IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GEORGE D. ORLOFF, MADELINE ORLOFF, and J.W. ACQUISITIONS, LLC, individually and derivatively on behalf of WEINSTEIN ENTERPRISES, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 852-N
LLOYD J. SHULMAN, SYLVIA W. SHULMAN, WARD M. LYKE, JR., and GAIL S. KOSTER,	)	
Defendants,	)	
and	)	
WEINSTEIN ENTERPRISES, INC., a Delaware corporation,	)	
Nominal Defendant.	)	

MEMORANDUM OPINION AND ORDER

Submitted: September 13, 2005
Decided: November 23, 2005

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LAMB, Vice Chancellor.

This is a case brought individually and derivatively on behalf of Weinstein Enterprises, Inc., claiming that the defendants violated their fiduciary duties and committed waste by mismanaging Weinstein, and that the defendants disseminated misleading information to the company's minority shareholders. The defendants have moved to dismiss the case on the basis of res judicata, laches, failure to state a claim on which relief can be granted, and lack of standing. This is the court's decision on that motion.

I.

Weinstein is a closely held company originally founded by the patriarch of the once famed Mays department stores, Joseph Weinstein, in order to hold some of the stores' real estate.[1] In 1982, Mays filed for bankruptcy, closed all its stores, and re-emerged as a real estate company in 1989. Weinstein's assets now chiefly consist of a combination of real property and securities that include approximately 45.15% of the outstanding common stock of Mays.[2]

A. <u>The Parties</u>

Lloyd Shulman, a grandson of Joseph Weinstein, succeeded his father, Max, to become CEO and Chairman of Weinstein in 1997. Together, Lloyd Shulman and his family own 66% of Weinstein. In addition to controlling Weinstein, the

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[1] Compl. ¶ 4.
[2] Compl. ¶ 2.

Shulmans are closely involved in the company's management. Sylvia Shulman, Lloyd's mother, is both a director and a vice president of Weinstein. Joseph Weinstein's daughter, Gail S. Koster, also sits on the Weinstein board. Ward Lyke, a long-time associate of the Shulmans, has been a Weinstein director for many years and formerly was a member of Weinstein's executive committee.

In addition to Weinstein's ownership of a near majority of Mays's common stock, the Shulman family and the J. Weinstein Foundation, Inc., a charitable foundation of which Sylvia and Lloyd Shulman are the officers and directors, together hold an additional 11.72% of Mays.[3] The ties between Weinstein and Mays are strengthened by the fact that some of the directors and officers of Weinstein have similar roles in Mays. Lloyd and Sylvia Shulman are Mays directors, while Lyke is currently Mays's Vice President of Management Information Systems. Lloyd and Sylvia Shulman, Lyke, and Koster are all named as defendants in this action.

The plaintiffs, Madeline Orloff and her son, George Orloff, are minority stockholders of Weinstein and are related to the Shulmans. Madeline Orloff has been a record shareholder since approximately 1972, and until 2004 sat on the board of Weinstein. In 2004, however, she was removed from the board, allegedly without her knowledge and without notice.[4] George Orloff inherited his shares from his

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[3] Compl. ¶ 25.
[4] Compl. ¶ 6.

grandmother in 2002. Until recently, the Orloffs held approximately 34% of Weinstein's stock. On June 28, 2004, however, the Orloffs sold their minority position in Weinstein, less 62 shares, to J.W. Acquisitions, LLC ("JWA") for over $26 million. JWA, which is a plaintiff in this case, is a New York limited liability company owned by members of the Cayre and Adjmi families, and is currently managed by Robert Cayre.[5] The Orloffs' remaining shares, which constitute over 1% of the 6,000 shares outstanding in Weinstein, are valued by them in excess of $1 million.[6]

B. Prior Litigation

The parties in this case have a long and acrimonious history of litigation. A recent episode, filed in 1992 and referred to throughout this opinion as the "New York action," was resolved by the New York Appellate Division on September 10, 1998. In that case, Madeline Orloff and her sister, Linda Jessogne, brought suit against Weinstein, as well as both Shulman defendants in their individual capacities, making a range of allegations as to breaches of fiduciary duty and

[5] The JWA plaintiffs concede that they have standing only to challenge continuing wrongs allegedly committed by the defendants, including the causes of action relating to Rockridge Farm and the Middle Bay Country Club lease. Compl. ¶ 17.
[6] Compl. ¶ 17.

oppressive conduct towards the minority Weinstein shareholders under New York law.[7] The trial court in the New York action, following what the Appellate Division called "extensive discovery,"[8] dismissed the Orloffs' claims as to fraud or illegality, but held that the "defendants' conduct in this regard [i.e., the exclusion of Madeline Orloff from meetings of the board of directors and other corporate affairs] is clearly oppressive."[9] This decision was reversed by the Appellate Division, which held that none of the plaintiffs' allegations rose "to a level entitling plaintiff[s] to any of the relief sought in the complaint or which was granted by the motion court."[10]

In January 2004, George Orloff filed an action in this court pursuant to 8 *Del. C.* § 220(c) "to obtain the information necessary to obtain a meaningful bid

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[7] The claims were as follows: (1) that the Shulmans caused Weinstein to wastefully buy Rockridge Farm, a property in Putnam County, New York; (2) that the Shulmans in their individual capacities charged Lloyd Shulman below market rent to live at Rockridge Farm; (3) that Weinstein, as a corporate entity, charged the individual defendants below market rents while they lived at Rockridge Farm; (4) that Weinstein paid Max and Lloyd Shulman inappropriate and excessive compensation; (5) that Weinstein improperly pledged its own securities as collateral for a $3 million loan to Mays; (6) that Weinstein redeemed shares held in trust by Celia Weinstein, but refused requests by the plaintiffs that the corporation redeem its own shares; (7) that the individual defendants caused the corporation to promote their interests by using funds to acquire additional shares of Mays; (8) that the defendants excluded the plaintiffs from occupying residences at Rockridge Farm; (9) that the defendants excluded Madeline Orloff from board of directors meetings and denied her access to the corporate books and records.

[8] *Orloff v. Weinstein Enters., Inc.,* 247 A.D.2d 63, 65 (N.Y. App. Div. 1998).

[9] *Orloff v. Weinstein Enters., Inc.*, Index No. 44504/92, Pl.'s Ex. A.

