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3 UNITED STATES DISTRICT COURT  
4 NORTHERN DISTRICT OF CALIFORNIA  
56  
7 IN RE: GOOGLE, INC. SHAREHOLDER  
8 DERIVATIVE LITIGATION

No. C 11-4248 PJH

9  
10 **ORDER GRANTING MOTION  
11 TO DISMISS**12 Defendants' motion to dismiss plaintiffs' amended verified consolidated shareholder  
13 derivative complaint came on for hearing before this court on July 3, 2013. Plaintiffs  
14 Patricia H. McKenna, Avrohom Gallis, and James Clem (collectively "plaintiffs") appeared  
15 through their counsel, Benny Goodman, Travis Downs, and Shane Sanders. Individual  
16 defendants and nominal party Google, Inc. (collectively "defendants") appeared through  
17 their counsel, Boris Feldman and Elizabeth Peterson. Having read the parties' papers and  
18 carefully considered their arguments and the relevant legal authority, and good cause  
19 appearing, the court hereby GRANTS defendants' motion as follows.20 **BACKGROUND**21 This is a shareholder derivative action on behalf of nominal defendant Google, Inc.  
22 ("Google"), against eight members of Google's Board of Directors.<sup>1</sup> Plaintiffs allege that  
23 defendants allowed certain Canadian pharmacies to advertise via Google's search engine  
24 for the sale of prescription medications to be imported into the United States, which  
25 advertisements were unlawful, and which resulted in the entry of a non-prosecution  
26 agreement ("NPA") between Google and the United States Department of Justice ("DOJ"),  
27 and the payment by Google of a \$500 million fine. See generally Amended Verified28  

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29 <sup>1</sup>The specific named individual defendants who form a part of Google's Board of  
30 Directors are: Larry Page ("Page"); Sergey Brin ("Brin"); Eric E. Schmidt ("Schmidt"); L. John  
31 Doerr ("Doerr"); John L. Hennessy ("Hennessy"); Paul S. Otellini ("Otellini"); K. Ram Shriram  
32 ("Shriram"); and Shirley M. Tilghman ("Tilghman") (all collectively "defendants").

1 Consolidated Shareholder Derivative Complaint (“Amended Complaint” or “AC”).

2 Plaintiffs allege that Google, who is best known for its widely used Internet search  
3 engine, has advertising as one of its primary revenue drivers. See Amended Complaint, ¶  
4 5. Google’s advertising services are closely linked to its search technology in that  
5 customers submit their advertisements and relevant contact information to Google, and  
6 Google displays those advertisements above and next to search results that are based on  
7 queries relevant to the advertiser. See id. Plaintiffs further allege that displaying the ads  
8 near search results relevant to the advertiser provides Google with an effective way to  
9 target consumers most likely to be interested in the products being advertised. Id.

10 Plaintiffs allege that the Food, Drug and Cosmetic Act (“FDCA”) prohibits  
11 pharmacies outside the United States from introducing or delivering for introduction any  
12 prescription drug into interstate commerce. Similarly, plaintiffs allege that the Controlled  
13 Substances Act prohibits such conduct with regard to controlled substances. Plaintiffs  
14 further allege that compliance with both Acts is both mandatory, and a legal duty generally  
15 known to sophisticated executives of U.S. companies who conduct business internationally.  
16 Amended Complaint, ¶ 6.

17 Plaintiffs allege that, as corporate directors and officers of the Company, defendants  
18 owe Google certain fiduciary duties: specifically, the duty of loyalty, and the duties of  
19 candor and good faith. Amended Complaint, ¶ 7. Notwithstanding these duties, however,  
20 plaintiffs allege that Google’s directors and officers caused Google to facilitate the illegal  
21 importation of prescription drugs by Canadian pharmacies for at least six years, and until  
22 Google became aware of an investigation by the DOJ into such practices. Amended  
23 Complaint, ¶ 8. Plaintiffs assert that, although facilitating improper advertisements  
24 temporarily helped Google secure millions in profits, the Company violated the  
25 aforementioned Acts by doing so and has now been exposed to significant damages. Id.

