Docket #0018 Date Filed: 11/12/2020

Michael B. Carlinsky
Susheel Kirpalani
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 489-7000
Email: michaelcarlinsky@quinnemanuel.com
Email: susheelkirpalani@quinnemanuel.com

Matthew Scheck
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 S. Figueroa Street, 10th Floor
Los Angeles, CA 90017
Telephone: (213) 443-3000
Email: matthewscheck@quinnemanuel.com

Attorneys for Plaintiffs Garrett Motion Inc. and Garrett ASASCO Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re GARRETT MOTION INC., *et al.*,[1] *Debtors*.	Case No. 20-12212 Chapter 11 (Jointly Administered)
GARRETT MOTION INC. and GARRETT ASASCO INC., *Plaintiffs*, v. HONEYWELL INTERNATIONAL INC., HONEYWELL ASASCO LLC, HONEYWELL ASASCO 2 LLC, HONEYWELL HOLDINGS INTERNATIONAL INC., SU PING LU, and DARIUS ADAMCZYK, *Defendants*.	Adversary Proceeding No. 20-1223

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

[1] The last four digits of Garrett Motion Inc.'s tax identification number are 3189. Due to the large number of debtor entities in these Chapter 11 Cases, which are being jointly administered, a complete list of the Debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' proposed claims and noticing agent at http://www.kccllc.net/garrettmotion. The Debtors' corporate headquarters is located at La Pièce 16, Rolle, Switzerland.

2012212201117000000000006

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

For decades, Honeywell and its predecessors sold asbestos-laden products, knowing of the dangers those products posed to human life. Honeywell's position was reflected in the views of one of its executives in 1966: "[I]f you have enjoyed a good life while working with asbestos products why not die from it."[2] Honeywell continued to sell asbestos-laden products well after the dangers associated with asbestos were well known to it.

Faced with billions of dollars in asbestos liability, Honeywell devised a plan to rid itself of that liability by foisting it upon Garrett through an Indemnification and Reimbursement Agreement (the "Indemnification Agreement").[3] As set forth in the Complaint, the terms Honeywell sought to impose on Garrett were unconscionable and stemmed from substantial breaches of fiduciary duty. Honeywell now overreaches—beyond the limits imposed by New York law—in demanding indemnification from Garrett for punitive damages and intentional misconduct. And even if the Indemnification Agreement were enforceable—and it is not—Honeywell has breached the few obligations it has under that contract, and has failed to satisfy the prerequisites for indemnity under New York law. Through its motion to dismiss, Honeywell seeks to evade any responsibility for its wrongful actions. Honeywell's motion is meritless.

As set forth herein, Garrett has alleged facts that plausibly show that Honeywell's hand-picked and conflicted director for Garrett, Su Ping Lu, breached her fiduciary duty to Garrett by,

---

[2] Compl. ¶ 240; *see Phillips v. Honeywell Int'l Inc.*, 9 Cal. App. 5th 1061, 1074 (2017) (quoting letter from Director of Purchases at one of Honeywell's largest asbestos-using facilities to Honeywell's asbestos supplier).

[3] Garrett refers to Plaintiffs Garrett Motion Inc. and Garrett ASASCO Inc. collectively as "Garrett" herein. Garrett refers to Defendants Honeywell International Inc., Honeywell ASASCO LLC, Honeywell ASASCO 2 LLC, Honeywell Holdings International Inc., Darius Adamczyk, and Su Ping Lu, collectively with their predecessors, as "Honeywell."

among other things, authorizing entry into the Indemnification Agreement without informing herself in the slightest. Honeywell's contention that it owed no duty to Garrett or Garrett's future shareholders misses the point. As a director of Garrett, Lu owed it a duty, and she breached that duty at Honeywell's direction while under Honeywell's control.

Garrett has also more than adequately pleaded that the Indemnification Agreement is substantively and procedurally unconscionable under New York law. Although Honeywell argues that this was just "an ordinary spin transaction," the Indemnification Agreement is anything but ordinary. An ordinary spin transaction culminates in the spin-off of an *independent* company. The Indemnification Agreement created a company whose primary corporate decisions are subject to Honeywell's veto power for 30 years. Moreover, Honeywell tied Garrett's financial health to Honeywell's legacy asbestos liability (90% of which Honeywell claims Garrett is responsible for), and bound Garrett to Honeywell's unilateral and undisclosed decisions on how to manage, defend, and settle claims—including claims asserted directly against *Garrett*. Even Honeywell's purported 10% retention of the financial burdens of its asbestos liability is illusory: Honeywell retains 10% of the *pre-tax* liability, but assuming any reasonable corporate tax rate, Honeywell is making an after-tax *profit* on the asbestos liability and thus is perversely incentivized not to minimize those liabilities, to Garrett's and its stakeholders' detriment.

Honeywell repeatedly touts that, as part of the spin, Garrett received assets. But Honeywell never once mentions in its entire brief the other value that Honeywell extracted from Garrett over and above the asbestos liability in the Indemnification Agreement, including a $1.6 billion cash distribution funded by debt that Honeywell forced Garrett to incur.

Honeywell is also not entitled to a pre-discovery dismissal of Garrett's claims on the scope of Garrett's indemnification obligations. Honeywell's attempt to force Garrett to indemnify it for

punitive damages and intentional misconduct under the Indemnification Agreement violates New York law. Honeywell's assertion that it can be indemnified for punitive damages arising from "past acts" is wrong; New York law prohibits indemnification for punitive damages irrespective of whether the culpable conduct occurred in the past, present, or future. And Honeywell's contention that it can escape liability by settling its punitive risk before yet another jury imposes punitive damages against it fares no better. The law is not so easily manipulated.

Garrett has also adequately pleaded that Honeywell has failed to meet the requirements under New York law for indemnification of settlements. To be indemnified, Honeywell must establish that its settlements are reasonable and in good faith, and that it would have or could have been liable on the settled claims. The Complaint states a claim for declaratory judgment that Honeywell must establish these prerequisites and that it has failed to do so. Honeywell's purported "sole discretion" to settle does not change this, as established by Honeywell's own cited authorities.

Finally, Honeywell is not entitled to dismissal of Garrett's breach of contract and implied covenant claims. The Complaint adequately alleges that Honeywell materially breached the Indemnification Agreement by failing to provide information Garrett needed as an SEC registrant, causing Garrett to report a material weakness. Honeywell's argument that Garrett's claim is "moot" is nonsense. Garrett's clearing of the material weakness does not undo Honeywell's material breach or the substantial harm it caused.

FACTS

A. Honeywell's Asbestos Liability And Punitive Damages Exposure

Honeywell and its predecessors manufactured and sold brake products containing asbestos for over six decades, from 1939 to 2001.[4] Compl. ¶ 239. Honeywell admitted to knowing of the dangers of asbestos by 1968, although courts have found that Honeywell may have been aware of the dangers long before. Compl. ¶¶ 24, 245. Yet Honeywell continued using asbestos for another thirty-three years. Compl. ¶ 26. As a result, Honeywell faces billions of dollars of liability for both compensatory and punitive damages. Compl. ¶¶ 1–2, 32–39.

Honeywell settles the vast majority of asbestos claims asserted against it. Compl. ¶¶ 212–13. This is driven in large part by the fact that the few cases Honeywell has taken to trial in recent years reveal Honeywell's significant exposure to punitive damages. Compl. ¶¶ 211, 214–15. In 2014, a jury imposed $3.5 million in punitive damages against Honeywell, and just last year a jury imposed $10 million in punitive damages against Honeywell. Compl. ¶¶ 216–20.

B. Honeywell's Efforts To Offload Its Asbestos Liability To Garrett

After previous attempts to shed the asbestos liability failed, Compl. ¶¶ 41–46, Honeywell devised a plan to spin off its remaining Transportation Systems business and saddle it with the legacy asbestos liability, even though the liability had nothing to do with the spun off business. Compl. ¶¶ 1, 47–48. Honeywell created a new company, Garrett, to not only offload this liability onto, but also to give Honeywell a $1.6 billion cash distribution, funded by debt Honeywell forced Garrett to incur. Compl. ¶¶ 1, 57–58, 93.

---

[4] The Bendix Corporation began manufacturing friction products containing asbestos in 1939. Compl. ¶ 23. It was acquired by the Allied Corporation in 1982, which then merged with Signal Companies (to create AlliedSignal). Compl. ¶¶ 27–28. AlliedSignal subsequently acquired Honeywell in 1999, with the surviving company being AlliedSignal but retaining the Honeywell name. Compl. ¶¶ 29–30.

Honeywell installed its own in-house attorney, Su Ping Lu, as Garrett's ostensible corporate representative, making her the president and sole director of several Garrett entities. Compl. ¶ 59. Honeywell also decided Paul Weiss, the law firm Honeywell hired to execute the spin, would concurrently "represent" Garrett. Compl. ¶¶ 61–62. At the epicenter of this orchestrated process was Honeywell's CEO and Chairman, Darius Adamczyk, who assigned his most senior advisors to work on the spin and received weekly progress updates. Compl. ¶ 64.

