IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRUCE KULP,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. _________
	§	
v.	§	
	§	
GAMESTOP CORP.,	§	**JURY TRIAL DEMANDED**
	§	
Defendant.	§	

PLAINTIFF BRUCE KULP'S ORIGINAL COMPLAINT

Plaintiff Bruce Kulp files this Original Complaint complaining of Defendant GameStop Corp., and in support would respectfully show the Court as follows:

SUMMARY

1. GameStop Corporation fired Bruce Kulp for trying to do the right thing. In June 2020, Kulp, GameStop's Senior Vice President of Supply Chain, learned that UPS was terminating its shipping contract with GameStop and that replacing that contract would have a material impact on GameStop's earnings. Kulp repeatedly attempted to raise these concerns with his supervisor, GameStop Executive Vice President Chris Homeister. Homeister, however, attempted to silence Kulp and told him to "re-run the numbers." When Kulp attempted to raise these issues with GameStop's Board of Directors, GameStop fired him. The failure to report the loss of the UPS

contract likely had a material effect on GameStop's investors and bondholders, including those holding short positions. GameStop's conduct constituted unlawful retaliation under the Sarbanes Oxley Act, for which Kulp seeks redress in this case.

PARTIES

2. Plaintiff Kulp is a Texas resident. From 2010 to 2020 Kulp was the Senior Vice President of Supply Chain for GameStop.

3. Defendant GameStop Corp. is a Delaware corporation headquartered in Grapevine, Texas. GameStop may be served with process through its registered agent CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136.

JURISDICTION AND VENUE

4. Subject matter jurisdiction is proper under 28 U.S.C. § 1331 and the Sarbanes Oxley Act "kick-out" provision of 18 U.S.C. § 1514A (b) (1)(B), which provides that, if the Secretary of Labor has not issued a final decision within 180 days of filing of the complaint with the Secretary of Labor and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such action without regard to the amount in controversy.

5. Plaintiff Kulp filed a Sarbanes-Oxley complaint with the Occupational Safety and Health Administration ("OSHA") against GameStop in accordance with 20 C.F.R. § 1880 et. seq. on March 9, 2020, within 180 days of his unlawful termination. See Exhibit 1. Plaintiff Kulp was interviewed by OSHA investigator Achieng Warambo on May 27, 2020. Plaintiff Kulp has provided Investigator Warambo all of the materials that she has requested. The Secretary of Labor has not yet reached a final decision. Thus, the Complaint is timely and Kulp has exhausted his administrative remedies.

6. This Court has personal jurisdiction and venue over GameStop because it has engaged in acts giving rise to this controversy in this district.

FACTS

A. Kulp Is a Valued GameStop Employee.

7. GameStop hired Plaintiff Kulp in June 2010 to be its Senior Vice President of Supply Chain based on his management experience in supply chain, procurement, and operations.

8. During his time at GameStop, Kulp brought tremendous value to GameStop. For example, Kulp implemented the 181,000 sq. ft. Refurbishment Operations Center (ROC) which drives a large portion of the company's profitability through the pre-owned business. He proposed and implemented GameStop's pre-owned tech business, which sold refurbished technology products, like iPods and later iPhones, and which turned into a 9 figure

business with substantial margins. Under Kulp's leadership, GameStop dramatically cut its shipping and shrinkage costs and implemented its first Asian sourcing and vendor direct programs, which significantly increased GameStop's margins on accessories. He proposed, negotiated and successfully implemented the 635,000 sq. ft. Shepherdsville Distribution Center which was needed to increase capacity and decrease costs for the GameStop's recently acquired Think Geek business.

9. In May 2013, GameStop and Kulp entered into an executive agreement as an incentive to retain Kulp as Senior Vice President – Supply Chain. This agreement, among other things, prohibits GameStop from paying Kulp a base salary of less than $325,000.

10. Also in 2013, Kulp successfully negotiated a deal on GameStop's behalf for UPS to provide the bulk of GameStop's shipping. Over time, GameStop's business with UPS increased, and the terms that UPS offered GameStop became more favorable. Indeed, UPS came to handle nearly all of GameStop's shipping. But while UPS's financial terms were very favorable to GameStop, relying on one shipper created a major risk for the company, as GameStop became increasingly dependent on UPS. If UPS were ever to terminate its relationship with GameStop, GameStop's shipping costs would increase dramatically. In 2018, Kulp made GameStop's internal auditors aware of this risk.

11. In 2018, Kulp received a substantial retention bonus only awarded to select executives and leaders, highlighting his importance and the contribution he made to the Company. Until 2020, Kulp received glowing performance reviews.