26 Plaintiffs further allege that even though Google purposely used third party  
27 verification services – like Square One and PharmacyChecker – ostensibly in order to  
28 prevent the unlawful solicitation of consumers for illegal pharmacy mailings, such third party

1 verification services were essentially a sham. Plaintiffs allege that Google's directors were  
2 aware that these services were ineffectual.

3       Specifically, and on August 24, 2011, plaintiffs allege that it was announced that  
4 Google had settled with the DOJ and entered into a non-prosecution agreement in which  
5 the Company agreed to forfeit \$500 million as a fine for facilitating the placement of  
6 advertisements from online Canadian pharmacies that resulted in the unlawful importation  
7 of controlled and non-controlled prescription drugs into the United States. Amended  
8 Complaint, ¶ 9. Plaintiffs allege that the \$500 million fine is one of the largest fines ever  
9 levied against a United States company. *Id.*

10       Plaintiffs allege that, had defendants complied with the Acts as their fiduciary duties  
11 required, they would not have allowed the improper advertisements to occur in the first  
12 place, and the unlawful activity would not have continued. Amended Complaint, ¶ 10.  
13 Ultimately, although the unlawful advertising increased Google's total revenues, plaintiffs  
14 allege that Google was damaged in a far greater amount. In addition to including the illicit  
15 profit Google received from Canadian pharmacies, the \$500 million settlement includes the  
16 revenue the pharmacies gained from their sales through Google. Plaintiffs further allege  
17 that Google has been exposed to millions of dollars in investigative costs and expenses,  
18 and will likely incur additional legal and professional fees and expenses related to  
19 implementation of remedial measures designed to correct the problems arising from the  
20 Google Board's failure to prohibit illegal advertising by Canadian pharmacies. Amended  
21 Complaint, ¶ 11.

22       Although the Company has been injured, plaintiffs allege that defendants have not  
23 fared nearly so badly. Amended Complaint, ¶ 12. Plaintiffs allege that, during the relevant  
24 time period, defendants collectively pocketed millions in salary, fees, stock options, and  
25 other payments that were not justified in light of the violations of federal law that had  
26 occurred. *Id.* Plaintiffs further allege that these payments wasted valuable corporate  
27 assets and unjustly enriched defendants to Google's detriment. *Id.*

28       In response to the foregoing conduct, plaintiffs filed the original complaint in this

1 action on August 29, 2011. The operative amended complaint was filed on June 8, 2012.

2 The complaint alleges three causes of action (labeled “counts”) against defendants:  
3 (1) breach of fiduciary duty of loyalty (including duties of candor and good faith); (2)  
4 corporate waste; and (3) unjust enrichment.

5 Nominal defendant Google, together with the individual defendants, now seek an  
6 order dismissing the complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and  
7 23.1 for failure to plead facts demonstrating demand futility, and for failure to state a claim.

## 8 DISCUSSION

### 9 A. Legal Standard

10 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims  
11 alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003).  
12 Review is limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen.  
13 Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive a motion to dismiss for  
14 failure to state a claim, a complaint generally must satisfy only the minimal notice pleading  
15 requirements of Federal Rule of Civil Procedure 8.

16 Rule 8(a)(2) requires only that the complaint include a “short and plain statement of  
17 the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Specific  
18 facts are unnecessary – the statement need only give the defendant “fair notice of the claim  
19 and the grounds upon which it rests. Erickson v. Pardus, 551 U.S. 89, 93 (citing Bell  
20 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). All allegations of material fact are  
21 taken as true. Id. at 94. However, a plaintiff’s obligation to provide the grounds of his  
22 entitlement to relief “requires more than labels and conclusions, and a formulaic recitation  
23 of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555 (citations and  
24 quotations omitted). Rather, the allegations in the complaint “must be enough to raise a  
25 right to relief above the speculative level. Id.

