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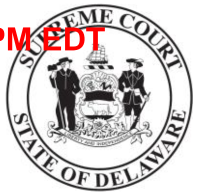

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MURRAY ZUCKER, Appellant, Plaintiff Below, v. GERALD L. HASSELL, ROBERT P. KELLY, RUTH E. BRUCH, NICHOLAS M. DONOFRIO, EDMUND F. KELLY, RICHARD J. KOGAN, MICHAEL J. KOWALSKI, JOHN A. LUKE, JR., MARK A. NORDENBERG, CATHERINE A. REIN, WILLIAM C. RICHARDSON, SAMUEL C. SCOTT III, JOHN P. SURMA, STEVEN G. ELLIOTT, ROBERT MEHRABIAN, WESLEY W. VON SCHACK, RICHARD MAHONEY, JORGE RODRIGUEZ and DAVID NICHOLS, Appellees, Defendants Below, -and- THE BANK OF NEW YORK MELLON CORPORATION, Appellee, Nominal Defendant Below.	No. 606, 2016 Court Below: Court of Chancery of the State of Delaware, C.A. No. 11625-VCG

<u>APPELLEES' ANSWERING BRIEF</u>

March 23, 2017

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NATURE AND STAGE OF PROCEEDINGS

This appeal seeks to overturn the dismissal of a stockholder derivative action purportedly brought on behalf of Appellee The Bank of New York Mellon Corporation ("BNY Mellon" or the "Company") by Appellant Murray Zucker ("Plaintiff").

On March 9, 2011, Plaintiff made a demand (the "Litigation Demand") on the BNY Mellon Board of Directors (the "Board") that the Board cause BNY Mellon to assert claims against certain of its current and former directors and employees in connection with the Company's historical foreign exchange ("FX") practices. (A124-28.)

Upon receipt of Plaintiff's demand, the Board promptly formed an independent Special Demand Review Committee that, with the assistance of its independent counsel, Cravath, Swaine & Moore LLP ("Cravath"), conducted a comprehensive eight-month investigation of the allegations in the Litigation Demand. (A131-35.) Following careful deliberations, the Special Demand Review Committee—and later the nonmanagement members of the full Board—concluded that there was no basis for litigation, and that any such litigation would not be in the Company's best interests. (A134.)

In October 2011, Plaintiff filed a derivative action in the Supreme Court of the State of New York, New York County (the "New York Action"), claiming that

the Litigation Demand had been wrongfully refused.[1] (A96 at ¶ 183.) Defendants' motion to dismiss the New York Action was granted on October 1, 2013, based upon Plaintiff's failure to plead with particularity that his Litigation Demand had been wrongfully refused. (B30, B35, B39-41.) Plaintiff appealed the decision dismissing the complaint, but it was affirmed in a unanimous decision by the Supreme Court of the State of New York, Appellate Division, First Department, on December 11, 2014. (B46-50.)

On October 20, 2015, following a nearly two-year process of seeking Company books and records pursuant to 8 *Del. C.* § 220 ("Section 220") that was initiated only after the New York Action was dismissed, Plaintiff brought the present action in Delaware, making the same allegations as in the New York Action. (A10-115.) Defendants moved to dismiss the Verified Derivative Complaint (the "Complaint") for failing to adequately plead wrongful refusal and as time-barred. (B70-93.) After briefing and oral argument, the Court of Chancery dismissed the Complaint, holding that Plaintiff failed to plead with particularity that his Litigation Demand had been wrongfully refused. (Op. at 6, 34.) In view

[1] Plaintiff prematurely filed the New York Action, claiming that the demand was "effectively refused" due to the Company's newspaper advertisement that addressed recently filed lawsuits against the Company regarding its FX practices. (A95-96 at ¶¶ 181-182.) The Board ultimately refused the Litigation Demand in December 2011. (*See* Counter-Stmt. of Facts C, *infra*.)

of Plaintiff's failure to satisfy the requirements of Rule 23.1 for pleading wrongful refusal, the Court of Chancery did not reach the issue regarding the untimeliness of the action. (*Id.* at 17 & n.71.) This appeal followed.

RESPONSE TO PLAINTIFF-APPELLANT'S "SUMMARY OF ARGUMENT" ON APPEAL

1. Denied. The Court of Chancery correctly determined that the Complaint failed to allege particularized facts supporting an inference that the Special Demand Review Committee or Board breached its duty of loyalty, or breached its duty of care, in the sense of having committed gross negligence. (Op. at 2, 6.)

2. Denied. The Court of Chancery identified and applied the correct standard, dismissing the Complaint due to Plaintiff's failure to allege particularized facts supporting an inference that the Special Demand Review Committee or Board breached its duty of loyalty, or breached its duty of care, in the sense of having committed gross negligence. (*Id.*) The Court of Chancery correctly recognized that any challenges to the redactions of materials produced to Plaintiff pursuant to Section 220 had to be raised during Plaintiff's Section 220 action (and that Plaintiff's decision not to do so was tactical) and properly rejected Plaintiff's remarkable demand that the Court of Chancery should infer that redacted privileged content must be inconsistent with the Special Committee's conclusion and must support his gross negligence argument. (Op. at 31.)

3. Plaintiff's claim is also barred by laches due to his unreasonable delay in bringing the action, including his failure to comply with the three-year statute of limitations.

COUNTER-STATEMENT OF FACTS

A. The Parties

BNY Mellon is a leading manager and servicer of financial assets globally; the Company is incorporated in Delaware and has its principal office in New York. (A19 at ¶ 14.) Plaintiff, a purported BNY Mellon stockholder, alleges a cause of action for breach of fiduciary duty. (A18-19 at ¶¶ 11-13; A113-14 at ¶¶ 213-218.) The individual defendants are current and former directors, officers, and employees of BNY Mellon. (A19-30 at ¶¶ 15-33.)

B. The Litigation Demand and the New York Derivative Action

On March 9, 2011, Plaintiff's counsel sent a letter to the Board demanding, among other things, a "completely independent investigation" into allegations concerning the Company's FX practices. (A94 at ¶ 179; A124-28.) Plaintiff alleges that the Company described certain custodial FX trades as being free of charge and executed under "best execution standards," yet levied hidden fees and costs on its clients. (A38-39 at ¶¶ 51-53.) Plaintiff claims that this practice, while profitable in the short term, damaged the Company's reputation and goodwill and exposed the Company to liability for allegedly misleading clients. (A87 at ¶ 171.)

Shortly after the Litigation Demand was received, the Board designated three independent directors to serve as a Special Demand Review Committee to investigate Plaintiff's allegations and demands. (A94 at ¶ 180; A131-32.) The

Special Demand Review Committee retained Cravath as an independent legal adviser and instructed Cravath to conduct a thorough investigation of the Company's FX practices in order to assess the allegations made in the Litigation Demand. (A94 at ¶ 180; A131.) Cravath provided an initial response to Plaintiff on April 6, 2011, noting that the investigation would take at least several months because of the complexity of the issues and the voluminous materials relating to the Company's FX practices. (B1.) The April 6 letter invited Plaintiff to assist with the investigation by providing additional information or by meeting with Cravath, but Plaintiff did not do so. (*Id.*)

On October 4, 2011, two lawsuits were filed against BNY Mellon regarding the Company's FX practices. (*See* A15-16 at ¶ 7.) Two days later, the Company placed an advertisement in the *New York Times* and other newspapers that addressed these lawsuits. (A34 at ¶ 40; A95 at ¶ 181.) Plaintiff alleged that this advertisement constituted an "effective refusal" by the Board of the Litigation Demand. (A95-96 at ¶¶ 181-182.)

