IN THE SUPREME COURT OF THE STATE OF DELAWARE

MELBOURNE MUNICIPAL FIREFIGHTERS' PENSION TRUST FUND, derivatively on behalf of QUALCOMM, INCORPORATED,	)	
Plaintiff Below Appellant,	)	No. 444, 2016
v.	)	CASE BELOW: COURT OF CHANCERY
PAUL E. JACOBS, STEVEN M. MOLLENKOPF, BARBARA T. ALEXANDER, DONALD G. CRUICKSHANK, RAYMOND V. DITTAMORE, SUSAN HOCKFIELD, THOMAS W. HORTON, SHERRY LANSING, HARISH MANWANI, DUANE A. NELLES, CLARK T. RANDT, JR., FRANCISCO ROS, JONATHAN J. RUBINSTEIN, GENERAL BRENT SCOWCROFT, and MARC I. STERN,	)	OF THE STATE OF DELAWARE, C.A. No. 10872-VCMR
Defendants Below Appellees,	)	
QUALCOMM, INCORPORATED,	)	
Nominal Defendant Below Appellee.	)	

DEFENDANTS BELOW-APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal by plaintiff below-appellant Melbourne Municipal Firefighters' Pension Trust Fund—a stockholder in defendant below-appellee Qualcomm Incorporated ("Qualcomm" or the "Company")—from a Memorandum Opinion of the Court of Chancery (the "Opinion" or "Op.") dismissing with prejudice plaintiff's Verified Stockholder Derivative Complaint (the "Complaint").

The Complaint asserts what is often referred to as a "Caremark claim": it alleges that the members of the Company's Board of Directors (the "Board") breached their duty of loyalty by failing to prevent Qualcomm from violating international competition laws. Plaintiff filed the Complaint without making the required pre-suit demand, arguing that a demand would be futile in this matter because a majority of the Board faces a substantial likelihood of personal liability. As the Court of Chancery held in its carefully reasoned Opinion, plaintiff is wrong.

To maintain demand futility with respect to its Caremark claim, plaintiff must plead—with specificity—that a majority of the Board knew of and consciously disregarded Qualcomm's alleged violations of competition law. Yet the Complaint contains not a single particularized allegation that even one member of the Board was aware of corporate misconduct, or acted in bad faith. Instead, the Complaint is premised entirely on the theory that because Qualcomm settled a civil

litigation with a competitor and is the subject of two pending regulatory proceedings (one in South Korea and one in Japan) involving alleged competition issues, the Board "must have" known the Company was engaged in misconduct, and "must have" breached its fiduciary duty by ignoring these supposed "red flags". The law is clear, however, both that the settlement and pending regulatory proceedings do not constitute "red flags" of misconduct, and that the type of generalized "must have" allegations pleaded in the Complaint are insufficient to maintain a Caremark (or any other) claim.

Defendants moved to dismiss the Complaint pursuant to Court of Chancery Rules 12(b)(6) and 23.1. The Court of Chancery granted defendants' motion pursuant to Rule 23.1, finding that demand is not excused in this case. Among other things, the Court of Chancery correctly found that even assuming the settlement and two regulatory proceedings were signs of potential misconduct, the Complaint is devoid of any allegations that would support a reasonable inference that the Board acted in bad faith in responding to them.

On appeal, plaintiff relies almost exclusively on two Court of Chancery cases to challenge the Vice Chancellor's conclusion that the Complaint fails adequately to plead bad faith on the part of the Board. But the Vice Chancellor carefully considered and distinguished both cases, which concerned facts and circumstances that are very different than those presented here. Plaintiff

offers no reasoned basis to overturn the Vice Chancellor's reading of these cases, or her Opinion dismissing the Complaint. As a result, this Court should affirm the Court of Chancery's dismissal for failure to make a demand.

This Court also should affirm the Court of Chancery's dismissal for the independent reason (argued below) that the Complaint fails to state a claim.

SUMMARY OF ARGUMENT

1. DENIED. The Vice Chancellor correctly held that the Complaint fails adequately to plead that a majority of the Board faces a substantial likelihood of liability for deficiently overseeing Qualcomm's compliance with international competition laws. The three purported red flags plaintiff cites do not establish that Qualcomm was violating international competition laws, let alone that the Directors knew of any such violations. Moreover, the Court of Chancery correctly ruled that the Board did not act in bad faith in responding to the supposed red flags, and the Board's response is protected by the business judgment rule in any event. Plaintiff's reliance on two Court of Chancery decisions in an attempt to establish that the Board acted in bad faith is misplaced; those decisions were properly distinguished by the Vice Chancellor.

2. The Court should affirm the dismissal of the Complaint for the additional and independent reason that it fails to state a claim pursuant to Court of Chancery Rule 12(b)(6).

COUNTERSTATEMENT OF FACTS[1]

A. The Parties

Plaintiff provides pension benefits to retired municipal firefighters in Melbourne, Florida. (A22 ¶ 11.) Plaintiff currently is a Qualcomm stockholder, and has been a stockholder at all times relevant to this action. (A94 ¶ 178.)

Defendants below-appellees Paul E. Jacobs, Steven M. Mollenkopf, Barbara T. Alexander, Donald G. Cruickshank, Raymond V. Dittamore, Susan Hockfield, Thomas W. Horton, Sherry Lansing, Harish Manwani, Duane A. Nelles, Clark T. Randt, Jr., Francisco Ros, Jonathan J. Rubinstein, General Brent Scowcroft and Marc I. Stern (collectively, the "Directors") all were members of Qualcomm's Board at the time plaintiff filed its Complaint. (A23-31 ¶¶ 14-28.) In addition to serving on the Board, Mr. Jacobs was the Company's CEO from 2005 to 2014 (A23-24 ¶ 14), and Mr. Mollenkopf has been the Company's CEO since 2014 (A24 ¶ 15). Messrs. Jacobs and Mollenkopf are referred to as the "Officers" and, together with the Directors, collectively referred to as "defendants".

Qualcomm is a Delaware corporation, headquartered in San Diego, California. (A22 ¶ 12.) Qualcomm leads the development and commercialization

[1] For purposes of this appeal, the Court should accept plaintiff's well-pleaded factual allegations as true; however, the Court should reject "inferences [and] conclusions of fact" that are "unsupported by allegations of specific facts upon which the inferences or conclusions rest". Grobow v. Perot, 539 A.2d 180, 187 & n.6 (Del. 1988).

of a digital communication technology called Code Division Multiple Access ("CDMA") and owns significant intellectual property applicable to products that implement any version of CDMA, including patents, patent applications and trade secrets. (A22 ¶ 12, A35 ¶ 40.) Qualcomm provides licenses to companies seeking to develop, manufacture and/or sell products that use CDMA technology. (A35 ¶ 41.) Qualcomm also manufactures and sells integrated circuits and software used in smartphones and wireless networks. (A35-36 ¶ 43.)

B. The Broadcom Litigations and Settlement

In 2005, Qualcomm and Broadcom Corporation ("Broadcom")[2] began a protracted legal battle in various forums, including federal District Courts and domestic and international administrative and regulatory bodies. (See, e.g., B83-84, 88.)[3] While the disputes primarily concerned mutual claims of patent infringement (see, e.g., Br. at 14; B83-84), Broadcom also asserted that certain of

[2] Broadcom is a competitor and a customer of Qualcomm. (See, e.g., B111.)