Honeywell's plan eventually culminated in the Indemnification Agreement, executed between two Honeywell entities: Honeywell ASASCO LLC, as indemnitor, and Honeywell ASASCO 2 LLC, as indemnitee. Compl. ¶ 73. Important to this motion, Honeywell ASASCO LLC received no consideration under the Indemnification Agreement. Compl. ¶¶ 75, 89. When it came time to approve the Indemnification Agreement, Su Ping Lu was given an out-of-date, incomplete draft, and was not given a meaningful chance to assess its terms; yet, she still signed on behalf of both indemnitor (Honeywell ASASCO LLC) and indemnitee (Honeywell ASASCO 2 LLC), as president of both ASASCO entities, at Adamczyk's direction. Compl. ¶¶ 76–79. Two days after the Indemnification Agreement was executed, it was assigned to Garrett through a Contribution and Assignment Agreement, also signed by Lu, at Adamczyk's direction, on behalf of both assignor (a Honeywell entity) and assignee (a Garrett entity). Compl. ¶¶ 88–91.

The Indemnification Agreement's onerous, one-sided terms show why Honeywell had to offload its liability in an agreement with itself—no reasonable counterparty would ever agree to such unreasonable terms. Compl. ¶ 5. The Indemnification Agreement requires Garrett to indemnify Honeywell for 90% of the legacy asbestos liability (among other liabilities). Compl. ¶¶ 3, 99. Garrett's payments are based on multi-million dollar *estimates* generated by Honeywell,

through a process unknown to Garrett, and delivered in a one-page statement that Garrett is purportedly required to accept at face value. Compl. ¶¶ 99–118, 128, 200–04.

A substantial portion of Honeywell's aggregate costs consist of defense costs. Compl. ¶¶ 137–38, 143, 273–75. Although Garrett must indemnify Honeywell for 90% of these costs, Honeywell designed the Indemnification Agreement to prohibit Garrett from having *any* input or insight into the management or resolution of claims. Even when a claim is asserted *directly against Garrett*, Garrett must refer the claim to Honeywell to manage, with Garrett still footing 90% of the bill. Compl. ¶¶ 141–42. Honeywell has no incentive to minimize its defense spend or settlement amounts. Compl. ¶ 144. ***First***, the asbestos liability is substantially more material to Garrett than it is to Honeywell. Compl. ¶¶ 145–47. ***Second***, the 10% liability Honeywell reserved for itself is recouped entirely by tax benefits to Honeywell when it deducts Garrett's payments from its own income taxes, as permitted by the Indemnification Agreement. Compl. ¶ 144.[5] Meanwhile, the Indemnification Agreement ***forbids Garrett from deducting its own payments for tax purposes***. Compl. ¶ 144 (quoting Compl. Ex. A (Indemnification Agreement) § 2.17).

To ensure that Garrett would continue to indemnify it, Honeywell included covenants in the Indemnification Agreement that prohibit or restrict Garrett's ability to (1) engage in significant corporate transactions; (2) incur debt or grant liens; (3) make investments; (4) sell assets; (5) pay dividends; (6) amend material agreements; and (7) engage in certain business activities. Compl. ¶¶ 94–96. These oppressive covenants give Honeywell the power to usurp or override decisions

---

[5] Honeywell's assertion that it retains liability over the $175 million annual cap (Br. 5, 25) rings hollow because, as Honeywell notes, the cap has never been hit (Br. 6) and the liability is projected by Honeywell to decline in the future. Moreover, with its "sole discretion" over the management of the litigation and the settlement of claims, Compl. ¶¶ 141–42, Honeywell is able to manipulate the timing and amount of its payments to ensure that the cap is never hit.

of Garrett's board and management during the thirty-year term of the Indemnification Agreement. Compl. ¶¶ 95, 97.

C. Honeywell's Bad Faith Conduct After The Spin

Since the spin, Honeywell has refused to abide by any of the obligations imposed on an indemnitee under New York law, while seeking to reap all of the financial benefits it gave itself under the Indemnification Agreement. *See* Compl. ¶¶ 199–200, 206–07. Honeywell has not proven (or even sought to prove) that the settlements were entered into in good faith, are reasonable, or arise from an indemnifiable claim for which Honeywell could actually be liable, or that the legal costs Honeywell incurred were reasonable or expended in a good faith defense of an indemnifiable claim. Compl. ¶¶ 199–200, 206–07, 271–72, 276. Indeed, Honeywell has not so much as identified a *single claim* for which it seeks indemnification. Compl. ¶ 203. This not only prevents Garrett from verifying that amounts are actually indemnifiable, but Garrett cannot even assess whether there has been a simple computational error in calculating the aggregate indemnity amount. Compl. ¶¶ 140, 203. Even more egregiously, Honeywell is also forcing Garrett to indemnify it for amounts to which it is not entitled under New York law, chief among them punitive damages, as well as for amounts it is not entitled to under the very terms of the Indemnification Agreement. Compl. ¶¶ 3, 100, 143, 278–81.

Honeywell also withheld crucial information from Garrett after the spin-off. Compl. ¶¶ 150–98. Once Garrett took responsibility for its own SEC reporting obligations, Compl. ¶¶ 152, 160, it requested that Honeywell provide the information Garrett needs "to satisfy its obligations as an SEC registrant" pursuant to Section 2.2(i) of the Indemnification Agreement. Compl. ¶¶ 150, 166–98. After repeatedly being told that the information requested was, in Honeywell's judgment, unnecessary for that purpose, Garrett was forced to disclose a material weakness in its internal control over financial reporting mere months after the spin, caused entirely by Honeywell's

material breach of Section 2.2(i). Compl. ¶¶ 171, 177–79, 181, 183. Although Garrett was finally given a subset of the information it had requested in September 2019, the data was deficient in both substance and form, missing key information and provided in a format that severely restricted its use. Compl. ¶¶ 190–97. Throughout this time, Garrett also requested essential documents like its Board of Directors resolutions and the Assignment Agreement. Compl. ¶¶ 170, 175. The Assignment Agreement was not provided to Garrett until March 15, 2019—*six months* after the spin. Compl. ¶ 176.

D. Procedural Posture

Shortly after the spin, Garrett raised significant concerns with the Indemnification Agreement, the circumstances surrounding its execution, and Honeywell's failure to provide information about the asbestos liability. *See, e.g.*, Compl. ¶¶ 166–68, 184, 283. The parties participated in an unsuccessful in-person mediation in September 2019. Compl. ¶ 286. Garrett filed this lawsuit in New York state court in December 2019.[6]

On September 20, 2020, the Debtors filed a voluntary petition under chapter 11. Although Honeywell has made public statements indicating it is entitled to over a billion dollars from the estates, Honeywell has not yet filed a proof of claim in the chapter 11 cases and has refused Garrett's requests to specify its claim or provide information underlying that claim. On November 2, 2020, the Debtors filed a Motion Pursuant to Sections 105(a) and 502(c) to Establish Procedures

---

[6] At every turn, Honeywell has misrepresented the nature of the delay in the state court litigation. *See, e.g.*, Br. 2, 7–8. It was Honeywell, not Garrett, that caused the vast majority of the delay. Inexcusably, Honeywell's brief fails to advise the Court that when Garrett needed payment relief during the COVID-19 pandemic, *Honeywell demanded a delay in the litigation in return*. And, when Honeywell issued a meritless default notice in May 2020 in connection with Garrett's Credit Agreement amendment with Garrett's lenders, Honeywell *again demanded a delay in the litigation* as a prerequisite to withdrawing its default notice.

for Estimating the Maximum Amount of Honeywell's Claims and Related Relief to determine the maximum amount of Honeywell's claims against the estates.

ARGUMENT

In evaluating a motion to dismiss, this Court must "accept[] all factual allegations [in the complaint] as true and draw[] all reasonable inferences in favor of the plaintiff." *Meyer v. Jinkosolar Holdings Co.*, 761 F.3d 245, 249 (2d Cir. 2014) (alterations in original) (citation omitted). A motion to dismiss does not resolve factual disputes but rather merely tests "the formal sufficiency of the plaintiff's statement of a claim for relief." *Halebian v. Berv*, 644 F.3d 122, 130 (2d Cir. 2011).

I. THE INDEMNIFICATION AGREEMENT IS VOID AND UNENFORCEABLE

A. The Unconscionability Claim Should Not Be Dismissed

The Complaint sufficiently alleges that the Indemnification Agreement is substantively and procedurally unconscionable because it contains "terms which are unreasonably favorable to [Honeywell]" and was entered into in the "absence of meaningful choice." *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (1988) (citation omitted). Specifically, the Indemnification Agreement unconscionably shackles Garrett to Honeywell in various ways, including through (1) a complete lack of control or input in managing the liability for which Garrett must pay 90% of the bill, Compl. ¶¶ 141–42; (2) blackbox payment obligations for a Honeywell legacy liability unrelated to Garrett's business, Compl. ¶¶ 1, 200–04; (3) perverse incentives for Honeywell in light of its post-tax *profit* from the asbestos liability, Compl. ¶ 144; (4) a lack of information, making Garrett's SEC-reporting obligations reliant on Honeywell's representations, Compl. ¶¶ 164, 178; and (5) oppressive covenants, Compl. ¶¶ 94–98.

