**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| MARK ZIMMERMAN, Derivatively on behalf of Nominal Defendant PRICELINE.COM INCORPORATED, | : | |
| Plaintiff, | : | |
| v. | : | **C.A. No.** 18473-NC |
| RICHARD S. BRADDOCK, JAY S. WALKER, DANIEL H. SCHULMAN, PAUL A. ALLAIRE, RALPH M. BAHNA, PAUL J. BLACKNEY, WILLIAM E. FORD, MARSHALL LOEB, N. J. NICHOLAS, JR. and NANCY B. PERETSMAN, | : | |
| Defendants, | : | |
| and | : | |
| PRICELINE.COM INCORPORATED, a Delaware corporation, | : | |
| Nominal Defendant. | : | |

**MEMORANDUM OPINION**

Date Submitted: April 23, 2002
Date Decided: December 20, 2002

R. Bruce McNew, Esquire of Taylor & McNew, Greenville, Delaware; Robert B. Weiser, Esquire and Eric L. Zager, Esquire of Schiffrin & Barroway, LLP, Bala Cynwyd, Pennsylvania, Attorneys for Plaintiff.

Bruce L. Silverstein, Esquire, Christian Douglas Wright, Esquire, and Danielle Gibbs, Esquire of Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware; Evan R. Chesler, Esquire and Daniel Slifkin, Esquire of Cravath, Swaine & Moore, New York, New York, Attorneys for Defendants priceline.com incorporated, Richard S. Braddock and Daniel H. Schulman.

Anne C. Foster, Esquire and Catherine G. Dearlove, Esquire of Richards, Layton & Finger, Wilmington, Delaware, Attorneys for Defendants Jay S. Walker, Paul A. Allaire, Ralph M. Bahna, Paul J. Blackney, William E. Ford, Marshall Loeb, N. J. Nicholas, Jr. and Nancy B. Peretsrnan; Martin Glenn, Esquire of O'Melveny & Myers LLP, New York, New York, Attorney for Defendant Jay S. Walker; Steven B. Rosenfeld, Esquire of Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, Attorney for Defendant William E. Ford; Sheldon H. Elsen, Esquire of Orans, Elsen & Lupert LLP, New York, New York, Attorney for Defendant Marshall Loeb.

NOBLE, Vice Chancellor

Plaintiff Mark Zimmerman (the "Plaintiff') initiated this shareholder derivative action on behalf of the Nominal Defendant priceline.com Incorporated ("priceline" or the "Company") against Defendants Richard S. Braddock ("Braddock"), Jay S. Walker ("Walker"), Daniel H. Schulman ("Schulman"), Paul A. Allaire ("Allaire"), Ralph M. Bahna ("Bahna"), Paul J. Blackney ("Blackney"), William E. Ford ("Ford"), Marshall Loeb ("Loeb"), N. J. Nicholas, Jr. ("Nicholas"), and Nancy B. Peretsman ("Peretsman") (collectively, the "Individual Defendants"), who along with Heidi G. Miller ("Miller"), constituted priceline's board of directors (the "Board') at the time of the original complaint.'

Plaintiff alleges in his June 21, 2001, Amended Derivative Complaint (the -"Complaint") that Braddock, Walker, and Nicholas (collectively, the "Selling Defendants") breached their fiduciary duties by engaging in insider trading and misappropriating confidential corporate information. Furthermore, the Complaint asserts that the Individual Defendants, in their failure to exercise good faith and loyalty in the performance of their duties, including the dissemination of misleading information regarding the Company, have proximately caused significant harm to the Company in litigation claims, the repricing of certain warrants, and the loss of goodwill

[1] Plaintiff is, and has been at all relevant times, a shareholder of priceline.

in the marketplace. Finally, the Plaintiff claims that, as no consideration was received, the Selling Defendants' use of priceline's confidential information during the course of their alleged insider trading, and the Individual Defendants' failure to act, constituted corporate waste. Because of the damages sustained by the Company, Plaintiff seeks the imposition of a constructive trust over the profits reaped by the Selling Defendants and damages from the Individual Defendants for the alleged breaches of fiduciary duties and acts of corporate waste.

The Individual Defendants have moved to dismiss this action pursuant to Court of Chancery Rules 23.1 ("Rule 23.1) and 12(b)(6) ("Rule 12(b)(6)"). They contend that the Plaintiff has failed to plead particularized facts excusing his failure to make a demand upon the Board. Furthermore, even if demand is excused, the Individual Defendants argue that the allegations of the Complaint fail to state a claim upon which relief can be granted.

As set forth in this memorandum opinion, I conclude that the Plaintiff has not alleged sufficient facts with particularity to excuse demand and, therefore, this action must be dismissed under Rule 23.1.

## 1. BACKGROUND

*A. The Company*

Priceline, a Delaware corporation with executive offices in Connecticut, was founded by Walker in July 1997 and began operations in April 1998. The Company principally provides a self-described "Name Your Own Price" Internet pricing system. Using this system, customers can establish the price of travel, automotive, home finance, and telecommunications products they seek to purchase. The Company's stock, since a successful March 1999 initial public offering, has been traded on the NASDAQ.

