

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

PROBATE AND FAMILY COURT
CIVIL ACTION NO. 16E0020QC

Philippe Dauman and George S. Abrams,
As Trustees of the SUMNER M. REDSTONE
NATIONAL AMUSEMENTS TRUST,

Plaintiffs,

vs.

Sumner M. Redstone, et al.,

Defendants.

**DEFENDANT SUMNER M. REDSTONE'S OPPOSITION TO MOTION FOR
IMMEDIATE MENTAL EXAM AND PRODUCTION OF MEDICAL RECORDS**

INTRODUCTION

Plaintiffs' motion for an immediate medical examination of Defendant Sumner M. Redstone ("Sumner") rests on their contention that an adjudication of Sumner's capacity and susceptibility to undue influence is necessary to adjudicate the validity of his removal actions on May 20, 2016. It is not. Those removal actions were not taken by Sumner alone, but instead, in anticipation of this very legal challenge, were ratified by a majority of the Trustees who would act in the event Sumner had, in fact, been incapacitated or a victim of undue influence. Moreover, findings of incapacity or undue influence would render Sumner's actions only voidable, not void, and Plaintiffs lack standing to disaffirm those actions. Consequently, there is no justification for an intrusion upon Sumner's privacy at all, much less before these likely case dispositive issues have been resolved.

In addition, Sumner underwent mental examinations by leading geriatric psychiatrists in September 2015, October 2015, December 2015, January 2016, April 2016, and May 2016. Reports have been prepared of each of these examinations. In support of their motion, Plaintiffs rely principally on the Declaration of Stephen Read, M.D., a respected geriatric psychiatrist engaged by Manuela Herzer in the prior California action. However, Dr. Read does not suggest that a further mental examination of Sumner is necessary, or even would be helpful. Instead, Dr. Read unequivocally opines, based on his own prior mental examination of Sumner and other materials available to him, that Sumner was mentally incapacitated and susceptible to undue influence on May 20, 2016, the date of the challenged actions. Neither Dr. Read nor any other declarant identifies any "good cause" for a further medical examination, and the motion instead rests on allegations and argument alone.

For all of these reasons, a further medical examination would be an unnecessary and harassing intrusion upon Sumner's privacy and integrity even if this case were to proceed in this Court—particularly where it is Plaintiffs, and not Sumner, who have placed his mental state at issue. Plaintiffs' motion should be denied.

ARGUMENT

I. Sumner's Mental Condition Is Not Legitimately "In Controversy"

Rule 35 first requires that Sumner's mental or physical condition be "in controversy." This requirement is not met "by mere relevance to the case," but instead requires "an affirmative showing by the movant that [Sumner's mental condition] is *really and genuinely* in controversy." *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964) (emphasis added). Plaintiffs assert in their motion that Sumner's mental condition "is the central issue in this case." Mot. at 1. There is no doubt that Plaintiffs *want* to make Sumner's mental condition the focal point of this litigation. However, wanting does not make it so. In reality, a mental examination of Sumner cannot yield evidence that would entitle Plaintiffs to the relief they seek—namely, to invalidate Sumner's decisions to remove them as Trustees of the Trust and as directors of NAI. An immediate mental examination would serve no purpose but to needlessly harass and embarrass Sumner.

A. Plaintiffs Cannot Seek A Retroactive Adjudication Of Sumner's Capacity

As discussed in Sumner's motion to dismiss, the Trust was carefully constructed to avoid precisely the kind of after-the-fact attacks on Sumner's decision-making advanced by Plaintiffs in the instant suit. The Trust grants Sumner the sole and exclusive right during his lifetime to do two things: (1) remove and replace disinterested Trustees (other than Leonard Lewin and his successor); and (2) vote the NAI stock held by the Trust. Trust, art. E ¶ 2(a), *id.*, art. G ¶ 21. These rights are suspended only "[d]uring any period in which [Sumner] is incapacitated (as defined in the immediately following subparagraph b)." Trust, art. E ¶ 2(a). That "immediately

following subparagraph b” states that Sumner “shall be deemed to be mentally incapacitated *only if*: (i) he is adjudged incompetent by a court of proper jurisdiction, or (ii) upon the delivery . . . of an instrument or instruments signed by three (3) doctors, chosen as hereinafter provided, stating that, based on medical evidence presented to each of them as each shall deem sufficient, [Sumner] is unable to manage his affairs in a competent manner.” Trust, art. E ¶ 2(b) (emphasis added). Lest there be any confusion on this point, the Trust reiterates several pages later that Sumner “shall be deemed to be incapacitated *only* in accordance with the provisions of subparagraph b of paragraph 2 of this Article.” Trust, art. E ¶ 12 (emphasis added).