1. The Indemnification Agreement Is Substantively Unconscionable

The Indemnification Agreement is substantively unconscionable in light of the "disparity in the consideration," *In re Friedman*, 64 A.D.2d 70, 85 (N.Y. App. Div. 2d Dep't 1978), and the Indemnification Agreement's "oppressive, unjust, and unreasonabl[e]" terms. *Day Op of N. Nassau, Inc. v. Viola*, 16 Misc. 3d 1122(A), at *7 (N.Y. Sup. Ct. Nassau Cty. Aug. 1, 2007). Moreover, under New York law, a contract can be held "unenforceable on the ground of substantive unconscionability alone" where its terms are particularly "outrageous," *Gillman*, 73 N.Y.2d at 12, or where the disparity in consideration is "overwhelming," *Friedman*, 64 A.D.2d at 85. As alleged in the Complaint, the Indemnification Agreement's terms are particularly outrageous.

The Indemnification Agreement purports to make Garrett responsible for 90% of Honeywell's asbestos liability—liability that has nothing to do with Garrett's business[7]—including for punitive damages and intentional misconduct in violation of New York public policy. Compl. ¶¶ 1, 3, 99; *see State v. Wolowitz*, 96 A.D.2d 47, 67, 69 (N.Y. App. Div. 2d Dep't 1983) (substantive unconscionability applies to an agreement with "unreasonably favorable contractual provisions," which "violate[] . . . a strong public policy"). The multi-million-dollar payments Garrett must make under the Indemnification Agreement each quarter are based on *estimates* generated by Honeywell, through a process entirely unknown to Garrett, and delivered in a one-page statement that Garrett has no opportunity to challenge and must accept at face value. Compl. ¶¶ 99–118, 128, 200–04.

[7] Indeed, Honeywell admits that the Bendix business was sold in 2014. Br. 5.

Honeywell contends that it has "sole discretion" to manage, defend, and settle the indemnified claims, giving it *carte blanche* to spend freely in defense costs and settlements with no oversight and virtually no financial responsibility. Compl. ¶¶ 141–42, 144; *see* Br. 23–25. Garrett has no say, even when a cause of action is asserted *directly against Garrett*. Compl. ¶¶ 141–42. Moreover, Honeywell has no incentive to reduce costs. Although Honeywell touts that it is responsible for 10% of the asbestos costs (Br. 5, 25), that is a mirage: the transaction was structured to allow Honeywell to deduct Garrett's indemnity payments from its income taxes, likely generating value to Honeywell in excess of its superficial 10% payment obligation. Compl. ¶ 144. This lack of economic incentive created by Honeywell's tax benefit exacerbates the lack of economic incentive inherent in Honeywell's materiality threshold, which is substantially higher than Garrett's. Compl. ¶¶ 145–47. The adverse incentives themselves contribute to the unconscionable nature of the Indemnification Agreement. *See Friedman*, 64 A.D.2d at 86 (finding contract unconscionable and emphasizing "potentially adverse" interests and "questionable" incentives). Honeywell purports to have complete control over the single largest line item in Garrett's budget, directly tying Garrett's financial health to how Honeywell chooses to manage its asbestos docket. Compl. ¶ 165. Moreover, Garrett must make its own SEC disclosures regarding the asbestos liability in near-total reliance on Honeywell's information. Compl. ¶¶ 164, 178.

In addition, the Indemnification Agreement's covenants shackle Garrett to Honeywell for 30 years, prohibiting Garrett's management and board from investing in or changing Garrett's business, and severely restricting their ability to conduct business in the ordinary course. Compl. ¶¶ 4, 94–98, 363. Honeywell argues the Complaint describes "an ordinary spin-off transaction" (Br. 14), but in a spin-off, "a division of a corporation *becomes an independent company*," Black's Law Dictionary (11th ed. 2019) (emphasis added). Honeywell never intended to create a truly

independent company. The covenants allow Honeywell to maintain a level of control over Garrett typically exerted by a parent or majority shareholder and illegally deprive Garrett's board and the management of managing the affairs of Garrett. *See* Compl. ¶¶ 363–64 (referring to a violation of section 141(a) of the Delaware General Corporate Law). Unlike a typical lending agreement, Garrett cannot escape the covenants through a refinancing or repayment. Compl. ¶ 95. No company would willingly sign a contract with such unreasonably one-sided provisions.[8]

The facts here are strikingly similar to those in *Blackrock Capital Investment Corp. v. Fish*, 799 S.E.2d 520 (W. Va. 2017), where agreements between two parent companies and a subsidiary required the subsidiary to indemnify the parents for any losses under the agreements. *Id.* at 524. Applying New York law, the court held it was substantively unconscionable to require the subsidiary to indemnify its parents without any ability to supervise or control the parents' conduct, even where such conduct was wrongful. *See id.* at 531–33; *see also In re Lyondell Chem. Co.*, 585 B.R. 41, 54–55 (S.D.N.Y. 2018) (recognizing the substantively unconscionable terms in *Blackrock* and distinguishing the facts). As in *Blackrock*, the terms of the Indemnification Agreement are "unreasonably favorable" to Honeywell, "lack[] any mutuality of obligation," and are "outrageous and oppressive." 799 S.E.2d at 532, 533.[9]

---

[8] Honeywell's unsupported factual assertion (Br. 16) that Garrett is free to merge with an investment grade company that is willing to assume Garrett's obligations, including the onerous covenants, is absurd. The truth, to be proven during discovery, is that no investment-grade company would ever assume Garrett's obligations. Indeed, *Honeywell itself* was unable to find a company willing to assume the asbestos liability despite *years* of trying. Compl. ¶¶ 41–46.

[9] Honeywell's cited cases are inapposite. The egregious contract terms here bear no resemblance to those in *Aviall, Inc. v. Ryder System, Inc.*, 913 F. Supp. 826 (S.D.N.Y. 1996), *aff'd*, 110 F.3d 892 (2d Cir. 1997), where the unconscionability claim was based merely on the selection of an arbitrator. *Id.* at 833 ("Aviall does not say what public policy is offended by the selection of an arbitrator who is an expert in the relevant field, is familiar with the highly technical facts of the case, and has a prior affiliation with both parties to the dispute.").

Although Honeywell argues that Garrett received valuable assets as part of the transaction (Br. 4, 15), it ignores that Garrett was required to round-trip much of that value immediately to Honeywell by incurring more than $1.6 billion in debt and funding a $1.6 billion dividend to Honeywell. Compl. ¶¶ 1, 93. This was in addition to Garrett's obligations under the Indemnification Agreement, and other obligations Honeywell imposed on Garrett (including under the Tax Matters Agreement).

2. The Indemnification Agreement Is Procedurally Unconscionable

The Indemnification Agreement is procedurally unconscionable because of Garrett's "lack of meaningful choice." *Gillman*, 73 N.Y.2d at 10–11. Every aspect of the "negotiation" and execution of the Indemnification Agreement shows that Garrett lacked any meaningful choice. Honeywell essentially contracted with itself in entering into the Indemnification Agreement, controlling the transaction from the side of the Payor (Honeywell ASASCO LLC), the Payee (Honeywell ASASCO 2 LLC), the Claim Manager (Honeywell International Inc.), and the eventual Assignee (Garrett ASASCO Inc.). *See* Compl. ¶¶ 59, 73, 76, 90, 294–96.

Blackrock is again instructive. Just as in *Blackrock*, (a) the agreement here was signed by the same person on both sides, who was "not 'consciously aware'" of the substance of the agreements; (b) the subsidiary lacked independent legal counsel; (c) the board "was comprised solely of principals" from the parents, and the president was an owner of one of the parents; and (d) "there was no real and voluntary meeting of the minds" because the parent was "effectively

---

Moreover, unlike the plaintiff in *Aviall*, Garrett articulates a clear public policy that is violated by the Indemnification Agreement. *See infra* Section II.A. And in *Chemours Co. v. DowDuPont Inc.*, 2020 WL 1527783 (Del. Ch. Mar. 30, 2020) (appeal pending), the plaintiff did not even allege substantive unconscionability as to the relevant provision of the contract. *Id.* at *14 (holding that the plaintiff did "not articulate a substantive unconscionability argument specific to the Delegation Clause").

contracting with [itself]." *Blackrock*, 799 S.E.2d at 529 (applying New York law). Similarly, in *In re Paragon Offshore PLC*, 588 B.R. 735 (Bankr. D. Del. 2018), also decided under New York law, the bankruptcy court held that the elements of procedural unconscionability were met based on allegations that the parent "absolutely and completely dominated [the subsidiary] at all times through execution of the [spin-off agreement]." *Id.* at 758 & n.119 (considering allegations that "all but one member of the [subsidiary] team consisted of [parent] employees and were tied to [parent] achieving the Spin-Off, consequently leaving [subsidiary] with no control or say of the Spin-Off transactions"). As the Complaint alleges, Su Ping Lu, as sole director and president, signed the Indemnification Agreement on behalf of Payor and Payee (both Honeywell entities), and the Assignment Agreement on behalf of Assignor (Honeywell) and Assignee (Garrett). Compl. ¶¶ 76, 90, 295. The Complaint alleges that Lu did so without informing herself or even seeing all the material terms, and that she was also, at best, advised by conflicted counsel or no counsel at all. Compl. ¶¶ 61–62, 78–79. These allegations are more than sufficient to withstand a motion to dismiss.