The origins of the "Name Your Own Price" technology lie in another Walker-founded venture. In 1998, Walker Digital Corporation ("Walker Digital"), a privately-held "think tank" founded by Walker, developed and patented the "demand collection system," an e-commerce pricing system that is the basis of the "Name Your Own Price" technology.[2] After being licensed to priceline by Walker Digital, the technology was first harnessed to sell airline tickets, a product which by May 2001 still generated 98% of

[2] Through the demand collection system, as implemented with the "Name Your Own Price" technology, priceline satisfies consumer demand collected over the Internet. Customers convey offers, guaranteed by a credit card and held open for a specified period of time, for a particular product or service. Priceline then communicates such offers directly to participating sellers or determines, from accessing participating sellers' private databases, whether the offer can be met.

priceline's revenues. The demand pricing system purportedly creates value by "enabl[ing] consumers to use the Internet to save money on products and services while at the same time enabling sellers to generate increased incremental revenue."[3]

*B. Individual Defendants and Interconnected Companies*

The licensing of the demand collection system by Walker Digital to priceline is not the only instance of a connection between priceline and a business entity of one of the Individual Defendants. In fact, a review of the myriad linkages alleged among priceline, the Individual Defendants, and companies affiliated with the Individual Defendants, is necessary to understand the basis for the Plaintiffs claims and my decision regarding whether demand is excused.

1. Walker

Walker was the driving force in the evolution of priceline. In addition to founding priceline, Walker served as the Company's Chief Executive Officer (until August 1998) and Vice Chairman of the Board (from August 1998 until January 2001). Walker, also, was the founder of and "is the largest equity owner and the Chairman of the Board [of Directors] of Walker

[3] Pl.'s Compl. ¶ 27.

Digital."[4] In turn, Walker Digital owned approximately 35% of priceline at the time (November 1, 2000) the initial complaint was filed in this action.[5] In addition to his ongoing involvement with Walker Digital, Walker serves as the non-executive Chairman of the Board of Directors of the Synapse Group, Inc. ("Synapse"). Synapse, co-founded as NewSub Services, Inc. ("NewSub") in 1992 by Walker and Michael Loeb,[6] is a privately-held direct marketing firm through which priceline offers magazine subscription services. Walker owns approximately 11.5% of Synapse.[7]

2. Braddock

Braddock, one of priceline's original investors, has served as Chairman of the Board (since August 1998) and as Chief Executive Officer (resuming his duties after the termination of Schulman in May 2001). Braddock had previously served as Chief Executive Officer from August 1998 through May 2000, when he resigned as Chief Executive Officer to spend more time with Walker Digital. "Braddock is a director and one of the largest equity owners of Walker Digital, having personally invested at

[4] Id. ¶ 7. Significantly, the Plaintiff never states what percentage of Walker Digital equity is controlled by Walker.
[5] *Id.* ¶ *6.*
[6] *Id.* ¶ 13. Michael Loeb is the son of Defendant Loeb.
[7] *Id.* ¶ *8.*

least $20 million in Walker Digital."[8] Like Walker, in addition to his involvement with Walker Digital, "Braddock is also a substantial equity owner and director of [Synapse]."[9] In 1999, Braddock received options to purchase an underlying 35,000 shares of Synapse common stock, at a strike price of $8.00 per share (the "Synapse Options").

Braddock's involvement with the connected business entities does not end with Walker Digital and Synapse. Braddock also serves as a director of WebHouse Club, Inc. ("WebHouse"), a privately-held, "Name Your Own Price" website for groceries and other retail items which figured significantly in priceline's attempt to diversify the products it offered. WebHouse was an independent licensee of priceline; in consideration for the Company's licensing its name and business model, WebHouse agreed to a royalty arrangement and granted a fully-vested, non-forfeitable warrant to the Company to acquire a majority stake of WebHouse, exercisable under certain conditions (the "WebHouse Warrant"). Walker Digital owned a 34% stake in WebHouse.[10] Braddock also served as a special advisor to General

[8] ***Id.*** ¶ 6. Again, significantly, the Plaintiff fails to note the percentage of Walker Digital equity controlled by Braddock.
[9] ***Id.***
[10] ***Id.***

Atlantic Partners, LLC ("General Atlantic"), and invested (as a limited partner) in several General Atlantic partnerships."

3. Nicholas

Nicholas, the third of the Selling Defendants, is connected to both the Company and Synapse. He has been a director of priceline since July 1998. Additionally, he serves a director of Synapse and, either personally or through affiliated entities, "is also a substantial equity owner of Synapse."[12] Like Braddock, Nicholas was granted the Synapse Options.[13]

4. Blackney

Blackney has been a director of priceline since July 1998. Furthermore, Blackney serves as President and Chief Executive Officer of Worldspan LP ("Worldspan"), a position he has held since October 1999. Worldspan is a privately-held, global travel distribution system ("GDS") and was the exclusive GDS booking agent for customers of priceline.[14] "Priceline entered into an amendment to its subscriber agreement with

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[11] Braddock's relationship with General Atlantic is significant because Ford, another priceline director, is Managing Member of General Atlantic. In addition, Braddock and Ford serve together as directors of E*Trade Group, Inc., a company that has a marketing agreement with priceline.

[12] Pl.'s Compl. ¶ 8.

[13] Nicholas also serves on the board of directors of Xerox Corporation ("Xerox"). Allaire, another priceline director, is the Chairman of Xerox's board of directors and its Chief Executive Officer.

[14] During the period 1998-2000, priceline sold in excess of 6,000,000 airline tickets through Worldspan. In 1998, Worldspan's revenues equaled $637.3 million.

Worldspan pursuant to which Worldspan paid [p]riceline three million dollars. . . in exchange for [p]riceline's committing to a certain minimum volume of bookings for the five year term of the agreement."" As such, priceline remains one of Worldspan's "biggest clients."[16]

5. Ford

Ford has been a director of priceline since July 1998, and also serves on the boards of both Walker Digital and Synapse.[17] Additionally, he is Managing Member of General Atlantic. General Atlantic has actively invested in priceline and entities connected to various Individual Defendants. During the course of 1998, General Atlantic purchased 21,58 1,059 shares of priceline stock." It then sold 6,567,130 shares of priceline common stock, for $356,555,000, during January and February of 2000.[19] General Atlantic also owns 17.5% of privately-held Synapse.[20]

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[15] Pl.'s Compl. ¶ 11.

