IN THE SUPREME COURT OF THE STATE OF DELAWARE

BEVERLY PFEFFER, individually and on behalf of all other similarly situated, Plaintiff Below, Appellant, v. SUMNER M. REDSTONE, GEORGE S. ABRAMS, DAVID R. ANDELMAN, JOSEPH A. CALIFANO, JR., WILLIAM S. COHEN, PHILIPPE P. DAUMAN, ALAN C. GREENBERG, JAN LESCHLY, SHARI REDSTONE, FREDERIC V. SALERNO, WILLIAM SCHWARTZ, PATTY STONESIFER, ROBERT D. WALTER, NATIONAL AMUSEMENTS, INC., JOHN F. ANTIOCO, RICHARD J. BRESSLER, JACKIE M. CLEGG, MICHAEL D. FRICKLAS, LINDA GRIEGO, JOHN L. MUETHING and CBS CORP. (f.k.a. VIACOM, INC.), Defendants Below, Appellees.	C.A. No. 115, 2008 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. NO. 2317-VCL

ANSWERING BRIEF OF DEFENDANTS BELOW-APPELLEES

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NATURE OF THE PROCEEDINGS

This action began on August 3, 2006, nearly two years after the closing of the transactions challenged in the Amended Complaint. Plaintiff-below, Beverly Pfeffer ("Plaintiff"), brought this case as an action for damages, based on various alleged breaches of fiduciary duty by the directors of Viacom, Inc. (now known as CBS Corporation) (the "Viacom Director Defendants") arising out of Viacom's divestiture in October 2004 of its majority interest in Blockbuster, Inc. ("Blockbuster"). The divestiture (or "split-off") was effected through a voluntary exchange offer whereby Viacom shareholders exchanged certain of their Viacom shares for Viacom's Blockbuster holdings.

Defendants moved to dismiss or to stay this action pending resolution of a nearly identical securities lawsuit in federal court in Texas (the "Texas Class Action"). In response, Plaintiff amended her complaint, adding claims on behalf of a class of Blockbuster stockholders without adding new allegations to support those claims ("Amended Complaint"). On April 27, 2007, Defendants filed a motion to dismiss or to stay the Amended Complaint. The motion to stay was later rendered moot by the Northern District of Texas's decision in *Congregation Ezra Sholom v. Blockbuster, Inc.*, 504 F. Supp. 2d 151 (N.D. Tex. 2007), dismissing with prejudice the Texas Class Action.

Defendants' motion to dismiss this action was argued on November 2, 2007, and on February 1, 2008, the Court of Chancery granted Defendants' motion to dismiss, dismissing with prejudice all of Plaintiff's claims. In its February 1, 2008 Opinion ("Op."), the Court held that the "entire fairness" standard did not apply to the transactions at issue; that Plaintiff failed to advance any well-pleaded factual allegations that would substantiate her disclosure claims against the Viacom Defendants; that 8 Del. Code § 144 did not apply to the transactions at issue; and that Plaintiff failed to state duty of loyalty claims against the Viacom Director Defendants and National Amusements, Inc. ("NAI"). As for Plaintiff's claims against the Blockbuster Director Defendants and Viacom concerning Blockbuster's declaration of a special dividend of $5 per share paid pro rata to all Blockbuster shareholders in advance of the divestiture (the "Special Dividend"), the Court held that those claims were derivative and dismissed them for Plaintiff's failure to comply with Court of Chancery Rule 23.1.

On February 28, 2008, Plaintiff filed a Notice of Appeal from the Court of Chancery's Order on Defendants' Motion to Dismiss. Plaintiff filed her Opening Brief on April 14, 2008. She appealed only the Court of Chancery's

decisions on Counts I-IV of her Amended Complaint. This is Defendants-below, Appellees' Answering Brief.

As set forth below, the Court of Chancery (Lamb, V.C.) correctly held that Plaintiff's lawsuit fails to state a cause of action. This case was filed two years after Viacom divested its interest in Blockbuster and nine months after the Texas Class Action asserted similar claims. The Court of Chancery correctly held that the entire fairness standard did not apply to Viacom's voluntary, non-coercive offer to acquire its own shares. The Court found that there was "nothing" in the Amended Complaint that suggested that the Viacom Director Defendants put their own interests above those of either Viacom or its shareholders, and that the September 9, 2004 final Prospectus for the Offer to Exchange (the "Prospectus") clearly disclosed that Viacom's majority stockholder, NAI, did not participate in the Exchange Offer.

The Court of Chancery also properly dismissed Plaintiff's various disclosure claims, noting that none of Plaintiff's wholly conclusory allegations set forth a material misstatement or omission in the Prospectus. For example, plaintiff points to the fact that 17 months after Viacom divested its interest in Blockbuster, Blockbuster restated and reclassified certain assets from non-current (investment) to current (operational), which had the effect of adjusting related expenses accordingly. Since this technical reclassification had no impact on the financial health of Blockbuster—that is, had no effect on earnings, net income, total cash flow or stock price—the Court of Chancery understandably concluded that it was not material.

As to Plaintiff's omission claim that the Prospectus failed to disclose the existence of a "cash flow analysis" supposedly prepared by a low-level Blockbuster employee seven months prior to the Special Dividend, the Court of Chancery properly concluded that there existed no pleaded basis to support an inference that this stale and low level document was ever brought to the attention of the Viacom executives sitting on Blockbuster's Board of Directors. Moreover, the Court of Chancery took strong issue with the credibility of Plaintiff's counsel. Plaintiff's counsel made representations about what that document supposedly said, only to admit that he had never read it. Instead he represented that "co-counsel" had it, and that he would bring it to the Court that same afternoon (which he never did). Op. at 23-24 (Exhibit A hereto); November 2, 2007 Transcript, Argument on Defendants' Motion to Dismiss ("Tr.") at 60, 82-83 (B0070, 92-93).[1] Plaintiff now claims in her Opening Brief, contrary to what her

[1] All parenthetical references to "B" followed by a number refer to the Appendix to the Answering Brief of Defendants Below-Appellees.

counsel explicitly represented to the Court of Chancery, that none of her counsel ever had, read or saw the supposed "analysis" on which she seeks to base an omission claim. PB. at 4 n.2.[2]

Last, the Court of Chancery properly rejected Plaintiff's effort to void the Exchange Offer as an interested transaction under Section 144 of the DGCL because neither NAI nor any of the Viacom Director Defendants stood on both sides of the Exchange Offer, and there was no allegation that NAI directed the actions of Viacom. There is nothing to this lawsuit, and this Court should affirm the Court of Chancery's judgment.

