IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BEVERLY PFEFFER, individually and on behalf of all others similarly situated, Plaintiff, v. SUMNER M. REDSTONE, GEORGE S. ABRAMS, DAVID R. ANDELMAN, JOSEPH A. CALIFANO, JR., WILLIAM S. COHEN, PHILLIPE 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 D. MUETHING and CBS CORP. (f.k.a. VIACOM, INC.), Defendants.	)	C.A. No. 2317-VCL

MEMORANDUM OPINION AND ORDER

Submitted: November 2, 2007
Decided: February 1, 2008

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LAMB, Vice Chancellor.

In 2004, a Delaware corporation divested itself of its majority interest in a subsidiary in a transaction that involved the payment of a special dividend by the subsidiary followed by an offer to the corporation's stockholders to exchange shares of the corporation's stock for stock of the subsidiary. Nearly two years later, after a time of declining performance by the former subsidiary, a stockholder who participated in the exchange brought suit alleging a variety of disclosure-based claims as well as various breaches of fiduciary duty by the corporate directors and the majority stockholder of the corporation in approving the transaction. The plaintiff also sues on a claim that the payment of the special dividend amounted to a breach of fiduciary duty to the minority stockholders of the subsidiary, who received that payment. For the following reasons, the court concludes that the complaint fails to state a claim upon which relief can be granted.

I.

A. The Parties[1]

The plaintiff, Beverly Pfeffer, is a New York resident who allegedly tendered Viacom stock for Blockbuster stock in an exchange offer completed on October 5, 2004. She brings her amended complaint as a putative class action on behalf of all former Viacom stockholders who tendered in the exchange offer. She

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[1] The facts recited in this opinion are taken from the amended class action complaint and certain publicly filed documents referenced in the complaint. *In re Wheelabrator Techs., Inc. S'holders Litig.*, 1992 WL 212595, at *12 (Del. Ch. 1992).

also purports to represent a class of all Blockbuster stockholders who held stock as of the August 27, 2004 record date for a special distribution issued by Blockbuster. Pfeffer first sued on August 3, 2006. She filed an amended complaint on January 12, 2007, in response to the filing of motions to dismiss.[2]

The plaintiff named 21 defendants in the complaint, including two corporations, National Amusements, Inc. ("NAI") and CBS Corporation. NAI was the controlling stockholder of Viacom, Inc. at all times relevant to this proceeding, holding roughly 71% of the voting power. While Viacom was the controlling stockholder of Blockbuster at the time of the two challenged transactions, a restructuring in December of 2004 separated Viacom and CBS into two companies. In light of this separation, the plaintiff, for reasons unknown and unchallenged, named CBS as the appropriate defendant.[3]

Turning to the individuals named in the complaint, defendant Sumner Redstone is the Chairman of the Board and the controlling stockholder of NAI. Through Redstone's controlling interest in NAI, he is indirectly the controlling stockholder of Viacom. He served as Viacom's Chief Executive Officer and Chairman of the Board at the time of the two challenged transactions and was also a director of Blockbuster from May 1999 until October 16, 2004.

[2] The amended complaint will be referred to through this opinion as the "complaint."
[3] Oddly, the plaintiff still refers to CBS as Viacom in the complaint.

The complaint separates the remaining 18 individual defendants into two groups. The first group consists of Viacom directors, including Sumner Redstone ("Viacom Director Defendants"). Each of the defendants other than Redstone served on the board of directors of Viacom at the time of the transactions in question.[4] Three of the Viacom Director Defendants, Abrams, Dauman, and Shari Redstone,[5] also served on the board of NAI. Greenberg and Salerno were on the board of directors of Bear Sterns, which served as co-manager of the challenged exchange offer.

The second group of individual defendants consists of the Blockbuster directors who approved the special distribution ("Blockbuster Director Defendants"). Redstone and Dauman, as well as six other Blockbuster directors, are named as defendants. Defendant John F. Antioco has been Blockbuster's Chairman and CEO since 1997. Defendant Richard J. Bressler was a director of Blockbuster from May of 2001 until October 16, 2004. Bressler was also Senior Executive Vice President and Chief Financial Officer of Viacom. Defendant Jackie M. Clegg has been a Blockbuster director since July of 2003. Defendant Michael D. Fricklas was a director of Blockbuster from June 2, 2004 until October

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[4] Those defendants are: George S. Adams, 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.

[5] Notably, Dauman served on the board of Blockbuster and Shari Redstone is Sumner Redstone's daughter. As of October of 2004, Shari Redstone also served as a director of NAI. She has served as President of NAI since January of 2000.

16, 2004. During this time, Fricklas was also Executive Vice President, General Counsel, and Secretary of Viacom. Defendant Linda Griego was a director of Blockbuster from July of 1999 through May 11, 2005.

B. Facts

Blockbuster is a provider of in-home movies and game entertainment with more than 9,000 stores throughout the Americas, Europe, Asia, and Australia. Viacom, a global media company, is a Delaware corporation with its principal place of business in New York, New York. Viacom acquired Blockbuster in 1994 for $8.4 billion and on August 16, 1999, Blockbuster completed an initial public offering. Through this offering, Blockbuster sold 31 million shares of its class A common stock to the public, representing approximately 18% of the total outstanding stock and 4% of the voting power. Viacom retained all of the Blockbuster class B common stock, which constituted 82% of the equity value of Blockbuster and 95.9% of its voting power.

In the years following the initial public offering, the competitive landscape for movie rental businesses, such as Blockbuster, drastically changed. Several market forces combined to significantly reduce Blockbuster's core in-store rental business. Foremost, new sources for accessing content, such as online subscription rental programs and video on demand, attracted an increasing number of

consumers away from Blockbuster. In addition, consumers began buying movies, instead of renting them, following the format change from VHS to DVD.

In the midst of these growing competitive threats, Viacom announced, on February 10, 2004, that it would pursue the divestiture of its approximately 81.5% interest in Blockbuster. Viacom explained the transaction as "based on the conclusion that Blockbuster would be better positioned as a company completely independent of Viacom."[6] While the market largely expected this announcement, Blockbuster's stock closed at $17.59 on February 11, a significant increase from its $16.20 closing price the previous day.

