IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE THE DOW CHEMICAL COMPANY DERIVATIVE LITIGATION	))	CONSOLIDATED Civil Action No. 4349-CC

MEMORANDUM OPINION

Date Submitted: December 31, 2009
Date Decided: January 11, 2010

Carmella P. Keener, of ROSENTHAL, MONHAIT & GODDESS, P.A., Wilmington, Delaware; OF COUNSEL: Lewis S. Kahn, Albert M. Myers, and Kevin Oufnac, of KAHN SWICK & FOTI, LLC, New Orleans, LA; Roy L. Jacobs, of ROY JACOBS & ASSOCIATES, New York, NY; Laurence D. Paskowitz, of PASKOWITZ & ASSOCIATES, New York, NY, Attorneys for Plaintiffs.

Kenneth J. Nachbar, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: Herbert L. Zarov and Michele Odorizzi, of MAYER BROWN LLP, Chicago, IL, Attorneys for Defendants.

CHANDLER, Chancellor

This is a shareholder derivative action brought on behalf of the Dow Chemical Company ("Dow" or the "Company"), seeking to recover for the Company its losses arising from the difficulties with the Rohm & Haas Company ("R&H") transaction. Plaintiffs, stockholders of Dow, brought this action against current directors and officers of the Company, alleging that the defendants breached their fiduciary duties to the company by (1) approving the R&H transaction, (2) misrepresenting the relationship between the R&H transaction and a joint venture with a Kuwaiti company, and (3) failing to detect and prevent a variety of alleged wrongs, including bribery, misrepresentation, insider trading, and wasteful compensation.

Pending before the Court is defendants' motion to dismiss the complaint for failure to properly plead demand futility under Chancery Court Rule 23.1.[1] For the reasons set forth below, the motion to dismiss is granted as to all claims. Pursuant to Chancery Court Rule 15(aaa), the primary breach of fiduciary duties claims are

[1] Plaintiffs argue that the broader pleading requirements of Rule 12(b)(6) should govern the majority of the claims, but all claims are derivative; there are no direct claims. *See* Compl. ¶ 119. Defendants correctly note, however, that demand futility under Rule 23.1 is "logically the first issue [for all derivative claims] and if plaintiffs cannot succeed under the heightened pleading requirements of Rule 23.1 . . . there is no need to proceed to an analysis of the merits of the claim" under Rule 12(b)(6). Defs.' Reply Br. at 3, n.4; *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 139 (Del. Ch. 2009) (citing *McPadden v. Sidhu*, No. 3310-CC, 2008 WL 4017052, at *7 (Del. Ch. Aug. 29, 2008) ("The standard for pleading demand futility under Rule 23.1 is more stringent than the standard under Rule 12(b)(6), and 'a complaint that survives a motion to dismiss pursuant to Rule 23.1 will also survive a 12(b)(6) motion to dismiss, assuming that it otherwise contains sufficient facts to state a cognizable claim.'")). Therefore, the Court begins its analysis of the derivative claims under Rule 23.1, and does not continue to Rule 12(b)(6) for the individual defendants because plaintiffs fail to adequately plead demand futility as to the entire derivative complaint.

dismissed with prejudice as to the named plaintiffs, and all remaining claims—insider trading, waste, and contribution and indemnification—are dismissed without prejudice.[2]

I. BACKGROUND

A. The Parties

Dow is a large, historically lucrative American chemical company. For years, Dow focused on the commodities side of the chemical business. More recently the Company decided to embark on a "transformative strategy" by diversifying into the specialty chemicals business. Dow is a corporation organized and existing under the laws of Delaware; its principal place of business is Midland, Michigan.

Defendants in this action are current directors and officers of Dow. The complaint names twelve directors as of February 9, 2009, the date the first of the now-consolidated actions was filed. Dow's board of directors consists of Andrew

[2] Ch. Ct. R. 15(aaa). With regard to plaintiffs' primary breach of fiduciary duty claims, I find no good cause to depart from the default pleading rule of Rule 15(aaa) which dictates dismissal with prejudice when a defendant succeeds on a motion to dismiss for failure to plead demand futility. I do find good cause, however, to dismiss all insider trading and waste claims without prejudice because plaintiffs voluntarily abandoned these claims. *See* discussion *infra* Part II.B.I. Good cause also exists to dismiss the contribution and indemnification claims without prejudice because those claims are unripe. *See* discussion *infra* Part II.C. Additionally, plaintiffs' request to replead in the event I grant defendants' motion to dismiss—in clear contravention of Rule 15(aaa)—is also denied. A plaintiff must amend his complaint before standing on it in opposition to a motion to dismiss.

N. Liveris, Geoffry E. Merszei, Arnold A. Allemang,[3] Jacqueline K. Barton, James A. Bell, Jeff M. Fettig, Barbara Hackman Franklin, John B. Hess, Dennis H. Reilley, James M. Ringler, Ruth G. Shaw, and Paul G. Stern (collectively, the "director defendants"). Liveris and Merszei are also current officers of the Company. Liveris serves many roles as the President, Chief Executive Officer, Chairman of the Board, and de facto Chief Operating Officer; Merszei is Dow's Chief Financial Officer.

The complaint also names three officers, alleged to have committed insider trading under Count I. The three officers are: Michael Gambrell, William Banholzer, and David E. Kepler.

Plaintiffs Michael D. Blum and Norman R. Meier are owners of shares of Dow stock.

B. K-Dow Joint Venture with Kuwait

In December 2007, Dow's board of directors caused the Company to enter a Memorandum of Understanding ("MOU") with Kuwait's Petrochemicals

[3] The complaint is unclear as to whether Allemang also held an executive or employee position at Dow during the relevant time period of this litigation. *Compare* Compl. ¶ 28 ("Allemang was an officer or employee of Dow for 43 years"), *with id.* at ¶ 125(c) ("Allemang [is a] high-level, highly-compensated executive officer[]"). In any event, defendants concede that Allemang "does not qualify as 'independent' under the standards Dow has adopted because of his former service as a Dow officer." Defs.' Supp. Br. at 9, n.9. Whether Allemang was only a director during the Rohm & Haas deliberations or was also an officer or employee does not affect my analysis.

Industries Company ("PIC").[4] The MOU, which was subject to the execution of a definitive agreement, customary conditions, and regulatory approvals, provided for $9 billion in cash payments to Dow upon the transfer of a 50% interest in five global Dow commodities chemical businesses into a joint venture with Kuwait.[5] The joint venture was known as "K-Dow," and each company was to take a 50% equity interest in the new company. At the time, Dow expected the K-Dow transaction to close in late 2008.

C. The R&H Merger Agreement

In July 2008, following an intense auction and six months after the K-Dow MOU, the Dow board unanimously approved and caused Dow to enter into a strategic merger agreement with R&H (the "R&H Transaction" or the "Merger Agreement"), pursuant to which Dow agreed to acquire all of R&H's stock for $78 per share, or roughly $18.8 billion.[6] Recognizing that uncertainty was a deal-breaker for R&H—and that there were many competitors standing ready to provide the certainty R&H sought—Dow did not condition the transaction's close on

[4] The facts are drawn from the complaint except where noted otherwise, and taken as true for purposes of the motion to dismiss.
[5] This amount consists of approximately $9 billion in pre-tax cash proceeds and an additional $500 million through the joint venture's proposed assumption of existing debt.
[6] Similar to the K-Dow deal, this amount consists of $15.6 billion in cash and a proposed assumption of approximately $3 billion of R&H's debt.

financing.[7] The transaction was slated to close within two business days of receiving all the required regulatory approvals.

