SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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IN RE OMNICOM GROUP INC. SHAREHOLDER DERIVATIVE LITIGATION

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INDEX NO 602383/2002

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: June 23, 2006

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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Index No. 602383/2002

IN RE OMNICOM GROUP INC. SHAREHOLDER DERIVATIVE LITIGATION

DECISION and ORDER

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MOSKOWITZ, J.:

In this derivative action, the two-count complaint seeks damages resulting from the defendants' alleged insider trading and breaches of fiduciary duties. The complaint also requests that the court impose a constructive trust over the profits received from the defendants' alleged improper sale of stock of nominal defendant Omnicom Group Inc. (Omnicom). Two actions have recently been consolidated and now bear the caption *In Re Omnicom Group Inc. Shareholder Derivative Litigation*.

Defendants now move to dismiss the complaint for failure to make a demand upon the board and for failure to allege demand futility.

Facts

The court takes the following factual allegations from the complaint.

Omnicom is a publicly held holding company that owns advertising, marketing and corporate communications companies. Defendant Bruce Crawford (Crawford) has served as Omnicom's chairman of the board of directors since 1995. Defendant John D. Wren (Wren) served as a director of Omnicom since 1993 and as chief executive officer since 1997.

The following defendants also served as directors of Omnicom between 1986 and 2002: Keith L. Reinhard (Reinhard), Allen G. Rosenshine (Rosenshine), Robert Callander (Callander), Robert Charles Clark (Clark), Leonard S. Coleman, Jr. (Coleman), Susan S. Denison (Denison), Peter Foy (Foy), John R. Murphy (Murphy), John R. Purcell (Purcell), Linda Johnson Rice (Rice)

and Gary L. Roubos (Roubos) (together with Crawford and Wren, Individual Defendants). Reinhard and Rosenshine also serve as chairmen of the boards and CEOs of Omnicom's subsidiaries, DDB and BBDO, respectively.

In 1996, Omnicom created a subsidiary, Communicade, Inc. (Communicade), to invest in and manage Omnicom's investments in 16 Internet consulting firms. Three of these firms went public: Razorfish, Inc. (Razorfish), Agency.com Ltd. (Agency.com) and Organic Online, Inc. (Organic). The price of Omnicom's stock allegedly increased as the price of its Internet companies' stock increased.

Communicade provided up-front investments in the Internet companies that the companies "earned-out" over time by meeting certain performance objectives. Complaint, ¶ 29. Once the companies satisfied the performance objectives, Omnicom was obligated to make certain payments to the companies. These payments allegedly went directly to the companies' principals. Communicade was also required to purchase larger stakes in some of these companies once they reached certain objectives, that the complaint refers to as "put-obligations." *Id.*, ¶ 20. Omnicom allegedly did not disclose the terms of the put-obligations and the size of the earn-out liability and put-obligations until 2002, when Omnicom took Communicade off the books.

Omnicom, through Communicade, owned 40% of Razorfish. This investment comprised substantially all of Omnicom's long-term investments in 1999, with a reported value of $785 million. In early 2000, Omnicom sold a portion of Razorfish, realizing a pre-tax gain of $110 million. Communicade also owned a 40% interest in Agency.com. Communicade's Securities & Exchange Commission (SEC) Form 10-K for the year 2000 stated that Omnicom's investment

of $51 million in Agency.com was below its book value.

By March 2000, many of Communicade's investments had fallen beneath their original values. Omnicom classified the lowered values as "temporary," because, otherwise, it would have to write off the original investments and take a charge against its earnings, thereby ending Omnicom's 15-year streak of revenue and growth. *Id.*, ¶ 42, 43. Omnicom sought to avoid this result by entering into a joint venture with non-party Pegasus Partners II, L.P. (Pegasus), a private equity investment firm. In May 2001, Omnicom and Pegasus formed Seneca Investments, LLC (Seneca). The same individuals who managed Communicade managed Seneca, out of the same office in Omnicom's corporate headquarters.

