



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

In Re: INFOUSA, Inc. Shareholders  
Litigation

) Consolidated C.A. No. 1956-N  
)  
)

**DEFENDANTS' OPENING MEMORANDUM OF LAW IN SUPPORT OF THEIR  
MOTION TO DISMISS THE CONSOLIDATED COMPLAINT**

POTTER ANDERSON & CORROON LLP

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

Donald J. Wolfe, Jr. (#285)  
Arthur L. Dent (#2491)  
Brian C. Ralston (#3770)  
Kirsten A. Lynch (#4573)  
Hercules Plaza, 6th Floor  
1313 North Market Street  
P.O. Box 951  
Wilmington, Delaware 19899-0951  
(302) 984-6000

Martin P. Tully (#465)  
William M. Lafferty (#2755)  
Jay N. Moffitt (#4742)  
1201 North Market Street  
P. O. Box 1347  
Wilmington, DE 19899-1347  
(302) 658-9200

*Attorneys for Defendant Vinod Gupta*

*Attorneys for George F. Haddix, Vasant H.  
Raval, Bill L. Fairfield, Anshoo S. Gupta,  
Elliot S. Kaplan, Martin F. Kahn, Bernard  
W. Reznicek, Dennis P. Walker, Charles  
Stryker, Harold W. Anderson and infoUSA  
Inc.*

OF COUNSEL:

KIRKLAND & ELLIS LLP  
Yosef J. Riemer  
Sudwiti Chanda  
Citigroup Center  
153 East 53<sup>rd</sup> Street  
New York, New York 10022-4611  
(212) 446-4800

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## PRELIMINARY STATEMENT

Finding that plaintiff Cardinal Value Equity Partners, LP (“Cardinal”) had “not pled demand excused sufficiently to meet the requirements of our Rule 23.1,” this Court recently dismissed Cardinal’s First Amended Derivative Complaint (the “First Amended Derivative Complaint”). *Cardinal Value Equity Partners, L.P. v. Gupta, et al.* (Bench Ruling dated October 17, 2006, p.13). Upon review of Cardinal’s allegations challenging the independence of *infoUSA*’s (the “Company” or “*infoUSA*”) board of directors (the “Board”), this Court held: “[T]here are no particularized allegations with respect to a majority of board members ... [that] make it clear that they were disabled because of their conflicts, or their domination by Vinod Gupta, that make them incapable of independently and objectively considering a demand on the board to vindicate this claim on behalf of *infoUSA*.” (*Id.* at 10).

Since that ruling, Cardinal has joined with three other plaintiffs<sup>1</sup> to file a revised derivative complaint (the “Consolidated Complaint”), which largely rehashes the same insufficient allegations of interest and lack of independence. The Consolidated Complaint, like the First Amended Derivative

Complaint that preceded it, falls far short of satisfying Plaintiffs’ burden of showing that a majority of the Board was disabled from considering a stockholder demand. As before, there is nothing pled, much less anything pled with the particularity required to satisfy Rule 23.1, that can be said to give rise to a reasonable doubt that a majority of the Company’s Board would have been unable to consider a demand objectively had one been made. (*See* § I *infra*.) Moreover, the Consolidated Complaint should be dismissed for a second independent

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<sup>1</sup> Dolphin Limited Partnership I, L.P., Dolphin Financial Partners, LLC, and Robert Bartow (collectively, “Dolphin”).

reason: its allegations are insufficient to conclude that Plaintiffs could prevail under any set of facts that can be reasonably inferred from the Complaint. (*See* § II *infra*.)

### **STATEMENT OF FACTS**<sup>2</sup>

Since its founding in 1972, *infoUSA* has grown into a leading provider of business and consumer financial information products, database marketing services, data processing services and sales and marketing solutions. (*See* Ex. 1, *infoUSA*, Form 8-K, filed on December 4, 2006, Ex. 99.1).<sup>3</sup> *infoUSA* does business with over 4 million customers, ranging from Fortune 2000 companies to small business owners, non-profit organizations and government agencies. (Compl., ¶ 15; Ex. 2, *infoUSA* Form 10-K filed March 10, 2006, pp.1-3). Headquartered in Omaha, Nebraska, *infoUSA* has been listed on the NASDAQ National Market (“NASDAQ”) since 1992 and trades under the symbol IUSA. (Compl., ¶ 15). The Company has grown dramatically since its first public offering. In the last ten years, for example, that growth has been aided by more than 25 strategic acquisitions. (Ex. 2, p.4). The Company’s business has undergone major changes as information technology has changed. For example, while it once derived most of its sales by offering products in the form of books, magnetic tapes and diskettes, it now offers expansive on-line electronic data services, including information on 1.1 million large public and private companies in approximately 170 countries. (*Id.*; Ex. 3, *infoUSA* IPO prospectus, p.12). The Company has close to 5,000 full-time employees, and is

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<sup>2</sup> The facts recited herein are based upon the allegations in the Consolidated Complaint, except as otherwise noted. The Consolidated Complaint, however, is replete with factual inaccuracies, to which Defendants do not respond herein.

<sup>3</sup> *See Ryan v. Gifford*, 2007 WL 416162, at \*10 n.38 (Del. Ch. Feb. 6, 2007) (*citing Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d, 312, 320 n.28 (Del. 2004) for the proposition that “[o]n a motion to dismiss, the court may take judicial notice of the contents of documents *required by law to be filed, and actually filed, with federal or state officials.*”) (emphasis added) (a compendium of unreported decisions is being filed simultaneously herewith).

governed by a nine-member board. Only one member of the Board is a member of the management team. As described more fully herein, all of the Company's directors have had distinguished careers in business, law or academics.

At the time the Dolphin derivative complaint was filed on October 19, 2006,<sup>4</sup> the Board was composed of nine members, all of whom are named as Defendants in the Consolidated Complaint: George F. Haddix, Vasant H. Raval, Dennis P. Walker, William L. Fairfield, Anshoo S. Gupta, Martin F. Kahn, Elliot S. Kaplan, Bernard W. Reznicek, and *infoUSA*'s Chairman and CEO Vinod Gupta ("Vin Gupta"). The composition of the Board at the time Dolphin sued was the same as what it had been when Cardinal first commenced suit except that Reznicek joined the Board as another outside, disinterested director in March 2006. The Consolidated Complaint also named as defendants former directors, Harold W. Andersen and Charles W. Stryker.

#### **The Members of the October 19, 2006 Board**

Defendant George F. Haddix ("Haddix"), has been a member of the *infoUSA* Board of Directors since 1995 and currently serves on the Nominating and Corporate Governance Committee. (Compl., ¶ 5). Haddix was a member of the Compensation Committee over the last five years, and served on the Audit Committee in 2001 and 2002. (*Id.*)

Haddix is the Chairman and CEO of PKW Holdings, Inc. and PKWARE, Inc., two computer software companies headquartered in Milwaukee, Wisconsin. (*See* Ex. 4, *infoUSA* Definitive Proxy Statement, filed on March 28, 2005, pp.4-5). Haddix co-founded and

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<sup>4</sup> Dolphin filed its first derivative complaint two days after the Court dismissed Cardinal's First Amended Derivative Complaint on October 17, 2006. Dolphin's complaint was subsequently consolidated with the Second Amended Derivative Complaint that Cardinal filed on December 15, 2006. Because Cardinal's First Amended Derivative Complaint was dismissed (albeit with leave to replead), the date for determining whether demand would have been futile with respect to the Consolidated Amended Complaint relates back to Dolphin's first complaint, not back to the first suit filed by Cardinal. *See Braddock v. Zimmerman*, 906 A.2d 776, 786 (Del. 2006).

served between 1994 and 1997 as the President, and until 2005, as a director, of CSG Systems International, Inc. (*See* Ex. 5, CSG Systems International, Inc. Form 8-K, filed June 1, 2005, p.2 and Ex. 99.1 attached thereto). CSG Systems International is a NASDAQ-listed company, trading under the symbol CSGS, that provides software and information services to the communications industry. (*Id.*) Haddix is also one of 36 members of the Board of Directors of Creighton University. (*Id.*) Haddix holds a B.A. from the University of Nebraska, an M.A. from Creighton University and a Ph.D. from Iowa State University. (*See* Ex. 6, *infoUSA* Definitive Proxy Statement, filed April 17, 2006, p.5).

Defendant Vasant H. Raval (“Raval”) has been a director of the Company since 2002 and is currently Chairman of the Audit Committee (on which he has served since 2003). (Compl., ¶ 6). He was also a member of the Finance and Compensation Committees. (*Id.*) Raval has been a distinguished member of the faculty at Creighton University since he joined it in 1981. In addition to being a Professor in the Department of Accounting, which he now chairs, he has also served as an Associate Dean. (Ex. 6, p.5). Raval is also a director of Syntel, Inc., a publicly traded company, trading under the symbol SYNT, that specializes in electronic business solutions. (*Id.*) He earned an MBA from Indiana State University and a Doctor of Business Administration degree from Indiana University. (*Id.*)

Defendant Dennis P. Walker (“Walker”) has been a director of *infoUSA* since 2003. (Compl., ¶ 12). He was a member of the Nominating and Corporate Governance, and currently serves on the Compensation Committee. (*Id.*) He co-founded and served as a director and executive vice president of MemberWorks, Inc., a leading database marketing company whose stock is listed on NASDAQ,<sup>5</sup> and has, since May 1999, been the president and CEO of Jet

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<sup>5</sup> The company’s common stock trades on NASDAQ under the symbol MBRS. (Ex. 7, MemberWorks, Inc., Form 10-K, filed on September 13, 2004, p.8).