[16] *Id.*

[17] Like Braddock and Nicholas, Ford received the Synapse Options.

[18] This investment occurred in three separate transactions. In February 1998, an affiliate of General Atlantic purchased from priceline 2854,875 shares of priceline common stock at $.70 per share. Next, in August 1998, "two partnerships affiliated with General Atlantic purchased 17,288,684 of [p]riceline stock" during the Company's second round of private financing at a price per share of $1.16. Lastly, in December 1998, "two partnerships affiliated with General Atlantic purchased 1,437,500 shares of [p]riceline stock" in the Company's third round of private financing at a per share price of $4.00. Pl.'s Compl. ¶ 12.

[19] *Id.*

[20] *Id.* General Atlantic affiliates had invested in excess of $59 million in NewSub. *Id.*

Finally, General Atlantic also has invested in privately-held priceline.com Europe.

6. Peretsman

While Peretsman has served as a director of the Company since February 1999, the Plaintiff alleges that her principal professional occupation is that of Managing Director and Executive Vice-President of Allen & Company, Inc. ("Allen & Co."), an investment banking firm. Peretsman had previously served as a director of NewSub and currently serves as a director of Synapse."

Allen & Co. has had significant financial dealings with priceline and companies connected to the Individual Defendants. It purchased 275,000 shares of priceline stock, at $4.00 per share, in priceline's third round of private financing (completed on December 8, 1998), and received $850,000 in consulting fees from the Company in 1999. Allen & Co. has also provided services to Synapse. It was scheduled to be one of the lead underwriters in the initial public offering planned for Synapse, an offering eventually canceled in December 2000. Synapse also generated for Allen & Co. $750,000 in consulting fees. Finally, "Allen & Co[.] was an investor in

[21] Peretsman, along with Braddock, Wallace, Nicholas and Ford, collectively constitute a majority of the Synapse board of directors. Peretsman, as did Braddock, Nicholas, and Ford, received the Synapse Options.

NewSub and, along with Peretsman, is one of the largest equity owners of Synapse."**

Peretsman, and the entities with which she is affiliated, sold 204,641 shares of priceline common stock, for proceeds of $15,225,807 in March and April of 2000.

7. Loeb

Loeb has been a director of the Company since July 1998. Additionally, Loeb was an equity investor in NewSub, a company that his son, Michael Loeb, co-founded with Walker, who is now its chairman, Michael Loeb is now an employee of Synapse. Loeb has also invested in excess of $3 million in Synapse. Both Loeb and his son are affiliated with the Loeb Family Limited Partnership, an entity that owns approximately 8.23% of Synapse.[23]

8. Schulman

Schulman served as President, CEO and director of priceline until his termination in May 2001.[24] Upon starting work at the Company, on June 14, 1999, Schulman and priceline entered into an employment agreement (the

[22] Pl.'s Compl. ¶ 14.
[23] *Id.* ¶ 13.
[24] Schulman, who was appointed Chief Executive Officer in June 2000, had served as a director of priceline starting in July 1999.

"Schulman Agreement"). The terms of the Schulman Agreement established that Schulman reported directly to Braddock, was to receive a minimum base salary of $300,000 annually, was granted 3,000,000 options to purchase priceline common stock, and was loaned $6,000,000 by priceline.[25]

9. Miller

Miller, who is not a defendant in this action, served as the Chief Financial Officer and as a director of priceline for the period of February through November 2000, when she resigned. Plaintiff alleges that at the time of the filing of the original complaint, this employment at priceline was Miller's principal profession. Miller entered into an employment agreement with the Company on February 18, 2000 (the "Miller Agreement"). The Miller Agreement provided that Miller would report directly to Braddock, would receive a minimum base salary of $300,000 annually, would receive 2,500,000 options to purchase priceline common stock, and would be loaned $3,000,000 by priceline.[26]

[25] Priceline subsequently (during the fourth quarter of 2000) forgave the loan in its entirety.

[26] This loan, like that to Schuhnan, was forgiven in its entirety in November 2000.

10. Allaire

Allaire has served as a director of priceline since February 1999. He also is the Chairman of the Board and Chief Executive Officer of Xerox.

11. Bahna

Bahna has served as a director of the Company since July 1999.

* * *

Thus, many of the Individual Defendants can be connected to one another through various entities outside of priceline. These entities, in turn, often have significant business dealings with, or own a percentage interest in, priceline.

*C. Problems Emerge*

Although priceline enjoyed initial success, at least as measured by the market's reception of its initial public offering and subsequent trading activity, the Company soon recognized that it would need to diversify the product base embraced by its 'Name Your Own Price" system to encompass more than airline tickets.[27] Therefore, during September 1999, it was announced that groceries would be available for "Name Your Own Price" purchasing at WebHouse, starting November 1, 1999, in New York City. Walker publicly commented on the future growth prospects of priceline and

[27] In September 1999, airline tickets accounted for 92% of priceline's revenue.

WebHouse, noting that priceline "will continue its rapid growth in the travel, financial services and automotive sectors while the WebHouse Club focuses its resources entirely to the retail-store segment of buyer-driven commerce."[28] WebHouse's strategic role went beyond that of diversifying the product base; Wall Street analysts and Company executives viewed WebHouse as a test for the scalability of the priceline business model. Positive remarks flowed from priceline management.[29]

While self-congratulatory praise abounded, what investors could not gather were hard facts regarding the financial condition of WebHouse. Despite only realizing $33,777 in revenues from royalties pursuant to the WebHouse licensing structure, priceline recognized $188.8 million in income (the WebHouse Warrant's estimated fair value) upon the receipt of the WebHouse Warrant in the fourth quarter of 1999. Because WebHouse was privately-held, investors (and those interested in priceline's convertible interest in WebHouse) needed to rely solely upon information provided by

[28] Pl.'s Compl. ¶ 34 (quoting Sept. 21, 1999, Company press release).

