

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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IN RE VIACOM INC. :
SHAREHOLDER DERIVATIVE : Consolidated Case Index No.: 602527/05
LITIGATION : (Juengling v. Abrams, et al., Index No.:
602526/05; D'Addario v. Abrams, et al.,
Index No.: 602527/05)
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**REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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Defendants George S. Abrams (“Abrams”), David R. Andelman (“Andelman”), Joseph A. Califano, Jr. (“Califano”), William S. Cohen (“Cohen”), Philippe P. Dauman (“Dauman”), Thomas E. Freston (“Freston”), Alan C. Greenberg (“Greenberg”), Leslie Moonves (“Moonves”), Charles Phillips, Jr. (“Phillips”), Shari Redstone, Sumner M. Redstone (“Redstone”), Frederic V. Salerno (“Salerno”), William Schwartz (“Schwartz”), Robert D. Walter (“Walter”), and nominal defendant Viacom Inc. (“Viacom” or the “Company”) (collectively the “Defendants” or “Viacom Defendants”) respectfully submit this reply memorandum of law in further support of their motion to dismiss Plaintiffs’ Operative Complaint (the “Complaint”), pursuant to Delaware Chancery Court Rule 23.1 and C.P.L.R. 3211.

PRELIMINARY STATEMENT

Plaintiffs face the impossible task of excusing their failure to make demand on Viacom’s distinguished Board of Directors (the “Board”). In trying to meet their burden they instead have made some compelling concessions. *First*, Plaintiffs concede that four members of the Board are independent and capable of reviewing a demand. *Second*, Plaintiffs concede that none of the outside Viacom directors are “interested.” And, *third*, Plaintiffs have not even attempted to argue that they can satisfy the second prong of the test set forth in the seminal case of *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984); that is, that the Plaintiffs have created a reasonable doubt as to the whether the “challenged transaction was otherwise the product of a valid exercise of business judgment.” Memorandum of Law in Opposition to Defendants’ Motion to Dismiss (“Opposition” or “Opp.”) at 8.

Given the fact that seven members constitute a majority of the Board and Plaintiffs’ concession that four directors are independent, the entirety of Plaintiffs’ demand futility argument is reduced to their ability to demonstrate that they have pled particularized facts

raising a reasonable doubt as to the independence of three outside directors, Greenberg, Salerno, and Schwartz (the “Challenged Directors”). Nothing in their Opposition can resuscitate their deficient Complaint. Plaintiffs make wholly conclusory allegations regarding connections between Viacom and the Challenged Directors, rather than pleading with the requisite particularity. And when it comes to the necessary allegation that the connections are material to the Challenged Directors, Plaintiffs do not even try to make a case.

Viacom’s Board is composed of a distinguished array of prominent figures in government, education, and industry, including the following independent directors:

- a former United States Secretary of Defense, United States Senator, and member of the House of Representatives (Cohen);
- a former United States Secretary of Health, Education and Welfare and Assistant for Domestic Affairs (Califano);
- a former Dean of Boston University Law School, law professor, and honorary member of the National College of Probate Judges (Schwartz);
- the Chairman of the Executive Committee and the former Chairman and Chief Executive Officer of Bear Stearns (Greenberg);
- the former Chief Financial Officer of Verizon Communications, Inc. (Salerno);
- the President of Oracle Corporation (Phillips);
- the founder and former Chairman and Chief Executive Officer of Cardinal Health, Inc. (Walter).¹

The stature of these individuals renders remote the likelihood that they could ever be found not to be independent, notwithstanding Plaintiffs’ attempts to impugn the independence of Messrs. Greenberg, Schwartz and Salerno. As the Delaware Supreme Court recently explained:

That a much stronger relationship is necessary to overcome the presumption of independence at the demand futility stage becomes especially compelling when

¹ See Viacom’s 2005 Proxy at 21, 22, 24 (quoted extensively throughout the Complaint and annexed as Exhibit C to the Affirmation Of John D. Roesser In Support Of Defendants’ Motion To Dismiss, dated October 26, 2005 (“Roesser Aff.”)).

one considers the risks that directors would take by protecting their social acquaintances in the face of allegations that those friends engaged in misconduct. To create a reasonable doubt about an outside director's independence, a plaintiff must plead facts that would support the inference that because of the nature of a relationship or additional circumstances other than the interested director's stock ownership or voting power, the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director.

