EFiled: May 15 2018 08:58PM EDT
Transaction ID 62033650
Case No. 2018-0342-AGB

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CBS CORPORATION, GARY L. COUNTRYMAN, CHARLES K. GIFFORD, BRUCE S. GORDON, LINDA M. GRIEGO, and MARTHA L. MINOW,	:	
Plaintiffs,	:	
	:	C.A. No. 2018-0342-AGB
v.	:	
NATIONAL AMUSEMENTS, INC., SHARI REDSTONE, SUMNER M. REDSTONE, NAI ENTERTAINMENT HOLDINGS LLC, and SUMNER M. REDSTONE NATIONAL AMUSEMENTS TRUST,	:	
Defendants.	:	

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

POTTER ANDERSON & CORROON LLP
Donald J. Wolfe, Jr. (No. 285)
Matthew E. Fischer (No. 3092)
Michael A. Pittenger (No. 3212)
Jacqueline A. Rogers (No. 5793)
Hercules Plaza, 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000

Attorneys for Defendants

OF COUNSEL:

Meredith Kotler
Victor L. Hou
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

Dated: May 15, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page(s)

Defendants National Amusements, Inc. ("NAI"), Shari Redstone, Sumner M. Redstone, NAI Entertainment Holdings, LLC, and the Sumner M. Redstone National Amusements Trust (collectively, "Defendants"), by and through their undersigned counsel, submit this Brief in Opposition to the Motion For A Temporary Restraining Order (the "TRO Motion") filed by plaintiffs CBS Corporation ("CBS"), Gary L. Countryman, Charles K. Gifford, Bruce S. Gordon, Linda M. Griego, and Martha L. Minow (collectively, "Plaintiffs").

PRELIMINARY STATEMENT

Plaintiffs seek a supposedly "temporary" remedy that is extraordinary both in scope and finality in response to unsupported allegations about NAI's intentions with respect to a possible merger of CBS with Viacom Inc. ("Viacom"). Specifically, Plaintiffs suggest that NAI intends to force such a merger by removing and replacing the CBS independent directors. There is no truth to that. NAI does not have, and has never had, any intention of replacing the CBS Board or taking other action to force a merger. Plaintiffs' supposed belief to the contrary is based on unsourced media reports and conjecture. Moreover, NAI offered to stipulate to a status quo order under which it would have agreed not to remove directors while this action is pending, as long as the CBS Board would postpone any meeting to approve the dilutive issuance. There is simply no cause for a TRO.

Moreover, even if NAI had not agreed to forego any action with respect to a potential business combination while this action is pending, the TRO that Plaintiffs seek, which is designed to enable the Board to adopt resolutions diluting NAI's voting power from approximately 80% to approximately 17% at a hastily scheduled Board meeting ("Special Meeting"), would still be egregiously overbroad and unjustified. If Plaintiffs were genuinely concerned that NAI would seek to force a merger upon the company, and NAI had not committed to refrain from doing so during the pendency of this action, the relief to which Plaintiffs would even plausibly be entitled would be an injunction to prevent NAI from forcing a merger upon the company while this litigation is pending. It would not be to dilute NAI's voting power, for all purposes, now and forever. This is an unprecedented usurpation of a controlling stockholder's voting power.

Plaintiffs' brazen attempt to disenfranchise a controlling stockholder of its voting rights fails on many levels:

- The TRO Motion seeks to strip NAI of its voting rights ostensibly to prevent NAI from forcing CBS to merge with Viacom—while conveniently ignoring that (a) NAI never intended to remove directors or force a merger over CBS's objections (and NAI made this clear to CBS through its words and actions), and (b) NAI in fact understood that there was a provisional agreement between the CBS and Viacom special committees on economic terms, and the only

remaining point was whether or not the Chief Executive Officer of Viacom would have a role as a director in the combined company.