[29] Walker publicly stated that "'[t]he rapid expansion of [WebHouse]'s grocery service . . . demonstrates the scalability of [WebHouse].'" Id. ¶ 37 (quoting a June 8, 2000, Company press release). A July 25, 2000, priceline press release claimed that WebHouse was "'America's leading Internet service for groceries.'" Id. ¶ 44. Walker also noted during an August 1, 2000, conference call that "WebHouse would achieve positive gross margins in both groceries and gasoline by the end of the year," and that he believed that "'[WebHouse] demonstrates yet again just how scalable the [priceline] business model really is.'" Id. ¶ 45.

priceline. And what that information allegedly masked was the failure of WebHouse. Around January 2000, senior management at WebHouse and Braddock voiced concerns regarding technological, financial, and conceptual problems with WebHouse.[30] Yet, WebHouse's launch continued at its scheduled pace. The Plaintiff alleges that the reason why WebHouse was launched, and the reason why the Synapse-WebHouse Agreement was entered into, was that, "despite the serious concerns raised by both senior WebHouse management and Braddock . . . due to the power that Walker exercised over both [p]riceline and WebHouse, his vote was the only vote that counted."[31]

Adding to priceline's woes was increased competition from the airlines themselves. On June 29, 2000, six major carriers announced the creation of a new online ticket service at Hotwire.com ("Hotwire"). While essentially offering surplus airline seats at cheap prices, much like priceline, Hotwire allowed greater consumer choice as now customers could designate

[30] An example of the troubles plaguing WebHouse cited by the Plaintiff was the "partnership agreement" entered into between WebHouse and Synapse (the "Synapse-WebHouse Agreement"). Synapse was to solicit consumers into trial magazine subscriptions in exchange for tokens redeemable for savings at WebHouse. Yet while customers signed up, and thus received the tokens for WebHouse, they did not renew their subscriptions. Furthermore, these "token users" were not returning to WebHouse once the "token savings" were expended. This deal was struck at Walker's insistence and despite the objections of WebHouse managers. Id. ¶¶ 48-50.

[31] *Id.* ¶ *47.*

the specifics of their flight and dictate a set price.[32] Other 'travel websites that did not use the "Name Your Own Price" bidding concept also arose.[33]

*D. The Alleged Wrongful Conduct*

The Plaintiff contends that from March 1999 through September 2000, "the Individual Defendants made a series of inaccurate and misleading public statements regarding [p]riceline's financial condition, business, and future growth prospects,"[34] allegedly in the face of the known reality that the Company "could not match the hyper-aggressive public guidance.. . provided to Wall Street."[35] Walker is alleged to have minimized the threat of the increased competition from Hotwire and other travel websites.[36] Plaintiff contends that, while stating publicly that priceline would achieve profitability imminently or in the near future,[37] the Individual Defendants "knew that [p]riceline's revenues and earnings were under tremendous pressure due to, *inter alia*, increased competition and loss of customers."[38]

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[32] Priceline "require[d] customers to commit to purchasing tickets before knowing the exact scheduled time of departure, scheduled time of arrival, and other material details." *Id.* ¶ *52.*

[33] Examples include Expedia.com and Travelocity.com.

[34] Pl.'s Ans. Br. in Opp'n to Defs.' Joint Mot. to Dismiss at 3.

[35] *Id.* at 4.

[36] For example, Walker predicted that "Hotwire would 'not really' compete with [p]riceline because Hotwire 'is not a name your own price website."' Pl.'s Compl. ¶ 54 (quoting a June 29, 2000, interview on the Fox News Network).

[37] For example, Schulman claimed that priceline was "'rounding the final turn and on the home stretch towards profitability."' *Id.* ¶ *58.* Miller told *Bloomberg* News that "'[p]riceline could be profitable now, but we are investing in our growth."' *Id.* ¶ *59.*

[38] Pl.'s Ans. Br. in Opp'n to Defs.' Joint Mot. to Dismiss at 3.

Also regarding priceline's business condition, the Plaintiff alleges that the Individual Defendants portrayed the Company's customer base as satisfied and growing,[39] when in fact the Individual Defendants knew of increasing customer dissatisfaction and a shrinking customer base. Moreover, the Individual Defendants allegedly made misleading public misstatements regarding the prospects of the critical WebHouse venture; the Individual Defendants publicly stated that WebHouse had been successful, thereby demonstrating the scalability of the priceline business model.[40] In fact, the Individual Defendants were aware of technological, financial and conceptual problems experienced by WebHouse. Thus, the Plaintiff complains that numerous misleading statements were made to the public regarding the business condition and prospects of priceline.[41]

This series of misleading statements ultimately afforded the Selling Defendants the opportunity about which Plaintiff now principally complains.

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[39] For example, Schuhnan noted that priceline "'continue[d] to attract record new customers, but even more importantly, our loyalty among existing customers is accelerating."' Pl.'s Compl. ¶ 58. He later noted in a July 24, 2000, interview with Fox News, that priceline is "'really focused on assuring that we have the best value proposition-a unique one that generates great satisfaction for customers."' Id. ¶ 60.

[40] *See supra* note 29. Additionally, Schuhnan claimed "'[p]riceline has a wonderful model.. . . That type of model would play exceptionally well in a downturned economy. "' Pl.'s Compl. ¶ 59 (quoting a July 24, 2000, appearance on CNBC financial news network).

[41] Plaintiff also complains that the Individual Defendants made misleading public statements that they were "'very comfortable"' with priceline's condition and future. *Id.* ¶ 71(f).

