



IN THE SUPREME COURT OF THE STATE OF DELAWARE

R. A. FEUER, suing derivatively on behalf
of VIACOM, INC.,

Plaintiff Below-Appellant,

v.

PHILIPPE P. DAUMAN; SUMNER M.
REDSTONE; SHARI REDSTONE;
GEORGE S. ABRAMS; THOMAS E.
DOOLEY; BLYTHE J. MCGARVIE;
CHARLES E. PHILLIPS, JR.; FREDERIC
V. SALERNO; WILLIAM SCHWARTZ;
CRISTIANA FALCONE SORRELL; and
DEBORAH NORVILLE,

Defendants Below-Appellees.

and

VIACOM, INC.,

Nominal Defendant Below-
Appellee

No. No. 487, 2017

Court Below:
Court of Chancery of
the State of Delaware
C.A. No. 12579-CB

REDACTED, PUBLIC VERSION
E-FILED: February 26, 2018

PLAINTIFF BELOW-APPELLANT'S OPENING BRIEF

OF COUNSEL:

GREENFIELD & GOODMAN, LLC
Richard D. Greenfield
Marguerite R. Goodman
Ilene Freier Brookler
250 Hudson Street-8th Floor
New York, NY 10013
(917) 495-4446

**ROSENTHAL, MONHAIT &
GODDESS, P.A.**

Norman M. Monhait (Del. Bar. No. 1040)
P. Bradford deLeeuw (Del. Bar No. 3569)
919 N. Market Street, Suite 1401
P.O. Box 1070
Wilmington, DE 19899
(302) 656-4433

Attorneys for Plaintiff Below-Appellant

DONOVAN AXLER, LLC
Michael D. Donovan
1055 Westlakes Drive, Suite 155
Berwyn, PA 19312
610-647-6067

January 8, 2018

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
NATURE OF PROCEEDINGS	4
SUMMARY OF ARGUMENT	5
STATEMENT OF FACTS	6
A. Viacom and its Board of Directors.....	8
B. Redstone and his Employment at Viacom	9
C. Redstone’s Deteriorating Health	10
1. Redstone’s Health in 2014	10
2. Redstone Played No Role in 2015	13
3. The Board’s Gifts to Redstone in 2016	18
D. Plaintiff and His Derivative Allegations	22
E. Litigation Over Control of Viacom.....	22
1. The Massachusetts Action	22
2. The California Action	23
3. The Delaware Actions.....	24
F. The Settlement of the Massachusetts Action, the California Action and the Delaware Actions	25
G. Redstone’s Elder Abuse Lawsuit	26
ARGUMENT	29
I. THE COURT OF CHANCERY ERRED IN DISMISSING THE COMPLAINT ON THE BASIS OF THE SELF-DEALING RELEASE.....	29

A.	Question Presented.....	29
B.	Standard Of Review	29
C.	Merits Of Argument	29
	CONCLUSION	36

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Brinckerhoff v. Enbridge Energy Company, Inc.</i> , 159 A.3d 242, 252 (Del. 2017).....	29
<i>Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC</i> , 27 A.3d 531 (Del. 2011).....	29
<i>Fins v. Pearlman</i> , 424 A.2d 305 (Del.1980).....	32
<i>In re Santa Fe Pac. Corp. S’holders Litig.</i> , 669 A.2d 59 (Del.1995).....	30
<i>In re Gen. Motors (Hughes) S’holder Litig.</i> , 897 A.2d 162 (Del. 2006).....	30
<i>McNair v. Taylor, et. al.</i> , 2007 WL 1218681 (Del. Super.).....	32
<i>Neponsit Investment Co. v. Abramson</i> , 405 A.2d 97 (Del. 1979).....	32
<i>Weinberger v. UOP, Inc.</i> , 457 A.2d 701 (Del. 1983).....	31, 32
<i>Zapata Corp. v. Maldonado</i> , 430 A.2d 779 (Del.1981).....	32, 33, 34
 Statutes	
8 <i>Del. C.</i> §220	4, 7, 22
8 <i>Del. C.</i> 225	24, 25
Ct. Ch. R. 8(c)	29

NATURE OF PROCEEDINGS

Plaintiff Below-Appellant (“Plaintiff”), a stockholder of nominal defendant Viacom, Inc. (“Viacom” or the “Company”), brought this litigation derivatively on behalf of Viacom based on documents obtained via a books and records demand pursuant to 8 *Del. C.* §220 and public facts. Plaintiff’s verified complaint (the “Complaint”) alleges: (i) that the members of the Company’s board of directors other than Sumner Redstone (“Redstone”) breached their fiduciary duty and wasted corporate assets by approving compensation packages for him that were excessive and unjustified because they knew he was severely incapacitated and incapable of providing any services of value to the Company during the time period from approximately July 2014 to May 2016 (the “Relevant Period”); and (ii) that Redstone was unjustly enriched by the receipt of such compensation.

