



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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IN RE CBS CORPORATION :  
LITIGATION : Consolidated  
: C.A. No. 2018-0342-AGB  
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**THE NAI PARTIES’ OPPOSITION TO THE CBS PARTIES’ MOTION TO  
COMPEL REVISED INTERROGATORY RESPONSES, TO STRIKE  
VERIFICATION, AND *IN LIMINE* TO PRECLUDE TRIAL TESTIMONY,  
OR, IN THE ALTERNATIVE, TO COMPEL DEPOSITION**

National Amusements, Inc. (“NAI”), NAI Entertainment Holdings LLC (“Holdings,” with NAI, the “NAI Entities”), the Sumner M. Redstone National Amusements Trust (“SMR Trust”), Shari Redstone, and Sumner Redstone (collectively, the “NAI Parties”), through their undersigned counsel, hereby oppose the motion (the “Motion”) to compel revised interrogatory responses, to strike verification, and *in limine* to preclude trial testimony, or, in the alternative, to compel deposition, filed by CBS Corporation (“CBS”) and certain members of its board (the “CBS Parties”).

**INTRODUCTION**

1. This Motion seeks three types of relief, each of which should be denied. *First*, the CBS Parties seek to strike two interrogatory responses that list Mr. Redstone (along with almost 100 others) as someone who “may have discoverable information” regarding the allegations in the Consolidated Matter.

Those responses are in fact accurate, and did not convey that the information was discoverable from Mr. Redstone, through a deposition of him.

2. *Second*, the CBS Parties seek to strike Mr. Redstone's verification of the interrogatory responses. Even putting aside that this Court's rules required Mr. Redstone to provide that verification as a party on whom the interrogatories were served, the CBS Parties have not explained why they need to "test the truth" of Mr. Redstone's verification of the limited information provided (*i.e.*, that he possesses certain information) through his deposition.

3. *Third*, the CBS Parties make the sweeping request to preclude the NAI Parties from offering at trial *any* witness to testify as to the *NAI Entities'* intentions with respect to themselves or CBS, or *any* witness to testify as to Mr. Redstone's intent—or to otherwise force a nonagenarian who they admit is in poor physical health to sit for deposition. Putting aside that the motion *in limine* is entirely premature (as depositions have even yet to begin), there is no basis under Delaware law for the request to preclude the NAI Entities from introducing testimony as to their own intentions. The Motion wrongly ignores the separate corporate form of the NAI Entities, each with its own properly constituted Board duly authorized to take action with respect to the CBS stock it holds and beneficially owns.

4. As for testimony regarding Mr. Redstone, while also premature at this point, the NAI Parties may seek to introduce testimony (again, not yet elicited) from other witnesses, including from the CBS Parties themselves, regarding statements Mr. Redstone previously made and/or his expressed intent regarding CBS, including in or around 2005 and 2006, when CBS and Viacom were separated and the stock dividend provision upon which the CBS Parties rely was introduced into the CBS Certificate of Incorporation. While there is no need for the Court to rule on the admissibility of such statements now, this evidence would be admissible to show both the witnesses' states of mind and also Mr. Redstone's then-existing state of mind, pursuant to D.R.E. 803(3).

5. Finally, the alternative request to compel the deposition of Mr. Redstone callously disregards the unequivocal medical recommendation of his long-time physician that a deposition [REDACTED]

### **BACKGROUND**

6. On July 2, in response to interrogatories served on them, the NAI Parties twice listed Mr. Redstone as someone who—along with almost 100 other individuals—“may have discoverable information” concerning the allegations in the complaints in this Consolidated Action. (Ex. 5 to Mot. at 8-18.) The NAI Parties provided verifications for the responses from each of the NAI Parties

(including Mr. Redstone) on whom the interrogatories were served, Ex. 1,<sup>1</sup> as required by this Court's rules.

7. On July 5, 2018, the CBS Parties served their First Notice of Deposition, seeking to depose Mr. Redstone (among others), and served their Preliminary Trial Witness List, identifying Mr. Redstone (among others). (Exs. 2, 3.) The NAI Parties' Preliminary Trial Witness List did not include Mr. Redstone. (Ex. 4.)

8. In advance of a July 23 meet and confer to discuss deposition notices, the NAI Parties advised that Mr. Redstone's physician had opined in January 2018 that, given his physical condition, sitting for deposition [REDACTED] and that two courts had rejected efforts to depose Mr. Redstone for that reason. (Ex. 5.)

