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Case No. 1956-CC

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

In Re: *INFO*USA, Inc. Shareholders Litigation	))))	Consolidated C.A. No. 1956-CC

DEFENDANTS' AMENDED REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED CONSOLIDATED COMPLAINT

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Dated: June 28, 2007
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PRELIMINARY STATEMENT

In the course of their litigation second-guessing the directors of *info*USA, the plaintiff hedge funds have had the benefit of an extensive Section 220 document production and no less than six opportunities to satisfy the requirements for finding that demand is excused. Six fruitless attempts to avoid Delaware's demand requirement are enough.

Despite being given the opportunity to amend their pleading yet again after briefing on Defendants' pending motion to dismiss was originally complete, the changes contained in the current complaint (the "Amended Consolidated Complaint") only highlight the lack of merit to Plaintiffs' arguments that demand would be futile.[1] The allegations with respect to *info*USA Chairman and CEO Vinod Gupta's ownership (through a trust) of a small number (less than 1%) of the shares of Opinion Research Corp. ("ORC"), are particularly revealing. When briefing began on Defendants' Motion to Dismiss, Plaintiffs alleged that the *info*USA Directors had taken "no action" when they supposedly learned about Vin Gupta's ownership of these shares after *info*USA had signed a merger agreement with ORC. (Amended Consolidated Complaint ("Am. Compl.") ¶ 135). In the current iteration of their pleading, Plaintiffs admit that after the ORC acquisition, Vin Gupta (through the trust) sold the ORC shares he still owned back to *info*USA at cost and that he "disgorged back to the Company $94,869" earned on shares that had already been sold. (Am. Compl. ¶ 136). Ironically, Plaintiffs now imply that it was their initial allegation that caused the Directors to act. But by claiming credit for the Directors' forceful

[1] For ease of reference, a redline version of Defendants' Reply Brief is attached hereto as Exhibit 23, which reflects the changes made to the reply brief in response to Plaintiffs' Amended Consolidated Complaint.

action with respect to the ORC shares, Plaintiffs demonstrate the emptiness of their contention that it would be futile for them to make a demand on the Directors.

Plaintiffs' effort to portray the *info*USA Board[2] as supine and a rubber stamp for transactions benefiting Vin Gupta is also belied by their other allegations. If the *info*USA Board was under Vin Gupta's thumb, surely when he proposed to take the Company private, the directors would have accepted his proposal. Instead, as Plaintiffs admit, the Board appointed a committee of outside independent directors who hired first-tier independent legal and financial advisors and thereafter rejected the proposal, forcing its withdrawal. Similarly, the Audit Committee, without any prior stockholder demand, investigated related party transactions and perquisites, and took action on related party transactions where it was deemed necessary. The Board also voted to acquire an airplane and other assets previously owned by Vin Gupta in order to better control Company use of such assets. Plaintiffs' assertion that the Board or its Audit or Special Committee should have done even more rings hollow in the face of these undisputed facts.

The bottom line remains as it was before: Plaintiffs have failed to satisfy the standard articulated in this Court's October 17, 2006 Bench Ruling. This Court has already determined that merely pleading "some type of connection between a particular director and Vin Gupta" is insufficient to show that a director is interested. (*Bench Ruling* at 10-11). Disregarding the *Bench Ruling*, Plaintiffs again argue in their Answering Brief that receiving "free office space" (*see* Plaintiffs' Answering Brief in Opposition to Defendants' Motion to Dismiss ("AB") at 7-8)

[2] Capitalized terms not otherwise defined herein are defined as they were in Defendants' Opening Memorandum of Law in Support of Their Motion to Dismiss the Consolidated Complaint ("OB").

or being designated a trustee of the same university foundation as Vin Gupta (AB at 24-25) makes a director incapable of acting independently, without regard to the materiality of such benefits. Plaintiffs have once again failed to "fill in the blanks" (*Bench Ruling* at 11) by pleading with particularity any facts sufficient to give rise to a disabling conflict of interest.

Unable to muster the particularized facts necessary to show domination of the Board by Vin Gupta, Plaintiffs instead rely on the very same substantive allegations of purported mismanagement to argue that the Directors will not independently consider demand to redress the alleged mismanagement. Such circular reasoning was rejected by this Court in the *Tyson* case and it should fare no better here. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 2007 WL 1018209 (Del. Ch.).[3]

ARGUMENT

I. THE AMENDED CONSOLIDATED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO MAKE A DEMAND ON THE BOARD.

In dismissing the First Amended Derivative Complaint, this Court found that Plaintiff Cardinal had failed to state "particularized allegations with respect to a majority of the board members, especially…no particularized allegations make it clear that they are disabled because of their conflicts, or their domination by Vin Gupta, that make them incapable of independently and objectively considering a demand on the board to vindicate this claim on behalf of *info*USA." (*Bench Ruling* at 10-11). Plaintiffs' Amended Consolidated Complaint fails to remedy this deficiency.

Although Plaintiffs urge the Court to examine an "accumulation of all factors" in determining whether demand is excused, that is just another label for what this Court already

[3] A compendium of unreported decisions is being filed simultaneously herewith.

deemed a "litany of examples" that was insufficient to meet Plaintiffs' burden of particularized factual allegations. (*Bench Ruling* at 9). The *Aronson* and *Rales* tests are not satisfied by attempting to tar the Board with a long and repetitious list of immaterial connections between management and the Board.

A. Plaintiffs Have Not Shown That a Majority of the Board is Interested or Lacks Independence.

In order to excuse demand, under both the first part of the *Aronson* test and under *Rales*, Plaintiffs must plead facts that satisfy the pleading standard of Rule 23.1, and show that the majority of the Board was interested. A director is deemed to be interested or to lack independence for purposes of demand futility if "divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the shareholders." *Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984); *see also* OB at 16. Only particularized facts that create a reasonable doubt that the director's conflicting interest is "material" such that the director was or would likely be influenced by the alleged self-interest are sufficient. (*See* OB at 16-17); *see also Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2002) (for an alleged conflict to be material, the "threatened loss create[s] reason to question whether the director is able to consider the corporate merits of the challenged transaction objectively"). Plaintiffs do not even attempt to meet this demanding standard.