- Even if Plaintiffs' supposed fear that NAI will take action as a stockholder to force such a merger is given credit, the remedy sought is much broader than is necessary to prevent the alleged harm, particularly given the availability of both a proceeding under DGCL Section 225 to challenge any director removal and a stockholder action to challenge any actual merger.
- NAI is at a loss to explain why Plaintiffs are seeking a remedy that goes so far beyond the unsupported allegation that NAI is trying to force CBS to merge with Viacom, except that the CBS Board and management team have simply become uncomfortable with the reality that CBS has a controlling stockholder and would prefer that not be the case.[1]

Putting aside that the dilutive dividend proposed by Plaintiffs will constitute a non-exculpated breach of fiduciary duty by the directors who vote in favor of it, there simply is no precedent in Delaware law for the extraordinary "temporary" relief they seek. To be sure, while NAI never had the intent to take stockholder

[1] NAI notes that behind this drama sits Les Moonves, Chairman and Chief Executive Officer of CBS. The course of action proposed by the independent directors—act at the Special Meeting to approve the dilutive dividend and then resign, *see* Compl. ¶ 73—would likely trigger claims by Mr. Moonves for massive "golden parachute" payments (reported to be in excess of $150 million). NAI of course reserves the right to challenge any such claims.

action to protect its voting power that Plaintiffs ascribe to it, Plaintiffs' actions in proposing the dilutive dividend and pursuing this case and TRO Motion have forced NAI to consider exercising its rights—or forfeit that exercise before the Special Meeting. Plaintiffs' application for a TRO should be denied.

BACKGROUND

I. NAI Asks For Consideration Of A Combination Of CBS And Viacom, And The Parties' Negotiations

NAI is a preeminent privately held theater and mass media holding company based in Massachusetts and incorporated in Maryland. In 2000, Viacom completed its acquisition of CBS, with the combined company controlled by NAI. *See* Compl. ¶ 23. In 2005, the two companies were separated, with public stockholders of the combined company receiving shares of each new company—and with the prior voting structure replicated to retain NAI's voting control of each. *See id*. ¶ 24. Since that time, CBS has repeatedly disclosed to stockholders NAI's voting control: "NAI, through its voting control of [CBS] . . . is in a position to control corporate actions that require stockholder approval, including the election of directors." Ex. A.[2] NAI currently controls 79.6% of the voting power of CBS. Compl. ¶ 4.

On September 29, 2016, NAI sent a letter (the "September 2016 Letter") to the boards of both CBS and Viacom regarding a potential combination of the two

[2] "Ex. __" refers to Exhibits appended to the Transmittal Affidavit of Jacqueline A. Rogers.

companies. Ex. B. In its Letter, NAI highlighted the "substantial synergies" that would result from the potential combination, permitting the combined company to more aggressively and effectively respond to the challenges facing the changing entertainment and media landscape.

The September 2016 Letter also stressed the need for "full and fair deliberation and negotiation" and that "any transaction would proceed only if it is approved by each board." *Id.* The September 2016 Letter also stated that none of NAI's then designees to the CBS and Viacom boards would vote or participate in any such deliberations. Further, NAI made clear: "To avoid any doubt, National Amusements is not willing to accept or support (i) any acquisition by a third party of either company or (ii) any transaction that would result in National Amusements surrendering its controlling position in either company or not controlling the combined company." *Id.*

Following negotiations, on December 12, 2016, NAI sent a letter to the CBS and Viacom boards (the "December 2016 Letter"), asking them to discontinue exploration of a potential combination. Ex. C. The December 2016 Letter noted that after careful assessment and meetings with leadership of both companies, NAI concluded that it was not the right time to merge. NAI's decision was also reached following management changes at Viacom effected by the Viacom board and Viacom's strategic planning changes under new executive leadership.

Over the next 12 months, continued changes in the entertainment and media landscape further confirmed that Viacom and CBS needed scale to remain competitive. Starting in approximately December 2017, NAI and various members of the CBS and Viacom boards, as well as certain CBS and Viacom executives, held discussions about a potential combination. *See* Compl. ¶ 46.

On February 1, 2018, each of CBS and Viacom announced that they had established special committees of independent directors to evaluate a potential combination. *See id*. ¶¶ 49, 52. NAI confirmed its support of these steps, and again confirmed that "[t]o avoid any doubt, National is not willing to accept or support (i) any acquisition by a third party of either company or (ii) any transaction that would result in National surrendering its controlling position in either company or not controlling the combined company." Ex. D. Between February 1 and May 11, 2018, as reported in the press, there were numerous exchanges between the special committees of CBS and Viacom, and also with representatives of NAI. *See* Compl. ¶¶ 54-55.