[3] The Court may consider Qualcomm's public filings with the United States Securities and Exchange Commission ("SEC") to the extent they are incorporated by reference in the Complaint. In re Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 69-70 (Del. 1995); (see also A16 (citing "Company filings with the United States Securities and Exchange Commission").) In addition, as plaintiff acknowledges in its Opening Brief ("Brief" or "Br.") (Br. at 19 n.2), this Court may take judicial notice of uncontroverted facts publicly available in filings with the SEC. Hazout v. Tsang Mun Ting, 134 A.3d 274, 280 n.13 (Del. 2016). Moreover, most of the public filings referenced herein specifically were attached to plaintiff's Opposition to Defendants' Motion to Dismiss the Verified Stockholder Derivative Complaint or plaintiff's Brief.

Qualcomm's licensing practices violated domestic and international competition laws (see, e.g., Br. at 9; A161-62 ¶¶ 98-99; B88, 90).

Qualcomm publicly expressed the view that the litigations with Broadcom were part of a larger strategy by competitors to influence Qualcomm's business practices. In November 2006, for example, Qualcomm disclosed that it believed certain companies, including Broadcom, were using, among other things, litigation (often alleging patent infringement or unfair competition) and appeals to governmental authorities (such as the European Commission, the Korea Fair Trade Commission ("KFTC") and the Japan Fair Trade Commission ("JFTC")) as a strategy to "renegotiate, mitigate and/or eliminate their need to pay royalties to [Qualcomm] for the use of [Qualcomm's] intellectual property in order to negatively affect [Qualcomm's] business model and that of [its] other licensees". (B88.) Qualcomm reported that, while the challenges to its "business model and licensing program [were] undesirable and the legal and other costs associated with defending [its] position have been and continue to be significant, [it] believe[d] that the[] challenges [were] without merit". (Id.) Qualcomm reiterated in 2007 and 2008 that it believed the claims made by Broadcom, among others, were "without merit" and stated that it would "vigorously defend the actions". (B98, 107.)

On September 1, 2006, one of the lawsuits brought by Broadcom, which alleged that certain of Qualcomm's licensing practices violated U.S. federal and state competition laws, was dismissed by the District Court for failure to state a claim. Broadcom Corp. v. Qualcomm Inc., 2006 WL 2528546 (D.N.J.); (see also B96.) On September 4, 2007, the United States Court of Appeals for the Third Circuit reinstated two of the eight federal antitrust claims and five pendant state claims, and affirmed the dismissal of the remaining counts subject to the appeal. Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 303 (3d Cir. 2007); (see also B96.)

In January 2008, Qualcomm reported that it had engaged in "many settlement discussions with Broadcom", but that those settlement discussions had "not been fruitful to date" because Broadcom demanded concessions that potentially would have "a material impact on [Qualcomm's] licensing and royalty business model". (B100-01.) On April 26, 2009, however, Qualcomm and Broadcom reached a global settlement. (A319.) Pursuant to the settlement, "(i) the companies agreed to terminate all litigation between the parties; (ii) Broadcom agreed to assign certain patent rights to the Company; and (iii) the companies granted certain rights to each other under their respective patent portfolios". (Id.) In addition, Qualcomm agreed to pay Broadcom $891 million. (Id.) Qualcomm disclosed that the "principal benefits to the Company from

entering into the [settlement agreement] were (i) the termination of litigation between the parties which allows the Company to avoid future litigation expenses and (ii) the avoidance of future customer disruption". (Id.) Qualcomm did not admit any wrongdoing in connection with the settlement.

C. The KFTC Investigation and Decision

In November 2006, Qualcomm disclosed that "two U.S. companies (Texas Instruments and Broadcom) and two South Korean companies (Nextreaming Corp. and THINmultimedia Inc.) ha[d] filed complaints with the [KFTC] alleging that [its] business practices [were], in some way, a violation of South Korean anti-trust regulations". (B88; see also A58 ¶ 91.) Qualcomm further disclosed that it did not believe that its "business practices violate[d] the legal requirements of South Korean competition law". (B88.) In subsequent years, Qualcomm reiterated that it did not believe that its business practices violated South Korean competition law (A418; see also B95, 104), but stated that it was cooperating with the KFTC's investigation of the complaints (B95, 104).

On February 17, 2009, the KFTC issued a Case Examiner's report setting forth allegations concerning the lawfulness of certain of Qualcomm's business practices. (A58 ¶ 91; B112.) On July 23, 2009, the KFTC found Qualcomm to be in violation of South Korean competition law and announced that

it would levy a fine of at least 260 billion Korean won,[4] as well as order Qualcomm to cease the practices at issue (the "KFTC Decision"). (A57 ¶ 90; B112.) Qualcomm stated that it intended to appeal the KFTC Decision, and that it believed its practices did not "violate South Korean competition law, [were] grounded in sound business practice and [were] consistent with [its] customers' desires". (B112; see also A60-61 ¶ 96, A102 ¶ 196.)

In February 2010, Qualcomm filed a complaint against the KFTC with the Seoul High Court appealing the KFTC Decision. (A418; see also A61 ¶ 96, A105-06 ¶¶ 203-05.) On June 19, 2013, the Seoul High Court affirmed the KFTC Decision and, on July 4, 2013, Qualcomm appealed the affirmance to the Korea Supreme Court. (A430; see also A61 ¶ 96, A105-06 ¶¶ 203-05.) That appeal remains pending. (A435; see also A61 ¶ 96, A106 ¶ 205.)

D. The JFTC Investigation and Order

In November 2007, Qualcomm disclosed that "unnamed parties filed a complaint [in 2006] with the JFTC allegedly claiming that [its] business practices are, in some way a violation of the Japanese competition laws". (B94-95; see also A102 ¶ 197.) Qualcomm stated that it did not believe that its "business practices violate[d] the legal requirements" of Japanese competition law and that it was

[4] The KFTC ultimately levied a fine of 273.2 billion Korean won, for which Qualcomm accrued a $230 million charge in fiscal 2009. (A418.) Qualcomm paid the fine in fiscal 2010. (A423; see also A256.)

cooperating with the JFTC's investigation. (B94-95.) Qualcomm further stated that it believed the challenges were "without merit" and that it would "continue to vigorously defend [its] intellectual property rights and [its] right to continue to receive a fair return for [its] innovations". (Id.) In 2008, Qualcomm reiterated that it believed it was not in violation of any Japanese competition laws, the challenges were without merit, it would continue vigorously to defend itself and it was cooperating with the JFTC. (A414.)

On September 29, 2009, the JFTC issued a Cease and Desist Order (the "JFTC Order") concluding that certain of Qualcomm's licensing practices violated Japan's competition laws and requiring that Qualcomm modify its existing licensing agreements with Japanese customers to remove certain provisions. (A62 ¶ 101, A64-65 ¶¶ 104-05; see also B112-13.) Qualcomm stated that it disagreed with the JFTC Order and that it intended "to invoke [its] right under Japanese law to an administrative hearing before the JFTC, request that the JFTC suspend the [JFTC Order] pending a decision following the hearing, and seek a stay of the [JFTC Order] from the Japanese courts should the JFTC deny [its] request to suspend the [JFTC Order]". (A318; see also A65 ¶ 107.)