Following this release, Blockbuster and Viacom, on June 18, 2004, jointly announced the preliminary terms of their proposed separation. The announcement stated that the planned divestiture would be in the form of a voluntary exchange offer, in which existing Viacom stockholders would have the opportunity to exchange Viacom shares for the company's Blockbuster shares ("Exchange Offer"). In the same disclosure, Blockbuster announced that prior to the Exchange Offer, it would pay a pro rata special cash dividend of $5 per share.[7] The dividend would cost approximately $905 million, with Viacom receiving $738 million of the distribution, based on its ownership in Blockbuster. Blockbuster also disclosed that the distribution would be financed through a new $1.45 billion credit facility.

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[6] Compl. ¶ 37.
[7] The dividend would be payable September 3, 2004 to stockholders of record August 27, 2004.

The press release also included statements from Redstone and Antioco endorsing the proposed separation. Redstone stated that after the transaction "Viacom will devote all its energies and resources into expanding core areas, particularly the content creation engine that we believe will drive our future growth."[8] Antioco said, "we believe that by becoming a separate company we will be better able to pursue our retailing strategy."[9]

On September 8, 2004, Viacom disclosed the final terms of the divestiture in the Exchange Offer Prospectus ("Prospectus"). According to the Prospectus, each Viacom stockholder opting to participate would receive 5.15 shares of Blockbuster stock, consisting of 2.575 shares of class A stock and 2.575 shares of class B stock, in exchange for each Viacom share tendered. Viacom would accept, until the closing on October 5, up to an aggregate of 27,961,165 shares of class A and class B common stock. The offer represented a premium of 17.6% for the Viacom class A stock and a premium of 19.2% for the Viacom class B stock. In the months leading up to this release, Blockbuster's stock had steadily declined and was trading between $12 and $13. By September 8, the stock was trading at $7.48, reflecting the payment of the special dividend.

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[8] Veet Aff. Ex. A.
[9] *Id.*

The Prospectus prominently disclosed that a special committee of the Blockbuster board of directors, comprised of three independent directors, recommended that the full Blockbuster board approve the special dividend and several key aspects of the Exchange Offer.[10] Far less conspicuous was a disclosure that a committee of Viacom's board of directors, delegated with the authority to approve the final terms of the divestiture, also approved the transaction. The Prospectus included a number of disclosures warning potential investors of the risks associated with Blockbuster in the current market environment, the challenges ahead, and the potential consequences of not being able to service Blockbuster's increased debt after the special dividend. Notwithstanding these warnings and the well known challenges facing Blockbuster, the Exchange Offer was fully subscribed and Viacom divested its entire interest in Blockbuster.

Following the Exchange Offer, Blockbuster struggled to maintain profitability. The plaintiff cites several later public announcements as undermining the veracity of the disclosures in the Prospectus. First, on October 27, 2004, only a few weeks after the Exchange Offer, Blockbuster reported that "profitability for the full-year 2004 [would] decline significantly because of . . . continued weakness in the rental business . . . and higher interest expense associated with the additional

[10] The members of the special committee were Jackie M. Clegg, Linda Griego, and John L. Muething.

$950 million in debt."[11] Blockbuster stock reacted accordingly, trading down to $6.81. Blockbuster also announced that projected softness in rental revenues would adversely affect profitability in 2005.[12] Despite these setbacks, Antioco remained confident, re-assuring stockholders in the following statement:

> We are excited about having successfully completed our divestiture from Viacom . . . . [W]e successfully launched our online subscription program well ahead of schedule, exceeded our subscription expectations for both our in-store and online passes, and aggressively rolled out movie and game trading to thousands of stores. To support these initiatives, as indicated in our previous guidance, we accelerated investment spending and this, along with continued softness in the movie rental industry, impacted our profitability. However, we believe we are taking the right steps to position Blockbuster for future growth in both revenues and profits.

By the time Blockbuster reported second quarter 2005 earnings on August 9, 2005, the initiatives critical to its success had still failed to improve profitability. The company announced a $57.2 million loss and it withdrew its full year forecasted financial results. For the three months ended June 30, 2005, Blockbuster lost 31 cents per share, compared with a profit of 27 cents per share for the same period in 2004. Blockbuster also disclosed that it had been forced to negotiate with its lenders to prevent a high debt ratio from triggering a default on the company's line of credit. After rebounding from the October 2004 lows, the

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[11] Compl. ¶ 72.
[12] *Id.*

negative disclosures in this report sent Blockbuster's stock down to $6.70 at the close of trading on August 10, 2005.

Blockbuster's announcement also prompted a reduction in its debt rating. Fitch Ratings downgraded Blockbuster's default rating and bank debt rating from "B+" to "CCC." Fitch explained these downgrades as "a result of Blockbuster's continued operating performance weakness, significantly lower liquidity position, and need for additional waivers from its bank lenders."[13]

Profitability at Blockbuster continued to decline through the third quarter of 2005. In the company's quarterly report, filed on November 8, 2005, Blockbuster reported a loss of $24.6 million, excluding non-cash charges and stock-based compensation. Blockbuster also raised the possibility of seeking bankruptcy protection. This pushed Blockbuster's stock down to $4.11 the following day.

On March 9, 2006, Blockbuster announced a restatement following months of discussions with the SEC. The restatement involved a reclassification of the new releases in its rental library from non-current assets to current assets. This change forced the company to categorize new releases as an operational expense, as opposed to a capital expense, which lead to a reduction in operational cash flow and an equal increase in investment cash flow. Blockbuster restated its reported cash flows for 2003 through 2005. For fiscal year 2003, this involved a

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[13] Compl. ¶ 75.

reclassification of $836.3 million; for fiscal year 2004, $798 million; and, for the nine months ended September 30, 2005, $638.5 million. The complaint does not allege that the announcement of this restatement caused a decline in the market price of Blockbuster's stock.