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[2] All references to "PB." are to Appellant's [Corrected] Opening Brief.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that Plaintiff failed to allege facts sufficient to show that either the Special Dividend to the Blockbuster stockholders or the Exchange Offer made to the Viacom stockholders was structured to elevate the interests of NAI over the other Viacom stockholders. Because the Special Dividend was paid *pro rata* to all of Blockbuster's stockholders and the Exchange Offer was completely voluntary, the Amended Complaint fails to state a claim based on the structure of the Exchange Offer.

2. Denied. The Court of Chancery correctly concluded that a restatement to reclassify Blockbuster's accounting of particular cash flows that took place 17 months after the Exchange Offer was not sufficient to establish that the Prospectus contained a material misstatement.

3. Denied. The Court of Chancery correctly held that an undisclosed cash flow analysis supposedly prepared by a Blockbuster employee was not "reasonably available" to the Viacom directors. Plaintiff's Amended Complaint contains no well-pleaded facts to show that Viacom directors knew of or had access to the alleged cash flow analysis—indeed, neither Plaintiff nor her counsel has ever seen that "analysis."

4. Denied. The Court of Chancery correctly held that more specific details regarding Viacom's calculation of the exchange ratio was not required.

5. Denied. The Court of Chancery correctly held that the Prospectus did not have to disclose the identities of the members of the committee of Viacom directors that approved the Exchange Offer because there was no recommendation to Viacom's stockholders from that committee or Viacom's Board of Directors.

6. Denied. The Court of Chancery properly dismissed Plaintiff's claims against the Viacom Director Defendants and NAI because the Amended Complaint includes no non-conclusory allegations to support an inference that the Viacom Director Defendants approved the transaction simply to benefit NAI. The Exchange Offer was completely voluntary, and Plaintiff fails to allege that NAI directed Viacom's actions in connection with the transactions or was a party to the Special Dividend or Exchange Offer.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. The Parties.

Plaintiff-Appellant Beverly Pfeffer allegedly tendered Viacom stock in an exchange offer that "split off" Blockbuster from Viacom in October 2004 (the "Exchange Offer"). ¶ 7[3] (A0045). Two years later, she brought this action on behalf of a putative class of those Viacom stockholders who tendered Viacom stock in exchange for Blockbuster stock in the Exchange Offer (the "Viacom Class"). In response to defendants' motion to dismiss her complaint for failing to state a claim, she amended her complaint to add a second putative class of all Blockbuster stockholders who held Blockbuster stock as of August 27, 2004, the record date for the Special Dividend paid to all Blockbuster stockholders prior to the exchange (the "Blockbuster Class"). ¶¶ 1, 79(a) (A0043, A0066). Plaintiff was a member of the putative class in the Texas Class Action, which is discussed in more detail below.

Defendants-Appellees were the directors of Viacom at the time of the Exchange Offer (the "Viacom Director Defendants"). ¶¶ 8-21 (A0045-46). Defendants-appellees added by the Amended Complaint are: (i) CBS Corporation (f.k.a. Viacom, Inc.); (ii) National Amusements, Inc. ("NAI"), a closely held company that is the controlling shareholder of Viacom; and (iii) Blockbuster's directors at the time the Special Dividend was paid.

B. The Split-Off Transaction And The Exchange Offer Prospectus.

On February 10, 2004, Viacom announced that its Board of Directors had authorized it to pursue the divestiture of its majority interest in Blockbuster, most likely through a "split-off" of its Blockbuster shares. ¶ 37 (A0050). In late June 2004, Viacom and Blockbuster jointly announced the outlines of the proposed "split-off," and Blockbuster disclosed that it anticipated declaring the Special Dividend of $5 per share to all of its shareholders in advance of the "split-off." ¶ 38 (A0050). A special committee of the Blockbuster Board of Directors had studied and approved the Special Dividend. Prospectus at 52-54 (A0402-04). On August 20, 2004, Blockbuster announced that it had declared

[3] All references to "¶" are to paragraphs of the Amended Complaint.

the Special Dividend payable to all Blockbuster shareholders of record as of August 27, 2004. ¶ 39 (A0050-51).

On September 9, 2004, Viacom distributed to its shareholders the final Prospectus (A0348), and Blockbuster filed its final amendment to its registration statement on Form S-4, which included the Prospectus. The Prospectus disclosed that any holder of Viacom common stock (Class A or Class B) was eligible to participate, or to decline to participate, in an Exchange Offer in which each share of Viacom common stock could be tendered to Viacom in exchange for 5.15 shares of Blockbuster stock (the "Exchange Offer"). ¶ 44 (A0052-53). Viacom agreed to accept up to 27,961,165 shares of Viacom stock from its stockholders and to distribute in exchange all of its Blockbuster stock. ¶¶ 44-45 (A0052-53). Viacom and its Board made no recommendation to its shareholders to participate in the Exchange Offer. Prospectus at 11 (A0361).

Based on the closing stock prices of Viacom and Blockbuster shares on September 7, 2004, the Exchange Offer reflected a 17.6% premium on the exchange of Viacom Class A common stock and a premium of 19.2% on the exchange of Viacom Class B common stock. ¶ 45 (A0053). The Prospectus stated that Viacom's controlling stockholder, NAI, would not be participating in the Exchange Offer, consistent with its historical, announced investment objective of retaining Viacom stock. ¶ 46 (A0053-54).

II. PROCEDURAL HISTORY

A. The Delaware Fiduciary Duty Actions Seeking Injunctive Relief.

1. Vogel.

On February 10, 2004, the same day as the initial announcement by Viacom of its proposed divestiture of Blockbuster, a shareholder class action complaint was filed on behalf of a putative class of Blockbuster stockholders in the Court of Chancery seeking to enjoin the proposed transaction. Complaint, *Vogel v. Bressler, et al.*, C.A. No. 226-N (Del. Ch. filed Feb. 10, 2004) (B0001). After extending defendants' time to respond to the complaint without date, plaintiff abandoned that matter, and it was never prosecuted.