The JFTC denied Qualcomm's request to stay the JFTC Order pending the outcome of the administrative hearing. (B117.) Qualcomm subsequently sought a stay in Japanese court (id.), and, in February 2010, the

Tokyo High Court granted Qualcomm's request for a stay of the JFTC Order pending Qualcomm's administrative hearing before the JFTC (A418; see also A65-66 ¶ 107). To date, the JFTC has held over 33 hearings, with the next hearing scheduled for January 17, 2017. (A435.) The matter remains pending. (See id.)

E. The NDRC Investigation and Settlement

In November 2013, the China National Development and Reform Commission ("NDRC") notified Qualcomm that it had commenced an investigation of Qualcomm relating to the Chinese Anti-Monopoly Law (which became effective on August 1, 2008) and Qualcomm's licensing business. (A67 ¶ 110.) Qualcomm reported that, "[g]iven the limited precedent of enforcement actions and penalties under the [Anti-Monopoly Law], it is difficult to predict the outcome of this matter". (B121.)

On February 9, 2015, Qualcomm reached a settlement with the NDRC concerning its investigation (the "NDRC Settlement"). (B124; A70 ¶ 118.) The NDRC issued an Administrative Sanction Decision finding that Qualcomm had violated the Anti-Monopoly Law, and Qualcomm agreed to implement a rectification plan that modifies certain of its business practices in China. (A70 ¶ 118, A71-72 ¶ 121.) In addition, the NDRC fined Qualcomm 6.088 billion Chinese Yuan renminbi (approximately $975 million). (A70-71 ¶ 120.) Qualcomm did not admit wrongdoing in connection with the NDRC Settlement.

F. The Commencement and Dismissal of This Lawsuit

Before commencing this derivative action, plaintiff sought books and records from Qualcomm pursuant to 8 Del. C. § 220, including books and records concerning the Board's knowledge of and response to the Company's alleged foreign competition issues (the "Section 220 Demand"). (See A16.) In response to the Section 220 Demand, Qualcomm produced over 14,000 pages of documents, including Board and Board-committee minutes and selected presentations made to the Board. (A213.)

On April 3, 2015, plaintiff filed the Complaint. The Complaint originally asserted four derivative counts on Qualcomm's purported behalf. Count I (the only remaining claim)[5] and Count II contend that the Directors and Officers, respectively, knew Qualcomm was violating applicable competition laws but consciously ignored the misconduct, thereby breaching their fiduciary duty of loyalty. (A127-31 ¶¶ 247-57.) Count III alleged waste (A131-33 ¶¶ 258-66) and Count IV alleged unjust enrichment (A133-34 ¶¶ 267-72).

[5] Plaintiff voluntarily dismissed Counts III and IV at oral argument (infra p. 14), and therefore the Court of Chancery only needed to consider defendants' motion to dismiss Counts I and II. On appeal, plaintiff challenges only the Court of Chancery's ruling with respect to Count I; it does not address the Court of Chancery's dismissal of Count II. Accordingly, plaintiff has waived any appeal of the dismissal of Count II. See, e.g., Tumlinson v. Advanced Micro Devices, Inc., 106 A.3d 983, 988 (Del. 2013) (argument not raised in opening brief is waived).

The Complaint contends that a pre-suit demand on the Board would have been futile because a majority of the Board faces a substantial likelihood of liability for the wrongdoing alleged therein. (A94-95 ¶¶ 180-81.)

On June 12, 2015, defendants moved to dismiss the Complaint pursuant to Court of Chancery Rules 12(b)(6) and 23.1 (the "Motion"). On April 5, 2016, the Court of Chancery held oral argument on defendants' Motion. At oral argument, plaintiff's counsel formally abandoned Counts III and IV. (Br. at 2.) Plaintiff's counsel also narrowed the scope of its theory, claiming that only the Broadcom Settlement, KFTC Decision and JFTC Order constituted red flags of Qualcomm's alleged wrongdoing, and that the NDRC Settlement was the consequence of Qualcomm allegedly ignoring them.[6] (A383-86.)

[6] The Complaint originally cited a number of other supposed red flags, but they simply were not so, as defendants demonstrated in their Motion papers. (See, e.g., B21-30; B58-73.) Although plaintiff abandoned these other supposed red flags at oral argument, on appeal, plaintiff again attempts to rely on them. (See Br. at 22-24.) The Court should not permit plaintiff to revive arguments that it abandoned below. See, e.g., In re Phila. Stock Exch., Inc., 945 A.2d 1123, 1134 (Del. 2008) (refusing to consider "argument [that] was never fairly presented to the Court of Chancery"); Del. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review" unless required by "interests of justice"). In addition, most of the events on which plaintiff now seeks to rely occurred after the filing of the Complaint (see Br. at 22-24), and are therefore irrelevant to the demand futility analysis. See, e.g., Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993) (demand futility determined "as of the time the complaint is filed"); In re Intel Corp. Deriv. Litig., 621 F. Supp. 2d 165, 175-76 & n.3 (D. Del. 2009) (refusing to consider legal proceedings that occurred after complaint filed).

On August 1, 2016, the Court of Chancery granted defendants' Motion, ruling that demand was not excused under Rales because the Complaint fails adequately to plead that a majority of the Board faces a substantial likelihood of personal liability under Counts I and II. (Op. at 15, 22, 35-36.) With respect to Count I, the Court of Chancery assumed for purposes of the Motion that the Broadcom Settlement, KFTC Decision and JFTC Order were red flags indicating potential misconduct (id. at 23), and held that the Complaint fails adequately to plead that the Board's response to them constitutes bad faith (id. at 21-35).

With respect to Count II, which was alleged against only the Officers, the Court of Chancery held that the Complaint fails to plead that a majority of the Board faces a substantial likelihood of liability because the Officers comprise only two members of the fifteen-member Board. (Id. at 35-36.) Again, plaintiff does not challenge the dismissal of Count II on appeal.

The Court of Chancery did not address defendants' showing that the Complaint fails to state a claim pursuant to Court of Chancery Rule 12(b)(6).

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED THAT THE COMPLAINT FAILS ADEQUATELY TO PLEAD DEMAND FUTILITY

A. Question Presented

Did the Court of Chancery properly find that the Complaint fails to plead particularized facts which support a reasonable inference that a majority of the Board faces a substantial likelihood of personal liability such that demand is futile?

B. Scope of Review

This Court's review of determinations of demand futility under Court of Chancery Rule 23.1 is de novo and plenary. Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000). Because Rule 23.1 requires that allegations be pleaded with particularity, this Court "need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences". Grobow, 539 A.2d at 187.

This Court "may affirm on the basis of a different rationale than that which was articulated by the trial court . . . [and] may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court". Unitrin Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1390 (Del. 1995); see also RBC Capital Mkts. LLC v. Jervis, 129 A.3d 816, 849 (Del. 2015).

C. Merits of Argument

The Court of Chancery properly held that demand is not excused because the Complaint fails adequately to plead that a majority of the Board faces a substantial likelihood of liability for failing to oversee Qualcomm's compliance with applicable competition laws. (Op. at 22.) The Court of Chancery correctly found that, even assuming (without deciding) that the Broadcom Settlement, KFTC Decision and JFTC Order constitute "red flags" of Qualcomm's potential violation of applicable competition laws, the Complaint does not adequately plead that the Board responded in bad faith to them. (Id.)

