IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MURRAY ZUCKER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 11625-VCG
	)	
GERALD L. HASSELL, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
THE BANK OF NEW YORK MELLON CORPORATION,	)	
	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

Date Submitted: August 19, 2016
Date Decided: November 30, 2016

Robert D. Goldberg, of BIGGS & BATTAGLIA, Wilmington, Delaware; OF COUNSEL: Mark Levine and Melissa Emert, of STULL, STULL & BRODY, New York, New York; Patrice Bishop, of STULL, STULL & BRODY, Beverly Hills, California, *Attorneys for Plaintiff*.

Kurt F. Gwynne, Brian M. Rostocki, and John C. Cordrey of REED SMITH LLP, Wilmington, Delaware; OF COUNSEL: Lawrence Portnoy and Bryan McArdle, of DAVIS POLK & WARDWELL LLP, New York, New York, *Attorneys for the Individual Defendants*.

Stephen P. Lamb and Meghan M. Dougherty, of PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, Wilmington, Delaware, *Attorneys for The Bank of New York Mellon Corporation*.

GLASSCOCK, Vice Chancellor

The Plaintiff here is a stockholder in nominal Defendant The Bank of New York Mellon Corporation ("BNYM" or the "Company"). The Company has recently incurred substantial civil liability for misleading customers in foreign currency exchanges. The Plaintiff seeks to bring this action derivatively, to hold certain current and former directors and officers liable to BNYM for causing or permitting the wrongful acts leading to liability. As this Court has explained often, choses-in-action are simply items of property belonging to the corporation, which in our model are under the control of the board of directors of the corporation, to exploit however the directors see fit in the exercise of their business judgment.

In order to promote the salutary results of director control, our law recognizes that, in general, a cause of action on the corporate behalf may not be pursued by a stockholder without permission of the board, and that before filing such a derivative action, the stockholder must make a demand upon the board for the corporation to act directly. Where the stockholder eschews demand and brings the action regardless, her suit will be dismissed unless she can show that demand would have been futile, because the board would have been unable to exercise its business judgment on behalf of the corporation to evaluate the demand; in that instance, our statutory law, as interpreted by our case law, balances the interests involved as permitting the stockholder-plaintiff to proceed in vindication of the corporate right.

Where, by contrast, the stockholder *does* make demand on the board, and the board nonetheless finds pursuit of the cause of action to be against the corporate interest, the path before the stockholder-plaintiff is steeper yet. By making the demand, she has impliedly conceded that a majority of the directors are disinterested and independent, and that the board could have brought its business judgment to bear on the issue. In order to go forward where such a board has refused the litigation demand, she must plead facts indicating that, notwithstanding the directors' disinterest and independence, their refusal of the demand was itself wrongful. Such a plaintiff must plead facts that raise a reasonable doubt that the directors complied with their fiduciary duties; that is, that they breached the duty of loyalty by taking the decision in bad faith, or were grossly negligent in violation of their duty of care.

It is this steep road that the Plaintiff here has striven, energetically but unsuccessfully, to climb. The underlying wrong here is, unfortunately, not unique: a well-known corporate citizen has engaged in improper conduct in misguided pursuit of its business interests. There is no doubt that this activity caused damage to BNYM's customers, as well as BNYM itself.[1] It should be remembered, however, that this litigation is not one by the *victims* of the corporation for compensation

[1] I note that this decision focuses on whether the Board made a decision, consistent with its fiduciary duties, to refuse the Plaintiff's demand to undertake litigation: it does *not* address the underlying issue in that proposed litigation; whether any BNYM fiduciary was complicit in the corporate wrongdoing that resulted in civil liability. I do not reach that question due to my decision below that the Plaintiff lacks standing here.

against the corporation; to the contrary, it is litigation *on behalf of* the corporation to recover for such compensation and penalties, paid by the corporation, from certain corporate fiduciaries. The (presumed independent and disinterested) Board here has determined that such litigation is likely to be fruitless and is otherwise not in the corporate interest. The Plaintiff has not actively pursued the theory that that decision was taken in bad faith. In order to proceed, under Rule 23.1, he must first plead facts, therefore, that support an inference that the Board was grossly negligent in reaching its decision.[2] That is, he must plead specific facts that, along with reasonable inferences therefrom, if true would create a reasonable doubt that the directors acted in a way consistent with their duty of care in deciding to refuse the Plaintiff's demand. Otherwise, he lacks standing to proceed derivatively.

