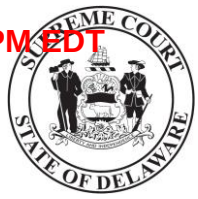
EFiled: Apr 07 2017 05:21PM EDT
Filing ID 60436195
Case Number 606,2016



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MURRAY ZUCKER,	)	
	)	
Plaintiff-Below,	)	
Appellant	)	C.A. No. 606, 2016
	)	
GERALD HASSELL, *et.al.*	)	
	)	
Defendants-Below,	)	
Appellees,	)	
	)	
THE BANK OF NEW YORK MELLON CORPORATION	)	
	)	
Nominal Defendant-Below	)	
Appellee,	)	

APPELLANT'S REPLY BRIEF

BIGGS AND BATTAGLIA
Robert D. Goldberg (Bar ID No. 631)
921 North Orange Street
P.O. Box 1489
Wilmington, DE 19899
(302)-655-9677
Attorneys for Plaintiff-Below
Appellant, Murray Zucker

Dated: April 7, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

Cases

Statutes

I. REPLY TO COUNTER-STATEMENT OF FACTS

Defendants' Counter-Statement[1] submits certain facts which are either untrue or omits other facts necessary to put the statements in context.

Much of the Counter-Statement's narrative is based on the Litigation Demand (A-124-130) and Demand Refusal (A-131-135).[2] Notably, however, when the Counter-Statement refers to something contained in the Litigation Demand it is presented as something that Plaintiff "claims" or "alleges." AB at 6. In contrast, when referencing the Demand Refusal the statements are presented as facts. This is particularly improper when the Counter-Statement references self-serving conclusory statements favorable to Defendants, such as that the Special Committee "carefully deliberated" or the conclusion of the Board was after "careful deliberations." *See* AB at 9, 20.

Further, Defendants fail to address even one fact learned by the Special Committee during in the course of its investigation. The Counter-Statement is focused only on quantity of the investigation, not quality, *i.e.* the number of documents reviewed, interviews conducted, and meetings held. Defendants have consistently followed this form over substance methodology throughout this litigation. Under Defendants' tunnel vision approach, the substance of the

[1] *See* Appellants' Answering Brief, filed March 23, 2017, ("AB") at 6-15.

[2] Capitalized terms are as defined in Appellant's Opening Brief, filed February 21, 2017 ("OB").

documents and other information gathered during the alleged investigation has no bearing on whether Demand Refusal was wrongful.[3] In contrast, the Complaint details how the Committee Documents reviewed by the Special Committee either demonstrate wrongdoing by BNYM insiders (*see, e.g.* ¶¶202-04) or shed no light on the issues raised by the Litigation Demand. *See, e.g.*, ¶¶192-98. But none of them provide reasonable support to reject the demand.

The Counter-Statement also fails to recognize that the Demand Refusal provides no reasons why bringing an action would not be in the best interest of BNYM. This omission is easy to understand–there are no documents that support refusing the Litigation Demand.

While the Counter-Statement claims the Board rejected Plaintiff's demand for corporate governance modifications (OB at 10; *see also* A-133-34), it omits that as a result of the Litigation Demand, the Board approved that the Special Committee remain constituted for not less than one year in order to: (i) receive and review any new information which comes to light after the date of the Demand Refusal that might bear on the Special Committee's prior work in connection with

[3] If this methodology were correct, there would never be a basis for using Section 220's "tools at hand" to address whether a demand was wrongfully refused. Indeed, Section 220 was not necessary to determine how many documents were reviewed or interviews were conducted. That information was in the Demand Refusal. Section 220 was used, to a large degree, to get the underlying substance of the investigation. If that substance—information regarding the underlying wrongdoing—has no impact on whether a litigation demand is wrongfully refused, Section 220 has little to no use in the demand refused context.

Plaintiff's demands; and (ii) review various measures implemented by management to assure that they were appropriately implemented. *See* A-134. The reason for this omission is also evident–it allows Defendants to avoid admitting that the Litigation Demand benefitted BNYM.