On appeal, plaintiff contends that the Complaint adequately alleges bad faith, and that the Court of Chancery erred in ruling otherwise in dismissing Count I. Plaintiff's position is without merit.

1. Applicable Law

Before bringing this derivative suit on behalf of the Company, plaintiff was required to make a demand on the Board asking the Company to bring the suit itself. See, e.g., Beam v. Stewart, 845 A.2d 1040, 1048 (Del. 2004). This requirement stems from the "cardinal precept . . . that directors, rather than shareholders, manage the business and affairs of the corporation", including whether to commence litigation. Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984); see also White v. Panic, 783 A.2d 543, 550 (Del. 2001). Plaintiff

acknowledges that it did not serve a demand on the Board before initiating this action, but contends that demand is excused because the Directors face a substantial likelihood of personal liability in connection with Count I. (A94-95 ¶¶ 180-81.)

Demand is excused only if a plaintiff pleads particularized facts that cast a reasonable doubt upon a majority of a board's disinterestedness or independence. See Rales, 634 A.2d at 934; (Op. at 15).[7] The particularity requirement "differ[s] substantially from the permissive notice pleadings" in non-derivative cases, and is designed to prevent shareholders from "caus[ing] the corporation to expend money and resources in discovery and trial in the stockholder's quixotic pursuit of a purported corporate claim based solely on conclusions, opinions or speculation". Brehm, 746 A.2d at 254-55. "[C]onclusory statements or mere notice pleading" will not suffice; plaintiff must provide "particularized factual statements that are essential to the claim". Id. at 254.

To satisfy the standard set forth in Rales, plaintiff here must show with specific factual allegations that the Complaint's underlying claims pose a serious threat to a majority of the Board. See Wood v. Baum, 953 A.2d 136, 141 (Del. 2008); (Op. at 16.) The conduct complained about must "be so egregious on

[7] Plaintiff concedes that the Rales demand-excuse test applies here. (See Br. at 25.)

its face" that the Board could not have exercised its business judgment in responding to plaintiff's demand to pursue those claims. Aronson, 473 A.2d at 815. "Demand is not excused solely because the directors would be deciding to sue themselves", In re Citigroup Inc. S'holder Deriv. Litig., 964 A.2d 106, 121 (Del. Ch. 2009), and "the mere threat of personal liability . . . is insufficient to challenge either the independence or disinterestedness of directors", Aronson, 473 A.2d at 815. Rather, a majority of the Board must face a "substantial likelihood" of personal liability for demand to be excused. Id.; Rales, 634 A.2d at 936.

It also is a "basic tenet[]" of Delaware law that "independent directors are presumed to be motivated to do their duty with fidelity". In re Cornerstone Therapeutics Inc. Stockholder Litig., 115 A.3d 1173, 1182-83 (Del. 2015) (quotation omitted); see also Beam, 845 A.2d at 1048 ("The key principle upon which [the demand] jurisprudence is based is that the directors are entitled to a presumption that they were faithful to their fiduciary duties."). Director liability premised on deficient oversight is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment". In re Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 967, 971 (Del. Ch. 1996); see also Stone v. Ritter, 911 A.2d 362, 372 (Del. 2006). "[I]mposition of liability requires a showing that the directors knew that 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. Stone, 911 A.2d at 370. Under this "scienter-based standard", "a showing of bad faith is a necessary condition to director oversight liability". Citigroup, 964 A.2d at 123 & n.47; see also Wood, 953 A.2d at 141.

Thus, to state a valid claim of deficient oversight, plaintiff must plead with particularity that (1) defendants had knowledge of red flags indicating that Qualcomm potentially was violating the law; (2) defendants acted in bad faith by failing appropriately to respond to those red flags; and (3) such failure proximately resulted in injury to Qualcomm. See Caremark, 698 A.2d at 971; (see also Op. at 20-21.)

2. The Broadcom Settlement, KFTC Decision and JFTC Order Are Not Red Flags Indicating Corporate Misconduct.

Plaintiff contends that the Broadcom Settlement, KFTC Decision and JFTC Order are red flags of corporate misconduct. (See Br. at 6-11.) That is mistaken as a matter of law.

The Broadcom Settlement—an agreement that resolved nearly four years of civil litigation between Qualcomm and its business competitor Broadcom—does not establish that Qualcomm violated any competition laws. It is well-recognized that legal settlements often "reflect[] nothing more than a business decision". E.g., In re Johnson & Johnson Deriv. Litig., 865 F. Supp. 2d 545, 570 (D.N.J. 2011).

In White, for example, this Court ruled that a company's settlement of eight sexual harassment lawsuits involving the CEO (and its guarantee of a multi-million dollar loan to the CEO to settle a paternity suit) did not establish that any misconduct in fact occurred. 783 A.2d at 553. The Court explained that the lawsuits and "resulting settlements . . . do[] not indicate that the directors knew that the suits were meritorious or that [the CEO] had engaged in the conduct alleged in those suits". Id. at 553 n.31. Instead, "the plaintiff has not pleaded facts indicating that the challenged settlements were anything other than routine business decisions in the interest of the corporation". Id. at 553; see also Marvin H. Maurras Revoc. Trust v. Bronfman, 2013 WL 5348357, at *6 (N.D. Ill.) (settlements not red flags); Johnson & Johnson, 865 F. Supp. 2d at 567, 570 (settlement of civil and criminal matter not red flag).[8]

Here, the Complaint pleads no basis to infer that the settlement with Broadcom reflected anything more than a routine business decision. Qualcomm did not admit any wrongdoing in connection with the settlement. See Johnson & Johnson, 865 F. Supp. 2d at 567, 569-70 (prior settlements with the Department of

[8] Indeed, an article plaintiff itself cites (Br. at 34 & n.3) recognizes that "there are incentives to settling a case that have nothing to do with the probability of loss for the company based on the merits of the case if litigated". Peter J. Brennan et al., Now, Never or Somewhere in Between?: The Nuts and Bolts of Setting Reserves, ACC Docket, at 12 (July/Aug. 2004), available at http://www.acc.com/_cs_upload/vl/public/ProgramMaterial/20446_1.pdf.

Justice did not establish corporate misconduct or support finding that board knew of alleged misconduct where no admission of liability). To the contrary, Qualcomm maintained in its public filings that Broadcom's numerous claims in the litigations were "without merit" and represented nothing more than strategic attempts to gain a competitive advantage. (Supra p. 7.) Qualcomm publicly explained that the settlement was the result of a business decision—namely, to "enable the Company to move forward with its business and focus on restoring its relationships with its customers and carriers". (A319.) The Complaint pleads no facts from which it reasonably could be inferred that Qualcomm was inaccurate or misleading in any way in its public statements. (See infra pp. 37-38.)

The Third Circuit's ruling in Broadcom—from which plaintiff quotes extensively (Br. 7-9)—likewise does not establish wrongdoing (see id. at 32 (contending that Qualcomm "suffered an adverse legal ruling in the Broadcom litigation in 2007")). That decision was an appeal from a motion to dismiss and, as such, the Third Circuit did not decide whether Qualcomm's business practices actually violated United States competition laws, but rather it merely held that Broadcom's theory could support an actionable claim. Broadcom, 501 F.3d at 303, 314.