26 A motion to dismiss should be granted if the complaint does not proffer enough facts  
27 to state a claim for relief that is plausible on its face. See id. at 558-59. “[W]here the well-  
28 pleaded facts do not permit the court to infer more than the mere possibility of misconduct,

1 the complaint has alleged – but it has not show[n] – that the pleader is entitled to relief.  
2 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

3 In addition, when resolving a motion to dismiss for failure to state a claim, the court  
4 may not generally consider materials outside the pleadings. Lee v. City of Los Angeles,  
5 250 F.3d 668, 688 (9th Cir. 2001). There are several exceptions to this rule. The court  
6 may consider a matter that is properly the subject of judicial notice, such as matters of  
7 public record. Id. at 689; see also Mack v. South Bay Beer Distributors, Inc., 798 F.2d  
8 1279, 1282 (9th Cir. 1986) (on a motion to dismiss, a court may properly look beyond the  
9 complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion  
10 to one for summary judgment). Additionally, the court may consider exhibits attached to  
11 the complaint, see Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542,  
12 1555 n.19 (9th Cir. 1989), and documents referenced by the complaint and accepted by all  
13 parties as authentic. See Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th  
14 Cir. 2002).

15 Finally, in actions alleging fraud, "the circumstances constituting fraud or mistake  
16 shall be stated with particularity." Fed. R. Civ. P. 9(b). Under Rule 9(b), the complaint  
17 must allege specific facts regarding the fraudulent activity, such as the time, date, place,  
18 and content of the alleged fraudulent representation, how or why the representation was  
19 false or misleading, and in some cases, the identity of the person engaged in the fraud. In  
20 re GlenFed Sec. Litig., 42 F.3d 1541, 1547-49 (9th Cir.1994).

21 B. Legal Analysis

22 The parties have set forth three issues to be decided: (1) whether plaintiffs  
23 adequately plead that they meet the ownership requirements of Rule 23.1, (2) whether  
24 plaintiffs adequately plead demand futility, and (3) whether plaintiffs adequately plead their  
25 claims for breach of fiduciary duty, waste of corporate assets, and unjust enrichment.

26 1. Rule 23.1's ownership requirements

27 As a threshold matter, defendants challenge plaintiffs' standing under Rule 23.1,  
28 arguing that the AC does not adequately allege that the plaintiffs were shareholders "at the

1 time of the transaction complained of.” Fed. R. Civ. P. 23.1(b). Defendants note that  
2 plaintiffs challenge conduct that allegedly began in 2003, even though Google did not  
3 become a publicly traded company until August 2004, and plaintiffs did not purchase stock  
4 until May 18, 2005. Plaintiffs concede that they cannot challenge conduct that occurred  
5 prior to their stock purchase, but argue that “each time defendants consciously decided not  
6 to take any action to block the illegal advertisements was a separate act.”

7 In ruling on defendants’ previous motion to dismiss, the court considered whether or  
8 not the challenged conduct was the result of an actual “business decision” by the board of  
9 directors, and ultimately determined that the complaint does not challenge any specific  
10 action by the board, and instead challenges its failure to act. See Dkt. 50 at 7-8 (citing  
11 Rales v. Blasband, 634 A.2d 927 (Del. 1993)). Though Rales was raised in the context of  
12 the demand futility analysis, the court also finds it relevant to this issue. Because plaintiffs  
13 do not challenge any specific act, but rather the board’s failure to act, the court must look at  
14 whether any such failure to act occurred during the time period of plaintiffs’ stock  
15 ownership. And in this case, even though the challenged conduct began in 2003, it is  
16 alleged to have continued until 2009. Thus, to the extent that defendants failed to act  
17 between May 2005 and 2009, plaintiffs do have standing under Rule 23.1. Moreover, two  
18 specific warning letters during this period identified by plaintiffs (the July 8, 2008 warning  
19 from CASA and the December 23, 2008 warning from NABP) provide additional foundation  
20 for their argument that defendants failed to act in response to specific warnings.

21 2. Demand futility

22 Aside from challenging plaintiffs’ standing, defendants also seek to dismiss the  
23 amended complaint on grounds that plaintiffs failed to make a demand on Google’s board  
24 of directors prior to commencing this action, and that the complaint fails to allege demand  
25 futility with particularity, as required by Rule 23.1.

26 Federal Rule of Civil Procedure 23.1 provides the procedural vehicle through which  
27 a shareholder derivative action may be pursued, as it applies where shareholders seek to  
28 “enforce a right of a corporation” when the corporation itself has failed to enforce a right

1 which could properly be asserted by it in court. Rule 23.1 requires that a shareholder  
2 seeking to file a derivative action allege that he or she made a pre-suit demand on the  
3 corporation's board of directors, or allege facts showing why such a demand would have  
4 been futile. The complaint must "allege with particularity" the efforts made by the plaintiff to  
5 obtain the action the plaintiff desires from the directors or comparable authority, or the  
6 reasons for the plaintiff's failure to obtain the action or for not making the effort. Fed. R.  
7 Civ. P. 23.1.