II. REPLY ARGUMENT

The Chancery Court Erred in Finding the Complaint did not Adequately Allege That Plaintiff's Litigation Demand was Wrongfully Refused

A. Defendants Overstate Plaintiff's Pleading Requirements

Under Defendants' analysis (*see* OB at 16-18), no matter what the underlying wrongdoing, as long as a board investigates a litigation demand and can cite to a large number of documents reviewed, and interviews and meetings conducted, it has the unequivocal right to reject the litigation demand. This is not the law nor should it be.[4]

In the demand refusal context the relevant inquiry is whether Plaintiff pled facts creating a *reasonable doubt* that the Board acted reasonably and in good faith in failing to take any action. *Rich ex. rel. Fuqi Int'l, Inc. v. Chong*, 66 A.3d 963, 979 & n.109 (Del. Ch. 2013), *citing Grimes*, 673 A.2d at 1218-19. This standard does not require proof that the Board actually acted unreasonably or not in good

[4] Defendants also confuse the standard on demand by stating "Plaintiff has conceded that the Board is independent and disinterested for purposes of reviewing these matters." *See* AB at 16-17, *citing Levine v. Smith*, 591 A.2d 194 (Del. 1991), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000) ("*Brehm*"). "[I]t is not correct that a demand concedes independence 'conclusively' and *in futuro* for all purposes relevant to the demand." *Scattered Corp. v. Chicago Stock Exch.*, 701 A.2d 70, 74-75 (Del. 1997), *overruled on other grounds by Brehm*. Therefore, "it does not necessarily follow *ex post* that the board in fact acted independently, disinterestedly, or with due care in response to the demand." *Id*. at 74, *citing Grimes v. Donald*, 673 A.2d 1207, 1218-19 (Del. 1996), *overruled on other grounds by Brehm*.

faith but only that plaintiff can allege a *reasonable doubt,* which means "that there is a reason to doubt." *Grimes*, 673 A.2d at 1217. The reasonable doubt standard "is sufficiently flexible and workable to provide the stockholder with 'the keys to the courthouse' in an appropriate case where the claim is not based on mere suspicions or stated solely in conclusory terms." *Id*.

The Board's actions cannot be considered reasonable or taken in good faith where it resulted from "[a] decision by a grossly negligent process that includes the failure to consider all material facts reasonably available." *Brehm*, 746 A.2d at 264; *see also Scattered*, 701 A.2d at 75. The serious nature of the underlying facts pled in the Complaint support a finding that the Board ignored significant adverse material facts at the time it rejected the demand.

B. A Review of the Underlying Facts and the Board's Blanket Refusal of the Demand Provide a Reason to Doubt that it Acted Reasonably or in Good Faith

As outlined in the OB, the Complaint details BNYM's practice of marking up foreign exchange purchases and marking down foreign exchange currency sales at, near, or outside of daily foreign currency trading prices in violation of its publicly disclosed procedures, without knowledge of its customer, in order to increase profits. ¶¶8-10, 49-52, 54, 76, 80-81, 121, 123, 130-32, 135-36, 139-42, 158, 176, 185, 200, 171. Furthermore, the Complaint details that BNYM admittedly violated FIRREA (by, among other things, hiding the practice to

clients) and paid out hundreds of millions of dollars in private civil, administrative and governmental actions. *See* ¶¶174-77.

Despite such serious allegations,[5] the Special Committee reviewed fewer than thirty (30) documents, a number of which substantiated the very wrongful conduct alleged and provided no reasoning for its Demand Refusal. Instead, "the Special Committee concluded that there is no sound legal basis for any claim, and that litigation would not be in the best interests of the Company in any event" and that it "recommended that the Board resolve not to assert claims against any current or former directors, officers or employees of the Company." *See* A-134. Under these circumstances, Plaintiff has established facts rebutting a presumption that the Board's refusal to act may be a valid exercise of business judgment. *See Levine*, 591 A.2d at 209.