Linx Aviation. (*Id.*; *see also* Ex. 4, pp.3-4). Walker has also held senior level marketing positions with First Data Resources and IBM. (Ex. 4, pp.3-4).

Defendant William L. Fairfield (“Fairfield”) has been a director of *infoUSA* since November 10, 2005. (Compl., ¶ 7). He is the current Chair of the Nominating and Corporate Governance Committee, and is a member of the Audit Committee. (*Id.*) He was the Chair of the Compensation Committee. (*Id.*) He is the Chairman of Dreamfield Capital Ventures, a venture capital firm, focused on economic development of the Mid-Plains region. (Ex. 6, p.6; Ex. 8, *infoUSA* Form 8-K, filed November 14, 2005, Ex. 99.1). Fairfield also serves on the Board of Directors of The Buckle, Inc., a retailer of casual apparel, footwear, and accessories for young men and women. (*Id.*) From 2002 to 2004, Fairfield was the Executive Vice President of Sitel Corporation, a worldwide provider of outsourced customer support services. Prior to that, he founded Inacom Corp., an Omaha-based technology management services company which grew to become a Fortune 500 company and is now listed on the New York Stock Exchange.<sup>6</sup> (*Id.*) Fairfield is also the former chairman of businessCreditUSA.com, a wholly owned subsidiary of the Company. (Compl., ¶ 7). Fairfield has a Bachelor of Science degree in Industrial Engineering from Bradley University, and an MBA from the Harvard Business School. (Ex. 6, p.6). Fairfield is one of over 800 individuals given the honorary title of Trustee of the University of Nebraska Foundation. (Compl., ¶ 7; *see also* Ex. 10, University of Nebraska Foundation Income Tax Return, Form 990 (2004) Schedule A, p.2, Part III, question 2).

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<sup>6</sup> In addition to founding Inacom, Fairfield served for many years as its President and CEO. Inacom had its first public offering in 1987 and was listed on NASDAQ until 1997, when it moved its listing to the New York Stock Exchange (NYSE: ICO). (Ex. 9, Inacom, Corp., Form 8-K, filed on October 18, 1999, Ex. 99.1).

Defendant Anshoo S. Gupta (“Anshoo Gupta”) has been a director of *infoUSA* since 2005. (Compl., ¶ 8). He is not related to Vin Gupta. (*Id.*) Anshoo Gupta serves on the Audit and Compensation Committees. (*Id.*) He is the President of JAG Operations, L.L.C., a management consulting company that he founded in 2003. (Ex. 6, p.6). Between 1969 and 2002, Anshoo Gupta held a series of financial, marketing, strategic planning and general management positions at Xerox Corporation, including serving as President of Xerox’s Production Systems Group. (*Id.*) He also serves on the Board of Directors of Docucorp International, Inc., a company specializing in the development, marketing and support of customer communication management solutions, and on the Advisory Board of the Indian Institute of Technology. (*Id.*) Anshoo Gupta graduated from the Indian Institute of Technology with a Bachelor of Science in Electrical Engineering, and holds an M.S.E.E. and an M.B.A. from the University of Rochester. (Compl., ¶ 8; *see also* Ex. 6, p.6).

Defendant Martin F. Kahn (“Kahn”) was a director of the Company from 2004 through February 2, 2007. (Compl., ¶ 10). He was also the Chairman of the Finance Committee and a member of the Nominating and Corporate Governance Committee from 2005 until his resignation from the Board in February 2007. (*Id.*) He is the Managing Director of Cadence Information Associates, LLC where he has worked since 1996. (Ex. 4, pp. 3-4). He served from 1993 to 2004 as Chairman of the Board of OneSource Information Services, Inc., a publicly-traded company listed on NASDAQ that was acquired by *infoUSA* in June 2004. (*Id.*) He also served briefly in 2004 as the interim CEO of OneSource.<sup>7</sup> (*Id.*) From 1990 to 1998, Kahn served as the Chairman of the Board of Ovid Technologies, Inc., a provider of on-line CD-ROM medical and scientific information services. (*Id.*) He also was Chairman of the Board of

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<sup>7</sup> OneSource’s Common Stock traded on NASDAQ under the symbol ONES. (Ex. 11, OneSource Information Services, Inc., Form 8-K, filed on June 4, 2004, at Ex. 99.1).

Directors of Vista Information Solutions, Inc., a supplier of geographically-based risk information, from 1992 to 1996. (*Id.*) Kahn earned a Bachelor of Arts from Yale University and an MBA from the Harvard Business School. (*Id.*)

Defendant Bernard W. Reznicek (“Reznicek”) has been a director of *infoUSA* since March 30, 2006, and serves on the Nominating and Corporate Governance Committee as well as the Audit Committee. (Compl., ¶ 11; *see also* Ex. 12, *infoUSA* Form 14A, Proxy Statement, filed on April 20, 2006, pp. 30-31). He is also the current Chair of the Compensation Committee. Reznicek is the President and CEO of Premier Enterprises, Inc., a consulting, investment and real estate development company. (Ex. 6, p.6). He was National Director-Special Markets of Central States Indemnity Company, a specialty insurance company that is a member of the Berkshire-Hathaway Insurance Group, from January 1997 until January 2003 and served as Chairman and CEO of Boston Edison, a utility company, from September 1987 to July 1994. (*Id.*) He was also President and CEO of Omaha Public Power District. (Compl., ¶ 11; *see also* Ex. 5, Ex. 99.1). Reznicek has been a director of CSG Systems International, Inc., a publicly-traded company, since 1997 and became non-executive Chairman of the CSG Board in May 2005. (*Id.*) He is also a director of Pulte Homes, Inc. (*See* Ex. 6, p.6). Between July 1994 and January 1997, he served as Dean of Creighton University College of Business. (*Id.*) Reznicek holds a B.S. in Business Administration from Creighton University and an MBA from the University of Nebraska. (*Id.*)

Defendant Elliot S. Kaplan (“Kaplan”) has been a director of *infoUSA* since 1988. (Compl., ¶ 9). Kaplan was a member of the Compensation Committee in 2001 and 2002, and was also a member of the Finance Committee. (*Id.*) Kaplan is a senior partner in the national law firm Robins, Kaplan, Miller & Ciresi LLP (“Robins Kaplan”). (*Id.*) Robins Kaplan

has provided legal services to the Company. (*Id.*) He has also been a director and officer of Best Buy Co, Inc., since its founding in January 1971. (Ex. 13, Best Buy Co., Inc., Form 14A, Definitive Proxy Statement, filed on May 20, 2005, p.12).

Defendant Vin Gupta founded *infoUSA* in 1972. He has served as its CEO for virtually its entire history and as a director from the time of its incorporation. (Compl., ¶ 4). He earned a Bachelors of Science in Engineering from the Indian Institute of Technology, Kharagpur, India, and both a Masters in Engineering and Masters of Business Administration from the University of Nebraska. (Ex. 2, p.11).

### **Plaintiffs**

Plaintiff Cardinal is the record owner of 100 shares of the Company's common stock and beneficially owns approximately 3,093,010 shares (5.6%) of the Company's common stock. (Compl., ¶ 3). Cardinal claims to have held these shares continuously since March 31, 2001. (*Id.*) Plaintiffs Dolphin Limited Partnership I, L.P. and Dolphin Financial Partners, LLC, beneficially own 2,000,000 shares (3.6%) of the Company's common stock, which they first began acquiring in June 2005, soon after Vin Gupta announced his offer to acquire all of the outstanding shares of the Company. (*Id.* ¶¶ 3, 26). Plaintiff Bartow has owned 2,000 shares of the Company's common stock since January 19, 2000. (*Id.* ¶ 3).

### **Vin Gupta's Offer to Take the Company Private**

On June 13, 2005, Vin Gupta announced an offer to acquire all of the outstanding shares of the Company that he did not already own for \$11.75 per share. (Compl., ¶ 26, the "Gupta Offer"). Upon receiving the Gupta Offer, the Board decided to form a Special Committee, consisting of Defendants Kahn, Stryker, Raval and Anshoo Gupta, for the purpose of evaluating the Offer and potential alternatives. (*Id.* ¶ 28). The Consolidated Complaint concedes that these members took their duties and responsibilities seriously. (*Id.* ¶ 41). The

Special Committee retained Fried, Frank, Harris, Shriver and Jacobson LLP, (“Fried, Frank”) as its legal counsel and Lazard Freres & Co. (“Lazard”) as its financial advisor. (*Id.* ¶ 35). In late August 2005, after receiving advice from both Lazard and Fried, Frank, the Special Committee unanimously determined that the Gupta Offer was inadequate and rejected it. (*Id.* ¶¶ 33-36). Following the Special Committee’s rejection of his offer, Vin Gupta withdrew his Offer and announced that he did not wish to dispose of any of his shares or vote in favor of an alternative acquisition of *infoUSA*. (Compl., ¶ 37). As this Court recognized in its Bench Ruling dismissing the First Amended Derivative Complaint, “Vinod Gupta, as a shareholder, has every right...not to sell his stock to any other potential acquirer, nor to vote his shares in favor of a merger if the special committee recommends it on particular terms. He would be entirely within his right as a shareholder to refuse to go forward in any respect and support an alternative transaction.” (*Bench Ruling*, p.12). Given the percentage of *infoUSA* voting shares that Mr. Gupta owns, any acquisition offer that did not have his support would require near unanimous approval of the remaining shareholders. In light of this, the Board disbanded the Special Committee, which was entirely within its power. (*Bench Ruling*, p.11) (finding that “[The Board] created the committee and, by definition, it can terminate the committee.”).

