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Case No. 2317-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BEVERLY PFEFFER, individually, and on behalf of all others similarly situated, Plaintiff, vs. 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.	)	C.A. No. 2317-VCL

REPLY BRIEF IN SUPPORT OF
VIACOM DEFENDANTS' MOTIONS TO STAY OR DISMISS

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INTRODUCTION

On August 22, 2007, the federal court hearing the related consolidated securities class action entered an Order and Final Judgment dismissing all claims raised in that action with prejudice, on the grounds of standing, materiality, scienter and loss causation. That ruling, and the reasons supporting it, requires dismissal of the claims raised in this action.

In this action, plaintiff's brief confirms that this case --- an action for damages brought 22 months after the Exchange Offer closed --- is, at its core, simply about alleged breaches of the fiduciary duty of disclosure. Specifically, just as in the now-dismissed federal securities case, the plaintiff claims that the September 9, 2004 Prospectus-Offer to Exchange relating to the Blockbuster split-off (the "Prospectus") contained two omissions or misstatements. First, plaintiff claims that the Prospectus improperly failed to reference an internal cash flow report prepared seven months earlier by an employee at Blockbuster --- though the Prospectus does contain numerous disclosures regarding cash flow issues, as well as a detailed discussion of two more current analyses of Blockbuster's financial condition prepared by two independent financial advisors. Second, plaintiff claims that the Prospectus improperly included "misclassified" assets and related cash flow figures --- a "re-classification" announced on March 9, 2006, 18 months after the Prospectus was issued and four months after the Blockbuster stock price drop that forms the basis for the alleged damages sought in this lawsuit.

These are the same issues raised in the securities class action filed in federal court nine months before this case was filed. In fact, the allegations regarding the internal cash flow report that plaintiff added to her amended complaint were lifted, in part *verbatim*, from the second amended complaint in that federal securities action. Because the facts and issues in both actions are identical, as plaintiff candidly admits, and because the parties are largely the same, this case should be stayed pending final resolution of the earlier-filed federal action.

In the alternative, plaintiff's complaint should be dismissed for failure to state a claim. As to the Viacom Defendants, plaintiff offers no allegation whatsoever to suggest that they had any knowledge of the matters allegedly omitted from the Prospectus. Indeed, plaintiff does not even mention the names of 12 of the 13 Viacom directors in the body of the complaint. There are no allegations in the complaint to support plaintiff's argument that the directors should have known about and disclosed the cash flow report prepared seven months earlier by a Blockbuster employee. Nor are there any allegations that any of Viacom's directors somehow knew, in September 2004 or ever, that certain Blockbuster assets should have been differently classified.

In addition, as the federal court ruled, the alleged omissions and misstatements are immaterial and cannot support an allegation of loss causation. The undisclosed internal cash flow report contained stale information, was disregarded by a Blockbuster manager, and was otherwise immaterial in light of the extensive risk disclosures contained in the Prospectus as well as the disclosures concerning two financial analyses prepared by Blockbuster's financial advisors. The "misclassification," too, was immaterial, because it involved only the *classification* of assets and related cash flow figures, and not the inclusion of non-existent assets or cash flow; thus, the restatement only involved moving entries from one cash flow category to another. Moreover, plaintiff alleges that the date the "truth became known" (*i.e.*, the date of the low-point stock price from which damages allegedly should be calculated) was November 9, 2005 --- four months before the announcement of the restatement on March 9, 2006. Simply put, the cash flow misclassification cannot have been material with respect to a stock price drop that had occurred four months earlier.

The remaining claims for alleged violations of the duty of disclosure and the duty of loyalty are grounded on the same alleged nondisclosures, and similarly fail to state claims for relief.

SUPPLEMENTAL STATEMENT OF FACTS

On August 22, 2007, the federal court handling the consolidated securities class action entered an Order and Final Judgment granting defendants' motions to dismiss and dismissing all claims with prejudice. *Congregation Ezra Sholom v. Blockbuster, Inc.*, --- F. Supp. 2d ----, 2007 WL 2403341 (N.D. Tex., Aug. 22, 2007). The disclosures at issue in the Amended Complaint were also at issue in that case. The Court said that the plaintiffs alleged that defendants "did not disclose the true state of Blockbuster's *cash flow position* at any time, *including in the Prospectus*," and that plaintiffs contended 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 *3 (emphasis added). The Court also noted 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.* at *4 (emphasis added).

In dismissing plaintiffs' claims, the Court specifically addressed the substance of the alleged omissions and misstatements at issue in this case.

First, the Court held that certain allegations in the second amended complaint were nothing more than "generalized positive statements" or "vague, optimistic statements," and thus were immaterial as a matter of law. *Congregation Ezra*, 2007 WL 2403341 at *8. The Court included in those categories three paragraphs of the complaint that referred to statements in the Prospectus that alleged that Blockbuster defendants "were aware but did not disclose that internal Blockbuster cash flow analyses showed that after paying the special dividend, Blockbuster would lack sufficient cash to pursue the initiatives described in the Prospectus." Viacom Defs' App. Ex. J ¶ 46. The Court dismissed plaintiffs' claims with regard to those statements. *Congregation Ezra*, 2007 WL 2403341 at *8.

Second, the Court held that certain Blockbuster statements qualified as forward-looking statements accompanied by meaningful, company-specific cautionary language, and were protected by the "safe harbor" and not actionable as a matter of law. *Id.* at *10. The Court included in that category four paragraphs of the complaint that referred to statements in the Prospectus regarding Blockbuster's proposed business initiatives and related cash, liquidity and capital requirements. *Id.* at *9. One of those paragraphs specifically alleged that "[i]nternal reports…made clear that Blockbuster lacked the cash flow to implement the programs necessary to survive in its competitive environment." Viacom Defs' App. Ex. J ¶ 50. The Court found that these statements were all accompanied by adequate, on-point risk disclosures, and thus were within the safe harbor's protection. *Congregation Ezra*, 2007 WL 2403341 at *9-10.

Third, the Court held that plaintiffs had not alleged loss causation because the alleged corrective disclosure --- in this case, a general announcement of disappointing earnings, "an unfortunate, but relatively common occurrence" --- did not constitute an admission that earlier challenged statements were false. *Id*. at *12-13. Moreover, the Court specifically held that the restatement "reclassifying" certain assets and related cash flow could not be deemed to have caused the loss that occurred months earlier. *Id.* at *12 n.9 ("Plaintiffs cannot possibly connect the alleged loss to events occurring seven months after the close of the Class. Accordingly, the post-class period activity is not material.").

The time within which plaintiffs may file a notice of appeal of the Court's Judgment dismissing the federal action has not yet run. Separately, defendants' motion to dismiss the related ERISA claim action remains under advisement in the Northern District of Texas. Viacom Defts. Br. at 8-9.