8 Plaintiffs admit that they did not make a demand on Google's board prior to  
9 commencing the instant lawsuit. Thus, the only question is whether plaintiffs have  
10 adequately pled that demand was excused. Because Google is a Delaware corporation,  
11 Delaware law establishes the circumstances under which plaintiffs' failure to make a pre-  
12 suit demand on its board of directors is excused. In re Silicon Graphics Sec. Litig., 183  
13 F.3d 970, 989-90 (9th Cir. 1999).

14 As explained above, the court has already found that the Rales test applies to  
15 plaintiffs' demand futility allegations. Under Rales, the court must determine whether the  
16 particularized factual allegations create a reasonable doubt that, as of the time the  
17 complaint was filed, a majority of the board as constituted at that time could have properly  
18 exercised its independent and disinterested business judgment in responding to the  
19 demand. 634 A.2d at 934. When the original complaint was filed, Google's board of  
20 directors consisted of nine members – so in order to show demand futility, plaintiffs'  
21 allegations must create a reasonable doubt that five of them could have exercised  
22 disinterested and independent business judgment. Plaintiffs urge the court to re-adopt its  
23 previous finding that the complaint sufficiently alleged that four of the outside directors  
24 (specifically, Hennessy, Shriram, Tilghman, and Doerr) lacked independence. However,  
25 given the differences between the previous complaint and the current amended complaint,  
26 the court will consider the Rales inquiry de novo.

27 As an initial matter, the parties dispute whether the court needs to find at least one  
28 "interested" director before considering the independence of the other directors.

1 Defendants argue that “where there is no director who is interested in the transaction, there  
2 is no need to consider the independence of the remaining directors.” In re The Dow Chem.  
3 Co. Deriv. Litig., 2010 WL 66769 at \*7 (Del. Ch. 2010). Plaintiffs cite to a footnote from the  
4 same case, where the Dow court noted that “independence may be dispositive without any  
5 director being interested,” as long as “a majority or control stockholder exists.” Id. at \*7,  
6 n.36. Plaintiffs then argue that, “because Schmidt, Page and Brin possess over 65% of  
7 Google’s shareholder voting power, demand may be deemed futile without the presence of  
8 an interested director.” However, while plaintiffs are correct that futility can be found even  
9 without an interested director, the Dow court made clear that “the independence of  
10 directors is only relevant when there exists an interested person.” Id. at \*8, n.38 (emphasis  
11 added). In other words, a controlling shareholder may still trigger the independence  
12 analysis even if he or she is not a director, but the controlling shareholder still must be  
13 found to be “interested.” The full quote from plaintiffs’ cited footnote explains that “the  
14 majority or control shareholder may influence board members even if the controller is not  
15 on the board. In that case, independence may be dispositive without any director being  
16 interested. That individual will satisfy the interest hook.” Dow at \*7, n.36. Thus, in order  
17 for any directors’ non-independence to be relevant, plaintiffs must identify interested  
18 persons (whether directors or not), and must show that other directors are not independent  
19 from those interested persons. In this case, plaintiffs allege that Schmidt, Page, and Brin –  
20 together – control the majority of Google stock. Thus, before reaching the “independence”  
21 analysis, the court will first look at whether plaintiffs have adequately alleged that Schmidt,  
22 Page, and/or Brin are “interested.”

23 A director is “interested” if his or her loyalties are divided, or if the director will  
24 receive a personal financial benefit from a transaction that is not equally shared by the  
25 stockholders, or when a corporate decision will have a “materially detrimental impact” on a  
26 director but not the corporation or its stockholders. Rales, 634 A.2d at 936. As is  
27 particularly relevant here, a reasonable doubt as to a director’s disinterestedness also  
28 exists where a director faces a “substantial likelihood” of liability for breaching his fiduciary



1 duty of loyalty (and good faith). See id. (where the potential for a director’s liability is not “a  
2 mere threat” but instead rises to “a substantial likelihood,” disinterestedness may be  
3 stated).