The case law cited by Defendants provides no support for the Demand Refusal. For example, the committee in *Spiegel v. Buntrock*, 571 A.2d 767 (Del. 1990), *see* AB at 20-21, issued a report and provided a great deal of detail as to why litigation would not be helpful including, among other things, that "discovery would be disruptive and burdensome in the extreme"; "the publicity which would

[5] *Baron v. Siff*, 1997 Del. Ch. LEXIS 152 (Del. Ch. Oct. 17, 1997), cited by Defendants, *see* AB at 21, for the proposal that a "refusal letter dated nine days after the demand letter is also insufficient to rebut the presumption that the Board adequately investigated the demand", is not dispositive. Indeed, as the *Baron* court noted, the demand letter itself requested the company commence action within ten days. There is no similarity to the facts herein.

accompany the continuation of the lawsuit would result in immediate damage to the Company's goodwill and reputation with its shareholders, its customers, and the investment community"; "the potential for success by the plaintiffs on their claim of insider trading and has concluded that the plaintiffs have proffered no evidence"; and "its investigation has uncovered no evidence, that would support this serious charge of unlawful conduct." *Id.* at 772. No such explanation was given by the BNYM Special Committee or Board.

Similarly, in *Halpert v. Harrison*, 2007 U.S. Dist. LEXIS 9769 (S.D.N.Y. Feb. 14, 1007), the demand refusal provided great detail in that it disclosed that the committee's "investigation did not uncover any misconduct rising to the level of gross negligence on the part of any Officer or Director"; "settlements with regulators and civil litigants were entered into in good faith to avoid the risks of litigation"; the "potential costs of litigation against the directors greatly outweighed the potential benefits"; and "as a result of remedial measures [ ] subsequently instituted, the likelihood of any repetition of the kind of wrongdoing alleged was low." *Id.* at *8-9.[6] No such detail was provided herein.

[6] *Boeing Co. v. Shrontz*, 1994 Del. Ch. LEXIS 14 (Del. Ch. Jan. 19, 1994) also cited by Defendants, is not dispositive because, among other things, the plaintiffs apparently took no issue with the reasonableness of the board's conclusions. Rather plaintiffs primarily argued that the board acted in bad faith and unreasonably because it did not meet with plaintiff's counsel and did not advise plaintiffs' counsel of that decision until the investigation was concluded. *Id.* at *6-9.

C. Plaintiff's Allegations as a Whole Support a Finding That the Litigation Demand was Wrongfully Refused

As detailed herein and in Plaintiff's OB, BNYM and certain personnel, including Defendant Nichols, engaged in wrongful conduct which admittedly violated FIRREA. That admission and the monetary penalties and settlement paid by BNYM, combined with Plaintiff's detailed allegations regarding the alleged wrongdoing, supports Plaintiff's assertion that demand was wrongfully refused. *See* AB at 25-29

First, *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), cited by Defendants (*see* AB at 25-27), does not support dismissal of this action. Plaintiff respectfully directs this Court's attention to the factual distinction between that case and the instant action made by Plaintiff in his OB at 31-32.

Second, Defendants attempt to distinguish *City of Orlando Police Pension Fund v. Page*, 970 F. Supp. 2d 1022 (N.D. Cal. 2013), fails. That *Page* involved potentially criminal conduct, as opposed to harmful conduct that may not be criminal, is a distinction without meaning. There is no case suggesting that if the conduct is not criminal demand should be rejected. No matter Vice Chancellor Glasscock's view of *Page*, it is clear that it was decided within the parameters of Delaware law for a Rule 23.1 demand refused motion. Moreover, that Defendants'

admission of wrongful conduct occurred after the Demand Refusal is of little import because the conduct referenced in the settlement is the same conduct revealed by the Committee Documents. *See also* OB at 26, 28-29.