Indeed, from NAI's perspective, the parties were making progress. It was NAI's understanding that, as of April 24, 2018, the special committees reached a provisional agreement on economic terms. *See* Ex. E. In addition, while there was disagreement over the role of Mr. Bakish (the Chief Executive Officer of Viacom) in the combined company, *see* Compl. ¶ 58, on May 4, 2018, the press reported that

Ms. Redstone had dropped a demand that he serve in management and instead would accept him having a role on the combined company board.[3]

During the afternoon of Friday, May 11, 2018, CBS director Mr. Klieger raised with Mr. Gordon of the CBS special committee—as Ms. Redstone had previously raised with Messrs. Moonves and Gordon—NAI's discomfort with the continued board position of Mr. Gifford given certain incidents that took place in 2016 and 2017, and the potential facilitation of his exit from the CBS Board with minimal disruption and public attention, including in the event of a merger, his non-appointment to the board of the combined company. *See* Ex. F.

Other than the discussion limited to Mr. Gifford, throughout the negotiations, Ms. Redstone and NAI never had the intent to replace the CBS Board or force a deal that was not supported by both special committees. To the contrary, CBS's Annual Proxy, filed with the SEC on April 6, 2018, included the statement that NAI "has advised the Company that it intends to vote all of its shares of the Company's Class A Common Stock in favor of" the CBS slate. Ex. G. CBS asked NAI to confirm the accuracy of this statement prior to the Proxy's filing, which NAI did. Additionally, Plaintiffs admit that the CBS Board—including Ms. Redstone—agreed that it would not approve any transaction without the favorable

[3] *See, e.g.*, Keach Hagey & Joe Flint, "Shari Redstone Seeks To End CBS-Viacom Deal Impasse," *The Wall Street Journal* (May 4, 2018).

recommendation of the special committees, and that Ms. Redstone publicly supported the special committee processes. Compl. ¶¶ 50-51.

II. Plaintiffs Ambush NAI

Apparently over the weekend of May 11-13, 2018, the CBS special committee determined that, in their view, a combination of CBS and Viacom was not in the best interests of CBS and its stockholders. *Id*. ¶ 62. The special committee, however, chose not to convey this to Ms. Redstone or anyone at NAI or Viacom. *Id.* Rather, on Monday, May 14, 2018, CBS noticed a Special Meeting to occur on Thursday, May 17, 2018. The stated purpose of the Special Meeting is to review and consider declaring a dividend of shares of Class A common stock to all CBS Class A and Class B stockholders for the *sole* purpose of diluting NAI's control position and voting rights. *Id.* ¶ 72; TRO Motion ¶ 7. As NAI currently owns a majority of the Class A Common Stock (voting stock), and the Class B Common Stock is non-voting, the proposed dividend will dilute NAI's voting rights from approximately 80% to approximately 17%. Compl. ¶ 72.

Almost immediately after CBS noticed the Special Meeting, Plaintiffs filed a Verified Complaint (the "Complaint"), the TRO Motion, and a motion for a preliminary injunction to prevent NAI from, among other things, exercising its voting rights as a controlling stockholder to remove CBS directors prior to the Special Meeting or to make changes to the "organizational documents" of CBS in

order to protect itself from the massive dilution threatened by Plaintiffs. All of Plaintiffs' claims and requested relief center on the Special Meeting, noticed to occur a mere three days after Plaintiffs commenced this action. In addition, the Complaint was filed just days before CBS's annual upfront presentation to advertisers (Wednesday, May 16) and its annual shareholder meeting (Friday, May 18).

According to the Complaint and TRO Motion, Plaintiffs are concerned that Ms. Redstone will follow through on purported threats "expressed in the media"—in other words, "speculation" on the part of journalists, analysts, and pundits, *see id*. ¶¶ 55, 57, 58-59, 61—to replace the independent directors of CBS, TRO Motion ¶ 6; Compl. ¶ 73, and thereafter force a combination of CBS and Viacom that the CBS special committee believes is not in the best interests of CBS and its stockholders, TRO Motion ¶¶ 8, 15; Compl. ¶ 78. Plaintiffs admit that even if NAI does not attempt to force through a merger, they still want to strip NAI of its controlling position, with the broad assertion that such control is "inimical to the best interests of all CBS stockholders." TRO Motion ¶ 6; Compl. ¶¶ 67-68.