Here, the Board's actions in response to the demand, facially, were proper. It empowered a committee of independent directors (the "Special Committee") to evaluate the claim and recommend action. The Special Committee hired competent corporate counsel, Cravath, Swain and Moore LLP ("Cravath"), to assist it. Cravath performed an investigation on behalf of the Special Committee and did what appears

[2] *See Espinoza on behalf of JPMorgan Chase & Co. v. Dimon*, 124 A.3d 33, 36 (Del. 2015) (stating that Delaware law is "settled" and "requires that the decision of an independent committee to refuse a demand should only be set aside if particularized facts are pled supporting an inference that the committee, despite being comprised solely of independent directors, breached its duty of loyalty, or breached its duty of care, in the sense of having committed gross negligence").

to be a thorough canvas of witnesses and facts. Cravath later advised the Special Committee through an oral presentation and by providing documents for the Committee's review of the results of its fact-finding. After the presentation and review, the Special Committee found that there was no sound legal basis for any claim and that, in any event, litigation was not in the corporate interest. The Special Committee, accompanied by Cravath, made a presentation to the Board, recommending denial of the demand; and in reliance thereon, the full board refused the Plaintiff's demand. Nothing on the face of this procedure indicates gross negligence.

Once demand was refused, the Plaintiff, to his credit, used vigorous litigation under 8 *Del C.* § 220 to receive documents pertinent to the Board's actions. As a result, the Complaint makes rather detailed allegations. Unfortunately for the Plaintiff, however, the facts alleged cannot clear the high bar of gross negligence. In order to demonstrate that demand refusal was wrongful, the Plaintiff must plead specific facts that, if true and with the reasonable inferences therefrom, create a reasonable doubt that the decision of the Board, *when taken*, was not the product of a valid exercise of business judgment. The Plaintiff makes two substantive arguments. Plaintiff's primary argument is a species of *res ipsa loquitur*; because, years after the demand was refused, wrongdoing and liability were admitted by BNYM in connection with a settlement, the investigation by the Board and Special

Committee—which failed to turn up this wrongdoing—*must* have been grossly negligent. This is a non-sequitur. The fact that a Department of Justice investigation was able to extract a concession of liability from one of BNYM's officers, and the Company itself, years after the Special Committee's investigation, does not itself demonstrate that the Board was grossly negligent in rejecting Plaintiff's demand. The Plaintiff, I note, did not seek a review of the Board's decision following that settlement.

The Plaintiff also attacks the particulars of the Cravath investigation and the Special Committee determination. He points out that, although Cravath conducted a broad review of documents and witnesses, it submitted less than thirty primary documents for the Special Committee to review; in light of the scope of the inquiry, argues Plaintiff, it must be gross negligence for the Special Committee to base its recommendation on thirty documents. Further, within these thirty documents, there were purportedly some neutral documents, along with some "bad" documents, but no exculpatory documents, thus the Plaintiff argues that, on balance, these documents can only support his demand. But the Special Committee based its recommendation on the results of the investigation by Cravath, supplemented, at Cravath's recommendation, by its review of the twenty-eight documents (and, surely, by the Special Committee's own knowledge of BNYM's business). Given the scope of Cravath's investigation, nothing in the facts pled indicates that it was

unreasonable (let alone grossly negligent) for the Board to rely on that investigation or reach the conclusion it did in reliance on the investigation.

Even with all reasonable inferences in the Plaintiff's favor, the fact of the eventual settlement can only indicate that the Special Committee's conclusion was, in part, wrong. It does not imply gross negligence. The motion to dismiss is accordingly granted. My reasoning follows.

I. BACKGROUND[3]

A. The Parties

The Plaintiff, Murray Zucker, is a stockholder of BNYM and has held his shares at all times relevant to liability.[4] He alleges one count of breach of fiduciary duty against all Defendants for "allowing, causing and/or profiting from the Company's foreign exchange . . . practices."[5]

Nominal Defendant BNYM is a worldwide financial services company, incorporated in Delaware.[6] BNYM provides various services to its clients, including foreign currency exchange.[7] Each individual Defendant is a current or former director, officer or employee of BNYM.[8]

---

[3] The facts are drawn from the well-pled allegations of Plaintiff's Verified Derivative Complaint (the "Complaint" or "Compl.") and exhibits or documents incorporated by reference therein, which are presumed true for purposes of evaluating Defendants' motion to dismiss.
[4] Compl. ¶ 13.
[5] *Id.* at ¶¶ 2, 213–218.
[6] *Id.* at ¶ 14.
[7] *Id.* at ¶ 3.
[8] *Id.* at ¶¶ 15–34.