4 Plaintiffs first attempt to characterize Schmidt, Page, and Brin as “interested” using  
5 blanket allegations applicable to all three, arguing that “each were personally and directly  
6 involved in the acts of mismanagement” and “each approved the actions which are  
7 complained of.” AC, ¶ 99. Thus, in plaintiffs’ view, all three inside directors face a  
8 substantial likelihood of liability for breaching the fiduciary duty of loyalty, creating a  
9 reasonable doubt as to whether they are disinterested. Plaintiffs list a host of allegations in  
10 support of this argument, pointing to these facts: (1) the three inside directors were  
11 “Google’s top executives” when Google settled the DOJ’s claims; (2) the NABP warned  
12 Google in 2003 about the illegal ads; (3) Google blocked pharmacy ads from countries  
13 other than Canada; (4) two “high-level Google officials” testified that Google “guarded  
14 against advertisements by rogue pharmacies; (5) the NABP again warned Google in 2008  
15 about the illegal ads; (6) the NPA states that Google was aware of the illegal ads in 2003;  
16 and (7) Google’s code of conduct required the inside directors to “understand the major  
17 laws and regulations” that were applicable and to “obey the law.” Dkt. 62 at 9-10. But  
18 these allegations do not identify any specific actions or knowledge on the part of either  
19 Schmidt, Brin, or Page. Instead, plaintiffs appear to argue that, because those three  
20 “operate the company collectively,” they necessarily face a substantial likelihood of  
21 culpability for anything that happened on their watch. Plaintiffs’ theory would eviscerate the  
22 “disinterested” prong of the Rales test, and would find any director involved in the day-to-  
23 day running of a company to be “interested” under any set of facts. Thus, the court finds  
24 these blanket allegations insufficient to create a reasonable doubt that either Schmidt, Brin,  
25 or Page were “disinterested.”

26 However, in addition to these blanket allegations, plaintiffs also offer specific  
27 “interestedness” allegations as to defendant Schmidt. Specifically, plaintiffs point to  
28 Schmidt’s testimony in a Senate Judiciary Committee hearing. See AC, ¶ 110. In that

1 hearing, during a discussion of the conduct that was the subject of the NPA (i.e., the  
2 Canadian pharmacy ads), Schmidt was asked whether “it was the result of oversight or  
3 inadvertence, or were there some employees in the company that were doing this without  
4 your knowledge.” Schmidt answered, “well, certainly not without my knowledge.” Schmidt  
5 also stated at that hearing that he “first learned of this issue” around 2004. Plaintiffs thus  
6 argue that Schmidt’s testimony shows that he was aware of the illegal Canadian pharmacy  
7 ads since 2004 and consciously chose to allow them to run, which creates a substantial  
8 likelihood of liability. Defendants argue that the question posed to Schmidt was unclear, in  
9 that the questioner did not explain what he meant by “it” (“was it the result of oversight or  
10 inadvertence...”) and “this” (“were there some employees in the company that were doing  
11 this without your knowledge”). However, defendants concede that the questioner  
12 eventually clarified his question to specifically ask when Schmidt became aware of the  
13 illegal Canadian pharmacy ads, to which Schmidt responded that, around 2004, he became  
14 aware “that there were some potential issues to consider regarding pharmacies advertising  
15 via AdWords, in violation of Google’s policies.” The court finds these allegations sufficient  
16 to raise a reasonable doubt that Schmidt was “disinterested.” Even without the clarified  
17 question, it is evident from the context of the question that “it” and “this” refer to the  
18 Canadian pharmacy ads. Schmidt’s subsequent clarification only serves to strengthen  
19 plaintiffs’ argument.