III. REPLY ARGUMENT

The Chancery Court Erroneously Permitted Defendants to use the Attorney- Client Privilege and Work-Product Immunity as a Shield and a Sword

At the 220 Trial, the Chancery Court allowed Defendants to substantially redact certain documents, including written talking points in which counsel discussed the Litigation Demand with the Special Committee, on the grounds of privilege and/or work-product. Defendants should not now be allowed to rely on the redacted information contained therein to claim that Plaintiff did not allege sufficient facts overcoming the business judgment rule.[7] If this Court finds it would be inappropriate to draw an inference against Defendants as to what the redacted materials state really say,[8] the Court may instead not allow Defendants to rely on the redacted documents.

---

[7] "[T]he attorney-client privilege 'is not absolute and, if the legal advice relates to a matter which becomes the subject of a suit by a shareholder against the corporation, the invocation of privilege may be restricted or denied entirely.'" *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1276, 1278 (Del. 2014) (holding the *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), (fiduciary exception to attorney-client privilege (the "*Garner*" doctrine) should be applied in plenary stockholder/corporation proceedings) (citations omitted).

[8] Defendants wrongly assert that Plaintiffs' reliance on *Hecksher v. Fairwinds Baptist Church, Inc.*, 2013 Del. Super. LEXIS 138 (Del. Super. Feb. 28, 2013), *rev'd on other grounds*, 115 A.3d 1187 (Del. 2015), "is misplaced." AB at 33 n.16. In *Hecksher*, after acknowledging the lower court's grant of adverse inference of guilt from a defendant's refusal to speak (in favor of a civil plaintiff), this Court overturned the dismissal of the civil plaintiff's action on summary judgment. 115 A.3d at 1194, 1209. This holding, combined with *Wal-mart*'s recognition that the

In *Chesapeake Corp. v. Shore*, 771 A.2d 293 (Del. Ch. 2000), Chief Justice Strine (as Vice Chancellor) faced a defendant's invocation of the attorney-client privilege. In so doing, the defendant was able to keep "virtually all of the professional advice given to the Shorewood board . . . from Chesapeake and its counsel—and thus the court." *Id.* 771 A.2d at 301. Judge Strine further recognized that "[d]uring the litigation, the defendants have attempted to use some of this concealed advice as a sword. For example, the defendants have attempted to establish that they have hired reputable investment bankers to look at strategic alternatives. Yet the defendants refused to allow Chesapeake to inquire even as to the basic nature of those alternatives." *Id.* Although in no way indicating that it was incorrect for the defendant to assert the privilege or that the plaintiff should have sought to have the privilege overturned, the Court stated:

> [T]he only fair way to proceed is not to give any weight to any advice of this nature or to the defendants' supposed search for alternatives. The potential for abuse is simply too great. For example, the defendants could be looking only at strategic alternatives that involve the continuation in office of Shorewood's management. Having denied Chesapeake and the court any opportunity to determine whether this is so, the defendants cannot use their hiring of advisors as evidence that they are willing to sell Shorewood at the right price to a party who intends to replace the Shorewood board and

---

attorney-client privilege is not absolute, supports Plaintiff's argument that Defendants should not be allowed to use the assertion of privilege as a sword and a shield.

> management. To allow the defendants to do so would be inequitable.

Id.

Similarly, it would be unfair to allow Defendants to conceal the substance of a meeting's discussions and allow them to use those discussions to demonstrate that their efforts were not grossly negligent. If this Court is not inclined to grant an inference in favor of plaintiff regarding the content of the redacted material, at a minimum, the Court should not consider the occurrence of those discussions in its evaluation as to whether the Demand Refusal was grossly negligent.[9]

---

[9] Similarly in *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 1998 Del. Ch. LEXIS 187 (Del. Ch. Oct. 23, 1998),Vice Chancellor Jacobs stated:

> By blocking discovery into these subjects, the defendants have, as a legal and evidentiary matter, thereby precluded themselves from arguing or placing into evidence the content of the legal advice they received or of the collective deliberations into which discovery was blocked.
>
> * * *
>
> The defendants are the masters of the evidence they will present in their defense, but they must accept the consequences of their tactical choice. Here the defendants' tactical decision to bar on privilege grounds discovery into what the board was advised was their fiduciary duty and into the content of the board's deliberations will in turn preclude them from proving those deliberations at trial to defend their position that their decision was reasonable and made with due care.