Beam v. Stewart, 845 A.2d 1040, 1051 (Del. 2004).²

Finally, in a tacit admission that they cannot meet the demand futility test set forth in *Aronson*, Plaintiffs desperately argue for "a far less demanding showing to support a conclusion of reasonable doubt" because Redstone is a controlling shareholder. Opp. at 19. Such an argument, however, finds no support in the law. The *Aronson* test is controlling in Delaware and Plaintiffs' burden is constant

ARGUMENT

POINT I.

PLAINTIFFS HAVE FAILED TO DEMONSTRATE DEMAND FUTILITY

The test for demand futility, as set forth in *Aronson*, is a two prong test. Plaintiffs must demonstrate either (1) that, "under the particularized facts alleged, a reasonable doubt³ is created that . . . the directors are disinterested and independent," or (2) that there is a reasonable doubt that "the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson*, 473 A.2d at 814; *see also* Opp. at 8. Although Viacom prominently

² Plaintiffs' own attempts to distinguish inconvenient case law forces them to concede that a director's public and professional reputation as a factor relevant to the independence analysis. *See* Opp. at 17, n. 17.

³ Plaintiffs attempt to dilute the standard of "reasonable doubt" by selectively quoting language from *Grimes v. Donald*, 673 A.2d 1207 (Del. 1996), that, when read out of context, appears to lighten the "stringent requirements of factual particularity." *See* Opp. at 9, n. 9. A similar attempt was flatly rejected by the Supreme Court of Delaware last year in *Beam*: "Plaintiff seemingly argues that our use of the phrases 'reason to doubt' and 'reasonable belief' in *Grimes* has somehow watered down the pleading threshold set forth in our jurisprudence. Nothing in *Grimes* was intended to weaken the traditional, objective reasonable doubt standard to be applied to the pleading threshold." *Beam*, 845 A.2d at 1050 n. 26 (citations omitted).

argued in its Memorandum of Law In Support of Its Motion to Dismiss (“Memorandum of Law” or “Mem.”) that Plaintiffs failed to meet either prong of the test, Plaintiffs address—albeit unsuccessfully—only the first prong, and effectively abandon the second.

A. Plaintiffs Have Failed To Plead Particularized Facts⁴ Creating A Reasonable Doubt As To The Challenged Directors’ Independence

Plaintiffs concede that four of the twelve Viacom directors, Califano, Cohen, Phillips, and Walter, are disinterested and independent. *See* Opp. at 3. Plaintiffs accordingly base the entirety of their demand futility argument on conclusory allegations challenging the independence (as opposed to the disinterestedness) of three directors, Greenberg, Schwartz, and Salerno. Opp at 9. These allegations are insufficient as a matter of law.

Plaintiffs’ burden is well-defined. The particularized factual allegations must raise a reasonable doubt, “*in the context of the director’s economic circumstances[,] as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest.*” *California Public Employees’ Ret. Sys. v. Coulter*, No. Civ. 19191, 2002 WL 31888343, at *6 (Del. Ch. Dec. 18, 2002) (citation omitted) (emphasis in original). Plaintiffs must “somehow link the accretion of a material benefit to the decision to approve the [challenged transaction]” and bare “allegations of

⁴ Plaintiffs take issue with Defendants’ statement that Plaintiffs’ allegations are improperly based on an editorial by Graef Crystal. Opp. at 6, n.7. In doing so, Plaintiffs’ selectively quote Delaware case law. For the Court’s convenience, the following is the entire paragraph of the *Brehm v. Eisner* decision, with Plaintiffs’ selective quotation underlined:

The Complaint, consisting of 88 pages and 285 paragraphs, is a pastiche of prolix invective. It is permeated with conclusory allegations of the pleader and quotations from the media, mostly of an editorial nature (even including a cartoon). A pleader may rely on factual statements in the media as some of the ‘tools at hand’ from which the pleader intends to derive the particularized facts necessary to comply with Chancery Rule 11(b)(3) and Chancery Rule 23.1. But many of the quotations simply echo plaintiffs’ conclusory allegations. Accordingly, they serve no purpose other than to complicate the work of reviewing courts.