As its only argument in response, Honeywell contends that "[a] parent company does not violate any *fiduciary duty* by declining to give a SpinCo its own lawyers." Br. 13 (emphasis added). But depriving Garrett of independent counsel was just one of many infirmities. In any event, Honeywell conflates Delaware fiduciary principles established by *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171 (Del. 1988) and its progeny with New York contract law. The question is not whether Honeywell breached a fiduciary duty under Delaware law but rather whether the Indemnification Agreement is unconscionable under New York contract law. *See Blackrock*, 799 S.E.2d at 530 (applying New York law and rejecting argument based on

Anadarko because *Anadarko* "focused solely upon the fiduciary duties of corporate directors" and "did not consider the doctrine of unconscionability").

Contrary to Honeywell's assertion, *Aviall* does not bar a spun-off subsidiary from ever asserting an unconscionability defense against its former parent. *See* Br. 14–15 (citing *Aviall*, 913 F. Supp. 826). Rather, the court held on summary judgment that a spun entity (Aviall) could not disqualify an arbitrator to which it had agreed with full awareness. *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 896 (2d Cir. 1997). The Second Circuit affirmed without mentioning unconscionability, holding that the disqualification claim was premature and needed to await resolution of the arbitration. *See id.* at 895, 897.

Aviall bears no resemblance to the facts here. Garrett's Complaint alleges that the Indemnification Agreement is outrageously one sided, and that it unconscionably imposes on Garrett oppressive restrictions and more than a billion dollars in payment obligations over the next 30 years. *See supra* Section I.A.1. Moreover, Garrett's sole director, Su Ping Lu, failed to inform herself in the slightest as to the Indemnification Agreement and its terms before entering into the contract. As described, *see infra* Section I.B.1, this constitutes a breach of fiduciary duty, and thus *Aviall*'s reference to *Anadarko*, *see Aviall*, 913 F. Supp. at 832, is inapposite.

By contrast, *Aviall* involved a very narrow issue—the selection of an arbitrator to resolve an accounting dispute that arose "at the time of the spin-off." 110 F.3d at 893–94. Aviall failed to articulate how the selection of the arbitrator was substantively unfair, oppressive, or unconscionable. *Aviall*, 913 F. Supp. at 833 ("Aviall does not say what public policy is offended by the selection of an arbitrator who is an expert in the relevant field, is familiar with the highly technical facts of the case, and has a prior affiliation with both parties to the dispute."). Rather, Aviall relied solely on the fact that the parent dictated the arbitrator's selection. But, "procedural

unconscionability alone may not render a contract unreasonable on its face." *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 392 (E.D.N.Y. 2015); *see also Tsadilas v. Providian Nat'l Bank*, 13 A.D.3d 190, 191 (N.Y. App. Div. 1st Dep't 2004) ("Arbitration agreements are enforceable despite an inequality in bargaining power."). And, in any event, unlike Garrett's director, Su Ping Lu, Aviall was "fully aware" of the arbitration provisions to which it was agreeing. *Aviall*, 110 F.3d at 896.

Finally, *Aviall* was issued on *summary judgment*, after discovery and a review of the evidence, including "affidavits, deposition testimony and documentary exhibits submitted by both parties." 913 F. Supp. at 828. Here, to the contrary, there has been no discovery of Honeywell—we are at the pleading stage.

Honeywell's reliance on *Chemours Co. v. DowDuPont Inc.*, 2020 WL 1527783 (Del. Ch. Mar. 30, 2020) (appeal pending), is similarly misplaced. As with *Aviall*, *Chemours* involved a dispute over arbitration, specifically whether an arbitration delegation clause could be invalidated as being unconscionable. *Id.* at *11. The dispute was governed by Delaware, not New York, law. *Id.* at *12. And, as in *Aviall*, the plaintiff in *Chemours* sought to invalidate an arbitration clause on the sole basis of purported procedural unconscionability, which is insufficient under Delaware law. *Id.* at *14 ("Chemours does not articulate a substantive unconscionability argument . . . ."); *In re Emery-Watson*, 412 B.R. 670, 674 (Bankr. D. Del. 2009) (Delaware unconscionability law requires "an absence of meaningful choice ***and*** contract terms unreasonably favorable to one of the parties" (emphasis added) (citation omitted)). Under New York law, contracts can be "unenforceable on the ground of substantive unconscionability alone." *Gillman*, 73 N.Y.2d at 12. *Chemours*'s discussion of parent-subsidiary relationships was therefore dicta concerning Delaware corporate law, not a binding (or even persuasive) consideration of New York contract law.

B. The Fiduciary Duty And Corporate Waste Claims Should Not Be Dismissed

1. Garrett's Director, Aided And Abetted By Honeywell And Adamczyk, Breached Her Duty Of Care To Garrett

Garrett's claims for breaches of fiduciary duty and aiding and abetting breaches of fiduciary duty are premised on Su Ping Lu's breach of her duty of care as a pre-spin director of Garrett. Compl. ¶¶ 315, 324. Honeywell's sole argument as to the duty of care is its contention that Garrett's charter waives duty of care claims. Br. 13 n.4. However, Garrett's charter only exculpates its directors against "monetary damages." HON Ex. H, Article IX, Section 1. Although Delaware law permits the elimination of monetary damages for a director's breach of the duty of care, *see* 8 Del. Code Ann. tit. 8, § 102(b)(7), "[u]nder Delaware law, exculpatory provisions do not bar duty of care claims 'in remedial contexts.'" *London v. Tyrrell*, 2010 WL 877528, at *18 (Del. Ch. Mar. 11, 2010) (citation omitted), and Garrett's charter does not purport to do so. The Complaint asserts that the Indemnification Agreement is not enforceable, making Garrett's duty of care claim actionable under both Delaware law and Garrett's charter. Compl. (Prayer for Relief). Nor does the charter protect Honeywell or Adamczyk from Garrett's aiding and abetting claim. *In re BioClinica, Inc. S'holder Litig*., 2013 WL 5631233, at *11 (Del. Ch. Oct. 16, 2013) (stating that Delaware law "solely exculpates directors (as opposed to secondary actors)" and "an aider and abettor could be liable" even if a director were exculpated); *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 818, 838 (Del. Ch. 2011) ("Section[] 102(b)(7) . . . do[es] not protect aiders and abetters . . . .").

Honeywell's heavy reliance on *Anadarko* and its progeny is misplaced. Garrett does not dispute *Anadarko*'s holding that "a parent does not owe a fiduciary duty to its wholly owned subsidiary." 545 A.2d at 1174. *Anadarko*, however, does *not* vitiate the fiduciary duties owed by a subsidiary's director, such as Su Ping Lu, to the subsidiary itself—a limitation on the *Anadarko*

holding recognized by numerous courts. *See, e.g.*, *Superior Offshore Int'l, Inc. v. Schaefer*, 2012 WL 5879608, at *3 (S.D. Tex. Nov. 20, 2012) ("[C]ourts that have considered the *Anadarko* decision have concluded, based on persuasive analysis, that the holding should not be read so broadly as to mean that the directors of a wholly-owned subsidiary owe no duties *to the subsidiary itself* . . . ."); *In re Touch Am. Holdings, Inc.*, 401 B.R. 107, 129 (Bankr. D. Del. 2009) ("Later courts have rejected the overly broad reading of *Anadarko* …."); *In re Sw. Supermarkets, LLC*, 376 B.R. 281, 283 (Bankr. D. Ariz. 2007) ("The facts of *Anadarko* did not raise the issue of whether any fiduciary duty was owed directly to the subsidiary."); *In re Mirant Corp.*, 326 B.R. 646, 651 (N.D. Tex. 2005) (*Anadarko* "held that directors of a parent owed no fiduciary duty to prospective shareholders of the subsidiary prior to a spinoff, not that the subsidiary's directors owed no duty to the subsidiary"); *First Am. Corp. v. Al-Nahyan*, 17 F. Supp. 2d 10, 26 (D.D.C. 1998) (rejecting contention that *Anadarko* stands "for the proposition that a wholly-owned subsidiary's director's fiduciary duties flow only to the parent," which "overstates the 'narrow confines' of the court's holding"); *Wooley v. Lucksinger*, 61 So. 3d 507, 589, 591 (La. 2011) (recognizing that "[t]he *Anadarko* ruling has been criticized as having been extended beyond its original intent," and concluding that, "in light of the subsequent interpretation of *Anadarko* by several courts, . . . [it] believe[d] the Texas court would hold a wholly-owned subsidiary's directors owe a fiduciary duty to the subsidiary corporation itself").