Plaintiff did not communicate with the Board, the Special Demand Review Committee, or Cravath about whether there was any connection between the advertisement and the then-pending investigation. Instead, Plaintiff filed a derivative complaint in New York Supreme Court, New York County, less than three weeks later (A34 at ¶ 41)—before the investigation was completed and

before the Board decided whether to litigate the issues described in the Litigation Demand.

The investigation of the Litigation Demand continued notwithstanding Plaintiff's filing of a derivative suit.

C. The Board's Investigation, Evaluation, and Rejection of the Litigation Demand

At the direction of the Special Demand Review Committee, Cravath conducted an investigation in response to the Litigation Demand between April and December 2011. (A132-34.)[2] As the investigation progressed, the Special Demand Review Committee was kept apprised of the status and findings, including through regular email communications with Cravath and meetings on April 11, 2011, June 29, 2011, October 31, 2011, November 11, 2011, and December 5, 2011. (A132-33.)

Over the course of the fact-finding process, Cravath collected and reviewed more than 10,000 internal Company documents relating to the Company's FX practices. (A132.) Cravath also conducted thirteen interviews, most of which

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[2] The correspondence and resolutions relating to the Board's consideration and rejection of the Litigation Demand may be considered by this Court on a motion to dismiss. *See, e.g.*, *Scattered Corp.* v. *Chi. Stock Exch. Inc.*, 701 A.2d 70, 76 & n.24 (Del. 1997), *overruled on other grounds by Brehm* v. *Eisner*, 746 A.2d 244 (Del. 2000); *Levine* v. *Smith*, 591 A.2d 194, 214 & n.9 (Del. 1991), *overruled on other grounds by Brehm*, 746 A.2d 244; *Baron* v. *Siff*, 1997 WL 666973, at *2 (Del. Ch. Oct. 17, 1997).

spanned multiple hours. (*Id.*) The interviewees included a director of the Company, current and former members of senior management, and current and former employees in multiple divisions of the Company. (*Id.*) The Company's outside advisers and other people at the Company were consulted on numerous occasions for relevant information. (*Id.*)

Cravath substantially completed its fact-gathering in October 2011. (A133.) On October 31, 2011, the Special Demand Review Committee met with Cravath in person to discuss the results of the investigation. (*Id.*) During the course of the four-hour meeting, the Special Demand Review Committee received a detailed overview of the investigation, reviewed dozens of key documents with Cravath attorneys, and asked numerous questions. (*Id.*) At the end of the meeting, the Special Demand Review Committee and Cravath determined that additional work was necessary to address the Litigation Demand. (*Id.*) Throughout November 2011, Cravath conducted the additional investigatory steps discussed during the October 31 meeting.

On December 5, 2011, the Special Demand Review Committee and Cravath reconvened by telephone to discuss the results of the supplemental investigation. (*Id.*) After careful deliberations, the Committee members concluded that there was no basis for litigation and that, in any event, such litigation would not be in the Company's best interests. (*Id.*)

The Special Demand Review Committee presented its recommendations to the nonmanagement members of the Board during the Board's regularly scheduled meeting on December 13, 2011, advising that: (i) the Company had no basis to assert claims against any current or former director, officer, or employee in connection with the issues raised in Plaintiff's Litigation Demand; (ii) in any event, any such litigation would not be in the best interests of the Company or its stockholders; and (iii) the other demands raised in the Litigation Demand—including corporate governance modifications and retention of additional consultants and auditors—also should be rejected. (A133-34.) The nonmanagement directors unanimously adopted all of the Special Demand Review Committee's recommendations as resolutions of the Board. (A134.) At the direction of the Board, Cravath then notified Plaintiff in a December 14, 2011 letter that, after careful investigation, the Board had determined not to pursue litigation. (A96-97 at ¶ 184; A131-35.)

D. The Dismissal of the New York Derivative Action and Plaintiff's Unsuccessful Appeal

The New York court dismissed Plaintiff's complaint without prejudice on October 1, 2013, concluding that Plaintiff had not pled with particularity that the Board's refusal of the Litigation Demand was wrongful. (B30, B35, B39-41.) The court observed that Plaintiff "should have proceeded to seek further records under

Delaware General Corporation Law Section 220 before [he] brought th[e] action." (B39.)

Plaintiff made a Section 220 demand on BNY Mellon less than a week after the New York court's dismissal of his action (*see* Section E, *infra*), but he also appealed the dismissal of the complaint.

The decision dismissing Plaintiff's complaint was affirmed in a unanimous decision by the Supreme Court of the State of New York, Appellate Division, First Department, on December 11, 2014. (B46-50.) The decision also awarded costs to defendants. (B46.)

E. Plaintiff's Belated Section 220 Demand and Action

On October 7, 2013, six days after the dismissal of the New York Action, Plaintiff served a demand pursuant to Section 220 seeking Company books and records relating to the Board's rejection of the Litigation Demand (the "Section 220 Demand"). (A136.)

BNY Mellon produced more than 90,000 pages of materials to Plaintiff on November 8, 2013. These materials had been produced to another BNY Mellon stockholder, Carole Kops, in response to a previous books and records demand on the same topic.[3] At that time, Ms. Kops had a Section 220 action pending (*Kops* v.

[3] Ms. Kops also filed a derivative action in the Court of Chancery approximately four months after Plaintiff (*Kops* v. *Hassell*, C.A. No. 11982-VCG);

Bank of New York Mellon Corp., C.A. No. 8064-VCG) that sought to compel production of further materials related to the Board's refusal of her litigation demand. (*See* Complaint, *Zucker* v. *Bank of New York Mellon Corp.*, C.A. No. 10102-VCG (Del. Ch. Sept. 8, 2014) (Dkt. Nos. 1, 19), at ¶¶ 25 & n.1, 35.) Plaintiff chose to "await a determination of the *Kops* action before taking any further steps." (*Id.* ¶ 35.) The court dismissed the *Kops* action in July 2014 for failing to comply with the statutory requirements of Section 220.[4] (*Id.* ¶ 25 & n.1.)

Approximately two months later, on September 8, 2014—more than 11 months after his Section 220 Demand—Plaintiff filed his own Section 220 action, seeking to compel BNY Mellon to produce documents subject to the attorney-client privilege or work product protection that related to the refusal of his Litigation Demand (the "Section 220 Action"). (A37 at ¶ 48.) The action concluded in July 2015; the court ruled that the only further item that was necessary and essential to Plaintiff's Section 220 Demand was a high-level summary of the topics that were presented to the Board in connection with the

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the actions were deemed related, and a combined oral argument on motions to dismiss was heard on July 26, 2016. Kops' complaint was also dismissed for failing to adequately plead wrongful refusal, 2016 WL 7011569 (Del. Ch. Nov. 30, 2016), but she did not appeal the dismissal.

[4] Ms. Kops corrected the deficiencies and refiled a Section 220 action (*Kops* v. *Bank of New York Mellon Corp.*, C.A. No. 10146-VCG), which was consolidated for administrative purposes with Plaintiff's Section 220 Action.

Litigation Demand, including identification of the BNY Mellon documents that Cravath shared with the Special Demand Review Committee and/or the Board during the investigation. (A172-77.) BNY Mellon produced these materials to Plaintiff in August 2015. (A37 at ¶ 48.)

