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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re NEWS CORPORATION SHAREHOLDER DERIVATIVE LITIGATION	Consolidated C.A. No. 6285-VCN

THE AUDIT COMMITTEE DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Without making a demand on the Board of Directors of News Corporation ("News Corp." or the "Company"), Plaintiffs filed this action challenging the business decision made by the Company's Audit Committee to acquire Shine Group ("Shine"). Putting aside Plaintiffs' allegations about Rupert Murdoch which are irrelevant because the negotiation and approval of the challenged transaction was delegated to a board committee consisting entirely of independent directors, the questions presented by the Verified Consolidated Shareholder Amended Complaint ("Amended Complaint") are: (1) Do Plaintiffs' allegations establish that demand on the full Board regarding the Audit Committee's approval of the acquisition of Shine (the "Transaction") was excused? and (2) Do Plaintiffs' allegations rebut the presumption of the business judgment rule which applies to the Audit Committee's decision to approve the Transaction? The answer to both questions is "no."

Demand futility: Plaintiffs fail to plead any particularized facts showing that a majority of the News Corp. Board could not have properly exercised its independent and disinterested business judgment in responding to a demand regarding the decision to approve the Shine Transaction made by the four outside directors of the Audit Committee, namely, defendants Peter Barnes, Rod Eddington, Andrew Knight, and Thomas Perkins (collectively, the "Committee Defendants").

Business judgment: Plaintiffs' allegations do not rebut the presumption that the business judgment rule applies to the Audit Committee's business decision to approve News Corp.'s acquisition of Shine, an international media company in News Corp.'s industry that produces successful television shows (including "The Biggest Loser," "MasterChef," and "The Office"). Am. Compl. ¶ 15. Plaintiffs' Amended Complaint does not contain well-pleaded allegations that

the Audit Committee is composed of anything other than four independent and disinterested outside directors. The Amended Complaint concedes that the Committee engaged an independent financial advisor to opine on the Shine Transaction. Am. Compl. ¶ 90. Tellingly, Plaintiffs' allegations do not seriously challenge the process engaged in, or care exercised by, the Committee in considering and then deciding to approve the Transaction.

For these reasons, and as explained in further detail below and in the Opening Brief In Support Of Defendants K. Rupert Murdoch, James Murdoch, Lachlan Murdoch, Chase Carey, David DeVoe, Joel Klein, Arthur Siskind, Jose Maria Aznar, Natalie Bancroft, Kenneth Cowley, Viet Dinh and John Thornton's Motion to Dismiss (the "Director Defendants' Opening Brief"), in which the Committee Defendants hereby join, Plaintiffs' Complaint should be dismissed in its entirety under Court of Chancery Rules 23.1 and 12(b)(6).

ARGUMENT

I. The Allegations Contained in the Amended Complaint Are Insufficient to Excuse Demand on the Board of News Corp.

A. To Determine Demand Futility, This Court Should Apply the Standard Set Forth in *Rales*.

As the Amended Complaint concedes, the decision to approve the Transaction was made by the Audit Committee, not by the full Board.[1] Accordingly, the appropriate standard to

[1] The Audit Committee is one of three standing committees of the News Corp. Board. *See* August 31, 2010 Definitive Proxy Statement ("2010 Proxy"), at 16. Among other things, the Audit Committee's responsibilities include "the review, approval and ratification of transactions with related parties." *Id.* In accordance with this mandate, the Audit Committee was responsible for reviewing and approving the Transaction on behalf of the full Board, which it did with the assistance of its financial advisor, Centerview Partners, and its legal advisor, Wachtell, Lipton, Rosen & Katz. *See* News Corp.'s April 5, 2011 Press Release (the "April 5 Press Release"), available at http://www.newscorp.com/news/news_482.html. The 2010 Proxy and April 5 Press Release are incorporated by reference in paragraphs 84 and 90 of the Amended Complaint, respectively, and are therefore properly considered by the Court on a motion to dismiss. *See 7457 Partners v. Beck*, 682 A.2d 160, 163 (Del. 1996) (in considering a motion to dismiss a court "may consider documents referred to in the complaint").

determine whether Plaintiffs have adequately pleaded demand futility is the one set forth in *Rales v. Blasband*, 634 A.2d 927, 933-34 (Del. 1993). *See Conrad v. Blank*, 940 A.2d 28, 36-37 (Del. Ch. 2007) (applying *Rales* to determine demand futility where the challenged transaction was authorized by the compensation committee, and not the full board); *Ryan v. Gifford*, 918 A.2d 341, 353 (Del. Ch. 2007) (similar).