2. Sepulvado.

On September 16, 2004, one week after the final Prospectus was issued, a different plaintiff filed a purported class action in the Court of Chancery seeking to enjoin the proposed Exchange Offer on behalf of a putative class of

Viacom stockholders. Complaint, *Sepulvado v. Viacom, Inc., et al.*, No. 707-N (Del. Ch. filed Sept. 16, 2004) (A0676). The complaint asserted claims for breach of fiduciary duty based on alleged material misstatements and omissions in the Prospectus. On September 21, 2004, the Court of Chancery denied plaintiff's application for a preliminary injunction hearing and for expedited proceedings.

The split-off closed as scheduled on October 5, 2004. Sepulvado did not further pursue the breach of fiduciary duty claims, and later voluntarily dismissed that action.

B. The Texas Class Action Alleging Misstatements And Omissions In The Prospectus.

On November 10, 2005, nine months before Ms. Pfeffer filed her lawsuit in the Court of Chancery and three days after the voluntary dismissal of the *Sepulvado* action, the same attorneys and law firm that had earlier filed the *Vogel* case in the Court of Chancery filed a class action complaint in the United States District Court for the Northern District of Texas (the "Texas Class Action"). Complaint, *Congregation Ezra Sholom v. Blockbuster, Inc., et al.*, No. 3:05 CV 2213-N (N.D. Tex. filed Nov. 10, 2005) (A0709). That complaint alleged violations of the federal securities laws on behalf of two classes of Blockbuster shareholders (including the former Viacom stockholders who obtained Blockbuster shares in the Exchange Offer), based on alleged false and misleading statements and omissions in the Prospectus.

On August 22, 2007, the federal judge in the Texas Class Action granted defendants' motions to dismiss, dismissing all of the disclosure claims with prejudice. *Congregation Ezra Sholom v. Blockbuster, Inc.*, 504 F. Supp. 2d 151 (N.D. Tex. 2007). The disclosures at issue in that case were virtually identical to those at issue in this case. For example, in the Texas Class Action, the Court dismissed plaintiffs' claims based on allegations that defendants "did not disclose the true state of Blockbuster's *cash flow position* at any time, *including in the Prospectus*," and that "Blockbuster was aware but did not disclose that an *internal cash flow analysis showed that after paying the special dividend, Blockbuster would lack sufficient cash to pursue the initiatives described in the Prospectus.*" *Id.* at 157 (emphasis added). The Court also dismissed claims alleging that, "[o]n March 9, 2006, Blockbuster announced that, *due to an accounting misclassification, it would reclassify cash flows* relating to the purchase of videos for its rental library contained in its financial statements dating back to 2003. *Id.* (emphasis added).

C. The ERISA Action.

On November 16, 2005, an alleged participant in the Blockbuster Investment Plan filed a class action in federal court in New York alleging violations of the Employee Retirement Income Security Act ("ERISA") by fiduciaries of the Plan and certain Viacom directors. The underlying factual allegations in the ERISA case are substantially similar to the allegations in the Texas Class Action and this case. That litigation was transferred to the Texas federal court, which dismissed certain of the claims and granted plaintiff leave to file an amended complaint. *Halaris v. Viacom, Inc., et al.*, No 06 CV 01646, 2007 WL 4145405 (N.D. Tex. Sept. 21, 2007). Defendants' motions to dismiss that amended complaint are pending.

D. This Case Was The Last Filed Action Alleging Misstatements And Omissions In The Prospectus.

On August 3, 2006—almost nine months after the Texas Class Action and the ERISA Action were filed, and almost two years after the Court of Chancery had rejected plaintiff's attempt to enjoin the Exchange Offer in *Sepulvado*—Ms. Pfeffer filed her complaint in this case. Complaint, *Pfeffer v. Redstone*, C.A. No. 2317-VCL (Del. Ch. filed Aug. 3, 2006) (A0015). The complaint contained the same disclosure allegations advanced in the Texas Class Action on behalf of the same putative class.

On November 28, 2006, Defendants in the belatedly-filed Delaware litigation moved to stay this case in favor of the Texas litigation, or, in the alternative, to dismiss the complaint for failure to state a claim. (A1179). On January 12, 2007, Plaintiff responded by filing an Amended Complaint. Amended Complaint, *Pfeffer v. Redstone*, C.A. No. 2317-VCL (Del. Ch. filed Jan. 12, 2007) (A0042).

The Amended Complaint restated Plaintiff's claim that the Prospectus contained misstatements and omissions. The only new factual allegations were nine paragraphs concerning Blockbuster's cash flow and an allegedly undisclosed internal cash flow analysis. *See* Amended Complaint (comparison version), *Pfeffer v. Redstone*, C.A. No. 2317-VCL (Del. Ch. filed Jan 12, 2007), ¶¶ 60-68 (A1228-31). These "new" allegations were lifted (sometimes verbatim) from the second amended complaint filed in the Texas Class Action on October 20, 2007. *Compare* Amended Complaint, *Pfeffer v. Redstone*, C.A. No. 2317-VCL (Del. Ch. filed Jan 12, 2007), ¶¶ 62-67 (A0059-61), *with* Second Consol. Amended Class Action Complaint, *Congregation Ezra Sholom v. Blockbuster, Inc., et al.*,

No. 3:05 CV 2213-N (N.D. Tex. filed Oct. 20, 2006), ¶¶ 56; 57; 60; 62; 59; 70 (A0842-49), respectively.

Plaintiff's Amended Complaint added (i) a claim against NAI on behalf of the Viacom Class for alleged breach of fiduciary duty as controlling stockholder of Viacom in connection with the Exchange Offer (¶¶ 4, 108-13) (A1213, A1243-44), (ii) a claim against the Blockbuster Director Defendants on behalf of the Blockbuster Class for alleged breach of fiduciary duty in connection with the Special Dividend (¶¶ 5, 114-18) (A1213, A1244-45), and (iii) a claim against Viacom on behalf of the Blockbuster Class, for alleged breach of fiduciary duty as controlling stockholder of Blockbuster in connection with the Special Dividend (¶¶ 5, 119-123) (A1213, A1245-46). Notably, Plaintiff did not assert new factual allegations to support those new claims, instead relying only on the allegations in her initial complaint.