9. Per the CBS Parties' request, the NAI Parties produced the January 30, 2018 Declaration of Dr. Richard Gold ("January Gold Declaration"), Mr. Redstone's primary care physician, in which he provided his unequivocal medical recommendation that Mr. Redstone not be required to sit for a deposition [REDACTED] [REDACTED] (Ex. 3 to Mot., ¶ 14; *see also id.* ¶¶ 4-5, 7-10, 12.)

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<sup>1</sup> The cited exhibits ("Ex.\_") are attached to the Transmittal Affidavit of Jacqueline A. Rogers submitted contemporaneously with this Opposition.

10. During the July 23 meet and confer, when counsel for the NAI Parties asked to discuss the noticed deposition of Mr. Redstone, counsel for the CBS Parties responded that “the wrong people are on the phone” to discuss it. Hours later, the Motion was filed.

11. On July 30, 2018, Dr. Gold confirmed his unequivocal medical recommendation that Mr. Redstone not be required to sit for deposition, explaining how [REDACTED]

[REDACTED]  
[REDACTED] Dr. Gold further explained that [REDACTED]  
[REDACTED] (Ex. 6, ¶¶ 10, 11, 14, 15.)

### **ARGUMENT**

#### **I. The CBS Parties’ Attempt To Preclude Evidence Is Baseless.**

12. The CBS Parties contend that because Mr. Redstone cannot be deposed due to his physical health, the NAI Entities should be precluded from offering any evidence regarding their intent with respect to their ownership of CBS stock. Putting aside the lack of any need for the Court to decide the admissibility of any evidence now, their argument is baseless.

13. The CBS Parties begin with the inaccurate assertion that, *supposedly according to the NAI Parties*, “Mr. Redstone is NAI . . . and NAI is Mr. Redstone,”

and “there can be no substitute for Mr. Redstone’s own testimony to establish NAI’s actual intentions—past, present, and future—with respect to NAI and CBS.” (Mot. ¶ 2.) The CBS Parties provide no citation for their demonstrably incorrect assertion.

14. The CBS Parties’ assertion ignores the separate corporate form, and distinct nature of a corporation (NAI) and its stockholder (the SMR Trust). It is undisputed that NAI and Holdings, a corporation and an LLC, respectively, hold and beneficially own the CBS stock at issue, that NAI owns all the membership interest in Holdings, and that the SMR Trust and a second trust established by Ms. Redstone own all the stock of NAI.

15. The CBS Parties cherry pick from statements made during a July 2016 hearing in the *In re Viacom* matter, when Mr. Redstone’s counsel stated that Mr. Redstone, as CEO of NAI and Holdings, had the authority to vote the Viacom stock owned by those entities. (*Id.* ¶ 3.) But during the same hearing, counsel for the NAI Entities made clear that the Boards of those entities *also* had concurrent authority to vote such Viacom stock. (Ex. 7 at 17-18.)

16. Moreover, the CBS Parties ignore that in September 2016, NAI’s Bylaws and Holdings’ LLC Agreement were amended to document that both entities’ Boards—as well as the CEO (Mr. Redstone) *and* President (Ms. Redstone) of each—are authorized to take action with respect to the CBS (and Viacom) stock

that each entity owns, and that neither the CEO nor the President can vote the stock contrary to Board instructions. (Ex. 2 to Mot.; Ex. 8.)

17. The CBS Parties also know that on May 16, 2018, in response to the proposed dilutive dividend, each NAI Entity’s entire Board—not the CEO or President—authorized and directed that the CBS stock be voted to amend the CBS Bylaws to require a 90% majority of the CBS Board to authorize any stock dividend (the “Bylaw Amendment”). (Ex. 4 to Mot.)

18. Thus, the NAI Entities have acted (and can intend to act) regarding the CBS stock they own through their Boards (or Presidents). Their officers and members of the Boards can provide testimony about each Board’s acts and each entity’s intentions.

19. It is true that the SMR Trust holds and owns 80% of NAI’s stock, and that during Mr. Redstone’s lifetime (unless declared incompetent per outlined procedures), he has the “sole and exclusive power” to vote such NAI stock—which would allow him to replace NAI directors. (Mot. ¶ 19.)<sup>2</sup> However, Mr. Redstone’s

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<sup>2</sup> The CBS Parties’ assertion that the SMR Trust “seemingly” gives Mr. Redstone “sole and exclusive power” to vote the CBS stock owned by the NAI Entities, *id.* ¶ 19, is false. The only stock held by the SMR Trust is NAI stock, and the Trust provides Mr. Redstone with “sole and exclusive” power during his lifetime to vote “any Stock held by this trust.” Ex. 1 to Mot., Art. G, ¶ 21; Art. A , ¶ 4(c) [INTENTIONALLY OMITTED].