746 A.2d 244, 249 (Del. 2000) (emphasis added). Plaintiffs’ allegations are identical in nature to those criticized by the court in *Brehm*.

pecuniary self-interest are merely conculsory and not well pled.” *In re General Motors (Hughes) S’holder Litig.*, No. Civ. 20269, 2005 WL 1089021, at *8 (Del. Ch. May 4, 2005). Moreover, any benefit received by any of the Challenged Directors must be alleged to have been “*material* to that director.” *California Public*, 2002 WL 31888343, at *6.

Plaintiffs’ abject failure to alleged particularized facts comes into sharp focus when compared to the facts alleged in other cases. For example, Plaintiffs cite to *Mizel v. Connelly*, No. Civ. 16638, 1999 WL 550369 (Del. Ch. July 22, 1999), to support the proposition that “[a]mong other situations, a lack of independence has been found where . . . a corporation’s majority stockholder exerts ‘considerable influence’ over the corporation’s employees.” *See* Opp. at 10. Yet in *Mizel*, plaintiffs did not simply allege that “the corporation’s majority stockholder exerted considerable influence;” they provided the court with particularized facts regarding the challenged directors’ positions as officers of the company, the amount of income that the director-officers received from the company, and that their positions as officers “constitute [their] principal employment and means of earning a living.” *Mizel*, 1999 WL 550369, at *3. Indeed, the court repeatedly cites to the complaint when discussing such facts in its opinion. *See id.* Here, Plaintiffs have not provided the Court with the essential particularized facts necessary to make such a finding.

1. Greenberg

Plaintiffs attempt to rebut the presumption that Greenberg is independent by repeating, over and over, that Greenberg “has a long-standing close business and personal relationship with Redstone,” (Opp. at 11), but Plaintiffs plead no supporting facts. Rather, Plaintiffs’ allegations boil down to the following: (1) Greenberg advised Redstone about two transactions that occurred *ten years ago*; (2) Bear Stearns provided services for Viacom relating

to the split-off of Blockbuster, which was completed in 2004; and (3) Bear Stearns is expected to perform certain broker services for Viacom. Compl. ¶ 33(a)(6). Not only are these allegations insufficiently particularized,⁵ Plaintiffs make no attempt whatsoever to allege how these connections are material to Greenberg so as to infringe upon his independence. *See California Public*, 2002 WL 31888343, at *6.

Plaintiffs' burden is to point to particularized facts contained in the Complaint that raise a *reasonable* doubt as to Greenberg's independence; that is, that the independence of the Chairman of the Executive Committee of a publicly traded company with \$255 *billion* in assets and \$1.3 *billion* in *net income* in 2004, will be impaired by the risk of losing fees, fees that would be paid to Bear Stearns, not Greenberg.⁶ *See* Compl. ¶ 17. Plaintiffs do not allege what fees Bear Stearns received from Viacom with respect to any of the transactions. Nor do Plaintiffs allege whether or how Greenberg's compensation is tied to the fees that Bear Stearns received from Viacom. On the basis of Plaintiffs' allegations, it is impossible for this Court to determine whether fees received by Bear Stearns have any impact, let alone a *material* one, on Greenberg's compensation. *Texlon v. Meyerson*, 802 A.2d 257, 265 (Del. 2002) (finding a director interested where his "law firm derived a *substantial portion of its revenue*" from the company) (emphasis added).

Plaintiffs' argument that "Delaware courts have repeatedly held that there is a reasonable doubt regarding the independence of directors who have contacts similar to

⁵ The facts as alleged are simply wrong. Plaintiffs refer to Greenberg representing and advising "Redstone in two of the most important deals in Redstone's career, the acquisitions of Paramount and Blockbuster." Opp. at 12. It is a matter of public record, however that Viacom, not Redstone, acquired Paramount and Blockbuster.

⁶ Plaintiffs' failure to make a Section 220 demand results in their allegations being unparticularized. Plaintiffs cannot allege the exact amount of fees paid to Bear Stearns because they never followed the procedures outlined by the Delaware Supreme Court for pre-suit investigation. *See, infra*, n. 8.