On April 27, 2007, defendants moved to stay or dismiss the Amended Complaint. (A0133, A0260). The motion to stay in favor of the Texas Class Action was later rendered moot by the opinion of the Texas federal court dismissing that action with prejudice, which the institutional lead plaintiffs in that case did not appeal. On February 1, 2008, the Court of Chancery likewise dismissed all of the claims in this action with prejudice. Op. at 1. Plaintiff now seeks review "of the dismissal of Counts I, II, III and IV" of Plaintiff's Amended Complaint. PB. at 14 n.7.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT THE COMPLAINT FAILS TO STATE A CLAIM BASED ON THE STRUCTURE OF THE EXCHANGE OFFER.

A. Question Presented

Whether the Court of Chancery's holding that "the transaction at issue in this case is not one that is judged by the entire fairness standard," and "Viacom's duties (and those of the Viacom Director Defendants) in connection with that offer were to structure its terms noncoercively and to disclose all material facts" should be affirmed.

B. Scope of Review

This Court "reviews *de novo*, for errors of law, the dismissal of a complaint under Court of Chancery Rule 12(b)(6)." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 112 (Del. 2006).

Under Delaware law, a duty of entire fairness is not imposed on "controlling stockholders making a noncoercive tender or exchange offer to acquire shares directly from the minority holders." *In re Aquila Inc.*, 805 A.2d 184, 190 (Del. Ch. 2003); *Solomon v. Pathe Commc'ns Corp*., 672 A.2d 35, 38-39 (Del. 1996). Delaware law also does not judge by the entire fairness standard voluntary, noncoercive offers by corporations to acquire their own shares. *Eisenberg v. Chicago Milwaukee*, 537 A.2d 1051, 1056 (Del. Ch. 1987); *Frank v. Arnelle*, 1998 WL 668649 at *4 (Del. Ch. Sept. 16, 1998). Moreover, a fiduciary is "interested" in a transaction by appearing "on both sides of a transaction" or expecting to derive any personal financial benefit which does not "devolve upon the corporation or all stockholders generally." *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

C. Merits of the Argument

Plaintiff's Amended Complaint alleges that the Exchange Offer is voidable because "[e]ach of the Viacom Director Defendants breached their fiduciary duties of loyalty and care in approving and/or acquiescing in the Exchange Offer on terms that were unfair to Viacom's minority shareholders and unfairly [benefited] Viacom's controlling shareholder, NAI, and Redstone." ¶ 106 (A0072). The sole count against NAI alleges that NAI breached its fiduciary duties of loyalty and good faith by causing the Viacom Director

Defendants to approve and recommend the Exchange Offer to Viacom's minority stockholders." ¶ 110 (A0073). From those conclusory allegations—and relying almost exclusively on *Feldman v. Cutaia*, 2006 WL 920420 (Del. Ch. Apr. 5, 2006)—Plaintiff asserts that the "Viacom Defendants structured the Exchange Offer transaction to benefit … NAI, by selling Blockbuster to Viacom's minority shareholders at an inflated price after extracting most of the value from Blockbuster through the Special Dividend." PB. at 19. The Court of Chancery found that there were no well-pleaded allegations in the Amended Complaint that could sustain such a claim. That well-reasoned holding should be upheld for the following two reasons.

1. There Are No Allegations That Support An Inference That The Viacom Directors Structured The Exchange Offer To Benefit NAI.

First, faced with a noncoercive exchange offer and pro-rata Special Dividend, the Court below correctly found that there was nothing in the Amended Complaint "to suggest that the Viacom directors who approved the Exchange Offer structured the transaction to put their own interests above those of either Viacom or any identifiable group of Viacom stockholders." Op. at 17.

Moreover, Plaintiff did not even plead facts to suggest that the Viacom Board acted due to control by NAI. *See* Op. at 18. The Court below considered and expressly rejected Plaintiff's conclusory argument that "[n]either the Chancery Court nor the Viacom Defendants have contested Plaintiff's allegation that Redstone [through NAI] … controlled the Viacom Board" PB. at 17, n.8. At oral argument, the Vice Chancellor noted, based on the allegations in the Amended Complaint, that Redstone was "not using his control of NAI in connection with [the Exchange Offer] in any way that [the Plaintiff] allege[d]." Tr. at 74 (B0084). In its Opinion, the Court correctly held that "[a]s would be required to sustain her claim, the Plaintiff makes no allegation that NAI directed the actions of Viacom." Op. at 34. Without such allegations, Plaintiff's Amended Complaint cannot support a claim for breach of fiduciary duty based upon the structure of the nondiscriminatory and noncoercive transaction. *See, e.g., Cinerama, Inc. v. Technicolor*, 1991 WL 111134, at *19 (Del. Ch. June 24, 1991) (when a majority stockholder does not take action, no fiduciary duty is implicated).

In fact, Plaintiff's position on appeal—that she has adequately alleged that "NAI and Redstone were the driving forces behind the divestiture"—is not even supported by the paragraphs of the Amended Complaint that Plaintiff cites

in her brief.[4] For these reasons, the Court below correctly held that, unlike the *Feldman* case on which Plaintiff relies, "there is nothing to suggest that the Viacom directors who approved the Exchange Offer structured the transaction to put their own interest above those of either Viacom or any identifiable group of Viacom stockholders." Op. at 17. Indeed, "the majority stockholder of Viacom, NAI, did not even participate in the Exchange Offer, and the Prospectus clearly discloses this fact." *Id.* Thus, the Amended Complaint fails to allege well-pleaded facts that a majority of the Viacom board of directors structured the transaction to benefit the majority stockholder (NAI) at the expense of the minority. Plaintiff's attack on the structure of the transaction was properly rejected.

2. There Are No Allegations That NAI Benefited From the Exchange Offer.

Second, the Court below correctly found that Plaintiff did not allege that NAI stood on both sides of the Exchange Offer, or did anything in connection with either the Special Dividend or Exchange Offer. Therefore, the entire fairness standard was not implicated, and Plaintiff failed to state a breach of fiduciary duty claim against NAI. Op. at 17, 34-35; *Cinerama, Inc. v. Technicolor, Inc*., 1991 WL 111134, at *19 (Del Ch. June 24, 1991), *aff'd in part, rev'd on other grounds sub nom. Cede v. Technicolor, Inc*., 634 A.2d 345 (Del. 1994) ("when … a majority shareholder takes no such action, generally no special duty will be imposed.").