B. GameStop Attempts to Silence Kulp When he Raises the Financial Impact of Losing the UPS Contract.

12. In early 2020, GameStop was experiencing severe financial problems, which led rating agencies to downgrade GameStop's debt. In light of GameStop's worsening credit risk, on March 13, 2020, UPS informed Kulp that it was very concerned about GameStop's worsening credit situation and wished to renegotiate its contract with GameStop regarding payment terms. When Kulp informed his supervisor, GameStop Executive Vice President Chris Homeister, of this development, Homeister became angry and told him not to inform other GameStop executives of this development. Kulp understood that this development could potentially affect the viability of the UPS contact and was material to both GameStop's earnings and operations.

13. Throughout the March–May 2020 time period, Kulp continued to negotiate with UPS, but UPS continued to offer unacceptable terms. In response, Kulp accelerated discussions he had started with FedEx in January as potential a backup solution in addition to other potential alternatives. Kulp knew, however, that these negotiations could take many months and possibly over a year to complete.

14. On June 9, 2020, UPS finally announced that it was terminating its existing contract with GameStop and proposed a new contract, which would have increased the cost of all UPS shipments by $2.44 a parcel. Kulp examined the termination's financial impact in detail, including the impact of the increase in GameStop's shipping costs under UPS's proposed new contract. At the time UPS notified GameStop that it was terminating its contract, GameStop did not have any agreements with other alternative carriers to replace UPS.

15. Kulp calculated that acceptance of UPS's offer to resume the contract would significantly increase costs (by more than $26 million per year), and in his and his team's estimation, the increased costs would decrease GameStop's earnings per share (EPS) by $0.42 (for context, GameStop's EPS in 2019 was negative $5.31).

16. Thus, changing the UPS contract would have had a material effect on GameStop's earnings. The Securities & Exchange Commission ("SEC") has stated that "a matter is 'material' if there is a substantial likelihood that a reasonable person would consider it important." SEC Staff Acct'g Bulletin 99; *see also TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (a fact is material if there is a "substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"). Under this standard, the fact that GameStop's

sole shipper had terminated its relationship with GameStop during a global pandemic—at a cost that would have had a nearly 8% EPS effect—was certainly material.

17. The announcement that UPS was terminating its shipping contract had additional significance in that it occurred while GameStop was in the midst of a critical $416 million bond exchange offering. Under the proposed exchange offer, the interest rate on GameStop's bonds would be raised from 6.75% to 10%. That GameStop was willing to offer what amounted to a "junk bond" rate to its bondholders shows what dire financial straits it was in and how desperately it needed the exchange offer to succeed. If these bondholders were to find out the GameStop's near-exclusive shipper terminated GameStop's contract and that any new shipping contract would cost roughly $20 million more, the bond offering may well have failed.

18. Kulp had been made aware by GameStop's then-CFO that GameStop was attempting to refinance its senior notes in the summer of 2020, and that GameStop needed at least 50.1% of its noteholders to agree to the deal for the exchange offer to succeed. Kulp understood any exchange less than 50.1% would cause the entire bond offer to fail due to debt covenants and likely result in GameStop having extreme difficulty in purchasing inventory for new gaming console launches and the upcoming holiday season, both critical aspects of the company's business. From this conversation, Kulp also

understood that the company's financial status was particularly important and that GameStop's bondholders would be scrutinizing GameStop's finances and risks as they made important decisions about their investments and the exchange offer with GameStop. GameStop should have disclosed this information about UPS to its investors. Instead, it intentionally withheld such information and was therefore able to complete the offering.

19. Even though the termination of the UPS contract and its subsequent financial impact was a material event, GameStop never notified its shareholders of this development. When Kulp shared his analysis of the cost of the termination of the UPS contract, Homeister looked him in the eye and told him to "re-run the numbers." Kulp once again re-ran the numbers and still came up with the same $26 million increase in shipping costs under UPS's proposed new contract. Homeister then told him to re-run the numbers yet again. It was clear to Kulp that Homeister was not engaging in a good-faith dispute over the numbers. Indeed, Homeister had no basis for challenging Kulp's analysis, as the calculations were simple and straightforward. Rather, Homeister simply wanted Kulp to change the numbers because they were not favorable to GameStop. The math for the financial impact was quite straightforward as calculated by Kulp: The number of parcels shipped multiplied by the increased cost per parcel proposed by UPS of $2.44. Homeister's insistence that Kulp "re-run the numbers" was, in Kulp's opinion,

a clear indication Homeister wanted Kulp to alter the real impact of the UPS termination. It was clear to Kulp that by making sure that investors didn't find out about the effect of the loss of the UPS contract, the company intended to deceive its investors.