F. The Delaware Derivative Action and the Court of Chancery's Decision

Two months later, on October 20, 2015, Plaintiff filed the Complaint in the Court of Chancery, making the same factual allegations against Defendants as he had in New York. (A10-115.) Defendants moved to dismiss the Complaint with prejudice pursuant to Court of Chancery Rules 23.1 and 12(b)(6) for failing to adequately plead wrongful refusal and as time-barred, respectively. (B51-94.)

On November 30, 2016, the Court of Chancery ruled that Plaintiff failed to meet his pleading burden under Rule 23.1 of demonstrating that the Board wrongfully refused his Litigation Demand. (Op. at 6, 34.)

The Court concluded that Plaintiff's arguments—which it characterized as "hav[ing] been somewhat of a moving target in this litigation"—fell short of "clear[ing] the high bar of gross negligence," even in the aggregate[5] (*Id.* at 4, 21):

[5] The Court noted that Plaintiff "has not actively pursued the theory that th[e] decision [refusing the demand] was taken in bad faith" and that, therefore, his burden was to plead particularized facts "that support an inference that the Board was grossly negligent in reaching its decision." (Op. at 3.)

First, Plaintiff's argument that the investigation "*must* have been grossly negligent" given that the Company entered into various settlements "years after the demand was refused"—which the Court of Chancery characterized as a "species of *res ipsa loquitur*"—was rejected as "a non-sequitur" (*id.* at 4-5); the Court concluded that Plaintiff's theory is "not our law, nor does it follow logically . . . from the facts pled" (*id.* at 24). Rather, the Court described the robust process followed by Cravath, the Special Demand Review Committee, and the Board, concluding that these steps "are not consistent with a conclusion that the Special Committee failed to inform itself, or that the investigation was inadequate in scope." (*Id.*)

Second, the Court rejected Plaintiff's attempt to quibble with the particulars of the Committee's investigation, noting that such "cavils about the types of documents reviewed, or the choice of persons to be interviewed, in an investigation will not support a finding of gross negligence." (*Id.* at 26.)

Third, the Court rejected Plaintiff's invitation to impose a "general duty for a board to revisit prior demands in perpetuity once conditions change." (*Id*. at 32.) Plaintiff had argued that the "failure [by the Special Committee] to revisit its conclusions when superior information came to light is a further sign of unreasonableness." (*Id.*) The Court noted that Plaintiff had not asked the Committee to reconsider its decision; in any event, the Court ruled that there was

no general or self-imposed duty for a Board to revisit its conclusions, as "the logic of Rule 23.1 and its protection of director supremacy are inconsistent with such a result." (*Id.* at 33.)

Fourth, the Court declined Plaintiff's request for an inference—an inference it deemed "inappropriate"—that redacted documents received in the Section 220 Action must have contained details that "are *not* consistent with the Special Committee's conclusion" and that "would support his gross negligence argument." (*Id.* at 30-31.) If "Plaintiff believed the redactions were such that he could not effectively evaluate the actions of the Special Committee," the Court of Chancery reasoned that he "should have sought relief" during "the Section 220 phase of the litigation," where the court "could evaluate the competing interests involved," instead of during the derivative action, "in the face of the Plaintiff's burden to show wrongful refusal." (*Id.*) The Court of Chancery also relied on the "candid statement" during oral argument by counsel for the BNY Mellon stockholder in the related action, Ms. Kops, that "the choice not to object to Defendants' redactions [in the Section 220 Action] was tactical." (*Id.* at 31 & n.121.)

In view of Plaintiff's failure to satisfy the requirements of Rule 23.1 for pleading wrongful refusal, the Court of Chancery declined to address Defendants' argument regarding the action's untimeliness. (*Id.* at 17 & n.71.)

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY HELD THAT PLAINTIFF FAILED TO PLEAD WITH PARTICULARITY THAT HIS LITIGATION DEMAND WAS WRONGFULLY REFUSED

A. Question Presented

Whether Plaintiff failed to satisfy the stringent requirements of pleading with particularity that his stockholder demand was wrongfully refused. (B73-92.)

B. Standard of Review

This Court reviews *de novo* the Court of Chancery's decision to dismiss the Complaint under Rule 23.1.[6] *White* v. *Panic*, 783 A.2d 543, 549 (Del. 2001). Thus, this Court applies "the law to the allegations of the Complaint as does the Court of Chancery." *Brehm*, 746 A.2d at 253.

C. Merits of the Argument: The Court of Chancery Correctly Concluded That Plaintiff Failed to Plead with Particularity That His Litigation Demand Was Wrongfully Refused

By its very terms, the Litigation Demand reflects Plaintiff's intent to "place control of the derivative litigation in the hands of the board of directors" and precludes any claim that a demand would have been futile. *Spiegel* v. *Buntrock*, 571 A.2d 767, 775 (Del. 1990). As a result, Plaintiff has conceded that the Board

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[6] Plaintiff asserts that a dismissal under Rule 23.1 is reviewed for abuse of discretion, citing *Scattered Corp.*, 701 A.2d at 72-73 (Op. Br. at 18); but *Scattered* was superseded by *Brehm*, which clarified that this Court's "review of decisions of the Court of Chancery applying Rule 23.1 is *de novo* and plenary." 746 A.2d at 253.

is independent and disinterested for purposes of reviewing these matters. *See Levine*, 591 A.2d at 197-98. Accordingly, the Board's refusal of the Litigation Demand may be reviewed "only for compliance with the traditional business judgment rule." *Id.; see Aronson* v. *Lewis,* 473 A.2d 805, 813 (Del. 1984), *overruled on other grounds by Brehm*, 746 A.2d 244.

The business judgment rule is a powerful presumption that "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 interests of the company." *Spiegel*, 571 A.2d at 774. The "alleged deficiencies in [a] Special Committee's investigation must rise to the level of gross negligence if the directors' decision is to be condemned as uninformed." *Mount Moriah Cemetery* v. *Moritz*, 1991 WL 50149, at *4 (Del. Ch. Apr. 4, 1991), *aff'd*, 599 A.2d 413 (Del. 1991). Courts therefore are highly deferential to a board's decision not to pursue a stockholder's demand that it institute litigation, reflecting a "judicial acknowledgement of a board of directors' managerial prerogatives." *Spiegel*, 571 A.2d at 774.

To rebut the presumption of the business judgment rule, a plaintiff must "allege[] facts <u>with particularity</u>" that "support a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment." *Levine*, 591 A.2d at 210 (emphasis added). "[C]onclusory allegations are not considered as expressly pleaded facts or factual inferences." *Beam* v. *Stewart*, 845

A.2d 1040, 1048 (Del. 2004) (internal quotation marks omitted; brackets in original). Likewise, "inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor." *Id.*

Because the "transaction" here is the Board's refusal of the Litigation Demand, the only relevant question is whether the Board's investigation, evaluation, and rejection of the Litigation Demand were conducted in an informed, good faith, and reasonable manner. *Levine*, 591 A.2d at 212.

Plaintiff offers only "conclusory and speculative statements" that the Board wrongfully refused the Litigation Demand, which "suffer[] fatally from a paucity of particularization" and fall well short of rebutting the presumption that the Board's decision was a valid exercise of business judgment. *Scattered Corp.*, 701 A.2d at 75. Accordingly, the Court of Chancery properly dismissed the Complaint. *See Grimes* v. *Donald*, 673 A.2d 1207, 1217 (Del. 1996) (particularity requirement "deter[s] costly, baseless suits by creating a screening mechanism to eliminate claims where there is only a suspicion expressed solely in conclusory terms"), *overruled on other grounds by Brehm*, 746 A.2d 244.