authority, through the SMR Trust, to replace NAI directors in no way vitiates the express authority—which the CBS Parties nowhere dispute—of the NAI Entities’ Boards to vote the CBS stock that those entities own.<sup>3</sup>

20. At bottom, the Motion is nothing more than an improper attempt, through the guise of a discovery motion, to block the NAI Entities from offering testimony about their actions and intent regarding the CBS stock those entities own. (*See id.* ¶¶ 1, 14.) The Motion does *not* seek “targeted relief,” *id.* ¶ 8, is flatly contradicted by the corporate documents of the NAI Entities provided to the CBS Parties, and wrongly disregards those entities’ separate, distinct corporate form. *See eCommerce Indus., Inc. v. MWA Intelligence, Inc.*, 2013 WL 5621678, at \*27 (Del. Ch. Sept. 30, 2013); *Case Fin., Inc. v. Alden*, 2009 WL 2581873, at \*4 (Del. Ch. Aug. 21, 2009).

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<sup>3</sup> The CBS Complaint contains no allegations about the SMR Trust, and counsel for the NAI Parties has repeatedly sought the CBS Parties’ basis for including the SMR Trust as a party here. The NAI Parties also agreed to stipulate that full relief could be provided to the CBS Parties without the Trust continuing to be named as a party. Ex. 9. When the CBS Parties demanded production of the SMR Trust instrument (a highly personal estate planning document), the NAI Parties agreed to provide copies to a limited set of outside counsel. Despite that review, the CBS Parties have offered nothing regarding the Trust other than supposition whether [INTENTIONALLY OMITTED]. Given the highly personal nature of the Trust instrument and its lack of relevance, the NAI Parties have objected to its further circulation beyond any additional outside counsel that the CBS Parties can explain is necessary.

## **II. The Requested Relief Is Both Unwarranted And Unnecessary.**

21. Aside from the sweeping relief discussed above, the Motion seeks to strike two of the NAI Parties' interrogatory responses that identify Mr. Redstone as someone "who may have discoverable information" regarding certain topics, on the ground that such answers are somehow inaccurate. (Mot. ¶ 12; Ex. 5 to Mot. at 8-18.) They are not. Per the responses, "discoverable" modifies "information"—conveying that Mr. Redstone may have information that is relevant to the matters at hand and a proper subject of discovery. There is no dispute that Mr. Redstone *does* possess such information. (Had the NAI Parties not identified Mr. Redstone as having such information, they would likely have faced a different motion.) The responses do not convey that such information was obtainable through a deposition of Mr. Redstone, or that Mr. Redstone's physical health is such that he can offer testimony in this action.

22. Equally meritless is the Motion's request to strike Mr. Redstone's verification of the interrogatory responses. (Mot. ¶ 13.) He is named as a defendant in CBS's lawsuit, the interrogatories were directed to him, and he is required by this Court's Rules to verify interrogatory responses.<sup>4</sup> Particularly given the limited information provided concerning Mr. Redstone (identifying him

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<sup>4</sup> As counsel for the NAI Parties has advised counsel for the CBS Parties, Mr. Klieger read the responses to Mr. Redstone, who then signed the verification.

as someone who possesses certain knowledge), the CBS Parties' insistence that they must have a "way to test the truth" of the verification—and can do so only through Mr. Redstone's deposition—rings hollow.

23. The CBS Parties nonetheless seize the opportunity to make their own pronouncements about Mr. Redstone's physical state, *id.* ¶ 8, and profess surprise that he could participate telephonically in a May 16 NAI Board meeting to consider the Bylaw Amendment, *id.* ¶ 4. This should come as no surprise to the CBS Parties, given that Mr. Redstone routinely participated (as Chairman Emeritus) via telephone in regular CBS Board meetings throughout 2016 and 2017, and in 2018, Ex. 10, and CBS counsel has defended that participation in other litigation. *See Feuer v. Redstone*, C.A. No. 12575-CB, Dkt. No. 116 (Del. Ch. May 22, 2017).

24. As for the request to preclude the NAI Parties from offering testimony directly from Mr. Redstone, Mot. ¶¶ 1, 14 n.4, the NAI Parties do not intend to introduce such testimony, a fact that the CBS Parties would have learned had they conferred with counsel for the NAI Parties before filing.

25. That leaves the Motion's request to preclude the NAI Parties from introducing testimony at trial from other witnesses about Mr. Redstone's intentions regarding CBS. This bid is both premature and wrong. It is premature because testimony from witnesses has not yet been elicited; there is no basis to limit

forthcoming deposition questioning when the Court can later decide the admissibility of testimony on motions *in limine* to be filed on September 14, per the Scheduling Order.