C. Procedural History

On August 3, 2006, or nearly two years after the Exchange Offer, the plaintiff filed her first complaint.[14] That complaint asserted claims against the Viacom Director Defendants alleging that they breached their fiduciary duties in connection with undertaking the Exchange Offer. In response, on October 27, 2006, the Viacom Director Defendants filed a motion to dismiss, under Court of Chancery Rule 12(b)(6), and to stay, followed by an opening brief in support of their motion on November 28, 2006. Instead of filing a response, the plaintiff filed her amended complaint on January 12, 2007, and added claims on behalf of Blockbuster stockholders who held stock at the time Blockbuster issued the special dividend. The plaintiff also added NAI, Viacom, and the Blockbuster Director Defendants as defendants. Again, the defendants responded with a Rule 12(b)(6)

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[14] Blockbuster's disappointing 2005 performance initially led to the filing of federal securities class action litigation in the Eastern District of Texas on November 11, 2005. That action, which contained factual allegations very similar to the ones found in the complaint in this action, was brought under provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, but was later dismissed. *See Congregation of Ezrashalom v. Blockbuster, Inc.*, 504 F. Supp.2d 151 (E.D. Tex. 2007). The district court's dismissal opinion provides a useful reference for many of the issues addressed in this opinion.

motion to dismiss and to stay this litigation. The motion to stay was later rendered moot. This opinion addresses the issues raised by the defendants' motion to dismiss.

II.

A. The Plaintiff's Claims

The plaintiff's complaint contains six counts for relief. Counts I through IV are brought on behalf of the Viacom stockholders who tendered shares in the Exchange Offer. Counts V and VI are brought on behalf of Blockbuster's minority stockholders who were allegedly injured as a result of the special dividend.

Count I alleges that the Viacom Director Defendants breached their duty of disclosure by making material misstatements, omissions, and misrepresentations in the Prospectus.[15] Count II asserts that the Viacom Director Defendants breached their fiduciary duty of loyalty and good faith by permitting a false and misleading

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[15] The complaint focuses its disclosure allegations on seven omitted or misstated facts:

1. That Blockbuster was without the financial resources required for it to implement its strategic plan following the payment of the special dividend;
2. That, due to outdated equipment, Blockbuster was unable to integrate its in-store and on-line operations;
3. That Blockbuster was experiencing difficulties launching its in-store DVD tracking system because it lacked adequate internal controls;
4. That the Exchange Offer was not engineered to benefit Blockbuster, but rather to allow Viacom to reduce its public float of stock to further solidify the control of NAI and Redstone over Viacom;
5. That it misrepresented Blockbuster's operational cash flow by more than 58%;
6. That it offered an incomplete explanation of the pricing methodology behind the Exchange Offer; and
7. That it omitted those who served on the Viacom special committee that approved the Exchange Offer.

Prospectus to be filed in connection with the Exchange Offer. The plaintiff contends that the entire fairness standard should apply to Counts I and II because NAI and Redstone are said to have been financially interested in the transactions. More specifically, the plaintiff alleges that, "[NAI and Redstone] received, through their substantial Viacom holdings, the overwhelming majority of the special $5 dividend that so devastated Blockbuster's financial prospects, and they enjoyed the increase in their majority control of Viacom that resulted from the Exchange Offer."[16]

Count III, to the extent it does not repeat Count II, argues that the Viacom Director Defendants breached their fiduciary duties by permitting the disclosure violations in the Prospectus and by acting to further the interests of NAI and Redstone over the Viacom minority stockholders.[17] Further, Count III contends that NAI and Redstone were financially interested in the Exchange Offer and should therefore carry the burden of demonstrating compliance with Section 144 of

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[16] Compl. ¶¶ 94, 99.

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

the Delaware General Corporation Law ("DGCL").[18] In Count IV, the plaintiff alleges that NAI, as the controlling stockholder of Viacom, breached its fiduciary duties to Viacom's minority stockholders by causing the Viacom board to approve the Exchange Offer.

Count V asserts that the Blockbuster Director Defendants breached their fiduciary duties of loyalty and good faith "by causing Blockbuster to take on crippling debt in order to declare the Special Dividend."[19] The plaintiff contends that the entire fairness test should apply because Blockbuster's majority stockholder, Viacom, was financially interested in the transaction. Lastly, in Count VI, the plaintiff alleges that Viacom, as Blockbuster's controlling stockholder, breached its fiduciary duties to Blockbuster's minority stockholders, by causing Blockbuster to declare the Special Dividend and incur the accompanying debt.

B. The Defendants' Response

The Viacom Director Defendants, NAI, and CBS (together, the "Viacom Defendants"), move to dismiss the complaint based on Court of Chancery Rule 12(b)(6). The Viacom Defendants argue that Count I should be dismissed because the alleged omissions cited by the plaintiff were disclosed or were immaterial. With respect to Count II, the Viacom Defendants contend that there is no basis for

[18] 8 *Del. C.* § 144.
[19] Compl. ¶ 116.

a duty of loyalty claim because the Exchange Offer was voluntary and it was offered to all Viacom stockholders on the same terms. Additionally, the Viacom Defendants claim the Exchange Offer was not an interested transaction because the directors were not personally benefitting from the transaction and they approved the Exchange Offer to benefit the corporation.[20] The Viacom Defendants assert that Count IV also fails to state a claim for breach of fiduciary duty against NAI because the plaintiff did not establish that NAI owed any fiduciary duty to the Viacom minority stockholders in the Exchange Offer and further failed to allege that NAI breached any potential duty. In support of this argument, the Viacom Defendants argue that the plaintiff failed to allege that NAI directed the actions of Viacom in the either of the two challenged transactions.

The Blockbuster Director Defendants move to dismiss Count V on the basis that the plaintiff's claim is derivative and she failed to comply with Rule 23.1. The Viacom Defendants assert that Count VI is also derivative and should not survive for the same reasons.

III.