1. The Board's Investigation, Evaluation, and Rejection of the Litigation Demand Were Conducted in an Informed, Good Faith, and Reasonable Manner

The Board's actions in response to the Litigation Demand exemplify an informed, good faith, and reasonable response to a stockholder demand. Indeed,

the details of the eight-month investigation leave no doubt about the propriety of the Board's decision-making process.

After receiving the Litigation Demand in early March 2011, the Board promptly designated three independent directors to serve as the Special Demand Review Committee. (A131.) The Special Demand Review Committee retained experienced outside counsel to serve as an independent legal adviser and assist with the investigation. (*Id.*) Cravath, at the behest of the Special Demand Review Committee,[7] conducted a comprehensive investigation that spanned from April through December, in which more than 10,000 documents were reviewed and thirteen interviews were conducted. (A132-33.) Cravath briefed the Special Demand Review Committee on the results of the investigation in a four-hour meeting on October 31, 2011. At the conclusion of the meeting, the Committee requested that Cravath undertake certain additional investigatory steps concerning the Litigation Demand. (A133.) On December 5, 2011, the Committee and

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[7] Several allegations fault the Committee for delegating parts of the investigation to Cravath. (*See, e.g.*, A97-98 at ¶¶ 185-187; Op. Br. at 22 ("[T]he Special Committee and Board blindly relied on Cravath.").) These claims are baseless. "[A]n informed decision to delegate a task is as much an exercise of business judgment as any other," *Grimes*, 673 A.2d at 1214 (internal quotation marks omitted), and retaining an independent law firm to spearhead an investigation is a common way that demand committees fulfill their responsibilities. *See, e.g.*, *Halpert Enters., Inc.* v. *Harrison*, 2007 WL 486561, at *2-3 (S.D.N.Y. Feb. 14, 2007), *aff'd*, 2008 WL 4585466 (2d Cir. Oct. 15, 2008) (ORDER); *Boeing Co.* v. *Shrontz*, 1994 WL 30542, at *1-2 (Del. Ch. Jan. 19, 1994).

Cravath reconvened to discuss the results of the supplemental investigation. (*Id.*) The Special Demand Review Committee then carefully deliberated and concluded that there was no basis for litigation, and that in any event such litigation would not be in the Company's best interests. (*Id.*) At the regularly scheduled Board meeting on December 13, 2011, the Special Demand Review Committee reported to the nonmanagement members of the Board on its investigation, findings, and recommendations. The nonmanagement directors asked questions, discussed the presentation, and then voted unanimously to adopt the Special Demand Review Committee's recommendations as resolutions of the Board. (A134.)

In short, the Board employed the same procedures that have been approved by numerous other courts when dismissing complaints for failing to plead wrongful refusal under Delaware law. For example, in *Scattered Corp.*, this Court affirmed a Court of Chancery decision holding that the creation of a special committee, the 25 interviews conducted by the committee, and the careful deliberation by the board regarding the committee's investigation and recommendations indicated that the refusal of the demand at issue had been a valid exercise of business judgment. 701 A.2d at 76-77. In *Spiegel*, this Court underscored that the special committee and its independent counsel conducted an extensive investigation "that spanned over five months," during which they "interviewed a great many people" and "reviewed volumes of documents"; accordingly, it also respected the rejection of

the stockholder demand. 571 A.2d at 772. Similarly, the court in *Mount Moriah Cemetery* commended an "extensive investigation" by a special committee and its law firm counsel, which included "the review of over 167,000 pages of documents and interviews of appropriate officers and employees." 1991 WL 50149, at *2. The court dismissed the complaint because the special committee reported the results of the investigation to the board and recommended refusing the demand, and the board discussed and adopted the special committee's recommendation. *Id.*; *see also Halpert Enters., Inc.*, 2007 WL 486561, at *2-3; *Boeing Co.*, 1994 WL 30542, at *1-2.

Here, the Board displayed at least the same diligence and conscientiousness as in these cases, and consequently there can be no real question that the Board's refusal of the Litigation Demand was the product of a valid exercise of business judgment. Indeed, Delaware courts have held that significantly less comprehensive investigations in response to stockholder demands have satisfied the business judgment rule. *See, e.g.*, *Levine*, 591 A.2d at 199 (dismissing complaint notwithstanding board's refusal—without consulting outside advisers—within a month of the demand); *Baron*, 1997 WL 666973, at *3 ("That the refusal letter is dated nine days after the demand letter is also insufficient to rebut the presumption that the Board adequately investigated the demand.").

Delaware law is clear: The very types of conclusory and speculative allegations offered by Plaintiff to challenge the Board's investigation have been rejected categorically. The Court of Chancery thus properly dismissed Plaintiff's Complaint due to his failure to allege particularized facts that establish a reasonable doubt that the investigation, evaluation, and rejection of the Litigation Demand were conducted in an informed, good faith, and reasonable manner.

2. The Court of Chancery Applied the Correct Legal Standard

Plaintiff claims that "[t]he Chancery Court failed to look at the facts as a whole," "failed to draw all inferences in Plaintiff's favor," and "consider[ed] the facts in isolation." (Op. Br. at 21, 23, 27.) But these quibbles are just with the result that the Court of Chancery reached, rather than with its analysis; indeed, Plaintiff concedes that the Court applied the correct standard. (Op. Br. at 18 (noting that Court "correctly stated" applicable rule).)[8]

[8] Plaintiff suggests that the Court of Chancery has "been, in the past, too inflexible in evaluating [wrongful-refusal] cases, contrary to the holdings of this Court." (Op. Br. at 20.) That argument disregards this Court's recent confirmation that "Delaware law on the relevant topic is settled" and that "[t]he burden to plead gross negligence is a difficult one," *Espinoza* v. *Dimon*, 124 A.3d 33, 36 (Del. 2015), as well as this Court's decisions affirming dismissals of wrongful-refusal claims by the Court of Chancery. *See, e.g.*, *Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan* v. *Andreotti*, 2015 WL 2270673 (Del. Ch. May 8, 2015), *aff'd*, 2016 WL 341201 (Del. Jan. 28, 2016); *Mount Moriah Cemetery*, 1991 WL 50149, *aff'd*, 599 A.2d 413. Plaintiff himself concedes that the rare instances where wrongful-refusal claims were sustained beyond a motion to

It is Plaintiff who mischaracterizes the applicable standard,[9] suggesting in numerous places that the Court can—and should—assess the substance of the Board's decision or demand some unspecified threshold of evidence supporting the decision. (*See, e.g.*, Op. Br. at 25 ("[I]t is hard to imagine that reasonable minds can consider the underlying facts and come to a conclusion other than the demand was improperly refused."); *id.* at 26 ("While the subjects addressed do not necessarily seem unreasonable, there is no evidence that the Special Committee reasonably considered those subjects in refusing the Litigation Demand.").[10])

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dismiss—he identifies two—are "outliers," "*sui generis*," and have "involved quite unusual circumstances." (Op. Br. at 20 n.7.)

[9] Plaintiff also claims that "a lack of gross negligence should not be found at the pleadings stage," citing *Brown* v. *United Water Del., Inc.*, 3 A.3d 272, 276 (Del. 2010). (Op. Br. at 23-24.) But *Brown* involved an assessment of gross negligence in connection with substantive causes of action for negligence and intentional and negligent infliction of emotional distress in a dispute regarding whether a water company had adequately serviced a fire hydrant. 3 A.3d at 273-74. That inquiry has no bearing on whether a plaintiff has adequately alleged gross negligence to demonstrate derivative standing pursuant to Rule 23.1—an assessment that happens only at the pleadings stage. Indeed, Plaintiff's argument would mean that a trial would need to be held before a court could determine whether the plaintiff had derivative standing to pursue a claim.