Chesapeake, 771 A.2d at 301 n.8, *citing Mentor Graphics*, 1998 Del. Ch. LEXIS 187, Del. Ch., C.A. No. 16584, tr. at 505.

IV. REPLY ARGUMENT

A. Question Presented

Whether Plaintiff's action is barred by the statute of limitations and laches. (Raised in Defendants' AB; Question Preserved at: B7-73.)

B. Standard of Review

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. *In re Santa Fe Pac. Corp. S'holder Litig*., 669 A.2d 59, 72 (Del. 1995).[10] However, this Court's "exercise of that power is controlled by balancing considerations of judicial propriety, orderly procedure, the desirability of terminating litigation, and the position of the lower court as the primary trier of issues of fact." *Weinberg v. Baltimore Brick Co.*, 112 A.2d 517, 518 (Del. 1955) (declining to rule on an issue not addressed by the Chancery Court on the grounds that "the additional issues that appellees seek to argue are at least partly factual", "the facts are to some extent in dispute", and "no facts touching these issues have been found by the Vice Chancellor").[11]

[10] Although Defendants raised their statute of limitations/laches arguments to the Chancery Court, the lower court deferred ruling on that issue. *See* Opinion at 17 n.71.

[11] Following the reasoning in *Weinberg*, it would be most appropriate for the Court to defer ruling on the statute of limitations/laches issue.

C. Merits

1. Plaintiff's Action is Not Time Barred

Generally, the statute of limitations for breach of fiduciary duty is three years from the claim's accrual. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007). Defendants argue that because this action was filed more than three years after accrual, it is presumptively barred by laches. AB at 36, *citing In re EZCorp., Inc. Consulting Agreement Derivative Litig.*, 2016 Del. Ch. LEXIS 14 (Del. Ch. Jan. 25, 2016). They are wrong.

Defendants' analysis neglects to state that "the limitations of actions applicable in a court of law are not controlling in equity." *Id, quoting Reid v. Spazio*, 970 A.2d 176, 183 (Del. Supr. 2009). While the issue may be decided at the motion to dismiss stage, because "a laches analysis is often fact-intensive", *EZCorp*, 2016 Del. Ch. LEXIS 14, at * 24, deciding the limitations issue on a motion to dismiss would be appropriate only if "the complaint itself alleges facts that show that the complaint is filed too late." *Id., quoting Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993)

Under certain circumstances, in suits of equity, courts can disregard the statutory limitation period. *AC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 177-78 (Del. 2011). In *AC/InterActiveCorp*, this Court provided guidance regarding an action proceeding after the statutory limitation period:

> There is no precise definition of what constitutes unusual conditions or extraordinary circumstances. The Court of Chancery must exercise its discretion, after considering all relevant facts. But several factors that could bear on the analysis include: 1) whether the plaintiff had been pursuing his claim, through litigation or otherwise, before the statute of limitations expired; 2) whether the delay in filing suit was attributable to a material and unforeseeable change in the parties' personal or financial circumstances; 3) whether the delay in filing suit was attributable to a legal determination in another jurisdiction; 4) the extent to which the defendant was aware of, or participated in, any prior proceedings; and 5) whether, at the time this litigation was filed, there was a bona fide dispute as to the validity of the claim.

Id. at 178.