Under *Rales*, in assessing demand futility, the Court considers only whether the well-pleaded allegations in the Amended Complaint give rise to a reasonable doubt that a majority of the board can exercise "its independent and disinterested business judgment in responding to a demand." *Rales*, 634 A.2d at 933-34.[2] Here, for Plaintiffs to succeed in demonstrating demand futility, they must make particularized factual allegations sufficient to raise a reasonable doubt as to the disinterest or independence of at least 8 of the 16 News Corp. directors. *See In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *6 (Del. Ch.)[3] ("Demand is deemed futile, and therefore excused, only if *a majority of the directors* have such a personal stake in the matter at issue . . . that they would not be able to make a proper business judgment in response to a demand." (emphasis added)). As explained in the Director Defendants' Opening Brief and below, Plaintiffs have failed to do so, and the Amended Complaint should therefore be dismissed under Rule 23.1.

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[2] The *Rales* test is the equivalent of an analysis under the first prong of the *Aronson* test. *See Rales*, 634 A.2d at 933-34. Under *Rales*, the Court does not undertake an analysis under the second prong of *Aronson* (*i.e.*, a determination as to whether the allegations demonstrate that the challenged decision was otherwise not a proper exercise of business judgment), because the board on whom demand would be made was not the original decision-maker. *Id.* ("[A] court should not apply the *Aronson* test for demand futility where the board that would be considering the demand did not make a business decision which is being challenged in the derivative suit.").

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

B. Plaintiffs Have Failed to Adequately Allege Demand Futility As to the Committee Defendants

The Director Defendants' Opening Brief filed contemporaneously herewith demonstrates that the Amended Complaint fails to include particularized factual allegations sufficient to excuse demand under *Rales*. The Committee Defendants hereby adopt and incorporate by reference the Director Defendants' arguments concerning Plaintiffs' failure to allege demand futility.

Indeed, the allegations of interest or a lack of independence against the Committee Defendants are particularly weak, amounting to nothing more than the sort of conclusory allegations that have routinely been rejected by this Court.

Directors' Fees: Plaintiffs' conclusory allegation that each of the Audit Committee members lack independence because they have received directors' fees or have unvested options to purchase News Corp. stock lacks any merit.[4] This Court has consistently held that the receipt of usual or customary director's fees will not raise a reasonable doubt as to directors' independence, absent detailed and particularized allegations demonstrating that those fees are material to the director. *See, e.g.*, *Grobow v. Perot*, 539 A.2d 180, 188 (Del. 1988); *Kahn v. MSB Bancorp, Inc.*, 1998 WL 409355, at *3 (Del. Ch.) (stating that "the mere fact that the directors receive fees for their service is not enough to establish an entrenchment motive"), *aff'd*,

[4] Indeed, that directors hold stock or options is generally recognized as aligning the directors' financial interests with the interests of the stockholders, and Plaintiffs' attempt to suggest that the ownership of unvested options would demonstrate a lack of independence is unavailing, particularly because the Amended Complaint does not allege that the value of any unvested options was material to any of the directors, or that Murdoch has the power to unilaterally terminate any of the directors or divest them of the options they hold, whether vested or unvested. *See* Director Defendants' Opening Brief, at 11-21; *Orman v. Cullman*, 794 A.2d 5, 27 n.56 (Del. Ch. 2002) ("A director who is also a shareholder of his corporation is more likely to have interests that are aligned with the other shareholders of that corporation as it is in his best interest, as a shareholder, to negotiate a transaction that will result in the largest return for all shareholders.").