In August and September of 2000, the Selling Defendants collectively sold in excess of 10 million shares of the Company's stock, reaping collective proceeds of more than $247 million.[42] These sales were executed based on material, non-public information concerning the truth about the Company's profitability and customer base, the increased competition facing the Company, and the troubles besetting WebHouse. In particular, it is alleged that Walker needed to inflate the market value of his priceline holdings in order to use the proceeds from the sales executed at artificially high levels to support WebHouse.[43]

Soon after the completion of the alleged insider trading by the Selling Defendants, the market learned the truth regarding the Company's condition. On September 27, 2000, the Company warned that its revenues and earnings would fall short of Wall Street's projections? On October 5, 2000,

[42] The Plaintiff alleges that on August 1, 2000, Walker sold 8 million shares of priceline's common stock, netting $190 million. That same day, Nicholas exercised 200,000 priceline options (at $0.80 per share), and then sold 100,000 shares of priceline's common stock for $2,519,000. The following day, acting as trustee of a family trust, Nicholas sold another 100,000 shares of priceline's common stock, earning $2,532,000. On August 15, 2000, Braddock exercised his priceline options (at $0.80 per share) and then sold 72,000 shares of priceline's common stock, for proceeds of $1,764,720. The next day, Braddock again exercised priceline options (at $0.80 per share) and sold 28,000 shares of priceline's common stock for proceeds of $692,160. Walker sold another 2 million shares of priceline's common stock, this time for a total of $50 million, on September 11, 2000. Id. ¶¶ 61, 62, 69, 70.

[43] *Id.* ¶ 55.

[44] Upon this release, priceline's stock plummeted 42% to establish a 52-week low of $10.75 per share.

priceline announced that WebHouse would be suspending operations for 90 days.[45] Therefore, the Plaintiff concludes that because of the materially inaccurate and misleading statements made by the Individual Defendants, priceline has suffered damages in the form of the profits reaped by the Selling Defendants who allegedly engaged in insider trading, liability and costs incurred in connection with defending securities suits, and a deterioration of the Company's goodwill.[46]

## 2. ANALYSIS

Plaintiffs failure to make a demand upon the Board prior to initiating this action necessitates a threshold inquiry into whether the particularized facts alleged in the Complaint demonstrate that demand would have been futile. A fundamental precept of Delaware corporate law is that the board of directors, not the shareholders, manages the corporation;[47] this managerial autonomy for decision-making extends to the determination to initiate litigation to vindicate the rights of the corporation.[48] Rule 23.1, regulating the encroachment on management's sphere of decision-making presented by

[45] The day of this release, priceline's stock plunged another 38% to close at 5 13/16.
[46] Plaintiff contends that another consequence of the misleading stockholders was a $9 million charge absorbed by priceline for re-pricing warrants held by Delta Airlines. Pl.'s Compl. ¶ 92.
[47] 8 *Del. C.* $141(a).
[48] *White v. Panic, 783* A.2d 543, 546-47 (Del. 2001)

shareholder derivative suits, has been characterized as the "procedural embodiment of this substantive principal."[49]

Rule 23.1, in pertinent part, provides:

> In a derivative action brought by 1 or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall.. . *allege with particularity* the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiffs failure to obtain the action or for not making the effort.[50]

However, a complaining shareholder need not always make a demand upon a corporation's board of directors. In this case, because the Complaint alleges that the Company's directors breached their fiduciary duties by failing to act, as opposed to a conscious decision to act or abstain from acting, the proper test for determining demand futility is "whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board

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[49] *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993). Rule 23.1 is designed, among other things, to provide the corporation with the opportunity to address the alleged wrong without litigation and to bestow control over the litigation if such litigation is indeed brought for the corporation's benefit. ***In re Delta & Pine Land Co. S'holders Litig., 2000*** WL 875421, at *5 (Del. Ch. June 2 1, 2000).

[50] Emphasis added.

of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."[51]

Critical to my resolution of this case is the particularity requirement of Rule 23.1. "Pleadings in derivative suits . . . must comply with stringent requirements of factual particularity that differ substantially from the permissive notice pleadings governed solely by Chancery Rule 8(a)."[52] In deciding whether demand is excused, I am limited to those particularized facts alleged in the Complaint, not those set forth only in the briefs.[53] Furthermore, at this stage in the proceedings, I accept as true the particularized facts of the Complaint, and the Plaintiff is entitled to all reasonable logical inferences drawn from those particularized facts.[54] However, "conclusory allegations are not considered as expressly pleaded facts or factual inferences."[55] With these standards in mind, I turn to deciding whether the Complaint has set forth such particularized facts so as to excuse the demand requirement of Rule 23.1.

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[51] *Rales*, *634* A.2d at 934.
[52] *Brehm v. Eisner,* 746 A.2d 244,254 (Del. 2000) (citations omitted).
[53] *Orman v. Cullman*, 794 A.2d 5, 28 n.59 (Del. Ch. 2002). For example, Plaintiff asserts in his brief that he "has alleged that Walker is the . . . *majority* equity owner of Walker Digital." Pl.'s Ans. Br. in Opp'n to Defs.' Mot. to Dismiss at 13 (citing Pl.'s Compl. ¶¶ 6-7) (emphasis added). The paragraphs of the Complaint referenced by Plaintiff allege, instead, only that Walker is the "largest equity owner" of Walker Digital.
[54] *Pogostin v. Rice, 480* A.2d 619, 622 (Del. 1984), *overruled on other grounds, Brehm,* 746 A.2d. 244.
[55] *Brehm, 746* A.2d at 255.