Plaintiffs instead refashion the applicable standard to argue that "directors should not simply be or appear independent, but rather they 'must act independently.'" (AB at 19). Not surprisingly, both of the cases Plaintiffs cite for this new standard are inapposite. First, in *Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997), the Supreme Court ruled in an entire fairness case after trial that members of a special committee that had negotiated a transaction with the

controlling shareholder lacked independence because the "least detached" outside director performed the essential functions of the special committee, without the participation of the other two directors, and essentially became a "single member committee," relying upon financial and legal advisors who were connected to the controlling shareholder. (*Id.* at 429-30). Second, in *Scattered Corp. v. Chicago Stock Exchange, Inc.*, the Court evaluated whether demand was wrongly refused and focused on the reasonableness of the board's investigation in deciding whether the board had acted independently. 701 A.2d 70, 73 (Del. 1997). Neither *Kahn* nor *Scattered Corp.* involved a situation like the case at bar where litigants sought to justify their refusal to make a demand.

1. Plaintiffs Allege No Particularized Facts Challenging the Independence of Directors Anshoo Gupta, Fairfield, and Reznicek.

As of October 19, 2006 (the date for measuring when their demand was excused), the *info*USA Board had nine members.[4] Notably absent from Plaintiffs' Answering Brief is any specific allegation that three of those nine directors -- Anshoo Gupta, William Fairfield and Bernard Reznicek -- were interested or lacked independence. Plaintiffs' failure to discuss these three directors in the context of arguing director interest effectively concedes the point.

2. Plaintiffs Fail to "Fill in the Blanks" in Their Challenge to the Five Remaining Outside Directors.

Having made no argument with respect to three of *info*USA's eight outside directors, Plaintiffs must establish that four of the five remaining outside Directors -- Martin Kahn, George Haddix, Dennis Walker, Vasant Raval, and Elliot Kaplan -- were interested or controlled by Vin

[4] Plaintiffs devote at least 12 paragraphs in their Answering Brief to attacking two Defendants -- Directors Charles Stryker and Harold Andersen -- who had left the Board by that time. (AB at 6-7, 10-14, 19-22 and 38; *see also* OB Ex.12 at 22 (Stryker retired on January 23, 2006) and OB Ex. 8 at 2 (Andersen retired on November 10, 2003)).

Gupta. Plaintiffs have failed to do so. Instead, Plaintiffs argue that "regardless" of the materiality of alleged conflict-creating relationships, the mere existence of "related party arrangements casts serious doubt on whether [the directors] would cause [*info*USA] to sue V. Gupta for his." (AB at 23). As previously found by this Court, such allegations are insufficient to render a director interested or lacking in independence. (*Bench Ruling*, at 10-11).

Kahn

Curiously, after failing to name Kahn as a defendant in the First Amended Derivative Complaint, Plaintiffs now contend in their Answering Brief that Kahn joined the vote to disband the Special Committee and accordingly lacked independence. (AB at 20). This is wrong: as Plaintiffs acknowledged in their Amended Consolidated Complaint, Kahn voted *against* disbanding the Special Committee. (Am. Compl. ¶ 44; Ex. 16, *info*USA, Inc., Definitive Additional Materials, Schedule 14A, April 27, 2006, p. 31 (citing August 26, 2005 Board minutes)).

Plaintiffs' other challenges to Kahn's independence are also unavailing. With respect to the fees he received for his service as director, or the $184,000 that Kahn received when *info*USA made a "topping offer" bid to purchase OneSource (which Plaintiffs now mischaracterize as a "topping fee"), Plaintiffs have failed to conform with this Court's Bench Ruling requiring a showing of materiality. (*See* OB at 18). There are no facts alleged that would demonstrate that these payments were so valuable to Kahn as to make him beholden to management. *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004); *see also* OB at 18-19.

Haddix and Walker

Plaintiffs' allegations with respect to Haddix and Walker are likewise insufficient. (*See* OB at 20-23). By falling back on bare-bones allegations of free office space and directors' fees, the Amended Consolidated Complaint suffers the same deficiencies as the First Amended Derivative Complaint -- namely, neither has "particularized allegations [that] make it clear that [Haddix and Walker] are disabled because of their conflicts, or their domination by Vinod Gupta, that make them incapable of independently and objectively considering a demand on the board…" (*See Bench Ruling* at 10). Plaintiffs attempt to revive their claim by alleging the Company paid an interior designer to assist Haddix and Walker decorate their offices. (Am. Compl. ¶¶ 6, 14). But, once again, Plaintiffs fail to show the materiality of these benefits to either director. In fact, Plaintiff Cardinal admitted as much in its Second Amended Derivative Complaint, stating that it is "impossible for [it] to know the precise magnitude of these [benefits]." (*See* Cardinal Second Amended Derivative Compl. ¶ 102 (incorporated by reference, *see* Am. Compl. ¶ 2)). Nor have Plaintiffs alleged facts demonstrating that Haddix or Walker (both executives and directors at other companies) would risk their reputations as fiduciaries in order to maintain these benefits from *info*USA. (*See* OB at 20-21).[5]

In their Answering Brief, Plaintiffs contend that Haddix and Walker face a substantial risk of personal tax liability arising out of the transactions challenged by Plaintiffs such that they

[5] Although Plaintiffs now assert that the Raval Report constitutes an admission that rent-free office space establishes a lack of independence (AB at 23), that is not a fair characterization and in any event, it is for this Court, not a non-lawyer such as Raval, to decide the legal significance of the office space relative to the requirements for excusing demand. In fact, as previously held by this Court, allegations of free office space are insufficient to excuse demand. (*Bench Ruling* at 9-10). Moreover, there is an obvious benefit to any company of having its non-executive directors on-site more often than just formal directors' meetings. (*See* OB at 13).

are rendered interested. (AB at 26-28). But Plaintiffs have done nothing to demonstrate that the directors' actions "were so egregious" that they would face a substantial risk of personal liability. *Seminaris v. Landa*, 662 A.2d 1350, 1354 (Del. Ch. 1995). Indeed, Plaintiffs have provided no evidence that the Board improperly reported the Company's transactions. Such speculation does not satisfy the "particularized allegations" standard required under Delaware law. *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 285 (Del. Ch. 2003).