Similarly, the KFTC Decision and JFTC Order are not evidence that Qualcomm violated competition laws. Plaintiff cannot merely "catalog . . .

ongoing investigations into . . . alleged wrongdoing, and then assert that the thickness of the catalog . . . [i]s so egregious and widespread that the Directors certainly must now face at least a 'substantial likelihood' of personal liability for having ignored the 'red flags'". Intel, 621 F. Supp. 2d at 175. Pending legal proceedings, including government investigations, do not establish that a company engaged in misconduct. See, e.g., In re Chemed Corp., S'holder Deriv. Litig., 2015 WL 9460118, at *18 (D. Del.) (pending government investigation not red flag), report and recommendation adopted sub nom. KBC Asset Mgmt. NV v. McNamara, 2016 WL 2758256 (D. Del.); Intel, 621 F. Supp. 2d at 175 (pending European Commission, KFTC, Federal Trade Commission and New York Attorney General investigations not red flags); La. Mun. Police Emps.' Ret. Sys. v. Hesse ("Hesse"), 962 F. Supp. 2d 576, 589 (S.D.N.Y. 2013) (New York Attorney General statements and lawsuits challenging tax compliance not red flags); Maurras, 2013 WL 5348357, at *6 (lawsuits not red flags); Johnson & Johnson, 865 F. Supp. 2d at 566-67 (federal government subpoenas and lawsuits not determination of wrongdoing); In re ITT Deriv. Litig., 653 F. Supp. 2d 453, 462 (S.D.N.Y. 2009) (criminal investigation, including search warrant, not red flag).

Significantly, the KFTC and JFTC proceedings at issue are still pending—Qualcomm has appealed the KFTC Decision and JFTC Order to the Korea Supreme Court and the JFTC, respectively. (Supra pp. 10-12.) (Notably,

the JFTC Order has been stayed by the Japanese courts pending the appeal. (Supra p. 12.)) Thus, no final determination has been made yet concerning whether Qualcomm's practices in fact violate South Korean or Japanese competition laws.[9] (See supra pp. 10, 12.)

3. The Complaint Fails Adequately to Plead That the Board Acted in Bad Faith in Response to the Alleged Red Flags.

Even if the Broadcom Settlement, KFTC Decision and JFTC Order were red flags indicating potential wrongdoing—and they are not—the Directors still do not face a substantial likelihood of liability under Caremark because the Complaint fails adequately to plead that the Directors responded to those alleged red flags in bad faith.

[9] Furthermore, the Broadcom Settlement, KFTC Decision and JFTC Order relate—at most—to Qualcomm's compliance with competition laws in the United States, South Korea and Japan, respectively. Plaintiff is silent as to the requirements of competition law in these countries, instead making the generalized argument that Qualcomm used the same licensing practices in China that were at issue in the Broadcom antitrust lawsuit and the KFTC and JFTC proceedings. (Br. at 21.) But the Complaint pleads no facts from which it reasonably could be inferred that competition law in China is the same as in the United States, South Korea or Japan, or that the Directors knew that to be the case. See, e.g., South v. Baker, 62 A.3d 1, 16-17 (Del. Ch. 2012) (prior mine accidents not red flags about "safety issues" at mine where no allegation "that the incidents were connected in any way"); In re Dow Chem. Co. Deriv. Litig., 2010 WL 66769, at *13 (Del. Ch.) (finding "similar [mis]conduct by different members of management, in a different country, in an unrelated transaction" to be "simply too attenuated to support Caremark claim").

Bad faith is an essential element of a deficient oversight claim. See, e.g., Stone, 911 A.2d at 369; In re Walt Disney Co. Deriv. Litig., 906 A.2d 27, 66 (Del. 2006). Bad faith entails "conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (i.e., gross negligence)". Stone, 911 A.2d at 369; see also Disney, 906 A.2d at 66 (bad faith involves an "intentional dereliction of duty", which is "more culpable than simple inattention or failure to be informed of all [material] facts"). Accordingly, to show a substantial likelihood of liability for deficient oversight, plaintiff has to plead with particularity that the Directors "intentionally fail[ed] to act in the face of a known duty to act, demonstrating a conscious disregard for [their] duties". Disney, 906 A.2d at 67 (internal citation omitted).

In ruling that demand is not excused, the Court of Chancery determined that the Complaint does not adequately plead bad faith because nothing in the Complaint supports a reasonable inference that the Board was aware of actual violations of competition law and consciously failed to correct or prevent them. (Op. at 22, 25-28.) To the contrary, the only reasonable inference that can be drawn from the principal internal Qualcomm document on which plaintiff relies—the Board's July 30, 2010, strategic plan review—is that the Board believed "Qualcomm's business practices were not, in fact, violative of any country's antitrust laws and that the legal actions it faced were the result of

political and competitive opposition, as opposed to an indication of actual illegal conduct". (Id. at 27-28.) The Court of Chancery further observed that the Board's belief "is consistent with the Board's disclosed views on the three red flags in its public SEC filings, in which Qualcomm denied wrongdoing in connection with the Broadcom lawsuit or KFTC and JFTC proceedings, and the fact that the Company appealed the KFTC Decision and JFTC Order". (Id. at 28); see also Intel, 621 F. Supp. 2d at 174 (finding complaint did not plead substantial likelihood of liability based on board's alleged failure to respond "in any way" to competition law investigations in South Korea, Japan and elsewhere because allegations did not support "the significant inference" that the directors knew that "an alleged failure to respond to the 'red flags' would be a breach of their fiduciary duties, which is required under Delaware law" (citing Wood, 953 A.2d at 141)). On appeal, plaintiff does not specifically address the stringent bad faith standard articulated by this Court. Instead, plaintiff contends that the Vice Chancellor erred in rejecting its argument that the Court of Chancery decisions in Louisiana Municipal Police Employees' Retirement System v. Pyott ("Pyott"), 46 A.3d 313 (Del. Ch. 2010), rev'd on other grounds, 74 A.3d 612 (Del. 2013), and In re Massey Energy Company, 2011 WL 2176479 (Del. Ch.), compel a finding that the Complaint sufficiently pleads bad faith. (Br. at 26-31.) According to plaintiff, the Court of Chancery's analysis of Pyott and Massey is not "tenable" because (1) the Board's

actions are "analogous to those of Pyott and Massey"; and (2) the Vice Chancellor found in error that the Board did not believe Qualcomm violated competition law. (Id. at 31-35.)

(a) Pyott and Massey Are Inapposite.

The Court of Chancery correctly held that Pyott and Massey are inapposite. (See Op. at 32-34.) The board conduct alleged in those cases differs substantially from the allegations at issue here.