### **The First Amended Derivative Complaint**

Cardinal first filed suit on February 22, 2006, six months after the announcement that the Special Committee had been disbanded. (On May 1, 2006, Cardinal filed an amended complaint (which has been referred to herein as the First Amended Derivative Complaint because it was the Complaint at issue in the Court’s October 17, 2006 ruling granting Defendants’ first motion to dismiss)). The First Amended Derivative Complaint named as defendants just five of the eight persons then serving as *infoUSA* directors: Haddix, Kaplan, Walker, Raval and Vin Gupta. Notably, Anshoo Gupta and Kahn (who were both members of

the Special Committee that found the Gupta Offer inadequate and who both voted against dissolving the Special Committee)<sup>8</sup>, and Fairfield (who was not even on the Board at the time of the Gupta Offer) were not named as defendants in the First Amended Derivative Complaint; nor did Cardinal otherwise challenge their independence.<sup>9</sup>

The First Amended Derivative Complaint sought the entry of a mandatory injunction voiding the decision to disband the Special Committee and reinstating the Special Committee for the purpose of continuing the “strategic process.” (First Amended Derivative Compl., ¶¶ 104, 108). Cardinal made no pre-suit demand on the Board. Instead, it alleged that a majority of the *infoUSA* Board was dominated and controlled by Vin Gupta, rendering them incapable of objectively considering a demand to institute such a suit on behalf of the Company. (First Amended Derivative Compl., ¶¶ 71-76). That assertion was premised on allegations that Defendants Kaplan, Walker, Haddix and Raval received free office space and directors’ fees from the Company and had other business relationships with the Company that compromised their independence. (First Amended Derivative Compl., ¶¶ 73, 75-76).

Defendants moved to dismiss the First Amended Derivative Complaint. Among the grounds for dismissal set forth in Defendants’ motion was that Cardinal had failed to plead facts sufficient to demonstrate that the Board was dominated and controlled by Vin Gupta. In particular, Defendants maintained that the allegations concerning free office space, directors’ fees and other compensation were devoid of any notion of materiality.

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<sup>8</sup> Charles Stryker, who also voted against the dissolution of the Special Committee, was also not named as a defendant. (First Amended Derivative Compl., ¶ 12). However, since he retired from the *infoUSA* board on January 23, 2006, (Ex. 12, p.22), which was before Cardinal’s derivative complaint was filed, he is not part of the relevant board for demand purposes on any complaint in these proceedings.

<sup>9</sup> Cardinal also named Harold Andersen as a defendant even though he had resigned from the Board as of November 10, 2005. (See Ex. 8, p.2)

### This Court's Dismissal of the First Amended Derivative Complaint

On October 17, 2006, this Court granted Defendants' motion to dismiss the First Amended Derivative Complaint. As explained in its opinion, the Court viewed that complaint as riddled with:

examples of related party transactions and numerous examples of failures to supervise or to provide any sort of principled basis for establishing the compensation of Vinod Gupta, and numerous instances of special benefits and perquisites lavished upon Vinod Gupta, ranging from fancy cars to catamarans...*But despite all of that, there are no particularized allegations with respect to a majority of board members, especially -- for example, Haddix and Walker...no particularized allegations make it clear that they are disabled because of their conflicts or their domination by Vinod Gupta, that make them incapable of independently and objectively considering a demand on the board to vindicate this claim on behalf of infoUSA.*

(*Bench Ruling*, pp. 9-10) (emphasis added). Accordingly, the Court found that such allegations did not meet the particularity demands of Rule 23.1 and dismissed the First Amended Derivative Complaint.<sup>10</sup>

A mere two days after this Court's dismissal of the First Amended Derivative Complaint, Dolphin filed another derivative complaint naming the entire *infoUSA* Board as defendants. Shortly after that, Cardinal filed what it called its Second Amended Derivative Complaint. On January 22, 2007, this Court granted Defendants' Motion for Consolidation of the Dolphin Derivative Complaint and the Cardinal Second Amended Derivative Complaint, rejecting Plaintiffs' argument that the two complaints did not raise common issues.

On February 5, 2007, Plaintiffs filed the Consolidated Complaint. As was the case with the First Amended Derivative Complaint, the new suits were filed without any pre-suit demand being made on the Board. Once again, the Consolidated Complaint alleges that demand

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<sup>10</sup> In addition to finding that the First Amended Derivative Complaint "inadequately pled demand excused with respect to a majority of the board," the Court held that dismissal was warranted on a second, independent ground: the Court concluded that the relief sought was "unrealistic." (*Bench Ruling*, p.11).

was excused largely in reliance on the same allegations already found to be inadequate with respect to directors' fees, free office space and the like.

## ARGUMENT

### **I. The Consolidated Complaint Should Be Dismissed For Failure To Make A Demand On The Board.**

When this Court dismissed Cardinal's First Amended Derivative Complaint, this Court held that Cardinal had failed to allege "with particularity facts that would support the conclusion that a majority of the Board could not impartially and objectively consider a demand that it take up this lawsuit on behalf of the company." (*Bench Ruling*, p.9). This Court found that in order to demonstrate that a majority of the *infoUSA* Board had a disabling conflict so as to excuse demand, it was not enough to simply list a litany of related party transactions involving *infoUSA* CEO, Vin Gupta, and to advert vaguely to outside director benefits such as directors' fees and free office space:

[T]here are no particularized allegations with respect to a majority of board members, especially -- for example, Haddix and Walker are two examples that jump immediately to mind -- no particularized allegations make it clear that they are disabled because of their conflicts, or their domination by Vinod Gupta, that make them incapable of independently and objectively considering a demand on the board to vindicate this claim on behalf of *infoUSA*.

I could go through with you, you know, director by director and itemize why there are allegations of some type of connection between a particular director and Vinod Gupta, with Gupta's affiliated companies, Everest and so forth, or the provision of free office space to certain directors so they can run their own businesses out of the free office space. But there's no -- there are no clear and particularized allegations about the size of these benefits, the magnitude of these benefits, the value of these benefits, or how meaningful or material the benefits would be to those receiving them. That is all left for me to fill in the blanks, and I don't think it's appropriate for me to fill in the blanks.

(*Bench Ruling*, pp. 10-11).

Plaintiff Cardinal, now joined by Dolphin, again seeks to allege that demand was futile. Yet, Plaintiffs have not "filled in the blanks," nor have they alleged any new

particularized facts beyond those set forth in the First Amended Derivative Complaint, dismissed on October 17, 2006. (*Bench Ruling*, p.13).

The applicable board for purposes of determining whether demand is excused under Rule 23.1 with respect to the Consolidated Complaint is the Board that was in place at the time when the Dolphin derivative complaint was filed, October 19, 2006. *See* note 4 *supra* (discussing *Braddock*, 906 A.2d at 786). The *infoUSA* Board at that time consisted of the following nine directors: Haddix, Walker, Kahn, Anshoo Gupta, Raval, Fairfield, Reznicek, Kaplan and Vin Gupta. As noted, the only change that had occurred since Cardinal had first filed suit was the addition of Reznicek.

A. The Standards For Pleading Demand Futility.

Under well settled Delaware law, a plaintiff seeking to pursue a shareholder derivative claim on behalf of a corporation must first demand that the corporation's board take the requested remedial action. *See Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984); 8 Del. C. § 327. The demand requirement "is not a mere procedural nicety," *Richardson v. Graves*, 1983 WL 21109, at \*2 (Del. Ch. June 17, 1983), but a substantive rule of law that affords "the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur." *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96-97 (1991). The demand requirement is a "recognition of the fundamental precept that directors manage the business and affairs of corporations," *Aronson*, 473 A.2d at 812, and is a "bedrock principle[] of Delaware law of corporate governance in the context of standing to maintain a derivative shareholder's suit." *Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991); *see also Agostino v. Hicks*, 845 A.2d 1110, 1116-17 (Del. Ch. 2004) ("The requirements of Rule 23.1 . . . are necessary to prevent the potentially disruptive effects of

derivative litigation on the ability of a board of directors to direct the business and affairs of a corporation.”); 8 Del. C. § 141(a) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .”).

A plaintiff’s burden to satisfy the demand futility test is a “heavy” one and represents “a marked departure from the ‘notice’ pleading philosophy....” *Levine*, 591 A.2d at 211 (internal quotations omitted). Plaintiffs are required to set forth “particularized factual statements that are essential to the claim.” *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000); *Richardson*, 1983 WL 21109, at \*2 (“Generalities, artistically ambiguous, all-encompassing conclusory allegations are not enough” to excuse demand). A court will not accept as true either “inferences [ ]or conclusions of fact unsupported by allegations of specific facts upon which the inferences or conclusions rest....” *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988). Additionally, courts will not “draw all inferences from [the allegations] in plaintiffs’ favor unless they are *reasonable* inferences.” *Id.* at 187 (emphasis added). “Speculation on motives for undertaking corporate action are wholly insufficient to establish a case of demand excusal.” *Id.* at 188. If the derivative plaintiff fails to satisfy its burden of pleading particularized facts showing demand futility, demand is not excused, and the complaint must be dismissed. *See Seminaris v. Landa*, 662 A.2d 1350, 1355 (Del. Ch. 1995).