III. NAI Attempts to Negotiate A Standstill

In an attempt to streamline the pending litigation for the best interest of all parties and the Court, NAI conveyed to Plaintiffs that it was prepared to agree to a mutual status quo order, pending briefing and development of an appropriate record addressing the parties' positions. Specifically, NAI offered that it would not exercise

its rights as controlling stockholder (including voting on various corporate action or to taking other action regarding the merger of CBS and Viacom) if Plaintiffs agreed to adjourn the Special Meeting until final adjudication. Plaintiffs refused and instead insisted that any such agreement must permit it to proceed with the Special Meeting and declare a dilutive dividend—which even on a "conditional"[4] basis would impose a permanent remedy since NAI would be forced to irrevocably surrender its right to take action as a stockholder prior to the Special Meeting. *See* Ex. H.[5]

ARGUMENT

I. Plaintiffs' Inexcusable Delay Bars Their Request For A TRO

By their own allegations, Plaintiffs have long known that NAI favors a CBS/Viacom merger. Rather than allowing for an orderly resolution of claims Plaintiffs believe they may have arising from the possibility of such a future combination, Plaintiffs orchestrated a sequencing in which they noticed a Special Meeting this Thursday, and nearly simultaneously dropped their pre-packaged 40-

[4] Plaintiffs have represented that if the Board were to approve the dilutive dividend, they would not implement it until after this Court has passed on the dividend's validity. TRO Motion ¶¶ 12, 24; Compl. ¶ 9. Based on that representation, NAI has not yet filed a complaint and motion to enjoin approval of such a dilutive dividend, but reserves the right to do so and to hold each director who votes in favor of it liable for damages flowing from what would be a non-exculpable breach of the fiduciary duty of loyalty.

[5] Plaintiffs offered, shortly before the deadline to file this Opposition, to agree that NAI could take "conditional" stockholder action under DGCL Section 228, but they continued to insist on the Special Meeting taking place at least concurrently with such stockholder action.

plus page Complaint and TRO Motion on Defendants. Nothing in the Complaint or the TRO Motion justifies this last-minute maneuver.

This case presents a prototypical example of Plaintiffs creating their own emergency, as Plaintiffs are entirely in control of the timing of the Special Meeting, which could easily have been noticed for one month hence. But Plaintiffs apparently hoped to gain a tactical advantage by forcing Defendants to brief this motion nearly overnight. This Court should not countenance such tactics.

As this Court has previously held: "The emergency nature of plaintiff's complaint is a self-inflicted wound that does not justify the commencement of the heavy machinery of expedited injunctive proceedings."[6] This Court refuses requests for temporary restraining orders when, as here, a plaintiff delays before seeking that relief.[7] For this reason alone, the Court can and should deny Plaintiffs' TRO Motion.

II. Even If Plaintiffs' Inequitable Delay Does Not Bar Their TRO Motion, The Court Should Apply The Summary Judgment Or, At The Very Least, Preliminary Injunction Standard

While a movant seeking a temporary restraining order ordinarily bears the burden to prove only a "colorable claim" (in addition to imminent irreparable harm and balancing of equities in its favor), the Court should require a stronger showing

---

[6] *Moor Disposal Serv., Inc. v. Kent Cty. Levy Ct.*, 2007 WL 2351070, *1 (Del. Ch.).

[7] *See, e.g., CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC*, 2011 WL 353529, *5 (Del. Ch.).

here for several reasons. *First*, Plaintiffs effectively seek final, irreversible relief: CBS scheduled the vote on the dilutive dividend for Thursday, precluding time for appeal or consideration of an interim injunction request on a fuller preliminary injunction record or after trial. If the Court grants the TRO, NAI will never have the opportunity to exercise its fundamental right to take corporate action *prior* to the Board voting on the dilutive stock dividend. Because the TRO would do more than maintain the status quo, Plaintiffs should be required to meet the more stringent summary judgment standard of proving actual success on the merits.[8]

Second, given Plaintiffs' delay and purposeful scheduling of the Special Meeting, Plaintiffs at the very least should be required to demonstrate a likelihood of success on the merits before securing any interim injunctive relief. This Court has applied the heightened preliminary injunction standard where, as here, "the plaintiff has not proceeded as promptly as it might, [and] has therefore contributed to the emergency nature of the application and is guilty of laches."[9]

III. Plaintiffs Have Failed To Allege Any Colorable Claims

Even using the lower TRO standard, Plaintiffs' motion easily fails.

[8] *See Kingsbridge Capital Grp. v. Dunkin' Donuts*, 1989 WL 89449, *4 (Del. Ch.); *Kejand, Inc. v. Town of Dewey Beach*, 1996 WL 422333, *1 (Del. Ch.).

[9] *See Cottle v. Carr*, 1988 WL 10415, *3 n.5 (Del. Ch.).