Greenberg's contacts with Redstone," (Opp. at 11), is belied by the very cases Plaintiffs cite. For example, in *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342 (Del. Ch. 1998), Delaware Chancellor Chandler evaluated the independence of two directors on The Disney Company's board of directors, Irwin E. Russell ("Russell") and Robert A.M. Stern ("Stern"), in reference to Disney's CEO Michael Eisner ("Eisner"). With respect to Russell, Plaintiffs write: "The court in *Disney* also found that the plaintiffs had raised a reasonable doubt regarding Russell's independence when they pled specific facts showing that Russell, an entertainment lawyer who had previously represented Eisner, 'has a long history of personal and business ties to Eisner.'" Opp. at 12 (quoting *Disney*, 731 A.2d at 360). Unlike Plaintiffs here, the plaintiffs in *Disney* provided the requisite particularized facts to support this conclusory statement and explained why the relationship was material to Russell:

In addition to being Eisner's personal counsel: Russell's law office is listed as the mailing address for Eisner's primary residence; Russell is the registered agent for several entities in which Eisner is involved; Russell has represented Eisner in connection with Eisner's negotiation of the Eisner Compensation Agreement in 1996 and early 1997 . . . ; and, Plaintiffs assert, Russell practices in a small firm for which the fees derived from Eisner likely represent a large portion of the total amount of fees received by the firm.

Disney, 731 A.2d at 360.

Similarly, with respect to Stern, plaintiffs had alleged that Stern and his architectural firm were commissioned to do work by both Disney and Eisner *personally* and the fees were material to him.⁷ *Id.* at 357 ("the fees received in the past, from both Disney and Eisner, have been quite substantial"). The few facts that Plaintiffs plead in their Complaint come nowhere close to those alleged by the *Disney* plaintiffs.

⁷ In their Opposition, Plaintiffs allege for the first time that Greenberg was Redstone's "long-standing personal investment-banker." Opp. at 11. This is a flagrant attempt to amend their pleading in a memorandum of law. Moreover, as a matter of law, such allegations are insufficient to raise a reasonable doubt as to an outside director's independence. See *In re The Limited, Inc.*, No. Civ. 17148-NC, 2002 WL 537692, at *5 (Del. Ch. Mar. 27, 2002).

2. Schwartz

Plaintiffs have also failed to raise a reasonable doubt as to the independence of Schwartz. The entirety of Plaintiffs' allegation is as follows: "Schwartz, who serves as counsel to Cadwalader, Wickersham & Taft, a law firm to which Viacom paid \$998,510 in legal fees in fiscal year 2004," for a matter that was concluded in 2004. Compl. ¶ 33(a)(8); *see* Roesser Aff., Ex. C at 46.

Plaintiffs provide no authority for the proposition that a director, who is counsel at a law firm that has provided legal services to the company, and does not participate in the law firm's profits or any of the work done for the company, should be rejected as independent. *Compare* Mem. at 18-19 *with* Opp. at 17. The only case that Plaintiffs cite, *Disney*, involved a director who was also Eisner's personal counsel and who "practices in a small firm for which the fees derived from Eisner likely represent a large portion of the total amount of fees received by the firm." 731 A.2d at 360; *see* discussion of *Disney* *supra* at 7. The same cannot be said for Schwartz or Cadwalader.

Such bare allegations have been squarely rejected time and again by Delaware courts as insufficient to defeat the presumption of director 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").

3. Salerno

All Plaintiffs have alleged is that Salerno's daughter works for a Viacom subsidiary. Such an allegation is insufficient as a matter of law to raise a reasonable doubt as to Salerno's independence.

In response to Viacom's argument that Salerno qualifies as an independent director under the New York Stock Exchange ("NYSE") regulations (*see* Mem. at 17-18), Plaintiffs simply state that "[a]s a controlled company, there is no regulatory check on Defendants' claims." Opp. at 3, n. 3. Such an argument makes no factual sense, but even assuming, *arguendo*, that the NYSE listing standards are not considered, Plaintiffs fail to plead any facts regarding the materiality of Ms. Salerno's employment to Salerno. *See In re Ply Gem Indus. S'holders Litig.*, No. Civ. 15779-NC, 2001 WL 755133, at *9 (Del. Ch. June 26, 2001) (refusing to consider allegation that director's son was the company's corporate secretary absent an allegation of materiality).