20 Plaintiffs then attempt to impute Schmidt’s testimony of his own knowledge to the  
21 other inside directors, arguing that “the only reasonable inference from the facts alleged is  
22 that defendant Page became aware” of the challenged conduct “around the same time as  
23 defendant Schmidt.” Plaintiffs provide no support for this assertion, as Schmidt did not  
24 mention Page in his testimony. Plaintiffs appear to assume that all of Schmidt’s knowledge  
25 was shared by Page, just by virtue of the fact that both of them were involved in running the  
26 company. Plaintiffs also point to the statement by the Rhode Island U.S. Attorney that  
27 Page “knew what was going on,” but again, plaintiffs do not provide any substantive  
28 support for their allegation that Page actually knew about the Canadian pharmacy ads. It is

1 true that the U.S. Attorney stated that his assertion was based on “documents [they]  
2 reviewed” and “witnesses [they] interviewed.” However, in order to raise a reasonable  
3 doubt that Page was “disinterested,” plaintiffs must do more than rely on those vague  
4 descriptions of evidence. They must provide actual factual allegations that Page was  
5 aware of the illegal ads. Because they have not done so, they have not shown that Page  
6 faced a substantial likelihood of liability, and thus they have not adequately alleged that  
7 Page was “interested.”

8 Plaintiffs’ allegations as to Brin are even thinner. Plaintiffs rely solely on the fact that  
9 Brin, together with Schmidt and Page, “operate the company collectively” and “consult  
10 extensively with each other.” If those allegations were enough, then every inside director in  
11 every shareholder derivative case would be deemed “interested.” Plaintiffs argue that  
12 Schmidt was “obligated by Google’s code of conduct to inform the entire board, including  
13 Brin, about relevant issues that could detrimentally impact Google’s customers and  
14 shareholders,” but provide no reason to believe that Schmidt actually did inform Brin of the  
15 Canadian pharmacy issue.

16 Overall, plaintiffs have adequately alleged (for pleading purposes) that Schmidt was  
17 interested, but have not done so for either Brin or Page. And, in contrast to the original  
18 complaint, plaintiffs do not allege that any of the outside directors were interested. Thus,  
19 as to the “disinterested” prong of the demand futility analysis, plaintiffs have made  
20 adequate allegations as to only one of the nine board members. In order to show demand  
21 futility, they need to adequately allege that at least four of the directors were not  
22 independent.

23 A director is “independent” when his or her decision is based on “the corporate  
24 merits of the subject before the board” rather than on “extraneous considerations or  
25 influences.” Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1983). When lack of independence  
26 is charged, the plaintiff must allege particularized facts “show[ing] that the Board is either  
27 dominated by an officer or director who is the proponent of the challenged transaction or  
28 that the Board is so under his influence that its discretion is ‘sterilize[d].’” Levine v. Smith,

1 591 A.2d 194, 205 (Del. 1991), overruled on other grounds, 746 A.2d 244 (Del. 2000). If a  
2 director is considered “controlled” by another, he or she is lacking in the independence  
3 necessary to consider the challenged transaction objectively.

4 A “controlled” director is one who is dominated by another party, whether through  
5 close personal or familial relationship or through force of will. A director may also be  
6 considered “controlled” if he or she is beholden to the allegedly controlling entity, as when  
7 the entity has the direct or indirect unilateral power to decide whether the director continues  
8 to receive a benefit upon which the director is so dependent or is of such subjective  
9 material importance that its threatened loss might create a reason to question whether the  
10 director is able to consider the corporate merits of the challenged transaction objectively.

11 See Telxon Corp. v. Meyerson, 802 A.2d 257, 264 (Del. 2002).

12 Plaintiffs address the outside directors first, and argue that the court has already  
13 found that four of them (Hennessy, Shriram, Tilghman, and Doerr) lacked independence.  
14 See Dkt. 50. However, the court found only that the four directors were not independent  
15 from Page, Brin, and Schmidt taken together, and did not address whether the outside  
16 directors were independent from individual interested directors. In fact, the court previously  
17 found that plaintiffs had not adequately alleged that any of the inside directors were  
18 interested. But as discussed above, plaintiffs’ amended complaint does now adequately  
19 allege that Schmidt was “interested.” Thus, the next question is whether any of the outside  
20 directors were not independent of Schmidt.

21 As to Hennessy and Shriram, the court’s previous finding of non-independence was  
22 based on the fact that they “have executive positions at Stanford University,” where Page  
23 and Brin are alumni, and that “Stanford has received over \$14.4 million from Google since  
24 2006.” While that would be sufficient to raise a reasonable doubt that Hennessy and  
25 Shriram were independent from Page and Brin, it is not enough to raise a reasonable doubt  
26 that Hennessy and Shriram were independent from Schmidt, the only interested director.  
27 Thus, for demand futility purposes, plaintiffs have not adequately alleged that Hennessy  
28 and Shriram were controlled by an interested director, and thus they are considered

1 “independent.”