Omnicom, through Communicade, transferred its interests in its 16 Internet companies to Seneca, in exchange for non-voting, non-participating preferred stock in Seneca. Omnicom's 10-K, filed with the SEC on March 28, 2002, states that Omnicom recognized no gain or loss in the transfer and that the value of its investment in Seneca of $280 million approximated its fair value. With the exception of Clark, each member of Omnicom's board allegedly approved the transaction. According to the complaint, the Individual Defendants knew that Omnicom's purpose was to avoid reporting losses associated with its Internet business, in order to prevent a reduction in Omnicom's earnings and stock price.

The transfer to Seneca took these investments off of Omnicom's balance sheet and valued the preferred Seneca stock Omnicom received at $280 million, an amount equal to the value of Omnicom's initial investments in these entities. The Individual Defendants allegedly knew that the value of the investment in Seneca was less than $280 million, but concealed Seneca's true financial condition by not consolidating Seneca's financial results with Omnicom's and by not

separately reporting Seneca's financial results.

In addition, Omnicom restructured some of Seneca's investments to allow Omnicom to repurchase entities from Sencca. According to the complaint, there was no requirement for Omnicom to pay for this option.

Between August 1, 2001 and May 20, 2002, Crawford, Reinhard and Rosenshine sold 298,100 shares of Omnicom common stock for $25,573,637. The average selling price was $85.79. These three Omnicom directors sold their stock based upon the non-public information that Omnicom had concealed Seneca's true investment value. These stock sales were allegedly not part of these defendants' normal or regular pattern of stock sales and comprised approximately 30% of Rosenshine's Omnicom stock holdings and 38% of Reinhard's holdings.

On June 10 and 12, 2002, the Wall Street Journal reported that Callander, the former chairman of Omnicom's audit committee, resigned because of Omnicom's limited disclosures about Seneca. Callander also expressed concerns about "off-loading the problematic" Internet company investments. *Id.*, ¶ 60.

Omnicom stock dropped from $77.56 to $54.62 after the publication of the Wall Street Journal articles. On June 12, 2002, Omnicom disclosed that its earn-out liability was $250-$350 million. On June 14, 2002, Standard & Poor's downgraded Omnicom's rating from "stable" to "negative". *Id.*, ¶ 63. On July 8, 2002, Omnicom disclosed in its SEC Form 8-K that its earn-out liability was $391 million, and that its put-obligation liability was $163 million. Omnicom subsequently filed several additional SEC Form 8-Ks, and, on April 29, 2003, ultimately disclosed Omnicom's earn-out liability of $490.2 million and put-obligation liability at $242.2 million. Three days later, Moody's Investors Services downgraded Omnicom's rating.

Plaintiffs admit that they have not made a demand upon Omnicom's board of directors. The complaint claims that the board is not capable of making an independent and disinterested decision to prosecute this action, and that, therefore, demand should be excused.

Discussion

New York's Business Corporation Law permits shareholders of a domestic corporation to bring an action. NYBCL § 626 (a). "In any such action, the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." *Id.*, § 626 (c).

Plaintiffs are excused from making a demand upon the board if the demand would be futile. *Marx v Akers*, 88 NY2d 189, 198 (1996). Under New York law,

> a demand would be futile if a complaint alleges with particularity that (1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction.

Id.

Director Interest

Director interest is when the "complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction." *Marx*, 88 NY2d at 200. "Directors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally." *Id.*, at 202. Director interest is determined by examining the "directors who sat at the time of the commencement of [the] action." *Batkin v Softbank Holdings Inc.*, 270 AD2d 177, 177 (1st Dept 2000).

Here, the complaint claims that the Individual Defendants exercised "control over the wrongful acts" alleged in the complaint, and that they caused Omnicom "to conceal from the investment community ... the truth regarding Seneca ... ." Complaint, ¶¶ 20, 22. The complaint also claims that the "Individual Defendants breached their duties of loyalty and good faith by placing their own personal interests above the Company's and by failing to prevent the Company, and its officers and directors, from committing acts which would, and did, injure the company." *Id.*, ¶ 24.