Plaintiffs endeavor to distinguish *In re J.P. Morgan Chase & Co.*, which stands for the proposition that a reasonable doubt cannot be created regarding a director's independence by alleging that the director's child is an employee of the company, by pointing to the fact that J.P. Morgan's CEO, Harrison, was not a majority or controlling shareholder of the company, while Redstone is. *See* Opp. at 17; *In re J.P. Morgan Chase & Co.*, No. Civ. 531-N, 2005 WL 1076069, at *9 (Del. Ch. Apr. 29, 2005). Yet, the relevant point is not whether Harrison could fire the board members but whether he could fire a director's son, a fact the court found insufficient to raise a reasonable doubt as to the director's independence. Thus, Plaintiffs' claim that "*J.P. Morgan Chase* bears no resemblance to Plaintiffs' argument that Salerno would not press Plaintiffs' claim against Redstone for fear he would retaliate against his daughter and harm her career" is, put simply, wrong. *See id.*

With the four directors Plaintiffs concede are independent and the three directors that Plaintiffs fail to adequately allege are not independent, Viacom's board has a majority of disinterested and independent directors who could have considered a demand.

B. The Existence Of A Majority Or Controlling Shareholder Does Not Vitate The Demand Requirements

Faced with Delaware's high threshold for pleading demand futility, Plaintiffs attempt to recast Delaware law as having a lower standard for pleading demand futility in situations involving a majority or controlling shareholder. Plaintiffs are not subtle about their attempt, arguing that this Court should apply "a far less demanding showing to support a conclusion of reasonable doubt." Opp. at 19.⁸ Plaintiffs' mischaracterization of Delaware law is both transparent and erroneous. Whether or not there is a majority or controlling shareholder, the *Aronson* test still applies and the burden remains the same.⁹

Bare allegations that a company has a majority or controlling shareholder does not result in the conclusion that the shareholder dominates and controls the actions of the board.¹⁰

⁸ Rather than trying to lessen the burden, Plaintiffs should be concerned about their failure to make a Section 220 demand on Viacom. Plaintiffs' failure, prominently raised in Viacom's opening brief and ignored by Plaintiffs, removes any "benefit of the doubt" that might normally be accorded to Plaintiffs' allegations. A shareholder's failure to conduct pre-suit investigation through a Section 220 demand has lead the Delaware Supreme Court to limit the inferences that can be drawn from the complaint:

Because [plaintiff] did not [make a Section 220 demand], I will not give a broad reading to the facts alleged in the complaint, *nor will I infer from them the existence of other facts that would have been proved or disproved by a further presuit investigation.*

White v. Panic, 793 A.2d 356, at 364 (Del. Ch. 2000), *aff'd*, 783 A.2d 543 (Del. 2001) (emphasis added); *see also J.P. Morgan Chase*, 2005 WL 1076069, at *7-8. Plaintiffs have offered no justification for their failure to make a Section 220 demand on Viacom. Their reasons for failing to do so, however, are easily inferred. The Delaware Supreme Court, in *Rales v. Blasband*, wrote: "Perhaps the problem arises in some cases out of an unseemly race to the court house, chiefly generated by the 'first to file' custom seemingly permitting the winner of the race to be named lead counsel. The result has been a plethora of superficial complaints that could not be sustained." 634 A.2d 927, 935 n.10 (Del. 1993).

⁹ One director is only "beholden" to another if the supposedly controlling director has "direct or indirect unilateral power to decide whether the [controlled] director continues to receive a benefit upon which the [controlled] director is *so dependent* or is of *such subjective material importance* that its threatened loss might create a reason to question whether" he could properly exercise independent business judgment. *Telxon*, 802 A.2d at 264 (emphasis added). Plaintiffs' complaint is entirely bereft of any such allegations.

¹⁰ In keeping with their blatant mischaracterization of Delaware law, Plaintiffs misquote *In re Western National Corp. S'holders Litig.* to support a completely different, self-serving standard whereby "a shareholders' domination and control is established 'if [the shareholder] owns a majority interest in or exercises control over the business and affairs of the corporation.'" Opp. at 20 ("quoting" *In re Western National Corp. S'holders Litig.*, No. 15927, 2000 WL 710192, at *6 (Del. Ch. May 22, 2000)). The full sentence that Plaintiffs quote reveals the extent of their

Delaware courts routinely refuse to excuse demand in situations where the company has a majority or controlling shareholder. This was the situation in the seminal case of *Aronson v. Lewis*, where the Delaware Supreme Court explained that “in the demand-futile context a plaintiff charging domination and control of one or more directors must allege particularized facts manifesting ‘a *direction of corporate conduct* in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling.’” *Aronson*, 473 A.2d at 815-816 (Del. 1984) (emphasis added) (demand not excused despite allegation of domination and control based on one director’s 47% equity ownership and fact that he had “personally selected” the other directors and approved their employment agreements insufficient because “[t]here must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person.”).