[10] *Orloff*, 247 A.D.2d at 67.

for the Orloff shares from third parties."[11] Ultimately, Orloff was granted access to a portion of the documents he sought.[12]

In August 2004, Weinstein filed an action in New York Supreme Court against the present plaintiffs, among others, asserting a wide range of fiduciary duty violations, torts, and breaches of contract relating to the sale of the Orloffs' shares.[13] In November 2004, the current plaintiffs responded by filing this case, alleging violations of fiduciary duties and waste. They then moved to stay or dismiss the 2004 New York action in favor of this one, and, on July 29, 2005, the New York Supreme Court agreed and dismissed the Shulmans' action on the condition that the Orloffs would consent to Delaware jurisdiction.[14]

The amended complaint in this case alleges six causes of action, the facts underlying which are set forth below: (i) breach of fiduciary duty and waste in connection with certain transactions between Weinstein and Mays;[15] (ii) breach of fiduciary duty and waste in approving a series of "third-party" transactions;[16]

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[11] Compl. ¶ 8.
[12] *Orloff v. Weinstein Enters.,* 2004 Del. Ch. LEXIS 85 (Del. Ch. June 22, 2004), *rev'd sub. nom. Weinstein Enters. v. Orloff,* 870 A.2d 499 (Del. 2005).
[13] Specifically, the defendants in this action claimed in New York that the Orloffs breached their duties to Weinstein, violated a confidentiality agreement by sharing Weinstein's information, fraudulently induced Weinstein to enter into the Confidentiality Agreement, tortuously interfered with Weinstein's business relationship, defamed and slandered the Shulmans, and conspired with JWA to harm Weinstein and the Shulmans. Compl. ¶¶ 1, 2, 4.
[14] *Weinstein Enters., Inc. v. Orloff,* Index No. 602497/2004, Pl.'s Reply Br. Ex. A.
[15] Compl. ¶¶ 95-97.
[16] Compl. ¶¶ 98-102.

(iii) breach of fiduciary duty and waste in relation to certain vacant lots and loss-making properties; [17] (iv) breach of fiduciary duty and waste in relation to Rockridge Farm;[18] (v) breach of fiduciary duty in relation to both a bylaw amendment and an amended certificate of incorporation;[19] and (vi) breach of fiduciary duty in relation to faulty disclosure.[20]

Some of these allegations, if true, would tend to reduce the income available to Weinstein, and thus to its managers and controlling shareholders. The complaint, therefore, also alleges that the apparent inconsistency between the defendants' actions and their normal incentives to maximize the income of Weinstein can be explained in two ways—first, by the fact that the defendants wished to purchase the Orloffs' shares for less than their fair value, and thus were willing to depress the value of their own Weinstein shares until they achieved their goal; alternatively, the plaintiffs suggest that depriving Weinstein of income could have been useful to the defendants for estate planning purposes.[21]

C. The Mays Transactions

The complaint alleges that the defendants violated their fiduciary duty of loyalty and committed waste in the following three transactions with Mays.

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[17] Compl. ¶¶ 103-105.
[18] Compl. ¶¶ 106-110.
[19] Compl. ¶¶ 111-114.
[20] Compl. ¶¶ 115-117.
[21] Compl. ¶ 29.

1. Levittown

Weinstein owns a two-story and basement store property in Levittown, New York. Before 1983, Weinstein leased the property to Mays.[22] The lease, which was scheduled to run until 2004, contains a "use" clause which requires Mays to maintain the premises as a retail department store. In 1983, in the course of bankruptcy, Mays negotiated a modification and assignment of the lease to Trade Town, Inc., at a substantially higher rent, for use as a flea market.[23] Weinstein objected, citing the "use" clause, and Mays and Weinstein agreed to share the excess rental equally.[24] Mays then petitioned the bankruptcy court for permission to assume the lease and assign it to Trade Town.[25] After notice, the bankruptcy court entered an order granting the relief requested, finding that it was in the best interest of Mays's creditors.[26] Ignoring the bankruptcy court's review and approval, the plaintiffs allege that this arrangement improperly diverted over $8 million of revenues from Weinstein to Mays over the next 20 years, in violation of the defendants' fiduciary duty to Weinstein.[27] This is so, they claim, because

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[22] The property was technically leased through a Weinstein subsidiary, Celwyn. The complaint treats Celwyn as equivalent to Weinstein for the purposes of this case. Compl. ¶ 31.
[23] Fischer Aff. Ex. D.
[24] *Id.*
[25] *Id.*
[26] Fischer Aff. Ex. C.
[27] Compl. ¶ 31.

Weinstein could have simply refused to agree to the assignment unless it received substantially all of the excess rental income for the property, rather than only half.

2. Fulton Street

Fulton Street is a major shopping artery in Brooklyn, New York. Weinstein owns a parcel at 504-506 Fulton Street, on which there is a multi-story building. This property and building is leased to Mays, which rents out space in the building to its own retail tenants. The original 1928 lease on the property, at a rental rate of $60,000 per year, expired in 1995. Weinstein extended the lease to 2011 at an initial rental rate of $99,000 per year, which was increased in 2001 to $108,000 per year.[28] The complaint alleges that, given the rental rates on Fulton Street in 1995, the property could have been rented to a third party for at least $500,000 per year, and could have been rented to Mays for even more because Mays would have violated its own subleases to tenants by allowing the property to revert to Weinstein. Furthermore, the plaintiffs allege that the defendants' valuation of the property at $1.2 million in 2001 was erroneous, and that the fair market value of the property in that year was far more than that amount. The plaintiffs allege that all of these facts establish that the defendants breached their fiduciary duties in connection with the Fulton Street property.

[28] Compl. ¶ 37.

3. Jamaica Avenue

Weinstein owns the ground at 168-21-52 Jamaica Avenue (approximately 73,575 square feet) in Queens, New York, which it leases to Mays. Mays owns a 250,000 square foot building on the parcel, which it carries on its books at $17 million and which it rents to many tenants, including Toys-R-Us. In 1958, the Weinstein predecessor leased the ground to Mays at $60,000 per year. That lease expired in 1985, subject to Mays's right to extend for two 21-year periods, based on rent calculated at 6% of the unimproved value of the ground. Mays opted to extend the lease in 1985, paying $61,800 based on an estimated value of the ground of $1.03 million. This constitutes a rental rate of $.84 per square foot of ground space. The complaint alleges that the value of the ground was actually "more than $5 million in 1985."[29] According to the complaint, therefore, a proper valuation of the property in 1985 would have yielded rent in excess of $300,000 per year, or roughly $4 per square foot of ground space. The plaintiffs argue, on this basis, that the defendants breached their fiduciary duties by undervaluing the land in 1985 and renting the land to Mays at an insufficient price.