Delaware law prescribes distinct requirements for pleading demand futility depending on whether a derivative action seeks to challenge a specific board decision or board inaction. If a plaintiff challenges a specific board decision, the test for demand futility under *Aronson v. Lewis* applies. *See Aronson*, 473 A.2d at 814-15; *Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993) (“The essential predicate for the *Aronson* test is the fact that a decision of the board of directors is being challenged in the derivative suit.”). The *Aronson* test excuses demand

only when the complaint sets forth particularized factual allegations that create a reasonable doubt whether: (1) a majority of the directors are disinterested and independent; or (2) the challenged transaction was the product of a valid exercise of business judgment. *Aronson*, 473 A.2d at 814.

The second part of the *Aronson* test is rarely satisfied and it requires stockholder plaintiffs to “overcome the powerful presumptions of the business judgment rule before they will be permitted to pursue the derivative claim.” *Rales*, 634 A.2d at 933. This presumption protects board decisions unless they cannot be “attributed to any rational business purpose.” *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971), *aff’d*, 332 A.2d 139 (Del. 1975). In formulating the *Aronson* test, the Delaware Supreme Court noted:

In our view the entire question of demand futility is inextricably bound to issues of business judgment and the standards of that doctrine’s applicability. . . . It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.

*Aronson*, 473 A.2d at 812 (citations omitted).

Where a derivative action challenges a board’s *failure to take action*, the test enunciated in *Rales* is utilized to evaluate the plaintiff’s futility allegations. *See Rales*, 634 A.2d at 933-34. Under the *Rales* test, the Court must determine whether “the *particularized* factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time

the complaint is filed, the board of directors could have properly exercised its *independent* and *disinterested* business judgment in responding to a demand.” *Id.* at 934 (emphasis added).<sup>11</sup>

B. Plaintiffs Have Not Shown That The Majority Of The Board Is Interested Or Lacks Independence.

Plaintiffs’ Consolidated Complaint fails to allege particularized facts to show that the same Board (with the single addition of Reznicek) that this Court previously held had not been shown to be interested or lack independence, now suffers from a disabling conflict of interest. In order to demonstrate that a director lacks independence to review a demand, the complaint must “state[] with particularity facts indicating that a relationship . . . is so close that the director’s independence may *reasonably* be doubted.” *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1051-52 (Del. 2004). “[T]o render a director unable to consider demand, a relationship must be of a bias-producing nature.” *Id.* at 1050.

A director is deemed interested for purposes of demand futility “whenever divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the shareholders.” *Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984); *Rales*, 634 A.2d at 936 (“Directorial interest also exists where a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders.”). However, not “every financial interest in a transaction that is not shared with shareholders would necessarily be sufficient” to rebut the presumption that the directors will consider a demand objectively and in the best interests of the company. *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1151 (Del. Ch.

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<sup>11</sup> Boiled down to its essence, the *Rales* test, with its singular inquiry, “makes germane all of the concerns relevant to both the first and second prongs of *Aronson*.” *Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003). Inherent in both tests is the review of the directors’ independence and disinterestedness and whether they were capable of exercising their objective business judgment.

1994), *aff'd*, 663 A.2d 1156, 1167 (Del. 1995). Rather, the complaint must set forth particularized facts creating a reasonable doubt that any conflicting interest was a “material” one such that the purportedly interested director “in fact was or would likely be affected” by the alleged financial self-interest. *Id.* at 1167.

Plaintiffs’ argument relies on facts that do not give rise to a reasonable doubt that the Board lacks independence. For example, Plaintiffs allege that receiving office space in connection with a position on the board of directors, or serving on the same Board of Trustees for a university as Vin Gupta are sufficient to show that demand should be excused. But Plaintiffs have alleged nothing to explain why any of these tenuous connections to Vin Gupta would be material. Plaintiffs also repeatedly rely on a circular argument: that the Board lacks independence because the Board made a decision with which Plaintiffs take issue. As discussed below, this kind of circular reasoning was rejected in *Aronson* itself. *See Aronson*, 473 A.2d at 816 (“The director’s approval [of a challenged act] alone does not establish control.”). In short, Plaintiffs have failed to meet their burden of showing that a majority of the directors are interested or lacked independence.

1. Anshoo Gupta

Plaintiffs do not allege that Anshoo Gupta is an interested director. In fact, the section of the Consolidated Complaint in which Plaintiffs assert that demand should be excused contains no reference to Anshoo Gupta whatsoever. (Compl., ¶¶ 137-145). Thus, there is no challenge to Anshoo Gupta’s independence.

2. Kahn

Plaintiff Cardinal did not name Kahn as a defendant in its First Amended Derivative Complaint because the facts pointed to his clear independence, as he was a member of the Special Committee which deemed the Gupta Offer inadequate and was one of three

directors who opposed the dissolution of the Special Committee. (Compl., ¶¶ 33, 43). None of the “facts” that Plaintiffs allege in the Consolidated Complaint concerning Kahn occurred before Cardinal filed its First Amended Derivative Complaint, and yet, Cardinal now alleges in the Consolidated Complaint that Kahn is disabled from exercising independent judgment.

Plaintiffs now allege that Kahn was not independent because he received fees for his service on the Board. But this Court specifically noted in its prior Bench Ruling that the payment of directors’ fees, without more, does not result in a director being interested under Rule 23.1. (*Bench Ruling*, p.10). Despite this Court’s admonition to provide particularized facts about how the benefits the directors received were material to them, Plaintiffs have not alleged any facts to show that Kahn’s directors’ fees for his service and for his participation on the Board and the Special Committee were of such personal importance to Kahn that their “threatened loss might create a reason to question whether the director is able to consider the corporate merits of the challenged transaction objectively.” *See Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2002); *see also Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 978 (Del. Ch. 2003). Plaintiffs certainly have not pled particularized facts demonstrating the materiality of this compensation to Kahn’s livelihood (*i.e.*, the amount of money Kahn makes per year and the amount of Kahn’s net worth). *See Cinerama*, 663 A.2d at 1167 (requiring an “independent judicial determination regarding the materiality of the [] director’s self interest” in the compensation).

Likewise, Plaintiffs’ allegation that Kahn was the former CEO of OneSource, a company recently acquired by *infoUSA*, and received an additional \$184,000 when *infoUSA* made a “topping offer” bid (Compl., ¶ 10), does not reasonably lead to the conclusion that Kahn is beholden to Vin Gupta so as to put Kahn’s independence in doubt. As with the directors’ fees,

the Consolidated Complaint fails to allege particularized facts to show that \$184,000 would have been material to Kahn in relation to his financial position; nor does it allege that Kahn and Vin Gupta are anything more than business acquaintances. Under well-settled Delaware law, mere outside business relationships are insufficient to raise a reasonable doubt regarding a director's independence. *See Litt v. Wycoff*, 2003 WL 1794724, at \*4 (Del. Ch. March 28, 2003); *see also Beam*, 833 A.2d at 980 (declining to find that “several years of business interactions . . . raises a reasonable doubt of [the director's] ability to evaluate demand independently”); *Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at \*5 (Del. Ch. March 17, 2006) (“It is well settled that ‘the naked assertion of a previous business relationship is not enough to overcome the presumption of a director's independence.’”) (citation omitted).<sup>12</sup>

More fundamentally, Plaintiffs have failed to plead particularized facts sufficient to show that Kahn (or any other member of the *infoUSA* Board) “would be more willing to risk his . . . reputation than risk the relationship with the interested director.” *Beam*, 845 A.2d at 1052. In fact, Kahn has had a distinguished career as a senior executive and director for many years. Here, as in *Beam*: “One might say that [the reputations of these Individual Defendants] for acting as a careful fiduciary is essential to [their careers] – a matter in which [they] would surely have a material interest.” *See Beam*, 833 A.2d at 980. Given the conclusory allegations here, Plaintiffs have failed to plead anything sufficient to conclude that Kahn (or the other members of the Board) would be more willing to risk a reputation for acting as a fiduciary than some tenuous relationship with Gupta. *Beam*, 845 A.2d at 1052.

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<sup>12</sup> Moreover, it is well settled that the mere fact that demand would require directors to sue “friends, family and business associates” is not enough to excuse demand under the law. *Beam*, 845 A.2d at 1050 (“Allegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence.”).

3. Haddix and Walker

In dismissing the First Amended Derivative Complaint, this Court specifically held that Plaintiff Cardinal had failed to plead sufficient facts to bring into question the independence of Haddix and Walker:

For example, Haddix and Walker are two examples that jump immediately to mind – no particularized allegations make it clear that they are disabled because of their conflicts, or their domination by Vinod Gupta, that make them incapable of independently and objectively considering a demand on the board to vindicate this claim on behalf of *infoUSA*.

(*Bench Ruling*, p.10).

In the Consolidated Complaint, Plaintiffs again allege essentially the same facts with respect to Haddix and Walker that were previously found to be insufficient to plead demand futility under Rule 23.1. Plaintiffs again allege that Haddix and Walker received free office space<sup>13</sup> and directors' fees from the Company. This Court has already ruled that both of these allegations were insufficient to show interest for purposes of a demand inquiry. (*Id.* at 10). As the Court explained, "the provision of free office space to certain directors so they can run their own businesses out of the free office space" does not meet the requirement of pleading with particularity why such a benefit is material. (*Id.* at 10). Once again Plaintiffs have failed to fill in the blanks to show some basis for finding materiality. (*Bench Ruling*, p. 11). The Consolidated Complaint fails to provide any additional information about the value of the free office space, how long Walker and Haddix have received this benefit, and how material this

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<sup>13</sup> The ABA Corporate Director's Guidebook notes that "the time required of directors of public companies has increased substantially in recent years as new responsibilities have been added for independent directors," and that "[a]ll directors are expected to devote substantial time and attention to their responsibilities -- enough time to permit the directors to prepare for and attend meetings of the board and board committees and to stay *informed* about the corporation's business performance and competitive position in the marketplace." ABA Corporate Director's Guidebook (4th ed. 2004) at pp.30-31. Given these expectations, it is "not uncommon for a director's total time commitment to involve 200 hours or more a year." *Id.* at 31. Given the time a director must spend on his or her duties at the corporation, it can hardly be said that providing "free" office space for a director's use at the corporation's headquarters demonstrates a lack of director independence.

benefit is to them. Nor have Plaintiffs (who have pled nothing about how much Haddix and Walker earn annually or their net worth) demonstrated that the directors' fees that Haddix and Walker receive are material to them. Furthermore, Plaintiffs have failed to demonstrate that Haddix and Walker, both executives and directors at other companies, would risk their reputations just to receive free office space and directors' fees.