B. Factual Overview

Because my decision turns on the legal question of whether the Plaintiff has adequately pled facts that create a reasonable doubt that the Special Committee complied with its duty of care or duty of loyalty in refusing the demand or in relying on Cravath's investigation, the following overview should be sufficient to orient the reader to the nature and history of this action.

1. The Foreign Exchange Standing Instruction

The underlying conduct precipitating this litigation is the manner in which BNYM operated its foreign exchange practices. BNYM customers were able to participate in "negotiated" or "non-negotiated" foreign currency exchange transactions.[9] Negotiated transactions involved a direct negotiation and agreement on price with Company traders,[10] whereas non-negotiated trades were "completed via the Company's Standing Instruction Service" (the "Standing Instruction").[11] BNYM represented to its clients that its Standing Instruction service followed "best execution standards."[12] However, contrary to representations to clients "that BNYM offered 'best rates,' the Bank gave [Standing Instruction] clients prices that were at or near the worst interbank rates during the trading day or session."[13]

[9] *Id.* at ¶ 3.
[10] *Id.* at ¶¶ 3, 66.
[11] *Id.* at ¶¶ 3, 67.
[12] *Id.* at ¶ 4 (citing Compl. Ex. A (the "Mar. 19, 2015 DOJ Settlement")).
[13] Mar. 19, 2015 DOJ Settlement at 6.

The Company was able to conceal its Standing Instruction practices by "fail[ing] to provide time stamped execution prices."[14] Clients had no reason to know of the deceptive practice, nor did they have means to reasonably detect it.[15] BNYM would charge its Standing Instruction clients "at or near" the least favorable daily rate, and then retain the difference as profits.[16] This process was repeated daily and reports presented to custodial clients gave them no reason to suspect that the rates "were assigned at the end of the day, at the extremes of the trading range for that day, without regard for the actual rate."[17] This practice was in spite of representations to clients that BNYM priced their foreign exchanges "at levels generally reflecting the interbank market at the time the trade is executed . . . ."[18] Internal BNYM analysis showed that during certain periods, the "margin on standing instruction trades was 22.33 basis points" whereas trades placed by telephone netted 2.80 basis points and e-commerce trades netted only 1.18 basis points.[19]

The Company's practices were eventually brought to light and BNYM has been the subject of numerous lawsuits relating to their Standing Instruction practices.[20] Whistleblowers filed suit regarding these practices as early as August

[14] *Id.* at ¶ 54.
[15] *Id.* at ¶¶ 169–171.
[16] *Id.* at ¶¶ 4–5 (citing Mar. 19, 2015 DOJ Settlement).
[17] *See id.* at ¶¶ 89–106.
[18] *Id.* at ¶ 130.
[19] *See id.* at ¶ 76.
[20] *Id.* at ¶¶ 7–8.

2011.[21] Further, the Complaint alleges internal Company communications leading up to the whistleblower actions demonstrate knowledge of the practices among certain individual Defendants.[22] Fines and payments from lawsuits and regulatory actions have cost the company approximately one billion dollars.[23] For example, a March 19, 2015 settlement with the Department of Justice and the New York Attorney General's office required the Company to pay $714 million, which includes $167.5 million to the United States and $167.5 million to the State of New York.[24] As part of that settlement, the Company admitted it gave its "clients prices that were at or near the worst interbank rates reported during the trading day or session."[25] The Company also admitted in the settlement that "many clients did not fully understand the Bank's pricing methodology for [Standing Instruction] transactions" and that many thought the phrase "best execution" meant best price would be "one of the most important factors" in the transaction.[26] Defendant David Nichols also admitted that he knew that the Company's "best execution" and Standing Instruction services, and their true pricing and operation, were not "fully understood" by the market, and that many thought best price would be one of "the most important

[21] *See id.* at ¶ 59.
[22] *See id.* at ¶ 204.
[23] *Id.* at ¶¶ 7–10, 203.
[24] *Id.* at ¶ 9; *see* Mar. 19, 2015 DOJ Settlement.
[25] *Id.* at ¶ 176(d) (quoting Mar. 19, 2015 DOJ Settlement).
[26] *Id.*

factors."[27] Beyond misrepresentations about foreign exchange products, the Complaint alleges that "clients were routinely charged more than their service agreements permitted through hidden expenses."[28]