A motion to dismiss for failure to state a claim under Rule 12(b)(6) invokes a well settled analysis. All well pleaded factual allegations must be accepted as true and all reasonable inferences should be drawn in favor of the nonmoving

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[20] The Viacom Defendants do not appear to address Count III.

party.[21] However, the court will not assume mere conclusions unsupported by factual allegations as true.[22] Indeed, "[w]hile specific allegations of fact, along with reasonable conclusions buttressed by specific allegations of fact, will sustain a complaint, mere conclusions of law or fact are insufficient under this standard of review."[23] Dismissal under Rule 12(b)(6) is only appropriate where the court finds, with reasonable certainty, that the plaintiff could not prevail on any set of facts inferable from the pleadings.[24]

IV.

As an initial matter, the court turns to why the transaction at issue in this case is not one that is judged by the entire fairness standard. "Delaware law does not impose a duty of entire fairness on controlling stockholders making a non-coercive tender or exchange offer to acquire shares directly from the minority holders."[25] Similarly, Delaware law does not judge by the entire fairness standard voluntary, non-coercive offers by corporations to acquire their own shares.[26] The

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[21] *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 (Del. 1997).
[22] *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996).
[23] *Feldman v. Cutaia*, 2007 WL 2215956, at *6 (Del. Ch. Aug. 1, 2007).
[24] *Solomon*, 672 A.2d at 38.
[25] *In re Aquila Inc.*, 805 A.2d 184, 190 (Del. Ch. 2003); *see also Solomon,* 672 A.2d at 30-40 ("[i]n the case of totally voluntary tender offers . . . courts do not impose any right of the shareholders to receive a particular price . . . . [I]n the absence of coercion or disclosure violations, the adequacy of the price in a voluntary tender offer cannot be an issue.").
[26] *Frank v. Arnelle,* 1998 WL 668649 at *4 (Del. Ch. Sept. 16, 1998) (recognizing that "neither Delaware law nor federal law requires the issuer in a Dutch auction to offer its stockholders the opportunity to tender at a *fair price*").

fact that Viacom offered to acquire a small percentage of its own shares in exchange for shares it owned in Blockbuster, rather than for cash, does not change the nature of this legal analysis. Viacom's duties (and those of the Viacom Director Defendants) in connection with that offer were to structure its terms non-coercively and to disclose all material facts.[27]

Disregarding this general principle, the plaintiff argues that the entire fairness standard should apply since she has alleged sufficient facts to give rise to an "inference that directors on the committee to approve the Exchange Offer had a stake in NAI and priced the Exchange Offer to benefit NAI" over the interests of the minority Viacom stockholders and, thus, application of the entire fairness test is appropriate.[28] The plaintiff relies on this court's first decision in *Feldman v. Cutaia*[29] to support her position.

In *Feldman*, this court refused to dismiss an entire fairness challenge to a self-tender offer in which the directors were alleged to have received "a financial benefit not equally shared by the company's stockholders."[30] The complaint in *Feldman* included allegations that the pricing of the exchange offer was "severely inflated" ($10 per share for a stock that never traded above $4) to allow the

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[27] *Solomon*, 672 A. 2d at 39 (citing *Lynch v. Vickers Energy Corp.,* 351 A. 2d 570, 576 (Del. Ch. 1976), *rev'd on other grounds,* 383 A.2d 278 (Del. 1976)).
[28] Pls.' Answering Br. 38-39.
[29] 2006 WL 920420 (Del. Ch. Apr. 5, 2006).
[30] *Id.* at *6.

directors, holding 89% of the company's otherwise underwater options and warrants, to improperly enrich themselves.[31] In addition, the exchange offer purportedly served no legitimate business purpose. These allegations led the court to conclude that the complaint adequately alleged that "the individual director defendants placed their own interests above those of the [] stockholders."[32] In such a case of a self-interested transaction, the entire fairness test would properly apply.

In the present case, unlike in *Feldman*, there is nothing to suggest that the Viacom directors who approved the Exchange Offer structured the transaction to put their own interests above those of either Viacom or any identifiable group of Viacom stockholders. The majority stockholder of Viacom, NAI, did not even participate in the Exchange Offer and the Prospectus clearly discloses this fact. Thus, the court will examine the complaint to see if it adequately alleges that the Exchange Offer was accomplished through the use of materially false or misleading disclosures.[33]

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[31] *Id*. at *4.
[32] *Id*. at *6.
[33] The complaint does not allege that the Exchange Offer was coercive.

A. Count I[34]

As discussed, in Count I the plaintiff alleges that the Prospectus contained numerous misstatements of fact and omits material information and that the Viacom Director Defendants breached their fiduciary duties by causing the Prospectus to be disseminated to the Viacom stockholders. While the plaintiff initially made seven disclosure allegations in the complaint, she abandoned all but four of them in her answering brief and only those allegations will be addressed.[35]

The duty of disclosure is not an independent duty, but derives from the duties of care and loyalty.[36] "Corporate fiduciaries can breach their duty of disclosure under Delaware law . . . by making a materially false statement, by

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[34] In light of this court's ruling on the issue of entire fairness and the rejection of the disclosure violations alleged in Count I, Count II of the plaintiff's complaint will also be dismissed. Count II claims that the Viacom Director Defendants breached their duty of loyalty by permitting the Exchange Offer to proceed based on a false and misleading Prospectus. "Disclosure violations may, but do not always, involve violations of the duty of loyalty. . . . [W]here there is reason to believe that the board lacked good faith in approving a disclosure, the violation implicates the duty of loyalty." *In re Tyson Foods, Inc.*, 919 A.2d 563, 597-98 (Del. Ch. 2007). The complaint fails to adequately allege facts that support an inference that the Viacom Director Defendants acted disloyally in authorizing the dissemination of the Prospectus. There are simply no well pleaded allegations of fact that those directors authorized the transaction at issue in order to further the interests of NAI or Redstone or that they knowingly and in bad faith approved false and misleading disclosures in connection therewith.