ARGUMENT

I. THIS CASE SHOULD BE STAYED IN FAVOR OF THE CONSOLIDATED SECURITIES CLASS ACTION.

As this Court recently emphasized, under the *McWane* doctrine, "Delaware courts should liberally exercise their discretion in favor of a stay when (1) a first-filed prior pending action exists in another jurisdiction, (2) that action involves similar parties and issues, and (3) the court in the other jurisdiction is capable of rendering prompt and complete justice. Well-founded concerns of judicial economy and the avoidance of conflicting judgments are central to this comity doctrine." *Enodis Corp. v. Amana Co.*, 2007 WL 1242193 at *2 (Del. Ch. Apr. 26, 2007) (Lamb, V.C.) (denying motion to lift stay). Delaware courts have routinely stayed fiduciary duty of disclosure cases in favor of earlier-filed actions asserting disclosure claims under federal securities laws. *See* Op. Br. at 11. The fact that a first-filed case has been resolved at the trial court level, and is subject to appeal, does not affect its status as a prior "pending" action. *Enodis*, 2007 WL 1242193 at *2.

Plaintiff concedes that the federal case was first filed in a court capable of rendering prompt and complete justice. *See* Viacom Defs' Br. at 11-13; Pl's Opp'n at 19-20. As to the second *McWane* factor, "Plaintiff admits that both cases involve the same underlying wrongdoing." Pl's Opp'n at 20. To avoid *McWane*, plaintiff raises two points --- (1) that the additional "Blockbuster class" she purports to represent in her Amended Complaint involves different class members than the federal securities action; and (2) that defendants asserted a standing defense in connection with the prospectus disclosure claims in the federal securities action. Neither of those arguments defeats the appropriateness of a stay here. Indeed, the ruling in the federal securities action makes clear that the final resolution of the federal case will significantly advance the resolution of this case.

A. Any Differences In The Plaintiff Classes In The Two Actions Are Immaterial To The *McWane* Analysis.

Both this Delaware action and the federal securities action in Texas include two plaintiff classes --- a "Viacom Class" and a "Blockbuster Class." Plaintiff admits that the Viacom Class in this action (consisting of Viacom shareholders who tendered Viacom stock in the Exchange Offer) is *identical* to the Viacom Class in the federal securities action (consisting of Viacom shareholders who acquired Blockbuster shares "pursuant to or traceable to" the Exchange Offer). *See* Pl's Opp'n at 20 (the "class of former Viacom shareholders who tendered their Viacom shares for Blockbuster shares in the Exchange Offer…admittedly purports to be represented in the federal action.").

As to the Blockbuster Class, the class in this action consists of all persons who held Blockbuster shares as of the August 27, 2004 record date for the Special Dividend, whereas the class in the federal securities action consists of all persons who purchased Blockbuster shares on the open market between September 8, 2004 and August 9, 2005. Plaintiff's suggestion that because the Blockbuster classes are not exactly identical, the motion for a stay under *McWane* should be denied is unpersuasive.

As this Court recently noted,

> Our jurisprudence has consistently recognized that, with regard to the second *McWane* factor, the parties and issues in the competing litigations are not likely to be exactly identical. A Delaware court, therefore, must balance the lack of complete identity of parties [and issues] against the possibility of conflicting rulings which could come forth if both actions were allowed to proceed simultaneously.

Xpress Mgmt., 2007 WL 1660741 at *4.[1] For example, in *Citrix*, this Court granted a stay of Delaware disclosure claims in favor of a federal securities action where there was "substantial

[1] *See also, e.g.*, *Citrix*, 2001 Del. Ch. LEXIS 2 at *5 ("the parties, issues, and claims in both actions need not be identical" --- instead, "[s]ubstantial or functional identity is sufficient") (Continued. . .)

overlap between [the] two groups of plaintiffs" --- even though the federal class of "purchasers" in a certain class period was both over- and under-inclusive of the putative Delaware class of "holders" in a different class period. 2001 Del. Ch. LEXIS 2 at *7-8. Thus, the different composition of the Blockbuster Class belatedly added to this case should not defeat the motion for a stay.

Plaintiff admits that "both cases involve the same underlying wrongdoing." Pltfs. Opp. at 20. Moreover, although plaintiff only recently added the new class of Blockbuster plaintiffs in her amended complaint, she added *no new factual allegations* related to the claims of this new class. Accordingly, it is untenable for plaintiff to suggest that the advancement and resolution of the federal securities case would not also advance --- or completely resolve --- the claims of *all* of the plaintiffs in this Delaware action. *See USX Corp. v. U.S. Denro Steels, Inc.*, 2001 Del. Ch. LEXIS 122 at *4-5 (June 29, 2001).

Finally, it cannot be ignored that the addition of the Blockbuster Class in plaintiff's Amended Complaint was a strategic reaction to defendants' motion to stay or dismiss plaintiff's original complaint. Plaintiff only sought to represent the new "Blockbuster Class" (with no new related factual allegations) in her Amended Complaint --- six weeks *after* defendants' filed their initial motion to stay or dismiss on November 28, 2006, five months after plaintiff filed her original complaint on August 3, 2006, fourteen months after the Blockbuster stock price drop on November 9, 2005 that forms the basis for the alleged damages that plaintiff seeks in this case (and that gave rise to the first-filed federal securities case), and twenty-nine months after the August 27, 2004 record date for the special dividend. Plaintiff's belated and strategic addition of a new class of

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(. . . continued.)
(quoting *AT&T Corp. v. Prime Sec. Distribs, Inc.*, 1996 Del. Ch. LEXIS 134 at *7 (Oct. 24, 1996)); *Davis Int'l, LLC v. New Start Group Corp.*, 2005 Del. Ch. LEXIS 169 at *9 (Oct. 27, 2005) (Lamb, V.C.) (same).

plaintiffs should carry no weight in this *McWane* analysis, and should not effectively force two courts to address the same issues.[2]

B. The Standing Defense Asserted In The Securities Action Is Immaterial To The *McWane* Analysis.

Defendants' successful challenge to the Securities Act standing of the plaintiffs in the consolidated securities action is no basis on which to deny a stay here, and plaintiff cites no authority to the contrary. Defendants' motions to dismiss the federal securities action were not solely based on standing; defendants moved to dismiss the Securities Act claims on various other grounds, including many of the same arguments --- such as immateriality and lack of knowledge --- presented in the motion to dismiss this action. Moreover, as the federal court ruling makes clear, plaintiff's contention that her claims "may not be vindicated" is wrong. The standing argument did not prevent the federal court from addressing and resolving --- in the context of the federal Exchange Act claims --- the same facts and issue presented in this case. *See Enodis*, 2007 WL 1242193 at *1.