On October 25, 2017, the Court of Chancery issued a Letter Opinion (the “Opinion” attached hereto as Exhibit A), granting Defendants’ motion to dismiss with prejudice as to Plaintiff on the grounds that the claims asserted in the Complaint were covered by the language of a broad general release included in a settlement agreement the Defendants caused Viacom to enter into after Plaintiff had filed his Complaint. Plaintiff appeals from that judgment.

SUMMARY OF ARGUMENT

The Court of Chancery erred in dismissing the Complaint based on the affirmative defense of Viacom's general release of claims against its directors (the "Release") contained in the August 18, 2016 Confidential Settlement and Release Agreement (the "Settlement Agreement"). The Settlement Agreement resolved wholly unrelated litigation among competing factions of directors engaged in a power struggle for control of Viacom. The Individual Defendants (individually and in their capacity as directors of Viacom) signed the Settlement Agreement after Plaintiff had filed his Complaint. The Release constitutes an affirmative defense that ordinarily must be asserted in a responsive pleading. It was neither integral to nor incorporated by reference into Plaintiff's Complaint; indeed, it could not have been because it did not exist when the Complaint was filed. The Individual Defendants caused Viacom to grant them a release of the derivative claims Plaintiff had asserted on behalf of Viacom against them. Accordingly, the Release constitutes classic self-dealing. The Court erred by giving effect in this case to the self-interested Release and granting Defendants' motions to dismiss without affording Plaintiff an opportunity for discovery and without entire fairness review.

STATEMENT OF FACTS¹

Redstone, the controlling stockholder of Viacom and the former Executive Chairman until February 4, 2016, has accomplished much in a colorful and public life. As the business and entertainment news media have extensively reported, however, Redstone's health and mental capacity declined sharply in the last few years; by at least July 2014, his mental and physical condition had so deteriorated that he was no longer capable of contributing to the management of Viacom or serving as a Director. Yet, his Board colleagues kept him on as Executive Chairman and compensated him handsomely until disputes with two individuals who had been close to him and knew him well lifted the curtain of privacy that had protected his decline from public view.

The extent of Redstone's limitations were chronicled in exacting detail in Manuela Herzer's Petition for Determinations re Advance Health Care Directive of Sumner M. Redstone, dated and filed on November 24, 2015 (the "Herzer Petition"), in *In re Advance Health Care Directive of Sumner M. Redstone*, in the Superior Court of the State of California, County of Los Angeles (the "Herzer Action"). The Herzer Action publicly revealed that, *inter alia*, Redstone is (and has for some time been) in the grips of a neurological disorder and has become

¹ The term "¶_" refers to paragraphs of the Complaint (A22-63).

dependent on his daughter, Shari Redstone, for his care. In a 15-minute highly circumscribed deposition, Redstone was able to utter only a few words that were hardly intelligible. While the Herzer Action Court determined that was sufficient to show he was competent to terminate Ms. Herzer as his caretaker, and to choose his daughter, Shari, to act as his sole health care agent, it made no determination as to his ability to serve on the Board of Directors of a publicly-owned company or whether he had been able to or did provide any services of value to Viacom during the Relevant Period.

In light of the publicity Redstone's disputes with his former confidantes engendered, Plaintiff made a demand pursuant to 8 *Del. C.* §220. Among other things, the demand sought documents concerning "[Redstone's] performance of any duties or responsibilities as Executive Chairman of the Board of Viacom." The documents produced did not evidence any contribution by Redstone to the management of Viacom. What the documents did evidence was that his limitations were apparent to Board colleagues who paid any attention to the subject as they should, and that they continued to pay him handsomely without regard to his debility until the harsh light of publicity forced them to change course. Each of the Board members was well-aware that Redstone was physically absent from and silent at every Board meeting conducted during the Relevant Period. They knew

or should have known that his physical ailments were so severe that he could barely communicate or complete even the most routine of tasks. Nevertheless, the Compensation Committee, the Nominating and Governance Committee and the Board as a whole never gave real consideration to Redstone's mental or physical condition or his non-performance of responsibilities expected of him.

Accordingly, Plaintiff brought this action for waste. As set forth in more detail below, the pleaded facts demonstrate that the Viacom Board compensated Redstone and re-nominated him to the Board despite his obvious inability to contribute to any services of value to Viacom.

A. Viacom and its Board of Directors

Viacom is a mass media corporation organized under the Delaware law, with its headquarters in New York City, ¶14 (A31). Viacom has two classes of stock, non-voting Class B shares and voting Class A shares, 79.5% of which is owned by National Amusements, Inc. ("NAI"), whose controlling shareholder is Redstone. Shari Redstone has 20% voting control of NAI. ¶¶15, 16, 75 (A31-32, A53).

At the time the Complaint was filed, the Viacom Board consisted of the eleven Individual Defendants, six of whom (Norville, McGarvie, Phillips, Salerno, Schwartz and Sorrell) were independent. ¶¶15-25 (A31-35). The members of the Compensation Committee were directors McGarvie, Phillips, Salerno, Schwartz,

Norville, and the members of the Nominating and Governance Committee were directors McGarvie, Salerno and Schwartz. ¶¶20-25 (A34-35).