20. The compensation for Homeister and other top GameStop executives was heavily tied to GameStop's stock price. Thus, they had additional motivation to prevent the disclosure of non-favorable news that would have damaged GameStop's stock price.

21. Under the notice provisions in the UPS contract, all services would cease entirely three months from the date that UPS notified GameStop of the termination with a steady ramp-down of volumes during the three month period. Thus, from June to August, Kulp accelerated negotiations with both UPS and FedEx on a new shipping contract.

22. Kulp knew, however, that no new contractual terms could be nearly as favorable to GameStop as the old UPS contract and that any new shipping contracts would come with greatly increased costs for the company. In short, there was no way GameStop would come away from the UPS termination without materially hurting its bottom line.

23. In late June, Kulp secured an agreement with FedEx to handle GameStop's ecommerce business (residential deliveries), which was the smaller portion of GameStop's parcel shipping expenses. But there was still

no contract covering GameStop's much larger commercial shipping business covering the shipment of virtually all product to GameStop's roughly 3,700 U.S. stores. FedEx told Kulp that because of the pandemic, it was generally not taking on more business.

24. Nevertheless, in August 2020, Kulp did negotiate a new contract with FedEx for its commercial shipping business. While slightly better than $2.44 increase per parcel being offered by UPS, Kulp estimated that the increased costs with FedEx over the terminated UPS contract would still decrease GameStop's earnings by roughly $19–$20 million, still a material amount. Once again, when Kulp brought this issue to Homeister's attention, Homeister attempted to silence him. In an August 11, 2020 email, Homeister told Kulp that the increased costs would not be "$19M as [they] discussed" and stated that he was "[n]ot sure why [Kulp] continue[d] to reference that." Homeister continually rebuked Kulp's analyses, even though Homeister had no basis to dispute the numbers.

25. But Kulp would not back down. In late August and early September, Kulp prepared a series of slides about the UPS contract and GameStop's shipping costs that was to be shown to GameStop's board of directors. One of those slides, which Kulp insisted be included, showed a detailed financial analysis of the UPS termination impact.

26. Homeister refused to include this slide in the presentation to the board, so Kulp attached it as an addendum. On the very day Kulp handed the final version of the presentation to Homeister, Homeister notified Kulp that GameStop was terminating him effective immediately.

C. GameStop's Pretext for Terminating Kulp.

27. GameStop claims that it terminated Kulp not because he continued to raise the financial impact of the loss of the UPS contract, but because Kulp refused to take a pay cut that the company instituted in the beginning stages of the COVID-19 pandemic when GameStop's financial future looked uncertain. But GameStop's pretextual reason for termination does not stand up under scrutiny.

28. In April 2020, GameStop's General Counsel requested that Kulp take a temporary 30 per cent salary reduction. Although Kulp's employment contract did not require that he accept such a reduction, for the good of the company, Kulp agreed in principle to the reduction. The only reason that Kulp's salary was not ultimately lowered was because *GameStop* refused to ensure that the reduction would not impact the remaining rights/obligations contained in Kulp's employment contract or that the term of the pay cut would be limited to two months as GameStop had suggested. Kulp stated that he intended to agree to the temporary salary reduction, raised his potential concerns with GameStop's general counsel, and proposed solutions to the

problems. But GameStop refused to give Kulp any assurances that he would not be waiving his executive agreement by agreeing to the salary reduction.

29. In a series of emails with GameStop's General Counsel, Kulp made it clear that while he did not want to waive other rights under the Employment Agreement, he did agree to the pay cut:

> "Again, I am not trying to be difficult in any way. I merely want to ensure all other terms and conditions of my existing Employment Agreement and Retention Agreement are not impacted in any way if I were to agree to participate in the temporary salary reductions from April 26, 2020 through June 30, 2020. ***I hope we can find a reasonable solution as I absolutely want to participate in the temporary salary reductions as intended and I to help the financial position of the company and avoid any potential furloughs***."

> "As discussed on the phone on April 23, 2020, ***I clearly indicated that I had no intent to contest a two month 30% salary reduction for May and June 2020.***"

> "As you know, I ***fully support the temporary salary reductions to protect the company financially and avoid any layoffs or furloughs***."

30. GameStop's pretextual reason for terminating Kulp does not make sense. Kulp's executive agreement specifically bars GameStop from lowering his base salary, and so GameStop could *never* force Kulp to take a salary reduction in the first place. In essence, GameStop argues that it fired Kulp for refusing to modify a mutually negotiated executive agreement.