In the absence of particularized facts, Plaintiffs resort to the circular argument that Haddix and Walker are necessarily interested and lack independence because they approved transactions that Plaintiffs claim improperly benefited Vin Gupta (such as the disbanding of the Special Committee, condoning certain related party transactions, and signing allegedly misleading *info*USA Forms 10-K). (*See* OB at 21). This circular argument does not advance Plaintiffs' claims. Plaintiffs incorrectly distinguish *Tyson* on the ground that they are not relying on Board *approval* of challenged transactions to prove lack of independence. (AB at 25). Rather, by referring to the documents obtained pursuant to the § 220 proceedings, Plaintiffs argue that the *lack of explicit approval* of certain challenged transactions proves that the directors lacked independence. *Id.* This tortured attempt to distinguish *Tyson* is unavailing. At bottom, *Tyson* rejects the circular argument that directors can be deemed to lack independence simply because they supported transactions being challenged. (*See* OB at 21). That is the very same argument that Plaintiffs would have the Court adopt here.

With respect to Haddix, Plaintiffs fail to allege that he materially benefited from *info*USA's investment in a company for which he worked ten years ago. (*See* OB at 22). Nor do they demonstrate how Haddix's membership on the Board of Directors of Creighton University, where Vin Gupta is alleged to have unspecified "strong ties," renders Haddix unable to

objectively consider a pre-suit demand. *Id*. In their most recent allegations, Plaintiffs assert (without offering any source for the allegation) that Haddix told some unidentified person that Haddix saw no conflict between Vin Gupta's offer to acquire the Company's shares and participation (in some unspecified way) in the consideration of that offer. (Am. Compl. ¶ 141). The allegation is wholly unsubstantiated and fails to save Plaintiffs' claim that Haddix somehow lacked independence. In any event, the Special Committee rejected the Gupta Offer and there is no allegation that Vin Gupta (who never served on the Special Committee) participated in that decision. (Am. Compl. ¶ 34).

With respect to Walker, although Plaintiffs allege that he flew on the Company jet with Vin Gupta on a "personal" trip (AB at 5), there is no allegation to show that this trip was in any way material to Walker such that it would compromise his independence for purposes of considering a pre-suit demand. (*See* OB at 22-23).

Raval

Plaintiffs again make the same general and conclusory allegations about Raval that this Court has previously deemed insufficient in this action. As with the other outside Directors, Plaintiffs allege that Raval lacks independence and is beholden to Vin Gupta because he receives directors' fees, because Raval and Vin Gupta are both associated with Creighton University, and because Raval signed allegedly misleading Forms 10-K. (*See* OB at 25).

As above, Plaintiffs fail to allege the materiality of the directors' fees to Raval in the Amended Consolidated Complaint. Instead, Plaintiffs cite average salaries for Creighton professors of unspecified tenure and position from a Nebraska Government website.[6] (AB at 4;

[6] Although Plaintiffs seek to rely on certain information supposedly provided in a source called the Chronicle of Higher Education, the cite for this report has not been provided.

Am. Compl. ¶ 7). As an initial matter, the Nebraska Government website report upon which Plaintiffs rely indicates on its cover that there are "errors in data submission" with respect to Creighton University's data in particular that was analyzed in that report. (*See* Ex. 10 (cover of Nebraska Government Report)). Further, the report's calculation of average professor salaries adjusts the numbers on a 9-month basis. (*See* Ex. 18 (average salary report of full-time instructional faculty)). Accordingly, Plaintiffs' comparison of erroneous and adjusted salaries to Raval's directors' fee is hardly of the particularized and reliable nature that is required. Raval presumably is paid more than the average Creighton University professor since Raval has been a professor at Creighton University since 1981, and also has chaired the Department of Accounting and served as an Associate Dean. (Am. Compl. ¶ 7; *see* OB at 4). Moreover, in comparing the hypothetical nine-month salary of an average Creighton professor to the fees received from *info*USA, Plaintiffs ignore the fact that Raval receives income from other sources, including his directorship at other companies (including fees and stock options he receives for serving on Syntel's Board, and as Chairperson of the Syntel Audit Committee) and royalties from numerous publications. (*See* OB at n.15). Not only do Plaintiffs' comparisons lack the required particularlity, once the Court considers for amounts from other sources of income, there is no way for the Court to find that the directors' fees from *info*USA are material to Raval.

Nor do Plaintiffs allege that Vin Gupta had any part in the hiring, salary or retention of Raval at Creighton University. (*See* OB at 26). Further, Plaintiffs' generalized allegation of interest based upon Vin Gupta's contributions to another school in India, which in turn has an exchange program of an undefined nature with Creighton University, is strained to the point of absurdity and has no support under Delaware law. Moreover, as with Haddix and Walker,

Plaintiffs' argument that Raval is interested because he supposedly faces a substantial risk of personal liability arising out of the challenged Board transactions is entirely conclusory.

Lastly, Plaintiffs again advance the same type of circular argument rejected in *Tyson* by arguing that Raval must be interested because he condoned certain transactions challenged by Plaintiffs, including signing allegedly misleading Forms 10-K. (Am. Compl., ¶ 70; *see also* AB at 10). In addition to being inconsistent with *Tyson*, this argument is inconsistent with Plaintiffs' own heavy reliance on Raval's examination of related party transactions, a report that Plaintiffs say "analyzed…[and] admitted significant problems with related party payments…" (AB at 9). These contradictions underscore Plaintiffs' inability even to construct a consistent theory to suggest Raval's lack of independence for purposes of considering a pre-suit demand.

Kaplan

Plaintiffs repeat many of the same allegations concerning Kaplan as they did about other directors, including Kaplan's receipt of directors' fees, his travel on the Company jet, his alleged condoning of certain transactions challenged by Plaintiffs, his alleged support for disbanding the Special Committee, and his purported risk of personal liability. (*See* AB at 22-23; Am. Compl. ¶ 143). For the reasons stated above, these allegations do not permit a finding that Kaplan is interested.

The fact that Kaplan is a partner in the Robins Kaplan law firm that has provided legal services to the Company is insufficient by itself to create reasonable doubt as to his independence, without further allegations demonstrating a personal benefit so significant as to render Kaplan incapable of questioning management. *See Beam*, 845 A.2d at 1050 (*see also* OB at 26-27). Even Plaintiffs' attempt to demonstrate materiality of legal fees paid by the Company to the Robins Kaplan firm falls flat. Plaintiffs allege that the Robins Kaplan firm had $164

million in total revenue in 2004. (Am. Compl. ¶ 10). The Company paid the firm $600,000 in legal fees that year -- less than one-half of 1% of the Robins Kaplan firm's total revenue. (*See* Ex. 20 (*info*USA Form 10-K filed March 15, 2007, p. 68)). As such, the fees can hardly be deemed material to Robins Kaplan, much less to Kaplan personally.