[35] *Seagraves v. Urstact Prop. Co., Inc.*, 1996 WL 159626, at *5 (Del. Ch. Apr. 1, 1996); *see also Weiss v. Rockwell Int'l Corp.*, 1989 WL 80345, at *4 (Del. Ch. July 19, 1989) (the plaintiff alleged six disclosure claims in his complaint, but only relied on two in his brief, thus, the court deemed the remaining five claims abandoned). Regardless of this finding, the discussion of the remaining disclosure allegations addresses and dismisses the abandoned allegations as unfounded. Either the Prospectus addressed each allegation, or, with respect to the claim that the Exchange Offer was engineered to allow NAI and Redstone to solidify control of Viacom, the allegation was without merit.

[36] *See Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001).

omitting a material fact, or by making a partial disclosure that is materially misleading."[37] "Material facts are those facts for which 'there is a substantial likelihood that a reasonable person would consider [them] important in deciding how to vote.'"[38] The plaintiff alleges that the Prospectus contained all three sorts of potential disclosure violations.

1. The Plaintiff's Claim Of A False Statement

"To state a claim for breach of the fiduciary duty of disclosure on the basis of a false statement or representation, a plaintiff must identify (1) a material statement or representation in a communication contemplating stockholder action (2) that is false."[39]

The plaintiff contends that the Prospectus misrepresented Blockbuster's operating cash flow and asserts that the March 2006 restatement is alone sufficient to demonstrate materiality, citing *In re First Energy Securities Litigation.*[40] The defendants respond that the restatement was merely the result of a "misclassification" that is immaterial because it had no effect on reported revenues, net income, total assets, shareholder's equity, total cash flow, current cash or liquidity positions, or compliance with financial covenants under Blockbuster's debt facilities.

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[37] *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 916 (Del. Ch. 1999) (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)).
[38] *Id.*
[39] *Id.* at 920.
[40] 316 F. Supp.2d 581 (N.D. Ohio 2004).

First Energy, a case involving securities fraud, is of little help to the plaintiff because it stands for the proposition that a restatement, by definition, means the prior statement was in error, not that it was materially false or misleading. As the Delaware Supreme Court stated in *Loudon v. Archer-Daniels-Midland Co.*, "[a] claim based on disclosure violations must provide some basis for a court to infer that the alleged violations were material."[41] While there is no dispute that some of the cash flow numbers in the Prospectus were later restated, the plaintiff must sufficiently demonstrate materiality. In this case, there is nothing in the complaint to suggest that the misstatement of cash flows was material to a Viacom stockholder in deciding whether or not to accept the Exchange Offer.

Blockbuster had certified financial statements throughout the time of the alleged misstatements and correctly disclosed the accounting principles that it relied on to report cash flows. Therefore, anyone examining Blockbuster's cash flow statements could discern its treatment of new releases and that treatment's effect on operating and investment cash flows.[42] The restatement involved a mere reclassification of certain cash flows that did not affect total cash flows, net income, or any other reported accounting figure. The complaint also does not allege that news of the reclassification affected the Blockbuster stock price, which

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[41] 700 A.2d at 141.

[42] Indeed, it was conceded at oral argument that the complaint does not allege that anyone detrimentally relied on the accounting principle that led to the reclassification.

is itself a strong indication of immateriality. In sum, the plaintiff fails to advance well pleaded allegations of fact that a reasonable person, in deciding how to vote, would consider important the reclassification of operational and investing cash flows in this case.

Moreover, the complaint does not contain well pleaded allegations of fact to support an inference that any of the Viacom Defendants engaged in a breach of fiduciary duty by authorizing the publication of the Prospectus containing the certified Blockbuster financial statements, including the cash flow statements, in their original, non-restated form. There is simply no factual basis alleged that could support a reasonable inference that the Viacom Defendants knew or should have known that Blockbuster's cash flow statements relied on a misapplication of GAAP in classifying new releases as non-current, rather than current, assets.

2. <u>The Plaintiff's Claim Of Omission</u>

"To state a claim for breach by omission of any duty to disclose, a plaintiff must plead facts identifying (1) material, (2) reasonably available (3) information that (4) was omitted from the proxy materials."[43] "Omitted information is *material* if a reasonable stockholder would consider it important in deciding whether to tender his shares or would find that the information has altered the 'total mix' of information available."[44]

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[43] *O'Reilly*, 745 A.2d at 926.
[44] *Frank*, 1998 WL 668649, at *3 (emphasis in original).

The centerpiece of the claimed omissions set forth in the complaint is found in a series of allegations relating to Blockbuster's cash flow and future profitability. In addition to the claim relating to the misclassification of cash flows already discussed, the plaintiff alleges that the Prospectus failed to disclose the existence of a cash flow analysis prepared by a treasury department manager at Blockbuster in "February or March of 2004"–some six or seven months before the date of the Prospectus. According to the complaint, this analysis concluded that the proposed special dividend would prevent Blockbuster from funding its planned initiatives.[45] Allegedly, this report also concluded that some of Blockbuster's strategic plans, such as its online subscription program and the elimination of late fees, would be unprofitable.[46] The plaintiff alleges that when the cash flow analysis was distributed to senior management at Blockbuster, the Senior Vice President of Investor Relations and Treasurer of Blockbuster told employees to disregard it.[47]

The plaintiff also alleges that "Blockbuster maintained inadequate controls to determine its cash flows at any time"[48] and cites to a former systems analyst who severely criticized Blockbuster's revenue accounting systems.[49] Finally, the

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[45] Compl. ¶ 62.
[46] *Id.*
[47] *Id.* ¶ 63 .
[48] *Id.* ¶ 64.
[49] *Id.* ¶ 65.

plaintiff alleges that, when confronted with "forecasting models showing that Blockbuster's proposed subscription service would not be profitable for the company . . . Blockbuster executives altered the models to fraudulently show that the new initiative would be profitable."[50]