Under Delaware law, "directors of a wholly-owned subsidiary," such as Lu, "owe the [subsidiary] fiduciary duties, just as they would any other corporation." *First Am. Corp.*, 17 F. Supp. 2d at 26; *accord Sw. Supermarkets*, 376 B.R. at 283 ("Delaware law does impose fiduciary duties on the officers and directors of a wholly owned subsidiary that run directly to the subsidiary itself . . . . It would be a startling and dramatic departure from settled law to conclude that officers

and directors do not owe any fiduciary duty to the corporation they serve."). For instance, in *Official Committee of Unsecured Creditors v. Meltzer*, 589 B.R. 6 (D. Me. 2018), the court held that notwithstanding *Anadarko*, the plaintiff had sufficiently pleaded a duty of care claim against directors of a solvent wholly-owned subsidiary based on an "alleged failure to obtain or to consider updated projections" before entering into a transaction. *Id.* at 28. Like the directors in *Meltzer*, Lu breached her fiduciary duties to Garrett by "(1) failing to inform herself regarding the implications of the Indemnification Agreement; (2) failing to inform herself regarding her purported reliance on the Solvency Opinion; and (3) entering into the Indemnification Agreement and causing Garrett's assumption thereof notwithstanding that such agreement is unconscionable and inhibits Plaintiffs' ability to transact business." Compl. ¶ 315; *see also* Compl. ¶¶ 77–87 (pleading that Lu approved the Indemnification Agreement based on an incomplete, three-week-old draft without consulting an independent legal counsel or financial advisor, and without ever reviewing the Indemnification Agreement on Garrett's behalf).[10]

By failing to "inform [herself], prior to [entering into the Indemnification Agreement and Assignment Agreement], of all material information reasonably available" to her, Lu breached the duty of care. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 367 (Del. 1993) (citation omitted),

---

[10] Honeywell's cited cases are inapposite. *Aviall* and *Chemours*, *see supra* Section I.A.2, did not involve a fiduciary duty claim or address a director's duty of care to a wholly-owned subsidiary. *See Aviall*, 913 F. Supp. 826; *Chemours*, 2020 WL 1527783. Indeed, the plaintiff in *Aviall* sought to disqualify a firm from serving as an arbitrator, 913 F. Supp. at 828, not hold a former director responsible for breaches of fiduciary duty. Honeywell's reliance on *Trenwick America Litigation Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168 (Del. Ch. 2006), (Br. 9–13), is also misplaced. *Trenwick* involved arms-length mergers with third parties. *Trenwick*, 906 A.2d at 172. The court in *Trenwick* rejected the notion that the board of the wholly-owned subsidiary had a duty to second-guess the decision of the parent's board to enter into those arms-length mergers. *Id.* at 201–03. This is irrelevant to Lu's failure to inform herself of contracts entered into directly between Garrett (for which she was President and sole director) and Honeywell. Compl. ¶ 315

modified on other grounds, 636 A.2d 956 (Del 1994). Garrett has also sufficiently pleaded that Honeywell and Adamczyk knowingly participated in Lu's breaches. *See, e.g.*, Compl. ¶¶ 3, 64, 77, 81, 85, 91, 324; *Universal Studios Inc. v. Viacom Inc.*, 705 A.2d 579, 594 (Del. Ch. 1997) (the parent's "control of [the subsidiaries] and its determination to merge the two with [certain] knowledge . . . constitutes aiding and abetting").[11]

2. The Indemnification Agreement Is Unenforceable Corporate Waste

The doctrine of corporate waste "condemns as wasteful a transaction," like the Indemnification Agreement, "that is on terms so disparate that no reasonable person acting in good faith could conclude the transaction was in the corporation's best interest." *Sample v. Morgan*, 914 A.2d 647, 669–70 (Del. Ch. 2007). "[T]o pass go at the complaint stage" as to a claim of corporate waste, a plaintiff need only "point[] to economic terms so one-sided as to create an inference that no person acting in a good faith pursuit of the corporation's interests could have approved the terms." *Id.* at 670. The Complaint is replete with such allegations, *see, e.g.*, Compl. ¶¶ 1, 3, 74–75, 94–98, 141–44, as discussed in connection with Garrett's unconscionability claim, *see supra* Section I.A. So long as the "pled facts support an inference of waste, . . . full discovery into the background of the transaction is permitted." *Sample*, 914 A.2d at 670. Although Honeywell notes it was Garrett's parent at the time of the spin, it does not explain why that fact supports dismissal. Honeywell's other arguments fail for the same reasons discussed above as to unconscionability. *See supra* Section I.A.[12]

---

[11] Honeywell does not address Garrett's aiding and abetting claim other than to argue that it requires a viable breach of fiduciary duty claim. Br. 13.

[12] Honeywell's intent in emphasizing that waste claims are "classically derivative" is perplexing, as derivative claims "belong[] to the Company," i.e., Garrett. *See Reith v. Lichtenstein*, 2019 WL 2714065, at *12 n.91 (Del. Ch. June 28, 2019).

C. The Lack Of Consideration Claim Should Not Be Dismissed

The Indemnification Agreement is also void and unenforceable because the original indemnitor, Honeywell ASASCO LLC, received no consideration. Compl. ¶¶ 75, 308. Honeywell does not address that allegation at all. Instead, Honeywell contends that *Garrett*, which received an assignment of the Indemnification Agreement, purportedly received consideration as part of the larger spin transaction. Br. 16. This ignores that "a void contract cannot be assigned." *Am. Transit Ins. Co. v. Miranda*, 42 Misc. 3d 1212(A), at *1 (N.Y. Sup. Ct. N.Y. Cty. 2013). The Indemnification Agreement, which was void for lack of consideration at the time it was assigned to Garrett, cannot be supported by consideration that Garrett later received. *See Spencer Blvd., LLC v. Eustache*, 906 25 Misc. 3d 1239(A), at *2 (N.Y. Sup. Ct. Kings Cty. 2009) ("[A]ssignee[] would be divested of any rights to sue on the void contract since an assignee can only acquire whatever rights the assignor possessed at the time of assignment.").

II. HONEYWELL IS NOT ENTITLED TO INDEMNIFICATION

A. The Complaint States A Claim That Honeywell's Settlements Contain A Non-Indemnifiable Punitive Damages Component

As Honeywell concedes (Br. 19), New York law "clearly precludes indemnification for punitive damages." *Soto v. State Farm Ins. Co.*, 83 N.Y.2d 718, 724 (1994). When Honeywell settles a claim seeking punitive damages, that settlement has a punitive component that cannot be indemnified. Honeywell, as indemnitee, has the obligation to apportion that settlement between indemnifiable and non-indemnifiable amounts. Honeywell has not done this for any of its settlements since the Indemnification Agreement went into effect.

1. Punitive Damages Are Not Indemnifiable

The prohibition on indemnification for punitive damages is not based on the nature of the act, i.e., whether it is criminal, illegal, or intended to cause harm. Rather, it is based on the nature

of the remedy, i.e., "the punitive nature of the award." *Home Ins. Co. v. Am. Home Prods. Corp.*, 75 N.Y.2d 196, 201 (1990). Permitting indemnification would "defeat[] the purpose of punitive damages, which is to punish and deter others." *Biondi v. Beekman Hill House Apartment Corp.*, 94 N.Y.2d 659, 663 (2000) (citation omitted). This is exemplified by the distinction between indemnification for compensatory and punitive damages arising from grossly negligent conduct. Although "indemnity for compensatory damages would be allowable," even for that *same grossly negligent conduct*, "indemnity for [punitive damages] . . . would be barred." *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 400 (1981).

Honeywell nonetheless mistakenly argues (Br. 19) that it is entitled to indemnification for punitive damages because its liability arises from its past misconduct. But the cases Honeywell cites—primarily *Feuer v. Menkes Feuer, Inc.*, 8 A.D.2d 294 (N.Y. App. Div. 1st Dep't 1959)—have nothing to do with whether punitive damages are indemnifiable under New York law and public policy.[13] They instead address the different issue of whether *non-punitive* civil remedies for illegal conduct are indemnifiable. *See id.* at 297–98. Moreover, *Feuer* involved a completely different situation—an agreement among wrongdoers to share liability arising from their own wrongdoing. *Id.* at 295–96. Here, to the contrary, Honeywell seeks to foist liability for its wrongdoing on Garrett, an innocent party.[14]

---

[13] Honeywell also cites *Brauer v. Central Trust Co.*, 77 A.D.2d 239 (N.Y. App. Div. 4th Dep't 1980), which also does not address punitive damages and merely cites *Feuer* in dicta. *See id.* at 246.