D. Third-Party Transactions

The plaintiffs claim that the defendants violated their fiduciary duties and committed waste in the following four transactions with third parties.

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[29] Compl. ¶ 43.

1. Jimmy Jazz

Weinstein owns a 12,000 square foot retail property at 518-520 Fulton Street, which it rents to Jimmy Jazz, a women's clothing store. In 2003, Jimmy Jazz became the sole tenant and entered into a 16-year triple net lease with Weinstein. The lease was initially set at $290,000 per year, or $24.17 per square foot. The plaintiffs allege that this is $22,500 less than the rents Weinstein had been receiving under the old leases prior to 2003.[30] The complaint also alleges that the market rent for the property should have been at least $1 million per year, or at least $100 per square foot, as measured by the fact that new leases on Fulton Street in 2003 were almost uniformly over $100 per square foot.

2. Modell's

Weinstein owns retail property at 360 Fulton Street, which it rents on a triple net basis to Modell's Sporting Goods, a sporting goods retailer. Prior to 2003, this rent was $172,000 per year. In 2003, the lease with Modell's was renewed at a rate of $179,000 per year, with 2% annual increases, and extends until 2015 with an automatic right to renew for another five years. At the current rate, the rent approximates $15 per square foot. The plaintiffs allege, however, that if the property were rented to a third party on arm's length terms the market rent would

[30] Compl. ¶¶ 50-51.

have been at least $1 million per year.[31] The complaint further alleges that Weinstein should have been able to demand a premium from Modell's because the space at 360 Fulton Street is part of a larger building, the remainder of which is owned by Modell's. Without the Weinstein space, the plaintiffs argue, Modell's would have been deprived of a viable store. By renting the property at less than 20% of the alleged fair market value, therefore, the plaintiffs allege that the defendants violated their fiduciary duties.

3. Westchester Foreign Autos

Weinstein leases a 15,000 square foot property at 75 Vredenburgh Avenue in Yonkers, New York, to Westchester Foreign Autos, which operates a Toyota dealership on the premises. In 1993, Weinstein entered into a 10-year lease with Westchester at $110,000 for the first year, with 3% increases annually. Under the original lease, Westchester had a two-year renewal option. In 1999, however, Weinstein agreed to give Westchester a seven-year lease extension right, which Westchester immediately exercised at the 1993 rates plus the annual 3% increases. At the time Weinstein agreed to extend the renewal term, the tenant's rent payment equaled approximately $8.50 per square foot. The plaintiffs contend that the fair market rate would have been "at least twice that amount."[32] The plaintiffs therefore

[31] Compl. ¶¶ 54-56.
[32] Compl. ¶¶ 57-59.

argue that the defendants' decision to extend the lease in 1999, and the low price subsequently demanded, constitutes a violation of the defendants' fiduciary duties.

4. Middle Bay Country Club

Weinstein owns the land under the Middle Bay Country Club in Oceanside, New York, which it has leased to the Middle Bay Golfers Association for the period 1968 through 2017. The complaint alleges that the 168-acre property is worth more than $11 million but is currently generating only $160,000 per year in rental income. If the lease were terminated, the plaintiffs argue, the property could be sold for a substantial profit, or rented at current market rates which are allegedly multiples of the amount now being paid in rent. The plaintiffs further claim that the Middle Bay Country Club is in breach of its lease agreement for failure to repair a bulkhead on the property, affording Weinstein the right to either terminate the lease or sue the tenant for breach. The defendants have allegedly failed to enforce their rights against the country club. The plaintiffs argue that this failure to maximize the value of the Middle Bay Country Club property constitutes a violation of the defendants' fiduciary duties.[33]

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[33] Compl. ¶¶ 62-64.

E. Vacant Properties, Loss-Making Properties, And Rockridge Farm

The complaint alleges that the defendants violated their fiduciary duties and committed waste in the following three transactions, which they designate as the vacant and loss-making properties.

1. Nine Vacant Properties

The plaintiffs allege that nine of Weinstein's properties are currently vacant. Six of the nine vacant properties form "one contiguous parcel across Jamaica Avenue from the property Weinstein leases to Mays."[34] The complaint specifies that the original cost of these properties was $941,799, and, in 1999, they were appraised to be worth between $1.75 million and $2.2 million. In 1998, the plaintiffs allege that Weinstein removed tenants and cleared buildings on the property in order to make the properties available for future development. But despite what the plaintiffs call potentially lucrative offers from developers and brokers, the plaintiffs argue that the defendants have done nothing with these six properties. The plaintiffs believe that they have identified three additional vacant lots located in Yonkers, New York. According to the plaintiffs, these properties had an original cost of about $420,000, have annual expenses of approximately $130,000, and were appraised in 2003 at close to $1 million. The plaintiffs allege that the defendants have violated their

[34] Compl. ¶ 66.

fiduciary duties by making “no attempt to develop or generate income” from these properties.[35]

2. Four Loss-Making Properties

The plaintiffs claim that the defendants own a number of potentially lucrative properties which are being operated at significant losses to Weinstein. The bulk of these properties are in Kansas City, Missouri, and were purchased initially for an investment of $11.6 million. For example, the complaint alleges that the 32-story Kansas City Power and Light building, owned by Weinstein, is only 30% occupied, and was operated at a net loss of $100,278 in 2003. The plaintiffs claim that the defendants’ “failure to make economically productive use of these properties” constitutes a breach of their fiduciary duties.

3. Rockridge Farm

Rockridge Farm is a 114-acre estate in Putnam County, New York. The property contains a 1,800 square foot wooden office building which serves as the corporate headquarters of Weinstein, and separate homes which serve as the residences of Lloyd and Sylvia Shulman. According to Weinstein’s 2003 financial statement, the land has a cost basis of $177,484, while the buildings and equipment cost $2.6 million. In fiscal year 2003, the plaintiffs claim, Weinstein spent 30.4% of its average net income for the last three years, or $423,810 in cash plus $74,949 in

[35] Compl. ¶ 66.

depreciation charges, for upkeep of the properties. In contrast, the plaintiffs allege, in 2003 the Shulmans paid Weinstein only $18,000 in rent for the privilege of residing at the estate and for using the property's garages for the Shulmans' collection of classic cars. The plaintiffs, therefore, allege that Weinstein's maintenance of Rockridge Farm in lieu of renting appropriate corporate headquarters elsewhere, and the below market rent paid to Weinstein by the Shulmans, constitute a breach of the defendants' fiduciary duties.