The Merger Agreement provided no traditional "outs" from completing the transaction with R&H but provided traditional penalties for any delay or failure to close, including specific performance. Section 5.1(b)(i) of the Merger Agreement required Dow to "take all action necessary to ensure that as of the Closing Date, [Dow] will obtain the Financing." Moreover, under Section 4.6 Dow expressly represented that it would have the funds necessary to close by the closing date. Dow also agreed to assume all risk regarding negative developments affecting the chemical industry or financial markets, in the form of a "Material Adverse Effect" clause. Pursuant to this provision Dow assumed the risk that the chemical industry or the financial markets would be negatively affected between signing and closing. The Merger Agreement also included a "force majeure" clause which only would provide Dow an out if R&H performed worse than all its peers.

Furthermore, the Merger Agreement provided for additional consideration—but not liquidated damages—to R&H in the event that the Transaction was delayed or did not close. In particular, Section 2.1(a) provided for "ticking fees" for a period up to six months. The per-day ticking fee amounted to approximately $3.3 million, minus any dividend that R&H paid to its shareholders during that period.

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[7] The bidding contest was quite spirited among the major chemical players. In addition to Dow, DuPont and BASF also participated. Defs.' Supp. Br. at 7, n.6.

These payments were clearly not liquidated damages because the Merger Agreement contained a specific performance provision in Section 8.5(a).

Though the markets may have been tightening during the summer of 2008, funding remained available and Dow had a variety of potential sources of financing. In addition to its available cash balances, Dow anticipated $9 billion in pre-tax cash proceeds from the K-Dow joint venture, $4 billion from investments by Berkshire Hathaway Inc. and the Kuwait Investment Authority, and a syndicated bridge loan for $13 billion of debt financing led by Citibank, N.A. if the R&H transaction closed before the K-Dow venture.[8]

Although proceeds from K-Dow were one source of financing, the R&H deal was not conditioned nor did it depend on the K-Dow deal closing. Accordingly, the Dow board informed stockholders that the financing for the Merger did not depend on Dow entering into a binding contract with Kuwait. Specifically, Liveris and Merszei disclaimed any temporal connection at a July 10, 2008 press conference. Liveris told an analyst: “we are not counting on [the K-Dow deal]. We can do [the R&H] deal without the Kuwait money, and we will stay at investment grade.” Merszei expanded, stating: “[t]his deal is certainly not contingent on the closing of our Kuwait joint venture.” Throughout the fall of

[8] The terms of the bridge loan provided $13 billion in debt financing for 12 months from the closing of the R&H Transaction, or April 14, 2010, whichever came first.

2008 defendants remained confident that the R&H Transaction would close "early next year."

At the time Dow entered the Merger Agreement with R&H, its earnings and stock price were strong. Two weeks after signing the Agreement, Liveris announced favorable second quarter results on behalf of Dow. Although oil prices surged from the first to second quarter of 2008, Dow "reacted quickly…enabl[ing Dow] to weather unparalleled increases in hydrocarbons, supply chain and other costs." All signs still indicated Dow would be able to arrange the financing necessary to close the R&H Transaction.

D. Tightening of Credit Markets & K-Dow's Disintegration

Unfortunately, a series of unforeseeable economic events unfolded over the next six months, which led to a drastic change in circumstances. As with other companies and the commodities and specialty chemicals industries, Dow's earnings and share price declined precipitously. Concurrently, Dow's cash reserves plummeted, and when coupled with the Company's general financial health decline, Dow's ability to tap alternative lines of credit, including the $13 billion bridge loan, quickly changed. Dow, along with many other companies, experienced multiple credit rating agency downgrades. In the span of five days, from December 29, 2008 to January 2, 2009, all three of the rating agencies—S&P, Moody's, and Fitch—lowered Dow's credit ratings to just a few notches above junk. Plaintiffs allege that the Dow board was faced with two problems in late 2008: (1) Dow did not have sufficient cash reserves to complete the R&H Transaction, and (2) if Dow closed the R&H Transaction without K-Dow's proceeds, a series of credit defaults would be triggered, causing insolvency.

Despite these challenges the Dow board remained committed to its transformative strategy and worked diligently to keep the R&H Transaction and K-Dow deals on track. For the R&H Transaction, the board worked to secure the required regulatory approvals, and remained on schedule by late December 2008. At that point the only remaining conditions on Dow's obligation to close were antitrust approvals by the FTC and the European Commission, which were anticipated to be obtained within the first two weeks of January.

Regarding the K-Dow deal, Dow received approval on November 24, 2008 from the Supreme Petroleum Council ("SPC") of Kuwait. Within days Dow executed the K-Dow Petrochemicals joint venture agreement with Kuwait, setting a closing date of January 2, 2009. Dow announced the execution of the K-Dow joint venture agreement on December 8, 2008. Unfortunately, yet another set back occurred on December 28, 2008. The Kuwaiti Petrochemicals Corporation and Petrochemicals Industries Company informed Dow that the Kuwait Supreme Petroleum Council had rescinded its approval of the joint venture. No reason was given for the rescission. Dow received written notice of the rescission on

December 31, 2008, and promptly issued a press release restating that the R&H Transaction was not contingent on K-Dow and reiterating its intent to keep the R&H Transaction on track.

It took nearly a month after Kuwait's withdrawal of its regulatory approval, before it publicly announced the bribery allegations through a report published by the *Kuwait Times*. Up until that report, vague allegations of the SPC's justifications trickled from the media stream. For instance, on December 29, 2008, the *Kuwait Times* reported that SPC's reversal was a reaction to believing that many senior oil sector officials had complained of "external interference" and "politicizing" of the country's vital oil industry. These vague terms were left undefined in the December 29th article. That same article stated that:

> The [K-Dow] deal came under the spotlight early this month when the Popular Action Bloc threatened it would grill the prime minister if the government *did not cancel the deal before the start of the New Year*. The Bloc described the deal as a sellout and that its value was highly exaggerated, citing the fact that Dow Chemical's value had fallen from $51 billion last year to $17 billion now because of the global financial crisis. The call was supported by many other MPs who also *questioned the benefits of the deal in the wake of the global financial crisis*.[9]

The same article disclosed that had Kuwait waited until the New Year to cancel its agreement it would be "liable to pay a penalty of up to $2.5 billion."

[9] Compl. ¶ 77 (emphasis added).

It was not until January 28, 2009, in another report published by the *Kuwait Times*, that the alleged reason for Kuwait's backing out of the deal came to light. According to the article, the National Assembly had voted overwhelmingly to investigate "suspicions of profiteering and accepting all forms of commissions by oil executives" involved in several deals, including K-Dow. Not only does this report still not mention "bribery"—though that allegation flows more reasonably than from the "external interference" and "politicizing" allegations—the same article stated that MP Mohammad Al-Mutair "said the government should tell Dow Chemical that if it initiated legal action against Kuwait on the deal, it risks losing its strategic projects in the country."

E. Dow's Attempt to Extend R&H Closing

Contemporaneously, the Dow board proceeded ahead with the R&H Transaction, but allegedly attempted to delay the closing. By January 9, 2009, only one hurdle remained before the Transaction could close: FTC regulatory approval. Plaintiffs allege that the Dow board lobbied the FTC to delay its approval and asked R&H to consider extending the deadline, but both routes were unsuccessful. The FTC granted final antitrust clearance for the R&H Transaction on January 23, 2009, which triggered a closing date of no later than January 27, 2009.