3. Plaintiffs' Blanket Assertions of Board Domination are Also Misplaced.

In an implicit concession that they failed to identify any particular relationship or specific conduct that renders the Board incapable of considering demand, Plaintiffs fault the Board for failing to adequately monitor the transactions that formed the basis of the Amended Consolidated Complaint. In addition to being circular, such arguments fail as a matter of substance.

For example, Plaintiffs argue that after receiving and reviewing the Raval Report, the Directors repeatedly deferred to Vin Gupta by failing to pursue reimbursement from him for certain challenged expenses, and by failing to further investigate his personal expenses from previous years. (AB at 19, 20, 25-29). They rely on *Coulter* to argue that such "deferral" reflects the Directors' inability to exercise sound business judgment. However, unlike the situation in *Coulter*, the *info*USA directors did not ignore their duties and fail to exercise appropriate business judgment. *See Cal. Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *14 (Del. Ch.). Plaintiffs admit that the very purpose of the Raval Report was to review certain expenses charged by Vin Gupta. In fact, the preparation of the Raval Report was consistent with the Board's practice of reviewing related party transactions with the help of outside auditors and advisors, and to the extent feasible, obtaining services from unrelated third parties. (Ex. 19, *info*USA Form Def. 14A, May 22, 2006, p. 3).

Plaintiffs also invoke *Disney* to argue that the *info*USA directors acted in "bad faith" so as to excuse demand. As an initial matter, Plaintiffs have failed to allege that the Raval Report

created a duty that would compel the directors to take the particular actions demanded by Plaintiffs, rather than serving as an informative investigative report focused upon prospective changes.[7] Where there is no duty to act, it is illogical to argue that the Directors breached a non-existent duty in bad faith.

In *Disney*, the allegation that the directors failed to take any action when an executive was granted a non-fault termination without board approval (which was alleged to be required by the company's bylaws) was supported by a number of particularized allegations including allegations that the directors had failed to: keep themselves informed of the termination, inquire about the terms and conditions of the termination, or prevent or delay the termination until more information could be collected. 825 A.2d at 289.

Here the Board did take action. First, as Plaintiffs acknowledge, the Audit Committee commissioned the Raval Report. Further, Plaintiffs admit that the Board took steps to investigate related-party transactions and exercised its business judgment in instituting appropriate responses. For example, the Company acquired ORC, a company in which Vin Gupta (through a trust) held 33,000 shares (or less than 1% of all outstanding shares), on December 4, 2006. (Ex. 20, p. 68). Plaintiffs concede that the Directors demanded disgorgement to *info*USA of the funds Vin Gupta's Trust received from the sale of ORC shares. (Am. Compl. ¶ 136). In its next annual report (filed three months after the acquisition), the Company disclosed the receipt of these funds. (Ex. 20, p. 68; *see also* Am. Compl. ¶ 136). In short, the Board acted independently

[7] Plaintiffs cite to the Raval Report as recommending to employees that they "should consider reporting unreimbursed employee expenses on the individual tax return to the IRS." (AB at 10). Raval's suggestion, written without the benefit of legal or tax counsel, in no way creates a duty.

and in the interest of the Company. Any argument that demand should be excused as futile must fail given these facts.

Second, the Audit Committee reviewed the Raval Report, deliberated over its findings, and amended the Company's practices concerning related party transactions. Plaintiffs' mere disagreement with the Directors' actions is insufficient to rebut the business judgment rule. *See In re Walt Disney Co.*, 907 A.2d at 750-51 (finding that "compliance with a director's duty of care can never appropriately be judicially determined by reference to the content of the board decision…so long as the Court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests").[8]

Third, the sheer volume of challenged transactions that are asserted is insufficient in and of itself to establish bad faith. *See Tyson*, 2007 WL 1018209, at *20 (finding that "a successful complaint will need to make detailed allegations with regard to the process by which a committee conducted its deliberations: the amount of time a committee took in considering a specific motion, for instance, or the experts relied upon in making a decision").

Fourth, Plaintiffs' circular argument that the Board must not have exercised its business judgment with respect to the Raval Report because the directors are supposed to have been interested is the same type of circular reasoning rejected by *Tyson*. Accordingly, there is no basis to find that the business judgment rule does not apply.

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[8] While Plaintiffs imply that changes in corporate governance policies that are prospective and not retroactive constitute bad faith, the scope of business judgment is not so limited. Indeed, Delaware courts often approve settlements and fee applications where settlements provide for prospective but not retroactive changes. *See e.g., Chrysler Corp. v. Dann*, 223 A.2d 384, 387-88 (Del. 1966) (finding that change to a corporation's incentive compensation plan was a benefit to the corporation that entitled the plaintiff to a fee award); *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989) ("Changes in corporate policy…if attributable to the filing of a meritorious suit, may justify an award of counsel fees.").

B. The Challenged Board Actions Are Not So Egregious as to be "Beyond the Pale" of Business Judgment.

In addition to failing to demonstrate interest or domination, the Amended Consolidated Complaint also fails to demonstrate that the challenged Board actions are "beyond the pale" of the business judgment rule (as is required to excuse demand with respect to Board actions under the second part of the *Aronson* test). *Kahn v. Tremont Corp.* 1994 WL 162613, at *5 (Del. Ch.). Plaintiffs carry a "substantial burden" to rebut the business judgment presumption; to do so they must come forward with particularized allegations demonstrating that "a decision is so extreme or curious as to itself raise a legitimate ground to justify further inquiry and judicial review." *Greenwald v. Batterson*, 1999 WL 596276, at *7 (Del. Ch.) (internal quotations omitted). Plaintiffs have failed to meet their "substantial burden." Instead of making particularized allegations sufficient to show that the challenged board actions are beyond the pale of the business judgment rule, Plaintiffs simply rely upon general allegations. And again, Plaintiffs employ the type of circular reasoning that was rejected in *Tyson* by arguing that the Board could not have exercised its business judgment with respect to these transactions because they lacked independence, while arguing elsewhere that the latter is based upon the former.