F. The Advancement Bylaw And Section 102(b)(7) Provision

The complaint alleges that on March 12, 2004, the Weinstein board held a meeting in which the directors approved new bylaws and approved an amendment to the certificate of incorporation. The new bylaws contain provisions giving the directors the right to have attorneys' fees advanced during litigation. The certificate amendment also contains a Section 102(b)(7) provision limiting directors' liability for breaches of fiduciary duty.[36] Crucially, say the plaintiffs, these changes were made in conjunction with the plaintiffs' books and records claim under 8 *Del. C.* § 220.[37] Each of the defendants voted in favor of the provisions, while Madeline Orloff voted against them. Therefore, the plaintiffs allege, it is apparent that the defendants approved each of these provisions under the threat of imminent litigation,

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[36] Compl. ¶ 78.
[37] Compl. ¶ 79.

and breached their fiduciary duties by self-interestedly protecting themselves against litigation that they knew would soon name them as defendants.

G. Disclosure Claims

The complaint alleges that in 2003 the defendants provided false documentation to the Orloffs in the form of a flawed list of properties owned by Weinstein.[38] For example, the plaintiffs claim that the 2003 document falsely lists the 168-21-52 property at Jamaica Avenue as being much smaller than it actually is, thus making the property's low rental price per square foot seem more in keeping with the market rate. The plaintiffs additionally allege that Lloyd Shulman provided a "fraudulent[ly]" low appraisal of the Orloffs' shares on November 24, 2003,[39] in an effort to purchase the shares for an artificially depressed price. Moreover, the plaintiffs claim that Lloyd Shulman caused Weinstein to attempt to commit securities fraud by depressing the apparent value of Weinstein, and hiding information that could have allowed the plaintiffs to stop the defendants' misconduct earlier. Finally, the complaint alleges that the defendants have violated their duty of disclosure by refusing to provide the Orloffs with the company's 2004 annual report unless they agree to an unreasonable confidentiality agreement,[40] while JWA was

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[38] Compl. ¶ 82.
[39] Compl. ¶ 83.
[40] Compl. ¶ 87.

denied the information outright. This, the plaintiffs claim, was a violation of the defendants' fiduciary duties.

H. The Defendants' Response

The defendants contest the plaintiffs' allegations that they breached their fiduciary duties. First, they maintain that none of the plaintiffs in this case has standing to pursue many of the claims raised in the complaint because JWA purchased their shares after the claims accrued, and because the Orloffs effectively sold their claims in transferring most of their shares to JWA while intentionally keeping only in their own hands the minimum required to justify a law suit. This conduct, the defendants argue, constitutes champerty, and is forbidden under Delaware law. The defendants next argue that the plaintiffs' claims as to the Mays transactions and as to Westchester Foreign Autos lease are barred by laches. Second, even if these two causes of action are not time barred, the defendants claim that those causes of action, as well as the plaintiffs' allegations as to any of the third-party transactions in connection with vacant lots, as to Rockridge Farm, and as to faulty disclosure, are barred by res judicata because those issues were already adjudicated in the New York action. Finally, the defendants argue that any of the plaintiffs' claims that survive laches and res judicata fail to rebut the business judgment presumption, or to properly allege a claim of waste against the

defendants.[41] Therefore, the defendants maintain, all counts of the amended complaint should be dismissed under Court of Chancery Rule 12(b)(6) for failure to state a claim.[42]

II.

In order to dismiss a claim under Court of Chancery Rule 12(b)(6), a court "must determine with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiffs would not be entitled to relief." When making its decision, a court must accept as true all well pleaded factual allegations in the complaint and all reasonable inferences to be drawn from those facts.[43] But a court need not "blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences."[44]

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[41] The defendants' forum non conveniens argument is somewhat dependent on the concurrent action initiated by the Shulmans in New York. Def's Opening Br. 61. Because that action has now been stayed in favor of this litigation, the defendants cannot meet the heavy burden required to invoke the court's discretionary power to decline jurisdiction over this case. *Candlewood Timber Group v. Forestal Santa Barbara SRL,* 2004 Del. LEXIS 458 (Del. Oct. 4, 2004).
[42] The defendants concentrate their argument on showing that the plaintiffs have not satisfied the pleading requirements of Rule 12(b)(6). The court notes, however, that the defendants have also moved to dismiss the plaintiffs' derivative claims under the higher pleading standards required to excuse demand under Court of Chancery Rule 23.1. Def.'s Opening Br. 19; Def.'s Reply Br. 40. The court has conducted its review of the plaintiffs' fiduciary duty claims under the higher standard required by Rule 23.1, and concludes that the plaintiffs' claims survive under that rule to the same extent as they survive under Rule 12(b)(6).
[43] *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988).
[44] *Id.* at 187.

III.

A. Res Judicata

The doctrine of res judicata provides that a final judgment on the merits rendered by a court of competent jurisdiction may, in the absence of fraud or collusion, be raised as an absolute bar to the maintenance of a second suit in a different court upon the same matter by the same party or his privies.[45] Res judicata is a not a mere technicality. Rather, the doctrine stands as a foundation of the legal system, judicially created in order to ensure a definitive end to litigation. Res judicata permits a litigant to press his claims but once, and requires him to be bound by the determination of the forum he has chosen, so that he "may have one day in court but not two."[46] Although courts formerly limited res judicata to actions that were actually already litigated and determined, the modern view of the doctrine is transactional in nature. Causes of action that arise out of the same transaction are precluded if brought in a subsequent action.[47]

The defendants argue that most of the claims in the complaint are barred by the adjudication of the New York action. Specifically, the defendants claim that all

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[45] *Epstein v. Chatham Park, Inc.*, 153 A.2d 180, 184 (Del. Super. 1959).
[46] *Maldonado v. Flynn,* 417 A.2d 378, 381 (Del. 1959) (*quoting Malone Freight Line, Inc. v. Johnson Motor Lines, Inc.* 148 A.2d 770, 775 (Del. 1959)).
[47] The extent to which separate events constitute one transaction is a matter to be determined flexibly by the court. RESTATEMENT (SECOND) OF JUDGMENTS § 24(b) (1982); the requirements for res judicata in Delaware are described in *Bradley v. Div. of Child Support Enforcement,* 582 A.2d 478, 480 (Del. 1990).

of the plaintiffs' claims except Count V (the bylaw amendments and the amended certificate of incorporation) are barred by res judicata.[48] The court agrees with the defendants as to Count IV, but concludes that Counts I, II, III, and VI are not barred by the prior adjudication.