B. Redstone and his Employment at Viacom

Redstone served as Executive Chairman of the Board and Founder of Viacom from January 1, 2006 until he “stepped down” on February 4, 2016. ¶15 (A31-32). His employment was governed by a self-renewing contract dated December 29, 2005, as amended on September 25, 2006. ¶11 (A30). This employment agreement provided that Redstone would work with the Board and President and CEO of Viacom to provide “overall leadership and strategic direction, give “guidance and support” to management, coordinate Board activities and communicate with shareholders. (A90). Redstone’s employment could “be terminated by either party at will.” ¶11 (A30).

The Viacom Board delegated to the Compensation Committee the responsibility for reviewing and approving Redstone’s compensation throughout the Relevant Period. ¶34 (A38). The Compensation Committee, together with the Nominating and Governance Committee, was responsible for annually evaluating Redstone’s performance in light of goals and objectives the Compensation Committee set at the beginning of the year. ¶¶35, 36 (A38-39).

On February 4, 2016, Redstone was designated by the Board as Chairman Emeritus, a title the Board gave him with no expectation that he would provide any

services to the Company. ¶15 (A31). In May 2016, Viacom stopped paying Redstone a salary as Chairman Emeritus. ¶6 (A26-27).

C. Redstone’s Deteriorating Health

1. Redstone’s Health in 2014

Redstone turned 91 in 2014. He was hospitalized several times for pneumonia which was “so severe that [Redstone] suffered brain ischemia – brain damage resulting from insufficient supply of oxygen to the brain. The brain ischemia severely compromised [Redstone’s] ability to swallow and to articulate speech.” ¶28 (A36).

[REDACTED]

[REDACTED]

[REDACTED]

¶29 (A36).

After multiple hospitalizations in the summer and fall of 2014, Redstone largely disappeared from public view. [REDACTED]

[REDACTED]

[REDACTED]

¶30 (A36-37).

By this time, the Individual Defendants knew that Redstone was not capable of communicating with them or with shareholders, as his employment contract required. *Id.* Additionally, Viacom’s Corporate Governance Guidelines provide

that the “Board’s responsibilities are active and not passive.” ¶49 (A44-45).

Redstone could not comply with this guideline.

For the November 12, 2014 Board meeting, Redstone’s attending nurses set up a conference call hook-up for a bedridden Redstone, in order for him to “participate.” [REDACTED]

[REDACTED] ¶31 (A37). The very next day, Redstone “participated” in the November 13, 2014 quarterly earnings call by telephone, and his few uttered words were “faint, slurred, barely audible” and “unintelligible” according to Viacom shareholders. ¶32 (A37).

The Compensation and Nominating and Governance Committees (namely, defendants McGarvie, Phillips, Salerno, Schwartz and Norville) held their annual joint meeting to “review” Redstone’s performance for fiscal year 2014 based on the 2014 goals and objectives the Compensation Committee had set [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ¶36-37 (39-40).

Viacom's January 23, 2015 Proxy Statement falsely claimed that "Mr. Redstone continued to oversee the activities of the Board of Directors. Under his leadership and vision, the company enhanced its financial position and continued to strengthen its overall business." ¶33 (A38). The Individual Defendants knew this statement was meant to convey to shareholders the false impression that Redstone was performing services. ¶36 (A39).

Indeed, at that time, the Individual Defendants knew that Redstone was unable to meet with any of them outside of his home, that he could not communicate intelligibly by phone or otherwise, and that it was unclear if he even comprehended what was said to him. They knew or should have known that Redstone was not "advising" or "providing guidance" or "coordinating activities" or "communicating," as his employment contract required. The facts that Redstone (or, someone on his behalf) dialed in to Board meetings and Redstone possibly understood what was being said does not indicate that he was able to perform the basic services required by his contract for which he was so well-paid. ¶¶37, 38 (A39-40).

Notwithstanding the fact that Redstone did not provide Viacom with the services he was contractually obligated to deliver for the latter half of 2014, as known to each of the Individual Defendants, Viacom paid Redstone \$13.2 million

for fiscal year 2014. ¶¶33, 39 (A38, A40). The 2015 Proxy Statement reported that Redstone’s annual base salary was increased to \$2 million from \$1.75 million, effective January 1, 2014. ¶41 (A41).

2. Redstone Played No Role in 2015

The Nominating and Governance Committee unanimously re-nominated Redstone during its January 2015 meeting without addressing his inability to communicate with the Board, nor his lack of mental competence to advise on strategic leadership and direction of the Company, to provide guidance and support to senior management or to coordinate the activities of the Board – the very goals and objectives the Compensation Committee had set. ¶42 (A42). Redstone did not offer his resignation despite the change in his personal circumstances, as Viacom’s Corporate Governance Guidelines required. ¶49 (A44-45).

At the January 14, 2015 Board meeting, the Board re-nominated Redstone as a director and elected him to remain as Executive Chairman of the Board. The 2015 Proxy Statement falsely stated that this role was appropriate “as he continues to actively participate in the development of the strategic direction of our company.” ¶43 (A42).