1. Creation and Termination of the Special Committee

This Court has already stated that the Board "created the committee and, by definition, it can terminate the committee." (*Bench Ruling* at 11). The inquiry should end there. Plaintiffs contend, however, that the Special Committee was a "sham," without alleging any particularized facts to support that conclusory statement. (*See* OB at 31-32). In fact, after receiving the Gupta Offer, the Board voted to establish the Special Committee to "negotiate, approve or reject" the Proposal. (Ex. 16, p. 16 (citing June 14, 2005 Minutes of the Board of Directors)). The next day, the Board appointed Directors Anshoo Gupta, Khan, Raval and Stryker to the Special

Committee because each of them was a "disinterested director of the Company with respect to the Proposal."[9] *Id*. As Plaintiffs acknowledge, the Special Committee selected experienced and independent legal and financial advisors to help evaluate the Gupta Offer. (Am. Compl. ¶¶ 29-30).

As Plaintiffs also admit, rather than rolling over and accepting the Gupta Offer, the Special Committee rejected it as "inadequate." (Am. Compl. ¶ 34). After the Special Committee rejected the Gupta Offer, Vin Gupta withdrew it. (Am. Compl. ¶ 35). As Plaintiffs also admit, the Board then took up the question of whether to continue to maintain the Special Committee with no offer on the table. After discussing "the potential disruption in the Company's operations that could result from continued exploration of strategic alternatives, including demands on management's time, a possible adverse impact on the Company's ability to retain key employees…and consequential adverse impact on the interests of the Company's stockholders," a majority of the Board voted to terminate the Special Committee. (Ex. 16, p. 30 (citing August 26, 2005 Minutes of the Board of Directors); Am. Compl. ¶ 45). In fact, the directors specifically noted that a third party would be free to submit a proposal, and that "while a special committee of disinterested directors was needed to consider Mr. Gupta's proposal, the

[9] Plaintiffs add the additional generalized allegation that the Company changed its pricing policy prior to receiving the Gupta Offer, which allegedly had a short-term negative impact on its cash flow and earnings. (Am. Compl. ¶ 17). Once again, the allegations lack the particularity required to establish director interest or demand futility. In fact, even if true, these allegations do not impact the issues before this Court -- namely, Board independence. As Plaintiffs concede, the Company expected that the change in policy would "produce superior financial effects" (Am. Compl. ¶ 17). Further, such policy obviously did not bolster the viability of the Gupta Offer: that offer was rejected by the Special Committee. (*Id*. at ¶ 18).

need for such a committee no longer exists in view of the withdrawal of Mr. Gupta's proposal." (Ex. 16, p. 30). To date, the Board has not received any other third-party proposals.[10]

2. Approval of Certain Expenses

In their Amended Consolidated Complaint, Plaintiffs challenge the approval of certain expenses as waste, including the University of Nebraska-Lincoln football stadium skybox, the purchase of the Everest Building, and certain travel expenses. (OB at 32-34). Although Plaintiffs concede, as they must, that the purchase of the skybox was approved by the Board (AB at n.4), they continue to challenge this expense. Remarkably, discussion of the approval of these expenses is conspicuously absent from Plaintiffs' discussion concerning demand futility. To the extent Plaintiffs seek to continue to challenge the approval of these expenses, such allegations fall short of excusing pre-suit demand under Rule 23.1. (OB at 32-34).

Plaintiffs fail to plead with particularity any basis to conclude that the Board's approval of these expenditures is beyond the pale of the business judgment rule. With respect to claims of waste, it is not the defendant directors' burden to show that a transaction had a rational business purpose, but rather Plaintiffs' heavy and very rarely satisfied burden to establish that the approval of these expenses "either served no corporate purpose or was so completely bereft of

[10] Plaintiffs also contradict their own argument that the Special Committee was a "sham" with their admission that the Special Committee "took seriously their duties and responsibilities" (Am. Compl. ¶ 42), retained legal and financial counsel to assist them in their responsibilities (Am. Compl. ¶¶ 29-30), and ultimately rejected the Gupta Offer. (Am. Compl. ¶ 34). Plaintiffs present an additional inconsistent argument by alleging that on the one hand, that the Special Committee was a "sham," but on the other, that directors who voted to disband this "sham" committee showed a lack of independence. Further, Plaintiffs fail to reconcile the fact that Cardinal, the lead Plaintiff as to Count I of the Amended Consolidated Complaint, previously sought to reinstate the same Special Committee which Plaintiffs now claim was a "sham." (*See* OB at 32). These internal inconsistencies demonstrate Plaintiffs' failure to develop an argument that holds together or why demand should be excused.

consideration that it effectively constituted a gift." *Ash v. McCall*, 2000 WL 1370341, at *7 (Del. Ch.); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971), *aff'd*, 332 A.2d 139 (Del. 1975). Plaintiffs have not met this burden with respect to any of the challenged expenses. (*See* OB at 32-34). For example, the Amended Consolidated Complaint states only that the American Princess yacht log book "does not reveal any business purpose" for the yacht's usage (Am. Compl., ¶ 67), but never states that the yacht was used for personal trips by Vin Gupta, completely unrelated to company business. Plaintiffs' additional sexist and tabloid-style suggestion that the yacht's female crew somehow invalidates the business purposes of the yacht is reflective of Plaintiffs' inability to substantiate their claim. (Am. Compl. ¶ 63). Notably, the news article upon which Plaintiffs rely ran three years ago and was available at the time Plaintiffs filed each of their previous five complaints, but was not cited before. Further, the article paints quite a different picture than Plaintiffs' suggestion in its description of the highly experienced three-person female crew that has been singled out and praised by peers for running the "cleanest, most well-maintained vessel." (Ex. 21 (article from The Triton, September 1, 2004)). The article also notes that, contrary to Plaintiffs' insinuation, the composition of the yacht's crew is consistent with the Company's policy of actively seeking to employ, promote and retain qualified women at all levels of management. (*Id.*). Instead of recognizing the obvious benefits of that policy to *info*USA's shareholders, Plaintiffs insinuate that there is something tawdry in employing a highly-qualified female Captain and crew. Further, the article goes into great detail in praising the experienced and earnest female crew for their diligence and ability to run a well maintained, spotless yacht as a "rarity."[11] (*Id.*). The Captain of the Company's yacht

[11] Defendants respectfully request this Court take judicial notice of 46 CFR 10.201 et seq. (2006), which outlines rigorous training and qualification requirements for the licensing of crew (Continued…)

also acknowledged her strong support system, including the fact that the Company has "give[n] [her] the opportunity to do [her] job the way [she] think[s] it should be done." (*Id.*). Plaintiffs' reliance on this news article not only undercuts their argument that the Company paid for personal expenses, but demonstrates the lengths to which Plaintiffs will go to distract the Court from the facts on the issue at hand.