Plaintiffs also advance the circular theory that because Haddix and Walker (and other directors) are alleged to have approved various transactions that plaintiffs seek to challenge in this action as unfairly benefiting Vin Gupta, these directors are dominated by Vin Gupta. (Compl. ¶ 140). In *In re Tyson Foods, Inc.*, 2007 WL 416132, at \*14 (Del. Ch. Feb. 6, 2007), this Court explicitly rejected this "wholly circular" argument by stating:

[I]n order to find that defendants lack independence, I must conclude that they failed to exercise independent business judgment by approving self-interested transactions; and yet in order to find those very transactions beyond the bounds of business judgment, I must conclude that the defendants lack independence. Such a decision would be contrary to the presumption of business judgment that directors enjoy, however, and cannot be supported.

In fact, the notion that demand could be excused by this kind of circularity was rejected in *Aronson* itself. See *Aronson*, 473 A.2d at 816 ("The director's approval [of a challenged act] alone does not establish control."). Under Delaware law, Plaintiffs must demonstrate that Haddix and Walker were so under the influence of Vin Gupta that their discretion was "sterilize[d]," not simply that Haddix and Walker supported transactions alleged to have benefited Vin Gupta. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 784 (Del. 1981).<sup>14</sup>

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<sup>14</sup> Similarly, Plaintiffs' attempt to impugn Haddix and Walker's independence by asserting that they signed *infoUSA* Forms 10-K that Plaintiffs attack as misleading is also circular and insufficient to excuse demand. (Compl., ¶¶ 140-141). These allegations only show that Haddix and Walker made a business decision to sign the Forms 10-K based on the information available to them at the time, including the contents of the Raval Report which required Vin Gupta to reimburse the Company for personal expenditures. (*Id.*) The allegations do not demonstrate that their discretion had been "sterilized" by Vin Gupta.

Plaintiffs likewise cannot meet their burden by making allegations that grow out of Haddix's role with a company acquired by *infoUSA* or his position as a member of the Board of Directors of Creighton University. The Consolidated Complaint misleadingly alleges that Haddix was a "former director and CEO of CSG Systems" without specifying when he held these positions. (Compl., ¶ 5). Although Haddix was a director of CSG until 2005, he has not been an employee of CSG's since 1997. (Ex. 14, CSG Systems International, Inc., Form 14A, April 5, 2004, p.6). Moreover, Plaintiffs do not allege facts to show that Haddix materially benefited from *infoUSA*'s investment in CSG when he was an employee of CSG ten years ago. The fact that Haddix long ago worked for a company in which *infoUSA* is alleged to have invested is not sufficient to show that Haddix is beholden to Vin Gupta. As for Plaintiffs' contention that Haddix is interested because he serves on the Creighton Board of Directors where Vin Gupta is purported to have "strong ties" (Compl., ¶ 5), such an allegation shows, at most, that Haddix and Vin Gupta "move in the same business and social circles" – an allegation that is not enough to demonstrate that Haddix lacks independence or is incapable of considering a pre-suit demand. *Beam*, 845 A.2d at 1051-52 ("Mere allegations that they move in the same business and social circles, or a characterization that they are close friends, is not enough to negate independence for demand excusal purposes.").

Likewise with respect to Walker, the Consolidated Complaint is largely a restatement of allegations this Court deemed insufficient in the First Amended Derivative Complaint. The only new allegation is that Walker flew on the Company jet with Vin Gupta on a "personal" trip. (Compl., ¶ 12). Once again, Plaintiffs have set forth "no particularized allegations about how meaningful or material" such a trip was to Walker. (*Bench Ruling*, p.10). Once again, the mere fact that Walker and Vin Gupta are friends or move in the same social

circles does not mean that Walker lacks independence. *See Beam*, 845 A.2d at 1051-52. Thus, once again, Plaintiffs have failed to plead anything sufficient to question Walker's independence.

4. Fairfield

Plaintiffs' only allegations challenging Fairfield's independence are that he is the former chairman of the board of directors of an *infoUSA* subsidiary (*businessCreditUSA.com*) and that he and Vin Gupta are both trustees of the University of Nebraska Foundation. (Compl., ¶ 144). The Consolidated Complaint fails to state when Fairfield was the chairman of *businessCreditUSA.com*, or whether such subsidiary still exists. Plaintiffs fail to allege, presumably because they cannot, that Fairfield ever held an executive or managerial position in *businessCreditUSA.com*, any other *infoUSA* subsidiary or *infoUSA* itself.

Plaintiffs' theory about Fairfield and Vin Gupta both being trustees of the University of Nebraska Foundation is just as empty. Plaintiffs allege no facts to show that this is meaningful to an assessment of Fairfield's objectivity. For example, the Consolidated Complaint says nothing about whether Fairfield receives any material benefits from his position. In fact, Plaintiffs say nothing about whether the Board of Trustees is a governing board or simply a designation the University of Nebraska gives to benefactors. Most importantly, Plaintiffs have not alleged any facts to show that Fairfield's being a Trustee is in any way related to Vin Gupta. Delaware law is clear that "allegations as to one's position on multiple boards does not in and of itself call into question one's independence from an interested director...." *Zimmerman ex rel. Priceline.com, Inc. v Braddock*, 2002 WL 31926608, at \*10 (Del. Ch. Dec. 20, 2002). And as with the other directors, Plaintiffs have not pled particularized facts to show that Fairfield, a successful businessman and executive, would risk his reputation simply to appease Vin Gupta given the attenuated connections between them. Plaintiffs' allegations are not sufficient to show lack of independence under Delaware law.

5. Reznicek

Plaintiffs claim that Reznicek lacks independence because he is the former dean of the Creighton University College of Business Administration and Vin Gupta has made “substantial contributions” to Creighton University. (Compl., ¶ 11). Plaintiffs fail to allege the amount of any such “substantial contributions” nor how those contributions could now be said to personally benefit Reznicek (who no longer works for Creighton University) so as to make him beholden to Vin Gupta. The test for determining whether an alleged benefit would be material to a director is subjective. *Telxon*, 802 A.2d at 264 (stating that a plaintiff must establish the “subjective material importance” of a benefit received from the allegedly controlling person or entity in order to establish domination and control). In light of Plaintiffs’ failure to allege anything showing that any contribution Gupta made to Creighton would have been material to Reznicek, such contributions cannot be used to challenge Reznicek’s independence.

Plaintiffs also allege that Reznicek has served as a director of CSG and that he is currently its non-executive Chairman. (Compl., ¶¶ 6, 11, 143). Although the Consolidated Complaint alleges that *infoUSA* had an investment in CSG between 1997 and 1999 (Compl., ¶ 5), there is no allegation that Reznicek benefited from that investment in any material way or that Vin Gupta has any say in corporate matters at CSG. Reznicek did not join the *infoUSA* Board until almost ten years after *infoUSA* made that investment.

As with many of the other directors, Reznicek is or has been an executive or a director at other major corporations for some time. And as with the other directors, Plaintiffs have failed to allege any facts that would permit a finding that Reznicek would risk his position and status simply because Vin Gupta has made donations to Creighton or because *infoUSA* long ago invested in CSG. *See Beam*, 845 A.2d at 1052.

6. Raval

With respect to outside director Raval, Plaintiffs repeat the same allegations that were unsuccessfully advanced in the First Amended Derivative Complaint. Plaintiffs suggest that Raval is dominated and controlled by Vin Gupta because (i) he receives directors' fees that allegedly are high in relation to his salary as a Professor at Creighton University, (ii) Raval and Vin Gupta share a common association with Creighton University, and (iii) Raval signed Forms 10-K allegedly approving some transactions challenged in the Consolidated Complaint. (Compl., ¶ 143). This Court addressed general and conclusory allegations of this kind in its Bench Ruling and found them to be insufficient. (*Bench Ruling*, p.10). As with Haddix, Walker, and Kahn, the receipt of directors' fees by Raval does not establish financial interest. Plaintiffs do not even allege the amount of Raval's Creighton University salary or whether Raval has other sources of income.<sup>15</sup> Thus, Plaintiffs have not alleged "how meaningful or material the benefits would be" to Raval as they must in order to challenge his independence. (*Bench Ruling*, p.10). Furthermore, even if Plaintiffs had alleged that Raval's *infoUSA* director fees are greater than Raval's income from other sources, which they do not, this would be insufficient to establish materiality. This Court has previously rejected the position advocated by Plaintiffs, which, if accepted, would improperly discourage persons of less than extraordinary means from serving on corporate boards. *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 359-360 (Del. Ch. 1998) (finding that teacher who received director fees greater than her salary was not beholden to company's CEO).