II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

A. The Complaint Fails To Plead A Valid Disclosure Claim.

Plaintiff's opposition brief confirms that her claim is that the Prospectus contained two principal omissions or misstatements. Specifically, plaintiff claims that the Prospectus: (1)

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[2] The lead plaintiff in the consolidated securities action includes an institutional plaintiff. *Cf. TCW Tech. L.P. v. Intermedia Commc'ns, Inc.*, 2000 Del. Ch. LEXIS 147 at *10 (Oct. 17, 2000) (noting preference for significant institutional investors to serve as lead plaintiffs). The plaintiff here could have --- but did not --- move to be appointed as lead plaintiff in the federal securities action. Instead, she chose to wait nine months after that action was filed (and two and a half months after the federal court appointed lead plaintiffs) before filing this suit --- and then asserted (and then withdrew) a request to intervene in the federal action. (Viacom Defs' App. Ex. M).

improperly failed to reference an internal cash flow report; and (2) improperly included "misclassified" assets and cash flow figures. In addition, plaintiff maintains her claim that the Prospectus improperly failed to disclose certain information regarding the Exchange Offer, specifically, exactly how the exchange ratio was calculated and exactly who served on the Viacom special committee that "had authority to approve the Exchange Offer." Plaintiff does not state a valid disclosure claim as to any of those alleged omissions and misstatements.

1. Plaintiff Fails to State a Claim With Respect to The Allegedly Omitted Or Misstated Cash Flow.

In their opening brief, the Viacom Defendants established that plaintiff has not alleged any facts to suggest that any Viacom Director had any involvement in, or awareness of, the subject matter of the principal alleged omissions and misstatements, *i.e.*, as to the alleged undisclosed internal cash flow report or the "misclassification" of cash flow. On those central points, plaintiff's complaint offers only one conclusory, boilerplate allegation to the effect that the defendants knew or should have known of the alleged undisclosed information. *See* Am. Compl. ¶ 68 ("Redstone, a director of Blockbuster and Viacom, knew about (1) the inflated cash flow from rental libraries [and] (2) the cash flow analysis showing that Blockbuster could not finance its changing business plan….Additionally, other members of Viacom's…board of directors knew or should have known that the Prospectus contained omissions and false statements."). Indeed, plaintiff does not even mention the names of 12 of the 13 Viacom directors in the amended complaint.

Plaintiff's conclusory allegations fail as a matter of law. First, plaintiff's amended complaint does not contain any well-pled allegation that would impugn the disinterest and independence of a majority of the Viacom directors in relation to the conduct that is the subject of this dispute. Second, there are no non-conclusory allegations that any member of the board of directors knew anything about a cash flow report prepared seven months earlier by an employee of

the Blockbuster subsidiary --- a report that plaintiff's own complaint acknowledges the employee's manager simply disregarded. Am. Compl. ¶¶ 62-63. There are likewise no allegations that Viacom's directors knew that certain assets of the Blockbuster subsidiary were misclassified -- or would require an adjustment 18 months later. *Id.* ¶¶ 61, 78.

In her opposition, plaintiff tries to bolster the deficiencies of her complaint by relying upon *In re Freeport-McMoRan Sulphur, Inc. S'holder Litig.*, 2005 WL 1653923 (Del. Ch. June 30, 2005) for the overly simplistic proposition that directors have a "duty to disclose fully and fairly all material within the board's control when it seeks shareholder action." She also cites *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963 (Del. Ch. 2000) for the propositions that "Directors are required to provide stockholders with all information that is material to *the action being requested*" and that a plaintiff need only plead facts indicating that allegedly material information omitted from *proxy materials* was "reasonably available" to the directors. Plaintiff then claims that she has pled sufficient facts to show that the Viacom Directors "had control over financial information of Blockbuster" and that such information was "reasonably available" to the Viacom Directors.

But the only support that plaintiff offers for her claim of "control" and "access" is based upon two unremarkable factual allegations: (1) that Viacom was the majority shareholder of Blockbuster; and (2) that two of the thirteen Viacom Directors, Messrs. Redstone and Dauman, were also directors of Blockbuster. On that basis alone, plaintiff claims she "has pled the existence of concrete information in the control of the Viacom Directors, including relevant cash flow information about Blockbuster." Those allegations are plainly insufficient to support a claim for a violation of the duty of disclosure.

The generalized standards that plaintiff quotes from *Freeport-McMoRan* and *Turner* do not articulate the proper standard to be applied to plaintiff's disclosure claims. In both *Freeport-*

McMoRan and *Turner,* the alleged disclosure violations arose in connection with merger proxy statements seeking shareholder approval; not in the context of a voluntary exchange. Moreover, in both of those cases, the allegedly undisclosed information was plainly within the knowledge of the directors, because the omitted information related to the directors' own potential conflicts of interest and the details of the merger. *See Freeport-McMoRan*, 2005 WL 1653923 at *14; *Turner*, 846 A.2d at 987.[3]

In this case, by contrast, there is no viable suggestion that the allegedly omitted or misstated information regarding the Blockbuster internal cash flow report or the "misclassified" Blockbuster assets was actually known to any of the Viacom directors. Moreover, the Viacom board did not seek shareholder consent to the Exchange Offer, or any shareholder action at all --- instead, the board merely approved (through a committee) the divestiture of the Company's investment in Blockbuster by means of the Exchange Offer. Significantly, the Viacom Board did not make any recommendation with respect to the Exchange Offer. As the Prospectus emphasized, "[n]either Viacom nor Blockbuster, nor any of their respective directors or officers…makes any recommendation as to whether you should participate in this Exchange Offer. You must make your own decision after reading this document and consulting with your advisors." Viacom App. Ex. B.

The Supreme Court of Delaware has set a very high bar for plaintiffs seeking to assert disclosure claims when the alleged disclosure violation was not connected to a specific request for stockholder action. *See Malone v. Brincat*, 722 A.2d 5, 14 (Del. 1998). In such circumstances, a plaintiff must prove that the directors "*knowingly disseminated false information.*"

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[3] Plaintiff's reference to *In re Netsmart Technologies, Inc. Shareholders Litigation*, 924 A.2d 171, 191, 199 (Del. Ch. 2007), Pl's Opp'n at 24, is similarly distinguishable because that case also involved a proxy statement seeking approval of a merger recommended by the board, and because, in relevant part, the proxy statement disclosed some, but not all, of the essential information relating to an investment banker analysis that was presented to the board.

"This level of proof is similar to, but even more stringent than, the level of scienter required for common law fraud." *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs, Inc.*, 854 A.2d 121, 157-58 (Del. Ch. 2004). Indeed, as the Court in *Metro Communication* noted, even where the directors are specifically requesting stockholder action, "a fiduciary in the corporate context cannot be held liable for damages for a failure to disclose a material fact unless that fiduciary acted with at least *gross negligence*. Because fiduciaries of business entities must take risks and make difficult decisions about what is material to disclose, they are exposed to liability for breach of fiduciary duty only if their breach of the duty of care is *extreme*." *Id.* at 157 (emphasis added).