Dow thereafter refused to close the Merger and informed R&H on January 25, 2009, citing economic concerns and viability of the combined entities. On January 26, 2009, R&H filed suit against Dow in this Court seeking specific performance of the Merger Agreement.

F. Plaintiffs' Claims

Plaintiffs primarily allege that director defendants breached their fiduciary duties by entering a merger agreement with the specialty chemical maker Rohm & Haas for $18.8 billion that unconditionally obligated Dow to consummate the merger. Plaintiffs challenge the wisdom of the board's July 2008 decision, focusing on the substantive provisions of the deal, rather than the procedure employed to make an informed business judgment by a majority of the disinterested and independent board members. In particular, plaintiffs take issue with the board's decision to enter a merger agreement without a financing condition. Repeatedly plaintiffs assert that the director defendants have placed Dow in a precarious position, facing potential financial ruin if this Court forced specific performance of the R&H Transaction.[10] Since plaintiffs in this action challenge a board decision, they must show that demand was futile under the two-pronged *Aronson* test.

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[10] This assertion is moot as the R&H Transaction was consummated on April 1, 2009 and the combined entity has survived. Additionally, the potential liabilities of billions of dollars in damages to R&H is not only moot, but also unripe at the time the complaint was filed and as this motion is pending before the Court.

Plaintiffs also seek to hold the directors liable under a *Caremark* theory for a variety of alleged monitoring failures. Under this theory, plaintiffs must demonstrate that the defendant directors acted in bad faith and consciously disregarded their fiduciary duties and thus face a "substantial likelihood" of liability for the alleged bribery, misrepresentations, insider trading, and wasteful and excessive compensation.

Plaintiffs attempt to show that the K-Dow deal fell apart because Dow officers bribed certain senior Kuwaiti officials. Plaintiffs argue that the press releases and newspaper articles from Kuwait, described above, support an allegation of bribery. They also assert that the Dow board was aware of or should have been aware of the bribery and failed to do anything. Therefore, plaintiffs conclude that the director defendants breached their fiduciary oversight duties under *Caremark*.

Plaintiffs allege that Liveris' and Merszei's press statements on behalf of Dow, among others, were false and misleading, and made with the direct intent to cover up the conditional nature of the R&H Transaction on K-Dow. Plaintiffs further allege that the director defendants knew the negotiations with Kuwait and PIC were not on track, yet continued to tell the press they were throughout the fall of 2008. Liveris continued to reassure stockholders and the public that Dow was "on track to close the [R&H] acquisition," that Dow "remain[ed] committed to the deal," and that Dow has "plenty of financing resources available" to do so.[11]

To add to their litany of allegations, plaintiffs also allege unlawful insider trading by three directors and three officers: Allemang, Liveris, and Merszei (directors); Banholzer, Gambrell, and Kepler (officers). Here, plaintiffs make attenuated insider trading arguments, insisting that these defendants had "non-public information about the business of Dow, as well as its finances, major contracts, merger plans, and present and future business prospects" through access to internal corporate matters. All but two of the twelve stock sales at issue here were made before the R&H Merger Agreement was executed; the vast majority was sold in April 2008, months before the R&H Transaction. Plaintiffs further assert that at the time of these sales the insiders knew that the R&H Transaction was dependent on the K-Dow deal but failed to disclose that material information to the public. As made clear throughout this Opinion, the statements were not misstatements; they were accurate as to the temporal significance of the two deals.

As for plaintiffs' final substantive allegation, wasteful and excessive compensation, there are no particularized allegations in the complaint. Even in

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[11] Compl. ¶ 63. Plaintiffs assert a corollary argument that the director defendants admitted in the R&H litigation that the R&H Transaction depended on K-Dow all along. Compl. ¶ 88. That a component of the financing for the R&H Transaction was anticipated to come from K-Dow does not mean that statements making clear the R&H Transaction was not dependent on the *closing* of K-Dow were misleading or false. To the contrary, the statements, as described below, were not misstatements at all; they merely relayed the temporal connection between the two deals. *See* discussion *infra* Part II.B.2.b.

plaintiffs' brief in opposition to defendants' motion, plaintiffs do not allege particularized facts. Rather, plaintiffs merely make broad assertions that the Dow board caused excessive and wasteful compensation to be made to unidentified directors and officers.

G. The Procedural History

On January 26, 2009, R&H filed suit in this Court seeking specific performance of the Merger Agreement. On the eve of trial, the lawsuit settled and the merger closed on April 1, 2009, on substantially altered financial terms.[12]

Shortly after R&H filed suit, on February 9 and 12, 2009, two individual stockholders filed two virtually identical derivate actions that have been consolidated into this action. The actions were consolidated on March 5, 2009. Defendants filed a motion to dismiss on April 15, 2009. Oral argument on this motion to dismiss was held on December 31, 2009.

II. ANALYSIS

A. Legal Standard for Demand Excusal

In recognition of the "fundamental precept that directors manage the business and affairs of corporations,"[13] Chancery Court Rule 23.1 imposes a

[12] All facts within this section come from the Defendants' Memorandum in Support of their Motion to Dismiss. Defs.' Supp. Br. at 2.
[13] *Aronson*, 473 A.2d at 812.

demand requirement for derivative actions.[14] The shareholder-plaintiff must either make pre-suit demand on the corporation's board of directors or allege demand futility.[15] Demand is deemed futile, and therefore excused, only if a majority of the directors have such a personal stake in the matter at issue or the proposed litigation that they would not be able to make a proper business judgment in response to a demand.[16] Rule 23.1 places "stringent requirements of factual particularity [on allegations of demand futility] that differ substantially from the permissive notice pleading[]" requirements of Rule 8.[17] The purpose of this heightened standard is to ensure only derivative actions supported by a reasonable factual basis proceed.[18] Plaintiffs need not demonstrate, however, a reasonable probability of success on the merits. Rather, plaintiffs need only make a "threshold showing through the allegation of particular facts, that their claims have some merit."[19]

Upon reviewing a motion to dismiss for failure to demonstrate demand futility pursuant to Rule 23.1, the Court must accept the well-pled factual

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[14] The purpose of this requirement "is not to insulate defendants from liability; rather, the demand requirement and the strict requirements of factual particularity under Rule 23.1 'exist[] to preserve the primacy of board decisionmaking regarding legal claims belonging to the corporation.'" *Citigroup*, 964 A.2d at 120 (citing *Am. Int'l Group, Inc., Consol. Derivative Litig.*, 965 A.2d 763, 807-09, 2009 WL 366613, at *29 (Del. Ch. 2009)).
[15] Ch. Ct. R. 23.1.
[16] *Aronson*, 473 A.2d at 814.
[17] *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000). *See also Citigroup*, 964 A.2d at 120-21 (citing *Brehm*).
[18] *See Brehm*, 746 A.2d at 266.
[19] *Rales v. Blasband*, 634 A.2d 297, 934 (citing *Aronson*, 473 A.2d at 811-12).