The plaintiffs' claims as to the Rockridge Farm lease are barred by res judicata because they were previously litigated by Madeline Orloff and Jessogne in the New York action. Rockridge Farm was expressly part of the previous litigation. The complaint in the New York action alleged substantially identical breaches of fiduciary duty by the Shulmans as those raised in the current case, including below market rents charged to the defendants and waste.[49]

The current complaint makes some superficially different allegations as to the Rockridge Farm property. For example, the Orloffs now claim that the maintenance of Rockridge Farm constitutes waste because corporate headquarters could be rented in Manhattan for less money than Weinstein spends to maintain Rockridge Farm,[50] but such claims are plainly of the same kind and about the same transaction advanced in the New York action.

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[48] Def.'s Opening Br. 44. The bylaw amendment and amended certificate of incorporation, which form the basis of the plaintiffs' fifth cause of action, indisputably post date the earlier litigation in New York. Compl. ¶ 22.
[49] Def.'s Ex. 4 ¶¶ 21-26.
[50] Compl. ¶ 75.

The plaintiffs argue that the present claim can be distinguished from the New York action because the latter was a direct suit against the corporation and the current claims are derivative.[51] It is not entirely clear that the plaintiffs are correct. The New York Court of Appeals has explained that a Section 1104 oppression action is the kind of relief available to allegedly oppressed minority shareholders when a derivative claim is unavailable for whatever reason.[52] But some of the plaintiffs' claims in the prior case seem to be derivative in nature under Delaware law, alleging financial mismanagement that would harm the corporation as a whole, and for which the corporation should be compensated.[53] The court need not decide this issue, however, because even if the court assumes that the plaintiffs' prior claims were direct, and the current claims derivative, the court concludes that the plaintiffs' pre-1998 claims are barred by res judicata.

As a rule of black-letter law, suits brought by the same party in another capacity are not subject to claim preclusion.[54] The general rule yields, however, to

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[51] Pl.'s Opening Br. 52.

[52] *In Re Kemp & Beatley, Inc.,* 64 N.Y.2d 63, 70 (1984). The only Delaware case that has squarely addressed the issue of oppression is *Litle v. Waters,* 1992 Del. Ch. LEXIS 25 (Del. Ch. Feb. 10, 1992). In that case, the court rejected the defendants' arguments that oppression was available only under "special state statutes," and instead defined the action as "a violation of the reasonable expectations of the minority." *Id.* at *22 (*quoting Gimpel v. Bolstein,* 477 N.Y.S.2d 1014, 1017 (N.Y. Sup. Ct. 1984)). *Gimpel,* where the plaintiff had brought both derivative claims and a statutory oppression action, strongly suggests that oppression is an individual claim under New York law.

[53] *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.,* 845 A.2d 1031, 1035-36 (Del. 2004).

[54] *Carlton Invs. TLC Beatrice*, 1997 Del. Ch. LEXIS 62, *7-8 (Del. Ch. Apr. 21, 1997).

considerations of public policy. Courts need not spare plaintiffs from the bar of res judicata if the important purposes of judicial efficiency and finality that the doctrine serves would be foiled.[55] This case presents precisely such an instance. Weinstein is a closely held corporation which has long had only one minority shareholder group. As such, the nexus of interest between the derivative action and the individual action is likely to be especially close. In that context, to allow the Orloffs to proceed with a derivative suit would be to cut the heart out of the previous adjudication, conducted at great length and expense in New York.[56] Courts have no duty to allow such laborious re-litigations by identical parties, and this court declines to sanction one now. While some other plaintiff could hypothetically bring a derivative claim on behalf of Weinstein, the Orloffs have already had their opportunity to do so.[57]

The plaintiffs note, correctly, that George Orloff was not a plaintiff in the New York action. In normal circumstances, a third party is not barred by res judicata as a result of claims made by a different plaintiff with whom he is not in privity. A

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[55] *Satterfield v. Pharmacia Corp.,* 2002 Del. Ch. LEXIS 70, *4 n.5 (Del. Ch. June 17, 2002), *aff'd,* 812 A.2d 224 (Del. 2002) (holding that res judicata applied where identical plaintiff attempted to relitigate a claim as an administrator that he had already lost in his individual capacity).

[56] *Boothe v. Baker Industries,* 262 F. Supp. 168 (D. Del. 1966).

[57] *Liken v. Shaffer*, 64 F. Supp. 432, 442 (D.Iowa 1946) annunciates an important principle with resonance here. In that case, the court held that "the fact that one stockholder has discovered fraud and is guilty of laches does not prevent another stockholder who is not guilty of laches from instituting a stockholder's derivative action." It is the same as to res judicata in this case. The corporation is not barred from bringing its claim because of the Orloffs' prior action. But the Orloffs are indeed barred in equity from doing so.

parent-child relationship, without more, does not generally create privity between two plaintiffs.[58] Thus, in normal circumstances, George Orloff would be permitted to bring claims his mother is barred from advancing.

In some cases, however, a substantial identity of parties' interests has been held to place two superficially separate parties in privity.[59] Here, it is fair to conclude that the entire Orloff family has long been intricately intertwined in this litigation.[60] The claims and disagreements identified by the various members of the family are so similar that the court cannot conclude that the claims raised by Madeline Orloff in the New York action and those alleged by George Orloff in this case are anything other than functionally one legal right.[61] The law simply does not

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[58] RESTATEMENT (SECOND) OF JUDGMENTS § 663 (1982).

[59] *Id.*

[60] The Delaware Supreme Court has defined privity as pertaining to "the relationship between a party to a suit and a person who was not a party but whose interest in the action was such that he [or she] will be bound by the final judgment as if he or she were a party. *Bradley*, 582 A.2d at 478. An important discussion of privity in res judicata can be found in a persuasive federal district court case, *Goel v. Heller,* 667 F. Supp. 144 (D.N.J. 1987). In that case, the court held that a group of defendants were in privity with each other (and therefore entitled to res judicata) where the plaintiffs were clearly abusing the concept of privity to repeatedly bring substantially identical claims against closely associated defendants. As the court held in that case, the test of privity is whether there is a "close or significant relationship between successive defendants." *Id.* at 150.