A. Plaintiffs Have Failed To Allege A Colorable Claim That Any Action By NAI In Relation To The Special Meeting Would Constitute A Breach Of Fiduciary Duty

As a threshold matter, while Plaintiffs repeatedly profess a concern that NAI would remove the independent CBS Board members, Plaintiffs have not shown and cannot show that prior to issuing notice of the Special Meeting and the filing of their Action, NAI had *any* intent to remove them. Rather, Plaintiffs rely solely on conjecture and speculation "in the media" as to what NAI might do. *See, e.g.,* TRO Motion ¶ 6. Meanwhile, NAI had no such intent, and instead raised only a concern with the continued Board service of a single CBS director given his conduct in 2016 and 2017. At CBS's request, NAI also confirmed the proposed disclosure in CBS's Annual Proxy that NAI would vote its shares in favor of the CBS slate. Ex. G. And, as Plaintiffs admit, Ms. Redstone agreed with the CBS Board that a deal should not go forward without the agreement of both companies, and publicly supported the special committee processes. Compl. ¶¶ 50-51.

Regardless, it is a basic principle of Delaware law that a controlling stockholder has the right to vote its shares for whatever reasons, including in its own self-interest.[10] Plaintiffs do not challenge NAI's legal right as CBS's controlling stockholder to vote its shares to do so.

[10] *See In re Synthes, Inc. S'holder Litig.*, 50 A. 3d 1022, 1041 (Del. Ch. 2012); *Emerson Radio Corp. v. Int'l Jensen Inc.*, 1996 WL 483086, *17 (Del. Ch.); *accord Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987); *Jedwab v. MGM*

Rather, Plaintiffs assert that NAI, in violation of its fiduciary duties, was going to remove the independent CBS directors in order to facilitate the recombination of CBS and Viacom. TRO Motion ¶¶ 8, 15; Compl. ¶ 78. But, even if Plaintiffs could establish that it was NAI's intention to do so (which it cannot), that would not be a breach. As NAI has repeatedly expressed, it believes that a recombination of CBS and Viacom would create value from synergies and scale in the current environment, creating long term value.[11] While the CBS special committee may disagree with NAI about the direction that CBS should pursue, that does not give rise to any claim, much less a colorable one, for breach of fiduciary duty on the part of NAI—and Plaintiffs cite no authority for such a proposition. *See* TRO Motion at ¶ 15. Indeed, Plaintiffs' Motion conveniently fails to mention the *billions* of dollars that NAI has invested in CBS, and NAI's long term interests in the Company.

In fact, Plaintiffs go so far as to demand that they want NAI stripped of its voting control *even if there is no deal between CBS and Viacom*. TRO Motion ¶ 6; Compl. ¶¶ 67-68. Plaintiffs do not even attempt to make a showing how NAI (or Ms. Redstone) is allegedly breaching its fiduciary duties merely through its status as controlling stockholder. Plaintiffs, and CBS stockholders, have known all along

---

Grand Hotels, Inc., 509 A.2d 584, 598 (Del. Ch. 1986) (controller need not sacrifice its own financial interest for sake of corporation or minority stockholders).

[11] Many analysts agree. *See, e.g.*, http://deadline.com/2018/02/cbs-viacom-committee-merger-1202276578/.

about NAI's position of control through its voting power, and NAI has long made clear—as is the right of any controlling stockholder[12]—that it is unwilling to sell its control to a third party or otherwise give up its control. Thus, Plaintiffs' claim that they seek "modest" relief, TRO Motion ¶ 23—attempting to upend the fundamental voting structure of CBS since its spinoff in 2005—is specious on its face. While Plaintiffs insist that their plan would not "alter NAI's economic stake," and still leave NAI with "the largest voting position in [CBS]," *id*. at ¶ 8, they do not and cannot dispute that they are seeking to eradicate NAI's voting *control*, which is a right having significant value.[13]

Plaintiffs separately attempt to assert a breach of fiduciary duty by claiming that NAI has somehow abandoned purported promises to respect the independence of CBS. TRO Motion ¶ 16; Compl. ¶¶ 29-37, 83. Plaintiffs allege that NAI represented in public filings that, despite its status as a controlling stockholder, CBS would be governed by an independent Board. Compl. ¶¶ 29-37. But Plaintiffs do not and cannot claim that even if NAI were to remove CBS Board members, they would be replaced by anyone other than fully qualified and equally independent

[12] *See Mendel v. Carroll*, 651 A.2d 297 (Del. Ch. 1994).