For all of 2015, Redstone did not participate in any conference calls with Wall Street analysts, and he did not physically attend any of Viacom Board meetings. ¶44 (A42-43). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Redstone did not attend the Viacom annual meeting of shareholders on March 16, 2015, as Viacom’s Corporate Governance Guidelines required. ¶¶4, 45, 49 (A25-26, A42-45). He allegedly participated by a call hook-up, but he was completely silent during the meeting. ¶45 (A43).

On April 9, 2015, Redstone’s estate planning attorney, Adam Streisand, e-mailed Ms. Herzer and Sydney Holland (Redstone’s other former companion), recommending that they not participate in a planned *Vanity Fair* interview with Redstone. Mr. Streisand wrote: “The main concern by Viacom is that if [Redstone] shames Shari publicly that Shari will seek to establish a conservatorship over [Redstone].” Mr. Streisand added, “If she does that, then his current condition will become public, and Viacom will have to remove [Redstone] as an officer/director and stop paying him compensation.” ¶46 (A43-44).

According to a May 31, 2015, *Vanity Fair* article entitled *Who Controls Sumner Redstone?*, one individual who saw Redstone in person stated he could not

speak and had not had a meal since Labor Day other than through tubes. That individual reportedly said: “I think he’s pretty out of it.” “He can’t speak, and I don’t know how much he knows what’s going on.” ¶47 (A44). This article also stated that a person who was visiting with Robert Evans, one of Redstone’s closest friends, broached the topic of Redstone’s health. “He looks like he’s dead,” the person told Mr. Evans, who is said to have replied, “Well, you should see him in person – he looks even worse.” ¶48 (A44).

The *Herzer* Petition described Redstone, at the time he evicted Holland from his home in August 2015, “as vacant, unable to reliably communicate, unaware of his surroundings, and without interest in things that used to excite and engage him.” ¶50 (A45). Redstone’s granddaughter, Keryn Redstone, wrote in a court declaration dated April 14, 2016 that she had noticed her grandfather’s behavior deteriorate in August – he was unusually disoriented, inattentive, wore a blank expression, and cried for no apparent reason. She stated that after Ms. Herzer’s departure, Redstone “could not talk intelligibly, walk, write, use a computer or phone.” ¶51 (A45-46). Shari Redstone publicly contested Ms. Herzer’s claims of Redstone’s incapacity despite the fact that his full-time health care staff made her aware of his deteriorated physical and mental condition. ¶52 (A46).

On December 8, 2015, Viacom’s Nominating and Governance Committee

met

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ¶54 (A47).

Defendant Dauman later acknowledged (in his own lawsuit commenced against Redstone on May 23, 2016) that Redstone was not actually competent in October and November 2015, but that he (Dauman) had submitted a declaration in the *Herzer* action stating that Redstone was engaged and active at that time “in order to help his longtime friend and colleague maintain his choice of healthcare agent.” ¶53 (A46-47).

At the December 8 meeting, the Nominating and Governance Committee

[REDACTED]

[REDACTED]

[REDACTED] ¶55 (A47).

On December 18, 2015, the Nominating and Governance Committee met to discuss “[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¶56 (A47-48).

At that meeting, the Committee interviewed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (A96).

The Compensation Committee approved the continued contractual salary compensation payable to Redstone despite the fact that the Company could not receive any of the services he was contractually obligated to deliver and they could have and should have terminated the contract at will. ¶¶58-59 (A48-49).

Viacom’s 2016 Proxy Statement reported that Redstone was paid a salary of \$2 million for fiscal year 2015 and that “[i]n light of Mr. Redstone’s reduced responsibilities for fiscal year 2015 no target bonus was set and no award was made for fiscal year 2015.” ¶57 (A48). The Individual Defendants had not previously admitted that Redstone’s role at Viacom had changed. *Id.* Even this statement was not candid inasmuch as each of the Individual Defendants knew Redstone was unable to provide any services of value during all of 2015. *Id.*

3. The Board’s Gifts to Redstone in 2016

Redstone did not physically attend the January 14, 2016 Board meeting and did not participate in the meeting as he was not capable of performing even menial tasks, as was known to all members of the Board. ¶62 (A50).

That same day, the Nominating and Governance Committee interviewed

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *Id.*

The Committee discussed re-nominating Redstone as director, and expressed concerns “[REDACTED] [REDACTED] ¶60 (A49). The 2016 Proxy Statement indicated that Redstone had been nominated for re-election to the Viacom Board. This was despite the fact that all of the Individual Defendants knew that Redstone was not capable of making “independent, analytical inquiries” as Viacom’s corporate governance guidelines required. ¶¶60-61 (A49-50).

On February 4, 2016, Redstone resigned or was caused to resign his chairmanship and was replaced by Defendant Dauman. ¶63 (A50). The Board designated Redstone as Chairman Emeritus. The Form 8-K filed with the SEC and related press release did not reveal any reasons for these changes. ¶64 (A50).