[61] In *VanDeWalle v. Albion Nat. Bank,* 500 N.W.2d 566 (Neb. 1993), the Nebraska Supreme Court faced a situation much like that before this court. In that case, two brothers who were part of a particularly litigious family attempted to bring a suit in state court after their parents had already been defeated in federal court on the same claims. The court in that case, though it acknowledged that the plaintiffs in the two cases were different, barred the brothers' claims by res judicata, noting that "the facts remain that the parents and sons had a close, mutual, relationship with respect to the property and that all [the] suits arise out of the same occurrence." *Id.* at 506. The court concluded with the observation that "under the circumstances, the entire VanDeWalle clan is in privity for the purposes of these suits." *Id.*

allow already litigated claims to be passed from one generation of the Orloff family to another in the hope that some court, someday, will eventually grant relief. George Orloff's claims as to Rockridge Farm are therefore barred to the same extent as his mother's claims.

The remaining claims, Counts I, II, III, and VI, are not barred by res judicata. Some of the claims in these counts occurred after judgment in the New York action. Those claims, of course, are not barred. None of the other claims at issue arise from the same transaction as that alleged in the New York action. Examining the complaint filed in New York, the gravamen of the plaintiffs' argument there plainly centered around Rockridge Farm and accusations of excessive compensation and minority shareholder oppression under the New York statute. The claims at issue in this case arise from entirely different circumstances.

The disputed Mays transactions, for example, concern discrete transactions between the two companies controlled by the Shulmans that cannot be captured by either the general allegations of breaches of fiduciary duty in the New York action or the more specific counts as to Rockridge Farm. The same is true of those other transactions, such as the Westchester Foreign Autos lease, which occurred before the New York action. The court, therefore, cannot dismiss any of the plaintiffs' other claims on the basis of res judicata.

B. Laches

Of the claims remaining after the application of res judicata, the defendants argue that the plaintiffs' allegations as to the Mays transactions and as to the Westchester Foreign Autos lease are time barred. As the defendants correctly note, none of these claims accrued more recently than 1999, and claims for breach of fiduciary duty are governed by a three-year statute of limitations. Therefore, the defendants claim, the plaintiffs are barred by laches from bringing their claims for unreasonable delay.[62]

The equitable defense of laches, rooted in the basic sense that those seeking equity must not slumber on their rights, interacts strongly with the statute of limitations. As the Delaware Supreme Court has held, great weight is placed on analogous statutes of limitations in determining whether a plaintiff's claim should be barred by laches, or allowed to continue.[63] Indeed, Delaware courts have consistently held that analogous statutory provisions create a "presumptive time period for application of laches to bar a claim,"[64] thereby relieving courts of the need to conduct the traditional equitable test. When applied by a court of equity,

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[62] *United States Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc*., 677 A.2d 497, 502 (Del. 1996).
[63] DONALD J. WOLFE, JR. AND MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 11.5(c) (2005 ed.)
[64] *Id.*

however, the statute of limitations is not applied inflexibly or arbitrarily.[65] Thus, under the doctrine of equitable tolling, the statute does not run against the plaintiff until he or she had reason to know the facts alleged to give rise to the wrong.[66]

As to all the claims aside from those concerning the Levittown lease, the court concludes that the defendants have failed to establish their claim of laches because the plaintiffs have pleaded sufficient facts to show that they could not have brought these claims without the information gathered during the Section 220 action in 2004. The information was not available in any public way. Indeed, the plaintiffs allege that the defendants were engaged in a campaign of intentional disinformation towards the minority shareholders. It is true that Madeline Orloff was on the board of Weinstein until 2004, and therefore would normally be considered to have had access to crucial information. But in response, the plaintiffs advance well pleaded allegations that Madeline Orloff was misled in her directorial capacity, and that she was intentionally excluded from the affairs of Weinstein.[67] These allegations, if true, mean that Madeline Orloff would have been unable, exercising normal diligence, to extract sufficient information from Weinstein and the defendants to bring this complaint at an earlier date. A complaint that includes such allegations cannot be

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[65] Especially important is the concept that "fiduciaries who benefit personally from their wrongdoing, especially as a result of fraudulent self-dealing, will not be afforded the protection" of the statute of limitations. *Yaw v. Talley,* 1994 Del. Ch. LEXIS 35, *17-18 (Del. Ch. Mar. 2, 1994).

[66] WOLFE & PITTENGER, *supra* note 59.

[67] Compl. ¶ 6.

barred by laches on a motion to dismiss before discovery has established a factual record.

The allegations relating to the Levittown lease present different issues. As discussed, *infra*, the court concludes that those allegations do not state a claim for relief and, thus, must be dismissed under Court of Chancery Rule 12(b)(6). Even if this were not the case, however, the claim relating to the Levittown lease would be barred by laches. The 1983 renegotiation and assignment of the Levittown lease was a matter of public record in the Mays bankruptcy–a proceeding that was highly material to the Orloff family because of Weinstein's substantial holdings of Mays common stock, as well as Weinstein's status as lessor of a number of the Mays department store properties. It is simply implausible that the plaintiffs or their predecessors-in-interest either did not know or did not have sufficient information to cause them to inquire into the Mays bankruptcy and, more particularly, the terms of the Levittown lease assignment. To allow the plaintiffs now to litigate claims relating to this 22-year old transaction would serve only to weaken the important doctrine of laches, and the ideal of diligent prosecution that it represents.

C. Standing

As the defendants note, the Orloffs' decision to pursue this case is somewhat puzzling. The bulk of their former economic interest is now in the hands of the co-plaintiff, JWA, and the amount at issue is relatively minor in relation to the cash the

Orloffs have extracted from the sale of their stock.[68] The defendants argue that this constitutes the offense of champerty, which consists of "an agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds if they prevail; the champertor to carry on the suit at his own expense."[69] There is no reason to believe, however, that the plaintiffs have engaged in the type of conduct that would deprive them of standing. The Orloffs maintain a substantial financial stake in Weinstein. There are no calls outstanding against their stock, and anyone who wants to buy them out must pay the price at which the Orloffs value their stake. So long as they maintain that stake, and held stock at the time of the alleged breaches of duty, they may bring their claims before this court.[70]

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[68] JWA has standing to bring only the causes of action for Rockridge Farm and the Middle Bay Country Club. Because the Orloffs are proper derivative plaintiffs, the defendants' argument that JWA's action represents a "strike suit" making allegations about transactions prior to stock ownership is unavailing. Def.'s Opening Br. 51.