2. The Special Committee, Refusal Letter and Cravath Investigation

The Plaintiff made a litigation demand on BNYM's Board of Directors on March 9, 2011, requesting an investigation of breaches of fiduciary duty stemming from BNYM's foreign exchange practices.[29] On April 6, 2011, Cravath informed the Plaintiff that the Board had formed the Special Committee to consider the litigation demand.[30]

a. The Refusal Letter

On December 14, 2011 the Company issued its demand refusal letter to the Plaintiff. The refusal letter characterizes the activities of the Board, the Special Committee, and its advisor as follows. The Special Committee concluded that based on its investigation and deliberations, there was "no sound legal basis to assert claims" and that in any event, "such litigation would not be in the best interests of [BNYM]."[31] The refusal letter explained that the Special Committee, composed of three independent directors, unanimously rejected the demand.[32] In April 2011, at

[27] *Id.* at ¶ 177 (quoting Mar. 19, 2015 DOJ Settlement).
[28] *Id.* at ¶ 53.
[29] *Id.* at ¶ 39 (citing Compl. Ex. B (the "Zucker Demand")).
[30] *Id.* at ¶ 180.
[31] Compl. Ex. C at 3 (the "Dec. 14, 2011 Demand Refusal Letter").
[32] Dec. 14, 2011 Demand Refusal Letter at 2.

the direction of the Special Committee, Cravath obtained and reviewed "more than 10,000 internal documents relating to the Company's foreign exchange trading practices."[33] Cravath conducted thirteen interviews of Company directors, current and former senior management officials, and current and former officers in various divisions of BNYM, "most of which were multiple hours in length."[34] These interviews included questions about BNYM's foreign exchange practices and "in particular, the pricing and marketing of the Company's standing instruction product."[35] "On numerous occasions, Cravath requested additional information from persons at the Company and from the Company's outside advisors."[36]

Cravath communicated with the Special Committee throughout its fact-gathering process via regular e-mail communications, and telephonic meetings with the Special Committee on April 11, 2011; June 29, 2011; November 11, 2011 and December 5, 2011.[37] The Chair of the Special Committee provided updates on the Special Committee's "meetings and activities" to the BNYM Board of Directors.[38] Following Cravath "substantially complet[ing] its fact-gathering," an in-person meeting was held between the Special Committee and Cravath on October 31,

[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 2–3.
[38] *Id.* at 3.

2011.[39] At this October 31st meeting Cravath lawyers presented a "detailed overview of their fact-finding and reviewed dozens of documents with the Special Committee."[40] The October 31st meeting lasted approximately four hours; the Special Committee members "asked numerous questions of Cravath," and at the close of the meeting "it was determined that Cravath would perform certain additional work in order to complete the investigation."[41]

On December 5, 2011 the Special Committee met again via phone with Cravath to review the results of the additional work ordered at the October 31st meeting along with "various other matters."[42] The December 5th meeting lasted over an hour.[43] The Special Committee members deliberated and discussed the basis for litigation against current or former BNYM directors or employees, and if there was a basis for a claim whether litigation would be in the Company's best interest.[44] The Special Committee determined that there was "no sound legal basis for any claim, and that litigation would not be in the best interests of the Company in any event."[45] On December 13, 2011 the Chair of the Special Committee and Cravath presented to the Board of Directors the Special Committee's "process, findings, observations

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*

and Recommendations."[46] Non-management directors "discussed the Special Committee's report and asked questions of the Special Committee and Cravath" before the non-management directors unanimously adopted the Special Committee recommendations as resolutions of the Board.[47] Finally, the Board resolved that the Special Committee was to remain constituted for at least one year "during which time it . . . will receive and review any new information which comes to light after the date of [the demand refusal letter] that might bear on the Special Committee's prior work in connection with the evaluation of Mr. Zucker's demands."[48]

b. Plaintiff's New York Litigation

BNYM published an advertisement in the New York Times on October 6, 2011 referencing lawsuits against the Company and stated that such suits "wrongly claim" that the Company has not been truthful, and that "[t]hose claims are flat out wrong and we will fight them in court."[49] This advertisement was published before the Company issued the demand refusal letter to the Plaintiff. Considering the advertisement an "effective refusal," the Plaintiff filed a derivative complaint in New York state court alleging breach of fiduciary duties and that demand was improperly refused.[50] Following the initiation of the New York action, Plaintiff's demand was