In Pyott, the complaint pleaded with particularity that the directors were aware of two FDA Warning Letters concerning the company's unlawful off-label drug marketing and were warned by the company's general counsel about "a potentially serious [off-label marketing] matter" with respect to which "the chance of receiving Agency Action including, but not limited to a Warning Letter . . . is in my opinion very high". 46 A.3d at 319-20 (quotation omitted). The Pyott complaint further pleaded with particularity that, despite these internal and external warnings, the directors approved business plans that unambiguously were predicated on significant off-label marketing (a practice that is per se illegal), ultimately leading the company to plead guilty to a misdemeanor, reach a civil settlement with the Department of Justice and pay sizable civil and criminal fines. Id. at 356-57; (see also Br. at 27-28; Op. at 30-31.)

In Massey, the complaint alleged "particularized facts" that the company "had pled guilty to criminal charges, had suffered other serious judgments and settlements as a result of violations of the law, had been caught trying to hide violations of law and suppress material evidence, and had miners suffer death and serious injuries at its facilities". 2011 WL 2176479, at *20; (see also Br. at 28; Op. at 28-30.) Moreover, even after its criminal convictions and adverse judgments and settlements, the company, among other things, "regularly flouted" important safety regulations and "experience[ed] an increase in . . . the number of violations of safety regulations". 2011 WL 2176479, at *19.

The present Complaint alleges nothing close to the particularized facts pleaded in Pyott and Massey. Qualcomm has never been accused of a crime, let alone pleaded guilty to one, as in both Pyott and Massey.[10] See Pyott, 46 A.3d at 321; Massey, 2011 WL 2176479, at *20; (Op. at 32.) Plaintiff's argument that "[n]othing in Massey or any Caremark case" requires "a guilty plea" (Br. at 31) misses the point. A guilty plea is an acknowledgement of wrongdoing; director knowledge of a guilty plea is therefore a way to plead director knowledge of misconduct. Plaintiff does not have to allege a guilty plea here, but it does have to plead particularized facts to support a reasonable inference that Qualcomm

[10] Qualcomm also did not admit wrongdoing in connection with the Broadcom Settlement. (Supra p. 9.)

violated international competition laws and that the Directors knew Qualcomm was doing so. As shown above, this is something plaintiff has not done. (Supra pp. 20-24.)

Pyott further is distinguishable because the board knew that the company's business plans were predicated on unquestionably illegal off-label marketing, yet the board nevertheless chose to move forward with the business plans predicated on that conduct. See 46 A.3d at 319-20; (Op. at 33-34.) Here, by contrast, the Complaint pleads no particularized facts from which it can be inferred that the Directors knew that Qualcomm's licensing practices in South Korea, Japan and China were in any way unreasonable under the competition laws in those countries.[11] Significantly, even plaintiff recognizes that the legality of Qualcomm's licensing practices depended at least in part on whether they were "reasonable" (see Br. at 6-8, 30, 33-34), and, as the Vice Chancellor correctly concluded, the Complaint pleads no particularized facts from which it can be inferred that the Directors knew that Qualcomm's licensing practices in South Korea, Japan and China were unreasonable under the competition laws in those countries (Op. at 34 ("[T]he Complaint does not include any particularized allegations indicating that the Board knowingly caused Qualcomm to adopt any

[11] Indeed, unlike in Pyott, where the general counsel warned the board about potential illegal off-label marketing, see 46 A.3d at 319-20, the Board here was advised that the Company's licensing practices were legal (see infra pp. 34-35.)

monopolistic practices.")). Indeed, the KFTC acknowledged that the "case was highly complicated and vast in scope and required sophisticated economic analysis and legal review" (B128), and Qualcomm's appeals in the KFTC and JFTC matters have been pending for years (see supra pp. 10, 12), demonstrating that it is far from certain that any competition laws in these countries were violated.

Under these circumstances, where there is no reasonable basis on which to infer that the Board knew the Company was engaging in misconduct, the Directors cannot face a substantial risk of liability. See La. Mun. Police Emps.' Ret. Sys. v. Wynn, 2013 WL 431339, at *6 (D. Nev.) (no substantial risk of liability for approving alleged bribe where complaint did not "sufficiently allege that defendants knew [payment] was improper" but only that directors "knew of company's obligations not to engage in bribery"), aff'd, 829 F.3d 1048 (9th Cir. 2016); cf. Ft. Lauderdale Gen. Emps.' Ret. Sys. v. Mechel OAO, 811 F. Supp. 2d 853, 874 (S.D.N.Y. 2011) (rejecting claim that company knew it was violating Russian competition law absent particularized allegations of "facts or precedents showing why it would have been ex ante foreseeable" that law was broken), aff'd sub nom. Frederick v. Mechel OAO, 475 F. App'x 353 (2d Cir. 2012).

Moreover, unlike in Massey, there is no allegation that Qualcomm ever tried to hide legal violations or to suppress evidence. See 2011 WL 2176479, at *20. Rather, Qualcomm cooperated with the various regulatory investigations.

(Supra pp. 9, 11.) Nor did Qualcomm "flout[]" the KFTC or JFTC decisions—plaintiff acknowledges that Qualcomm complied with the KFTC injunction (even during the pendency of its appeal) and that Qualcomm obtained a stay of the JFTC Order. (See Br. at 30; supra p. 12.) In Massey, by contrast, the company allegedly continued regularly to violate the law. 2011 WL 2176479, at *20. Indeed, as the Vice Chancellor observed, in Massey, the company did not "simply . . . disagree[] with the regulator's interpretation of applicable safety laws", but believed it "'knew better than the law about what was necessary to run safe mines'". (Op. at 33 (quoting Massey, 2011 WL 2176479, at *19).) Here, however, "Plaintiff fails to allege that the Board ever expressed disagreement with the underlying laws themselves". (Id.)

Accordingly, Pyott and Massey are not applicable here. Indeed, the circumstances alleged in both cases are so unique that, like the Vice Chancellor here, both Delaware and non-Delaware courts have been careful to limit them to their specific facts. E.g., Reiter v. Fairbank, 2016 WL 6081823, at *13-14 (Del. Ch.) (demand not excused where "factual allegations stand in stark contrast to" those in Pyott and Massey); South, 62 A.3d at 18 (Massey inapposite); In re Capital One Deriv. S'holder Litig., 979 F. Supp. 2d 682, 700 (E.D. Va. 2013) (Pyott "distinguishable" because its "high bar" not met); Kococinski v. Collins, 935 F. Supp. 2d 909, 922 (D. Minn. 2013) (Pyott inapposite); Gulbrandsen v.

Stumpf, 2013 WL 1942158, at * (N.D. Cal.) (Massey "not analogous"); Holt v. Golden, 880 F. Supp. 2d 199, 204 (D. Mass. 2012) (Massey inapposite).[12]

Notwithstanding the sharp distinctions between the Complaint and Pyott and Massey, plaintiff argues that the cases are "analogous" because, despite the purported red flags, "Qualcomm . . . maintain[ed] its patent licensing practices (except to the extent enjoined in South Korea) and by arguing with and expressing contempt for antitrust law". (Br. at 30.) Plaintiff's argument has no basis.