[13] *See IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, *7 n.54 (Del. Ch.); *Synthes*, 50 A.3d at 1039.

persons.[14] Moreover, NAI never promised to cede its control; to the contrary, NAI made clear that it would retain control, and CBS repeatedly disclosed NAI's control to stockholders. Plaintiffs further allege that CBS stockholders "agreed to invest in CBS on the basis of NAI's commitment to operate CBS as an independent company," and allege that NAI and the Redstones are "estopped from taking any action that is inconsistent with their prior representations." *Id.* ¶ 83. But nothing NAI has done—and nothing Plaintiffs speculate it might do—is inconsistent with those statements.

B. The Proposed Dividend Constitutes A Breach Of Fiduciary Duty By Plaintiffs And Would Be Invalid

Far from breaching its fiduciary duties, if NAI exercised its right as a controlling stockholder to take action with respect to the Special Meeting to vote on the dividend, NAI would actually *prevent* a breach of fiduciary duty *by Plaintiffs and the CBS Board*. Plaintiffs admit that the sole reason for the proposed stock dividend is to dilute NAI's voting control. Compl. ¶ 72; TRO Motion ¶ 8.

---

[14] This easily distinguishes *Shamrock Holdings of California, Inc. v. Iger*, and *Dousman v. Kobus*, where the plaintiffs were able to point to clear false disclosures. *Shamrock*, 2005 WL 1377490, *5 (Del. Ch.) (complaint asserted facts sufficient to infer that board deliberately misinformed stockholders about CEO search, causing plaintiffs to refrain from running competing slate of directors); *Dousman*, 2002 WL 1335621, *6 (Del. Ch.) (where offering memorandum falsely stated that majority vote would elect directors, and where company and board did not correct that misstatement, defendants were estopped from relying on bylaw supermajority provision).

This Court has held that, absent a compelling justification (which is non-existent here), a board of directors breaches its fiduciary duty of loyalty by acting for the primary purpose of diluting a controlling stockholder's voting rights.[15] Plaintiffs have alleged no compelling justification here, which is unsurprising because none exists. Indeed, the only justification Plaintiffs have alleged is a threat of director removal, which is not a legally cognizable threat under *Unocal* or *Blasius* that would justify the extraordinary action of diluting a controlling stockholder.[16]

Even if removal of directors were a cognizable threat under *Unocal*/*Blasius* (which it is not), it is well settled that directors may not take action in response to such a threat that "preclude[s] effective stockholder action."[17] Taking action that would preclude the holder of a majority of a corporation's stock (whether a controlling stockholder or a disaggregated group of stockholders) from voting power prior to considering a stock dividend is preclusive. If this Court were to rule that stockholders can be enjoined from removing directors so that directors can then dilute the stockholders in order to prevent the directors' own removal, it would mean that any time a stockholder (controlling or not) commences a proxy contest to

---

[15] *See, e.g.*, *Johnston v. Pedersen*, 28 A.3d 1079, 1091 (Del. Ch. 2011); *accord Mendel*, 651 A.2d at 304-07; *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660-63 (Del. Ch. 1988).

[16] *See, e.g.*, *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 811 (Del. Ch. 2007).

[17] *Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062, *20 (Del. Ch.).

remove directors who are not pursuing what the stockholders believe to be in their best interests, a board of directors that believes it knows better than the stockholders could take action to preclude their removal and entrench themselves indefinitely. That is not and never has been Delaware law, and this Court should not change Delaware law by facilitating such conduct through a TRO preventing lawful stockholder action.

Additionally, the proposed dilutive stock dividend would be invalid under *Adlerstein v. Wertheimer*.[18] There, the Court recognized that where a controlling stockholder has the power to forestall board action by preemptively removing directors, the board cannot take steps to neutralize the controlling stockholder's voting power in order to effectuate the board action. In *Adlerstein*, the controller had the power to remove certain directors and, recognizing this, the board kept the controller in the dark about a board proposal that destroyed his voting control over the corporation until it was too late for the controller to act. Recognizing that the controller was entitled to an adequate opportunity to protect his interests, the Court held that the directors' decision to keep the controller uninformed about the proposal invalidated the board's approval of the proposal. Here, Plaintiffs make no secret of their plan to wrest voting control away from NAI. But through the TRO Motion, Plaintiffs effectively ask the Court to do what the Court in *Adlerstein* held was

[18] 2002 WL 205684, *9 (Del. Ch.).

improper: prevent NAI from taking any steps it is entitled to take to protect its interests with respect to the CBS Board. The Court should not condone such machinations, which are inconsistent with the respect Delaware law affords to the stockholder franchise.