734 A.2d 158 (Del. 1999) (TABLE); *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *1 n.5, *8 (Del. Ch.) (finding director compensation of over $200,000 per year insufficient to excuse demand where the complaint included "no allegations … that relate a given director's salary and benefits to that director's own economic circumstance"). Plaintiffs' allegations do not even come close to raising a reasonable doubt as to the independence on the part of any of the members of the Audit Committee, but instead merely recite the amounts (which are not exceptional for directors of large companies) received by each of the directors. *See* Am. Compl. ¶¶ 25 (alleging that Perkins received compensation of $258,000 in fiscal year 2010), 26 (reciting that Barnes received $236,000 in fees in fiscal year 2010), 87 (reciting that Knight received over $1 million in directors fees, over 20 years as a director of News Corp.), 106-07 (alleging generally that Eddington has received fees for service as a director of News Corp. or other positions in affiliated companies).

Business or Personal Relationships: Similarly, this Court has long rejected the contention that directors lack independence merely because of personal or business relationships with management. *See Beam v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004); *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 355 (Del. Ch. 1998) (rejecting a claim that long-standing business or personal ties demonstrated a lack of independence). Thus, Plaintiffs' allegations that members of the Audit Committee have business, personal, or social ties to Rupert Murdoch are insufficient to raise a reasonable doubt as to their independence. *See, e.g.*, Am. Compl. ¶¶ 88 (alleging that Rupert Murdoch provided an endorsement for Perkins' novel and considered a joint investment over a decade ago), 86 (alleging that Eddington has a relationship with Murdoch

as a fellow board member), 108 (alleging that Knight was named as Murdoch's "backstop and successor" in the 1990s).[5]

Board Consensus or Alleged Acquiescence: The Amended Complaint makes conclusory allegations concerning the length of certain directors' tenure on the News Corp. board and their alleged "acquiescence" in prior transactions. *See, e.g.*, Am. Compl. ¶ 110 (characterizing Barnes's tenure on the Audit Committee as "unremarkable"), 23 (noting that Eddington has served as a director of News Corp. since 1999), 24 (noting that Knight has served as a director of News Corp. since 1991). Such statements, by themselves, fail to raise a reasonable doubt as to the independence of any of the Audit Committee members. *See Gantler v. Stephens*, 2008 WL 401124, at *15 (Del. Ch.) ("Here, even if Plaintiffs' bald allegation Eddy voted with Stephens in every vote Gantler attended could support a finding of a pattern of votes evincing control, Plaintiffs failed to allege how Eddy received any material benefit from his alleged acquiescence. Thus, Plaintiffs have not alleged sufficient facts from which one could infer Eddy lacked independent business judgment and was controlled by Stephens."), *rev'd on other grounds*, 965 A.2d 695 (Del. 2009); *Khanna v. McMinn*, 2006 WL 1388744, at *15 n.92 (Del. Ch.) ("Although there may be instances in which a director's voting history would be sufficient to negate a director's presumed independence, routine consensus cannot suffice to demonstrate disloyalty on the part of a director."); *Jacobs v. Yang*, 2004 WL 1728521, at *3

[5] Knight's former employment at News Corp.—which ended 15 years ago—is also not relevant to his current independence. *See In re Western Nat'l. Corp. S'holders Litig.*, 2000 WL 710192, at *17 (Del. Ch.); *cf. Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 315 (Del. Ch. 2010) ("[I]t has been over ten years since she was a Barnes & Noble executive in 1997, and she thus satisfies the NYSE's cooling-off period. [The NYSE Rules provide that a director who was employed by the company becomes 'independent' after a three year cooling-off period.] I decline, without more facts, to base a finding of non-independence solely on Miller's distant service as Riggio's subordinate." (footnotes omitted)).

(Del. Ch.) (rejecting allegations that a board would not take an "adversarial position" against certain alleged controlling board members, and finding that plaintiffs failed to allege demand futility).[6]

Approval of the Shine Transaction: Finally, the fact that the Audit Committee members voted in favor of the Transaction is insufficient to excuse demand. It is well-established that "the mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge either the independence or disinterestedness of the directors." *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984); *Malpiede v. Townson*, 780 A.2d 1075, 1085 (Del. 2001) (affirming dismissal of complaint and holding that the threat of personal liability for approving a merger transaction does not in itself provide a sufficient basis to question the disinterestedness of directors). It is only where the particularized factual allegations establish a "substantial likelihood" of personal liability that a reasonable doubt as to the director's interest is created. *In re Baxter Int'l, Inc. S'holders Litig.*, 654 A.2d 1268 (Del. Ch. 1995) (granting a motion to dismiss where the complaint failed to plead with particularity reasons why the directors faced a substantial risk of liability); *Guttman v. Huang*, 823 A.2d 492, 503-04 (Del. Ch. 2003) (same); *see also In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 126 (Del. Ch. 2009) (stating that a plaintiff seeking to demonstrate a failure of oversight that would give rise to a substantial likelihood of personal liability must allege particularized factual allegations demonstrating bad faith by the director defendants).