First, absent knowledge that Qualcomm's licensing practices actually violated competition law, it was the Board's prerogative (and duty) to decide how the Company should respond to the legal proceedings and how to navigate the Company's legal risk, especially regarding a complex issue like competition law compliance in multiple countries. In Hesse, for example, the court found that directors could not be held liable for defending the company's tax practices against

[12] Plaintiff contends (Br. at 26-27) that Pyott and Massey are "supported by" Rosenbloom v. Pyott, 765 F.3d 1137 (9th Cir. 2014), and Westmoreland County Employee Retirement System v. Parkinson, 727 F.3d 719 (7th Cir. 2013), but neither case helps plaintiff. As plaintiff itself acknowledges, Rosenbloom involved "virtually identical facts" to Pyott. (Br. at 26-27.) Westmoreland similarly involved particularized allegations that the board intentionally decided not to comply with the law—allegations that simply are not present here. See 727 F.3d at 728 ("directors consciously flouted . . . FDA regulations" and "knowingly steered [company] on a course that was all but certain to prompt the FDA to take enforcement action under [a] Consent Decree"); see also Capital One, 979 F. Supp. 2d at 700 (Westmoreland "distinguishable" where comparable allegations not present).

the New York Attorney General and others because the company believed it did not violate the law. 962 F. Supp. 2d at 590. The court explained: "While pursuing [the tax] strategy may be risky, it could result in substantial rewards for the company in lieu of substantial losses." Id. Similarly, in In re Life Partners Holdings, Incorporated Shareholder Derivative Litigation, the court found no director bad faith despite the company's unsuccessful attempt to refute SEC charges that the company's financial statements were inaccurate, even where the directors' "follow-up on the red flags was not perfect", because the directors were entitled to rely on management's analysis of the issue. 2015 WL 8523103, at *15 (W.D. Tex.). Hesse and Life Partners are consistent with Delaware decisions recognizing that directors are responsible for managing the corporation's risk and should not be held personally liable if, in hindsight, their decisions turn out unfavorably.[13] See, e.g., Se. Pa. Transport. Auth. v. Abbvie, 2015 WL 1753033, at *18 (Del. Ch.) ("The Plaintiffs point out that [the] directors assumed a very substantial risk on behalf of the Company . . . a risk that provided a very bad bet for the Company, indeed. Assessing such a risk is a core directorial function;

[13] It is premature to judge Qualcomm's response to the KFTC and JFTC proceedings because the Company's appeals are still pending and the outcomes of those proceedings thus are still unknown. (Supra pp. 10, 12.) Indeed, one of the legal proceedings that plaintiff originally claimed was a red flag ended when the regulator "closed its proceeding against the Company" with no charges. (A54-55 ¶ 84.) And nothing in the Complaint provides any basis to assess the success of the Company's decisions with respect to the NDRC proceeding.

fulfilling that function poorly, without more, is not actionable under our law."), aff'd, 2016 WL 235217 (Del.) (Order).

Here, the Complaint and the documents it references show that the Board was informed about the competition proceedings in Asia (and elsewhere) and was advised that they were competitor-fueled attacks directed at Qualcomm because it is a foreign company and that the proceedings entailed "aggressive efforts worldwide to increase regulation of IP", "new rules/laws that devalue IP" or sought to use competition laws as a "guise" to "regulat[e] . . . license fees". (A44-45 ¶¶ 64, 66-67; Br. at 16-18.) As the Vice Chancellor noted: "The Complaint concedes that the Board continuously monitored each of the three alleged red flags as well as the NDRC Decision." (Op. at 34.) The advice the Board received—upon which it was entitled to rely, see, e.g., RBC Capital, 129 A.3d at 855 (citing 8 Del. C. § 141(e))—does not concede or even suggest wrongdoing. It informs the Board that there are various political and other reasons for the increased scrutiny of Qualcomm's business practices by foreign competition authorities, something that would justify the Board's belief that Qualcomm was in compliance with competition law and its decision to defend the Company's licensing practices by, among other things, appealing the KFTC Decision and JFTC Order. Plaintiff is therefore wrong that the Board did not "assess the legality of its business model and licensing practices" and that it took no action in response to the purported red

flags (Br. at 16, 35), and the Court need not accept plaintiff's incorrect contention, see In re Gen. Motors Co. Deriv. Litig., 2015 WL 3958724, at *5 n.33 (Del. Ch. ("Even on a motion to dismiss . . . I need not accept a characterization of a document that is clearly contrary to the face of the document; that would be an unreasonable inference."), aff'd, 2016 WL 235217 (Del.) (Order). Plaintiff may disagree with the Board's assessment of the alleged red flags or wish that the Board had chosen a different path, but the Board, not plaintiff, is responsible for deciding how Qualcomm should respond to the legal challenges.

Second, the Board's decision to defend Qualcomm's licensing practices is protected by the business judgment rule. The business judgment rule "presum[es] that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company". Aronson, 473 A.2d at 812. Plaintiff's hindsight attack on the Board's response to the alleged red flags represents precisely the type of second-guessing the business judgment rule was intended to prevent. See, e.g., Massey, 2011 WL 2176479, at *22 ("An essential purpose of the business judgment rule is to free fiduciaries making risky business decisions in good faith from the worry that if those decisions do not pan out in the manner they had hoped, they will put their personal net worths at risk."); In re Lear Corp. S'holder Litig., 967 A.2d 640, 651 (Del. Ch. 2008) ("[T]he plaintiffs are in reality

down to the argument that the . . . board did not make a prudent judgment about the possibility of future success. That is, the plaintiffs are making precisely the kind of argument precluded by the business judgment rule."); (Op. at 23-24 ("Simply alleging that a board incorrectly exercised its business judgment and made a 'wrong' decision in response to red flags . . . is insufficient to plead bad faith." (citing Citigroup, 964 A.2d at 131)).)[14]

Third, plaintiff's claim that the Company "argu[ed] with and express[ed] contempt for antitrust law" (Br. at 30) is unsupported by the record. According to plaintiff, Qualcomm "treated with contempt the notion that China's anti-monopoly law applied to Qualcomm's licensing of intellectual property" because an internal document described efforts in China to regulate license fees as being undertaken "in the guise of anti-monopoly". (Br. at 17-18 (quoting A45 ¶ 66).) Plaintiff never explains—nor could it—how this statement evinces contempt for the law, as opposed to a particular viewpoint about the proper scope of Chinese law. To the extent plaintiff believes that Qualcomm argued with or expressed contempt for antitrust law by exercising its appeal rights in South Korea

[14] While plaintiff may contend that the business judgment rule does not apply because Qualcomm supposedly violated the law, only intentional violations of the law are outside the protection of the business judgment rule, e.g., Massey, 2011 WL 2176479, at *20 ("[A] fiduciary . . . cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law." (emphasis added)), and plaintiff has not pleaded an intentional violation of the law.

and Japan, plaintiff supplies no legal or factual support for its theory or any way to differentiate contemptuous appeals from ones plaintiff considers to be proper.[15]

(b) The Board Believed That Qualcomm Was Complying with Applicable Competition Laws.

Plaintiff argues that the Court of Chancery erred in distinguishing Pyott and Massey by giving "undue weight at the pleading stage to public protestations of innocence". (Br. at 33.) But the only reasonable inference that can be drawn from the relevant internal documents and SEC filings is that the Board believed the Company was complying with competition law.