allegations of the derivative complaint as true and draw all reasonable inferences in favor of plaintiffs.[20] "Conclusory allegations, however, are not accepted as true."[21] Different standards apply to the various decisions or non-decisions a board may make. For conscious board decisions—whether to act or not—the two-pronged *Aronson* test applies.[22] A board's failure to act absent a conscious decision to refrain from acting, such as a failure to supervise,[23] is analyzed under *Rales*.[24]

The *Aronson* standard clearly applies to plaintiffs' claims arising from the board's approval of the R&H merger. The remaining claims are based on a failure to supervise, and thus are governed by the *Rales* standard.[25]

B. Demand Futility Regarding Plaintiffs' Breach of Fiduciary Duty Claims

Plaintiffs' complaint pleads three derivative claims. Count I pleads a breach of the fiduciary duty of loyalty claim for insider trading by certain director and officer defendants.[26] Count II pleads breaches of fiduciary duty by the director

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[20] *Rales*, 634 A.2d at 931 (footnotes omitted).
[21] *Id.*
[22] *See Aronson*, 473 A.2d at 813. *See also Citigroup*, 964 A.2d at 121.
[23] *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).
[24] *Rales*, 634 A.2d at 930.
[25] Plaintiffs argue that the breach of fiduciary duty claims arising from the R&H Transaction should be analyzed under *Rales* as well as *Aronson*. But defendants correctly note that plaintiffs are not entitled to "two bites at the demand futility apple." Defs. Supp. Br. at 17. As *Citigroup* made clear, *Aronson* applies to board action and *Rales* applies to board inaction. *Citigroup* at 121. The R&H Merger was a transaction and any allegations relating to that decision are analyzed under *Aronson*. Plaintiffs' other claims as to failure to supervise (enabling bribery and insider trading) are not board decisions and, thus, are appropriately analyzed under *Rales*.
[26] Plaintiffs allege that three directors and three officers—Allemang, Banholzer, Gambrell, Kepler, Liveris, and Merszei—sold their Dow shares when "each had access to and knew highly confidential information." Compl. ¶ 137.

defendants by: (a) approving the R&H Transaction, (b) misrepresenting the relationship between the R&H and K-Dow transactions, (c) failing to detect and prevent alleged bribery in connection with the K-Dow transaction, (d) failing to detect and prevent the alleged misrepresentations, (e) failing to detect and prevent insider trading, and (f) failing to prevent the payment of allegedly excessive and wasteful compensation. Count III asserts claims for contribution and indemnification against the director defendants for unidentified future claims.

1. Insider Trading Claim – Count I

As an initial matter, I deem plaintiffs' insider trading claims in Count I as waived. Plaintiffs quietly abandoned this claim in their brief in opposition to defendants' motion to dismiss, by failing to address or respond to defendants' arguments in their motion to dismiss.[27] As noted above, the complaint is insufficient to satisfy the particularized factual allegations standard relating to insider trading. The complaint fails to identify any specific knowledge of inside material information on the two relevant trade dates.[28] Moreover, the relevance of ten of the alleged twelve insider trades is not pleaded adequately. These ten trades occurred months before the R&H Merger Agreement was executed and no particularized facts are pled that these were based on inside information regarding

[27] The only mention of "insider trading" in plaintiffs' brief is a conclusory allegation contained within a laundry list that the board "fail[ed] to detect and prevent insider trading." Pls.' Opp'n Br. at 25.

[28] Compl. ¶ 109 (the relevant dates are August 29, 2008 and September 12, 2008).

the R&H deal as of the April trade dates. Therefore, Count I is dismissed without prejudice pursuant to Chancery Court Rule 15(aaa).[29]

2. Approval of R&H Transaction – Count II

To satisfy *Aronson* plaintiffs must plead particularized facts that raise a reasonable doubt either (i) that a majority of the directors who approved the transaction in question were disinterested and independent, or (ii) that the transaction was the product of the board's good faith, informed business judgment.[30]

a. First Prong of *Aronson*

Plaintiffs argue that demand is excused because it would be futile. According to plaintiffs, at least half of the board members, or six of the board's twelve directors, fail the test of being disinterested and independent.[31] Disinterested "means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally."[32] "Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous

[29] Because plaintiffs abandon this insider trading claim in their opposition brief, it may be unjust to dismiss with prejudice. Therefore, I dismiss without prejudice. Ch. Ct. R. 15(aaa).
[30] *Aronson*, 473 A.2d at 814.
[31] Plaintiffs must show that at least half of the board is not disinterested and independent. *Beam v. Stewart*, 845 A.2d 1040, 1046 (Del. 2004) ("[D]emand is excused where a board is evenly divided between interested and disinterested directors.").
[32] *Aronson*, 473 A.2d at 812.

considerations or influences."[33] One such influence occurs when a director is "dominated and controlled" by someone who is interested;[34] an entrenchment motive can provide another such influence.[35] But where there is no director who is interested in the transaction, there is no need to consider the independence of the remaining directors.[36]

Here, none of the outside directors[37] stood on both sides of the transaction; nor are they alleged to have received a personal financial benefit from it other than one devolved on all Dow stockholders alike. Moreover, *no* directors are alleged to have been interested in the deal.[38] Thus, there is no issue regarding any directors' interest. Rather, the thrust of plaintiffs' allegations is that the Dow directors were not independent because of various business or personal relationships with Liveris,

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[33] *Id.* at 816.

[34] *Brehm*, 746 A.2d at 257. *See also* David A. Skeel, Jr., *The Accidental Elegance of* Aronson v. Lewis, *in* THE ICONIC CASES IN CORPORATE LAW 165, 187 (Jonathan R. Macey ed., 2008) ("Only if a majority of the board is either interested or can be shown to be controlled by the interested director is demand excused under *Aronson*'s first prong.")

[35] *In re The Limited, Inc. S'holders Litig.*, 2002 WL 537692 at *3 (Del. Ch. Mar. 27, 2002).

[36] *Brehm*, 746 A.2d at 258. The situation may be different where a majority or control stockholder exists. There the majority or control stockholder may influence board members even if the controller is not on the board. In that case, independence may be dispositive without any director being interested. That individual will satisfy the interest hook of the *Aronson* test. Here, no control or majority stockholder exists, so the relevant persons to examine for purposes of interest are the directors, and absent an interest hook, the Court need not consider the remaining directors' independence.

[37] Of the twelve directors on Dow's board, nine are outside directors. *See* Compl. ¶ 125(c).

[38] Defendants directly challenged plaintiffs' apparent misunderstanding of the relationship between interestedness and independence. Defs. Supp. Br. at 15. In response, plaintiffs consciously chose: (i) to stand on their complaint that contained no interest allegation, and (ii) to answer defendants' brief *still* without addressing the interest issue and instead focusing solely on the independence analysis. *See* Pls. Opp'n Br. at 14-19. Plaintiffs have clearly misunderstood the *Aronson* test and its progeny; under *Brehm*, the independence of directors is only relevant when there exists an interested person.

which allegedly left at least seven directors beholden to Liveris, and thus unable to act independently of his influence. But plaintiffs do not allege any interest on the part of Liveris.[39] At best plaintiffs point to Liveris' role as a director at Citigroup—the named bank in a consortium of nineteen to provide bridge financing for the R&H Transaction, should Dow need it. That the potential for a conflict of interest may have existed does not reasonably lead to the conclusion that a conflict existed. Defendants correctly note that Liveris may have had a conflict if R&H had succeeded in forcing Dow to draw on its bridge financing to close the deal, and Dow had gone into bankruptcy as a result.[40] Nonetheless, under *JP Morgan*, even directors with "substantial personal wealth invested in their related companies [e.g., Citi], each of which conducts business with [Dow]" were found independent.[41] Without a conflict there is no interest hook for plaintiffs to assert.