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<sup>15</sup> In fact, Raval is on the Board of Directors of Syntel, Inc., and receives fees for serving on its Board and as Chairperson of the Syntel Audit Committee. In addition, upon being elected to the Syntel Board, he received a number of shares of restricted stock equal to \$55,000 under Syntel's 1997 Stock Option and Incentive Plan. (*See Ex. 15, Syntel, Form 14A, filed on May 1, 2006, pp. 2-4, 14-15*).

The other allegations challenging Raval's independence in the Consolidated Complaint are equally insufficient. Plaintiffs' allegations about Vin Gupta's affiliations with Creighton no more demonstrate that Raval is beholden to Vin Gupta than they do that Reznicek is beholden to Vin Gupta. Plaintiffs do not allege that Raval owes his job at Creighton to Vin Gupta, nor that Vin Gupta has any control over the decisions made by Creighton related to Raval's job advancement or compensation. The mere fact that Vin Gupta is a contributor to the Vin Gupta School of Business Administration in India, which in turn has an exchange program of an undefined nature with Creighton, is entirely insufficient to render Raval beholden to Vin Gupta.

Finally, Plaintiffs' argument that Raval is interested because he signed a Form 10-K approving of certain expenditures by Vin Gupta is circular. *See In re Tyson*, 2007 WL 416132, at \*14; *Aronson*, 473 A.2d at 816. In fact, Plaintiffs themselves point to a report that Raval prepared, which they characterize as critical of these expenditures. (Compl., ¶ 143). That concession is further evidence that Plaintiffs do not allege anything that would permit a finding that Raval lacks independence.

#### 7. Kaplan

Plaintiffs make many of the same allegations as they do about other directors concerning outside director Kaplan. Thus, Plaintiffs argue that Kaplan is interested because he (like the rest of the Board) receives directors' fees, or because he (like Walker) is alleged to have flown on the Company jet. (Compl., ¶ 9). As discussed above, these allegations are patently insufficient.

Although Plaintiffs also try to make much of the fact that Kaplan is a partner at a law firm (Robins Kaplan) which has provided legal services to *infoUSA*, Delaware law is well-settled that mere outside business relationships are insufficient to raise a reasonable doubt

regarding a director's independence. *See Beam*, 845 A.2d at 1050 (“Allegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director’s independence.”); *see also Id.* at 980 (declining to find that “several years of business interactions . . . raises a reasonable doubt of [the director’s] ability to evaluate demand independently”). Moreover, Plaintiffs have not pled anything establishing the materiality of the fees paid to the law firm or Kaplan’s interest in those fees.

Finally, as with the other directors, Plaintiffs allege no particularized facts that would demonstrate that Kaplan (who advises “several major corporations” (Compl., ¶ 9)) would risk tarnishing his reputation for integrity -- a particularly important virtue for a lawyer -- just to appease Vin Gupta and keep *infoUSA*’s business. *See Beam*, 845 A.2d at 1052.

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In sum, two of the eight outside directors (Kahn and Anshoo Gupta) who are now named as defendants in the Consolidated Complaint, were not even alleged to be interested in the First Amended Derivative Complaint because they had rejected the Gupta Offer and had opposed the dissolution of the Special Committee. Although Plaintiffs now seek to attack Kahn and Anshoo Gupta, the allegations against them are patently insufficient. Likewise, no new facts are alleged with respect to Haddix and Walker, whom this Court used as specific examples of plaintiff Cardinal’s failure to plead anything sufficient to show that the majority was not independent. (*Bench Ruling*, p.10). The allegations directed to outside directors Fairfield and Reznicek, who joined the *infoUSA* Board in November 10, 2005 and March 30, 2006, respectively (Compl. ¶ 7; *see also* Ex. 12, p. 30), are either allegations that this Court has already held to be insufficient to prove that a director is beholden to Vin Gupta (such as the receipt of directors’ fees) or the sort of general and conclusory allegations that are legally insufficient to

raise a reasonable doubt that a director lacks independence. Finally, the allegations against the remaining outside directors -- Raval and Kaplan -- essentially rehash the allegations unsuccessfully asserted against them in Cardinal's First Amended Derivative Complaint.

Plaintiffs have failed to plead facts to show that any of the eight outside directors who served on the Board with Vin Gupta as of October 19, 2006 were, as Plaintiffs assert in a conclusory fashion, "dominated and controlled by Vin Gupta." (Compl., ¶ 138(f)). At a minimum, Plaintiffs have failed to show (as they must) that five of the nine directors suffered from a disabling conflict of interest such as to render them "incapable of independently and objectively considering a demand on the board to vindicate [the] claim on behalf of *infoUSA*." (*Bench Ruling*, p.10).

C. The Consolidated Complaint Fails To Meet The *Rales* Test With Respect To Alleged Board Inaction.

A significant portion of Plaintiffs' allegations assert that the Board breached its fiduciary duties by failing to supervise the Chief Executive Officer, Vin Gupta. (Compl., ¶¶ 63, 100, 113, 151, 157, 163, 164). These allegations of director inaction are governed by the *Rales* test for demand futility. Under *Rales*, and in particular, in the context of a failure to supervise, "demand is excused only when the complaint contains particularized facts creating a reasonable doubt that a majority of the directors would have been independent and disinterested when considering the demand." *Ash v. McCall*, 2000 WL 1370341, at \*10 (Del. Ch. Sept. 15, 2000). As explained in Section I.B. *supra*, Plaintiffs have failed to plead particularized facts demonstrating that a majority of the Board in place on October 19, 2006 is not independent or interested. Moreover, Plaintiffs have failed to demonstrate that "the potential for liability [for the directors] is not a mere threat but instead may rise to a substantial likelihood." *Id.* (internal quotations omitted). "[O]nly a sustained or systematic failure of the board to exercise oversight

. . . will establish the lack of good faith that is a necessary condition to liability. Such a test of liability – lack of good faith as evidenced by sustained or systematic failure of a director to exercise reasonable oversight – is quite high.” *In re Caremark Int’l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

Plaintiffs here fall short of establishing that this is the “rare case . . . where defendants’ actions were so egregious that a substantial likelihood of director liability exists.” *Seminaris*, 662 A.2d at 1354. Plaintiffs have failed to plead particularized facts to show that the expenditures in question were without a conceivable valid business purpose, such as client entertainment or client development or that the terms of the consulting agreements were unfair to the Company and that the Company did not receive beneficial advice in return. Indeed, the Board acting through its Audit Committee has investigated and taken action with respect to many of these same allegations of improper personal expenditures by the Chief Executive Officer. Plaintiffs admit that Raval, Chairman of the Audit Committee, prepared a report that was critical of several of the challenged related party transaction and that required Vin Gupta to reimburse the Company for \$631,899 in charges that were personal and not supportable business expenses. (Compl., ¶¶ 101, 107). Accordingly, Plaintiffs have not alleged a sustained failure to act when it comes to transactions involving the Chief Executive Officer.

D. The Consolidated Complaint Fails To Allege Particularized Facts Sufficient To Satisfy the Second Part Of The *Aronson* Test.

To the extent that the Consolidated Complaint challenges Board action, those challenges fail to satisfy the second part of the *Aronson* test. Plaintiffs further allege in the Consolidated Complaint that the Board breached its fiduciary duties by approving (a) the creation and disbanding of the Special Committee (Compl., ¶¶ 28, 43); (b) approval of purchases of a University of Nebraska-Lincoln football stadium skybox (*Id.* ¶ 97) and the Everest Building

by assumption of the mortgage (*Id.* ¶ 100); and (c) approval of the Rights Plan and the standstill agreements to the Rights Plan (*Id.* ¶¶ 116, 127). Plaintiffs, however, only make conclusory allegations in the Consolidated Complaint that these actions by the board “w[ere] not the product of a valid exercise of business judgment” and involved the abdication of the directors’ fiduciary duties. Plaintiffs allege no particularized facts to show why any of the actions in question is not a valid exercise of business judgment. (*Id.* ¶ 138(b)). Since a majority of the Board has not been shown to be interested or lack independence, the presumptions of the business judgment rule are applicable. *See Aronson*, 473 A.2d at 812. Plaintiffs must plead particularized facts sufficient to demonstrate for each challenged Board action that there was no “rational business purpose” for approving such a transaction. *Sinclair Oil*, 280 A.2d at 720. Plaintiffs carry a “substantial burden” of rebutting the business judgment presumption because “the second prong of the *Aronson* test is ‘directed to *extreme* cases in which, despite the appearance of independence and disinterest, a decision is so extreme or curious as to itself raise a legitimate ground to justify further inquiry and judicial review.’” *Highland Legacy*, 2006 WL 741939, at \* 7 (citations omitted) (emphasis added). Absent any such “particularized allegations to the contrary, the directors are presumed to have acted on an informed basis and in the honest belief that their decisions were in furtherance of the best interests of the corporation and its shareholders.” *Id.*

In asserting that they have overcome the presumption that the business judgment rule applies to the Board decisions at issue in the Consolidated Complaint, Plaintiffs again rely on the circular reasoning explicitly rejected in *In re Tyson Foods, Inc.*, 2007 WL 416132, at \*14. Plaintiffs attempt to prove their allegations that the Board could not have exercised its business judgment with regard to these transactions by asserting that the Board lacked independence. And yet, in order to prove the latter, they rely upon allegations of the former. Plaintiffs have

failed to plead facts sufficient to demonstrate either, and such circular logic should be disregarded by this Court. (*See discussion supra* § I.B(3)) As discussed in the rest of this section, Plaintiffs have failed to plead any particularized facts that demonstrate that this is one of the “extreme” cases where the Court could conclude that the Board’s decisions have no rational business purpose. *Highland Legacy*, 2006 WL 741939, at \*7.