Plaintiff attacks the Court of Chancery's observation that Qualcomm described Broadcom's antitrust claims as being "without merit", arguing that Qualcomm's 2009 10-K refers only to Broadcom's patent claims and "do[es] not specifically identify Broadcom's domestic antitrust action or its foreign antitrust complaints". (Id. at 13.) Plaintiff is wrong. The 2009 10-K cites "a series of complex legal disputes in various forums" and states that Broadcom's claims were

[15] The Massey court's observation in a footnote that the company "ranked first" among coal companies in appealing citations issued by the Mining Safety and Health Administration ("MSHA"), 2011 WL 2176479, at*20 n.146; (Br. at 29), does not support plaintiff's position. The Complaint does not allege that Qualcomm's volume of appeals is unusually high, or that it was unreasonable for it to appeal two decisions regarding an important part of its business. Moreover, in Massey, the court explained that the MSHA observed that mine operators with poor safety records sometimes used appeals tactically rather than on the basis of the merits. See 2011 WL 2176479, at *20 n.146. The Complaint makes no such allegation about Qualcomm's appeals.

"without merit for a variety of reasons, including" those relating to patent issues. (A319 (emphasis added); see also Br. at 13-14.) The 2009 10-K thus never states that only Broadcom's patent claims were without merit. Plaintiff also neglects to mention that Qualcomm described Broadcom's antitrust claims as being "without merit" in other SEC filings. (See supra p. 7.)

Also mistaken is plaintiff's assertion that "it is not reasonable to infer that any director believed Qualcomm was paying [Broadcom] $891 million to resolve meritless antitrust claims". (Br. at 33.) Plaintiff apparently believes that the Broadcom Settlement only resolved Broadcom's "domestic and foreign antitrust claims" (id. at 29-30), but that is not the case. Broadcom and Qualcomm were engaged in numerous disputes in multiple forums and the Broadcom Settlement resolved all litigation between the companies. (See supra pp. 6, 8.) As this Court (and even plaintiff's own authority) has recognized, companies frequently settle lawsuits for business reasons, regardless of their view of the legal merits and plaintiff offers no basis to infer that the Broadcom Settlement reflected anything more than a business decision by Qualcomm. See White, 783 A.2d at 553; (see also supra pp. 20-22.)

Plaintiff also contends that Qualcomm's statements in SEC filings and internal documents—which describe the KFTC and JFTC proceedings as being "without merit" and part of a strategy by competitors to interfere with Qualcomm's

business model (supra pp. 7, 9-11)—are part of a larger "public relations strategy" and should not be credited at this stage. (See e.g., Br. 30, 33.) However, plaintiff has not proffered any factual allegations to cast doubt on them, nor cited any legal precedent or other authority that would warrant such an approach. Moreover, the Company's public statements reflect the information provided to the Board—namely, that the proceedings in South Korea and Japan were part of a strategy by Qualcomm's competitors (such as Broadcom) to pressure Qualcomm—and the Board is entitled to rely upon information it learns from management and other advisors. See, e.g., RBC Capital, 129 A.3d at 855 (citing 8 Del. C. § 141(e)).

With respect to the KFTC Decision, plaintiff cites the fact that Qualcomm "'recorded a $230 million charge'" in connection with that proceeding, arguing that the charge "means that Qualcomm deemed it probable that its intended appeal of the KFTC Decision would fail". (Br. at 34 (citing A312).) The Court should reject plaintiff's argument. Plaintiff conspicuously fails to cite Generally Accepted Accounting Principles for its accounting-based argument, relying instead on an article published by the Association of Corporate Counsel. (See id. & n.34.) In addition, the article plaintiff cites is not on point. It concerns "accrual for a 'loss contingenc[y]'", which it defines as "a loss . . . arising from a past event, the amount of which, if any, will be confirmed by a future event that is not within the company's control". (Brennan, supra p. 21 note 8, at 1, 5.) Here

Qualcomm paid the KFTC fine in 2010 even as it pursued its appeal. (See supra p. 10 note 4.) Plaintiff does not explain how Qualcomm could have avoided recording a cash payment that it actually made, or how doing so reveals anything about the Company's outlook regarding the merits of its appeal. In any event, plaintiff did not make this argument below (or plead it in the Complaint) and thus the argument is waived. See Phila. Stock Exch., 945 A.2d at 1134; Del. Supr. Ct. R. 8.

Finally, contrary to plaintiff's contention, the Court of Chancery did not treat "[p]rotestations of innocence" as a "defense" to its Caremark claim; nor did it fail to draw all reasonable inferences in plaintiff's favor or "misinterpret[]" Qualcomm's SEC filings. (Br. at 33, 34.) Rather, consistent with this Court's articulated bad faith standard, the Court of Chancery carefully examined the Complaint to determine whether it sufficiently pleaded that the Directors consciously disregarded their oversight duties. In doing so, it concluded that the internal Qualcomm documents and SEC filings cited in the Complaint simply do not support an inference of bad faith. Plaintiff has identified no error in the Vice Chancellor's analysis.

II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

A. Question Presented

Should the Complaint be dismissed pursuant to Court of Chancery Rule 12(b)(6) where it fails to plead any facts to support a reasonable inference that any Director breached his duty of loyalty?

B. Scope of Review

Although the Court of Chancery did not rule on whether the Complaint fails to state a claim pursuant to Court of Chancery Rule 12(b)(6), this issue was properly raised before the court in defendants' Motion (see supra p. 14) and, thus, may be ruled on by this Court. Unitrin, 651 A.2d at 1390 (the Court "may affirm on the basis of a different rationale than that which was articulated by the trial court [and] may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court"); see also, e.g., RBC Capital, 129 A.3d at 849.

To survive a Rule 12(b)(6) challenge, a complaint must plead "reasonabl[y] conceivable" claims for relief. Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, 27 A.3d 531, 535 (Del. 2011). While the Court is required to accept the well-pleaded allegations of the Complaint as true and draw reasonable inferences in favor of the plaintiff, "conclusory allegations need not be treated as true, nor should inferences be drawn unless they truly are reasonable".

Feldman v. Cutaia, 951 A.2d 727, 731 (Del. 2008); see also Malpiede v. Townson, 780 A.2d 1075, 1083 (Del. 2001) (plaintiff is entitled only to those "reasonable inferences that logically flow from the face of the complaint" and courts are "not required to accept every strained interpretation of the allegations proposed by the plaintiff"). "Moreover, a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law." Malpiede, 780 A.2d at 1083.

C. Merits of Argument

The Complaint also should be dismissed for failing adequately to plead a Caremark claim as to the Directors (which is the only remaining cause of action (supra pp. 13-14 & note 5)).

As set forth above, to state a valid Caremark claim, plaintiff must adequately plead that (1) defendants had knowledge of red flags indicating that Qualcomm potentially was violating the law; (2) defendants acted in bad faith by failing appropriately to respond to those red flags; and (3) such failure proximately resulted in injury to Qualcomm. See Caremark, 698 A.2d at 971; (see also Op. at 20.)

Plaintiff fails here to plead the essential elements of its Caremark claim for all the reasons set forth above in the context of plaintiff's failure adequately to plead demand futility. In particular, the Complaint does not plead

that the Directors were aware of any red flags evidencing corporate misconduct (supra pp. 20-24); that they acted in bad faith in responding to any red flags (supra pp. 24-41); or that their alleged failure to respond to any red flags proximately caused any injury to the Company (supra p. 24 note 9).

CONCLUSION

For each of the foregoing reasons, the decision and order of the Court of Chancery should be affirmed.

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