Where, as here, the board is not specifically seeking shareholder approval or action and makes no recommendation, disclosure claims must sufficiently allege that the directors knowingly disseminate false information. But plaintiff makes no viable allegations to meet that requirement. The applicable standard is not met, as plaintiff suggests, by allegations that directors had "control" over allegedly material information relating to a subsidiary.

This is not a case that would properly test the boundaries of the "actual knowledge" requirement. Aside from the allegations that Viacom was the majority stockholder of Blockbuster and that Messrs. Redstone and Dauman served on both the Viacom and the Blockbuster boards, plaintiff provides no factual allegation to support the far-fetched claim that any of the Viacom directors would have known anything about an internal cash flow report prepared by a Blockbuster employee seven months before the Exchange Offer, or would have known the details of the accounting classification rules for Blockbuster's assets and cash flow. In her complaint, plaintiff merely provides a boilerplate, conclusory allegation that Mr. Redstone and the other Viacom directors knew or should have known of the alleged omissions and misstatements. Am. Compl. ¶ 68. But as shown below, plaintiff's bare-bones allegation that the Viacom board somehow knew

and yet ignored omissions and false statements in the Prospectus collapses under its own weight and fails to state a claim for violation of the duty of disclosure.[4]

2. The Risks Related To The Cash Flow Information Were Disclosed.

In their opening brief, the Viacom Defendants showed that the Prospectus contained numerous robust disclosures that directly addressed Blockbuster's cash flow issues, its new business initiatives, the increased leverage and other effects of the special dividend and related borrowings, and its ability to service its increased debt payments. Viacom Defs' Br. at 21-22 and n.9, 29. Plaintiff responds to this point by asserting that the "disclosure of so-called 'risks' does not relieve the defendants of their affirmative obligations to disclose *facts* of which they knew." Pl's Opp'n at 26 (emphasis original). However, as discussed above, plaintiff has made no viable allegation that any Viacom director had any knowledge of the alleged undisclosed Blockbuster internal cash flow report or the "misclassification" of Blockbuster assets and related cash flows. Accordingly, plaintiff's argument provides no basis on which to neutralize the detailed warnings and risk disclosures contained in the Prospectus. The risks were fully disclosed.

Plaintiff's citations to *Credit Suisse First Boston Corp. v. ARM Financial Group, Inc.*, 2001 WL 300733 (S.D.N.Y. 2001) and *In re Prudential Securities Inc. Limited Partnerships Litigation*, 930 F. Supp. 68 (S.D.N.Y. 1996) are inapposite because --- as plaintiff's own quotations indicate --- the defendants in those cases were found to have had specific knowledge of the

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[4] It is also worth noting that because plaintiff's complaint fails to set forth non-conclusory allegations that a majority of the Viacom board was not disinterested and independent, or that the board acted in bad faith with respect to the Prospectus, plaintiff's complaint fails to state a claim for money damages and must be dismissed. *See* 8 *Del. C.* §102(b)(7); *Arnold v. Soc'y for Savings Bancorp, Inc*., 650 A.2d 1270, 1290 (Del. 1994) (holding that claims alleging disclosure violations that do not otherwise fall outside non-exculpated conduct are protected by Section 102(b)(7) and any certificate of incorporation provision adopted pursuant thereto); *Frank v. Arnelle*, 1998 WL 668649, at *10 (Del. Ch. Sept. 16, 1998), *aff'd* 806 A.2d 441 (Del. 1999).

undisclosed facts, and thus the risk disclosures were incomplete.[5] More importantly, as the Court in *Credit Suisse* stated, "Courts have made clear that 'when defendants warn investors of a potential risk, they need not predict the precise manner in which the risks will manifest themselves.'" 2001 WL 300733 at *6.

Moreover, the federal court in the Texas action has already addressed these same issues. Specifically, that court held that the statements in the Prospectus regarding Blockbuster's proposed business initiatives and related cash, liquidity and capital requirements were accompanied by meaningful cautionary language and adequate on-point risk disclosures, such that any nondisclosure of cash flow issues (including the alleged undisclosed internal cash flow analysis) was immaterial. *See Congregation Ezra*, 2007 WL 2403341 at *9-10 and Viacom Def's App. Ex. J ¶ 50. As discussed in more detail below, that finding should have preclusive effect in this case.

3. Plaintiff Has Not Adequately Alleged That Any Of The Allegedly Omitted Or Misstated Cash Flow Information Was Material.

Plaintiff cites *Albert v. Alex. Brown Management Services, Inc.*, 2005 WL 2130607 at *2 (Del. Ch. Aug. 25, 2005) (Lamb, V.C.) for the proposition that materiality generally cannot be resolved on the pleadings. However, in *Albert* itself, this Court addressed five alleged non-disclosures in the context of a Rule 12(b)(6) motion, and found that two of them would not support a reasonable inference of materiality and thus could not support a claim for relief. *Id.* at *2-3; *see also, e.g., Sanders v. Devine*, 1997 WL 599539 at *8 (Del. Ch. Sept. 24, 1997) (Lamb, V.C.) ("When viewed in light of the clear and repeated disclosure about the possibility of a cash-out

[5] *See, e.g., Prudential*, 930 F. Supp. at 74 ("The risk disclosures to which Polaris points in rebuttal were simply carefully masked general warnings that residual values of its aircraft could decline. This is a far cry from disclosure of what Polaris *had in its possession* when these assertions were made – that residual value appraisals and studies *existed to their knowledge* that contained the true residual value information not used in its sales materials and, in turn, not conveyed to brokers and investors") (emphasis added).

merger, the alleged omissions specified in ¶ 35 [regarding risk of share redemption upon corporate reconsolidation] are *immaterial as a matter of law*"). Where, as here, the allegations are immaterial as a matter of law and thus cannot support claims for relief, dismissal is warranted.

a. The Internal Cash Flow Report.

The undisclosed internal cash flow report was immaterial because it was allegedly prepared by a Blockbuster employee seven months prior to the issuance of the Prospectus, was inherently unreliable, was discounted by that employee's manager, and was utterly insignificant in light of the extensive risk disclosures contained in the Prospectus and the detailed discussion of two financial analyses prepared by separate financial advisors at the time the Prospectus was issued. Viacom Defs' Br. at 28-29; Am. Compl. ¶¶ 62-65.