The Board supplemented Viacom’s 2016 Proxy Statement on February 12, 2016 explaining that Redstone was appointed to the role of Chairman Emeritus “because of his position as our controlling shareholder, his role in founding Viacom, including managing it for many years, his extensive experience in and

understanding of the media and entertainment industry and his relationships with the business community.” ¶65 (A50). These reasons are identical to those set forth in the 2016 Proxy Statement as to why the Board purportedly believed Redstone should be re-nominated as a director and should serve as Chairman of the Board. *Id.* The Supplement to Viacom’s 2016 Proxy Statement did not reveal what, if any, duties the Chairman Emeritus had, nor did it address Redstone’s mental and physical incapacity. ¶66 (A50-51).

According to a March 1, 2016 *New York Times* article, the geriatric psychiatrist who examined Redstone at the California Court’s direction “found that he lacked mental capacity.” ¶67 (A51).

According to the complaint in a lawsuit Defendant Dauman commenced in late May 2016, he had visited Redstone during the first week of March. Dauman reported that Redstone “appeared almost totally non-responsive, and could not meaningfully communicate at all.” ¶68 (A51).

Redstone did not attend the Viacom annual meeting of shareholders on March 14, 2016. He participated by a call hook-up, but was completely silent during the meeting. ¶69 (A51). At the March 14, 2016 Board meeting, a resolution was passed that Redstone was designated Chairman Emeritus [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ¶¶70, 71 (A51-52). Each member of the Board knew they would never request that Redstone “consult with management” or be assigned any duties. ¶72 (A52). In breach of his fiduciary duties, Defendant Dauman allowed Redstone to be paid in his role as Chairman Emeritus, despite the fact that he had seen Redstone the prior week and found him to be completely unresponsive. *Id.*

On May 11, 2016, the California Court dismissed the *Herzer* Petition, finding that Redstone was sufficiently competent to make his own decisions about who would be his caretaker. The Court did not make any determination as to Redstone’s mental capacity to make business decisions or serve on the Board of Directors of a publicly-owned company or whether he had provided any services of value to Viacom during the Relevant Period. ¶73 (A52). Indeed, there was expert testimony in the case that Redstone suffers from moderate dementia, as evidenced by his emotional, speech and reasoning challenges. *Id.*

Without any public explanation, Viacom’s Board suddenly stopped paying a salary to Redstone in May 2016. As *The New York Times* wrote on May 31, 2016, in an article entitled, “The Struggles of Today’s Sumner Redstone,” “This board

paid Mr. Redstone millions for years without a peep about his competency and decided not to pay him only a few weeks ago.” ¶6 (A26-27).

D. Plaintiff and His Derivative Allegations

Plaintiff has been a shareholder of Viacom throughout the Relevant Period. ¶¶13, 91 (A31, A58). On March 29, 2016, Plaintiff made a demand for documents pursuant to 8 *Del. C.* §220 and Viacom produced approximately 3,300 pages of heavily redacted documents in response. ¶2 (A24-25). Not a single document demonstrates that Redstone provided any services of value to Viacom during the Relevant Period. ¶¶2, 96 (A24-25, A60). Plaintiff commenced this action on July 20, 2016 derivatively on behalf of Viacom. The Complaint asserts two counts. Count I asserts a claim for breach of fiduciary duty and waste of corporate assets against all of the Individual Defendants except for Redstone for providing unearned compensation to Redstone during the Relevant Period when they knew he was incapable of providing any services of value to the Company. Count II is alleged against Redstone for being unjustly enriched by the payment to him for services he failed to and could not perform.

E. Litigation Over Control of Viacom

1. The Massachusetts Action

On May 20, 2016, defendants Dauman and Abrams were served with notices informing them that Redstone had removed them as trustees of the Redstone Trust,

that the stockholders of NAI, acting by unanimous written consent, had removed them as directors, and that NAI, acting by written consent, had removed them as managers of NAI Entertainment Holdings and NAI Asset Holdings. ¶77 (A54).

On May 23, 2016, defendants Dauman and Abrams filed suit in Massachusetts seeking to be reinstated as trustees of the Redstone Trust and as directors of NAI (the “Massachusetts Action”). The Massachusetts Action alleged that Redstone “suffers from profound physical and mental illness. In particular, he is afflicted with a ‘subcortical neurological disorder’ that can be characterized by dementia, impaired cognition, a slowness of mental processing, a loss of memory, apathy and depression. Because of his diminished physical and mental health, Mr. Redstone is unable to initiate or participate in meaningful conversation, including communications concerning his business or personal affairs. In court proceedings earlier [in 2016], lawyers representing Mr. Redstone appear to have agreed that Mr. Redstone is subject to mental impairment and stipulated the he is susceptible to undue influence.” ¶79 (A55).

2. The California Action

On May 23, 2016, a lawyer acting in Redstone’s name filed a petition in Los Angeles Superior Court, seeking an order affirming the removal of defendants Dauman and Abrams as trustees of the Redstone Trust, and their replacement by Thaddeus Jankowski, NAI general counsel, and Jill Krutick, a friend of defendant

Shari Redstone, and appointing Kimberlee Korff Ostheimer, Shari's daughter, as a director of NAI. ¶80 (A55) (the "California Action").