[10] Plaintiff does not contend that the Board was required to commission a written report and has abandoned his argument that the letter refusing his Litigation Demand "omitted sufficient detailed information," which he pursued aggressively in the New York actions. (A96 at ¶ 184; B34.) And for good reason: there is no requirement that a report or letter be drafted at all, or that a demanding stockholder receive detailed information regarding the company's investigation of his or her demand. *See Gatz* v. *Ponsoldt*, 2004 WL 3029868, at *5 (Del. Ch. Nov. 5, 2004) ("[T]here is no authority that suggests that Delaware law requires a formal

But such inquiries are precluded by the business judgment rule, which "accords directors the presumption that they acted on an informed basis." *Levine*, 591 A.2d at 214. When reviewing a board's decision, "[c]ourts do not measure, weigh or quantify directors' judgments," and they "do not even decide if [the directors' judgments] are reasonable" in the traditional sense. *Brehm*, 746 A.2d at 264. Instead, courts "give[] great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and will not substitute [their] views for those of the board if the latter's decision can be attributed to any rational business purpose." *Paramount Commc'ns, Inc.* v. *QVC Network, Inc.*, 637 A.2d 34, 45 n.17 (Del. 1994) (internal quotation marks omitted).

At bottom, Plaintiff "take[s] issue with the substantive decisions of the [Board], instead of the process the [B]oard followed"; but that type of "substantive second-guessing of the merits of a business decision . . . is precisely the kind of inquiry that the business judgment rule prohibits." *In re Dow Chem. Co. Derivative Litig.*, 2010 WL 66769, at *9 (Del. Ch. Jan. 11, 2010).

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report as a matter of law . . . ." (internal quotation marks omitted)), *rev'd on other grounds*, 925 A.2d 1265 (Del. 2007); *see also Belendiuk* v. *Carrión,* 2014 WL 3589500, at *6 (Del. Ch. July 22, 2014); *Boeing*, 1994 WL 30542, at *4 (rejecting wrongful-refusal claim even though plaintiff was not provided with a copy of special committee's report nor informed which directors comprised the committee).

3. Settlements Do Not Render a Refusal Wrongful

Plaintiff asked that the Court of Chancery "look past the steps the Board took via the Special Committee to inform itself, and conclude that based on the existence of large settlements later in time, the Board must have been grossly negligent."[11] (Op. at 23-24; A112-13 at ¶ 212.)

But simply observing that settlements were reached and payments were made is not a substitute for pleading the requisite particularized facts. *Brehm*, 746 A.2d at 254; *Guttman* v. *Huang*, 823 A.2d 492, 499 (Del. Ch. 2003) ("[The court] cannot accept cursory contentions of wrongdoing as a substitute for the pleading of particularized facts."). The Court of Chancery rightly concluded that such a *res ipsa loquitur* theory does not "follow logically . . . from the facts pled" and "is not our law." (Op. at 4, 24.)

Plaintiff's attempt to bypass his heightened pleading burden in this way is not novel. Courts have repeatedly rejected theories of wrongfulness premised on settlements and large monetary payments. For example, the *Andreotti* decision[12]—affirmed unanimously by this Court—is illuminating. The plaintiff alleged that:

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[11] As the Court of Chancery noted, Plaintiff "has not actively pursued the theory that th[e] decision [refusing the demand] was taken in bad faith," and therefore his burden is to plead particularized facts "that support an inference that the Board was grossly negligent in reaching its decision." (Op. at 3.)

[12] 2015 WL 2270673.

> the Company was forced to settle with [a counterparty]. In short, the Defendants' evolving scheme to mislead the Company's stockholders regarding [the product at issue] resulted in a $1 billion Judgment against the Company, a severe Sanctions Order against the Company by a federal court, untold legal fees and other unnecessary expenses, damage to the Company's name and goodwill, and grave harm to the Company's reputation with the public.

Complaint, 2014 WL 4787414, at ¶ 14 (Del. Ch. Sept. 19, 2014).

As with Plaintiff here, "[t]he gravamen of the [p]laintiff's argument . . . . [wa]s, in effect, a species of *res ipsa loquitur*": the underlying conduct and "the resulting litigation and settlement thereof, were so botched, and so costly to [the company], that somebody must be liable for a breach of fiduciary duties, and that liability is so clear and so valuable to [the company] that a decision not to pursue that claim must have been made in bad faith." 2015 WL 2270673, at *26.

The *Andreotti* court rejected plaintiff's theory outright, noting that "the pertinent 'reason to doubt' [standard] is not doubt about the propriety of the underlying conduct, nor is it doubt about whether the Board, in rejecting the demand, made a wise decision" (*id.*); rather, the reasonable doubt standard relates to "whether the Board's action, wise or foolish, was taken in good faith and absent gross negligence." *Id.* (emphasis omitted). Accordingly, "a disagreement, however vehement, with the conclusion of an independent and adequately represented committee is not the same as pleading particularized facts that create a

reasonable doubt that the Board acted in what it perceived as the best interests of the corporation." *Id.* at 32. Plaintiff's failure to plead such particularized facts thus was fatal to its claim. *Id.*

Halpert Enterprises, Inc. v. *Harrison* also is instructive. There, the plaintiff alleged that defendants' Enron- and WorldCom-related conduct:

> led to investigations by the SEC, the Office of the District Attorney for New York County, the Federal Reserve Bank of New York, New York State Banking Department, the NYSE and NASD, among others. . . . [and] has already resulted in over <u>$4.4 billion</u> in settlements and millions of dollars in fines paid by the Company and continues to expose the Company to potentially record-setting civil penalties and criminal punishment.

See Complaint, 2006 WL 3089724, at ¶ 4 (S.D.N.Y. Sept. 20, 2006).

The court dismissed the 141-page complaint for failing to plead wrongful refusal, however, ruling that plaintiff levied "no allegations, aside from conclusory allegations, that the Audit Committee's investigation, and Board's subsequent refusal of Plaintiff's demand, r[ose] to the level of 'gross negligence.'" *Halpert Enters., Inc.*, 2007 WL 486561, at *6.

Plaintiff relies heavily (Op. Br. at 27, 29-32) on a case from the Northern District of California, *City of Orlando Police Pension Fund* v. *Page*, 970 F. Supp. 2d 1022 (N.D. Cal. 2013). The Court of Chancery already has, on several occasions, declined to follow the California court's reasoning. *See, e.g.*, *Andreotti*,

2015 WL 2270673, at *28 (concluding that the case "misse[d] the mark"); (Op. at 24 n.100). Plaintiff's analogy to the case is similarly misguided.[13]

As these cases show, the question here is "not whether these losses in fact occurred, or even whether, assuming they did, the individuals responsible for those losses could be liable to the Company for breaches of fiduciary duties." *Andreotti,* 2015 WL 2270673, at *31. Rather, when assessing whether to pursue a particular lawsuit, a board must balance many factors, including "ethical, commercial, promotional, public relations, employee relations, fiscal as well as legal."[14] *Zapata Corp.* v. *Maldonado*, 430 A.2d 779, 788 (Del. 1981) (internal quotation marks omitted).