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[39] *See* Compl. ¶ 125 (although plaintiffs allege the directors "are not disinterested and independent," the list of specific allegations (¶¶ (a) – (k)) focuses solely on independence and does not mention interestedness).

[40] But even that conflict is not clear. First, the decisions challenged under the alleged conflict are decisions made after the K-Dow deal—not R&H—did not close. Plaintiffs are solely challenging the R&H deal, not K-Dow. Second, Citigroup was one of *nineteen* banks that agreed to provide bridge financing. The potential conflict here is too attenuated, especially in light of plaintiffs' own argument that Liveris depends on his continued employment with Dow for his livelihood, suggesting he would not place Citigroup's interest above Dow's. Pls.' Opp'n Br. at 14.

[41] *In re J.P. Morgan Chase & Co. S'Holders Litig.*, 906 A.2d 808, 821-22 (Del. Ch. 2005) ("JPMC is a national commercial and investment bank. That it provided financing to large American companies should come as no shock to anyone. Yet this is all that plaintiffs allege.").

Under *Brehm*, without an interested director the independence of the remaining directors need not be examined. Plainly put, the beholdenness or dominance of any director is irrelevant because there is no fear that the dominating director, without a personal or adverse interest, will do anything contrary to the best interest of the company and its stockholders. Thus, plaintiffs' allegations of Liveris' domination over seven directors is irrelevant.[42] Liveris is not interested in the R&H deal and, therefore, his influence is not in question.

Before moving on to the second prong of *Aronson*, I pause to address two of plaintiffs' arguments. First, plaintiffs allege that the three inside directors—Liveris, Merszei, and Allemang—depend for their livelihood on Dow.[43] Under *Rales*, depending on a director office for one's livelihood is evidence of beholdenness.[44] But where a director is beholden to the *company* there is no reason to doubt her loyalty to that company. Her interests are aligned with the company and presumably she is able to make decisions in the best interests of the

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[42] The seven directors are Bell, Hess, Merszei, Reilley, Shaw, Stern, and Franklin. Pls.' Opp'n Br. at 16.

[43] The board is dominated by outsiders. Of the twelve directors, only three are insiders. Liveris, Merszei, and Allemang are employed by Dow in various executive capacities. Compl. ¶ 125(c). The remaining nine directors are not employees and, therefore, not insiders. Neither party disputes these three directors' dependence. Both the New York Stock Exchange and Dow's own director independence standards support their dependence. *Id.*; Defs.' Reply Br. at 9.

[44] *Rales*, 634 A.2d at 936. Yet, beholdenness is only relevant where there is an interested person, as there was in *Rales*. *See id.* at 936 (Rales brothers found "interested" because subject to a substantial likelihood of liability); *see also*, *Brehm*, 746 A.2d at 258.

company. Thus, plaintiffs' allegations of "beholdenness to Dow" are misplaced and inaccurate.

Second, assuming that plaintiffs adequately pleaded interest as to one director—which they have not—a domination and control inquiry still would not establish a lack of independence. Plaintiffs have alleged no more than "mere outside business relationship[s which], standing alone, are insufficient to raise a reasonable doubt about a director's independence."[45] Plaintiffs assert that the defendant directors are beholden to Liveris for numerous reasons, but they fail to demonstrate why that is so.[46]

Problems also exist with all other allegations of influence. That directors of one company are also colleagues at another institution does not mean that they will not or cannot exercise their own business judgment with regard to the disputed

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[45] *Beam*, 845 A.2d at 1050. *See also J.P. Morgan*, 906 A.2d at 821 (citing *Beam* at 1051 ("Allegations that Stewart and the other directors moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as 'friends,' even when coupled with Stewart's 94% voting power, is insufficient, without more, to rebut the presumption of independence.")).

[46] For example, plaintiffs' argument that Liveris allegedly exercised influence by "order[ing] the Board, overnight, to summarily terminate two dissident officers"—their best argument—falls short. Upon further investigation it is clear that valid business reasons existed to terminate those two officers; they held clandestine meetings and set up a proposed leveraged buyout—all behind the board's back. Not surprisingly, the board may not have wanted them at the company. On the contrary, plaintiffs paint a different picture, suggesting that the two officers were whistleblowers on the bribery charges brought by the SEC against Dow in early 2007. Pls.' Opp'n Br. at 16. The complaint, however, states that the officers were engaged in clandestine meetings without the full board or the CEO's knowledge. *See* Compl. ¶ 125. Thus, it is far from clear that the board acted as Liveris' puppets in deciding to fire them.

transaction.[47] Furthermore, the mere fact that a director played a role in nominating new directors does not mean that the new director is beholden to the nominating director.[48] It is a business reality that current directors often nominate new directors, and some former relationship usually factors in to the nomination.[49] Finally, allegations of interlocking positions forming a tight "inner circle" between the Audit Committee and Governance Committee and Liveris on the board are, without more, also insufficient. Committees may, and often do, have overlapping members. That sole fact, without some allegation of improper influence, is not enough to establish lack of independence.[50]

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[47] For instance, in addition to co-directorship at Dow, Hess and Franklin also are colleagues at J.P. Morgan Chase. Plaintiffs suggest, as a result of this perceived "structural bias," that "neither would take action to investigate or sue the other with respect to the R&H Merger for fear of jeopardizing his own financial dependence on J.P. Morgan." Pls.' Opp'n Br. at 18. But without more, such as a financial connection between Dow and the other company, this allegation is merely conclusory and insufficient. *See Beam*, *supra* note 45; *see also J.P. Morgan* at 821-24 (finding that outside directors' ties to organizations that JPMorgan donated to still was not enough to find an improper influence).

[48] Plaintiffs allege that Liveris "hand picked or played a heavy role" in the selection and retention of six of Dow's board members who joined in 2005 or later: Bell, Hess, Merszei, Reilley, Shaw, and Stern. Pls.' Opp'n Br. at 16.

[49] *See* A. Gilchrist Sparks, III, *Corporate Democracy – What It Is, What It Isn't, and What It Should Be* 6 (February 2006), *available at* *www.mnat.com/attachment/39/Sparks+New+Article.pdf* ("the corporation's slate is nominated by a committee of the incumbent board").

[50] As the Supreme Court observed in *Brehm*, demand futility allegations cannot be based on deviations from "aspirational goals of ideal corporate governance practices." 746 A.2d at 256. Moreover, plaintiffs concede that they did not employ a books and records demand as a tool to flesh out their unparticularized allegations of a "clubby" inner circle on the Dow board. Had they done so (as plaintiffs were admonished in *Beam*, *supra* note 45) their allegations might have met the requirements of Rule 23.1.