1. The Creation and Disbanding of the Special Committee.

This Court has already held in its Bench Ruling dismissing the First Amended Derivative Complaint that the creation of the Special Committee and its dissolution were within the Board’s discretion. (*Bench Ruling*, p.11) (“The board voted to terminate the committee, which the board had the power to do. It created the committee and, by definition, it can terminate the committee.”). Nonetheless, Count I of the Consolidated Complaint seeks to assert a claim for damages to the Company because the creation of the Special Committee is alleged to have been a “sham,” serving no rational business purpose so that the amounts used to fund the Special Committee were “improperly paid.” (Compl. ¶ 147) Plaintiffs allege no particularized facts to show that the Special Committee served no business purpose or that the decision to disband it had no rational basis.

The Consolidated Complaint is devoid of any allegations challenging the process the Board followed in creating the Special Committee and as to the role Fried, Frank and Lazard played in advising the Special Committee concerning the Gupta Offer. There are no particularized allegations challenging the process by which the Special Committee considered and rejected the Gupta Offer. With regard to the disbanding of the Special Committee, the Consolidated Complaint fails to identify any specific information that the Board failed to consider before voting to disband the Special Committee. Curiously, the Consolidated Complaint specifically admits that the Board, in considering “whether it was desirable to

‘proactively seek alternative proposals’” and keep the Special Committee in place, “discussed the potential disruption to Company operations, the potential adverse effect on key employees, the uncertainty and possible adverse effect on employees in general and the consequential adverse impact on the interests of the stockholders.” (Compl., ¶ 44). Plaintiffs acknowledge that the Special Committee rejected Vin Gupta’s offer as inadequate and that his proposal was withdrawn as a result. (*Id.* ¶ 17). Far from being a “sham,” the Committee had actual decision-making power and its actions had a powerful effect.

There is another striking inconsistency in Plaintiffs’ “sham” assertion. In the First Amended Derivative Complaint, Cardinal, the lead Plaintiff as to Count I of the Consolidated Complaint, sought to have the Special Committee reinstated by this Court. Now, the same Plaintiff is attempting to sue for damages on behalf of *infoUSA* claiming that the same Special Committee that it sought to reinstate was a sham and that funding it in the first instance was tantamount to a waste of corporate assets.

2. Approval of Corporate Expenditures for Purchase of a Skybox and the Everest Building.

Counts II, IV, and V, Plaintiffs challenge several corporate expenditures alleged to have been approved by the Board, including the purchase of a University of Nebraska-Lincoln football stadium skybox (Compl., ¶ 97), and the “Everest Building” by assumption of the mortgage (*Id.* ¶ 100). Plaintiffs, however, have failed to plead with particularity any basis to conclude that the business judgment rule does not apply to the Board’s approval of those transactions. Thus, once again, Plaintiffs have failed to meet the standard for demand futility under the second part of the *Aronson* test. As a result, these claims must also fail for failure to make demand.

Plaintiffs' claims amount to allegations of waste and such allegations must comply with Rule 23.1 demand requirements. *See Ash*, 2000 WL 1370341, at \*7. Applying the business judgment analysis of *Aronson* to waste claims, a plaintiff must allege particularized facts that show that the consideration received by the corporation was "so inadequate . . . that no person of ordinary, sound business judgment would deem it worth that which the corporation has paid." *Grobow v. Perot*, 539 A.2d 180, 189 (Del. 1988), *overruled in part on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (quoting *Saxe v. Brady*, 184 A.2d 602, 610 (1962)) (internal quotations omitted). "Put another way, plaintiffs must show that [the action] in question either served no corporate purpose or was so completely bereft of consideration that it effectively constituted a gift." *Ash*, 2000 WL 1370341, at \*7. It is "an extreme test, very rarely satisfied by a shareholder plaintiff, because if under the circumstances any reasonable person might conclude that the deal made sense, then the judicial inquiry ends." *Zupnick v. Goizueta*, 698 A.2d 384, 387 (Del. Ch. 1997) (internal quotations omitted). Delaware imposes this onerous burden for waste in deference to a corporate board's fundamental decision-making authority, and in recognition that "[c]ourts are ill-fitted to attempt to weigh the 'adequacy' of consideration under the waste standard . . ." *Brehm*, 746 A.2d at 263. Directors named as defendants need not demonstrate that a transaction approved by a corporation's board had a rational business purpose. *See Sinclair Oil*, 280 A.2d at 720. Rather, the burden is on the Plaintiffs to plead facts to show that the Board action was beyond the pale of the business judgment rule. Plaintiffs have not met this burden.

- (i) Payment for the University of Nebraska-Lincoln football stadium skybox.

Plaintiffs allege sparse facts concerning the purchase of a skybox lease at the University of Nebraska-Lincoln football stadium. (Compl., ¶¶ 97, 157(1)). Although the

Consolidated Complaint sets forth the price the Company paid to acquire the skybox lease from Vin Gupta, there is no allegation that the Company paid Mr. Gupta more than other leases were going for in other transactions. Moreover, there are no particularized allegations showing that the skybox was not used by the Company to entertain clients or that the Audit Committee did not adequately review the purchase of the skybox.

(ii) Purchase of the “Everest Building.”

The Consolidated Complaint contains allegations that the Audit Committee met on October 15, 2001 to approve the Company’s acquisition of an office building owned by the Everest group of companies (“Everest”). (Compl., ¶ 13). Plaintiffs allege that *infoUSA* acquired the “Everest Building” by “assuming the mortgage for which V. Gupta was personally liable from one of V. Gupta’s affiliates, Everest Investment Management, for \$2.8 million.” (*Id.*). The Consolidated Complaint contains no allegations that the terms of the acquisition were above market or otherwise unfair or that *infoUSA* derived no benefit from owning the building, such as rental income or use of the space for *infoUSA*’s business operations. Again, Plaintiffs have not met their burden of showing that the Board action served no valid business purpose.

3. The Rights Plan and July 21, 2006 Letter Agreement.

As the Consolidated Complaint acknowledges, in 1997 the Board adopted a Shareholders Rights Plan (the “Rights Plan”). (Compl., ¶ 116). As the Consolidated Complaint also acknowledges, the Rights Plan has always specified that Vin Gupta, his family, and any entities he controls are excluded from the definition of “Acquiring Person,” and thus, are exempt from the Rights Plan. (*Id.*) Vin Gupta and *infoUSA* have been parties to a series of standstill agreements in which Vin Gupta has agreed, for some defined period, not to purchase additional *infoUSA* securities (other than by exercising any stock options he receives) and *infoUSA* has agreed not to modify the Rights Plan to terminate the exemption. (*Id.* ¶ 126). The most recent

agreement between the parties was dated July 21, 2006 (the “July 21, 2006 Letter Agreement”). (*Id.* ¶ 127).

Plaintiffs challenge the validity of the July 21, 2006 Letter Agreement (*Id.* ¶¶ 128, 129), asserting that such agreement is “void and invalid” pursuant to the terms of the Rights Plan and pursuant to 8 Del. C. § 141(a). (*Id.* ¶ 109). It is hornbook law, however, that a Delaware corporation may enter into an agreement with one of its stockholders. Moreover, Section 141(a) does not prevent a board from entering into contracts that limit the board’s power. *Unisuper Ltd. v. News Corp.*, WL 3529317, at \*6 (Del. Ch. Dec. 20, 2005). The Board is entitled on this record to the presumption that it entered into the Rights Plan and the various standstill agreements because it believed that they were in the best interests of the shareholders and Plaintiffs have not shown otherwise.

Furthermore, Plaintiffs have set forth no particularized allegations to demonstrate that entering into the Letter Agreement served no rational business purpose such that this decision should be denied protection under the business judgment rule. In particular, there are no allegations concerning the Board’s process in approving the Rights Plan and subsequent standstill agreements; no allegations concerning how many times the Board met to consider the Rights Plan and subsequent standstill agreements; no allegations concerning advice the Board received or should have received from outside counsel or advisors regarding the Rights Plan and subsequent standstill agreements; and no allegations about what other information the Board should have considered before approving the Rights Plan and subsequent standstill agreements. In short, Plaintiffs’ allegations with respect to Board action regarding the Rights Plan, like the allegations with respect to other challenged Board action, are wholly conclusory and fail to

comply with the “stringent requirements of factual particularity” required to plead demand futility under the second part of the *Aronson* test. *Brehm*, 746 A.2d at 254.

**II. Each Count Of The Consolidated Complaint Fails To State A Claim and Should Be Dismissed Pursuant to Chancery Court Rule 12(b)(6).**

In addition to Plaintiffs’ failure to make demand, the Consolidated Complaint should be dismissed for the second, independent reason that each of the five counts fails to state a claim. Accordingly, the Consolidated Complaint should be dismissed pursuant to Rule 12(b)(6).

**A. Count I – Alleged Breach Of Fiduciary Duty Regarding The Creation Of The Special Committee.**

Count I should be dismissed because the action challenged therein falls squarely within the ambit of the business judgment rule. The creation and dissolution of the Special Committee were decisions clearly within the Board’s power. (*Bench Ruling*, p. 10). The business judgment rule operates to preclude courts from second-guessing good faith decisions made by directors in their management of a corporation. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1988). Plaintiffs have not alleged any new facts beyond those unsuccessfully asserted in the First Amended Derivative Complaint to support their conclusory allegation that the Special Committee was a “sham.” In fact, they allege that the Special Committee hired independent advisors, studied the Vin Gupta offer and rejected the offer as inadequate. (Compl., ¶ 17). These actions are entirely inconsistent with a “sham” Special Committee. In any event, because the business judgment rule applies, Count I should be dismissed.