As a preliminary matter, the complaint alleges wrongdoing generically against the Individual Defendants, because they were allegedly "responsible for authorizing, or permitting the authorization of, the practices which resulted in ... the misappropriation of confidential corporate information" for the benefit of Crawford, Reinhard and Rosenshine. *Id.* However, "[s]imply naming a majority of the board as defendants with conclusory allegations of wrongdoing or control is insufficient to circumvent the requirement of demand." *Bansbach v Zinn*, 1 NY3d 1, 11 (2003). That the Individual Defendants authorized or permitted the transaction at issue fails to explain how these Individual Defendants were interested. Therefore, these "conclusory allegations of wrongdoing ... are insufficient to excuse demand." *Marx*, 88 NY2d at 202 (internal citation and quotation marks omitted).

Moreover, plaintiffs name ten Individual Defendants who were Omnicom directors at the time that plaintiffs commenced this action: Crawford, Wren, Clark, Coleman, Denison, Foy, Murphy, Purcell, Rice and Roubos. Complaint, ¶ 74 (A). However, the complaint does not contain allegations that Clark, Coleman, Denison, Foy, Murphy, Purcell, Rice or Roubos were interested directors or that any of these individuals received a financial benefit from the

transaction. Rather, plaintiffs' allegations of insider trading are directed at Crawford, Reinhard and Rosenshine and neither Rosenshine nor Reinhard were Omnicom directors at the time that plaintiffs commenced this action. Therefore, plaintiffs fail to allege with particularity that a *majority* of the directors were interested in the transaction. *See Tomczak v Trepel*, 283 AD2d 229, 230 (1st Dept 2001) (derivative action dismissed where plaintiffs failed to allege wrongdoing against a majority of the board).

Plaintiffs also claim that the directors are incapable of independently and disinterestedly considering a demand to commence this action, because Wren and Crawford are named defendants in a separate securities fraud class action in the United States District Court for the Southern District of New York (Securities Action). Some of the fraud claims in the Securities Action arise out of the same operative facts as plaintiffs allege here. On a motion to dismiss in the Securities Action, the court held that the plaintiff had stated claims against the defendants for violations of Section 10 (b) of the Securities and Exchange Act. *In re Omnicom Group, Inc. Sec. Litig.*, 2005 WL 735937 (SD NY, March 30, 2005).

However, in the Securities Action, the only overlapping defendants are Crawford and Wren. These two defendants comprise far less than a majority of Omnicom's board. Therefore, the first argument is unpersuasive.

Plaintiffs here fail to show how the ability to state a valid cause of action in the Securities Action is relevant to plaintiffs' pleading demand futility in this action. *See Simon v Becherer*, 7 AD3d 66, 71 (1st Dept 2004) (applying Delaware law) (allegation that "[b]oard members faced a substantial likelihood of liability" insufficient to excuse demand); *see also Decker v Clausen*, 1989 WL 133617, *2 (Del Ch 1989) ("the suggestion that demand is excused because the

directors ... are defending related litigation is without merit"). Nor do any of the cases plaintiffs cite support plaintiff's position.

Plaintiffs also claim that Omnicom's directors are interested, because Omnicom's directors' and officers' liability insurance policy has an "insured vs. insured" exclusion. Complaint, ¶ 74 (E). Plaintiffs argue that the policy would not cover Omnicom's officers and directors under the policy if the Individual Defendants caused Omnicom to sue those officers and directors. Plaintiffs claim that, therefore, this derivative action is the only way to obtain a recovery from Omnicom's officers and directors for the benefit of Omnicom.

However, "[t]hat the insurance policy indemnifying defendants would not cover their liability were the corporation itself to bring suit against them is also not a sufficiently particular basis for inferring demand futility." *Halpert Enter., Inc. v Harrison*, 362 F Supp 2d 426, 433 (SD NY 2005) (applying Delaware law); *see also Stoner v Walsh*, 772 F Supp 790 (SD NY 1991). In *Stoner*, the court stated that:

> the insured/insured exclusion appears to be a standard clause designed to prevent collusive suits between parties whose interests in the litigation might not be genuinely adverse [citation omitted]. Plaintiff's assertion that the exclusion automatically renders a board member "interested" with respect to a decision to reject demand finds no support in either case authority or logic. Such a rule would preclude rejection of a demand whenever the standard exclusion exists.