Adherence to this bright-line rule is essential to the effective functioning of the Trust. Even temporary uncertainty regarding who is entitled to vote the stock of NAI or the validity of a particular vote would destabilize the governance and affairs not only of NAI, but also of Viacom, of which NAI is the controlling shareholder. The Trust’s exclusive methodology for determining incapacity, which does not allow for after-the-fact attacks on particular decisions, avoids this uncertainty. Unless and until Sumner has been adjudged by a court of competent jurisdiction or determined by three doctors (selected per the Trust) to be unable to manage his affairs in a competent manner, his decisions are final, conclusive, and immune from attack. Once there has been such an adjudication or determination of incompetency, the decisions of the seven successor Trustees, as then constituted and acting by majority vote, are final, conclusive, and immune from attack. No one, including the Viacom shareholders, needs to worry about the NAI votes or any downstream actions being undone as a result of *post hoc* attacks on Sumner’s legal capacity to make particular decisions.

Plaintiffs cannot plausibly contend that they were deprived of the opportunity to seek an adjudication or determination of incapacity before Sumner removed them as Trustees of the

Trust and directors of NAI. Sumner was defending against a challenge to his capacity brought by a former girlfriend for six months before he removed Plaintiffs from the Trust and NAI board. *In re Advance Health Care Directive of Sumner M. Redstone*, Los Angeles County Superior Court Case No. BP 168725. Plaintiff Dauman submitted a declaration in support of Sumner's capacity in connection with that proceeding. Klieger Decl., Ex. A. While Dauman asserts that he witnessed a dramatic decline in Sumner's capacity by March 2016—two months before the challenged removals—he did not seek to have Sumner declared incompetent. To now permit a retroactive attack on Sumner's competency would conflict not only with the purposes of the Trust, but also with the language of paragraph 2(b) itself. *See* Trust, art. E ¶ 2(b) (“[Sumner] shall be deemed to be mentally incapacitated only . . . *upon the delivery* . . . of an instrument or instruments . . . stating that . . . [Sumner] *is* unable to manage his affairs in a competent manner.”) (emphasis added).¹

Because the Trust does not allow for a retroactive attack on Sumner's capacity, his mental capacity is not “really and genuinely” in controversy, and Plaintiffs' motion should be denied for this reason alone.

B. Ratification Of Sumner's Actions Obviates The Need To Adjudicate Capacity Or Undue Influence, As Does Plaintiffs Lack Of Standing To Disaffirm Those Actions

Even if the Trust did allow for a retroactive adjudication of Sumner's capacity (which it does not), the Court will not be required to reach that issue given that the challenged actions were ratified by the successor Trustees who would act for the Trust in the event that Sumner had been incapacitated. Under the Second Administrative Amendment to the Trust, the seven

¹ The test for when Sumner will be deemed to have regained capacity is similarly forward-looking. *See* Trust, art. E ¶ 2(b) (stating that incapacity shall not “be deemed to continue to exist *after*: (A) a court of proper jurisdiction has found [Sumner] to be competent, or (B) a majority of three (3) doctors, chosen as hereinafter provided, deliver a written opinion or opinions that [Sumner] has regained the capacity to manage his affairs in a competent manner”) (emphasis added).

successor Trustees who act upon Sumner's incapacity or death are Shari Redstone, Tyler Korff, David Andelman, Leonard Lewin, Norman Jacobs, and Plaintiffs Dauman and Abrams. Second Admin. Amend. ¶ A. Each of the seven Trustees has one vote, and all decisions are made by majority vote. Trust, art. E, ¶ 7(b). Four of the seven Trustees—Shari Redstone, Tyler Korff, David Andelman, and Leonard Lewin—expressly ratified and approved the removal and replacement of Plaintiffs as Trustees of the Trust and as directors of NAI. Klieger Decl., Exs. B-C. In other words, Plaintiffs were not only removed from the Trust but, to the extent they somehow retained their positions, they were outvoted. Whether or not Sumner had capacity or was unduly influenced is ultimately irrelevant.

Although not at legitimately at issue in this proceeding, the same is true of the actions that the NAI board has taken with respect to Viacom, and, in particular, the removal and replacement of five of Viacom's eleven directors.² That action was approved *unanimously* by the six-member NAI board, both in written consents and in a special meeting of the board. Klieger Decl., Exs. D, F. As above, even if Plaintiffs could prove that they were not validly removed from the NAI board, NAI's actions would still have been approved by a majority of the board, which is all that the bylaws require.