At the time of the filing of the original complaint, the Company's board consisted of eleven directors.[56] Thus, in order to excuse demand as futile, Plaintiff must allege particularized facts raising a reasonable doubt as to the independence or disinterestedness of at least six of the Company's directors. Because I find that the allegations set forth in the Complaint have not done so, Defendants' motion to dismiss under Rule 23.1 is granted.[57]

"Directorial interest exists whenever divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders."[58] Defendants do not dispute for the purposes of this motion that the three Selling Defendants are interested in light of the Complaint's allegations that they wrongfully profited by trading on inside information. Because Plaintiff does not argue that any of the eight remaining directors are interested for purposes of demand excusal analysis,[59] I turn to an assessment of the particularized facts in the Complaint to determine if they raise a

[56] In addition to the ten directors named as defendants in this case, the eleventh director of priceline at the time this action was initiated was Miller.
[57] Thus, I need not address Defendants' motion to dismiss under Rule 12(b)(6).
[58] *Pogostin,* 480 A.2d at 624 (citing *Aronson v. Lewis, 473* A.2d 805, 812 (Del. 1984)).
[59] See Pl.'s Ans. Br. in Opp'n to Defs.' Joint Mot. to Dismiss at 1 I-28.

reasonable doubt as to the independence of those directors from the interested Selling Defendants.[60]

"Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[61] In arguing that at least six of the remaining eight directors are not dependent for the purposes of this inquiry, Defendants assert that Plaintiff has failed to demonstrate that the interested directors held the power to control "unilaterally" the positions, dealings, and holdings of many of the remaining directors. In support of this argument, Defendants point to *Orman v. Cullman* for the proposition that:

> A director may be considered beholden to (and thus controlled by) another when the allegedly controlling entity has the *unilateral* power (whether direct or indirect through control over other decision makers), to decide whether the challenged director continues to receive a benefit, financial or otherwise, upon which the challenged director is so dependent or is of such subjective material importance to him that the threatened loss of that benefit might create a reason to question whether the controlled director is able to consider the corporate merits of the challenged transaction objectively.[62]

Contrary to Defendants' unduly restrictive reading of the above quoted passage, *Or-man* is clear in providing that a director's independence may be

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[60] Plaintiff does not offer any argument that the alleged misstatements of the Individual Defendants affect the determination of whether demand was necessary. See *id.*

[61] *Aronson, 473* A.2d at 816.

[62] *Oman, 794* A.2d at 25 n.50 (emphasis added).

called into question when the allegedly controlling director 'has the power, whether solely in his own capacity or in conjunction with others who share his purpose, to exert pressure on the challenged director of such a nature as to compromise that challenged director's ability to consider the merits of a demand for suit objectively.[63]

The Plaintiffs arguments can be generally characterized as asserting that the Selling Defendants exerted control over a majority of the Board through various interconnected entities controlled or dominated by the Selling Defendants. Of course, this line of argument presumes that the ***particularized facts*** of the Complaint establish that such entities were, in fact, controlled or dominated by the Selling Defendants, individually or collectively. Thus, my resolution of demand futility begins with a determination of which, if any, entities have been shown by the Plaintiffs particularized facts to be controlled or dominated by the interested Selling Defendants.[64]

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[63] ***Id.; see also Telxon Corp. v. Meyerson, 802*** A.2d 257,264 (Del. 2002).

[64] As stated previously, the Defendants do not contest that Walker and Braddock, along with Nicholas, are interested for the purposes of this motion. The discussion that follows focuses on the allegations in the Complaint as to Walker and Braddock's investments, positions, relationships, and dealings in order to lay the necessary foundation for my analysis of the independence of the remaining directors vis-tvis Walker and Braddock. Because Plaintiff does not seriously argue that Nicholas controlled or dominated the business affairs of priceline or the members of the Company's board, the specific allegations as to Nicholas' dealings are not discussed separately in this section. Instead, any relevant allegations about Nicholas are explored in my analysis of the director

*A. Entities Controlled by the Selling Defendants*

The particularized facts of the Complaint, and the reasonable inferences drawn therefrom, fail to establish that the Selling Defendants directly or indirectly controlled priceline. The Plaintiff alleges in the Complaint that Walker was the Company's founder and that he served first, as the Company's Chief Executive Officer until August 1998, and, second, as the Vice-Chairman of the Board from August 1998 until January 2001. The Complaint, however, is silent as to Walker's personal equity interest in priceline. The Complaint also sets forth that Braddock, a long-serving director of priceline who has served as the Company's Chairman of the Board since 1998, is the Company's Chief Executive Officer, having resigned in May 2000, and having been subsequently reinstated approximately six months before the initiation of this action. Additionally, he is also alleged to have been one of the Company's "original investors." However, the Complaint, as with its treatment of Walker, contains no allegations as to Braddock's specific personal equity interest in priceline. Finally, Nicholas is merely alleged to serve as a director of the Company.

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defendants who are alleged to have been under the control of the Selling Defendants, including Nicholas.,

As such, the Complaint fails to state any particularized facts from which I can draw the inference that the Selling Defendants directly controlled priceline. I am unable even to fathom a guess as to what percentage of priceline is owned by the three interested directors. Furthermore, their positions alone are not sufficient to exert control over the Company? Therefore, it must be determined whether the Selling Defendants controlled priceline through their control of other, connected entities, namely Walker Digital and Synapse.

Were the Selling Defendants sufficiently alleged to control Walker Digital, an entity that owns 35% of priceline, it could be argued that they indirectly control priceline.[66] While the Complaint does allege that Walker "is the largest equity owner" of Walker Digital, and sets forth that Walker Digital owns approximately 35% of priceline, the Complaint is devoid of any allegation as to Walker's specific personal interest in Walker Digital. The bald allegation that Walker "is the largest equity owner" of Walker Digital does not provide the factual predicate necessary for an inference that

[65] I note that this determination is in light of the fact that Walker's tenure as priceline's CEO ended in August 1998, more than two years before Plaintiff initiated this action.