Plaintiff concedes that "NAI did not participate in the Exchange Offer." PB. at 18. Yet she continues to argue that, through the Exchange Offer, NAI: (i) consolidated its control of Viacom (PB. at 19); (ii) "dump[ed] grossly overvalued Blockbuster stock on Viacom's minority shareholders" (*id*. at 20), and (iii) "enjoy[ed] an enormous profit through the issuance of the Special Dividend." *Id*. Those contentions were properly rejected below because "[m]ere allegations that the Exchange Offer benefited NAI to the detriment of Viacom's other stockholders do not suffice…" to state a claim for breach of fiduciary duty. Op. at 34; *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999) ("a trial court need not blindly accept as true all allegations, nor must it draw all

[4] Paragraphs 34, 68, 69, 94, 99-101, 108, and 110-13 do not allege, as Plaintiff now claims, that NAI or Mr. Redstone were the "driving forces behind the divesture." The allegations in paragraph 81 and 109 are merely conclusory allegations.

inferences from them in plaintiffs' favor unless they are reasonable inferences.") quoting *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988).

a. The Exchange Offer Did Not "Consolidate NAI's Control Over Viacom."

The Court below correctly and necessarily found that Plaintiff's claim that NAI used the Exchange Offer to consolidate its control of Viacom was frivolous because:

> [A]s disclosed in the Exchange Offer Prospectus, the maximum amount of Viacom class A and class B shares that Viacom could acquire through the offer was equal to a mere 1.6% of the Viacom common stock outstanding as of September 30, 2004. NAI already owned Viacom common shares representing approximately 11% of the common equity and 71% of the voting power. A 1.6% reduction in the number of outstanding common shares would increase NAI's equity ownership interest to 11.18%. The plaintiff fails to allege that either this or any possible change in NAI's voting power resulting from the Exchange Offer could have a material affect on NAI's power to control Viacom.

See Op. at 12 n.17, 36; *In re GM (Hughes) S'holder Litig.*, 897 A.2d 162, 171 (Del. 2006) ("where a plaintiff has no good faith basis for challenging the authenticity or legitimacy of an extraneous fact, that is otherwise subject to judicial notice, the trial court may properly consider such fact in ruling on a motion to dismiss… .").

b. The Exchange Offer Was Not Coercive.

Equally insufficient is Plaintiff's contention that Blockbuster stock was dumped on the Viacom stockholders. PB. at 20. Contrary to Plaintiff's arguments on appeal, the Amended Complaint makes and could make no allegation that the Exchange Offer was coercive (Op. at 17, n.33) and thus cannot support the inference that Blockbuster stock was "dumped" on the Viacom minority stockholders. Instead, the Exchange Offer was completely voluntary and Viacom Stockholders were free to accept or reject the Exchange Offer based on their own evaluation of their own best interests. Under these circumstances, there can be no claim of breach of the duty of loyalty based on mere argument

that the Exchange Offer was coercive. *See, e.g.*, *In re Siliconix Inc., S'holder Litig.*, 2001 Del. Ch. LEXIS 83 at *24 (June 19, 2000) ("unless coercion or disclosure violations can be shown, no defendant has the duty to demonstrate entire fairness.").

3. NAI Did Not Disproportionately Benefit From The Blockbuster Dividend.

Similarly, Plaintiff's Amended Complaint is plainly insufficient with respect to its breach of fiduciary duty claim based on a conclusory allegation that NAI "enjoyed" a profit from the Special Dividend paid to all Blockbuster stockholders prior to the Exchange Offer. The dividend was received *pro rata* by every Blockbuster stockholder. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 721-22 (Del. 1971) (entire fairness did not apply to issuance of dividend because "Sinclair received nothing from Sinven to the exclusion of its minority stockholders."). *See also In re General Motors (Hughes) Shareholder Litig*, 2005 WL 1089021, at *8 (Del. Ch. May 4, 2005) ("Without allegations to somehow link the accretion of a material benefit to the decision to approve the Hughes [special dividend and subsidiary sale] transactions, the allegations of pecuniary self-interest are merely conclusory and not well pled."), *aff'd*, 897 A.2d 162 (Del. 2006).

Indeed, at oral argument on defendants' motion to dismiss the Amended Complaint, Plaintiff conceded that she was not arguing that NAI was self-dealing. Tr. at 76 (B0086). Plaintiff cannot now claim to the contrary that NAI's receipt of the dividend was self-interested. *Id.* ("I'm not suggesting that NAI was self-dealing.").

Finally, the Court below also found that the Plaintiff was without standing to challenge the issuance of the Special Dividend because any such claim is derivative, and Plaintiff failed to comply with Rule 23.1.[5] Op. at 35-36; *see also* Tr. at 76-81 (B0086-91). That finding is not challenged on appeal (PB. at 14, n.17), and, for that reason alone, cannot be overturned.

For these reasons, the Court below properly declined to depart from the well-established rules that Delaware law does not "impose a duty of entire fairness on controlling stockholders making a noncoercive tender or exchange offer to acquire shares directly from the minority holders" or "voluntary, non-

[5] For the same reason, the Court dismissed the claim that the Viacom directors could be liable for causing Blockbuster to pay the dividend.

coercive offers by corporations to acquire their own shares." Accordingly, the duties Viacom (and the Viacom Director Defendants) had "in connection with th[e exchange] offer were to structure its terms noncoercively and to disclose all material facts." After finding that the Amended Complaint contained no allegation that the Exchange Offer was coercive, the Court properly distilled the remaining claims as challenges to Viacom's disclosures. For the reasons stated in the next section, all material facts were disclosed in connection with the Exchange Offer and Plaintiff's disclosure claims were properly dismissed.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT THE COMPLAINT FAILS TO STATE DISCLOSURE CLAIMS.

A. Question Presented

Did the Court of Chancery correctly hold that the Plaintiff's disclosure claims failed as a matter of law because the Amended Complaint does not contain well-pled allegations to support a claim that the Prospectus disseminated in connection with the Exchange Offer contained materially false statements, omitted material facts or made materially misleading partial disclosures?

B. Standard of Review

The Supreme Court "reviews de novo, for errors of law, the dismissal of a complaint under Court of Chancery Rule 12(b)(6)." *Wal-Mart Stores, Inc.*, 901 A.2d at 112.

The duty of disclosure is not an independent duty, but derives from the duties of care and loyalty. *Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001). The essential inquiry is whether the alleged omission or misrepresentation is material. *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992). Thus, "the plaintiff must show a substantial likelihood that the omitted facts, if disclosed, would have 'significantly altered the total mix of information' available to stockholders, and would therefore have assumed actual significance in a reasonable stockholder'[s] deliberations." *Weiss v. Samsonite Corp.*, 741 A.2d 366, 374 (Del. Ch. 1999) (citing *Arnold v. Soc'y For Savings Bancorp*, 650 A.2d 1270, 1276 (Del. 1994)).