As for knowledge of these facts by any of the Viacom Defendants, the plaintiff alleges in the complaint, without elaboration, that Redstone was aware of the cash flow analysis and the related cash flow and profitability issues. The complaint also states generally that "other members of Viacom's and Blockbuster's board of directors knew or should have known that the Prospectus contained omissions and false statements."[51]

Before addressing the significance of these allegations, the court notes that at oral argument counsel for the plaintiff, whose name appears in the signature block of the complaint, admitted that he had never read or even seen the alleged cash flow analysis that sits at the core of most of these claims. Not surprisingly, this concession substantially undermined the court's confidence in the allegations about this document and the related matters. Perhaps to restore credibility, the plaintiff's counsel twice stated at oral argument that he would, that same afternoon, submit the document for the court's examination. Remarkably, he both failed to do

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[50] *Id.* ¶ 67.
[51] *Id.* ¶ 68.

so and failed to explain the omission. In the circumstance, the court cannot help but wonder whether–if it exists–any of the plaintiff's counsel have seen the alleged report or whether it or the claims related to it are accurately described in the complaint.

Also at oral argument, the court questioned the plaintiff's counsel about the basis for the allegations that Redstone and the other Viacom directors knew about any of these matters. The response was striking. According to the plaintiff's counsel, Redstone is alleged to have knowledge merely because Antioco (allegedly) knew about this information and would have told Redstone.[52] The other Viacom Defendants supposedly "knew or should have known that the Prospectus contained omissions and false statements" because Redstone (allegedly) knew and would have shared that information with his fellow Viacom directors.

This response, based entirely on a daisy chain of surmise and illogic, suggests that the plaintiff and her counsel have no basis to support the far-reaching

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[52] First, while the plaintiff in her complaint does generally allege that "the cash flow analysis was distributed to senior management of Blockbuster . . .," the only allegation that directly identifies Antioco is the previously mentioned quote that states "Blockbuster financial analysts presented Antioco and other members of Blockbuster's senior management with forecasting models showing that Blockbuster's proposed subscription service would not be profitable for the company." Compl. ¶ 67. At oral argument, counsel for the plaintiff attempted to expand the complaint with a more particularized allegation that the cash flow report "was given to, and read by, Mr. Antioco." Tr. 37. Relying on this allegation, the plaintiff's counsel further argued that "[b]y virtue of [Redstone's] position on the board, and by virtue of the fact that Mr. Antioco was on the board, it's a reasonable inference that Mr. Redstone knew about the cash flow problems and knew about the reports and knew about . . . the other problems identified in the complaint . . . ." *Id.* 38.

allegations of knowledge made in the complaint. They simply do not have a factual basis from which to allege that Antioco ever saw the cash flow analysis, that he ever showed it to Redstone, or that Redstone ever disclosed it to the other Viacom directors. Lacking such knowledge and based only on a series of suppositions, they nevertheless expect the court to credit their general allegations that the Viacom Director Defendants knew or, in some cases, should have known about some internal Blockbuster treasury department report written months before the Exchange Offer and the other unflattering characterizations of Blockbuster's accounting systems.

There are, of course, many situations where bare allegations of knowledge are so grounded in common experience as to suffice. For example, it is generally fair to allege that a director knew as fact something either known (or reasonably assumed) to have been disclosed to or discussed with the board as a whole or otherwise known publicly. For example, the court assumes that the boards of directors of both Viacom and Blockbuster received and reviewed reports and information concerning the transactions involved in this litigation. Many of these are identified in the Prospectus.

By contrast, directors are not as a matter of general experience presumed to know business operational information that is not of a kind routinely disclosed to boards of directors. For example, it would be at odds with what is known of how

large public corporations run their affairs to expect directors to have knowledge of studies prepared by staff that are not presented to them for some purpose. As this court said in *IOTEX Communications, Inc. v. Defries*:

> [W]here pleading a claim of fraud or breach of fiduciary duty that has at its core the charge that the defendant knew something, there must, at least, be sufficient well-pleaded facts from which it can reasonably be inferred that this "something" was knowable and that the defendant was in a position to know it.[53]

In this case, in particular, common experience is very much at odds with the plaintiff's contention that any of the Viacom directors, including Redstone, somehow must have known about the February-March 2007 cash flow study prepared by an analyst in the Blockbuster treasury department or about the other operational infirmities she alleges. In fact, the plaintiff alleges that Blockbuster's Senior Vice President of Investor Relations and Treasurer told her subordinates not to worry about the cash flow analysis, strongly suggesting that she did not transmit that study to even the Blockbuster board of directors, much less that of Viacom.

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[53] 1998 WL 914265, at *4 (Del Ch. Dec. 21, 1998); *See also Metro Commc'ns Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 145 (Del. Ch. 2004) (the complaint failed, under Court of Chancery Rule 9(b), to allege that the defendants had knowledge of the misleading nature of statements distributed to stockholders because the complaint only created an inference of contemporaneous knowledge on the part of the defendants); *Alex v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del. Ch. Aug. 25, 2005) (a bare allegation that knowledge of the purported wrongful acts should be imputed to an employer, where the court found no agency relation to exist, was insufficient to support a fraud claim and breach of fiduciary duty claim); *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 207-8 (Del. Ch. 2006) (in a fraud claim based on allegedly improper disclosures, the plaintiffs' general and cursory allegations that the parent and subsidiary acted together to commit the improper disclosures failed to adequately plead knowledge).