Upon review of the plaintiffs' allegations, I find that plaintiffs fail to meet their burden under Rule 23.1 with respect to any of the outside directors. The majority of the Dow board was disinterested and independent.

b. Second Prong of *Aronson*

Plaintiffs argue that demand is also excused under the second prong of the *Aronson* test. In order to succeed, "plaintiffs must allege particularized facts that raise doubt about whether the challenged transaction is entitled to protection of the business judgment rule."[51] Specifically, the "plaintiffs must plead particularized facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision."[52]

Nothing in the complaint indicates the Dow board was not adequately informed about the transaction with R&H. The complaint is devoid of any allegations that the board failed to put in the time and effort necessary to properly evaluate the risks and benefits of that transaction, or allegations that the board was unaware of any material terms of the transaction or failed to obtain the advice of experts before approving it. On the contrary, plaintiffs unintentionally concede—on more than one occasion—that defendant directors did perform some due

[51] *J.P. Morgan*, 906 A.2d at 824 (citing *In re Walt Disney Co. Derivative Litig*., 825 A.2d 275, 286 (Del. Ch. 2003)).
[52] *Id.*

diligence.[53] Even accepting all the well-pled allegations as true, plaintiffs do not rebut or address the accepted facts that the board was negotiating in a seller's market and R&H demanded certain deal protections.[54] Fearing that R&H would walk away, Dow made a clear business decision to approve the R&H deal and sign the Merger Agreement without a financing contingency. Plaintiffs' failure to address these facts is highly suggestive that they do not focus on the process but rather on the substantive content of the directors' decision.

Simply put, plaintiffs take issue with the substantive decisions of the R&H Transaction, instead of the process the board followed. This Court made clear in *Citigroup* that substantive second-guessing of the merits of a business decision, like what plaintiffs ask the Court to do here, is precisely the kind of inquiry that the business judgment rule prohibits.[55]

Both of plaintiffs' attempts to distinguish *Citigroup* fail. First, plaintiffs draw a line between a simple exercise of business judgment relating to a transaction or series of transactions, and a "bet the company" transformational

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[53] "Plaintiffs do, indeed, attack the board of directors for the woefully inadequate *process*, and lack of acting properly on *what they must have learned through due diligence*, in connection with the K-Dow and R&H transactions." Pls. Opp'n Br. at 20 (emphasis added). *See also* Compl. ¶ 58 (quoting Liveris stating: "[A] lot of work we've done already on due diligence tells us that we'll make sure that synergies are bankable.").

[54] Both parties acknowledge that R&H was unwilling to enter an agreement without the certainty that an agreement without a financing condition provides. Compl. ¶ 56; Defs.' Supp. Br. at 17.

[55] *Citigroup*, 964 A.2d at 122 ("[S]o long as the court determines that the process employed was either rational or employed in a *good faith* effort to advance corporate interests" the court will not second-guess a board's business decisions.).

transaction.[56] Delaware law simply does not support this distinction. A business decision made by a majority of disinterested, independent board members is entitled to the deferential business judgment rule regardless of whether it is an isolated transaction or part of a larger transformative strategy. The interplay among transactions is a decision vested in the board, not the judiciary.[57]

Second, plaintiffs again attempt to distinguish *Citigroup* on the ground that the Citigroup directors were accused of failing to recognize business risk, rather than failing to uncover fraud or criminal conduct. As described below, I am not persuaded that the directors made any misrepresentations, and plaintiffs' bribery allegations with respect to the board's involvement are wholly unsupported. Nonetheless, as in *Citigroup* I examine plaintiffs' primary claim in evaluating whether plaintiffs properly pleaded demand futility.[58] Here, plaintiffs have failed to adequately plead that the directors are not entitled to business judgment review for decisions made by a disinterested and independent board.

Turning to plaintiffs' allegations of bad faith, I am unconvinced that the directors acted in any way other than honestly and in good faith. To show that a disinterested and independent board acted outside the bounds of business

[56] Pls.' Opp'n Br. at 33.
[57] *See, e.g.*, 8 *Del. C.* § 141(a).
[58] The primary claim in *Citigroup* was that the directors failed to recognize the coming subprime business risk. The Court examined this claim under the business judgment rule, even though the plaintiffs also accused management of making misrepresentations and engaging in other misconduct. *See Citigroup*, 964 A.2d at 124.

judgment, plaintiffs must show that directors acted in bad faith.[59] Recently, the Supreme Court clarified the concept of bad faith in *Lyondell Chemical Co. v. Ryan*, noting that "[i]n the transactional context, [an] extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties."[60] Plaintiffs must show that defendants completely and "utterly failed" to even attempt to meet their duties.[61]

Though the complaint does identify specific disclosures alleged to be misleading, plaintiffs do not allege specific facts "that reasonably suggest sufficient board involvement in the preparation of the disclosures,"[62] nor does the complaint sufficiently allege that "the director defendants had knowledge that any disclosures or omissions were false or misleading or that the director defendants acted in bad faith in not adequately informing themselves."[63] To determine "whether the alleged misleading statements were made with knowledge or bad faith requires an analysis of the state of mind of the individual director defendants."[64] Plaintiffs have not made specific factual allegations that allow for such an inquiry.

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[59] *Lyondell Chem. Co. v. Ryan*, 2009 WL 1024764 at *7 (Del. 2009).
[60] *Id.* (quoting *In re Lear Corp. S'holder Litig.*, 2008 WL 4053221 at *11 (Del. Ch. 2008)).
[61] *Lyondell* at *7.
[62] *Citigroup*, 964 A.2d at 134.
[63] *Id.* (citing *Pfeffer v. Redstone*, 965 A.2d 676, 687 (Del. 2009)).
[64] *Citigroup*, 964 A.2d at 134.

The gist of plaintiffs' claim is that Liveris and Merszei, with the board's approval, misrepresented the connection between the R&H and K-Dow deals. According to plaintiffs the K-Dow deal was an integral part of the R&H financing, known to the board upon entering the merger agreement in July 2008. The board, therefore, must have concealed and misrepresented this fact when Liveris stated that the R&H deal was not contingent on the closing of the K-Dow deal.

This claim fails for two reasons. First, plaintiffs' own allegations show that Liveris never stated anything that misrepresented the relationship between the R&H and K-Dow transactions; he merely stated that the *order in which the transactions were completed* did not matter.[65] At that time the board believed that the $13 billion bridge loan would enable Dow to maintain its investment grade rating and close the R&H deal in the event that R&H closed *before* K-Dow. Liveris never stated, and there is no allegation to suggest that the board believed, that the R&H deal was contingent on K-Dow. Even in light of the unanticipated financial turmoil, which made it impossible for Dow to take advantage of its back-up financing arrangement when K-Dow did not close, Liveris' earlier statement still was not a misrepresentation because the board only intended to draw on the bridge loan if Dow would remain at investment grade.

[65] "[W]e are not counting on [the K-Dow deal]. We can do [the R&H] deal without the Kuwait money, and we will stay at investment grade." Compl. ¶ 57. Furthermore, Merszei stated "[t]his deal is certainly not contingent on the closing of our Kuwait joint venture." *Id.*

Second, plaintiffs accusation as to state of mind is, as defendants correctly note, "utterly circular."[66] For Liveris and Merszei to "feel a need to conceal" they must first have made a misrepresentation, which they did not. The complaint offers no factual basis for plaintiffs' misrepresentation claim and, furthermore, the disputed statements, on their face, do not appear to be misrepresentations. Thus, plaintiffs' allegations are insufficient to support demand futility under the second prong of *Aronson*.

Finally, plaintiffs have alleged no particularized facts to connect the board to Liveris or Merszei's statements. Without a connection, there is reason to doubt that the board knew that the statements were false or misleading or acted in bad faith by not adequately informing themselves about the statements.