C. Merits of the Argument

Plaintiff seeks review of three types of disclosure claims in connection with the Exchange Offer. First, Plaintiff claims that Viacom's Prospectus was materially false because, 17 months after the Prospectus was disseminated, Blockbuster was required to reclassify the accounting treatment of its cash flows. Second, Plaintiff claims that Viacom's Prospectus omitted an "analysis" prepared by an employee in Blockbuster's Treasury Department concerning Blockbuster's "cash flow problems" and "future profitability" seven months prior to the announcement of the Exchange Offer. Third, Plaintiff claims that Viacom's Prospectus made materially incomplete disclosures because the Prospectus failed to disclose "more precisely how the Exchange Ratio was calculated" and the identity of the committee of Viacom Directors who approved the exchange ratio.

PB. at 21-32. The Court of Chancery correctly held that each of these disclosure claims fails as a matter of law.

1. The Amended Complaint Does Not State A Claim That The Viacom Defendants Disclosed Materially False Statements In The Prospectus.

To state a claim based on a false disclosure, a "plaintiff must identify (1) a material statement in a communication contemplating shareholder action (2) that is false." *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 916 (Del. Ch. 1999) (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)).

Plaintiff asks this Court to find that the Court of Chancery erred in holding that an accounting reclassification made by Blockbuster 17 months after the Exchange Offer closed was insufficient to establish that the Prospectus misstated material information regarding Blockbuster's cash flows at the time of the Exchange Offer. But as this Court has held, "[a] claim based on disclosure violations must provide some basis for a court to infer that the alleged violations were material." *Louden v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 141 (Del. 1997). Here, no allegations supported Plaintiff's argument that an alleged misclassification of Blockbuster's cash flows was material to the Viacom stockholders' decision to tender their shares for Blockbuster shares.

Plaintiff conceded at oral argument that she has no basis by which to allege that the reclassification of Blockbuster's cash flows affected Blockbuster's earnings, total cash flow, net income, or any other accounting measure.[6] Tr. at 65, 68 (B0075, 78). Moreover, Plaintiff also conceded, as she must, that the Amended Complaint does not allege that anyone relied on the technical accounting issue that led to the later reclassification. Op. at 22, n.42. Indeed, Plaintiff conceded that Blockbuster had audited financial statements that correctly set forth the accounting principles that Blockbuster relied upon to report

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[6] To comply with GAAP, Blockbuster's rental library assets had to be reclassified in 2006 as current assets, rather than non-current (or investment) assets. The effect of that accounting adjustment was to shift the classification of expenses associated with the assets from capital (*i.e.*, investment) to operational (*i.e.*, current) expenses. The reclassification had no effect on Blockbuster's overall net cash flow because the accounting adjustment from investment expenses to operation expenses was dollar-for-dollar. Op. at 20; *see also, e.g.*, Tr. at 65 (B0075).

its cash flows at the time of the Exchange Offer. As the Court correctly held, "anyone examining Blockbuster's cash flow statements could discern its treatment of new releases and that treatment's effect on operating and investment cash flows." Op. at 20. Moreover, the later reclassification had no discernible impact on Blockbuster's stock price. *Id.* at 20-21; Tr. at 65-66 (B0075-76). Plaintiff cannot credibly argue that either the allegations in the Amended Complaint or any reasonable inference therefrom could support a finding that a misstatement of the classification of Blockbuster's cash flows was material to a Viacom stockholder when deciding whether to tender Viacom shares for Blockbuster's. *See id*. at 21.

Plaintiff now attempts to retreat from those concessions. She urges this Court to adopt a *per se* rule that whenever a restatement of financial results is required, a disclosure violation under Delaware law follows. PB. at 23-24. Not surprisingly, Plaintiff cites no Delaware authority for that novel theory. As the Court below noted, the authorities that Plaintiff relies upon can, at best, be read to suggest that a restatement based on a reclassification under GAAP can be presumed to be an error. That does not establish that the financial information that had to be reclassified was material. Op. at 20.

With no basis to support her disclosure claim, Plaintiff now contends that Vice Chancellor erred because he "suggested" in his Opinion that the Plaintiff "must sufficiently *demonstrate* materiality" as opposed "merely to *plead* materiality" to establish a disclosure claim. PB. at 22. Plaintiff argues that she has met her burden because the Amended Complaint alleges that "the Prospectus represented that Blockbuster's ability to maintain sufficient operating cash flow was *critical* to funding Blockbuster's new business plan." *Id*. at 23; ¶¶ 37, 47 (A0050, 0054).

Plaintiff's argument is mere semantics. Although Plaintiff may now quibble with the word choice in the Opinion, as her own concessions make plain, the Court properly dismissed the "operational" cash flow disclosure claim. The Court's decision did not "elevate" the standard for pleading a disclosure claim. Simply put, when pressed by the Court below to identify how the allegations regarding the reclassification of "operational" cash flow showed materiality, Plaintiff acknowledged that she could not allege that the restatement affected Blockbuster's stock price, earnings, net income or total cash flow. *Id*. at 65, 68 (B0075, 78). For that reason, she "fails to advance well pleaded allegations of fact that a reasonable person, in deciding how to vote, would consider important the reclassification of operation and investing cash flows." *See* Op. at 21. *See, e.g.*, *Gantler v. Stephens*, 2008 WL 401124, at *19 (Del. Ch. Feb. 14, 2008) ("The burden of demonstrating materiality rests with the plaintiffs."); *Globis*

Partners, L.P. v. Plumtree Software, Inc., 2007 WL 4292024, at *10 (Del. Ch. Nov. 30, 2007) (same).[7]

2. The Amended Complaint Does Not State A Claim That The Viacom Directors Caused Blockbuster To Omit Material Information From The Prospectus.

To state a disclosure claim based on an alleged omission, the "plaintiff must plead facts identifying (1) material, (2) reasonably available (3) information that (4) was omitted from the proxy materials." *O'Reilly*, 745 A.2d at 926.