Twenty years after *Aronson*, the Delaware Supreme Court affirmed its position that allegations of majority stock ownership or control of the corporation cannot be used to defeat the demand requirement. *Beam*, 845 A.2d at 1054 (demand not excused despite 94% stock ownership by majority shareholder; plaintiff’s allegations did not establish majority shareholder’s control over other board members). The Delaware Court of the Chancery has consistently applied this rule. *See J.P. Morgan Chase*, 2005 WL 1076069, at *9 (“[e]ven in cases in which the CEO had a supermajority of voting power, courts have upheld outside directors’ independence in the face of additional relationships.”).

Plaintiffs cite no law to the contrary. Instead, they assert:

disingenuity: “A shareholder will be considered a fiduciary if it owns a majority interest in or exercises control over the business and affairs of the corporation.” *Id* (emphasis added). Thus, the *Western National* court did not, as Plaintiffs claim, hold that domination and control over a board member is established simply by showing that a shareholder owns a majority interest in or exercises control over the affairs of the corporation. Plaintiffs cannot use these two concepts—control over a director for demand purposes and control of a corporation through stock ownership—interchangeably to suit their needs. *See Opp.* at 18.

Delaware courts have repeatedly held that while establishing a director controls or dominates a board *or* company does not, in itself, establish that the board lacks independence, the courts will consider it as a sort of tipping-point in the contextual independence analysis and will apply a far less demanding showing to support a conclusion of reasonable doubt.

Opp. at 18. Plaintiffs cite no authority for this sweeping generalization because there is none.

The relevant inquiry, as demonstrated by the cases Plaintiffs cite,¹¹ has not changed since *Aronson*—whether Plaintiffs, by pleading particularized facts, have raised a reasonable doubt that the Board could evaluate a demand. They simply have not done so.

POINT II.

PLAINTIFFS FAIL TO OFFER ANY BASIS FOR THEIR CLAIMS REGARDING FRESTON AND MOONVES' COMPENSATION

Plaintiffs do not even attempt to argue that there is any basis for excusing demand with regard to the compensation paid to Freston and Moonves. Freston and Moonves do not serve on Viacom's Board and, therefore, the Board cannot possibly have a disabling conflict that could preclude it from evaluating a demand. Similarly, Plaintiffs are unable to offer any

¹¹ Plaintiffs' reliance on *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002), serves only to highlight the necessity of performing a materiality analysis in determining a director's independence. The court in *Orman* makes clear that a plaintiff must show "the possibility [that] gaining some benefit or the fear of losing a benefit *is likely to be of such importance* to that director that it is reasonable for the Court to question whether valid business judgment or selfish considerations animated that director's [decision]." See Opp. at 19-20 (quoting *Orman*, 794 A.2d at 25 n.50) (emphasis added).

Plaintiffs argue that *Friedman v. Beningson*, No. Civ. 12232, 1995 WL 716762 (Del. Ch. Dec. 4, 1995), stands for the proposition that, in the context of a suit involving a controlling shareholder, as a matter of law, a "director's receipt of a consulting fee of merely \$48,000 had rendered that director non-independent for the purposes of demand futility, even though plaintiff did not allege that the consulting arrangement was financially material to the director." Opp. at 19. The *Friedman* court, however, did conduct the requisite materiality analysis regarding such fees, as evidenced by, once again, the very language that Plaintiffs quote: "receipt of consulting fees, which have been on the magnitude of \$48,000 a year, *when considered in the context of the other facts alleged, represents a substantial interest . . .*" *Friedman*, 1995 WL 716762, at *5 (emphasis added) (quoted in Opp. at 19).

Similarly, the court in *Ply Gem* made clear that "in assessing director independence, Delaware courts apply a subjective 'actual person' standard to determine whether a 'given' director was likely to be affected in the same or similar circumstances." 2001 WL 755133, at *7 n.28. In fact, the *Ply Gem* court frequently refers to such fees received by a director as "substantial" where the director is interested and finding a director independent where there was an "absence of some allegation that [the fee payment] was material" to the director. *Id.* at *9.

argument as to why the compensation paid to Freston and Moonves was not a valid exercise of the Board's business judgment.

