

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES KIM, DERIVATIVELY ON
BEHALF OF MGM MIRAGE; AND
SANJAY ISRANI, DERIVATIVELY ON
BEHALF OF MGM MIRAGE,
Appellants,

vs.

MGM MIRAGE; WILLIE D. DAVIS; THE
HONORABLE KENNY C. GUINN;
ALEXIS HERMAN; ROLAND
HERNANDEZ; KIRK KERKORIAN;
ANTHONY MANDEKIC; ROSE
MCKINNEY-JAMES; DANIEL TAYLOR;
MELVIN B. WOLZINGER; ROBERT H.
BALDWIN; GARY N. JACOBS; JAMES
J. MURREN; J. TERRANCE LANNI;
AND DANIEL J. D'ARRIGO,
Respondents.

No. 61101

FILED

DEC 30 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing shareholder derivative actions. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Appellants Charles Kim and Sanjay Israni instituted shareholder derivative suits, which were later consolidated, against certain current and former officers and directors of the MGM Resorts International, alleging the officers and directors improperly instituted a stock buy-back program, issued false and misleading statements concerning a construction project, failed to exercise appropriate oversight, improperly approved certain officers' resignations, and sold MGM stock based upon insider knowledge. Respondents moved the district court to dismiss the action based on appellants' failure to serve pre-suit demands

on the Board. Appellants opposed the motion, arguing that making demands would have been futile. The district court found that demands were not futile and were not excused, and dismissed the complaint without prejudice to appellants' complying with the demand requirements. Appellants appealed.

On appeal, appellants argue that the district court's conclusion about the pre-suit demand not being futile was improper because five directors were interested in the allegedly illegal sales of stock and two other directors were beholden to director Kirk Kerkorian; thus providing the needed majority of 7 of the 14 total directors to excuse a pre-suit demand.

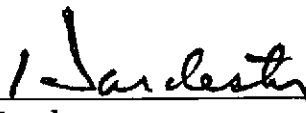
Under Delaware law,¹ plaintiffs seeking to assert claims derivatively on behalf of a corporation must make a pre-litigation demand upon the corporation's board of directors requesting that the board take certain action, unless such a demand is legally futile. *Brehm v. Eisner*, 746 A.2d 244, 254-56 & n.19 (Del. 2000). A demand is futile when there is a reasonable doubt as to whether (1) a majority of the directors are disinterested and independent such that they can exercise independent reasoning when considering a demand, or (2) the challenged transaction was the product of a valid exercise of business judgment. *Id.* at 256. When plaintiffs complain of Board inaction, plaintiffs must meet only the first prong of this test. *Rales v. Blasband*, 634 A.2d 927, 933-35 (Del.

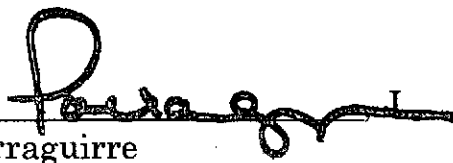
¹Delaware law applies to this case because MGM is incorporated in Delaware and "the laws of the jurisdiction of incorporation govern internal corporate relationships." *Sternberg v. O'Neil*, 550 A.2d 1105, 1123 (Del. 1988).

1993), *abrogated on unrelated grounds by Lambrecht v. O'Neal*, 3 A.3d 277, 287-93 (Del. 2010).

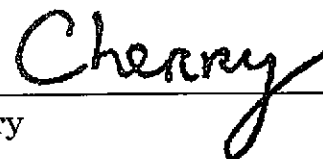
Regarding the two directors that are allegedly beholden to Kerkorian, appellants do not allege that Kerkorian himself was interested in any challenged transaction. Thus, whether two directors were beholden to him was irrelevant. *Brehm*, 746 A.2d at 258 (holding that whether some directors were beholden to another director was irrelevant because that director was disinterested). Next, as to the five directors who were allegedly interested in the stock sales, appellants fail to identify any other director who was interested in the stock sale, and the five directors' interest in the sales does not establish that they were interested in any other challenged transaction. Thus, appellants failed to demonstrate a reasonable doubt as to whether a majority of MGM's directors could exercise independent judgment and reasoning when considering a pre-suit demand. Accordingly, having reviewed the parties' arguments and the record, we conclude that the district court did not err when it dismissed the case without prejudice, *id.* at 253-54 (establishing *de novo* review for a court reviewing whether a demand is excused), and we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Hardesty



Parraguirre


_____, J.
Cherry

²Because we affirm the district court's order based upon the demand requirement, we do not address the parties' other arguments.

cc: Hon. Mark R. Denton, District Judge
Lansford W. Levitt, Settlement Judge
The Weiser Law Firm, P.C./PA
Aldrich Law Firm, Ltd.
The Weiser Law Firm, P.C./CA
Federman & Sherwood
Munger, Tolles & Olson LLP
Pisanelli Bice, PLLC
Morris Law Group
Irell & Manella, LLP
Eighth District Court Clerk