Here, the allegations of the Amended Complaint fail to suggest any potential for liability on the part of the Committee Defendants, let alone a substantial likelihood of liability. A substantial likelihood of personal liability does not exist where, as here, the decision in question

[6] *See* Director Defendants' Opening Brief, at 13-14, 16-21.

will be reviewed under the business judgment rule. *Baxter*, 654 A.2d at 1270; *Citigroup*, 964 A.2d at 126-30. As discussed in more detail below, Plaintiffs' allegations concede that the Audit Committee, which is composed of four independent directors, voted to approve the Transaction, and Plaintiffs do not allege any facts (as opposed to conclusory suggestions) that constitute a well-pleaded claim that the Audit Committee failed to adequately review the Transaction. *See In re Tyson Foods Inc. Consol. S'holder Litig.*, 919 A.2d 563, 595-96 (Del. Ch. 2007) (dismissing a claim because the complaint failed to allege particularized facts concerning alleged defects in the committee's process); *Grobow v. Perot*, 526 A.2d 914, 925-26 (Del. Ch. 1987) (granting a motion to dismiss pursuant to Court of Chancery Rule 23.1 and noting that "[i]t is not alleged that the committee failed to consult with and consider the views of financial or legal advisors"). Moreover, each of the Committee Defendants is fully exculpated under News Corp.'s Section 102(b)(7) provision, such that they could face personal liability only in circumstances involving a breach of the duty of loyalty or bad faith. *See* Director Defendants' Opening Brief, at 42. There are no factual allegations in the Amended Complaint pleading acts of disloyalty or bad faith by members of the Audit Committee.

II. The Complaint Fails to State A Claim Because the Audit Committee's Decision to Approve the Transaction Is Protected by the Business Judgment Rule.

The Shine Transaction was evaluated and approved by the Audit Committee—not by News Corp.'s full board.[7] Am. Compl. ¶ 24. Because the Transaction was unanimously approved by a fully empowered committee composed of four independent and disinterested directors, the presumptions of the business judgment rule apply. Under the business judgment rule, this Court should dismiss Plaintiffs' challenges to the Shine Transaction.

[7] Although Plaintiffs apparently recognize this fact (*see, e.g.*, Am. Compl. ¶ 24), they make confusing and contradictory statements in their pleadings. *See, e.g.*, Am. Compl. ¶¶ 5 (alleging that the "Transaction was approved by News Corp's Board"), 117.

In the face of this, Plaintiffs naturally seek to divert attention to other matters. They spend more than eleven pages of their Amended Complaint (¶¶ 32-64) on matters that are irrelevant to any claim about the Shine Transaction.[8] Plaintiffs' litany of speculation about political agendas and Murdoch family dynamics are not relevant to the business judgment rule analysis. Nor does quoting the reports of various stock analysis provide a basis for any well-pleaded allegation that would rebut the business judgment rule presumption that applies when a transaction is approved by independent well-informed directors.

Plaintiffs bear the burden, on the instant motion, of rebutting the presumptions of the business judgment rule. *Aronson*, 473 A.2d at 812.[9] To rebut the presumptions, Plaintiffs must show that a majority of the approving directors—here, the four outside directors of the Audit Committee (Barnes, Eddington, Knight, and Perkins)—were interested or lacked independence. *See Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 979-80 (Del. Ch. 2000); *Blackmore Partners, L.P. v. Link Energy LLC*, 2005 WL 2709639, at *7 (Del. Ch.) ("The protections of the business judgment rule may still insulate a board decision from challenge so long as a majority of the directors approving the transaction remain disinterested."); *President & Fellows of Harvard Coll. v. Glancy*, 2003 WL 21026784, at *22 (Del. Ch.) ("The only relevant inquiry is whether the directors who approved the Revised Stock Option Plan were financially interested in

[8] The Transaction also did not financially benefit Rupert Murdoch in any event.