[66] As the Plaintiff has alleged no relationship between Nicholas and Walker Digital, I will only address the possible control exerted by Walker and Braddock over Walker Digital.

he was the controlling equity holder of that company.[67] In an even weaker fashion, the Complaint also alleges Braddock to have been "one of the largest equity owners of Walker Digital." Thus while Braddock is detailed to have "personally invested at least $20 million in Walker Digital," no facts are plead that could establish his percentage ownership in that entity. Therefore, given the positions of Walker and Braddock, and the absence of any particularized facts as to their holdings in Walker Digital as pleaded in the Complaint, I am unable to conclude that the Selling Defendants controlled Walker Digital, an entity that arguably could be said to exert material influence over priceline.

Shortcomings of the Complaint also prevent me from ascertaining that the Selling Defendants, through their involvement with Synapse, control priceline. The Complaint sets forth that Walker is the non-executive Chairman of Synapse's board of directors and the owner of 11.5% of Synapse. Additionally, the Plaintiff alleges that Braddock is "a substantial equity owner" as well as a director of Synapse. Finally, like Braddock, Nicholas is alleged to be a director and "a substantial equity owner of

[67] He could, for example, be a 5% owner in Walker Digital, and the other investors in that entity be owners of yet smaller stakes. See, e.g., *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1070 (Del. Ch. 1985) (noting that the defendant corporation's largest shareholder held "approximately 5% of its stock'?.

Synapse?* However, the particularized facts of the Complaint fail, on two levels, to demonstrate that the Selling Defendants could exert control over priceline. Even assuming that the Selling Defendants were able to control Synapse, an assumption that is not supported by the allegations of the Complaint, I cannot conclude that control of Synapse would have enabled the Selling Defendants to exert material influence over priceline and its directors.[69] More specifically, there simply are no allegations as to Synapse's equity interest in priceline from which one can conclude that the individuals in control of that company could influence the affairs or directors of priceline.

Accordingly, I am of the opinion that the Complaint alleges insufficient particularized facts from which a reasonable inference may be drawn that the interests and positions of the interested directors, whether individually or collectively, empowered them with the means to dominate

[68] The Complaint also specifies the Braddock and Nicholas were each granted the Synapse Options.

[69] I note, by way of example, the absence of any particularized allegations addressing Synapse's equity interest in, or business dealings with, the Company (i.e., that Synapse's marketing services were material to the affairs, success, or viability of priceline).

and control the Board and affairs of priceline, Walker Digital or Synapse."

*B. The Independence of Individual Defendants*

1. Peretsman

Plaintiff argues that the independence of Peretsman, a director of the Company since 1999, is called into question on account of (1) her substantial and material investments in and directorial positions with entities controlled by Walker and Braddock and (2) her principal employment as a managing director and executive vice-president of Allen & Co., an investment banking firm that purchased and sold shares of the Company's stock, received consulting fees from the Company averaging $800,000 in 1999 and 2000, and was scheduled to be one of the lead underwriters for Synapse's since cancelled initial public offering.

The Complaint alleges that Peretsman previously served as a director of NewSub and now serves as a director of Synapse. Peretsman is further alleged to have been granted the Synapse Options in connection with her board position with that company. Having previously concluded that the

[70] Having concluded that the record before me precludes a finding for this motion's purposes that Walker and Braddock in their individual capacities could control priceline and its board, I acknowledge the possibility that the two individuals (along with Nicholas for that matter) could collectively dominate the affairs of the Company. Based on the allegations of the Complaint, however, Plaintiff has failed to plead particularized facts calling into question the interested directors' collective abilities to do so for most, if not all, of the same reasons set forth in the above analysis of those directors in their separate capacities.

Complaint's allegations as to Walker and Braddock's relationships with Synapse were insufficient to conclude that either could, or collectively could, unilaterally influence that company's affairs, I fail to see how the Complaint's allegations regarding Peretsman's options in Synapse and dealings with that company call into question her ability to act independently of Walker and Braddock. Moreover, a director's holdings in a given company do not *ipso facto* cast into doubt that director's ability to act independently of an allegedly dominating director and/or shareholder of that company. If anything, "[t]he only reasonable inference that . . . can [be] draw[n] . . . is that [the shareholder-director in question] is an economically rational individual whose priority is to protect the value of his . . . shares.""[71] Of course, this discussion presupposes that Walker, Braddock, or Nicholas controlled the companies that Peretsman is alleged to have substantially invested in.

If one concludes for the purposes of this motion, as I have, that the Complaint contains insufficient particularized facts from which an inference may be drawn that Walker and Braddock controlled priceline, the allegations as to Peretsman's principal employment with Allen & Co. and the consulting

[71] *In re the Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 356-57 (Del. Ch. 1998), rev'd *on other grounds sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

fees that Allen & Co. received from priceline fail to rebut the presumption that Peretsman would have acted independently as well. Even assuming that the fees were material to Allen & Co. or that Peretsman derived a material personal benefit from them, however, the Plaintiff must demonstrate that Peretsman was beholden to Walker or Braddock on account of their supposed ability to affect the continued services generating those fees. Because of my finding that Plaintiff has failed to set forth particularized facts establishing Walker and Braddock's control over the affairs of priceline, I find that the Complaint's allegations fail to raise a reasonable doubt as to Peretsman's ability to act independently and impartially in her capacity as a director of priceline.

2. Ford

Plaintiff argues that Ford, who serves as Managing Member of General Atlantic, lacks independence for the purposes of this motion on account of the Synapse Options granted to him in connection with his directorship with that company and the fact that General Atlantic and its affiliates have invested heavily in priceline, Synapse and Walker Digital. Specifically, the Complaint alleges that General Atlantic invested over $59 million in NewSub, owns approximately 17.5% of Synapse, and is "one of

the largest equity owners of Walker Digital." Ford also serves as a director of Walker Digital and Synapse.