Plaintiff cites *Lynch*, 383 A.2d at 281, in an attempt to support her claim that this alleged "third analysis" was material and should have been disclosed. Pl's Opp'n at 31-32. Putting aside the critical fact that the Viacom directors, unlike the directors in *Lynch*, were not "in possession of" the undisclosed analysis (as discussed above), *Lynch* is distinguishable on its facts. In *Lynch*, the two reports at issue presented very different approaches --- one analysis used a "floor" approach to net asset valuation while the other, more optimistic analysis (that was not disclosed) used a "ceiling" approach. *Id.* Here, by contrast, plaintiff has provided no allegation to suggest that the Blockbuster employee report was anything other than an inherently unreliable statement of cash flows.

As this Court recognized in *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 503 (Del. Ch. 1990) (emphasis added), internal reports that are not provided to the board are not required to be disclosed:

> Plaintiff asserts that the proxy statement was misleading because it failed to disclose an internal financial study of Remington prepared by Mr. Gerald Brunner, an analyst in DuPont's finance department. Mr. Brunner calculated a value for Remington of $36.38 per share,

> based on the discounted present value of expected future dividend payments. However, that calculation was not made to value Remington for merger purposes and DuPont did not rely upon it in connection with its acquisition of the Remington minority shares. *Indeed, Mr. Buxbaum, who was Brunner's superior, contemporaneously rejected certain of Brunner's key assumptions....Accordingly, the Brunner $36.38 computation did not constitute sufficiently reliable evidence of Remington's value to warrant proxy statement disclosure*."

Thus, the federal court's determination that the alleged undisclosed Blockbuster internal cash flow report was immaterial as a matter of law is completely consistent with Delaware law.

b. The "Misclassified" Asset And Related Cash Flow Figures.

The "misclassification" was immaterial because it involved the mere *classification* of assets and related cash flow figures, and not the inclusion of non-existent assets or cash flow, and thus the restatement only involved adjusting entries from one asset and cash flow category to another. Viacom Defs' Br. at 27; Am. Compl. ¶¶ 42, 61, 78. Plaintiff avoids acknowledging that every reduction in historical operational cash flow reflected in the restatement was matched with an exact corresponding *increase* in investing cash flow. *See* Viacom Defs' App. Ex. U (adjustments involved "presentation and classification errors" and had no effect on "reported revenues, net income, total assets, shareholder's equity, *total cash flows, current cash or liquidity position* [or] compliance with financial covenants under…debt facilities.").

Instead, Plaintiff argues that, by issuing the restatement, Blockbuster "conceded the materiality" of the misclassification. But plaintiff's argument ignores the fact that Blockbuster expressly stated that the restatement only involved "presentation and classification errors" that had *no effect* on total cash flows or other financial metrics. Viacom Defs' App. Ex. U. Plaintiff further argues that "[t]he SEC only requires restatements of past filings if they contain *material* errors." Pl's Opp'n at 30 (emphasis original). That does not mean, however, that every restatement will

necessarily operate as an admission that the restated figures were materially false when made. In fact, plaintiff herself (Pl's Opp'n at 30 n.14) gives one example of where this was not the case. *See In re U.S. Robotics Corp. S'holders Litig.*, 1999 WL 160154 at *13 (Del. Ch. Mar. 15, 1999) ("Nor does the fact that 3Com issued a restated 10-QA constitute an admission that the March 1997 10-Q was false when issued"). Because this case involves mere reclassification of historical entries, this too is an unusual case. Here, the Blockbuster restatement did not operate as an admission that the "misclassification" was materially false.[6]

More importantly, plaintiff does not allege that the market reacted negatively to the restatement --- or that there was any meaningful market reaction at all. In fact, plaintiff essentially pleads the opposite. Both in her complaint and in her opposition brief, plaintiff says nothing about the market reaction to the March 9, 2006 restatement announcement, but instead focuses on November 9, 2005 as the date of the relevant Blockbuster stock price drop, "once the truth about Blockbuster became known." Am. Compl. ¶¶ 77-78; Pl's Opp'n at 14-16 and nn.9-10. The date that Blockbuster's stock hit its low-point was four months before the announcement of the restatement on March 9, 2006. Simply put, the cash flow misclassification cannot have been material with respect to a stock price drop that had occurred four months earlier.

Alternatively, plaintiff's claim should be dismissed because it fails to plead loss causation, which is an indispensable element of a disclosure case when directors seek no shareholder action. *See Malone*, 722 A.2d at 12; *A.R. DeMarco Enters, Inc. v. Ocean Spray*

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[6] Plaintiff's citation to 17 C.F.R. § 210.4-01(a)(1) (Pl's Opp'n at 30) is inapposite, because that regulation states only that financial statements not prepared in accordance with GAAP are presumed to be misleading or inaccurate --- not that the non-conforming statements are therefore also material. Plaintiff's citation to *In re FirstEnergy Sec. Litig.*, 316 F. Supp. 2d 581, 594-95 (N.D. Ohio 2004) (Pl's Opp'n at 25, 30) is similarly inapposite, because that case states only that a restatement indicates that the prior statement was false --- not that the prior statement was therefore also material.

Cranberries, Inc., 2002 WL 31820970 at *4 n.10 (Del. Ch. Nov. 26, 2002). Here, the alleged loss cannot be found to have been caused by the misclassification first revealed in the March 9, 2006 restatement, because the complaint alleges that the loss had occurred on November 9, 2005, four months prior to the restatement. *See McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1049 (2d Cir. 1995) (dismissing prospectus liability claim because, "as a general rule, a 'price decline before disclosure [of the alleged truth] may not be charged to defendants'") (quoting *Akerman v. Oryx Comms., Inc.*, 810 F.2d 336, 342 (2d Cir. 1987)); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 272 F. Supp. 2d 243, 254 (S.D.N.Y. 2003) (dismissing prospectus liability claim where losses occurred prior to disclosure of allegedly concealed facts, and thus "could not have been caused by misstatements which had not yet been revealed").

The federal court's ruling on the issues of materiality and loss causation is consistent with the proper application of Delaware disclosure law. As the federal court held, "Plaintiffs cannot possibly connect the alleged loss to events occurring seven months after the close of the Class. Accordingly, the post-class period activity is not material." *Congregation Ezra*, 2007 WL 2403341 at *12 n.9.