Finally, as NAI will later establish (but need not do so here), the proposed dividend would violate CBS's Charter (quoted only in part in the Complaint, Compl. ¶ 25). Plaintiffs' allegation that the "plain language of the Charter authorizes the Board" to issue a stock dividend of voting Class A Common Stock to holders of non-voting Class B Common Stock, TRO Motion ¶ 7; Compl. ¶ 25, is incorrect. In fact, where the Charter refers to holders of Class A Common Stock and Class B Common Stock receiving "identical" securities, *see* Ex. I, "identical" refers back to the underlying Class of Common Stock held by each such holder (*i.e.*, Class A holders must receive Class A shares and Class B holders must receive Class B shares in any such dividend). This reading is consistent with the second clause of the dividend provision of the Charter, which permits dividends of other securities so long as thereafter the relative voting rights of the holders of Class A Common Stock and Class B Common Stock are respected.

NAI's interpretation of the Charter also is consistent with CBS's repeated disclosure that "NAI will be in a position to control the outcome of corporate actions that require stockholder approval, including the election of directors." Indeed,

Plaintiffs' new reading of the relevant Charter provision is inconsistent with CBS's prior positions[19] and would imply nonsensically that NAI, at the time that CBS and Viacom were separated, would have knowingly accepted a "back door" permitting the Board at any time to dilute NAI's voting rights.

IV. Plaintiffs Will Not Suffer Imminent Irreparable Harm

Plaintiffs have separately failed to establish the existence of irreparable harm and cannot do so. The availability of an action under Section 225 of the DGCL precludes any holding that the purportedly threatened removal of directors constitutes irreparable harm.[20]

Plaintiffs instead attempt to manufacture irreparable harm through speculation that Ms. Redstone might attempt to effectuate a CBS/Viacom merger and further supposes that if she were to do so, it would be on unfair terms. While Plaintiffs argue that a remedy for injury purportedly stemming from a Viacom/CBS merger

---

[19] Shortly after the spinoff of CBS from Viacom in 2006, the CBS Board recommended *against* a stockholder proposal to adopt a recapitalization plan—premised on concerns that the Redstone family had disproportionate and "nondilutable percentage of the stockholder vote"—that would provide for all of the company's stock to have one vote per share, stating "[t]he Company's current share capital structure . . . has been in place since it became a public company. Each stockholder purchasing a share of CBS Corporation is aware of the Company's capital structure and many are attracted to CBS Corporation stock by the long-term stability the Class A stockholders provide to the Company." Ex. J.

[20] *See Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 209 (Del. Ch. 2002); *Edelman v. Authorized Distrib. Network, Inc.*, 1989 WL 133625, *7 (Del. Ch.).

would be impossible to craft, TRO Motion ¶¶ 17-20, this argument is premature.[21] An allegation that a merger constitutes irreparable harm cannot possibly satisfy the irreparable harm standard absent any allegation that such merger is imminent. This Court is "prevented from entering a preliminary injunction, at this time, by the rule of law … [that a] court cannot render hypothetical opinions dependent on supposition and whenever a court examines a matter where facts are not fully developed it runs the risk of not only granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law."[22] If any subsequently announced transaction involving CBS is believed by any CBS stockholders to have resulted from a breach of a controlling stockholder's fiduciary duties, those claims—and request for injunctive relief—can be brought by an appropriate plaintiff at that time.[23]

Plaintiffs' reliance on *Hollinger International, Inc. v. Black* to demonstrate the existence of irreparable harm is misplaced. TRO Motion ¶¶ 21-23. *Hollinger* involved outrageous conduct—serious breaches of fiduciary duty, breaches of contract by the controlling stockholder, including the controlling stockholder's self-

---

[21] *See Frazer v. Worldwide Energy Corp.*, 1987 WL 8739, *6 (Del. Ch.).

[22] *In re Holly Farms Corp. S'holders Litig.*, 1989 WL 60502, *4 (Del. Ch.) (citation omitted).