[14] None of Honeywell's other cited authorities support the bold relief Honeywell seeks—allowing the sole wrongdoer to escape punishment by shifting that punishment to a wholly-innocent party. *Katun Corp. v. Clarke*, 484 F.3d 972 (8th Cir. 2007), held that a wrongdoer (a former Katun shareholder) could not invalidate a settlement agreement requiring him to indemnify *an innocent third-party acquirer* for the consequences of criminal acts that the wrongdoer and others engaged in prior to the acquisition. *Id.* at 978 ("It does not clearly offend public policy to permit a purchaser to protect itself from the consequences of actions, legal or

Feuer addresses a limitation on the prohibition of indemnification of illegal acts—not the separate prohibition against indemnification of punitive damages. In *Feuer*, the government alleged that a family business and its principals had committed customs violations. *Id*. at 296–97. The government sought a "civil recovery" under 19 U.S.C. § 1592, *id.*, which was a remedial statute. *See United States v. Alcatex, Inc.*, 328 F. Supp. 129, 133 (S.D.N.Y. 1971).[15] Before the allegations were resolved, one member of the family (Charles) left the business and obtained an indemnification agreement from the business and the other family members. *Feuer*, 8 A.D.2d at 296. Charles later settled with the government for $3300 and sought indemnification. *Id.* at 297. The indemnitors refused to pay, arguing that although Charles had paid to settle civil claims, his conduct was not indemnifiable because it could also have given rise to liability under a criminal statute. *Id.* (citing 18 U.S.C § 542). The court disagreed, holding that "one may make an agreement to be indemnified or to indemnify with respect to a crime or illegal act which occurred prior to the making of the agreement." *Id.* at 297–98. In so holding, the court did *not* adopt the rule that Honeywell advocates, under which a party can be indemnified for punitive damages relating to past misconduct.

---

illegal, taken prior to its acquisition of the company."). Similarly, in *Oxy USA, Inc. v. Southwestern Energy Production Co.*, 161 S.W.3d 277 (Tex. App. 2005), the court refused to invalidate indemnity obligations of a party whose intentional misconduct "exposed" the indemnitee to liability. *Id.* at 287 ("The public policy goal is especially inapplicable because . . . part of [the indemnity contract's] rationale . . . lies in the misconduct of the indemnitor.").

[15] *See also One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972) (holding that "monetary penalty" imposed by companion statute was "remedial rather than punitive"). Note that 19 U.S.C. § 1592 was amended substantially in 1978 to proscribe "punishable" conduct. *See* Pub. L. 95–410, title I, § 110(a), Oct. 3, 1978, 92 Stat. 893. Those provisions did not exist when *Feuer* was decided. *See* 8 A.D.2d at 296 n.1 (quoting § 1592 as in effect in 1959).

New York law has long recognized that punitive damages are never indemnifiable—whether before or after the conduct occurs—because, by definition, the purpose of punitive damages is to impose a punishment on the *actual wrongdoer*. Indeed, the Southern District of New York in *Pfizer, Inc. v. Stryker Corp.*, 348 F. Supp. 2d 131 (S.D.N.Y. 2004), found that "Pfizer [was] not entitled to indemnification for any losses . . . resulting from a punitive damage award," notwithstanding that the culpable conduct occurred prior to the indemnification agreement. *Id.* at 137, 144–45 (culpable conduct occurring in 1996 and 1997, and indemnification agreement entered into in 1998). There is no such policy interest as to ordinary civil penalties, including those in *Feuer*. *See* 8 A.D.2d at 295–97.

Honeywell's reliance on *Parker Hannifin Corp. v. Standard Motor Products, Inc.*, 2019 WL 5425242 (N.D. Ohio Oct. 23, 2019), decided under Ohio law, is misplaced. Although both Ohio and New York have a public policy against indemnification for punitive damages, the focus of their policy objectives is not the same. Under Ohio law, the public policy focuses on "the deterrent effect of punitive damages," which "would be diminished if tortfeasors can be indemnified against them." *Id.* at *20. Under New York law, the public policy emphasizes the retributive value of punitive damages, which would be eviscerated if indemnification were permitted. *Goldfarb*, 53 N.Y.2d at 400 ("Such damages are, as the name implies, a punishment . . . . [T]o allow insurance coverage for such damages 'is totally to defeat the purpose of punitive damages'" (citation omitted)); *Home Ins. Co.*, 75 N.Y.2d at 201 ("It is the punitive nature of the award . . . which calls for the application of New York public policy."). The *Parker* court held that the defendant had cited "no Ohio case law for the proposition that the policy objective to 'punish' wrongdoers is a sufficient basis, standing alone, to invalidate a carefully negotiated indemnification provision relating to past conduct only." 2019 WL 5425242, at *22. Whatever

the merits of that holding as a matter of Ohio law, it is inapplicable here because the New York Court of Appeals has held that even in a context where "the deterrent value of the rule against indemnification [of punitive damages] may be somewhat attenuated . . . , the rule's equally ***important goal of preserving the condemnatory and retributive character of punitive damage awards remains clear and undiminished***." *Soto*, 83 N.Y.2d at 724 (emphasis added). The notion that the retributive value of punitive damages can be cast aside is untenable under New York public policy and Court of Appeals precedent.[16]

2. Honeywell's Settlements Contain A Non-Indemnifiable Punitive Damages Component

Honeywell's argument that Garrett has not identified a specific punitive damage award it has been asked to pay (Br. 3, 18, 21) is not a pleading deficiency, but a consequence of Honeywell's own settlement-driven litigation strategy. Compl. ¶¶ 212–13, 225. Garrett pleads this settlement-heavy litigation strategy (1) is fueled by a fear of punitive damages and (2) results in settlements that contain a punitive component in every case in which punitive damages are sought. *See, e.g.*, Compl. ¶¶ 208, 223, 241, 252, 256. Although Honeywell may disagree, that

---

[16] Honeywell's reliance on *Loscher v. Hudson*, 182 P.3d 25 (Kan. Ct. App. 2008), is also misplaced. *Loscher* concerned whether to enforce a separation agreement that would have required the husband to indemnify his wife for amounts that were part of wife's restitution. *Id.* at 33. The court noted that the statute under which the restitution was imposed considered restitution not "a means of punishment," but rather a "means of recouping . . . personal and financial losses." *Id.* at 35–36. As described, *see supra* Section II.A.1, the policy behind punitive damages is to punish. *See*, *e.g.*, *Rental & Mgmt. Assocs., Inc. v. Hartford Ins. Co.*, 155 Misc. 2d 547, 550 (N.Y. Sup. Ct. N.Y. Cty. 1992) ("Punitive damages are allowed to a plaintiff not because of any damages suffered by the plaintiff, but as the expression of the condemnation of the community, a kind of hybrid of outrage and imposition of a criminal fine."), *aff'd*, 206 A.D.2d 288 (N.Y. App. Div. 1st Dep't 1994); *accord Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 316–17 (1994) ("Punitive damages are not intended to compensate or reimburse the plaintiff.").

does not entitle it to dismissal. *NAS Elecs., Inc. v. Transtech Elecs. PTE Ltd.*, 262 F. Supp. 2d 134, 147 n.2 (S.D.N.Y. 2003) ("On a motion to dismiss, the allegations in the Complaint are accepted as true" and "all reasonable inferences are drawn in the plaintiffs' favor."). The key facts pleaded are as follows:

- Juries have returned verdicts imposing multi-million-dollar punitive damage awards against Honeywell, finding evidence of "malice or oppression" and that Honeywell was acting "in reckless disregard of the consequences of its actions." Compl. ¶¶ 215–23.[17] These verdicts provide substantial leverage for plaintiffs in settlement negotiations. Compl. ¶ 222.

- There is considerable evidence available against Honeywell to support punitive damages, such as an infamous letter by a Honeywell executive stating "if you have enjoyed a good life while working with asbestos products why not die from it," and an internal memorandum reflecting the hope that certain documents would "quiet the fear" of the dangers of asbestos disclosed by a magazine article. Compl. ¶¶ 240–50. Honeywell has also admitted under oath that it was on notice of the dangers of asbestos by 1968—more than thirty years before it stopped using asbestos in its friction products. Compl. ¶¶ 26, 245.

- The facts underlying the punitive verdicts are numerous, indisputable and applicable in all cases against Honeywell. Compl. ¶¶ 239–50.

- Honeywell has decades of adverse rulings against it that reflect its punitive risk. Compl. ¶ 251.

- Honeywell has admitted that threats of punitive damages "are real," that they "inflate settlement values," that fear of punitive damages "is a very powerful factor in encouraging settlements," and that "staggering punitive damages verdicts have occasionally been awarded." Compl. ¶ 252.

[17] In the two recent punitive verdicts against Honeywell, the punitive component of the verdicts exceeded the compensatory component. Compl. ¶ 224 (the *Thomas* verdict with $10 million in punitive damages and $1.6 million in compensatory damages; the *Phillips* verdict with $3.5 million in punitive damages and $2.4 million in compensatory damages).

- Honeywell has a heavy volume of claims asserted against it stemming from Madison County, Illinois, where the risk of punitive damages is even greater.[18] Compl. ¶¶ 262–64.