31. The timing of Kulp's termination also does not support GameStop's purported reason for firing him. Kulp was fired nearly *five months* after GameStop first asked him to take the pay cut. Instead, his termination occurred only after he continued to sound the alarm about the financial effect of the replacement of the UPS contract.

32. GameStop's purported non-retaliatory reason for terminating Kulp are contradicted by GameStop's actions, common sense, or time. In fact, Homeister, and GameStop fired Kulp because he would not stop raising the alarm about the financial impact of the UPS termination. That was illegal retaliation for which Kulp now seeks vindication.

CLAIM FOR RELIEF

COUNT ONE—VIOLATION OF VIOLATION OF 18 U.S.C. § 1514A

33. All previous paragraphs are incorporated by reference as if set forth fully herein.

34. GameStop's termination of Kulp violated 18 U.S.C. § 1514A.

35. As discussed above, Kulp attempted to raise the alarm about GameStop's material decrease in earnings from the loss of the UPS contract and its replacement with a far more expensive shipping contact. This was a material event and was required to be disclosed to GameStop's shareholders. Kulp reasonably believed that the loss of the UPS contract was a material event requiring disclosure, which is why he continued to press the issue with

Homeister, his supervisor. Because Kulp was attempting to alert GameStop's management and Board to a failure to disclose material information—a violation of the federal securities laws including without limitation 15 U.S.C. § 77k, 15 U.S.C. 78j (b); 17 C.F.R. § 240.10b-5—he was engaging in a protected activity under 18 U.S.C. § 1514A.

36. GameStop was aware that Kulp was engaging in this protected activity because Kulp repeatedly raised the issue with Homeister, GameStop's Executive Vice President. Kulp repeatedly spoke with Homeister about the UPS termination, about the increased costs, and about the effect on GameStop's earnings per share. But instead of ensuring that GameStop reported these material events, Homeister, repeatedly told Kulp to re-run the numbers.

37. It was clear to Kulp that Homeister was not pleased with Kulp's insistence on reporting the increased costs, particularly during the critical approximately $416 M bond-exchange offer, and that Homeister wanted Kulp to "re-run the numbers" to show a lesser increase in costs. But Homeister was not in any position to second guess Kulp and his team, as he did not have the information that Kulp and his team had, and Kulp continued to report the numbers accurately.

38. Kulp's protected activity—attempting to have GameStop disclose the UPS termination and its impact on the company to its noteholders and

investors—was at the very least, a contributing factor to his firing. During Kulp's repeated attempts to alert GameStop's senior management to these events, Kulp's boss got angry with him, told him to "re-run the numbers," and told him not to share the information with other persons at the company. And when Kulp attempted to include a slide that would disclose GameStop's increased costs in a presentation to the board, Homeister would not allow it in. Shortly thereafter, GameStop fired Kulp. As discussed above, GameStop's purported reasons for terminating Kulp are pretextual and nonsensical.

DAMAGES

39. Kulp hereby restates and re-alleges each and every allegation contained in Paragraphs 1 through 35 above, and every subparagraph therein as though they are fully set forth.

40. As a consequence of his termination, Kulp lost his income and bonuses from being without a job. In addition to lost income, Kulp also lost all his vested GameStop stock awards he was contractually entitled to receive as per his executive employment agreement. Under two long-term incentive agreements between GameStop and Kulp, Kulp was to receive from GameStop restricted share units. These shares would vest on an annual basis while he was working for GameStop. Because GameStop terminated Kulp due to his protected activity, Kulp never received the shares to which he was entitled.

41. The price of GameStop stock has appreciated substantially since August 2020, but Kulp has not been able to realize these gains. Kulp thus seeks back pay with interest and a return of his GameStop shares.

42. Kulp also seeks re-instatement to his prior position as Senior Vice President of Supply Chain and compensation for any special damages sustained as a result of his termination, including litigation costs, expert witness fees, and reasonable attorneys' fees.

JURY DEMAND

43. Kulp demands a trial of this action by jury.

PRAYER

44. Kulp respectfully requests that Defendant GameStop be cited to appear and answer, and that on final trial hereof before a jury, that Kulp be awarded judgment against GameStop, for the following:

a. Damages sustained as a result of his termination, including back-pay (base salary, bonus, LTI cash, PSUs, health insurance premiums and accrued dividends) and a return of his shares as discussed above;

b. Prejudgment interest;

c. Costs of court;

d. Special damages sustained as a result of his termination, including litigation costs, expert witness fees, and reasonable attorney fees;

e. Reinstatement to his prior position or one of equal seniority; and

f. All other relief to which Plaintiff is entitled.

Respectfully submitted,

SMYSER KAPLAN & VESELKA

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