B. Count II – Alleged Invalidity Of Transactions Between infoUSA And Vin Gupta Under 8 Del. C. § 144 And Invalidity Of Stock Option Payment To Consultant Under 8 Del. C. § 157 – Fails To State A Claim.

Plaintiffs’ allegations in Count II of the Consolidated Complaint fail to state a cause of action under the two statutes Plaintiffs invoke: Sections 144 and 157 of the Delaware General Corporation Law (“DGCL”). As a result, Count II should be dismissed.

Section 144 was adopted as part of the 1967 revision of the DGCL to eliminate the need for boilerplate provisions in corporate charters, reversing the common law rule that interested director transactions were invalid *per se*. Under Section 144, a transaction involving interested directors is not invalid so long as: (1) the transaction is approved by disinterested members of the board of directors; (2) the transaction is approved by the shareholders; or (3) the transaction is fair to the corporation. In order to state a claim that a transaction is invalid under Section 144, Plaintiffs must plead that none of these three circumstances applies. Plaintiffs have not done so. There are no allegations to demonstrate that the challenged transactions were unfair to *infoUSA* (or even that the consideration received by *infoUSA* has been inadequate).

On a Rule 12(b)(6) motion, “[t]he requirement to draw reasonable inferences is not an invitation to irrational, plaintiff-friendly speculation....” *Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955, 964 (Del. Ch. 2004). Instead, on a motion to dismiss, “the court must draw reasonable inferences in the plaintiff’s favor to the extent such inferences arise from well-pled facts in the complaint.” *Id.* “Conclusory allegations unsupported by facts contained in a complaint...will not be accepted as true.” *Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002). Plaintiffs only make conclusory allegations that the transactions challenged in Count II were unfair without providing any factual support for their assertions. Nor have Plaintiffs explained why it is a reasonable inference that the transactions were unfair to the Company. Thus, Plaintiffs’ Section 144 claim fails.

Plaintiffs' Section 157 claim is similarly unavailing. Plaintiffs make the conclusory allegation that any options given to an *infoUSA* consultant who formerly was a high-level government official are invalid because, "[o]n information and belief," they were not approved by the Board. (Compl., ¶ 113). That allegation is insufficient here. In 1997, the Board (and subsequently the stockholders) approved an Options Plan, which had as its stated purpose "to attract and retain the best available personnel for positions of substantial responsibility." (Ex. 4, p. 17) The Options Plan specifically authorizes consultants to be granted options as compensation for services rendered. The Consolidated Complaint acknowledges that the former high-level government official who is referenced in connection with this allegation is a party to a consulting agreement with *infoUSA* (Compl., ¶ 113). Thus, the former government official is eligible for option grants under the Board-approved Options Plan.

Because the Consolidated Complaint fails to plead the elements of a cause of action under both Sections 157 and 144, Count II should be dismissed in its entirety.

C. Count III – Alleged Invalidity Of The July 21, 2006 Letter Agreement.

The Board of Directors of *infoUSA* had the authority to enter into the July 21, 2006 Letter Agreement with Vin Gupta. Indeed, as noted above, Section 141(a) of the DGCL does not prevent a board of directors from entering into contracts that arguably limit the board's power. *See Unisuper*, 2005 WL 3529317, at \*6. The July 21, 2006 Letter Agreement was nothing more than a contractual arrangement entered into between *infoUSA* and Vin Gupta, and the decision to enter into this agreement with Vin Gupta is protected by the business judgment rule.

Moreover, the issue of whether the July 21, 2006 Letter Agreement somehow impermissibly restricts the ability of the Board to act as Plaintiffs allege, is not ripe for adjudication. Plaintiffs' theory is that the Board will be unable to act in accordance with its

fiduciary duties if the Company receives a third-party offer. The Consolidated Complaint, however, is devoid of any allegation that the Company has received an offer from a third party. Until such time as the Board is arguably required to take action under the Rights Plan in response to an acquisition proposal, Plaintiffs' claim is pure speculation, and is not a ripe controversy subject to judicial interpretation. *See Bebhuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006) (“a ripe dispute is one where litigation sooner or later appears to be unavoidable, and one in which material facts are static.”) (internal quotations omitted); *Stroud v. Milliken Enters.*, 552 A.2d 476, 480 (Del. 1989). As in Count II, Plaintiffs have purported to state a claim without alleging any ensuing harm. Accordingly, Count III of the Consolidated Complaint should be dismissed.

D. Count IV – Alleged Breach Of Fiduciary Duty.

Plaintiffs have failed to provide any allegation that would permit them to maintain a claim that the Board has breached its fiduciary duties. Nearly all of the allegations made in Count IV were made in the First Amended Derivative Complaint this Court dismissed on October 17, 2006. Since Plaintiffs have not pled facts to support an inference that the Board is interested, the presumption of the business judgment rule is applicable. When the decision of the board of directors of a Delaware corporation falls within its discretion under the business judgment rule, Courts will not second-guess the board's decision. *Mills Acquisition*, 559 A.2d at 1279. In order to overcome this presumption, Plaintiffs must show for each of the challenged transactions that there was “no rational business purpose.” *Sinclair Oil*, 280 A.2d at 720. Since Plaintiffs have not satisfied this burden, Count IV fails to state a claim.

E. Count V – Alleged Waste.

Because Plaintiffs have not pled facts sufficient to satisfy the “extreme” test that must be met to state a claim for corporate waste, Count V should be dismissed. *Zupnick*, 689

A.2d at 387 (the test for a corporate waste claim is an “extreme [one], very rarely satisfied by a shareholder plaintiff”). In order to meet the legal requirement for waste, a plaintiff must show facts that, if true, would prove that the Defendants approved a transaction exchanging something of value for consideration so inadequate that “no person of ordinary, sound business judgment would deem it worth what the corporation has paid.” *Steiner v. Meyerson*, 1995 WL 441999, at \*1 (Del. Ch. July 19, 1995) (internal quote and citation omitted); *see also, Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979).

For a waste claim to survive a motion to dismiss, “the Court must find that in any of the possible sets of circumstances inferable from the facts alleged under the complaint, no reasonable person could deem the received consideration adequate.” *Apple Computer, Inc. v. Exponential Tech., Inc.*, 1999 WL 39547, at \*11 (Del. Ch. Jan. 21, 1999). Delaware courts impose this onerous burden in deference to a corporate board’s fundamental decision-making authority, and in recognition that “[c]ourts are ill-fitted to attempt to weigh the ‘adequacy’ of consideration under the waste standard...” *Brehm*, 746 A.2d at 363.

Plaintiffs simply have not alleged anything that rises to the extreme level required for a waste claim. At no point do they allege facts that show that the challenged travel and entertainment expenses did not have a valid business purpose. (Compl., ¶ 163). The Consolidated Complaint alleges that *infoUSA* was “harmed” by the payment of consultant fees, but Plaintiffs do not plead facts that show that any consideration paid to the consultant exceeded the value received for the consultant’s services or that these services were so grossly inadequate so as to constitute waste. In sum, Count V, like the other Counts of the Consolidated Complaint, fails to state a claim.

## CONCLUSION

Plaintiffs have not alleged sufficient particularized facts (as Rule 23.1 requires to maintain a derivative complaint) to show that the a majority of the nine directors serving on the *infoUSA* Board on October 19, 2006 was interested or was beholden to Vin Gupta and therefore, that demand upon the Board would have been futile. As such, the Consolidated Complaint should be dismissed for failure to comply with Rule 23.1. Furthermore, each count of the Consolidated Complaint fails to state all of the elements required to state a claim. Thus, dismissal is also mandated by Rule 12(b)(6).

POTTER ANDERSON & CORROON LLP

/s/ Brian C. Ralston

Donald J. Wolfe, Jr. (#285)  
Arthur L. Dent (#2491)  
Brian C. Ralston (#3770)  
Kirsten A. Lynch (#4573)  
Hercules Plaza, 6th Floor  
1313 North Market Street  
P.O. Box 951  
Wilmington, Delaware 19899-0951  
(302) 984-6000

*Attorneys for George F. Haddix, Vasant H. Raval, Bill L. Fairfield, Anshoo S. Gupta, Elliot S. Kaplan, Martin F. Kahn, Bernard W. Reznicek, Dennis P. Walker, Charles Stryker, Harold W. Anderson and infoUSA Inc.*

March 5, 2007  
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MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Martin P. Tully

Martin P. Tully (#465)  
William M. Lafferty (#2755)  
Jay N. Moffitt (#4742)  
1201 North Market Street  
P. O. Box 1347  
Wilmington, DE 19899-1347  
(302) 658-9200

*Attorneys for Defendant Vinod Gupta*

OF COUNSEL:

KIRKLAND & ELLIS LLP

Yosef J. Riemer  
Sudwiti Chanda  
Citigroup Center  
153 East 53<sup>rd</sup> Street  
New York, New York 10022-4611  
(212) 446-4800

**CERTIFICATE OF SERVICE**

I, Brian C. Ralston, hereby certify that on March 5, 2007, the foregoing document was electronically served via *LexisNexis File & Serve* upon the following counsel:

Elizabeth M. McGeever, Esquire  
Prickett Jones & Elliott, P.A.  
1310 King Street  
Wilmington, Delaware 19899

R. Bruce McNew, Esquire  
Taylor & McNew LLP  
2710 Centerville Road, Suite 210  
Wilmington, DE 19808

A handwritten signature in black ink, appearing to be 'BR', written over a horizontal line.

Brian C. Ralston (I.D. No. 3770)