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[13] Several important differences render the comparison inapt. First, *Page* related to a federal criminal investigation, which led to Google entering into a non-prosecution agreement (rather than facing criminal charges), *Page*, 970 F. Supp. 2d at 1024; here, there have not even been any allegations of criminal conduct let alone a non-prosecution agreement. Second, the criminal investigation in *Page* was preceded by numerous formal written warnings from regulators, which defendants apparently ignored. *Id.* at 1025. Third, the litigation demand and investigation occurred after the company entered into the non-prosecution agreement, and the court concluded that the investigation should have been tailored accordingly based on the resolution of the criminal allegations. *Id.* at 1032.

[14] Plaintiff's arguments that the Board "did not even identify the potential claim or its potential value" and failed to "identif[y] the reasons for its conclusion that litigation would not be in the corporation's best interest" (Op. Br. at 27) are puzzling. His demand for all of the Company's privileged documents and work product relating to the Litigation Demand was rejected by the Section 220 court. (*See* Counter-Stmt. of Facts E.) Accordingly, his assertions regarding the supposed absence of various types of documents or information are entirely speculative.

Many factors are relevant when assessing a demand, and therefore "'[i]t is within the bounds of business judgment to conclude that a lawsuit, even if legitimate, would be excessively costly to the corporation or harm its long-term strategic interests.'" *Espinoza* v. *Dimon*, 807 F.3d 502, 508 (2d Cir. 2015) (applying Delaware law and affirming dismissal of derivative complaint alleging $6.25 billion in damages—relating to the "London Whale" trading incident—based on failure to plead wrongful refusal) (quoting *In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 986 (Del. Ch. 2007)). Indeed, courts across the country have recognized that the board of a Delaware corporation properly can conclude that other considerations outweigh the benefits of pursuing a stockholder derivative claim even if there might be a basis for litigation. *See, e.g., Friedman* v. *Maffei,* 2016 WL 1555331, at *12 (Del. Ch. Apr. 13, 2016); *In re Merrill Lynch & Co.*, 773 F. Supp. 2d 330, 348-49 (S.D.N.Y. 2011), *aff'd sub nom. Lambrecht* v. *O'Neal*, 504 F. App'x 23 (2d Cir. 2012) (ORDER); *Furman* v. *Walton*, 2007 WL 1455904, at *4-5 (N.D. Cal. May 16, 2007), *aff'd*, 320 F. App'x 638 (9th Cir. 2009) (ORDER).

The Court of Chancery thus rightly rejected Plaintiff's argument as a non-sequitur, concluding that the "facts alleged cannot clear the high bar of gross negligence." (Op. at 4.)

4. Plaintiff Seeks an Inappropriate Privilege Inference and Mischaracterizes the Relevant Pleading Standard

Plaintiff claims that the Court of Chancery "permitted Defendants to use the attorney client privilege and work product immunity as a shield and a sword." (Op. Br. at 34.) But the argument is merely a request for an inference that the Court of Chancery rightly deemed "inappropriate" (Op. at 31): that wrongfulness should be inferred because there are privileged materials generated during the investigation to which he was denied access by the court in Plaintiff's Section 220 Action (the "Section 220 Court").

Plaintiff's Section 220 Demand sought every document, communication, and note (and any other information) that was reviewed or generated by Cravath during the more than eight-month investigation of his Litigation Demand. (*See, e.g.*, A138.) The Section 220 Court rejected that broad demand and concluded that only a narrow set of additional materials should be produced, including a high-level summary of the topics that were presented to the Board in connection with Plaintiff's Litigation Demand. (A175-76.) The Section 220 Court contemplated that these additional materials would be redacted so that privileged content that was not necessary and essential to the Section 220 Demand was not revealed. (*See* A175 ("I think there needs to be produced either a redacted set of memoranda or a summary of the areas that were described to the board."); *id.* ("So I am hopeful that

either a redaction of the memoranda or a summary of the memoranda can be produced in a way that the parties can agree is sufficient.”).)

Plaintiff did not challenge the redactions in the Section 220 Action. He also did not appeal the final order resolving the Section 220 Action (which would have been reviewed for abuse of discretion as to scope, *Espinoza* v. *Hewlett-Packard Co.*, 32 A.3d 365, 371 (Del. 2011)). As the Court of Chancery here properly noted, the place for Plaintiff to have sought relief regarding the redactions was in the Section 220 Action, where the Section 220 Court “could evaluate the competing interests involved.” (Op. at 31.) Plaintiff’s lone supposed rationalization for not challenging the redactions—that Defendants’ statute of limitation argument “would only be stronger” (Op. Br. at 34)—rings hollow: the Section 220 Court offered in several instances to review the redacted documents and expeditiously resolve any disputes,[15] and in any event the limitations period had already lapsed at that time (*see* Section II.C, *infra*).

Plaintiff also fails to acknowledge the candid statement made at argument by counsel for the similarly situated BNY Mellon stockholder, Ms. Kops, whose Section 220 action was consolidated administratively with Plaintiff’s—a statement underscored by the Court in its decision (Op. at 31 & n.121)—that the decision not

[15] (*See, e.g.*, A181 (“If it comes down to it, I will review the documents in chambers.”); A175 (“[I]f I need to review [the documents], I will do so.”).)

to appeal or challenge the redactions in the Section 220 action was strategic: counsel thought "we had enough to proceed with the complaint we filed concerning the process," and he "didn't think [he] was going to get [further materials] anyway because [BNY Mellon] would make a strong attorney-client privilege argument." (A256.)

The Court of Chancery thus did not "find that Plaintiff was at fault for not further pursuing the removal of the redactions" (Op. Br. at 37); rather, it concluded that "[i]f the Plaintiff believed the redactions were such that he could not effectively evaluate the actions of the Special Committee," he should have sought relief "at the Section 220 phase of the litigation" (Op. at 31). Failing to do so—likely for strategic reasons he now seeks to disavow—does not provide a basis for the remarkable inference Plaintiff seeks: that "the redacted materials contained facts that would add to the wealth of information showing the Alleged Wrongdoing and the Special Committee's gross negligence in refusing the Litigation Demand" (Op. Br. at 37). Indeed, such an inference is expressly prohibited by Delaware Rule of Evidence 512. Del. R. Evid. 512(a) ("The claim of a privilege . . . is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.").[16]

[16] Plaintiff's reliance on *Hecksher* v. *Fairwinds Baptist Church*, *Inc.*, 2013 WL 1561564 (Del. Super. Feb. 28, 2013) (Op. Br. at 38) is misplaced. The

At bottom, as the Court of Chancery recognized (Op. at 31), Plaintiff's argument mischaracterizes the burden applicable to his claim. It is Plaintiff's burden to "allege[] facts with particularity" that "support a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment." *Levine*, 591 A.2d at 210 (internal quotation marks omitted). Defendants therefore are not "us[ing] the redactions to tell a story consistent with Defendants' narrative that the Special Committee did not uncover wrongdoing" (Op. Br. at 37). Rather, Plaintiff is attempting to shirk his pleading burden and excuse the lack of requisite particularized allegations in the Complaint by speculating about the contents of privileged materials[17] or arguing that BNY

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decision was reversed by this Court, 115 A.3d 1187 (Del. 2015), and, in any event, failed to acknowledge or address Rule 512(a). The stray reference in dicta to an inference based on invocation of Fifth Amendment privilege also is squarely against other Delaware precedents on this issue. *W.L. Gore & Assocs., Inc.* v. *Long*, 2011 WL 6935278, at *4 & n.31 (Del. Ch. Dec. 28, 2011) ("Although, as a matter of federal law, courts presiding over civil actions may draw an adverse inference against a party who invokes the privilege against self-incrimination without violating the U.S. Constitution, Delaware law prohibits courts in this State from doing so. D.R.E. 512(a)." (internal citation and parenthetical omitted)); *Digiacobbe* v. *Sestak*, 1998 WL 684149, at *10 (Del. Ch. July 7, 1998); *see also Sharer* v. *Tandberg, Inc.*, 2007 WL 983849, at *2 (E.D. Va. Mar. 27, 2007) ("Defendant may not refer to Plaintiff's legal consultation . . . to draw an inference about the substance of legal advice.").