Plaintiffs thus are unable to meet either prong of *Aronson*. They have failed to show that a majority of the board is either interested or lacks independence. They also have failed to establish a reasonable doubt that the board's decision was anything other than a valid business judgment. Plaintiffs' derivative claim for breach of fiduciary duties regarding the R&H Transaction must be dismissed because demand is not excused. Pursuant to Rule 15(aaa), this claim is dismissed with prejudice.

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[66] Defs.' Reply Br. at 15.

3. *Caremark* Failure to Supervise Claims – Count II

Plaintiffs allege that demand is futile as to their failure to supervise claims because the director defendants are not able to exercise disinterested business judgment in responding to a demand because their failure of oversight subjects them to a substantial likelihood of personal liability. According to plaintiffs, the directors face a substantial threat of liability because their conscious disregard of their duties and lack of proper supervision and oversight caused the Company to be exposed to (1) bribery allegations in relation to the K-Dow transaction, (2) misrepresentation allegations regarding the relationship between the K-Dow and R&H transactions, and (3) insider trading allegations.

A board's unconscious failure to act is governed by *Rales*.[67] Under *Rales*, the only demand futility issue is whether "the board that would be addressing the demand can impartially consider its merits without being influenced by improper considerations."[68] Again, plaintiffs must plead particularized factual allegations that create a reasonable doubt that the board could have, at the time the complaint is filed, validly exercised its independent and disinterested business judgment when responding to a demand.[69] Under *Rales*, defendant directors who face a "substantial likelihood of personal liability" are deemed interested in the

[67] *See Rales*, 634 A.2d at 930.
[68] *Id.* at 934.
[69] *Id.*

transaction and thus cannot make an impartial decision.[70] But "[d]emand is not excused solely because the directors would be deciding to sue themselves."[71] Rather, "demand will be excused based on a possibility of personal director liability only in the rare case when a plaintiff is able to show director conduct that is 'so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists.'"[72]

a. Substantial Likelihood of Personal Directorial Liability

As in *Citigroup*, plaintiffs' arguments are "based on a theory of director liability famously articulated by former-Chancellor Allen in *In re Caremark*."[73] That theory is oversight liability. Under *Citigroup*, "to establish oversight liability a plaintiff must show that the directors *knew* they were not discharging their fiduciary obligations or that the directors demonstrated a *conscious* disregard for their responsibilities such as by failing to act in the face of a known duty to act."[74] Furthermore, the test is "rooted in concepts of bad faith; indeed, a showing of bad faith is a *necessary condition* to director oversight liability."[75] Only an "utter

[70] *Id.* at 936.
[71] *Citigroup*, 964 A.2d at 121 (citing *Jacobs v. Yand*, 2004 WL 1728521, at *6 n.31 (Del. Ch. Aug. 2, 2004).
[72] *Citigroup*, 964 A.2d at 121 (citing *Aronson*, 473 A.2d at 815).
[73] *Citigroup*, 964 A.2d at 121 (citing *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996)).
[74] *Citigroup*, 964 A.2d at 123 (emphasis supplied) (footnotes omitted).
[75] *Id.*

failure" will satisfy a showing of bad faith.[76] Moreover, because Dow has adopted a Section 102(b)(7) provision in its charter, plaintiffs must plead particularized facts showing bad faith in order to establish a substantial likelihood of personal directorial liability.[77]

i. Bribery Allegations Relating to K-Dow Transaction

Plaintiffs allege that Dow's board failed to detect and prevent bribery in connection with the K-Dow transaction, and though plaintiffs allege that bribery may have occurred, they do not allege that the board knew about, or had reason to suspect, bribery. Plaintiffs do not dispute that no formal charge of bribery has been made. The only proffered support for the bribery allegation is an unsubstantiated charge made by a member of the Kuwaiti Parliament.[78] But even plaintiffs concede that Kuwait is an "unpredictable regime whose adherence to the rule of law [is] doubtful."[79] Moreover, as the complaint admits, Kuwaiti politics have been riddled with "[e]ndemic infighting" for more than a decade.[80] Further, the Kuwait government took nearly a month to formulate its bribery allegations against Dow. Initially, Kuwait cited vague concerns of "external interference" and

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[76] *Lyondell*, 2009 WL 1024764 at *7 (quoting *In re Lear Corp. S'holder Litig.*, 2008 WL 4053221 at *11).

[77] *See Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006); *Citigroup*, 964 A.2d at 125.

[78] Compl. ¶¶ 76-79.

[79] *See* Pls.' Opp'n Br. at 7.

[80] Compl. ¶ 79. According to defendants, this political fighting has been between the National Assembly (the source of the bribery rumors) and the Cabinet (which was blamed by some Parliament members for its involvement in the K-Dow transaction). Defs.' Reply Br. at 20.

"politicizing." During the next month these allegations evolved into "suspicions of profiteering and accepting all forms of commissions by oil executives" involved in K-Dow. Concurrently, the *Kuwait Times* reported that the political group, Popular Action Bloc, "threatened it would grill the prime minister if the government *did not cancel the deal before the start of the New Year*." Presumably this was because after the New Year Kuwait would be liable to pay up to a $2.5 billion penalty. Moreover, the political group makes clear its hesitation to enter a deal "in the wake of the global financial crisis." Other politicians did not hesitate to use strong-arm techniques. For instance, MP Mohammad Al-Muair suggested the government threaten to block Dow out of any Kuwait ventures if Dow brought legal action against the country.[81]

Though plaintiffs' bribery allegations are sketchy (at best), plaintiffs have adequately alleged particularized facts that allow a reasonable inference that bribery may have occurred in relation to the joint venture between Dow and the Kuwaiti government. At a motion to dismiss stage, the key inquiry is "do[es the nonmoving party] get . . . access to evidence to go further."[82] Though the particularized factual allegations also support a theory that Kuwait got cold feet in the wake of the global financial meltdown, and used allegations of bribery as the

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[81] Compl. ¶ 79 (quoting a January 28, 2009 *Kuwait Times* report).
[82] *In re Marsh & McLennan Cos. Inc. Deriv. Litig.*, C.A. No. 753-VCS (Del. Ch. June 17, 2009) (tr., p.107).

vehicle to back out of the deal, it is not irrational to infer that bribery could have occurred. Accordingly, based on plaintiffs' factual allegations and the low motion to dismiss threshold, I accept for purposes of this motion the inference that Dow officers may have engaged in bribery.

Nonetheless, plaintiffs fail to plead with particularity allegations that, if true, would give the Dow board cause for suspicion. The alleged "red flag" to alert the board that Dow management had engaged in bribery in connection with K-Dow simply is not a "red flag." As a preliminary matter, the only "red flag" plaintiffs mention is not even contained in the complaint. Accordingly, I need not address it.[83] Even had such an allegation been in the complaint, it is still insufficient. Plaintiffs argue that because bribery may have occurred in the past (Dow paid a fine to the SEC in January 2007), by different members of management, in a different country (India), and for a different transaction (pesticide registrations),[84] the board should have suspected similar conduct by different members of management, in a different country, in an unrelated transaction. This argument is simply too attenuated to support a *Caremark* claim.

With neither knowledge of bribery, nor any reason to suspect such conduct, the defendant directors could not "conscious[ly] disregard" their duty to supervise

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[83] Under Rule 15(aaa), a party cannot use its brief as a mechanism to informally amend its complaint. Ch. Ct. R. 15(aaa).