4. Plaintiff Should Be Precluded From Relitigating These Disclosure Issues.

In addition to the reasons set forth above, plaintiff's disclosure claims should also be dismissed under the doctrine of collateral estoppel or issue preclusion because a judgment in a prior suit precludes relitigation of a factual issue which was litigated and decided in the prior suit between the same parties or persons in privity with them. *Kohls v. Kenetech Corp.*, 791 A.2d 763, 767 (Del. Ch. 2000) (Lamb, V.C.). Although a shareholder who is a member of a putative class is not automatically deemed to be in "privity" with the named plaintiff in a prior suit, a non-party may nevertheless be bound by a prior determination of an issue if that person's conduct "falls short of becoming a party but which justly should result in [her] being denied opportunity to relitigate the

matters previously in issue." Restatement (Second) of Judgments, § 62 at cmt. a (quoted in *Kohls*, 791 A.2d at 769). Here, such preclusion is appropriate, because plaintiff retained the same lawyers hired by the plaintiffs in the federal securities action for the purpose of intervening in that action, but shortly thereafter withdrew her intention to intervene in that proceeding. *See* Viacom Defs' Br. at 7-8 and Viacom Defs' App. Ex. M. By her actions, plaintiff indicated her awareness, ability and intention to intervene in the federal securities action, but then chose not to do so for strategic reasons. Because plaintiff has attempted to game the system, and to play one action off against another, it is appropriate to bind her to the judgment in the prior action.

5. The Viacom Defendants Had No Duty To Disclose The Allegedly Omitted Information Regarding The Exchange Offer.

Under well-established principles of Delaware disclosure law, the Viacom Defendants had no duty to disclose exactly how the exchange ratio was calculated or exactly who served on the Viacom committee, and these points are immaterial in any event. Viacom Defs' Br. at 25-27. As noted in *Frank*, "Delaware courts generally do not require disclosure of pricing methodology in connection with non-coercive self-tender offers." 1998 WL 668649 at *5; *see also id.* at *6 ("it is settled under our decisional law that where a board is not obligated to offer or pay a fair price, absent any materially misleading disclosures, it is neither required to disclose to its stockholders the pricing methodology nor an investment bank fairness opinion, including valuations"). Although the methodology employed to set the price, as well as information regarding the special committee, might be "of interest" to a stockholder deciding whether or not to tender shares, such information is not "material to that decision." *Id.* at *5.

Plaintiff cites to both *In re Pure Resources, Inc. Shareholders Litigation*, 808 A.2d 421 (Del. Ch. 2002) and *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051 (Del. Ch. 1987) for the general proposition that background valuation information should be disclosed. However,

those cases are clearly distinguishable. First and foremost, *Pure Resources* and *Eisenberg* both involved actions seeking to enjoin then-pending offers --- not, as here, an action for damages first brought *22 months* after the closing of the transaction.[7] Also, in *Pure Resources* the board had made a recommendation for specific stockholder action regarding the offer, and in *Eisenberg* the board had made a fair price determination for the self-tender offer. And in each case the board had retained investment bankers who had prepared substantive analyses of valuation and fairness, but did not accurately disclose those opinons. *See Pure Resources*, 808 A.2d at 448-49; *Eisenberg*, 537 A.2d at 1146-47.

Here, by contrast, the Viacom Board made no such recommendation or determination of fairness --- it merely approved (through a special committee) the divestiture of Blockbuster by means of the Exchange Offer. Moreover, the Prospectus emphasized that each shareholder would have to make an independent decision as to whether to exchange shares. In addition, the Prospectus stated clearly that the exchange ratio was based on, among other things, the current and historical market prices of Viacom and "discussions with the co-dealer managers as to what exchange ratio might induce Viacom shareholders to tender" the maximum number of shares. Plaintiff does not suggest that any more detailed background analysis or information even exists --- and any such information would not need to be disclosed in this context in any event.

Plaintiff next attempts to discount the holdings in *Frank* by suggesting that the Delaware Supreme Court limited the case by stating that information relevant to "the decision to hold or dispose of shares" might still be material. Pl's Opp'n at 33-34. On that basis, plaintiff claims that "whether or not the Viacom Directors took into account the negative cash flow analysis

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[7] As discussed above, because this is an action for damages and, at best, the challenged nondisclosures involve an alleged breach of the duty of care, this claim is precluded in any event by Viacom's § 102(b)(7) provision. *See supra* note 10.

and the true cash flow of the company" would have been material to Viacom stockholders in deciding whether or not to participate in the Exchange Offer. *Id.* at 34. However, plaintiff's argument merely duplicates the other disclosure claims in this case, which are without merit for the reasons discussed above. More importantly, the Supreme Court opinion in *Frank* expressly confirmed the relevant holding of the Court of Chancery, *i.e.*, that a non-coercive self-tender offer, without a recommendation or determination of fairness, does not require disclosure of background valuation information. As the Court stated:

> 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.

Frank, 725 A.2d at 441.

Finally, plaintiff cites to *Zoren v. Genesis Energy, L.P.*, 836 A.2d 521 (Del. Ch. 2002) as support for her claim that the names of the members of the Viacom committee were material. Pl's Opp'n at 34-35. *Zoren*, however, is plainly distinguishable, because it involved a proxy solicitation relating to a proposed restructuring that was subject to approval by a majority of unitholders --- and also involved findings and a recommendation regarding the proposal by a special committee. 836 A.2d at 523-24, 526. In any event, the Court dismissed all of the disclosure claims on the grounds that no possible relief was available.[8] *Id.* at 530. In the present case, as in *Frank*, the composition of the committee might have been "of interest" to shareholders, but it was not material to their decision whether to tender shares in the Exchange Offer.

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[8] The Court also noted that the plaintiff "now proposes that the court consider these claims years after the Restructuring was concluded," and that "[t]he question raised by Zoren's failure to seek relief at a time when equity could have intervened to assure proper disclosure is whether any form of monetary relief could be awarded at trial years after the vote was taken. Many disclosure claims will support only equitable or injunctive relief." *Id.* at 530-31.

B. The Complaint Fails To State A Claim For Breach Of The Fiduciary Duty Of Loyalty.

Plaintiff's opposition brief confirms that her duty of loyalty claim is based on the same alleged nondisclosures as her duty of disclosure claim. Pl's Opp'n at 2-3 ("Plaintiff alleges that the Viacom Directors breached their duty of disclosure and their duty of loyalty to Viacom shareholders by failing to disclose material facts about the poor financial health of Blockbuster."). Plaintiff concedes that, in order to state a claim for breach of the duty of loyalty, a plaintiff must plead "facts sufficient to support the inference that the disclosure violation was made *in bad faith, knowingly or intentionally*." *Id.* at 37 (citing *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 915 (Del. Ch. 1999)) (emphasis added).