Indeed, it is well settled that "the institution of other litigation to ascertain the facts involved in the later suit will toll the statute [of limitations] while that litigation proceeds." *Sutherland v. Sutherland*, 2009 Del. Ch. LEXIS 46, at *17 (Del. Ch. March 23, 2009)[12] (Lamb, V.C.) (statute of limitations may be tolled during the pendency of plaintiffs' Section 220 proceeding), *citing Technicorp Int'l II v. Johnston*, 2000 Del. Ch. LEXIS 81 (Del. Ch. 2000) ("It is settled Delaware law that the institution of other litigation to ascertain the facts involved in the later suit will toll the statute while that litigation proceeds same"); *see also Caspian*

[12] A subsequent opinion clarified that that decision was "intended only to resolve the motion to dismiss and should not be construed as deciding the ultimate question of whether the defense of laches or statute of limitations will prevail as to claims arising more than three years before the institution of this action." In *Sutherland v. Sutherland*, 2009 Del. Ch. LEXIS 52, at *1-2 (Del. Ch. April 22, 2009) (Lamb, V.C.).

Select Credit Master Fund Ltd. v. Goh., 2015 Del. Ch. LEXIS 246, at *44 (Del. Ch. Sep. 28, 2015) (statute of limitations deemed tolled based on, among other reasons, the timing of sending a Section 220 demand letter within three years of accrual of claim).[13] Moreover, pursuing a Section 220 action is "regarded as 'strong evidence that plaintiff was aggressively asserting its claims at that time,'" thereby putting Defendants on notice. *Sutherland*, 2009 Del. Ch. LEXIS 46, at *20, *quoting Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 714 A.2d 96, 105 (Del. Ch. 1998).[14]

Here, Plaintiff had been "pursuing his claim, through litigation [and] otherwise" well before the passing of three years. *See AC/InterActiveCorp*, 26 A.3d at 178; *see also* A-184-192 at ¶¶6-41. For the factual reasons detailed below and contained in the record, this action was timely filed.[15]

---

[13] In fact, former Vice Chancellor Lamb not only found tolling based on the pendency of the Section 220 action, but also found that plaintiff's 120-day delay between issuance of the Section 220 opinion and the filing of the derivative complaint was reasonable. 2009 Del. Ch. LEXIS 46, at *17-18 (recognizing a plaintiff may need additional time to "evaluate any potential claims in light of what was produced.").

[14] Defendants make an irrelevant distinction that the cases previously cited regarding equitable tolling during the pendency of a Section 220 action involved actions to obtain underlying facts of the wrong, as opposed to the facts regarding the response to the demand. AB at 9. In order to bring any shareholder derivative action it is necessary to obtain facts regarding the underlying wrong as well as facts from which a shareholder may claim that demand was wrongfully refused.

[15] Defendants suggest that the timing of his filing of the original complaint in New York in October 2011, and then starting a Section 220 proceeding, suggests that

2. The Action Was Tolled as to the Individual Defendants

The tolling issue concerns the resolution of questions of fact and is more complex than as presented by Defendants. At oral argument below, the Vice Chancellor spent significant time trying to digest whether tolling applies and, if it does, would the action toll against the Individual Defendants because the Section 220 action was only against the Company. B196-197.[16] While the Chancery Court never ruled on the timeliness issue, it did make clear that it had not decided the issue and was "struggling to understand how this doctrine of tolling should work." B-197.

However, if there were any grounds for tolling, the doctrine would be meaningless if it only applied to the nominal defendant corporation and not to the alleged wrongdoing individuals. Moreover, it is well established that even though

---

Plaintiff either filed that complaint in violation of Rule 11 or acknowledged being on constructive notice at that time. While Plaintiff does not contest that he was on constructive notice by October 2011, certainly the suggestion of a possible violation of Rule 11 is not warranted. Having a complaint dismissed for failing to have enough detail about the refusal of a shareholder demand in no way suggests a violation of Rule 11.

[16] Defendants absurdly assert, without even asserting one fact, that tolling is inappropriate in this action because the 220 Action took too long. AB at 10 n.11. To the extent that the Plaintiff's Section 220 action took longer than an ideal time, BNYM bears some responsibility by, among other things, in a summary proceeding, insisting on deposing Mr. Zucker and Ms. Kops, the plaintiff in the related action. Moreover, a Plaintiff cannot control all of the many factors that dictate how long a proceeding takes. There can be no doubt that Plaintiff aggressively pursued relief to benefit BNYM since 2011.

a Section 220 action is against the corporation only, tolling also applies as to the individual defendants. *See Sutherland*, 2009 Del. Ch. Lexis 46 (tolling for duration of Section 220 proceeding which allows derivative case to be timely filed against the individual defendants).