[69] *Gibson v. Gillespie,* 152 A. 589, 593 (Del. Super. 1928); *In re Emerging Comm., Inc. S'holders Litig.,* 2004 Del. Ch. LEXIS 70, *106 (Del. Ch. May 3, 2004).

[70] The formal nature of the stock ownership requirement is underlined by Chancellor Chandler's recent decision in *In re New Valley Corp. Deriv. Litig.,* 2004 Del. Ch. LEXIS 107 (Del. Ch. June 28, 2004). In that case, the court held that a current and long-term shareholder in the defendant lacked standing to bring a derivative claim because of a single five-month gap in his share ownership, during which he held only non-voting warrants. In reaching that decision, the court expressly rejected the plaintiff's argument that his long-term interest in the defendant vitiated the policy concern of abusive law suits behind the "iron-clad" continuous ownership rule. *Id.* at *13. As the court stated the rule, "a plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit." *Id.* The reverse proposition, as in this case, is also true. A shareholder who formally maintains continuous ownership generally has standing to bring a derivative claim, no matter how few shares he or she holds. *See also Dann v. Chrysler Corp.*, 174 A.2d 696, 699 (Del. Ch. 1961).

D. Breaches Of Fiduciary Duty And Waste

Taking into account only those claims which are not barred by res judicata, the plaintiffs allege in Counts I, II, III, V, and VI that the defendants breached their fiduciary duties and committed waste. Delaware's business judgment rule operates primarily as a presumption that directors making business decisions act in good faith, on an informed basis, and in the honest belief that their actions are in the corporation's best interest.[71] The burden is on the party challenging the decision[72] to allege particularized facts creating a reasonable doubt that (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.[73] One way of showing the latter is to allege that the defendants wasted corporate assets. But the standard for establishing a claim of waste is a high one. Indeed, it has been held that the test for finding waste of corporate assets is whether the consideration received by the corporation was so inadequate that no person of ordinary sound business judgment would deem it worth that which the corporation paid.[74] While this is not the

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[71] *Aronson v. Lewis,* 473 A.2d 805, 812 (Del. 1984).
[72] *Id.* at 812 (*citing Puma v. Marriot,* 283 A.2d. 693, 695 (Del. Ch. 1971)).
[73] *Aronson*, 473 A.2d at 815.
[74] RODMAN WARD, EDWARD P. WELCH, & ANDREW TUREZYN, FOLK ON THE DELAWARE GENERAL CORPORATION LAW, § 141.2.11 (2005 ed.); *Saxe v. Brady*, 184 A.2d 602 (Del. Ch. 1962).

impossibly stringent test urged on the court by the defendants,[75] merely poor, misguided, or loss-making transactions are insufficient for a finding of waste.

The complaint alleges that the defendants have violated their fiduciary duties and committed waste by approving what are alleged to be substantially below market transactions between Weinstein and Mays. The plaintiffs also point to a number of transactions between Weinstein and third parties as evidence of potential waste or breaches of fiduciary duty.

The court first considers the plaintiffs' claims as to the Levittown transaction. The plaintiffs' claim is that the defendants committed waste by "inexplicably" consenting to the assignment of the Mays Levittown store lease to Trade Town. Had they instead refused to consent, the plaintiffs allege, Weinstein could have secured all the excess revenue from the Levittown lease to itself, rather than sharing half with Mays.

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[75] The defendants insist that in order to state a claim for waste, a plaintiff must "demonstrate that the transaction served no corporate purpose or was so completely bereft of consideration as to constitute a gift." Def.'s Opening Br. 27. The source of this standard is the court's decision in *President & Fellows of Harvard Coll. v. Glancy*, 2003 Del. Ch. LEXIS, 25, *72 (Del. Ch. Mar. 21, 2003), which drew on Chancellor Allen's decision in *Lewis v. Vogelstein,* 699 A.2d 327, 336 (Del. Ch. 1997). Read in context, the cited language is merely an illustration of a typical claim of waste rather than the definition itself: "most often, the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received. Such a transfer is in effect a gift." *Id.* The actual legal standard for waste, as expressed in *Vogelstein*, is the traditional one: "an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Id.*

The record of the bankruptcy court's approval of the Levittown lease assignment (of which the court takes judicial notice), however, fatally contradicts the complaint's blithe allegation of misconduct. Indeed, a review and consideration of Mays's bankruptcy court petition requesting approval of the Levittown assignment clearly demonstrates that there was a real issue as to whether or not Weinstein would be able to recover any of the excess value of that lease . The bankruptcy record shows that the Levittown lease was recognized as a valuable asset of the estate. Thus, in its petition seeking authorization from the court to assume the lease and agree to the assignment, the burden was clearly on Mays to show that it was fair to Mays's creditors to pay half of the excess rents to its landlord, Weinstein. It is this dynamic that explains the reference in Mays's petition to an objection raised by counsel for Celwyn's minority shareholders (Celwyn being a subsidiary of Weinstein) during the lease reassignment negotiation process.[76]

What Mays hoped to show by including the objections raised by Celwyn in the record was not that the deal might be unfair to Celwyn, as the plaintiffs suggest, but that the deal reached was the best that Mays could achieve in the face of active opposition by someone other than the Shulmans. Because the Shulmans stood on both sides of the lease reassignment,[77] Mays's creditors might otherwise have been

[76] Fischer Aff. Ex. D at ¶ 12.
[77] The bankruptcy court papers show that Max Shulman approved the lease reassignment on behalf of Celwyn, and Lloyd Shulman signed on behalf of Mays. Fischer Aff. Ex. D ¶ 20.

justly suspicious that the lease reassignment had been engineered to shift revenue from Mays to Weinstein, and thus to shield assets from the bankruptcy proceeding.

In this context, the plaintiffs' bald assertion that the defendants wasted Weinstein assets by not insisting on even better terms from Mays and its creditors is simply insufficient to rebut the business judgment rule presumption as to the Levittown lease. The situation was obviously more complex than the complaint allows, and the directors' decision to authorize a compromise that secured a substantial advantage to Weinstein is plainly one within their sound business judgment. Indeed, even if the plaintiffs are ultimately correct in their allegations that the Shulmans later systematically moved revenue from Weinstein to Mays, such an action would have made no sense at all during Mays's bankruptcy, when any money shifted to Mays would have been available to repay creditors. The plaintiffs' allegations of fiduciary duty breach as to the Levittown property, therefore, must be dismissed for failure to state a claim.