Plaintiffs attempt to suggest that Redstone used the compensation paid to Freston and Moonves to leverage an increase in his own compensation. Opp. at 5, n.6. The Delaware Supreme Court rejected this *exact* argument in *Brehm v. Eisner*, 746 A.2d at 257. Plaintiffs in *Brehm* alleged that the CEO of the Walt Disney Company, Eisner, was interested in the compensation that Disney's board approved for its incoming President, Michael Ovitz ("Ovitz").

Id. The court's analysis in *Brehm* is dispositive of Plaintiffs' argument here:

Plaintiffs' theory is that Eisner was advancing Ovitz' interests primarily because a lavish contract for Ovitz would redound to Eisner's benefit since Eisner would thereby gain in his quest to have his own compensation increased lavishly. This theory appears to be in the nature of the old maxim that a "high tide floats all boats." But, in the end, this theory is not supported by well-pleaded facts, only conclusory allegations.

Id. The court in *Brehm* rejected this argument and affirmed the Court of Chancery's holding that, "no reasonable doubt can exist as to Eisner's disinterest in the approval of [Ovitz'] Employment Agreement, as a matter of law." *Id.* The result here should be the same.

POINT III.

PLAINTIFFS FAIL TO STATE A CLAIM

Even assuming that Plaintiffs have alleged particularized facts that could excuse making demand on the Board under the first prong of *Aronson*,¹² the Complaint should be dismissed because Plaintiffs fail to state a claim as to any of their three causes of action.

Plaintiffs' first claim is for "Breach of Fiduciary Duties (Entire Fairness)." As Viacom pointed out in its Memorandum of Law, entire fairness is the applicable standard *only if*

¹² As discussed *supra*, Point I., Plaintiffs have failed to even attempt to make an argument that the Complaint could meet the second prong of *Aronson*.

there is an interested transaction. Mem. at 25. The Challenged Compensation, however, does not constitute an interested party transaction because it was determined by an independent Compensation Committee and therefore falls within the safe harbor of Section 144(a)(1). Plaintiffs make no argument to the contrary. Therefore, the Challenged Compensation is not subject to the heightened “entire fairness” standard and must be judged under the presumption that the business judgment rule applies. Plaintiffs have failed to state a claim that the Board breached their fiduciary duties in approving the Challenged Compensation.

Plaintiffs’ second claim is for “Breach of Fiduciary Duty of Good Faith.” It is telling that Plaintiffs’ fail to cite a single case where the Delaware courts have held that there exists a separate, freestanding duty of good faith. *In re Walt Disney Co. Derivative Litig.* recognizes there to be no such duty after a full trial on the merits. The court’s reservation of decision on this issue at the pleading stage does not detract from the significance of its ultimate decision after trial. *In re Walt Disney Co. Derivative Litig.*, No. Civ. 15452, 2005 WL 2056651, at *35 n.447 (Del. Ch. Aug. 9, 2005).

Plaintiffs’ final cause of action pleads unjust enrichment. Essentially, Plaintiffs are trying to do an end-run around the business judgment rule. The Challenged Compensation was the product of a valid exercise of the Board’s business judgment. The Compensation Committee deliberated as to the amount of compensation that should be paid to Redstone, Freston, and Moonves. Plaintiffs have failed to raise a reasonable doubt that this was a valid exercise of the Board’s business judgment. They cannot overcome that failure by attempting to supplant the Board’s business judgment with their own assertion that “their compensation was wholly unjustified.” Opp. at 26. Once again, *Brehm* is instructive:

One can understand why [company] stockholders would be upset with such an extraordinary lucrative compensation agreement . . . awarded a company

president . . . who underperformed to the extent alleged. That said, there is a very large—though no insurmountable—burden on stockholders who believe they should pursue the remedy of a derivative suit instead of selling their stock or seeking to reform or oust these directors from office This Complaint, which is a blunderbuss of a mostly conclusory pleading, does not meet [the burden of Delaware’s pleading rules], and it was properly dismissed.

746 A.2d at 267.

CONCLUSION

For all the foregoing reasons, Plaintiffs’ claims should be dismissed in their entirety with prejudice.

Dated: New York, New York
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