[17] (*See* Op. Br. at 37 (claiming that "[w]ith a field of otherwise damning facts in the record, the idea that the redacted material would similarly be consistent with wrongdoing is a logical conclusion").)

Mellon was not entitled to defend its interests in the Section 220 Action.[18] Such "conclusory and speculative statements," which "suffer[] fatally from a paucity of particularization," are insufficient to meet Plaintiff's heightened burden. *Scattered Corp.*, 701 A.2d at 75.

[18] (*See* Op. Br. at 37 (arguing that BNY Mellon "tak[ing] the position that it rightfully did not want to waive privilege or immunity" in the Section 220 Action was "in effect hiding material contained in the redacted memo").)

II. PLAINTIFF'S CLAIM IS TIME-BARRED

A. Question Presented

Whether Plaintiff's action is barred by the doctrine of laches when the applicable statute of limitations elapsed long ago and there are no mitigating circumstances that merit disregarding the limitations period. (B70-73.)

B. Standard of Review

In view of Plaintiff's failure to satisfy the requirements of Rule 23.1 for pleading wrongful refusal, the Court of Chancery declined to address Defendants' argument regarding the action's untimeliness. (Op. at 17 & n.71.)

But the Court of Chancery's dismissal of the Complaint may be affirmed on any ground supported by the record, regardless of whether the Vice Chancellor relied upon it in his ruling. *See Haley* v. *Town of Dewey Beach*, 672 A.2d 55, 58-59 (Del. 1996); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995) (noting that the Court may "decide issues not reached below in the interest of orderly procedure and the early termination of litigation").

C. Merits of the Argument: The Action Is Barred by Laches and There Are No Mitigating Circumstances That Merit Disregarding the Limitations Period

Even if the Court were to determine that Plaintiff adequately pleaded particularized facts demonstrating a wrongful refusal of his Litigation Demand—which for the reasons set forth above, he has not (*see* Section I.C, *supra*)—the

dismissal of Plaintiff's claim for breach of fiduciary duty (the only cause of action alleged in the Complaint) should still be upheld because the claim is barred by laches.

"[B]ecause equity follows the law, it is firmly established that [Delaware] Court[s] can and will apply a statute of limitations by analogy." *In re Coca-Cola Enters., Inc.*, 2007 WL 3122370, at *4 (Del. Ch. Oct. 17, 2007) (internal quotation marks omitted), *aff'd sub nom. Int'l Bhd. Teamsters* v. *Coca-Cola Co.*, 954 A.2d 910 (Del. 2008). Under Delaware law, a claim for breach of fiduciary duty has a three-year limitations period. *See* 10 *Del. C.* § 8106(a).

Any cause of action that accrued before October 20, 2012 "is therefore presumptively barred by laches" because of the "great weight" afforded to the three-year statute of limitations. *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *8 (Del. Ch. Jan. 25, 2016), *reconsideration granted in part on other grounds*, 2016 WL 727771 (Del. Ch. Feb. 23, 2016); *Acierno* v. *Goldstein*, 2005 WL 3111993, at *5 (Del. Ch. Nov. 16, 2005) (noting that "[d]elay beyond the period fixed by the statute is presumptively unreasonable"). The untimeliness of the Complaint is ripe for resolution on a motion to dismiss. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007); *see also In re Coca-Cola Enters., Inc.,* 2007 WL 3122370, at *5.

Plaintiff cannot dispute that the cause of action he alleges arose more than four years before his filed this action: he made his Litigation Demand in March 2011, and this action is his attempt to force BNY Mellon to bring a lawsuit regarding the purported wrongdoing outlined in his 2011 Litigation Demand. Indeed, the Complaint here fails to specifically allege any wrongdoing after 2011, and the underlying allegations are largely unchanged from the original derivative action he filed in 2011: he cites FX revenue figures only through 2010 (A40-41 at ¶ 55; A43 at ¶ 58; A48 at ¶ 75; A61-62 at ¶ 120), the "last visited dates" of Company websites he identifies are in June 2011 or earlier (*see, e.g.*, A37-39 ¶¶ 50-52; A48 at ¶ 74; A62-63 at ¶ 121; A69 at ¶ 135; A81-82 at ¶¶ 157-159), and when citing the Company's annual statements he refers to filings for 2009 and 2010 (A40-41 at ¶¶ 55-56). Moreover, the alleged conduct underlying Plaintiff's purported derivative claim ceased by, at the latest, August 8, 2011—the date that BNY Mellon included detailed information regarding its FX pricing methods in its quarterly Form 10-Q filing with the SEC for the second quarter of 2011.[19]

[19] (*See* B6-7.) Delaware courts commonly rely upon information contained in a company's SEC filings to impute knowledge to stockholders and to dismiss a complaint as untimely. *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *9 (Del. Ch. July 17, 1998) (dismissing complaint as untimely because "the information in the annual reports alone [more than three years prior] should have provided plaintiffs with adequate notice of any alleged misconduct by defendants"), *aff'd*, 725 A.2d 441 (Del. 1999); *In re Tyson Foods, Inc.*, 919 A.2d at

Accordingly, Plaintiff's claim should be dismissed as untimely, without even needing to resort to a traditional laches analysis.[20] *See Gallagher* v. *Long*, 2013 WL 718773, at *3 (Del. Ch. Feb. 28, 2013) ("Because more than three years have elapsed since [the alleged breach of fiduciary duty], and because there is no reason why [plaintiff] could not have sued within the statute of limitations, it is appropriate to dismiss [plaintiff's] claim of breach of fiduciary duty on grounds of laches."), *aff'd*, 65 A.3d 616 (Del. 2013); *In re Coca-Cola Enters., Inc.,* 2007 WL 3122370, at *4; *State ex rel. Brady* v. *Pettinaro Enters.*, 870 A.2d 513, 527 (Del. Ch. 2005).

1. Plaintiff Cannot Avail Himself of Any Potential Tolling of the Three-Year Statute of Limitations

In the Court of Chancery, Plaintiff claimed that the statute of limitations should be tolled during the pendency of his Section 220 Action (*see* B144-45). But the Section 220 Action was not filed until September 8, 2014 (A37 at ¶ 48), so this action is still untimely even if such tolling were applied. (*See* Section II.C, *supra*.)

585-86; *In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *5 (Del. Ch. Sept. 27, 2013).

[20] The claim warrants dismissal under the traditional laches analysis as well. "Although there is no bright-line test, there are three generally accepted elements that the defendant must prove to show laches: (1) knowledge by the plaintiff of the basis for a legal claim; (2) the plaintiff's unreasonable delay in bringing the claim; and (3) resulting prejudice to the defendant." *Houseman* v. *Sagerman*, 2015 WL 7307323, at *5 (Del. Ch. Nov. 19, 2015). The three elements are satisfied for the reasons discussed *infra* in Sections II.C.1-3, respectively.