Stoner, 772 F Supp at 805. Therefore, plaintiffs' allegations concerning the "insured vs. insured" exclusion in the corporate insurance policy fail to establish director interest.

Plaintiffs also claim that Wren, Omnicom's president and CEO, is interested, because he is "subject to the considerable influence of Crawford and the other members of the Board to

whom he owes his employment and livelihood." Complaint, ¶ 74 (D). The basis of this allegation is that Wren's principal professional occupation is his employment with Omnicom. However, even assuming for the moment that Wren lost his independence and that Crawford influenced him, adding Wren still does not result in a board majority. Nor do plaintiffs allege with any particularity how Crawford or other members of the board influenced Wren. Therefore, this allegation fails to establish director interest. For the foregoing reasons, plaintiffs fail to show that a majority of the directors were interested.

Failure To Inform

Defendants next argue that the allegations of the complaint fail to show that the directors did not inform themselves about the transaction to a degree reasonably appropriate. Plaintiffs argue that the Wall Street Journal articles and certain "red flags" that should have revealed to the board that the Seneca stock valuations were overstated, show that the board was not informed. Plaintiffs' Opp. Mem. of Law, at 23.

> Demand is excused because of futility when a complaint alleges with particularity that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances. The long-standing rule is that a director does not exempt himself from liability by failing to do more than passively rubber-stamp the decisions of the active managers.

Marx, 88 NY2d at 200 (internal citations and quotation marks omitted).

Throughout the complaint, plaintiffs allege that the Individual Defendants "knowingly approved Omnicom's transfer of its Communicade investments to Seneca ... ." Complaint, ¶¶ 74 (A), 18, 22, 23, 52, 46, 55, 77. The essence of plaintiffs' breach of fiduciary duty claim is that

the Individual Defendants "knowingly approved [Omnicom's] formation and use of Seneca to conceal the true financial condition of Omnicom's Internet investments." *Id.*, ¶ 77. None of the allegations in the complaint show that defendants failed to inform themselves. To the contrary, allegations that the board knowingly approved the challenged transaction are inconsistent with plaintiffs' argument that demand should be excused because the board was not informed. Thus, plaintiffs' argument that defendants knew of, but ignored, red flags that facilitated the alleged concealment is unpersuasive.

The June tenth Wall Street Journal article quoted in the complaint states that Callander "resigned unexpectedly because he was unhappy with Omnicom management's limited disclosure to the audit committee about the entity that holds many of Omnicom's former Internet assets." Complaint, ¶ 59. However, the same article also states that Crawford, Omnicom's chairman, stated that "'there is no issue' with Seneca," and that "the board had signed off on the creation of an electronic-services company more than a year ago." *Id.* These allegations fail to show "particular facts in contending that [Omnicom's] board failed to deliberate" to the extent necessary to become fully informed, under the circumstances, about the Seneca transaction. *Marx*, 88 NY2d at 202.

The June twelfth article states that Callander "questioned whether something wasn't being disclosed to the board about the initial off-loading of the problematic investments and the proposal to buy two Internet firms ... ." Complaint, ¶ 60. However, this article concedes that an advantage of Omnicom's transfer of 16 of its struggling Internet companies to Seneca was that "it allowed [Omnicom] to avoid the possibility of writing down the value of its investments in some of the online firms." *Id.* The article also states that Purcell, another director, "felt satisfied

the board had signed off on Seneca." *Id.* In addition, the article quotes Wren, Omnicom's director and CEO, as stating that "Seneca was smart because instead of just walking away from these [Internet investments] and taking a write-off, we said we believe that Pegasus, through Seneca, could restructure the assets and make them valuable again" (*id.*), thereby acknowledging that the transaction was made on an informed basis.