Having found the absence of particularized facts from which one may reasonably conclude that Walker or Braddock controlled Synapse, there is no factual predicate from which one may infer that the options granted to Ford are attributable to the control of either of those individuals. As such, Ford's receipt of the Synapse Options fails to establish that either Braddock or Walker had the power to assert control or domination over him as a director of priceline. Moreover, the allegation that General Atlantic and its affiliates invested heavily in priceline (or entities with interests in priceline) does not militate in favor of Plaintiffs requisite showing because the mere investment in those companies does not suggest that the Walker or Braddock had dominion over Ford. With respect to Ford's directorships with Walker Digital and Synapse, allegations as to one's position on multiple boards does not in and of itself call into question one's independence from an interested director sitting with him on such boards. Accordingly, Plaintiff has failed to set forth particularized facts raising a reasonable doubt as to Ford's ability to act objectively as a director of priceline.

3. Loeb

The Complaint alleges that Loeb was an equity investor in Synapse and that company's predecessor (NewSub). The Complaint further alleges that Michael Loeb, Loeb's son, co-founded NewSub in 1992 with Walker and that his position with Synapse serves as his principal employment.

As stated previously, the Complaint's allegations as to Walker's position as the non-executive Chairman of Synapse with an interest of less than 12% in that company, without more, fails to create a record from which one may conclude that he dominates the business affairs of Synapse or the employment of that company's employees. The same holds true of Braddock who, like Walker, is alleged to be a substantial equity owner of Synapse.[72] Having already found that Peretsman and Ford are not beholden to the Selling Defendants, Plaintiff's argument that Loeb's son is "beholden to defendants Walker, Braddock, Nicholas, Ford and Peretsman, who collectively make up a majority of the Synapse Board,"[73] is unpersuasive. Even if Loeb's son were somehow "beholden" to all five individuals collectively, the Plaintiff has not alleged any basis for the Court to conclude

[72] The Complaint alleges that "Walker, Braddock, Ford (through General Atlantic), . . . Nicholas (and/or entities with whom he is affiliated), and Peretsman are all substantial equity owners of Synapse, each having invested millions of dollars in Synapse." Pl.'s Compl. ¶ 100(e).
[73] *Id.*

that Ford and Peretsman, who are not under the control 'of the Selling Defendants, based on the allegations of the Complaint, would join with the Selling Defendants in any effort within Synapse that would somehow adversely affect Loeb's son and, thus, affect Loeb's independence as a priceline director. Consequently, Loeb's son's position with Synapse does not call into question Loeb's ability to act independently of Walker, Braddock or Nicholas for the purposes of this motion. Regarding Loeb's investments in Synapse, as stated in my analysis of Peretsman and Ford, a director's investment in another company allegedly controlled by the same individual who is said to be a dominating force in the company under analysis does not suggest, without more, that the investing director lacks independence. As such, I conclude that Plaintiff has alleged insufficient particularized facts to raise a reasonable doubt as to Loeb's independence.

4. Miller

The Complaint alleges that priceline served as Miller's principal employment and that "at the time this action [was] initiated, . . . [she] was preparing to leave her employment with [p]riceline and was beholden to defendants Braddock and Walker to approve the terms of her departure."[74] Having previously found that Plaintiff has alleged insufficient particularized

[74] *Id.* ¶ 100(d).

facts from which a reasonable inference can be drawn that Braddock or Walker exerted control over the Company, I fail to see how Miller could be beholden to them, especially considering that Miller was leaving her position with the Company. While Plaintiff argues that Miller was beholden to Walker and Braddock on account of their influence over her departing compensation package, again, Plaintiff has alleged insufficient particularized facts calling into question their ability to dominate or control the terms of her departure. For this reason, the Complaint's allegations as to priceline's forgiveness of $3 million of Miller's personal debt (and the options granted to her by the Company to purchase priceline stock) also fail because there are insufficient allegations from which one can conclude that Walker or Braddock had the power to compromise the presumptive independence of Miller.

5. Bahna

The Complaint merely alleges that Defendant Bahna has served as a director or the Company since July 1999. With nothing more, this fact fails to impugn the independence of Bahna with respect to evaluating any demand to vindicate the Company's rights. Plaintiff does not contend that Bahna is not independent.

6. Allaire

While the Complaint notes that Defendant Allaire is a director of the Company and also serves as Chairman of the Board of Directors and CEO of Xerox Corporation, an entity for which Nicholas serves as a director, nothing in the Complaint or the Plaintiffs arguments can be viewed as seriously contending that the Selling Defendants exerted material influence over Allaire. Thus, on these limited allegations, I consider Allaire to be independent for purposes of determining whether demand is excused. As with Bahna, the Plaintiff does not challenge Allaire's independence.

* * *

Because the Plaintiff has failed to allege particularized facts raising a reasonable doubt as to the independence or disinterestedness of at least six of priceline's eleven directors, the Plaintiff has not met his burden under Rule 23.1 to justify excusing his failure to make a demand on the Board.[75]

## 3. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss under Rule 23.1 for the Plaintiffs failure to make pre-suit demand on the Board is

[75] My finding that the Plaintiff has not met his burden with respect to the independence or disinterestedness of six of priceline's eleven directors obviates the need to consider the status of Schulman and Blackney.

granted. Dismissal is without prejudice.[76] An order will' be entered in accordance with this memorandum opinion.

[76] I conclude that dismissal with prejudice would not "be just under the circumstances" because of the complex and intertwined relationships among priceline, the Individual Defendants, and the various entities with which they are associated and because of the apparently non-public status of certain facts, the absence of which may have materially affected the outcome. Court of Chancery Rule 15(aaa). It is appropriate to remember the admonition of Justice Hartnett in his concurring opinion in *Brehm v. Eisner:* "Plaintiffs must not be held to a too-high standard of pleading because they face an almost impossible burden when they must plead facts with particularity and the facts are not public knowledge." 746 A.2d at 268 (Hartnett, J., concurring).