Moreover, even if these ratifications are ignored, a showing that Sumner lacked capacity or was unduly influenced would render his actions only *voidable*, not void. *See Sparrow v. Demonico*, 461 Mass. 322, 327 (2012) ("It has been long established that a contract is voidable by a person who, due to mental illness or defect, lacked the capacity to contract at the time of

² Plaintiffs misleadingly suggest that the validity of NAI's decision to remove and replace five of the eleven Viacom directors is part of this proceeding, and that "a complete takeover of the Viacom" is imminent. Mot. at 5-6. Neither is true. Fred Salerno, Viacom's lead independent director and the plaintiff in the Delaware challenge to those removals, explicitly acknowledges in his complaint in that action that "the validity of the removal of Viacom directors is not before [the Massachusetts or California] courts." Klieger Decl., Ex. E at 8 n.2. Moreover, Plaintiffs fail to mention that the Delaware court has entered a status quo order that indefinitely maintains the prior Viacom board in place, such that the supposed "takeover of Viacom" is anything but imminent.

entering into the agreement.”); *Howe v. Palmer*, 80 Mass. App. Ct. 736, 742 (2011) (“It is well settled . . . that an instrument procured by undue influence is voidable by the person who was unduly influenced.”). The right to disaffirm an action that is undertaken during a period of incapacity or as a result of undue influence is “a personal right” exercisable only by the person who acted without capacity or as a result of undue influence (or by his or her guardian or representatives), and, after his or her passing, by his or her executor, heirs, and beneficiaries. *Carrier v. Sears*, 86 Mass. 336, 337 (1862). There is no world in which Plaintiffs have standing to disaffirm Sumner’s acts, regardless of how the capacity and undue influence issues might be resolved. And, for that reason, there is no need for the Court to decide those issues at all, much less to force Sumner undergo the indignity of another mental examination.³

II. Plaintiffs Have Not Established Good Cause For A Mental Examination

Even if Plaintiffs could demonstrate that issues of capacity or undue influence were “really and genuinely” in controversy (which they cannot), they cannot make the second showing required to prevail on a Rule 35 motion—namely, that good cause exists for ordering the requested examination. Particularly where, as here, the party for whom a medical examination is sought did not place his or her mental or physical state at issue, the good cause inquiry requires a “discriminating” review of the evidence submitted in support of the motion. *Schlagenhauf*, 379 U.S. at 118.⁴ “The rule requires a greater showing of need than is met merely by demonstrating that such an examination will yield relevant evidence.” *Dasilva v. Gagliardo*, 17 Mass. L. Rprt. 141, 2003 WL 23094879, at *1 (Mass. Super. Ct. Dec. 30, 2003). To make that showing and

³ All of these issues can promptly be presented in a dispositive motion that should require little or no discovery. At a minimum, the Court should entertain such a motion before requiring Sumner to undergo another mental examination or to otherwise opening the door for broad, and ultimately needless, discovery on issues of capacity and undue influence.

⁴ The suggestion that Sumner put his mental state at issue by introducing evidence in opposition to Plaintiffs’ request for an expedited medical examination (Mot. at 8) is simply preposterous.

otherwise satisfy the requirements of Rule 35, “[a] motion for a Rule 35 examination should be as detailed as possible and accompanied by an affidavit and a proposed order containing the specification of ‘the time, place, manner, conditions, and scope of the examination and the person and persons by whom it is to be made.’” *Id.* at *1 n.1.

Plaintiffs have not submitted any affidavits in support of their motion, nor have they submitted a proposal order setting forth the information required by Rule 35. Insofar as evidence is concerned, the motion relies entirely on: (1) the Declaration of Stephen L. Read, M.D., a respected geriatric psychiatrist who performed a mental examination of Sumner in January 2016, which was previously submitted to the Court by Keryn Redstone; (2) the previously submitted Declaration of Keryn Redstone; (3) the previously submitted report of Dr. James Spar, another leading geriatric psychiatrist who performed mental examinations of Sumner in September 2015, October 2015, December 2015, April 2015, and May 2015; and (4) the previously submitted Declaration of Pierce O’Donnell, Keryn Redstone’s counsel, regarding his observations from a deposition of Sumner on May 5, 2016. Mot. at 9-10. None of these declarations suggests or sets forth reasons that Sumner should be forced to undergo yet another mental examination. Indeed, Dr. Read’s declaration, upon which Plaintiffs principally rely, expresses unequivocal opinions regarding Sumner’s capacity and susceptibility to undue influence on May 20, 2016—the very date the challenged acts were undertaken—without once suggesting that a further medical examination would even be valuable, much less necessary. Specifically, Dr. Read opines:

- “[I]t is my opinion that Mr. Redstone’s profound impairments and deficits in mental function have certainly persisted and in fact appears to have worsened, from January 2016 to the subsequent time in May that Mr. Redstone purportedly

took the actions with regard to Philippe Dauman and George Abrams that are the subject of this lawsuit.” Read Decl. ¶ 4(h).