The Viacom directors wrote a letter to various "Viacom constituencies" that they would challenge their removal "[b]ecause we see that as our responsibility to the non-controlling shareholders of Viacom who own 90 percent of the equity of the company." The May 31, 2016 *New York Times* article commented: "Funny that a board so beholden to Mr. Redstone and willing to dole out excessive compensation to both Mr. Redstone and Mr. Dauman over the years now cares about other constituencies." ¶81 (A55-56).

3. The Delaware Actions

On June 16, 2016, NAI issued a written consent to amend Viacom's by-laws to permit vacancies on the Board to be filled by Viacom shareholders and to remove defendants Dauman, Abrams, McGarvie, Schwartz and Salerno as Viacom directors and replace them with Nicole Seligman, Kenneth Lerer, Thomas May, Judith McHale and Ronald Nelson. ¶82 (A56). That same day, two lawsuits were filed in the Delaware Court of Chancery pursuant to 8 *Del. C.* 225. In one action, NAI sought an order declaring that such written consent was valid. ¶83 (A56). In the other action, Defendant Salerno sought to invalidate the June 16, 2016 written consent, accused Shari Redstone of unduly influencing Redstone and claimed Redstone would not have removed these directors if he were mentally competent.

¶85 (A56-57). The two competing actions pursuant to 8 *Del. C.* 225 were subsequently consolidated (the “Delaware Actions”).

F. The Settlement of the Massachusetts Action, the California Action and the Delaware Actions

On August 18, 2016, the Delaware Actions, the Massachusetts Action, and the California Action were settled pursuant to a Confidential Settlement and Release Agreement (the “Settlement Agreement”) that was signed by each of the Individual Defendants individually and in their capacity as directors of Viacom. (A106-A194). The Settlement Agreement contains a general release of Viacom’s claims against its directors (the “Release”) up to its Effective Date, which is defined in the agreement’s preamble as August 18, 2016:

Each of Viacom, its subsidiaries, affiliates under its control, predecessors, successors and assigns, and the current and former directors, officers, employees, agents, attorneys and representatives of each of them (collectively the “Viacom Parties”), hereby releases and forever discharges from all liability . . . [Sumner and Sheri Redstone], . . . Dauman, Abrams, Salerno, McGarvie, Schwartz, Phillips, Sorrell, Norville, Dooley, and the agents, attorneys, representatives, heirs, executors and assigns of each of them . . . from any and all Claims (defined below) which such Viacom Party ever had, now has or hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the Effective Date of this Settlement, including, but not limited to, any and all Claims arising out of or relating to conduct alleged in, or the claims asserted in or that could have been asserted in, the Massachusetts Action, the California Action, or the Delaware Actions. (A130).

G. Redstone's Elder Abuse Lawsuit

On October 25, 2016, a lawsuit was filed in the Superior Court of California, County of Los Angeles with Redstone as the plaintiff asserting claims against Herzer, Holland and various unknown defendants for elder abuse, breach of fiduciary duty, constructive fraud and intentional infliction of emotional distress (the "Redstone Abuse Lawsuit"). The Redstone Abuse Lawsuit confirms that Redstone was unable to render any services to Viacom since at least May 2014.²

Among other things, the Redstone Abuse Lawsuit, alleges that:

- Redstone suffered from "a precipitous decline in his physical health," "[b]y the spring of 2014, Holland and Herzer were in near total control of Redstone's life," and that "[g]iven his advanced age and poor physical health, Redstone was prevented from effectively protecting himself from wrongful conduct on Holland and Herzer's part." Ex. A at ¶¶2, 3, 29, 32, 75 (A239-40, A246-47, A265).
- Redstone suffered from dysarthria for which he attended speech therapy sessions and, could not effectively communicate orally. Ex. A at ¶¶2, 15, 29, 33, 45. (A239, A242, A245, A248, A252-53).
- Redstone was entirely dependent on Herzer and Holland; under their control; and easily duped, confused and manipulated. *See e.g.*, Ex. A at ¶¶2, 3, 43 (A239-40, A251) (alleging that Holland and Herzer would get Redstone to simply repeat whatever they demanded him to say); *id.* at ¶33 (A248) ("Holland sometimes even told Redstone she had been sitting by his side for hours and blamed him for being so forgetful,

² Plaintiff attached to his Answering Brief in the Court of Chancery a copy of the complaint filed on behalf of Redstone in the Redstone Abuse Lawsuit (A238-274) and asserted that the Court could take judicial notice of the filing of the Redstone Abuse Lawsuit, and the allegations made therein by or on behalf of Redstone, as judicial admissions not subject to contradiction or explanation (A222).

when in fact she had returned home only minutes earlier.”); *id.* at ¶40 (A250) (Holland and Herzer induced Redstone to sign paperwork and authorize the transfer of \$45 million to each of their personal bank accounts in May 2014); *id.* at ¶39 (A250) (Holland and Herzer asked nurses to leave the room when they wanted Mr. Redstone to sign papers “and he was frequently anxious, confused or distraught when they returned.”).