[23] *See In re Ocean Drilling & Exploration Co. S'holders Litig.*, 1991 WL 70028, *7 (Del. Ch.).

dealing and wrongful conduct, and efforts to divert corporate opportunities for his own benefit.[24] There are no allegations of similar conduct here. Instead, Plaintiffs point to a supposed "real risk" of the removal of board members, TRO Motion ¶ 22, which is neither illegal nor wrongful.[25]

While Plaintiffs cannot point to any irreparable harm, NAI can—contrary to Plaintiffs' assertion, Compl. ¶ 80 ("NAI, Mr. Redstone and Ms. Redstone would suffer no injury from being subject to an injunction…."). Plaintiffs seek to go forward to consider and vote on a dilutive dividend while simultaneously *preventing* NAI from exercising its right, as controlling stockholder, to take corporate action to prevent such consideration and dividend issuance (even on a "conditional" basis). If the Court were to enjoin NAI from exercising its rights prior to the meeting, the injury to NAI would be irrevocable—even if it was ultimately determined that any such TRO or any subsequent dilutive dividend is improper—because the Special Meeting will have occurred. This irreparable injury is also substantial, and includes

[24] *Hollinger*, 844 A.2d 1022, 1072 (Del. Ch. 2004).

[25] Plaintiffs also seek to rely on *Hollinger* to justify their challenge to a not-yet-existing bylaw. But in *Hollinger*, the Court found that the challenged bylaw amendments "complete[d] a course of contractual and fiduciary improprieties." 844 A.2d at 1081. Here, there is no actual wrongful conduct alleged, nor can there be, on behalf of NAI, and *Hollinger* does not apply. Indeed, in invalidating the challenged bylaw, the *Hollinger* Court distinguished *Frantz Manufacturing Co. v. EAC Indus.*, 501 A.2d 401 (Del. 1985), where the Supreme Court upheld the bylaws at issue because the majority stockholder (i) did not commit any acts of wrongdoing and (ii) was acting to protect itself from dilution. *Id.* at 1080.

the potential diminution in value of NAI's CBS holdings through loss of its voting control and could result in a raft of other collateral consequences (such as potential adverse estate tax consequences if NAI no longer controls CBS).

Moreover, in this way, Plaintiffs' filings have forced NAI to now consider taking various stockholder action to protect itself from dilution, or otherwise forfeit the opportunity to do so in advance of the Special Meeting. Plaintiffs have thus *themselves* generated the very stockholder action that they claim they wanted to avoid.

V. The Balance Of The Equities Overwhelmingly Favors Defendants

In exercising its discretion whether to grant the extraordinary relief of a temporary restraining order, the Court must balance the equities to determine whether the potential harm from improvidently granting the requested injunction would outweigh the harm that might occur if the injunction is denied.[26]

The balance of the equities favors denying Plaintiffs' requested relief. As described *supra*, if the Court grants a TRO, NAI will forever lose the opportunity to vote its stock to stop Plaintiffs' consideration and issuance of a stock dividend at the Special Meeting. But if the Court instead denies the injunction, neither the directors nor CBS would be harmed. For example, if a dispute were to erupt over the proper directors of CBS, a mechanism exists under the DGCL to resolve that dispute.

[26] *See Mills Acq'n Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1272-79 (Del. 1989).

This is simply not a situation where granting a TRO would merely preserve the status quo. Rather, Plaintiffs have forced CBS's controlling stockholder into a position of having to make a Hobson's choice—of either accepting massive dilution of its voting power (thereby losing control of the Company and suffering the economic detriment to its stake that entails), or acting as a stockholder to prevent such dilution and protect its voting power, knowing that doing so might trigger the departure of (and payment of massive parachute payments to) key management and directors of the Company. The Board unquestionably understands that a controlling stockholder would not willingly give up control uncompensated, and it is imprudent that the Board would put the management of a $20 billion company at risk in such a fashion. The balance of the equities therefore weigh strongly against granting the requested relief.

CONCLUSION

For all of the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs' TRO Motion.

POTTER ANDERSON & CORROON LLP

By: */s/ Matthew E. Fischer*
Donald J. Wolfe, Jr. (No. 285)
Matthew E. Fischer (No. 3092)
Michael A. Pittenger (No. 3212)
Jacqueline A. Rogers (No. 5793)
Hercules Plaza, 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000

Attorneys for Defendants
WORDS: 5,967
(order granted)

OF COUNSEL:

Meredith Kotler
Victor L. Hou
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

Dated: May 15, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2018, a copy of the foregoing document was served via *File & ServeXpress* upon the following attorneys of record:

David E. Ross, Esq.
Bradley R. Aronstam, Esq.
Garrett B. Moritz, Esq.
S. Michael Sirkin, Esq.
Roger S. Stronach, Esq.
100 S. West Street, Suite 400
Wilmington, DE 19801

/s/ Jacqueline A. Rogers
Jacqueline A. Rogers (No. 5793)