26. Regardless, the NAI Parties anticipate that there may be testimony from any number of witnesses concerning Mr. Redstone's prior statements and intent regarding CBS—including that he would never have agreed to give up control of CBS or authorized a stock dividend provision that could be used to dilute NAI's voting control. These witnesses include Mr. Moonves, who admitted: "Remember her father always said you can never give up your control. . . . That was his first rule." (Ex. 11.) Any such testimony from Mr. Moonves or others about Mr. Redstone's intent would be admissible to show both those witnesses' states of mind,<sup>5</sup> and also Mr. Redstone's then-present state of mind, per D.R.E. 803(3). See *In re PetSmart, Inc.*, 2017 WL 2303599, \*18 n.227 (Del. Ch. May 26, 2017); *Matter of Last Will and Testament of Sandstrom*, 2016 WL 1304841, \*9 n.124 (Del. Ch. Apr. 4, 2016).

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<sup>5</sup> The trial record will confirm that at various times between 2006 and 2015, Mr. Moonves (and others) sought to purchase NAI's voting control of CBS, at a substantial premium.

### III. The Alternative Request To Depose Mr. Redstone Fails.

27. The Motion includes an “alternative” request for a deposition of Mr. Redstone, Mot. ¶ 18, but the CBS Parties make no serious effort to question the unequivocal medical recommendation in the January Gold Declaration.

28. The CBS Parties assert that Dr. Gold’s declaration proposed that, *if Mr. Redstone’s health improved*, it could be possible to structure a deposition protocol that would minimize risks. But they omit that Dr. Gold stated that [REDACTED] [REDACTED] (Ex. 3 to Mot., ¶ 15.) [REDACTED] [REDACTED] he cannot clear Mr. Redstone for any deposition. (Ex. 6, ¶ 15.)

29. The suggestion that the “unexplained” procedures used for Mr. Redstone to vote on the Bylaw Amendment and verify interrogatory responses “could be a model” for deposition is specious. (Mot. ¶ 18.) [REDACTED] [REDACTED] [REDACTED]

30. While the CBS Parties insist that they are now “duty-bound” to make their request, *id.*, they provide no explanation for why—in possession of a video that they claim indicates to them that Mr. Redstone is “incapable of

communicating his views,” *id.* ¶ 8—they included him on their Preliminary Trial Witness List weeks ago.

31. It will be for the CBS Parties to explain why they included that video with their Motion, other than for harassment. The video was taken in Mr. Redstone’s California home, without his consent, in violation of California Penal Code § 632. It is unclear how Ms. Redstone (or any daughter) would be anything *other than* “furious,” *id.* ¶ 8 n.2, by the notion that someone walked into her father’s home and videotaped him without his consent—a grievous invasion of privacy and assault on her father’s dignity.<sup>6</sup>

### **CONCLUSION**

32. For the foregoing reasons, the Motion should be denied.

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<sup>6</sup> The Motion is conspicuously silent as to *why* Mr. Kopelson thought it appropriate or necessary “to memorialize Mr. Redstone’s physical state” in January 2018. *Id.* Mr. Kopelson’s interrogatory responses failed to respond to interrogatories asking him to identify (i) whether he obtained Mr. Redstone’s consent for the video recording, and (ii) any person who advised, counseled, or agreed with him to record that conversation. Ex. 12. Meanwhile, the CBS Parties continue to refuse to search for and produce all documents, without application of an imprecise search protocol, concerning that recording.

POTTER ANDERSON & CORROON LLP

/s/ Matthew E. Fischer

*Of Counsel:*

Meredith Kotler  
Lev L. Dassin  
Victor L. Hou  
Rahul Mukhi  
Mark E. McDonald  
CLEARY GOTTLIEB STEEN  
& HAMILTON LLP  
One Liberty Plaza  
New York, New York 10006  
(212) 225-2000

Myron T. Steele (Bar No. 000002)  
Donald J. Wolfe, Jr. (Bar No. 285)  
Matthew E. Fischer (Bar No. 3092)  
Michael A. Pittenger (Bar No. 3212)  
J. Matthew Belger (Bar No. 5707)  
Jacqueline A. Rogers (Bar No. 5793)  
Callan R. Jackson (Bar No. 6292)  
Hercules Plaza, 6th Floor  
1313 N. Market Street  
P.O. Box 951  
Wilmington, Delaware 19899  
(302) 984-6000

*Counsel for the NAI Parties*

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