As noted above, there are no factual allegations in the amended complaint to suggest that the Viacom directors had any knowledge of the alleged weakness in Blockbuster's financial condition as reflected in the internal cash flow report or the "misclassification" of assets and related cash flow. Therefore, plaintiff cannot plead that any nondisclosure was made *knowingly or intentionally*. Moreover, the only basis on which plaintiff claims that the Viacom directors acted in "bad faith" is that they "acquiesced" to an alleged plan that allowed NAI (and Mr. Redstone) to split-off an "underperforming asset," reduce the public float of Viacom, and consolidate control over Viacom. Pl's Opp'n at 37-38. However, the natural effects of the split-off were well-known, and the Exchange Offer itself was completely voluntary (non-coercive) and available to all Viacom shareholders on the same terms. Significantly, plaintiff still does not and cannot claim that the Viacom directors obtained any personal benefit from the Exchange Offer, and the alleged "benefit" to NAI and Mr. Redstone is only asserted in conclusory terms. There are no factual allegations to support plaintiff's boilerplate assertion that the "Viacom directors" acted in "bad faith," much less

"facts sufficient to support the inference that the disclosure violation was made *in bad faith, knowingly or intentionally*." Pltfs. Opp. at 37 (citing *O'Reilly*, 745 A.2d 915 (emphasis added).[9]

C. The Complaint Fails To State A Claim For Breach Against NAI.

Plaintiff's opposition brief confirms that her claim against NAI is that, as "Viacom's majority shareholder, [NAI] breached its duty of loyalty and good faith to minority shareholders by *knowingly* failing to disclose the above material information about Blockbuster." Pl's Opp'n at 3 (emphasis added). However, plaintiff provides no factual allegations to suggest that NAI had any knowledge of the alleged weakness in Blockbuster's financial condition as reflected in the alleged internal cash flow report or the "misclassification" of assets and related cash flow. *See* Am. Compl. ¶ 3. On that basis alone, plaintiff's claim against NAI must be dismissed.

Even if plaintiff had adequately pled NAI's knowledge, her claim still fails because she has failed to allege not only that NAI was Viacom's controlling shareholder, but also that NAI *exercised actual control* over the subject transaction, and thus took on a fiduciary duty to minority

[9] Plaintiff's reference to NAI and Mr. Redstone's control over Viacom (Pl's Opp'n at 37) is irrelevant on this point, because the Exchange Offer was voluntary (non-coercive) and available to all shareholders on the same terms, without any recommendation or request for action by the Viacom board. Similarly, plaintiff's reference to the proverbial "800-pound gorilla" is inapposite because the Court used that term in addressing the very different context of "negotiated mergers" involving controlling stockholders and companies. *See Pure Resources*, 808 A.2d at 436 (citing *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994)). Finally, plaintiff's citation to *Feldman v. Cutaia*, 2006 WL 920420 (Del. Ch. April 5, 2006) (Lamb, V.C.) to support the assertion that "the overall transaction" here was "plainly interested" and thus should be subject to review under the "entire fairness" standard (Pl's Opp'n at 38), is well off the mark. In *Feldman*, the directors were alleged to have personally received securities in a private placement transaction for little or no consideration, and also approved the repurchase of their own options and warrants at a grossly inflated price, and thus stood to receive a clear disproportionate benefit. 2006 WL 920420 at *5-6. Here, the Viacom directors are not alleged to have received any benefit at all, and thus a heightened level of scrutiny is inappropriate.

shareholders. In *In re Primedia Derivative Litigation*, 910 A.2d 248, 257 (Del. Ch. 2006) (Lamb, V.C.) --- which plaintiff herself quotes (Pl's Opp'n at 40) --- this Court stated that :

> For the plaintiffs to survive a motion to dismiss, they must allege domination by [the controlling shareholder] through *actual control* of [the corporation's] corporate conduct. The bare allegation that [the controlling shareholder] possessed the potential ability to exercise control is insufficient. However, the plaintiffs need not demonstrate that [the controlling shareholder] oversaw the day-to-day operations of [the corporation]. Allegations of control over the particular transaction at issue are enough.

In this regard, an allegation that the controlling shareholder placed one or more directors on the corporate board will not establish that the shareholder exercised actual control. *Primedia*, 910 A.2d at 258 (controlling shareholder's "nomination of its associates to [the corporation's] board, without more, does not establish actual domination."). Where the majority shareholder does *not* exercise actual control, no fiduciary duty will attach. *See Cinerama, Inc. v. Technicolor, Inc.*, 1991 Del. Ch. LEXIS 105 at *63 (June 24, 1991), *aff'd in relevant part, rev'd in part on other grounds*, 634 A.2d 345, 372 (Del. 1993), *modified*, 636 A.2d 956 (Del. 1994) ("when a shareholder, who achieves power through the ownership of stock, exercises that power by directing the actions of the corporation, he assumes the duties of care and loyalty of a director of a corporation. *When, on the other hand, a majority shareholder takes no such action, generally no special duty will be imposed*") (emphasis added).

Plaintiff provides no particularized factual allegations to show that NAI exercised actual control over Viacom with respect to the Exchange Offer, such that it would assume a fiduciary duty to Viacom minority shareholders in connection with the Exchange Offer. In fact, plaintiff essentially concedes that point, by noting the "express absence of any suggestion that either [Mr. Redstone] or his appointees on the Viacom Board had anything to do with causing or structuring the Special Dividend and Exchange Offer." Pl's Opp'n at 41. Instead, plaintiff simply asserts that "it is a reasonable inference" that Mr. Redstone, as Viacom's Chairman and CEO, "had

his fingers in every aspect of the transaction." *Id.* Such an assertion is clearly an insufficient basis on which to impose a fiduciary duty upon NAI with respect to the Exchange Offer. NAI, after all, did not participate in the Exchange Offer, and plaintiffs provide no particularized allegation as to any demonstrable interest that NAI had in the transaction.

D. The Complaint Fails To State A Claim For Breach Of The Fiduciary Duty Of Loyalty Against The Blockbuster Director Defendants.

As stated in her amended complaint, plaintiff's claim against the Blockbuster directors challenges Blockbuster's assumption of debt and the declaration of the pro rata special distribution. Am. Compl. ¶¶ 5, 116. In their motions to dismiss, defendants established that this count failed to state a claim because it is an unauthorized derivative claim, because the challenged conduct is clearly protected under the business judgment rule and *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) and its progeny, and because the *pro rata* special dividend and related financing were recommended by an independent and disinterested special committee following consideration of, among other things, reports by two independent financial advisors (a point that plaintiff largely ignores).

In her opposition, plaintiff now states that her claim is that the Blockbuster directors breached their duty of loyalty to the Blockbuster minority shareholders by "*failing to disclose* the true crippling effect" of the special distribution. Pl's Opp'n at 41 (emphasis added); *see also* Pl's Opp'n at 3-4 (claim is "for issuing the crippling Special Dividend and misleading the public about the viability of Blockbuster"). But that is not the claim presented in the amended complaint. As plaintiff has abandoned her "special distribution" claim as stated in the complaint, that claim should be dismissed.