2 As to Doerr, the court’s previous finding of non-independence was based on his  
3 having “obtained investments from Google for private companies in which his own venture  
4 capital firm is a major investor, which relationship has resulted in actual profits for Doerr’s  
5 venture capital firm.” Dkt. 50 at 15. Because Brin, Page, and Schmidt – taken together –  
6 had the ability to withhold further investments, the court found that plaintiffs had raised a  
7 reasonable doubt that Doerr was independent from them. However, plaintiffs have  
8 provided no reason why Doerr would lack independence from Schmidt individually. Thus,  
9 plaintiffs have not adequately alleged that Doerr was controlled by an interested director,  
10 and he is considered “independent” for demand futility purposes.

11 As to Tilghman, the court’s previous finding of non-independence was based on her  
12 position as president of Princeton University, where Schmidt is an alumnus “who created a  
13 \$25 million endowment fund, and was a former trustee who exercised control over  
14 Tilghman’s compensation and employment.” Dkt. 50 at 15. Thus, plaintiffs have  
15 adequately raised a reasonable doubt that Tilghman was independent from an interested  
16 director.

17 Aside from the allegations related to the outside directors, plaintiffs also claim that  
18 the three inside directors (Page, Brin, and Schmidt) lack independence. Plaintiffs appear to  
19 argue that all three lack independence from each other “because of their controlling  
20 position at the company.” Plaintiffs also point to the NASDAQ listing rules, which state that  
21 Schmidt, Page, and Brin are not independent. However, those NASDAQ rules define  
22 “independent” completely differently, and characterize any officer or employee of a  
23 company as “not independent.” In other words, under the NASDAQ standard, any inside  
24 director would be considered “not independent.” This is not the applicable standard for  
25 analyzing demand futility. And as before, the only relevant question here is whether Page  
26 and Brin are independent from Schmidt, as Schmidt is the only director who can be  
27 considered “interested.” As explained above, Schmidt owns only 9.5% of the company,  
28 whereas Page and Brin together own over 50%. While it may be true that Schmidt is not

1 independent from Page and Brin, these holdings provide no basis to believe that Page and  
2 Brin are not independent from Schmidt. Plaintiffs essentially concede this argument, and  
3 base their independence allegations on the fact that Page and Brin, together, own a  
4 controlling share of the company. But, since Page and Brin are not sufficiently “interested,”  
5 Schmidt’s lack of independence is irrelevant. Thus, the court finds that plaintiffs have not  
6 adequately alleged that any of the inside directors are “not independent” for demand futility  
7 purposes.

8 In all, the court finds plaintiffs’ allegations to be sufficient to show that one director  
9 (Schmidt) is “interested,” and one director (Tilghman) lacks independence. Plaintiffs thus  
10 fall short of creating a reasonable doubt that a majority (i.e., five) of the directors could  
11 have exercised its disinterested and independent business judgment in responding to a  
12 demand. Accordingly, plaintiffs cannot establish demand futility, and defendants’ motion to  
13 dismiss is GRANTED. The court does not reach the merits of plaintiffs’ three causes of  
14 action.

15 However, at the hearing, plaintiffs notified the court that the records from a recent  
16 Delaware case, involving similar allegations, had been unsealed. Thus, plaintiffs claim that,  
17 if given an opportunity to amend, they would be able to allege additional facts supporting  
18 their demand futility argument. Based on that representation, the court does find that leave  
19 to amend is warranted.

20 C. Conclusion

21 For all the foregoing reasons, defendants’ motion to dismiss is GRANTED. Leave to  
22 amend is also granted, with respect to the deficiencies specifically enumerated herein. No  
23 new claims or parties may be added without leave of court. Plaintiffs’ amended complaint  
24 shall be filed no later than **October 24, 2013**, and defendants’ response thereto shall be  
25 filed no more than 28 days thereafter.

26 Defendants’ corresponding request for judicial notice is also GRANTED.  
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**IT IS SO ORDERED.**

Dated: September 26, 2013



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PHYLLIS J. HAMILTON  
United States District Judge