- “Mr. Redstone’s lack of mental capacity . . . extends to any documents that he purportedly executed in May of this year with regard to removing and appointing directors and trustees of his various business entities.” *Id.* ¶ 10.
- “Mr. Redstone’s vulnerability to influence as regards both the explicit acts and the formation of his false beliefs undermines the validity of any provision regarding any and all testamentary documents executed by Mr. Redstone on or after October 16, 2015 and up to the present time, including any documents he purportedly executed in May of this year with regard to removing and appointment directors and trustees of his various business entities.” *Id.* ¶ 15.
- “[A]ctions taken by Mr. Sumner Redstone in and after October, 2015, including any testamentary acts and recent changes of directors and trustees a few weeks ago, were taken by a man with severely impaired mental functions, fully dependent on a car team and on his daughter Shari Redstone, whose involvement and motivations have previously been questions, and therefore by a man who is extremely vulnerable to the influence of others, with the result that Mr. Sumner Redstone lacked the requisite mental capacity to execute such documents on October 16, 2015 and lacked that capacity continuously after that including up to the present time with regard to recent changes in directors and trustees in his business entities.” *Id.* ¶ 23.

In other words, the expert upon whom *Plaintiffs* rely has already opined on Sumner’s capacity and susceptibility to undue influence as of May 20, 2016, without once suggesting that good

cause exists for a further mental examination. If Dr. Read does not believe a further mental examination is needed before he can opine of Sumner's capacity, Plaintiffs and their attorneys should not be heard to argue otherwise. *See R.R.K. v. S.G.P.*, 400 Mass. 12, 19 (1987) (Liacos, J., concurring) ("unsworn, unverified statement of the plaintiff" failed to satisfy Rule 35).

This is consistent with the rule that "good cause for ordering an examination may be lacking if the party's mental or physical condition can be established by referring to prior examinations or other documentary evidence." *Palmer v. Youth Opportunities Upheld, Inc.*, 18 Mass. L. Rptr. 301 (2004); *see Odom v. Odom*, 2001 WL 1543476, at *6 (Tenn. Ct. App. Dec. 5, 2011) ("If formal or informal discovery leads to the production of existing examination records, the moving party will not be entitled to insist on further examinations unless it can demonstrate that the prior examinations are insufficient for its purposes."). Here, Plaintiffs have presented no evidence that the prior examinations of Sumner are insufficient for purposes of evaluating Sumner's capacity and susceptibility to undue influence as of May 20, 2016, the date of the challenged actions, and the evidence Plaintiff's themselves rely upon demonstrates precisely the opposite. No good cause exists for a further mental examination under Rule 35, and Plaintiffs' motion should therefore be denied.

III. Plaintiffs' Request For Medical Records Is Not Supported By Rule 35 And, In Any Event, Is Grossly Overbroad

In addition to ordering the immediate medical examination of Sumner, Plaintiffs also request that the Court order "that all medical records relating to Mr. Redstone's mental condition from the past 6 years be immediately produced by the parties and their agents." Mot. at 12. There is no support in Rule 35 for this request. Plaintiffs assert that this production is necessary to permit a further mental examination; however, for the reasons discussed above, Plaintiffs are not entitled to a further mental examination. Moreover, Plaintiffs offer no justification for their

request to reach back six years, particularly where the expert upon whose opinions Plaintiffs rely conducted a thorough examination of Sumner just five months ago. This is pure harassment.

CONCLUSION

For the foregoing reasons, Sumner respectfully requests that the Court deny Plaintiffs' Motion for Immediate Mental Examination and Production of Medical Records.

Dated: June 29, 2016

SUMNER M. REDSTONE,
By his attorneys,



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CERTIFICATE OF SERVICE

I, William F. Sinnott, hereby certify that on June 29, 2016 I caused a true copy of the foregoing document to be served by First Class U.S. Mail and electronic mail on the following counsel and parties:

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