As a further attempt to bolster their claim, Plaintiffs offer an opinion on the effectiveness of the *info*USA Board from something called the Corporate Library. (Am. Compl. ¶ 19). Of course, it is for this Court, and not the "Corporate Library" to determine if Plaintiffs have plead enough to challenge the independence of the Board. There is nothing before the Court that would permit Plaintiffs to offer an opinion from the "Corporate Library."

Relying on *Emerald Partners v. Berlin*, 1993 WL 545409, at *6 (Del. Ch.), Plaintiffs also contend that demand is excused because they have pleaded waste. As a threshold matter, because a waste claim requires an allegation of alleged harm to the corporation, such claims are derivative in character and subject to the demand requirement. *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1244-45 (Del. 1999); *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988). *Emerald Partners* itself recognized that bringing a waste claim does not obviate the requirement to plead such a claim with particularized facts. 1993 WL 545409, at *7. Accordingly, even for waste claims, the heightened pleading standards of Rule 23.1 and the considerations of the business judgment rule apply. Several of the corporate decisions that Plaintiffs cast as "waste" (including the purchase of the skybox and the "Everest Building") were

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members on a vessel of this size, including "age, experience, character references and recommendations, physical health, citizenship, approved training, passage of a professional exam, a test for dangerous drugs, and…a practical demonstration of skills." See Ex. 22 (46 C.F.R. § 10.201(a) (2006)).

approved by the Board; none can be said to have had no rational business purpose. As discussed in more detail below, aside from mere speculation, Plaintiffs have failed to address the adequacy of the consideration received by the Company for these transactions.

3. Approval of the July 21, 2006 Letter Agreement

As Plaintiffs concede, the *info*USA Rights Plan has always exempted Vin Gupta, his family and any entities he controls, from the Plan. (*See* OB at 34-36). Plaintiffs challenge the validity of the most recent July 21, 2006 Letter Agreement, pursuant to which Vin Gupta agreed not to purchase additional *info*USA shares (aside from exercising any stock option he receives) for some time and the Company in turn agreed not to modify the Rights Plan to terminate the exemption. Plaintiffs, however, have not and cannot refute Delaware caselaw that allows a board "for proper business reasons [to] enter into contracts limiting its ability to exercise [its] power. Boards of directors necessarily limit their future range of action all the time." *Sample v. Morgan*, 914 A.2d 647, 671 (Del. Ch. 2007). Given that a "core function of boards is to 'manage' the business and affairs of the corporation," limiting the board's power "does not mean that the board has 'abdicated' its authority to manage, it means that the board has exercised its authority." *Id.* at 671-72; *see also* Leo E. Strine, Jr., *If Corporate Action is Lawful, Presumably There are Circumstances in Which it is Equitable to Take that Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft*, 60 BUS. LAW. 877, 879-80 (2005) (the Delaware General Corporation Law is an enabling statute providing directors with "capacious authority to pursue business advantage by a wide variety of means"). If the judiciary invented a rule barring boards from entering into contracts limiting their power, "directors would be rendered unable to manage, because they would not have the requisite authority to cause the corporation to enter into credible commitments with other actors in commerce." *Sample*, 914 A.2d at 673 n.79.

Instead, Plaintiffs claim that the execution of the July 21, 2006 Letter Agreement was an *ultra vires* act and thus that any Board action with respect to the agreement is clearly beyond protections of the business judgment rule. This argument misses the critical step, however, that 8 *Del. C.* § 141(a) does not prevent a board from entering into an agreement with one of its shareholders. Accordingly, entering into the July 21, 2006 Letter Agreement is an action that *is* within the scope of the Board's authority and therefore *is* protected by the business judgment rule.

In any event, Plaintiffs cannot avoid the pleading requirements under Rule 23.1 by making the conclusory allegation that an action is *ultra vires* -- they must still plead those claims with particularity. *See Coulter*, 2002 WL 31888343, at *11 (Del. Ch.). Plaintiffs have failed to establish with particularity or otherwise that the July 21, 2006 Letter Agreement did not have a rational business purpose. In fact, they have failed to make any particularized allegations concerning the decision to enter into this agreement. At bottom, Plaintiffs' wholly conclusory allegations regarding the Rights Plan and the July 21, 2006 Letter Agreement are insufficient to excuse their failure to make a demand.

4. Additional Actions Challenged by Plaintiffs

Plaintiffs' efforts to show demand was excused with respect to their challenges to numerous other Board actions are similarly unavailing. For example, the Amended Consolidated Complaint challenges, among other things, the alleged lack of approval by the Board of a consulting agreement entered into with a former high ranking U.S. government official as violating 8 *Del. C.* § 157 (Am. Compl., ¶ 114), whereas in the Answering Brief, Plaintiffs challenge the grant of certain options as violating 8 *Del. C.* § 157. (AB at 30). Both of Plaintiffs' arguments -- that the consulting agreement and the grant of options are outside of the Board's authority and violate § 157 -- miss the critical step that such an actions *are* within the

scope of the Board's authority and therefore protected by the business judgment rule. Plaintiffs allege no particularized facts that the agreement had no beneficial value to the company, that the consulting services were not in fact rendered, or that the Company received no consideration for the transaction.

Plaintiffs' demand arguments are equally unavailing with respect to alleged Board action to re-price certain options, grant additional options to Vin Gupta, and authorize Vin Gupta to distribute an additional 700,000 options to key employees. Plaintiffs have provided no particularized allegations demonstrating that these transactions were not in the Company's best interest, or were not a valid exercise of business judgment. Rather, Plaintiffs resort to speculation in order to avoid the particularized facts requirement, which they are unable to satisfy. *In re Walt Disney Co.*, 825 A.2d at 285 ("The complaint must set forth particularized factual statements that are essential to the claim. Mere speculation or opinion is not enough.") (internal quotations omitted).