- Prior to May 19, 2014, Redstone asked his nurses for updates regarding CBS’s and Viacom’s stock prices (which they apparently obtained via an electronic ticker set up in his bedroom). After Herzer and Holland duped and/ or manipulated Redstone into selling all of his vested holdings of Viacom and CBS securities on May 19, 2014, the ticker was removed from Redstone’s bedroom and he ceased asking his nurses for updates. Ex. A at ¶¶35-39 (A248-50).
- By September 2014, Redstone could not eat or drink, “it became difficult for Redstone to initiate communication or articulate more than the most basic verbal responses”, “was reduced to a shell of his former self”, and “required around-the-clock nursing care, and any semblance of independence was lost.” Ex. A at ¶47 (A253).
- Mr. Redstone’s condition “prevented him from effectively protecting himself from wrongful conduct” by Holland and Herzer. Ex. A at ¶ 75 (A265).

Mr. Redstone’s own allegations demonstrate that by May 2014 *at the latest* he was not performing – and was wholly incapable of performing – any of the tasks the Compensation Committee had set for him. Given Mr. Redstone’s own judicial admissions regarding his extremely limited capabilities, he was plainly incapable of: (1) “[a]dvis[ing] on the overall strategic leadership and strategic direction of the Company and provid[ing] guidance and support to senior

management”; or (2) “[c]oordinat[ing] the activities of the Board, including promoting and facilitating effective communication with the Board and [providing] assistance to Board in maintaining best governance practices.” ¶37 (A39-40).

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN DISMISSING THE COMPLAINT ON THE BASIS OF THE SELF-DEALING RELEASE

A. Question Presented

Whether the Court properly dismissed the Complaint based on the Release on a Rule 12(b)(6) motion, prior to assessing demand futility, without affording Plaintiff an opportunity for discovery concerning the validity and effect of the self-dealing Release and without requiring the Individual Defendants to demonstrate that the Release of these claims was entirely fair to Viacom. This issue was preserved for appeal. (A234, A341-43, A369-70).

B. Standard Of Review

This Court's review of a trial court's grant of a motion to dismiss under Rule 12(b)(6) is *de novo*. *Brinckerhoff v. Enbridge Energy Company, Inc.*, 159 A.3d 242, 252 (Del. 2017). The Court must accept all well-pleaded allegations as true and draw all reasonable inferences in the plaintiff's favor. *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536-37 (Del. 2011).

C. Merits Of Argument

The existence of a release is an affirmative defense that ordinarily must be asserted in a responsive pleading. *See* Ct. Ch. R. 8(c). In this case, the Settlement Agreement containing the Release did not exist at the time Plaintiff filed his

Complaint and therefore could not have been pled. The Release cannot be deemed integral to Plaintiff's claims or incorporated into the Complaint. *In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59, 69-70 (Del.1995).

The Court nonetheless gave effect to the Release, without first assessing demand futility, and without converting the motion to dismiss into a motion for summary judgment.³ Even though the Release: (i) was part of a settlement of unrelated litigation (in which some of the Individual Defendants were adverse to other Individual Defendants, and which did not involve any dispute about Redstone's compensation (A287)), and (ii) constituted classic self-dealing in that it conferred a direct benefit upon each of Individual Defendants who caused Viacom to approve it (A142-44, A370), the Court simply presumed the Release to be valid and effective, and dismissed Plaintiff's Claims without applying any judicial scrutiny or affording Plaintiff any discovery to illuminate whether or not the Release would be deemed entirely fair to Viacom. Opinion at 9-14.⁴

³ The Court appears to have considered the Release pursuant to D.R.E 201. Opinion at 2 n. 1. While the Court had discretion to do so (*see, e.g., In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170-71 (Del. 2006)), as explained further below, because the Release was, on its face, inherently a self-dealing transaction, it was incumbent upon the Court to apply judicial scrutiny to it, rather than simply giving it effect.

⁴ Plaintiff did not dispute the broad language of the Release and conceded that it "looks like" Plaintiff's claims would be released "if the release was valid." A343.

As Plaintiff argued below, however, the Individual Defendants clearly stood on both sides of the Release and should have borne the burden of demonstrating “their utmost good faith and the most scrupulous inherent fairness of the bargain” “sufficient to pass the test of careful scrutiny by the courts.” A370 (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)); *See also* A341 (“[T]his release is inherently a self-dealing transaction. It’s something the defendants agreed to amongst themselves that benefits them.”); A343 (“[The Release] certainly looks like a self-dealing transaction, and one that should be scrutinized by the Court and not just accepted at face value.”); A324 (“[T]he purported release is clearly a self-interested transaction, and insufficient facts have been put before the Court concerning the circumstances under which it was negotiated and executed to assess its validity.”).

Indeed, while the specific facts and circumstances of the Release are all within Defendants’ control, its self-dealing nature is self-evident. But the Court seemingly placed no import on the self-interested nature of the release. Opinion at 11 (“[t]his [that the Release is a self-interested transaction] may well be true. . .”) and instead focused on the fact that Plaintiff did not amend his pleading to attack the Release after Defendants asserted in their opening brief that the Release was

effective to release the claims Plaintiff asserted on behalf of Viacom against them.