To the extent that plaintiff seeks to advance a new "disclosure" claim in her opposition papers, this newly-stated claim should be dismissed because it was not alleged in her

amended complaint. In any event, plaintiff's new disclosure claim against the Blockbuster directors fails to state a claim. To the extent that plaintiff challenges allegedly misleading disclosures made "*to the public*" generally (Pl's Opp'n at 4), she has no cause of action under Delaware law, in light of remedies under federal securities laws. *Malone*, 722 A.2d at 12. In the event that she seeks to challenge allegedly misleading disclosures made directly to Blockbuster stockholders, she has no claim because she has not alleged --- and cannot allege --- that the Prospectus was directed to Blockbuster shareholders (except to the extent that it was disseminated to the public generally as part of a registration statement filed with the Securities and Exchange Commission). Plaintiff says nothing on this point, even in her opposition brief.

Moreover, in her opposition brief, plaintiff asserts for the first time that she "decid[ed] not to sell her [Blockbuster] shares," and that she did so in reliance on Blockbuster's statements in the Prospectus. Pl's Opp'n at 42. In her complaint, she alleged only that she "owned" Blockbuster shares "at the time of the declaration of" the special distribution, and her conclusory allegation of reliance relates only to her decision to tender her Viacom shares in the Exchange Offer --- not any decision to "hold" Blockbuster shares. Am. Compl. ¶ 7.

In addition, plaintiff concedes that in order to proceed on this "fraudulent disclosure" claim, she would have to plead that the Blockbuster directors "knowingly disseminated" materially false information in the Prospectus. Pl's Opp'n at 42 (citing *Malone*, 722 A.2d at 9). However, plaintiff provides no sufficient factual allegation to suggest that any Blockbuster director defendant had any knowledge of the alleged weakness in Blockbuster's financial condition as reflected in the alleged internal cash flow report or the "misclassification" of assets and related cash flow. Other than Mr. Redstone, none of the other Viacom-affiliated directors (Messrs. Dauman, Bressler and Fricklas) is even mentioned by name in the substantive allegations of the complaint. Plaintiff's

conclusory allegations on this point are plainly insufficient as a matter of law, and they fare no better from mere repetition in plaintiff's brief. Pl's Opp'n at 43-44.

For all of these reasons, plaintiff's newly-crafted disclosure claim against the Blockbuster defendants fails to state a claim, and must be dismissed.

Apparently in connection with her original "special distribution" claim against the Blockbuster directors, plaintiff also argues that the Exchange Offer "scheme" benefited Viacom, that a majority of the Blockbuster directors were financially interested in the transactions or beholden to Viacom, and thus that plaintiff has rebutted the business judgment rule. Pl's Opp'n at 42. On this point, however, plaintiff again offers only sparse, conclusory and insufficient allegations. Pl's Opp'n at 42-43.[10] Plaintiff also argues that the claim against the Blockbuster directors is direct, and not derivative, by re-characterizing her claim as one based on misrepresentations and nondisclosures. Pl's Opp'n at 45-46. As to these points, the Viacom Directors incorporate by reference the arguments of the Blockbuster Defendants in their reply brief.

E. The Complaint Fails To State A Claim For Breach Of Fiduciary Duty Against Viacom

As stated in her complaint, plaintiff's claim against Viacom relates to Blockbuster's assumption of debt and declaration of the *pro rata* special distribution. Am. Compl. ¶ 121. In their motion to dismiss, the Viacom Defendants established that this count fails to state a claim because it

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[10] Plaintiff briefly acknowledges that a committee of independent Blockbuster directors approved the special distribution, but argues that the committee apparently did not act in an "informed manner," on the sole ground that they did not foresee the reclassification of assets and related cash flow that occurred 18 months later. Pl's Opp'n at 43 n.18. Plaintiff's citation to *Teachers' Ret. Sys. of Louisiana v. Aidinoff*, 900 A.2d 654 (Del. Ch. 2006) is inapposite, because in that case the Court decried that the full board "relied blindly" on a single director, "after hearing a short song-and-dance from him annually," and the outside directors "did *not* employ any integrity-enhancing device, such as a *special committee*," to review the subject transaction. *Id*. at 669 (emphasis added).

is an unauthorized derivative claim and because plaintiff failed to establish any duty or breach, or any knowledge of any undisclosed financial problems of Blockbuster. Viacom Defs' Br. at 37-38.

In her opposition, plaintiff re-states her claim as one for breach of the fiduciary duty of loyalty for "causing Blockbuster to pay the Special Dividend *and issue a false and misleading Prospectus*." Pl's Opp'n at 3-4, 44 (emphasis added). Again, to the extent that plaintiff seeks to advance a new "disclosure-based" claim in her opposition papers, this newly-stated claim should be dismissed for that reason alone. Moreover, again, Blockbuster did not issue the Prospectus --- except to the extent that it was disseminated to the public generally as part of a registration statement Blockbuster filed with the Securities and Exchange Commission. Plaintiff has no cause of action in Delaware based on such general statements to the public. *Malone*, 722 A.2d at 12.

In any event, in order for plaintiff to move forward with this claim, she must allege not only that Viacom was Blockbuster's controlling shareholder, but also that Viacom *exercised actual control* over the subject transaction, and thus took on a fiduciary duty to Blockbuster minority shareholders. *Primedia*, 910 A.2d at 257; *Cinerama*, 1991 Del. Ch. LEXIS 105 at *63 (when majority shareholder takes no action to direct the actions of a corporation, "generally no special duty will be imposed"). Even assuming that Viacom was the controlling shareholder of Blockbuster, plaintiff still provides no particularized factual allegations to show that Viacom exercised actual control over Blockbuster with respect to the special distribution or the Prospectus such that it would assume a fiduciary duty to Blockbuster minority shareholders in that regard. In her opposition brief, plaintiff adds nothing to suggest that Viacom had any sort of direct involvement with the Blockbuster special distribution or Blockbuster disclosure. Pl's Opp'n at 44. The *pro rata* special dividend and the related financing were recommended by an independent and disinterested special committee of Blockbuster directors, following consideration of, among other things, reports by two independent financial advisors.

Even if Viacom had a fiduciary duty to Blockbuster minority shareholders --- though it clearly did not --- plaintiff has not alleged a breach of any such duty. As noted, there is no basis to assert that the special distribution was improper in any way, that Viacom had any knowledge of Blockbuster's alleged financial weakness as reflected in the alleged internal cash flow report or the "misclassification" of assets and related cash flow, or that the alleged nondisclosures were material. In her opposition, plaintiff merely repeats her assertion that she has adequately pled that "Viacom had actual knowledge that Blockbuster could not be a viable company." Pl's Opp'n at 44. Plaintiff has not alleged that Viacom had any such knowledge.

The irony is, plaintiff has not even alleged that Blockbuster "could not be a viable company." In fact, Blockbuster clearly is still a viable company. This is an opportunistic lawsuit based on a corporate collapse that never happened. As with the federal securities case, it is time for this case to be put to rest.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the Viacom Defendants' motion to stay, or, in the alternative, to dismiss, should be granted.

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