3. Conditions Exist to Justify Deviating From the Statute of Limitations Established for Cases in Law

As stated above, a case cited by Defendants, *IAC/InterActiveCorp*, set out guidelines for deviating from the three-year statute of limitations. Although Plaintiff admittedly did commence his first action before issuing his 220 Demand that should not factor against tolling. In fact, it put defendants on notice of the same claim earlier than if Plaintiff had waited to file suit after the 220 Demand.[17]

The tolling of the statute of limitations in equity is based not just on the 220 Demand or 220 Trial, but the plethora of activity that was documented to the Chancery Court. *See* A-183-192. For example, Plaintiff filed his initial New York action in October 2011; on October 1, 2013, the New York court dismissed that action "without prejudice and the possibility of re-pleading either based on a better pled complaint and/or a better pled complaint after more information is obtained

[17] In *Louisiana Mun. Police Employees Ret. Sys. v. Morgan Stanley and Co., Inc*., 2011 Del. Ch. LEXIS 42 (Del. Ch. March 4, 2011), a shareholder brought a Section 220 action following the dismissal of a shareholder derivative action on the grounds that the first complaint did not adequately allege that its litigation demand was improperly refused. The plaintiff was awarded many documents for the purpose of filing a new derivative complaint.

by way of Delaware Procedural Law Section 220"; on October 7, 2013, the 220 Demand was sent to BNYM's counsel; BNYM responded to the 220 Demand on October 14, 2013, proffering the same documents it offered to Kops; on October 15, 2013, Plaintiff's counsel accepted BNYM's proposal so long as it was without prejudice to seek additional documents; on November 8, 2013, BNYM agreed to Plaintiff's condition and made an electronic production the same day; on November 20, 2013, Plaintiff's counsel sought additional documents from BNYM; on December 11, 2013, BNYM responded that it was determining what additional documents to produce; on December 20, 2013, BNYM outlined which additional documents would be produced; on January 7, 2014, Plaintiff responded to BNYM's prior email's. A-184-186 at ¶¶6-15.

As the record reflects, even when Plaintiff was not actively pursuing his 220 Demand it was only in an effort to conserve judicial resources in light of BNYM's request that he wait for the resolution of Kops' 220 action. A-187-89 at ¶¶16-25. Once it became evident to Plaintiff's counsel that it would be futile to continue to negotiate an informal 220 Demand resolution, Plaintiff filed an action under Section 220. A-189 at ¶26.

At the request of Vice Chancellor Glasscock, the parties each provided a timeline of relevant events to assist the court with the laches issue. B-226; AR-1-14. As demonstrated by Plaintiff's timeline (AR-3-11), Plaintiff actively pursued

his and BNYM's rights from 2011 through the filing and subsequent litigation of this action.[18]

4. Defendants Demonstrate No Real Prejudice Sufficient to Apply Laches

Defendants claim they need not show prejudice in order to have this Court dismiss the action for laches. In fact, even if the delay in filing this action were assumed to be unreasonable, "mere delay alone will not give rise to the equitable defense of laches." *Technicorp Int'l II v. Johnston*, 2000 Del. Ch. LEXIS 81**,** at *31 (Del. Ch. Aug. 10, 1999), *quoting Fed. United Corp. v. Havender*, 11 A.2d 331, 343 (Del. 1940). In considering the application of laches, a "change of position on the part of those affected by non-action, and the intervention of rights are factors of supreme importance." *Id.*;[19] *accord Thomas & Agnes Carvel Found.*

---

[18] As demonstrated by Plaintiff's timeline, between March 2011 (the Litigation Demand's issuance) and October 2015 (the Opinion's issuance), there is very little time when neither a demand (for litigation and/or under Section 220) nor a derivative action was pending. The New York Action was only terminated by the resolution of an appeal on December 11, 2014. *See* AR-009. Therefore, the only window of time where there was no activity of record was from July 17, 2015, the day after the 220 Trial and Vice Chancellor Glasscock's ruling thereon, and October 20, 2015, when Zucker filed his derivative Complaint in Chancery Court. Importantly, however, is the fact that BNYM produced additional documents as a result of the Section 220 Trial on August 17, 2015. A-191 at ¶40; *see also* A-192 ¶42.