- It is universally acknowledged that settlement amounts incorporate the risk of punitive damages. Compl. ¶¶ 253–57.

These facts more than support the plausible inference that Honeywell's settlements contain a punitive component in every case in which punitive damages are sought.

In addition to the above, and perhaps most compelling, Honeywell's settlement history, considered in light of events that increase punitive risk, illustrates the tangible impact of punitive damages on its settlements. Compl. ¶¶ 226–36. ***First***, in July 2015, the New York Appellate Division, First Department confirmed the end of nearly two decades of deferring punitive damages in the New York City Asbestos Litigation docket. Compl. ¶¶ 227, 230. [redacted] Compl. ¶¶ 232–33. [redacted] Compl. ¶ 232. [redacted] Compl. ¶¶ 234–35.

[18] Madison County, Illinois has been referred to as "a Mecca for asbestos lawsuits," "a national clearinghouse for asbestos malignancy claims," and "the epicenter of asbestos litigation." Compl. ¶ 262. Substantial punitive damage awards have been awarded in asbestos cases in Madison County, including a $200 million award in 2003. Compl. ¶ 262.

[redacted] Compl. ¶ 234. These events, and the palpable impact they had on Honeywell's settlements, confirm that punitive damages not only factor into Honeywell's settlements, but they are a substantial component of its settlements. Compl. ¶ 236.

Honeywell is not entitled to indemnification for the punitive component of its settlements. *See Am. States Ins. Co. v. Synod of the Russ. Orthodox Church Outside of Russ.*, 183 F. App'x 401, 403 (5th Cir. 2004) ("[U]nder New York law, an insurer cannot be made to indemnify an insured ***for any part of a settlement award that represents punitive damages***." (emphasis added)). Where a claimant seeks both compensatory and punitive damages, "some portion of the settlement of that case likely represent[s] potential punitive damages," *id.* at 404, and consequently "there is a factual issue of the apportionment between [indemnifiable] and [non-indemnifiable] damages," *Nat'l Union Fire Ins. Co. of Pittsburgh v. Ambassador Grp., Inc.*, 157 A.D.2d 293, 299 (N.Y. App. Div. 1st Dep't 1990); *accord STB Invs. Corp. v. Sterling & Sterling, Inc.*, 140 A.D.3d 449, 451 (N.Y. App. Div. 1st Dep't 2016) ("[O]nce damages are awarded or a settlement entered, [plaintiff] may . . . be entitled to discovery regarding whether the awards are punitive in nature, and thus not indemnifiable."); *Ansonia Assocs. Ltd. P'ship v. Pub. Serv. Mut. Ins. Co.*, 180 Misc. 2d 638, 641 (N.Y. Sup. Ct. N.Y. Cty. 1998), *aff'd*, 257 A.D.2d 84 (N.Y. App. Div. 1st Dep't 1999). In the analogous context of reinsurance, the Court of Appeals has similarly held that a settlement between an insurer and its insured must be allocated to determine what portion of the settlement was attributable to non-indemnifiable bad faith claims. *See United States Fid. & Guar. Co. v. Am. Re-Ins. Co.*, 20 N.Y.3d 407, 425 (2013). Honeywell has undertaken no allocation for the asbestos liability for which it has sought payment from Garrett.

Honeywell asserts that indemnification is permitted where there is a settlement without an admission of wrongdoing. *See* Br. 22. That is both legally and factually incorrect. ***First***, there have been multiple findings of wrongdoing against Honeywell. Compl. ¶¶ 216–20. ***Second***, New York law does not permit Honeywell to evade the public policy barring indemnification for intentional misconduct and punitive damages simply by settling in an effort to avoid another jury imposing such damages.

Honeywell's reliance on *Gibbs-Alfano v. Burton*, 281 F.3d 12 (2d Cir. 2002), is mistaken. *Gibbs* did not involve indemnity for punitive damages, but rather the separate bar on indemnity for intentional misconduct. *Id.* at 21. In *Gibbs*, the indemnitees had never been found by any court to have engaged in any wrongdoing. *Id.* Consequently, the court held that in the absence of a prior judgment "of intentional conduct on the part of the [indemnitees]," public policy did not bar indemnification for alleged intentional misconduct. *Id.* Here, unlike in *Gibbs*, juries *have found* Honeywell liable for punitive damages based on its "malice or oppression" and "reckless disregard of the consequences of its actions" through its knowing and intentional use of asbestos. *See, e.g.*, Compl. ¶¶ 216–20.[19]

Moreover, *Gibbs* is distinguishable for the additional reason that the indemnitor trying to escape its indemnity obligations there was the primary wrongdoer. The indemnitor in *Gibbs*, a boat club, had been sued for discrimination, and the indemnitees, town councilmembers, were sued for allegedly failing to investigate. *Gibbs*, 281 F.3d at 14. The court held that "the settling party seeking indemnification was essentially charged with nonfeasance arising from a more culpable

---

[19] The indemnitee in *In re Residential Capital, LLC*, 524 B.R. 563, 596 (Bankr. S.D.N.Y. 2015), cited by Honeywell (Br. 22), also was never found liable for intentional misconduct. *Residential Capital*, 524 B.R. at 596. By contrast, at least two juries have awarded punitive damages against Honeywell.

party's malfeasance," and thus indemnification was permissible. *Id.* at 19, 23 (the indemnitees' "duty to investigate would never have been invoked but for the [indemnitor's] malfeasance"). Here, Garrett, as indemnitor, is in no way the "more culpable party"—to the contrary, Honeywell, the indemnitee, is the *sole wrongdoer*. While Honeywell tries to distance itself from this wrongdoing by stating that the actual wrongdoer was "one of Honeywell's corporate predecessors" (Br. 3, 4, 20), Bendix was acquired by the Allied Corporation in 1982—nineteen years before Honeywell stopped using asbestos in its friction products. Compl. ¶¶ 26, 27. The Allied Corporation thereafter merged with the Signal Companies (forming AlliedSignal), and in 1999, AlliedSignal acquired Honeywell. Compl. ¶¶ 28–29. Although the Honeywell name was retained for brand recognition, the continuing corporation was AlliedSignal in all respects. Compl. ¶¶ 29–30.

B. The Complaint States A Claim As To Honeywell's Failure To Establish The Prerequisites For Indemnification

As an indemnitee under New York law, Honeywell is "required to prove the objective reasonableness of [its] decision to settle and [each] settlement amount," that the settlement was in good faith, and that it would or could have been liable on the underlying claims. *Deutsche Bank Tr. Co. of Ams. v. Tri-Links Inv. Tr.*, 43 A.D.3d 56, 63, 67, 69 n.11 (N.Y. App. Div. 1st Dep't 2007).[20] Honeywell refers to these obligations as "proposed background rules" applicable only if advance notice of a settlement is required but not provided. Br. 24. That is wrong. Good faith and reasonableness are fundamental prerequisites to obtaining indemnification under New York

[20] "Relevant factors [in assessing reasonableness] include the monetary value of plaintiffs' injuries, [the] potential exposure to liability, the costs and attorney's fees saved by settling the case, and any other facts that might have affected plaintiffs' potential recovery." *Hendershot v. Consol. Rail Corp.*, 1998 WL 240495, at *4 (S.D.N.Y. May 12, 1998).

law, *regardless* of whether notice is required or provided. Honeywell misstates the holding in *Feuer* (Br. 24), which expressly recognizes that reasonableness and good faith must be proven *regardless* of whether notice is given. *Compare* 8 A.D.2d at 298–99 (stating that "[i]f such notice is given, . . . the indemnitor is conclusively bound by any reasonable good faith settlement"), *with id.* at 299 (stating that "if the indemnitee fails to notify the indemnitor, . . . he must establish . . . that there was no good defense to the liability" and that "the amount paid . . . was a reasonable amount").[21]

Honeywell asserts that because it granted itself sole discretion in the Indemnification Agreement to settle claims, it need not establish that its settlements were reasonable, entered into in good faith, or that it would have or could have been liable on the underlying claims. Br. 23–25. But Honeywell's own cited authorities hold precisely the opposite—the settlement must be reasonable and in good faith even where there is sole discretion. *See Star Ins. Co. v. A&J Constr. of N.Y., Inc.*, 2017 WL 6568061, at *5 (S.D.N.Y. Dec. 22, 2017) (where indemnity agreement had sole discretion clause, settlements must be "scrutinized … for good faith and reasonableness as to the amount paid"); *Int'l Fid. Ins. Co. v. Spadafina*, 192 A.D.2d 637, 638–39 (N.Y. App. Div. 2d Dep't 1993) (same). The agreements in both *Star* and *Spadafina* contained not only "sole discretion" clauses, but also clauses stating that "an itemized statement of Losses … shall be prima facie evidence of the fact and extent of the liability." *Star*, 2017 WL 6568061, at *2; *see also*

---

[21] Notice *is* relevant for another purpose. Whereas a party that provides notice need only prove *potential* liability, *Leon Holdings, LLC v. Northville Indus. Corp.*, 134 A.D.3d 910, 912 (N.Y. App. Div. 2d Dep't 2015), a party that does not provide notice, like Honeywell in this case, "must establish that [it] would have been [actually] liable and that there was no good defense to the liability," *Deutsche Bank Tr. Co. of Ams. v. Tri-Links Inv. Tr.*, 74 A.D.3d 32, 39 (N.Y. App. Div. 1st Dep't 2010) (first alteration in original) (citation omitted). Honeywell has not satisfied this prerequisite to indemnification either.