[9] Plaintiffs suggest that "the entire fairness standard applied to the Transaction, as Murdoch stood on both sides of the deal." Am. Compl. ¶ 8. But Plaintiffs misread Delaware law, apparently suggesting that this is the type of transaction in which entire fairness would apply *ab initio*. It is not. Entire fairness *ab initio* only applies "in certain special circumstances, viz, a squeeze out merger or a merger between two companies under the control of a controlling shareholder." *Orman*, 794 A.2d at 20 n.36. The Delaware Supreme Court has limited the automatic application of entire fairness to "the narrow class of cases in which there is a controlling shareholder on both sides of a challenged merger." *Id.* at 21 n.36. That is not the case here, so entire fairness does not apply *ab initio*. Plaintiffs must rebut the presumptions of the business judgment rule.

the transaction."). Plaintiffs failed to meet their burden. As noted above and in the Director Defendants' Opening Brief, the Committee Defendants were neither interested in the Transaction nor beholden to Rupert Murdoch. Plaintiffs therefore cannot rebut the presumptions of the business judgment rule. *See, e.g., Goldman v. Pogo.com, Inc.*, 2002 WL 1358760, at *2 (Del. Ch.) ("Only upon a showing by a challenger that raises a reasonable doubt as to the independence and/or disinterestedness of a majority of a company's directors who approved the challenged transaction will the presumption of director fealty which lies at the core of the business judgment rule be rebutted.").

Plaintiffs are similarly unable to rebut the business judgment presumptions by adequately alleging that the Committee Defendants breached their duty of care. *See Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989); *see also In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 1001 (Del. Ch. 2007) ("To rebut the presumption of business judgment, in the absence of allegations that the Rights Plan was not approved by a vote of the majority of disinterested directors, plaintiffs must show that the decision is one so egregious as to be beyond any reasonable business judgment."). But Plaintiffs cannot meet this showing either. First, gross negligence is a high bar: it has been defined as "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." *Tomczak v. Morton Thiokol, Inc.*, 1990 WL 42607, at *12 (Del. Ch.); *see also In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 652 (Del. Ch. 2008) ("The definition of gross negligence used in our corporate law jurisprudence is extremely stringent."). Second, Plaintiffs make virtually no allegations regarding the Audit Committee's process, although they do concede that the Audit Committee engaged financial experts to advise it on the Shine Transaction. *See* Am. Compl. ¶ 90 (conceding that "the Audit Committee retained Centerview Partners to evaluate the

appropriateness of acquiring Shine and whether the price was fair"); *see also* Am. Compl. ¶ 84 (conceding that the Audit Committee's responsibilities included "assist[ing] the Board in its oversight of . . . the review, approval and ratification of transactions with related parties"). Plaintiffs do not allege that the Committee Defendants acted in undue haste or were improperly informed regarding the Transaction. Failing such allegations, and considering the concession that the Audit Committee retained experts to advise it on the financial terms of the Transaction, Plaintiffs have not pleaded a breach of the Audit Committee's duty of care. *Cf. S. Muoio & Co., LLC v. Hallmark Entm't Invs. Co.*, 2011 WL 863007, at *14 (Del. Ch.) (finding that reliance on advice from its advisors was "sufficient to satisfy the Special Committee's duty of care"). Third, even assuming *arguendo* Plaintiffs' allegations were sufficient to state a breach of duty of care, money damages for such a breach are barred by News Corp.'s Section 102(b)(7) exculpatory charter provision, which would warrant dismissal of the Amended Complaint. *See* Director Defendants' Opening Brief, at 42.

This Court has long refused to allow Plaintiffs to pursue litigation that is based upon challenges to business decisions made by disinterested, independent directors. This Court has long required plaintiffs to plead facts—not conclusions—sufficient to rebut the presumptions of the business judgment rule. Plaintiffs have failed to meet that burden here, and this Court should therefore dismiss the Amended Complaint under Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, and those set forth in the Director Defendants' Opening Brief, the Committee Defendants respectfully request that the Amended Complaint be dismissed with prejudice.

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