[19] As stated in *Fed. United Corp.*, a court of equity moves on considerations of conscience, good faith and reasonable diligence. Knowledge and unreasonable delay are essential elements of the defense of laches. The precise time that may elapse between the act complained of as wrongful, and the bringing of suit to

v. Carvel, 2008 Del. Ch. LEXIS 142, at *22 (Del. Ch. Sept. 30, 2008) (finding that there is "no rigid rule to determine what constitutes an unreasonable delay").

Citing *In re Sirius XM S'holder Litig.*, 2013 Del. Ch. LEXIS 240 (Del. Ch. Aug. 28, 2013), Defendants argue that they need not show prejudice as a result of the Complaint being filed more than three years after the cause of action's accrual. However, Defendants arrive at that conclusion by quoting *Sirius* for the proposition that "[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" while they ignore the language regarding plaintiff having "fair opportunity to file within the limitations period."[20]

In the alternative, without submitting any evidence supporting harm to BNYM, Defendants assert that they have shown prejudice.[21] However, *Wolst v.*

---

prevent or correct the wrong, does not, in itself, determine the question of laches. What constitutes unreasonable delay is a question of fact dependent largely upon the particular circumstances. There is no rigid rule.

[20] In the same vein, Defendants cite *Chaplake Holdings, LTD v. Chrysler Corp.*, 766 A.2d 1 (Del. 2001), and merely provide a quote of a truism about the statute of limitations. The case was actually one where the issue arose as to the application of "relating back" to an attempt to add defendants after the statute of limitations expired.

[21] Tellingly, although Defendants refer to the production of 90,000 pages as an element of the prejudice, those documents had already been electronically produced to Kops, making the effort and expense to produce those same pages to Plaintiff were minimal at best.

Monster Beverage Corp., 2014 Del. Ch. LEXIS 198 (Del. Ch. Oct. 3, 2014), the one case they cite to in support, is not dispositive. Plaintiff *Wolst* filed a Section 220 action more than three years after the claim accrued and argued the case was timely because a related securities class action had been filed. The Chancery Court easily rejected the theory that a securities class action tolls the statute of limitations applying to a potential derivative action.

5. Plaintiff Has Not Abandoned Allegations from an Earlier Complaint

Clearly trying to poison the waters against Plaintiff, Defendants assert that he "has abandoned most of the arguments from his original derivative action." AB at 40. This is inaccurate. In fact, the only previously pled allegations Plaintiff is not pursuing are: (i) Special Committee members were conflicted as a result of other associations; and (ii) a newspaper advertisement by BNYM that it had done nothing wrong with respect to its FX practices, which was placed two months before a formal refusal, was an effective demand refusal. Those allegations are not contained in the Complaint because they were rejected by the New York appeals court and that became the law of the case.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Opinion be reversed and the action remanded.

Respectfully submitted,

BIGGS & BATTAGLIA

Dated: April 7, 2017

/s/ Robert Goldberg

Robert Goldberg (ID #631)
921 N. Orange Street
Wilmington, Delaware 19801
Tel: 302-655-9677
Fax: 302-655-7924
goldberg@batlaw.com

Counsel to Plaintiff Zucker

Of Counsel:

STULL, STULL & BRODY
Mark Levine
Melissa Emert
6 East 45th Street
New York, New York 10017
Tel: 212-687-7230
Fax: 212-490-2022

STULL, STULL & BRODY
Patrice Bishop
9430 W Olympic Blvd,
Beverly Hills, CA 90212
Tel: 310-843-9433
Fax: 310- 209-2087