Spadafina, 192 A.D.2d at 639. Those clauses are absent here, and in fact, Honeywell has refused to provide anything even close to an itemized statement of losses.[22] Moreover, both these cases were decided at summary judgment after evidence concerning the settlements was submitted to the court.

Honeywell's argument was also recently rejected by another federal court, which found that a contract granting "sole discretion to settle without notice" did "not grant [the indemnitee] sole discretion to determine the reasonableness of the [s]ettlements." *In re RFC & RESCAP Liquidating Tr. Action*, 332 F. Supp. 3d 1101, 1155–56 (D. Minn. 2018) ("[A] party seeking indemnity for a settlement must show that the settlement was reasonable. Nothing in the . . . [sole discretion provision] … overrides this principle."). The *RFC* court held that the "party seeking indemnity" had "the burden of proving that the [s]ettlements were reasonable." *Id.* at 1156. The "sole discretion" provision merely addresses control over the underlying litigation and does not alter what is required for an indemnitee to enforce its indemnification claims under New York law.

Honeywell's remaining arguments are mistaken and misleading. In arguing that the Complaint "rest[s] on rank speculation" because it does not identify specific evidence of bad faith or unreasonable settlements (Br. 3, 25), Honeywell is seeking to blame Garrett for a problem of Honeywell's own creation. Honeywell and the agreement it drafted are the reason why Garrett has been left in the dark as to Honeywell's settlements. *See, e.g.*, Compl. ¶¶ 140–42, 259–60. And Honeywell's argument (Br. 25) that its superficial retention of 10% of the liability somehow

---

[22] *Republic Insurance Co. v. Real Development Co.*, 161 A.D.2d 189 (N.Y. App. Div. 1st Dep't 1990), cited by Honeywell (Br. 24), is also irrelevant. The court there rejected the argument that indemnitors had an "impl[ied] . . . right" to notice where they "were much more familiar with the underlying obligations." *Id.* at 189–90. Here, Honeywell controls the litigations, is responsible for the liability, and has kept Garrett in the dark.

establishes good faith or reasonableness is highly misleading, considering Honeywell entirely recoups this 10% through tax benefits, as the Complaint pleads. Compl. ¶ 144.

III. HONEYWELL IMPROPERLY WITHHELD CLAIMS INFORMATION AND HAS ACTED IN BAD FAITH

Honeywell materially breached the Indemnification Agreement by failing to provide information Garrett needs as an SEC registrant, as required by Section 2.2(i) of the Indemnification Agreement. *See* Compl. ¶¶ 150–98, 372. Honeywell does not dispute that it materially breached the Indemnification Agreement, but rather argues that (1) the claim is "moot" because Garrett was eventually able to clear its material weakness and (2) Garrett does not sufficiently allege damages. Br. 25–26. Honeywell is wrong on both issues.

First, Garrett need not assert a *continuing* breach. Garrett is entitled to be compensated for the harm Honeywell's material breach caused, regardless of whether the breach is continuing. *See, e.g.*, *Wiener v. Unumprovident Corp.*, 202 F. Supp. 2d 116, 125 (S.D.N.Y. 2002) (breach of contract claim was not moot because the plaintiff had not been compensated fully for damages suffered). Honeywell cites no authority to the contrary, and does not dispute Garrett's allegation that Honeywell materially breached the Indemnification Agreement from the time of the spin until Garrett cleared its material weakness a year later.

Second, Garrett has sufficiently pleaded damages. Garrett need only plead the "factual content that allows the court to draw the reasonable inference" that it "suffered damages as a result of the breach." *Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research*, 2016 WL 205445, at *7 (S.D.N.Y. Jan. 15, 2016) (citation omitted). Garrett need not "specify the measure of damages" or plead "proof of causation" "at this stage." *Id.* (citation omitted) ("The precise magnitude of damages proximately caused by the breach is properly evaluated at the summary judgment stage, not the motion to dismiss stage."). The Complaint satisfies this standard

by alleging that Honeywell's breach caused Garrett's material weakness, resulting in substantial damages. Compl. ¶¶ 177–79, 373, 375. In any event, nominal damages are always available in breach of contract actions, *Luitpold Pharms., Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie*, 784 F.3d 78, 87 (2d Cir. 2015) (stating nominal damages are available even if claims of substantial damages are speculative), and "satisfy the damages element of a breach of contract claim," *Baskin-Robbins Inc. v. S & N Prinja, Inc.*, 78 F. Supp. 2d 226, 232 (S.D.N.Y. 1999).[23]

Finally, the Complaint asserts that Honeywell's material breach excuses Garrett from further performance under the Indemnification Agreement. Compl. (Prayer for Relief). Because Honeywell's motion does not dispute that Honeywell materially breached the Indemnification Agreement, Garrett maintains that it is excused from performance under the Indemnification Agreement.

Garrett's claim for breach of the implied covenant of good faith and fair dealing is not duplicative of its breach of contract claim. The breach of contract claim is premised on Honeywell's failure to provide documents related to the underlying asbestos liability, Compl. ¶ 372, while the good faith and fair dealing claim is based on (1) Honeywell's refusal to provide Garrett with basic documents relating to the Indemnification Agreement and whether it was

---

[23] As part of its damages, Garrett also seeks fees and expenses in connection with enforcing its rights and interpreting the Indemnification Agreement's terms. Compl. ¶ 375. Section 4.11 allows a prevailing party to recover fees incurred in enforcing or interpreting the contract. Compl. Ex. A (Indemnification Agreement) § 4.11. The Court is clearly being asked to interpret the Indemnification Agreement in this proceeding.

appropriately authorized,[24] and (2) the deficient and unworkable data set Honeywell provided.[25] Compl. ¶¶ 170, 175–76, 191–97, 389–90; *see MBIA Ins. Co. v. GMAC Mortg. LLC*, 30 Misc. 3d 856, 865 (N.Y. Sup. Ct. N.Y. Cty. Dec. 14, 2010) (claims are not duplicative where they "are not predicated on contractual terms that form the basis of the breach of contract claim").[26]

CONCLUSION

Garrett respectfully requests the Court deny Honeywell's Motion to Dismiss in its entirety.

---

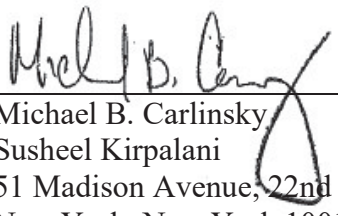
[24] For instance, for many months Honeywell failed to provide Garrett with the Assignment Agreement and other documents requested by Garrett regarding the spin-off and its own corporate governance, including certain schedules to documents related to the spin and Garrett Board of Directors resolutions. Compl. ¶¶ 170, 175.

[25] Garrett's breach of contract claim is about its entitlement to that information as an SEC registrant. Garrett's good faith and fair dealing claim, in contrast, is about what obligation Honeywell has to deliver a complete and accurate set of data and to deliver that data in a usable format, i.e., its implied obligation under the contract to exercise good faith in delivering any of the information required under Section 2.2(i) of the Indemnification Agreement. Garrett's good faith and fair dealing claim "depends on facts in addition to those that might support a breach of contract claim," and thus "is not duplicative of the breach of contract claim." *Fantozzi v. Axsys Techs., Inc.*, 2007 WL 2454109, at *3 (S.D.N.Y. Aug. 20, 2007). This is a prime example of "injuring Plaintiffs' right to receive 'the fruits of the contract'" even if Honeywell was "fulfill[ing] [its] contractual obligations." *Burton v. Label, LLC*, 344 F. Supp. 3d 680, 697 (S.D.N.Y. 2018) (citations omitted).

[26] In any event, contrary to Honeywell's assertions that the good faith and fair dealing claim should be dismissed as duplicative (Br. 26 n.7), it is well established that "a party may plead a claim for breach of the covenant of good faith and fair dealing in the alternative" where "the existence or meaning of a contract is in doubt." *Hard Rock Cafe Int'l, (USA), Inc. v. Hard Rock Hotel Holdings, LLC*, 808 F. Supp. 2d 552, 567 (S.D.N.Y. 2011).

Dated: New York, New York
November 12, 2020

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: 

Michael B. Carlinsky
Susheel Kirpalani
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000
michaelcarlinsky@quinnemanuel.com
susheelkirpalani@quinnemanuel.com

Matthew Scheck
865 S. Figueroa St.
Los Angeles, CA 90017
(213) 443-3000
matthewscheck@quinnemanuel.com

Attorneys for Plaintiffs Garrett Motion Inc. and Garrett ASASCO Inc.