The June twelfth article states that Wren informed the Omnicom board that he wanted to buy back Organic and Agency.com, and that Callander's resignation was prompted by skepticism about whether the proposed buyback was the result of Wren and others entering into transactions "without running it through the board." *Id.* However, the article goes on to state that Murphy, another board member, and Wagner, Omnicom's general counsel, did not share Callander's concerns. The article states that Wren "has been open with the board about Seneca," and that "the board gave him the green light to negotiate to buy Organic and Agency.com." *Id.* Thus, the June tenth article fails to show "particular facts in contending that [Omnicom's] board failed to deliberate" to the extent necessary to become fully informed, under the circumstances, about the Seneca transaction. *Marx*, 88 NY2d at 202.

The essence of plaintiffs' argument on this point is that the board "had ample information," yet rendered a decision with which plaintiffs are dissatisfied. *Alpert v National Ass'n. of Securities Dealers, LLC*, 2004 WL 3270188, *13 (Sup Ct, NY County 2004). For the foregoing reasons, the complaint fails to show that the directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances. Nor do the allegations support plaintiffs' contention that the board passively rubber-stamped the decisions of the active managers.

Business Judgment

Defendants next argue that the allegations of the complaint do not show that the directors failed to exercise their business judgment in approving the transaction. In opposition, plaintiffs argue that the Seneca transaction was designed with the sole, improper purpose of concealing the true financial condition of Communicade's investments, with no valid business justification.

"Demand is excused because of futility when a complaint alleges with particularity that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors." *Bansbach*, 1 NY3d at 9.

> Developed in the context of commercial enterprises, the business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. So long as the corporation's directors have not breached their fiduciary obligation to the corporation, the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient.

Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 537-38 (1990) (citations and internal quotation marks omitted). "Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to [corporate directors'] honest and unselfish decision ... ." *Auerbach v Bennett*, 47 NY2d 619, 629 (1979) (citation and internal quotation marks omitted). However, evidence of bad faith or fraud rebut the presumption of the business judgment rule. *Id.* at 631; *see also Crescent/Mach I Partners, L.P. v Turner*, 846 A2d 963, 981 (Del Ch 2000) ("the presumptive validity of the business judgment rule can be rebutted 'where the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable

on any ground other than bad faith'").

"On a motion to dismiss a complaint we accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory." *Morone v Morone*, 50 NY2d 481, 484 (1980). As recently stated, on a motion to dismiss the complaint under CPLR 3211 (a), in the context of the business judgment rule: "the complaint will be sustained if it contains allegations sufficient to demonstrate that directors did not act in good faith or were otherwise interested, as 'prediscovery dismissal of pleadings in the name of the business judgment rule is inappropriate.'" *Higgins v New York Stock Exchange, Inc.*, 10 Misc 3d 257, 282 (Sup Ct, NY County 2005), *citing Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 667 (1st Dept 1993).

Here, the complaint alleges that Communicade's investment portfolio was risky (Complaint, ¶ 28); that by the end of 2000, Omnicom's investment in Agency.com had fallen below the value of Omnicom's original investment, as reported in Omnicom's SEC Form 10-K filing (*id.*, ¶¶ 36-38); that Omnicom did not want to take a charge against earnings and end a 15-year streak of reported earnings, that would have occurred if it reclassified its losses as "non-temporary" (*id.*, ¶ 43); that, therefore, the sole purpose of establishing Seneca was to remove these losses from Omnicom's balance sheet (*id.*, ¶¶ 43, 47); and that Omnicom never fully explained why the transfer to Seneca was completed or accounted for on its books at a value of $280 million, because the Individual Defendants also allegedly knew that the $280 million valuation of Seneca was unsupportable (*id.*, ¶¶ 49, 52).