*Id.*⁵

Plaintiff respectfully submits that approach was inconsistent with fundamental principles of Delaware corporate law, which (i) place the burden of demonstrating fairness on self-dealing fiduciaries and (ii) require judicial scrutiny of transactions in which corporate fiduciaries seek to dismiss or compromise derivative claims. *See, e.g., Weinberger*, 457 A.2d at 710 (“The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.”); *Fins v. Pearlman*, 424 A.2d 305, 308 (Del.1980) (noting the rule that, “when examining a proposed settlement of a derivative suit involving directors standing on each side of a transaction under attack, the Court of Chancery is to use its own business judgment to determine whether the settlement is intrinsically fair.” (citing *Neponsit Investment Co. v. Abramson*, 405 A.2d 97, 100 (Del. 1979)); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 787-88 (Del.1981) (“In this case, the litigating stockholder plaintiff facing

⁵ The trial Court faulted Plaintiff for failing to amend his Complaint (Opinion at 11-12), but Plaintiff had no obligation to supplement (rather than amend, since the Release occurred after the Complaint was filed) his pleading to address an affirmative defense Defendants raised on a 12(b)(6) motion. *Cf. McNair v. Taylor, et. al.*, 2007 WL 1218681 at *1 n. 3 (Del. Super.) (Vaughn, J.) (“[P]laintiff is not required to anticipate affirmative defenses in his complaint”).

dismissal of a lawsuit properly commenced ought, in our judgment, to have sufficient status for strict Court review.”).

In *Zapata* this Court noted that an interested Board’s rejection of a demand to bring claims against its members would be a “probabl[y] tainted exercise of [its] authority . . .” 430 A.2d at 786. This Court held that a “board, tainted by the self-interest of a majority of its members, can legally delegate its authority to a committee of two disinterested directors” to exercise the board’s managerial power over derivative litigation properly instituted by a stockholder plaintiff, *subject to a framework of judicial safeguards* that (1) place the burden on the committee to demonstrate its independence, good faith and reasonable investigation; and (2) expressly preserve the Court of Chancery’s discretion to make its own judgment regarding the soundness of the committee’s decision. *Id.* at 788-89. Here, the trial Court’s decision allowed the Viacom board, “tainted by the self-interest of a majority of its members” to *directly* conclude derivative claims pending against themselves, without being subjected to any judicial scrutiny whatsoever. If the Court’s decision below stands, no Board faced with derivative litigation will need to bother with the carefully crafted *Zapata* process; they can simply cause the corporation to grant them a release.

If Plaintiff's Complaint adequately asserts demand futility, then dismissal on the face of the Release, without judicial oversight, should clearly be invalid. *Zapata*, 430 A.2d at 787 (concluding that "there is sufficient risk in the realities of a situation like the one presented in this case [where demand was futile] to justify caution beyond adherence to the theory of business judgment."). If the conclusion of an independent committee to dismiss a properly instituted derivative action is subject to judicial oversight, as it is under *Zapata*, then a decision by a conflicted board that is asserted to have the same effect should be subject to even more searching review, *i.e.* entire fairness scrutiny. The trial Court, however, made no determination regarding the sufficiency of Plaintiff's demand futility allegations. Thus, prior to a judicial determination of whether his claims were "properly initiated", Viacom's conflicted directors were permitted – by means of the self-interested Release – to dismiss derivative claims pending against themselves, while entirely avoiding judicial scrutiny of plain self-dealing. Plaintiff respectfully submits that result is inconsistent with the carefully crafted procedures of *Zapata* and the venerated Delaware decisional law requiring strict judicial scrutiny of self-dealing transactions.

Under the facts of this case, dismissal should not have been granted on the face of the Release. To meet their obligation of establishing entire fairness,

Defendants should be required to put before the Court evidence concerning the circumstances under which the Release was negotiated and executed and whether or not Viacom obtained fair consideration for relinquishing these claims. Plaintiff should have received the opportunity to develop a record on these issues.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits, the Court of Chancery's Opinion should be reversed and the case should be remanded to the Court of Chancery for further proceedings.

ROSENTHAL, MONHAI & GODDESS, P.A.

/s/ P. Bradford deLeeuw

Norman M. Monhait (#1040)

P. Bradford deLeeuw (#3569)

919 N. Market Street, Suite 1401

Citizens Bank Center

Wilmington, Delaware 19801

(302) 656-4433

Attorneys for Plaintiff Below-Appellant

OF COUNSEL:

**GREENFIELD &
GOODMAN, LLC**

Richard D. Greenfield

Marguerite R. Goodman

Ilene Freier Brookler

250 Hudson Street-8th Floor

New York, NY 10013

(917) 495-4446

DONOVAN AXLER, LLC

Michael D. Donovan

1055 Westlakes Drive, Suite 155

Berwyn, PA 19312

610-647-6067

January 8, 2018