Moreover, the Court of Chancery noted the conceptual flaw in Plaintiff's Section 220 tolling argument: the Section 220 proceedings did not involve the "actual defendants who are not the corporation for whom the statute of limitations exists and for whose protection the statute of limitations exists." (B196.)

In any event, Plaintiff cannot avail himself of <u>any</u> potential tolling of the three-year statute of limitations, given that "no theory will toll the statute beyond the point where the plaintiff was objectively aware, or should have been aware, of facts giving rise to the wrong." *In re Tyson Foods, Inc.*, 919 A.2d at 585. Plaintiff was objectively aware—or should have been aware—of the underlying facts during 2011. (*See* Section II.C, *supra*.) Accordingly, Plaintiff cannot carry his heavy burden of "pleading specific facts to demonstrate that the statute of limitations was, in fact, tolled." *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6.

Plaintiff's original derivative action alone demonstrates that no tolling doctrines can cure the untimeliness of this action. Indeed, he is "caught on the horns of a dilemma" because of his original, premature derivative action: "Either [he] raised a claim on [October 25, 2011] without sufficient knowledge (thus violating, among other things, Rule 11), or the fact that [he] filed [his] complaint serves to show that [he] would have been on inquiry notice at that point." *In re Tyson Foods, Inc.*, 919 A.2d at 594.

2. No "Unusual Conditions" or "Extraordinary Circumstances" Justify Deviating from the Statute of Limitations

No "unusual conditions or extraordinary circumstances" justify not applying the statute of limitations here. *See IAC/InterActiveCorp* v. *O'Brien*, 26 A.3d 174, 178 (Del. 2011). Indeed, several aspects of Plaintiff's litigation tactics show that such extraordinary relief is unwarranted:

First, Plaintiff rushed to file his original derivative action back in October 2011—before the Board had even completed its investigation and consideration of his Litigation Demand—and disregarded the fact that Delaware courts have "admonished stockholders repeatedly to use Section 220 . . . to obtain books and records and investigate their claims before filing suit," *South* v. *Baker*, 62 A.3d 1, 6 (Del. Ch. 2012). The wastefulness from Plaintiff's haste is clear: the complaint was dismissed, his appeal was rejected, and Plaintiff now has abandoned most of the arguments from his original derivative action.[21]

Second, Plaintiff expressed concerns regarding the potential expiration of the statute of limitations back in 2011, in an apparent attempt to pressure the Special Demand Review Committee to truncate or pare back its investigation.

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[21] For example, Plaintiff argued (unsuccessfully) to the New York trial court and appellate court that routine outside affiliations of members of the Special Demand Review Committee created reasonable doubt as to their independence and that an October 2011 newspaper advertisement constituted an "effective" refusal of his demand. (B35-37; B47-50.)

(*See* B9 (August 29, 2011 letter from Plaintiff's counsel stating, "The delay of the special committee in completing its investigation raises concerns as to the expiration of the statute of limitations for bringing claims against those who may be subject to liability").) The letter also demanded information regarding the Company's insurance carriers. (*Id.*) Having expressed concerns about untimeliness back in 2011—regardless of whether they were sincerely held or used strategically—Plaintiff cannot credibly claim five and a half years later that the equities should excuse the untimeliness of the Complaint.

Finally, Plaintiff disregarded the obvious path to filing a timely updated complaint using materials received pursuant to Section 220: re-filing an action in New York court on or before June 11, 2015. Such an action would have been timely due to New York's savings statute, which permits a plaintiff under certain circumstances to "commence a new action within six months after the termination [of a prior action], even if the new action would otherwise be untimely." *Tavares*

v. *N.Y.C. Health & Hosps. Corp.*, 2015 WL 158863, at *9 (S.D.N.Y. Jan. 13, 2015) (internal quotation marks omitted); *see* N.Y. C.P.L.R. 205(a).[22]

Given that Plaintiff sent his Section 220 Demand on October 7, 2013, he had more than 20 months to seek books and records and still avail himself of the New York savings statute. Whatever his motivation, Plaintiff declined to proceed in this manner, which would have avoided statute of limitation issues and promoted

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[22] The New York savings statute applies to actions such as Plaintiff's that are dismissed for reasons "pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim." *Tavares*, 2015 WL 158863, at *9 (internal quotation marks omitted). The six-month period began running on December 11, 2014, when the decision dismissing Plaintiff's complaint was unanimously affirmed by the New York appellate court. (B46.)

Delaware also has a savings statute, 10 *Del. C.* § 8118, but Plaintiff has waived any argument that it is applicable here. (B144 (stating that "Plaintiff does not allege that Delaware's saving statute applies in this action").) At any rate, the Delaware savings statute would be inapplicable here for two reasons: First, the dismissal of the New York action for failing to plead wrongful refusal was not for a "matter of form" covered by the Delaware savings statute. *See Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96-97 (1991) ("[T]he demand doctrine . . . clearly is a matter of 'substance,' not 'procedure.'"); *Pogostin* v. *Rice*, 1983 WL 17985, at *3 (Del. Ch. Aug. 12, 1983) ("Chancery Court Rule 23.1 . . . is a rule of substantive right—not simply a technical rule of pleading."), *aff'd*, 480 A.2d 619 (Del. 1984); *Hartsel* v. *Vanguard Grp. Inc.,* 2015 WL 331434, at *3-4 (D. Del. Jan. 26, 2015) (dismissing complaint and denying plaintiffs' attempt to "characteriz[e] the dismissal of the previous case for failure to make a demand as dismissal for a 'matter of form'" for purposes of invoking the savings statute), *aff'd*, 648 F. App'x 265 (3d Cir. 2016). Second, the Delaware statute does not apply to remedy "mistaken strategic decisions by counsel." *Huffington* v. *T.C. Grp.*, 2012 WL 1415930, at *10 (Del. Super. Ct. Apr. 18, 2012) (internal quotation marks omitted) (declining to apply savings statute because plaintiff "chose a strategy that backfired" and "did not get here 'through no fault of his own'").

judicial economy by having the case heard by the same judge who presided over Plaintiff's prior derivative action that spanned nearly two years.

3. Defendants Have Been Prejudiced by Plaintiff's Delay

Defendants need not show that they have been prejudiced by Plaintiff's delay in filing this action, because "[a]fter the statute of limitations has run, defendants are entitled to repose and are exposed to prejudice as a matter of law by a suit by a late-filing plaintiff who had a fair opportunity to file within the limitations period." *In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *4; *Chaplake Holdings, LTD* v. *Chrysler Corp.*, 766 A.2d 1, 6 (Del. 2001) ("Statutes of limitation prevent a party from sleeping on assertable rights to the disadvantage of a defendant.").

Nevertheless, the prejudice to Defendants from Plaintiff's course of conduct is clear. Plaintiff's "protracted distractions [have] divert[ed] management's attention from the needs of the corporation" throughout the nearly five and a half years that he has litigated these issues. *Wolst* v. *Monster Beverage Corp.*, 2014 WL 4966139, at *2 (Del. Ch. Oct. 3, 2014). In addition, Plaintiff's efforts have generated hundreds of thousands of dollars in litigation expenses, including the drafting of four sets of motion to dismiss papers (three in New York and one in Delaware), protracted Section 220 litigation (even though the Company provided Plaintiff with 90,000 pages of documents in response to his Section 220 Demand

prior to his filing of the Section 220 Action), and drafting appeal papers in New York and Delaware.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Chancery's order dismissing the Verified Derivative Complaint.

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