The complaint avers that removing the Communicade liabilities from Omnicom's financials was predicated upon Seneca's independence, but that Seneca was managed by the

same individuals who managed Communicade out of Omnicom's office, and that, therefore, Omnicom retained control over the investments. *Id.*, ¶¶ 53, 54. In addition, Omnicom allegedly restructured some of Seneca's investments to include options for Omnicom to repurchase the entities from Seneca. *Id.*, ¶ 54. These options were allegedly given to Omnicom for free. *Id.* According to the complaint, the Wall Street Journal reported that Callander resigned because he was dissatisfied with Omnicom's alleged limited disclosure concerning these Internet company investments. The article also reported that certain experts stated that Seneca's public SEC filings raised red flags with respect to certain Seneca transactions. *Id.*, ¶¶ 59, 60.

As does the complaint in the Securities Action, the complaint here,

> presents a detailed picture of why this scheme was deceptive and not simply a legitimate transfer of assets: Omnicom, not wanting to write-down its failing investments in internet companies, miss Wall Street projections, and devalue its stock, entered into a transaction with Pegasus to create Seneca, to which it could transfer the internet assets and thereby take them off its books. In exchange, Omnicom gained stock in Seneca. All the while, Omnicom maintained control of Seneca, which consisted of a few former-Omnicom employees operating out of Omnicom's Manhattan offices ... . Omnicom then failed to account for Seneca on its books despite Omnicom's control over it.

In re Omnicom Group, Inc. Securities Litigation, 2005 WL 735937, at *10. The court in the Securities Action did not apply the demand futility test articulated in *Marx* (88 NY2d 189, *supra*), and did not assess whether the board's approval of the Seneca transaction was the product of sound business judgment. However, the District Court sustained the portion of the plaintiffs' fraud claims that arose out of the same operative facts as plaintiffs allege in this action. Because showings of fraud and bad faith rebut the presumption of the business judgment rule (*Auerbach v Bennett*, *supra* at 631), this court finds the reasoning and conclusion of the District

Court persuasive.

The allegations of the complaint show that the sole purpose of the transaction was to conceal the true status of the failing Internet companies. Based upon this showing, plaintiffs have rebutted the presumption of the business judgment rule. *See e.g. Crescent/Mach I Partners, L.P. v Turner*, 846 A2d at 982-83 ("it does not matter here that the Complaint fails to establish that [the director defendants] were either interested directors or that they lacked the ability to form an independent judgment. Their approval of [the CEO and chairman of the board's] alleged self-interested 'side-deals' allegedly taint the entire merger process and strips the board of the protection of the business judgment rule. Even though the remaining directors failed to benefit personally from the merger, their judgments were aligned with that of [the CEO and chairman of the board] and not that of [the corporation] or its minority stockholders").

Defendants seek to characterize plaintiffs' showing as conclusory. With respect to plaintiffs' showing of bad faith and fraud, defendants' argument relies upon business rationales purportedly asserted in the complaint's reproduction of the June twelfth Wall Street Journal article about the Seneca transaction. The June twelfth article recites statements made by Wren, that Omnicom believed that "Pegasus, through Seneca, could restructure the assets and make them valuable again," and, at the same time, "preclude having to record its proportional share of any losses from Agency.com." Complaint, ¶ 60. Thus, defendants seek to characterize the Seneca transaction as nothing more than a legitimate transfer of assets.

However, as stated by the District Court in the Securities Action:

> [T]his characterization ignores the allegations in the complaint that by transferring the declining e-services investments to Seneca, Omnicom was able to avoid recognizing the non-temporary impairment of those investments on its own books as required under GAAP. Defendants do not present any legitimate purpose

> for the Seneca transaction that could be reasonably inferred from the facts in the complaint.

The District Court also stated that what made the claim fraudulent was "the intentional or reckless act of violating accounting and regulatory rules to avoid notifying the market of Omnicom's financial losses as a result of the decline of the e-services companies." *Id.*, at *14. The District Court's observations apply with equal force to the complaint in this action. For the foregoing reasons, defendants' argument as to business judgment is unpersuasive.

Accordingly, it is hereby

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: June 23 2006

ENTER:

J.S.C.