At bottom, Plaintiffs' argument comes down to this: with respect to every Board decision Plaintiffs attack, Plaintiffs assume any director who disagrees with them must be beholden to Vin Gupta. In fact, Plaintiffs provide no specific allegations and no authority that would permit the Court to find or infer that those decisions could not have yielded a benefit to the Company. For example, as *info*USA reported to its stockholders, the re-pricing of shares "serve[d] to further align Mr. Gupta's incentives with the interests of all of the Company's stockholders." (Ex. 6 to OB, p.19; *see also* Richard A. Booth, *Symposium: Uncorporation: A New Age? Executive Compensation, Corporate Governance, and the Partner-Manager*, 2005 U. ILL. L. REV. 269, 283-84 (2005) (noting the importance of periodically resetting the price of options which can serve as an incentive to management and can be beneficial to the Company)). Plaintiffs point to

no specific allegations or authority to second-guess the Board's determination. Instead, Plaintiffs offer only conclusory assertions and unreasonable inferences that fall short of the particularized requirements under Rule 23.1.

C. All of Plaintiffs' Claims are Derivative, Not Direct.

In apparent recognition that their Amended Consolidated Complaint is likely subject to dismissal for failure to make a demand, Plaintiffs argue in their Answering Brief that their claims relating to the July 21, 2006 Letter Agreement and their claims concerning the alleged non-disclosure of Vin Gupta's share ownership in the Company's 2005 proxy statement are direct, not derivative. (AB at 37-38). As Plaintiffs own allegations and admissions make clear, however, these claim are derivative.[12]

In fact, Plaintiffs confirm that their claim with respect to the July 21, 2006 Letter Agreement is derivative in describing it as having caused harm *to the Company* by failing to permit the Board to discharge its fiduciary duties in accordance with proper corporate governance for the benefit of the Company and its stockholders. (AB at 37) (emphasis added). Of course if the alleged injury is to the Company, the claim is derivative in nature. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 817 (Del. Ch. 2005) (dismissing claims as derivative and noting that to show a direct injury under *Tooley*, plaintiff must show "that the duty

[12] In connection with briefing on the motion to consolidate, Plaintiffs implicitly recognized that this claim, along with their claim for breach of fiduciary duty based on disclosure issues (discussed above), were derivative in nature. In Dolphin's opposition to Defendants' motion to consolidate, Dolphin distinguished its claims from Cardinal's, in part, by pointing out that, unlike Cardinal, Dolphin was not bringing "a class action." (Dolphin's Opposition to Defendant's Motion to Consolidate ¶ 2). There is no reason why this distinction would have any importance if Dolphin were making direct claims (as it is difficult to conceive of how any such direct claims could take the form of anything other than class action claims). Thus, it is disingenuous for Plaintiffs to modify their position now in an attempt to avoid the demand requirements applicable to derivative claims.

breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation").

Plaintiffs likewise cannot escape their failure to make demand by arguing that their breach of fiduciary duty claim (which is based on the alleged failure to fulfill certain disclosure obligations) is a direct, not derivative, claim. That claim alleges, after-the-fact, that Vin Gupta's ownership of *info*USA stock was underreported by approximately 4.4% in connection with the Company's 2005 proxy statement, which Plaintiffs allege "was used to secure shareholder approval of an amendment to IUSA's 1997 Stock Option Plan." (AB at 38). Plaintiffs further allege that an amendment to the 1997 Stock Option Plan adopted in 2005 increased the number of shares available to *all* for issuance under the Plan. (Am. Compl. ¶ 122). Because that amendment increased the number of shares available to all participants, and there is no allegation that any group of stockholders suffered impairment of economic or voting rights in relation to any other group of stockholders, any injury with respect to this claim would have been to the Company. *See, e.g., J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766 (Del. 2006). Accordingly, the breach of fiduciary duty claim is derivative, not direct, and Plaintiffs must satisfy the demand requirements of Rule 23.1.

II. THE AMENDED CONSOLIDATED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

As set forth in Defendants' Opening Memorandum, Plaintiffs' Amended Consolidated Complaint is also subject to dismissal under Rule 12(b)(6) because each of the five counts fails to state a claim.

A. The Amended Consolidated Complaint Fails to State a Claim for Breach of Fiduciary Duty Regarding the Creation of the Special Committee.

Count I should be dismissed because the formation and dissolution of the Special Committee clearly fall within the protections of the business judgment rule. *Supra* § IB(a).

Plaintiffs have not offered any basis to conclude that the Special Committee was formed to advance Vin Gupta's interests or that Haddix, Anderson, Kaplan, and Walker voted to dissolve the Special Committee in order to benefit Vin Gupta, rather than the Company. (AB at 34-35).

Tellingly, Plaintiffs also do not deny this Court's determination that the Board clearly had the power to form and dissolve the Special Committee. (*Bench Ruling* at 11). Rather, Plaintiffs mischaracterize this Court's prior ruling as endorsing their idea that the Special Committee was a sham. (AB at 35). On the contrary, this Court simply stated that Plaintiffs had "the beginnings" of a viable claim for breach of fiduciary duty and that "there might be a claim, a *potential* claim, lurking in this pleading." (*Bench Ruling* at 13-14; AB at 35 (emphasis added)). This was hardly a ringing endorsement of Plaintiffs' allegations or an invitation for them to rest on the allegations in their original complaint. This Court clarified that Plaintiffs "may" have a claim if they can demonstrate that directors acted in "bad faith," that the Special Committee was "knowingly" created "through pretext and a sham," and that the directors knew the Special Committee's "real functions w[ere] merely to provide legal cover for Gupta's low ball offer to acquire the remaining shares in the company." (*Id.*). Because Plaintiffs have not alleged any new facts since that ruling, and have failed to show that the Board's decision to form and dissolve the Special Committee was anything but a good faith business decision, the Board's decision should be protected by the business judgment rule and Count I should be dismissed.

B. The Amended Consolidated Complaint Fails to State a Claim for Alleged Invalidity of Transactions Between *info*USA and Vin Gupta Under 8 *Del. C.* § 144 and Invalidity of Stock Option Payment to Consultant Under 8 *Del. C.* § 157.