Plaintiff's only omissions claim relies on the contention that the Viacom Director Defendants knew or should have known that the Prospectus contained a material omission concerning "Blockbuster's cash flow problems." The centerpiece of that claim is Plaintiff's theory that the Prospectus failed to disclose an "analysis" supposedly prepared by a Blockbuster employee—seven months before issuance of the Prospectus—that allegedly "concluded that Blockbuster could not meet its business goals if it issued the Special Dividend and that Blockbuster's new strategic initiatives would not be profitable." ¶ 62 (A0059). The Amended Complaint also alleged that senior management at Blockbuster knew about Blockbuster's cash flow problems and had seen its treasury department employee's cash flow analysis, yet also alleged that Blockbuster's Treasurer told his subordinates not to worry about that analysis. ¶ 63 (A0059-60).

The Vice Chancellor properly rejected Plaintiff's attempt, based purely on supposition and surmise, to saddle the Viacom Director Defendants with knowledge of a purported internal document generated many months before by an employee in Blockbuster's treasury department (and apparently rejected by the Treasurer himself). *See* ¶ 63 (A0059-60). Plaintiff did not set forth well

[7] There is no merit to Plaintiff's last-ditch effort to obliterate the materiality requirement by misconstruing the Court of Chancery's observation that the subsequent restatement also had no effect on Blockbuster's stock price. The Court did not impose a "loss causation" pleading requirement on the Plaintiff or improperly resolve a factual question. Rather, the Court properly noted an indisputable fact (which Plaintiff conceded) that further belied the inference of materiality the Plaintiff sought the Court to draw. *In re GM (Hughes)*, 897 A.2d at 171.

pleaded facts alleging that this document was written or intended for the Blockbuster Board of Directors or that it was actually shown to or seen by any Viacom Director Defendant. Op. at 24-25; Tr. at 61-62 (B0071-72). Even as to Mr. Redstone, the Amended Complaint contained only a conclusory allegation. ¶ 68 (A0061). Instead, pressed by the Court below, plaintiff argued that Blockbuster's CEO (John Antioco) had (or must have had) knowledge of this stale document and its contents therefore should be imputed to Mr. Redstone and the rest of the Blockbuster Board on the theory that Mr. Antioco would have brought it to Mr. Redstone's attention.

As the Court below recognized, this is untethered supposition, not well pleaded allegations. Op. at 24 & n.52, 25. First, the Court rejected as unreasonable the strained inference that this internal document was reasonably available to the Viacom Director Defendants. The low level document was not of a kind routinely disclosed to boards of directors, it was seven months stale, and was allegedly considered unreliable by senior treasury officers. ¶ 63 (A0059-60); Op. at 25-26; *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 503 (Del. Ch. 1990); *IOTEX Communications, Inc. v. Defries*, 1998 WL 914265, at *4 (Del Ch. Dec. 21, 1998) ("breach of fiduciary duty that has at its core the charge that the defendant knew something, there must, at least, be sufficient well-pleaded facts from which it can reasonably be inferred that this 'something' was knowable and that the defendant was in a position to know it."); *see also Grobow*, 539 A.2d at 187 n.6 (Del. 1988) ("a trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences.").

Plaintiff's conduct at oral argument further undermined the reasonableness and reliability of her position regarding this document. Since her argument was based on the contention that this document was of such clear importance that Mr. Antioco must have known of it and must have brought it to the attention of Mr. Redstone and the other Viacom Director Defendants, the Court pressed plaintiff to provide some detail regarding the content of this treasury report. Tr. at 56-62 (B0066-72). Plaintiff's counsel stated that Plaintiff possessed the document but then acknowledged that he had never bothered to review it, although he represented that his co-counsel had. Faced with a skeptical judge, counsel promised to deliver the report to the Court that afternoon. Tr. at 60, 82-84 (B0070, 92-94). He did not do so then or at any time before the decision issued. In her brief in this Court, Plaintiff retracts the representations made below and now claims that the document is unavailable but was described to unnamed co-counsel.

In all events, it is clear that the omission Plaintiff complains of is immaterial as a matter of law in light of the robust disclosures concerning Blockbuster's cash flows that were contained in the Prospectus. The Prospectus contains numerous disclosures that directly address the critical issues regarding risks in Blockbuster's cash flow, its new business initiatives, the increased leverage and other effects of the Special Dividend and related borrowings, and Blockbuster's ability to service its increased debt payments. *See* Op. at 28 & n.57. The Prospectus also provides extensive disclosure regarding the contemporaneous work of two separate financial advisors to the Blockbuster special committee that analyzed the Special Dividend and its impact on Blockbuster. *See* Prospectus at 55-56. *See also Congregation Ezra Sholom*, 504 F. Supp. 2d at 164 (dismissing this Plaintiff's nearly identical disclosure claims because Blockbuster's Prospectus contained statements pertaining to Blockbuster's cash flow which were accompanied by adequate, on-point risk disclosures). For these reasons, Plaintiff's disclosure claim based on the omission of this missing document fails as a matter of law.

3. The Amended Complaint Does Not State A Claim That The Viacom Directors Made Materially Incomplete Partial Disclosures In The Prospectus.

Plaintiff's third attempt to plead a disclosure claim fares no better. To state a disclosure claim based on partial disclosure, a "plaintiff must plead facts identifying a (1) perhaps voluntary, but (2) materially incomplete (3) statement (4) made in conjunction with solicitation of stockholder action that (5) requires supplementation or clarification through (6) corrective disclosure of perhaps otherwise material, but reasonably available information." *Id*. at 927. Here, Plaintiff alleges that "Viacom shareholders were entitled to know precisely how the [e]xchange [r]atio was calculated." ¶ 70 (A0061-62); PB. at 29. Plaintiff also alleges that the Prospectus "was misleading because, while disclosing that a 'committee' of Viacom directors structured Viacom's divestiture of Blockbuster, the Prospectus did not disclose the identity of the particular directors who served on that committee." PB. at 32; ¶ 71 (A0062-63). Neither meets the pleading standards, and the Court below correctly dismissed those claims.

a. The Pricing Methodology.

