v. Beard Research, Inc.*, 2010 WL 1644176 (Del. Ch. Apr. 23, 2010).
42. *Hampshire Group, Ltd. v. Kuttner*, 2010 WL 2739995 (Del. Ch. July 12, 2010).
43. *In re Goldman Sachs Group, Inc. Shareholder Litigation*, 2011 WL 4826104 (Del. Ch. Oct. 12, 2011).
44. *Protas v. Cavanagh*, 2012 WL 1580969 (Del. Ch. May 4, 2012).
45. *Zucker v. Andreessen*, 2012 WL 2366448 (Del. Ch. June 21, 2012).
46. *Seinfeld v. Slager*, 2012 WL 2501105 (Del. Ch. June 29, 2012).
47. *Freedman v. Adams*, 58 A.3d 414 (Del. 2013).
48. *TVI Corporation v. Gallagher*, 2013 WL 5809271 (Del. Ch. Oct. 28, 2013).
49. *Cambridge Retirement System v. Bosnjak*, 2014 WL 2930869 (Del. Ch. June 26, 2014).
50. *Zutrau v. Jansing*, 2014 WL 3772859 (Del. Ch. July 31, 2014).
51. *Quadrant Structured Products Co., LTD. v. Vertin*, 102 A.3d 155 (Del. Ch. 2014).
52. *Higher Education Management Group, Inc. v. Mathews*, 2014 WL 5573325 (Del. Ch. Nov. 3, 2014).