Despite Plaintiffs' assertions to the contrary, Plaintiffs' Section 144 claim fails as a matter of law because Plaintiffs have failed to demonstrate that the transactions challenged in Count II were unfair to the Company. All Plaintiffs have done is make conclusory allegations

that the challenged transactions were unfair without providing any factual support. Simply stating that the challenged transactions fall within Section 144 (Am. Compl. ¶ 152; AB at 35-36) is not enough; nor is asserting that the Amended Consolidated Complaint "pleads numerous examples of wasteful misuse and abuse of the Company's assets," without providing facts to support those "numerous examples." (AB at 36). Plaintiffs have not even explained why it is a reasonable inference that the transactions were unfair to the Company.

Plaintiffs' Section 157 claim also fails to state a claim. Plaintiffs' allegation that any options given to the former high ranking government official are invalid because "[o]n information and belief," they were not approved by the Board is insufficient. (Am. Compl. ¶ 114). The Options Plan, as approved by the Board and the shareholders, specifically authorizes consultants to be granted options as compensation for services rendered. (OB at 38). As plaintiffs acknowledge, the former high-level government official is party to a consulting agreement with *info*USA (Am. Compl. ¶ 113), as permitted by the board-approved Options Plan. As such, Plaintiffs have failed to plead a cause of action under Section 157.

C. The Amended Consolidated Complaint Fails to State a Claim for Invalidity of the July 21, 2006 Letter Agreement.

Plaintiffs' claim that the July 21, 2006 Letter Agreement is invalid under Section 141(a) of the Delaware General Corporation Law should be dismissed. The Board was within its rights to manage the business and affairs of the Company when it entered into the contract with Vin Gupta. *Supra* § IB(3).

Plaintiffs' reliance on *Abercrombie v. Davies*, 123 A.2d 893 (Del. Ch. 1956), is misplaced. (AB at 36-37). In *Abercrombie*, the Court voided an agreement between the directors and several large shareholders which provided for the directors to act as "agents" of and vote on corporate matters according to the wishes of the large shareholders, without regard to

whether the directors were acting in the interests of other shareholders. *Id.* at 895. The extent of the board's abdication of power in *Abercrombie* made it one of the rare cases where the "directors [were] essentially no longer in control of the corporation." *Sample*, 914 A.2d at 672 n.77. No such allegations can be lodged at the Defendants here.

Finally, the issue of whether the July 21, 2006 Letter Agreement impermissibly restricts the ability of the Board to manage the Company is not ripe for adjudication. Although Plaintiffs are correct that the July 21, 2006 Letter Agreement has been executed and is in effect (AB at 37), entering into the July 21, 2006 Letter Agreement, as shown above, was permissible and should not be subject to litigation. Plaintiffs' claim that the July 21, 2006 Letter Agreement would deter prospective bidders (AB at 16-17) is not ripe because the Company has not received a third-party offer. Also, Plaintiffs' claim that the July 21, 2006 Agreement gives Vin Gupta the ability to incrementally increase his stock position "to a majority position thus destroying any opportunity for the public stockholders to receive a control premium while capturing the same for himself" (AB at 37) is not ripe because Vin Gupta has not increased his stock ownership percentage to over 50%.

D. The Amended Consolidated Complaint Fails to State a Claim for Breach of Fiduciary Duty Regarding Related Party Transactions Between *info*USA and Vin Gupta.

Plaintiffs' allegations concerning breach of fiduciary duty fail to state a claim. Plaintiffs assert, without any evidence, that the directors' actions in connection with the related party transactions should not fall under the protections of the business judgment rule because the "directors act[ed] disloyally, without care or in bad faith." (AB at 38). Instead of demonstrating that for each the challenged transactions there was "no rational business purpose," all Plaintiffs

have shown are disagreements with certain Board decisions, not the basis for breach of fiduciary duty claims.[13] *Sinclair Oil*, 280 A.2d at 720.

The disclosure allegations contained in the Amended Consolidated Complaint, at most, show that the directors made a business decision to sign the Forms 10-K and the 2005 Proxy Statement based on the information available to them at the time. Because Plaintiffs have failed to make anything other than conclusory statements that the directors knowingly disseminated misleading and inaccurate information to shareholders, the directors' decision that the Forms 10-K adequately described the payments to Annapurna and that the 2005 Proxy Statement was accurate and complete falls squarely within the business judgment rule.

E. The Amended Consolidated Complaint Fails To State A Claim For Waste.

Plaintiffs cannot meet the high bar set by Delaware courts for stating a valid claim for corporate waste. *See Zupnick v. Goizueta*, 698 A.2d 384, 387 (Del. Ch. 1997) (the test for corporate waste is "an extreme [one], very rarely satisfied by a shareholder plaintiff") (internal quotations omitted). Plaintiffs have not alleged facts demonstrating that the challenged expenditures were not for a valid business purpose, and instead rely on negative inferences and conclusory statements. Accordingly, Plaintiffs have not satisfied their obligation to prove that under "any of the possible sets of circumstances inferable from the facts alleged under the

[13] Plaintiffs argue that this Court did not previously dismiss Plaintiff Cardinal's claim for breach of fiduciary duty in connection with the related party transactions between *info*USA and Vin Gupta. (AB at 37). Plaintiffs fail to mention, however, that this Court did not specifically include such a claim for breach of fiduciary duty amongst the claims it stated could possibly be found in an amended complaint. Indeed, this Court only stated that Plaintiff Cardinal might be able to make viable claims for the formation and dissolution of the Special Committee and for waste. (*Bench Ruling* at 13).

complaint, no reasonable person could deem the received consideration adequate." *Apple Computer, Inc. v. Exponential Tech., Inc.*, 1999 WL 39547, at *11 (Del. Ch.).

In addition, Plaintiffs fail to even address the inadequacy of their waste claim regarding the consulting arrangement with the former government official who acts as a consultant for the Company. Indeed, Plaintiffs do not dispute that the Amended Consolidated Complaint contains no allegation that the consideration paid to the consultant exceeded the value received for his services. In short, Plaintiffs' waste claim should also be dismissed.

CONCLUSION

For the foregoing reasons, and those set forth in Defendants' Opening Memorandum, plaintiffs' amended consolidated complaint should be dismissed with prejudice.

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