Although some of the plaintiffs' remaining allegations are more serious than others, the court concludes that the plaintiffs have pleaded sufficient facts to sustain these allegations against a motion to dismiss. As to the transactions between Weinstein and Mays, the consideration secured for Weinstein from these transactions was troublingly low, in some cases less than 20% of what the plaintiffs allege was the fair market rate. Second, the Shulmans obviously stand on both sides

of the transaction, as controllers of both Weinstein and Mays. Given the possibility that the defendants might, for the self-serving reasons that the plaintiffs have alleged, prefer revenues and profits to be shifted from Weinstein to Mays, the court cannot dismiss these allegations at this stage in the proceeding.

The plaintiffs' allegations as to transactions with third parties and as to the vacant and loss-making properties, if true, together suggest a striking picture of financial mismanagement. The plaintiffs have alleged, for example, that the defendants have rented many of their properties to third parties for less than 20% of their market value, as measured against the rents charged for properties on the same streets. Although there may be legitimate reasons that explain such a disparity between the alleged market price and the price Weinstein collected, the size of the gap between the two numbers means that the court cannot say that a claim of waste or breach of fiduciary duty could not be proven at trial. It is equally unclear why the defendants would leave what appear to be viable plots on Jamaica Avenue entirely vacant for years at a time, rather than generating what revenue they could.

Some of the plaintiffs' other factual allegations, such as the defendants' alleged inaction in the face of the Middle Bay Country Club's breach of its lease with Weinstein, or the loss-making properties in Kansas City, appear more within the protection of the business judgment rule. If these allegations had appeared alone, the court might well have dismissed them for failure to state a claim. But in the

context of the plaintiffs' other allegations, where the plaintiffs seek to show a pervasive scheme through which Weinstein's management pursued actions designed to depress Weinstein's earnings, the plaintiffs should have the opportunity to conduct discovery into these claims. Ultimately, the plaintiffs' burden of proof on these matters remains high, especially where they seek to show waste. The defendants could have reasonable explanations for all of the alleged incidents of mismanagement. But at this stage, enough questions remain about the defendants' property transactions that the court cannot dismiss the plaintiffs' claims before discovery.

The same is not true of the plaintiffs' claim that the defendants violated their fiduciary duties by approving a bylaw amendment which provided for the advancement of legal fees during litigation. The law of Delaware is clear on the permissibility of advancing legal fees. This is especially true when, as here, the plaintiffs challenge the adoption of a bylaw that requires the corporation to advance litigation costs sometime in the future rather than challenging the directors' decision to advance particular litigation expenses.[78] Bylaw amendments mandating litigation advances are a fundamental part of Delaware's policy to encourage qualified people to serve as corporate directors. Moreover, as the Delaware Supreme Court has held,

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[78] Decisions to advance litigation costs in the absence of a bylaw mandate are governed by the business judgment of the board of directors. *Havens v. Attar,* 1997 Del. Ch. LEXIS 12 (Del. Ch. Jan. 30, 1997).

bylaw amendments are presumed to be valid unless they are unreasonable.[79] The plaintiffs have pleaded no facts which suggest that the bylaw amendment at issue is unreasonable in this case. Therefore, it is not subject to further scrutiny by this court.

Relatedly, the plaintiffs allege that the defendants have violated their fiduciary duties by approving an amendment to Weinstein's certificate of incorporation which includes a Section 102(b)(7) provision protecting the directors from personal liability for violations of due care. This action constitutes a violation of the defendants' fiduciary duties, according to the plaintiffs, because the directors knew they were in imminent danger of being sued and thus stood on both sides of the "transaction." The court has at least twice before rejected claims of this kind, noting that they are "but variations on the 'directors suing themselves' and 'participating in the wrongs' refrain."[80] Nor do the plaintiffs' allegations in this complaint allege particularized facts creating a reasonable doubt that the directors were disinterested or independent when they made their decision to approve the certificate amendment. In the absence of such facts, the directors' decision to adopt a Section 102(b)(7)

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[79] *Frantz Mfg. Co. v. EAC Indus.,* 501 A.2d 401 (Del. 1985).
[80] *Decker v. Clausen,* 1989 Del. Ch. LEXIS 143 (Del. Ch. Nov. 6, 1989), *8; *Caruana v. Saligman*, 1990 Del. Ch. LEXIS 210, *11 (Del. Ch. Dec. 21, 1990) .

provision, which was later approved by the shareholders, does not provide any reason to depart from the court's settled precedent.[81]

Finally, the plaintiffs allege that the defendants violated their fiduciary duties by making false disclosures to the Orloffs, which, had they been truthful and complete, would have allowed the plaintiffs to mitigate the losses they attribute to the defendants' alleged mismanagement of Weinstein. The Delaware Supreme Court has held that claims for a breach of fiduciary duty of disclosure can only arise when the defendant has made statements to the corporation's stockholders in connection with a request for stockholder action.[82] Of course, the statements in this case were not made in connection with any kind of corporate action, such as in a proxy statement. The courts have been willing, however, to allow plaintiffs to plead fraudulent disclosures under the rubric of the duty of loyalty.[83]

To successfully state a duty of loyalty claim against directors for providing information in the absence of a request for stockholder action, a stockholder must allege that he received "false communications" from directors who were "deliberately misinforming shareholders about the business of the corporation."[84] In this case, the plaintiffs have pleaded sufficient facts claiming that the defendants

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[81] *Caruana,* 1990 Del. Ch. LEXIS at *11.

[82] *Steinman v. Levine,* 2002 Del. Ch. LEXIS 132, *46-47 (Del. Ch. Nov. 27, 2002), *aff'd* 822 A.2d 397 (Del. 2003).

[83] *Id.*

[84] *Jackson Nat'l Life Ins. Co. v. Kennedy,* 741 A.2d 377, 389 (Del. Ch. 1999).

misled the Orloff shareholders. The alleged fraudulent appraisal of the Orloffs' shares, for example, could have, but did not, persuade the Orloffs to sell their shares at an insufficient price. As for the 2003 document that allegedly misstates the size of certain properties, the faulted disclosures could have been, but were not, material in keeping the minority shareholders quiescent while funds were shifted from Weinstein to Mays. In sum, therefore, the plaintiffs' allegations, if true, could demonstrate a violation of the defendants' duty of loyalty to the plaintiffs.

IV.

For the foregoing reasons, the defendants' motion to dismiss pursuant to Rule 12(b)6 is GRANTED as to Counts IV and V, GRANTED IN PART AND DENIED IN PART as to Count I, and DENIED as to Counts II, III, and VI. IT IS SO ORDERED.