[84] The SEC alleged that Dow officers "paid bribes to government officials in India to secure the marketing of three insecticides in that country" and Dow later agreed to pay a civil penalty to settle the charges. Pls.' Opp'n Br. at 1, n.1.

against bribery. Plaintiffs have also failed to allege facts suggesting that the Dow board "utterly fail[ed]" to supervise insiders, or that any director acted with anything other than good faith.[85] Therefore, plaintiffs have failed to allege facts that establish a substantial likelihood of director liability due to oversight liability under *Citigroup*, and their *Caremark* claims as to bribery in Count II are dismissed with prejudice pursuant to Rule 15(aaa).

ii. Misrepresentation of Relationship between K-Dow and R&H Transactions

Plaintiffs repeat their allegations that the board is responsible—and thus a substantial likelihood of liability must exist—for violations of the duty of disclosure[86] made by Liveris and Merszei regarding the relationship between the K-Dow and R&H transactions. For the same reasons stated above, and based on the complaint's conclusory allegations, I cannot conclude that the director defendants face a substantial likelihood of liability that would prevent them from

[85] Plaintiffs cannot meet their burden here for another reason. The Dow board has set up policies to prevent improper dealing with third parties. In particular, Dow's Code of Ethics expressly prohibits any unethical payments to third parties. Moreover, plaintiffs' own complaint once again belies their argument. Contained within Count II's litany of alleged breaches of fiduciary duty plaintiffs implicitly acknowledge Dow's "corporate governance procedures." *See* Compl. ¶ 144(i) (plaintiffs accuse director defendants of "allowing the corporate governance features of the Company to be fatally compromised by their direct, complicit participation in the wrongs described herein"). Plaintiffs cannot simultaneously argue that the Dow board "utterly failed" to meet its oversight duties yet had "corporate governance procedures" in place without alleging that the board deliberately failed to monitor its ethics policy or its internal procedures.

[86] *Citigroup*, 964 A.2d at 131.

impartially considering a demand.[87] Accordingly, these *Caremark* claims are dismissed with prejudice.

iii. Insider Trading and Waste Claims

The complaint also alleges that the board failed to (i) detect and prevent insider trading and (ii) prevent the payment of allegedly excessive and wasteful compensation to unidentified officers and directors. Plaintiffs quietly abandoned these arguments when they failed to respond to defendants' arguments regarding the *Caremark*, claims beyond mere reassertions of broad allegations.[88] I, therefore, deem these claims waived or abandoned, and grant defendants' motion to dismiss without prejudice as to the *Caremark* insider trading and waste claims of Count II.

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[87] As stated in my analysis of the board's approval of the R&H Transaction, even assuming that the Liveris and Merszei statements were false, plaintiffs have alleged no reason for the board to suspect, let alone condone, that the statements were false or misleading. *See* discussion *supra* Part II.B.2.

[88] Defs.' Reply Br. at 20. With regard to the insider trading claim, plaintiffs do not allege any specific information to suggest that any director is "interested." Plaintiffs allege that directors had non-public information about all aspects of the Dow business. Compl. ¶ 107. Under *Guttman*, a director is not deemed interested "whenever a derivative plaintiff cursorily alleges that he made sales of company stock in the market at a time when he possessed material, non-public information." *Guttman v. Huang*, 823 A.2d 492, 502 (Del. Ch. 2003). Instead, to show interestedness, a plaintiff must allege specific information that gives rise to a reasonable inference that the insiders sold stock "on the basis of and because of" adverse material non-public information. *Id.* at 505. Plaintiffs have failed to meet their burden here. Turning to the waste claim, plaintiffs never explain whose compensation should be deemed excessive and wasteful, let alone attempt to meet the stringent requirements for waste. Waste occurs when there is "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *Citigroup*, 964 A.2d at 136 (quoting *Brehm*, 746 A.2d at 263). Clearly, without even bringing a board decision to the analysis table, plaintiffs have failed to overcome the "general presumption of good faith" with regard to their waste claim. *See Citigroup*, 964 A.2d at 136 (quoting *White v. Panic*, 783 A.2d 543, 554 n.36 (Del. 2001)).

b. Director(s) Domination or Control of Board

Plaintiffs further argue that even if none of the outside directors face a substantial likelihood of liability for failing to supervise Dow's management, they have shown that Liveris does and that he dominates and controls a majority of the directors. For all the reasons presented above, I likewise conclude that plaintiffs have not alleged facts sufficient to show that Liveris is subject to a substantial likelihood of liability; therefore, whether he dominates and controls at least five other members of the Dow board is irrelevant because he suffers from no disabling or conflicting interest.[89]

Plaintiffs have failed to plead particularized facts sufficient to establish a substantial likelihood of liability for any Dow director, let alone a majority of the board, on the grounds of bribery, misrepresentations, insider trading, excessive or wasteful compensation or any other ground. Without establishing that at least one director faces a substantial likelihood of liability, plaintiffs cannot show that a majority of the board is dominated and controlled and thus improperly influenced by one such director. Plaintiffs have failed, therefore, to establish that demand is excused for their *Caremark* claims under *Rales*. Pursuant to Rule 15(aaa), all the

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[89] In any event, plaintiffs do not meet the heavy burden to establish domination or control established in *Beam*. A plaintiff "must plead facts that would support the inference that because of the nature of the relationship…the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director." 845 A.2d at 1052.

Caremark claims in Count II are dismissed with prejudice, except for the insider trading and waste claims which are dismissed without prejudice.

C. Demand Futility Allegations Regarding Plaintiffs' Indemnification and Contribution Claims

Count III of the complaint seeks to assert claims for contribution or indemnity against the director defendants for unidentified claims that might be asserted in the future against Dow. The complaint is devoid of any currently pending claims, let alone actual claims, against Dow. To establish demand futility, plaintiffs must show that the board cannot exercise valid business judgment in deciding whether to pursue the derivative action because it is not disinterested and independent.[90] Delaware courts only hear disputes that are ripe for judicial determination.[91] "[A] ripe dispute is one where litigation 'sooner rather than later appears to be unavoidable,' and one in which the 'material facts are static.'"[92]

Plaintiffs' claims for contribution and indemnification are clearly not ripe because no dispute or litigation currently exists or is pending. Therefore, plaintiffs' allegations are insufficient to establish demand futility, and Count III is dismissed without prejudice under Rule 23.1.[93]

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[90] *See Aronson*, 473 A.2d at 814.
[91] *See Stroud v. Milliken Enters., Inc.*, 552 A.2d 476 (Del. 1989).
[92] *Bebchuck v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006) (citing *Stroud*, 552 A.2d at 476).
[93] As stated above, there is no need to proceed to an analysis of the merits of the claim under Rule 12(b)(6) if plaintiffs cannot sufficiently plead the more stringent demand futility

VI. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is GRANTED. All claims in the complaint are dismissed for failure to adequately plead demand futility pursuant to Chancery Court Rule 23.1. Pursuant to Chancery Court Rule 15(aaa), the primary breach of fiduciary duties claims—the *Aronson* and *Caremark* claims—are dismissed with prejudice as to the named plaintiffs; all remaining claims—insider trading, waste, and contribution and indemnification—are dismissed without prejudice.

Counsel shall confer and agree upon a form of implementing Order.

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requirements of Rule 23.1. *See supra*, note 1. Also, pursuant to Rule 15(aaa), I find good cause to dismiss without prejudice because plaintiffs' claims are unripe; it would be unjust to foreclose these potential claims should that become possible in the future.