When faced with substantially similar allegations regarding the same cash flow study and related information, the federal district judge in *Congregation of Ezrasholom v. Blockbuster* determined, albeit under a different standard, that the plaintiffs in that case failed to plead scienter under the Private Securities Litigation Reform Act ("PSLRA").[54] More specifically, the court stated,

> According to the Confidential Sources, Defendants Antioco and Zine were presented with financial models showing that the "No Late Fees" initiative would lose money, which Antioco refused to acknowledge. What is missing from the Complaint, however, is any indication that Antioco or Zine accepted the models and proceeded nonetheless. To the contrary, the Confidential Source indicated that Antioco rejected the assumptions underlying the models. This is more consistent with an inference that Antioco and Zine disagreed with the pessimistic models, and that is why they went forward with the "No Late Fees" initiative. It is illogical and contrary to common sense to infer that two executives would believe that a new program would be disastrous, and nonetheless proceed.[55]

This analysis serves to further erode the plaintiff's blithe assertion that Redstone and the other Viacom Director Defendants received the report. Even assuming arguendo that Antioco reviewed the report, the well pleaded allegations in the complaint strongly suggest that he dismissed its findings. Thus, there is no well

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[54] 504 F.Supp.2d 151. Under the PSLRA, a plaintiff must "plead with particularity facts giving rise to a strong inference that defendants acted with scienter, which is 'a mental state embracing intent to deceive, manipulate, or defraud.'" *Barrie v. Intervoice-Brite, Inc.*, 397 F.3d 249, 263 (5th Cir. 2005) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)).
[55] *Congregation Ezrashalom*, 504 F. Supp.2d at 165-66.

pleaded basis in fact to support an inference Antioco gave the report, or conveyed its contents, to Redstone or any of the other Director Defendants. [56]

It is also a fact that the Prospectus contained numerous robust disclosures and warnings 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.[57] These clearly disclosed cautionary statements put anyone reading the Prospectus on notice that Blockbuster faced significant challenges in servicing the debt incurred from the special dividend and in funding the ambitious strategy critical to

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[56] It is also worth noting that the plaintiff waited nine months from the filing of the federal court action and almost two years after the Exchange Offer to file her complaint in this court. Presumably, if the plaintiff felt that she had a well founded Delaware state law claim, she would have sought relief in this court much sooner.

[57] Those disclosures included the following:

- "As a Result of the Payment of the Special Distribution Blockbuster's Leverage Will Increase and Blockbuster's Ability to Make Payments on its Bank Debt and Senior Subordinated Notes will Depend on Blockbuster's Future Operating Performance Which Will Depend on a Number of Factors That are Outside of Blockbuster's Control." Abramczyk Aff. Ex. B 42.
- "Blockbuster's indebtedness may make it more difficult for Blockbuster to pay its debts as they become due during negative economic and market industry conditions because if its revenues decrease due to general economic or industry conditions, it may not have sufficient cash flow from operations to make its scheduled debt payments. *Id.* at 43.
- "Blockbuster may not be able to effectively upgrade and expand its systems, or add new systems, in a timely manner or to integrate smoothly any newly developed or purchased technologies with its existing technologies." *Id.* at 40.
- "[F]inancial results, including cash flows, will . . . be adversely impacted by the investment for approximately $90 million of incremental operating expenses and approximately $100 million of additional capital investments associated with the development and launch of its key growth initiatives, as well as the anticipated continued weakness in the rental industry." *Id.*

reviving its business. Those Viacom stockholders considering tendering into the Exchange Offer should have been particularly conscious of these risks given the well known deterioration of Blockbuster's business and its inability to challenge Internet-based companies, such as Netflix.com.

3. The Plaintiff's Claims Of Partial, Misleading Disclosures

"To state a claim of partial, misleading disclosure, a plaintiff must plead facts identifying a (1) perhaps voluntary, but (2) materially incomplete (3) statement (4) made in conjunction with solicitation of stockholder action that (5) requires supplementation or clarification through (6) corrective disclosure of perhaps otherwise material, but reasonably available information."[58]

a. Pricing Methodology

The plaintiff asserts that the "Viacom shareholders were entitled to know precisely how the [e]xchange [r]atio was calculated."[59] In response, the defendants argue that the disclosure of such information is not required in connection with a voluntary Exchange Offer. The Prospectus contained the following explanation of the derivation of the exchange ratio:

> In determining the exchange ratio, Viacom considered among other things:

[58] *O'Reilly*, 745 A.2d at 927.
[59] Compl. ¶ 70.

- recent historical market prices on the New York Stock Exchange for shares of Viacom class A and class B commons stock and Blockbuster class A common stock; and
- discussions with the co-dealer managers as to what exchange ratio might induce Viacom stockholders to tender Viacom class A or class B common stock in this exchange offer so that all (or the greatest percentage) of the shares of Blockbuster class B common stock and converted class A common stock that Viacom holds will be distributed.[60]

Generally, Delaware courts, in non-coercive self-tender offers, do not require the disclosure of specific pricing methodologies. The defendants here cite the Chancellor's decision in *Frank v. Arnelle*[61] to support their position that further disclosure was not required. In *Frank*, this court, faced with similar circumstances, found that disclosure of a pricing methodology prepared in connection with a Dutch auction was unnecessary, since it was a non-coercive self-tender offer.[62] The holding in *Frank* did note that such disclosure would be necessary to ensure a balanced presentation where "the board has made a partial disclosure that implies that the offered price is fair."[63]

In this case, the Prospectus did not state that the offered price was fair. For example, it did not contain language suggesting that the price was based on the company's intrinsic value.[64] On the contrary, it candidly disclosed that one of the primary reasons behind the price was to induce stockholders to tender.

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[60] Abramczyk Aff. Ex. B 71.
[61] 1998 WL 668649.
[62] *Id.* at *5.
[63] *Id.*
[64] *See id.*

The plaintiff here, similar to the plaintiff in *Frank*, asserts that the offer of a premium suggests that the price is fair, thus, requiring further explanation. This argument is entirely unpersuasive. As discussed, the description of the derivation of the exchange ratio makes clear that the price was not represented to stockholders as fair.

b. Composition Of The Viacom Committee

Finally, the plaintiff asserts that the members of the Viacom board committee that approved the Exchange Offer should have been disclosed in the Prospectus. The plaintiff claims that the composition of this committee is important to determine if its members had conflicting ties to NAI or Redstone. The analysis in *Frank* is also instructive on this point. The defendants argue that such disclosure was not required, citing the language in *Frank* that "the fact that a special committee, as opposed to the full Board, set the price range and other terms [is not] material . . . ."[65] But, here, unlike *in Frank*, the Prospectus contained a reference to a Viacom board committee that approved the transaction. Thus, the issue is whether the disclosure made about the Viacom board committee was materially incomplete.