Plaintiff cannot dispute that the Prospectus disclosed the derivation of the exchange ratio and Viacom made no recommendation to its stockholders to participate in the Exchange Offer. ¶ 70 (A0061-62). Instead, she is left to argue that it was a "highly misleading partial disclosure to state that Viacom was

purchasing its stock at a 19.2% premium without disclosing that the market price . . . was not a true reflection of the company's value." PB. at 29; ¶ 70 (A0061-62). The Court below correctly rejected that contention: "Delaware courts, in non-coercive self-tender offers, do not require the disclosure of specific pricing methodologies." Op. at 30; *Frank v. Arnelle*, 1998 WL 668649 (Del. Ch. Sept. 16, 1998), *aff'd*, 725 A.2d 441 (Del. 1999) ("Because the auction was not coercive, there was no obligation on WMX to pay a price that was intrinsically fair . . . The Tender Offer did not include a recommendation as to whether the stockholders should tender, and there was no implication that the Tender Offer price was fair. The directors therefore had no duty to disclose Merrill-Lynch's opinion of the stock's intrinsic value.").

To avoid that rule here, Plaintiff argues that the Viacom Directors implied that the Exchange Offer was "fair" by disclosing that the Offer was being made at a "premium" to the market price on the day prior to the announcement of the Offer. ¶ 45 (A0053). That argument is a makeweight. As Plaintiff must admit, the simple fact of the premium to the market price was accurate. Tr. at 44-48 (B0054-58). And the Prospectus plainly disclosed that the premium was based upon "what exchange ratio might induce the Viacom stockholders to tender…." *See* Op. at 29-30; ¶ 70 (A0061-62); Prospectus at 71 (A0421). The Viacom Board made no recommendation or determination of fairness and the Prospectus did not contain language suggesting that the price was based on the company's view of the "intrinsic value" of Blockbuster. Op. at 30-31. And for the reasons discussed above, Viacom stockholders had available all material information necessary to make an independent evaluation of whether to tender into the Exchange Offer.

b. <u>The Committee's Composition.</u>

Plaintiff's last disclosure claim is pinned to a passing reference contained in the Prospectus to the Viacom board committee that approved the final form of the divesture of Blockbuster. ¶ 71 (A0062-63). From that singular reference, plaintiff concedes that, "standing alone," the identity of the committee "might not be sufficient" (Tr. at 53 (B0063)) to state a claim, but, taken together with everything else, the composition of the committee was material because Viacom shareholders would need to know "[w]hether board members on the committee had ties to NAI or Redstone." PB. at 32.

Despite the misimpression left by the Plaintiff at page 32 of her brief, the Court below did not rely on *Frank* to dismiss Plaintiff's tag-along claim. Rather, the Court held that "when fiduciaries undertake to describe events, they must do so in a balanced and accurate fashion which does not create a materially

misleading impression." Op. at 32; *Clements v. Rogers*, 790 A.2d 1222, 1240 (Del. Ch. 2001). Plaintiffs cannot credibly charge error to this standard. And having applied the correct standard, the Court properly concluded that the single disclosure concerning the committee was not materially incomplete because there was no suggestion that the committee was independent of management or NAI; the language in the Prospectus did not induce stockholders to rely on the committee's decision to validate the transaction; and nothing in the Prospectus suggests that the committee decision carried any greater significance that that of the full board of directors. Op. at 32.

For these reasons, the Plaintiff's disclosure claims fail as a matter of law and the Court of Chancery did not err in dismissing the Amended Complaint.

III. THE COURT OF CHANCERY CORRECTLY DISMISSED THE DUTY OF LOYALTY CLAIMS AGAINST THE VIACOM DEFENDANTS AND NAI.

A. Question Presented

Whether the Plaintiff can state a claim of bad faith in connection with the dissemination of the Prospectus, when the Plaintiff cannot establish as a matter of law that the entire fairness standard applied to the Exchange Offer and failed to state any viable disclosure claim.

B. Standard of Review

The Supreme Court "reviews *de novo*, for errors of law, the dismissal of a Complaint under Court of Chancery Rule 12(b)(6)." *Wal-Mart Stores, Inc.*, 901 A.2d at 112.

C. Merits of the Argument

For the reasons discussed in the previous two sections, the Court of Chancery correctly held that the entire fairness standard was not applicable to the noncoercive, voluntary Exchange Offer (*see* Argument *supra* at 10-15) and that Plaintiff's disclosure claims failed as a matter of law (*see* Argument *supra* at 16-24). What is left of Plaintiff's Amended Complaint is a rote assertion of bad faith predicated upon the same allegations as before: that the "entire transaction was designed at Redstone's behest to allow Redstone to divest … Blockbuster" and that the Viacom Defendants "failed to disclose all material facts about the Prospectus." PB. at 34. Simply re-labeling these claims as bad faith does not change the conclusory nature of the underlying allegations.

The Court of Chancery properly dismissed Plaintiff's loyalty claims against the Viacom directors because there was nothing in the Amended Complaint "to suggest that the Viacom directors who approved the Exchange Offer structured the transaction to put their own interests above those of either Viacom or any identifiable group of Viacom stockholders" (Op. at 17) and that "[t]here are simply no well pleaded allegations of fact that those directors authorized the transaction at issue in order to further the interests of NAI or Redstone or that they knowingly and in bad faith approved false and misleading disclosures in connection therewith." Op. at 18 n.34. That reasoned basis for this decision is set forth above and need not be stated again here. *IOTEX Commc'ns., Inc. v. Defries*, 1998 WL 914265, at *4 (Del. Ch. Dec. 21, 1998) ("Speculative conclusions unsupported by fact do not allege breaches of fiduciary duty.").

And once more, NAI "was not a party to either the Special Dividend or the Exchange Offer," and the claim that the transaction solidified NAI's control is "frivolous." Op. at 35. For these reasons, the Court below properly held that "the complaint fails to state any well pleaded facts that NAI did anything in connection with either transaction" and thus the Plaintiff could not "sustain her claim." *Id*. at 34; *Cinerama, Inc.*, 1991 WL 111134, at *19 *aff'd* in relevant part, rev'd in part on other grounds, 634 A.2d 345, 372 (Del. 1993); *In re Primedia Derivative Litig.*, 910 A.2d 248, 257 (Del. Ch. 2006).

Plaintiff's breach of the duty of loyalty claims against the Viacom Defendants and NAI fail as a matter of law and were properly dismissed.

CONCLUSION

For the foregoing reasons, the Court of Chancery's February 1, 2008 Memorandum Opinion and Order dismissing all of Plaintiff's claims for failure to state a claim against the Viacom Defendants and NAI should be affirmed in all respects.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2008, the Answering Brief of Defendants Below-Appellees was served, by LexisNexis File & Serve, on the following attorneys of record:

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