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[65] *Id*.

Specifically, the Prospectus stated:

> On June 17, 2004 a committee of Viacom's board of directors delegated with authority to approve the final form of the divestiture of Blockbuster from Viacom approved the divestiture by means of the split-off contemplated by this Prospectus-Offer to Exchange. The committee also approved Viacom's entry into the various separation agreements described on the section entitled "Agreements Between Viacom and Blockbuster and Other Related Party transactions."[66]

As noted, "when fiduciaries undertake to describe events, they must do so in a balanced and accurate fashion, which does not create a materially misleading impression."[67] This singular and brief reference to the Viacom board committee did not create a materially misleading impression for stockholders, necessitating further disclosure. There is no indication that the committee was independent of management or NAI, nor does the language in the Prospectus induce stockholders to rely on the committee's decision to validate the transaction. In short, this passing reference to the committee did not materially mislead stockholders because nothing in the Prospectus suggests that its decision carried any greater significance than that of the full board of directors.

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[66] Compl. ¶ 71.
[67] *Clements v. Rogers*, 790 A.2d 1222, 1240 (Del. Ch. 2001).

B. Count III

In Count III, the plaintiff seeks to void the Exchange Offer as an interested transaction under Section 144 of the DGCL.[68] According to the complaint, the transaction unfairly benefitted NAI and Redstone and was approved by the other Viacom directors in breach of their fiduciary duties in order to promote the interests of NAI over those of the other Viacom stockholders. As the complaint conclusorily states: "[e]ach of the Viacom Director Defendants breached their fiduciary duties of loyalty and care in approving and/or acquiescing in the Exchange Offer on terms that were unfair to Viacom's minority shareholders and unfairly [benefitted] Viacom's controlling shareholder, NAI, and Redstone."[69]

The provisions of Section 144 apply to interested transactions, but neither NAI nor any of the Viacom Director Defendants stood on both sides of the

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[68] 8 *Del. C.* § 144(a) provides: (a) No contract or transaction between a corporation and one or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which one or more of its directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee thereof which authorizes the contract or transaction, or solely because his or their votes are counted for such purpose, if: (1) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or (2) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the shareholders; or (3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee thereof, or the shareholders.

[69] Compl. ¶ 106.

Exchange Offer. Thus, Section 144 has no bearing on this case and cannot serve as a means to invalidate the Exchange Offer. Mere allegations that the Exchange Offer benefitted NAI to the detriment of Viacom's other stockholders do not suffice to overcome this obvious conclusion.

C. Count IV

Count IV is the sole claim brought against NAI and it alleges that NAI breached its fiduciary duties of loyalty and good faith "by causing the Viacom Director Defendants to approve and recommend the Exchange Offer to Viacom's minority stockholders."[70] Count IV also alleges that the Exchange Offer was designed to unfairly benefit NAI and Redstone through the reduction of Viacom's public float, the solidification of control by NAI and Redstone over Viacom, and the termination of Viacom's relationship with Blockbuster, which allegedly had "undisclosed problems that were known to NAI."[71]

NAI was not a party to either the special dividend or the Exchange Offer, and the complaint fails to state any well pleaded facts that NAI did anything in connection with either transaction. As would be required to sustain her claim, the plaintiff makes no allegation that NAI directed the actions of Viacom.[72] Since

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[70] Compl. ¶ 110.
[71] *Id.*
[72] As noted in *Cinerama, Inc. v. Technicolor, Inc.*, "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." 1991 WL 111134, at *19 (Del Ch. June 24, 1991), *aff'd in part, rev'd on other grounds sub nom.*

there are no well pleaded allegations supporting the plaintiff's conclusions, this claim will be dismissed. In addition, in light of the obviously *de minimis* effect of the Exchange Offer on the capitalization of Viacom,[73] the claim that the Exchange Offer "consolidated" NAI's control over Viacom will be dismissed as frivolous.

D. Counts V and VI

The plaintiff brings Counts V and VI as direct claims. Count V alleges that the Blockbuster Director Defendants breached their duties of loyalty and good faith in declaring the special dividend. Count VI alleges that Viacom breached its fiduciary duties of loyalty and good faith by causing the Blockbuster Director Defendants to declare the special dividend.

As the defendants correctly point out, these are derivative claims that require the plaintiff to comply with Rule 23.1. The Supreme Court stated in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.* that the test for distinguishing direct and derivative claims hinged on "(1) who suffered the alleged harm (the corporation or the stockholders); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)."[74] "The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the

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[73] *See* note 17, *supra.*
[74] 845 A.2d 1031, 1033 (Del. 2004).

stockholder and that he or she can prevail without showing an injury to the corporation."[75]

Since Blockbuster suffered the alleged harm, the plaintiff's claim is derivative. Indeed, claims of excessive dividends, such as Count V, have been held to be derivative.[76] Having failed to present either board of directors with her claim or allege why demand should be excused under Rule 23.1, both of these claims will be dismissed.

V.

In conclusion, the plaintiff fails to sustain her disclosure claim due to her conclusory allegations that are wholly dependent on an unsupported and illogical understanding of the Viacom Director Defendants' oversight of Blockbuster. In addition, the plaintiff's other disclosure allegations are clearly not material and did not warrant further disclosure. Her claim against NAI is also unfounded, given she does not sufficiently allege that NAI directed the actions of Viacom in connection with the Exchange Offer. Lastly, the claims against the Blockbuster Director Defendants and Viacom, challenging the special distribution, are improperly raised as direct, as opposed to derivative, claims and fail to comply with Court of Chancery Rule 23.1.

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[75] *Id.* at 1039.
[76] *In re Rexene Corp. S'holder Litig.*, 1991 WL 77529, at *3 (Del. Ch. May 8, 1991).

For the foregoing reasons, the defendants' motion to dismiss for failure to state a claim upon which relief may be granted is GRANTED with prejudice. IT IS SO ORDERED.