[46] *Id.* at 4.
[47] *Id.*
[48] *Id.*
[49] Compl. ¶ 181.
[50] *Id.* at ¶ 41. I note the Plaintiff's briefing on the Motion to Dismiss in this action did not pursue the effective refusal theory and stated, it "barely matters" and was more significant in the New

formally refused on December 14, 2011 via the letter discussed above.[51] The Plaintiff amended his complaint in the New York action twice but, after full briefing and argument, the action was dismissed without prejudice on October 1, 2013 "for failure to adequately plead that the demand was wrongfully refused."[52]

c. The Section 220 Demand and Action

Shortly following the dismissal of Plaintiff's New York action, the Plaintiff made a books and records demand pursuant to Section 220 on October 7, 2013, seeking documents related to Cravath's investigation of his litigation demand and the Special Committee process.[53] After reviewing initial documents produced pursuant to his request, the Plaintiff initiated a Section 220 proceeding in this Court to seek further documents.[54] Ultimately a trial was held before this Court on July 16, 2015, and BNYM was ordered to produce certain additional documents.[55]

d. Alleged Deficiencies in Special Committee Process

Aided by the information gained via the Section 220 demand and trial, Plaintiff's Complaint attacks the particulars of the Special Committee process. Plaintiff's initial critique is that the Special Committee gave up too much control

York action. *See* Pl's Answering Br. 50–51; *see also Kops v. Hassell et al.*, C.A. No. 11982-VCG (Del. Ch. Nov. 30, 2016) (rejecting the "effective refusal" theory).
[51] Compl. ¶ 42.
[52] *Id.* at ¶ 44.
[53] *Id.* at ¶ 45.
[54] *Id.* at ¶¶ 47–48.
[55] *See id.*; July 16, 2015 Trial Tr. at 52–64 (C.A. No. 10102-VCG).

over the investigation to Cravath.[56] Cravath selected the 10,000 documents to review.[57] Cravath conducted each of the thirteen interviews, holding control over whether "pointed questions were asked," and who was interviewed.[58] Certain "people whose conduct was subject to scrutiny" were not interviewed.[59] Only through the Section 220 trial was the Plaintiff able to determine who was actually interviewed.[60]

Regarding the 10,000 documents reviewed, fewer than thirty were reviewed with the Special Committee.[61] Of these thirty, some "either did not shed light on the questions under investigation" or "supported the assertion" that there was misconduct.[62] For example, some documents were organizational charts and checklists.[63] Others purportedly, "point the finger directly at BNYM [and certain individual Defendants] for disseminating to customers documentation that prevent[ed] those customers from understanding the pricing of the [Standing Instruction] transactions."[64] The Complaint critiques various failings regarding the

[56] *See* Compl. ¶¶ 185–87.
[57] *Id.* at ¶ 185.
[58] *Id.* at ¶¶ 186–87.
[59] *Id.* at ¶ 188.
[60] *Id.*
[61] *Id.* at ¶ 190.
[62] *Id.*
[63] *Id.* at ¶¶ 192–93.
[64] *Id.* at ¶ 190. The Complaint alleges that other documents reviewed involved "tinkering" with disclosure language to customers, which in Plaintiff's view was "akin to rearranging the deck chairs on the Titanic in terms of providing real transparency to customers." *Id.* at ¶ 200.

selection and review of particular documents by the Special Committee.[65] The Complaint considers perhaps the "most damning document" reviewed by the Special Committee an email between two individual Defendants which reflects their knowledge of the Standing Instruction's profitability and that when a client trades through an e-commerce platform with full transparency, BNYM's pricing benefits disappear.[66] Finally, the Complaint alleges that within these thirty selected documents, there was "an absence of the kinds of documents one would have expected to see a committee to review if it were going to conclude that even if there had been wrongdoing, it would not have been in BNYM or its shareholder's interest to bring an action against anyone."[67]

C. Procedural History

The Plaintiff filed this derivative complaint on October 20, 2015. The Complaint alleges one count for breach of the fiduciary duties of "good faith and fair dealing, loyalty, candor and due care"[68] against all Defendants for the Company's "foreign exchange practices and in particular with respect to the pricing of [Standing Instruction] transactions and disclosures to customers regarding such pricing."[69] On

[65] *See id.* at ¶¶ 192–206.
[66] *Id.* at ¶ 204.
[67] *Id.* at ¶ 208. The Complaint posits that such documents would have included whether the potential wrongdoers could satisfy a judgment or were covered by insurance, and potential liabilities of the Company stemming from the foreign exchange practices. *See id.*
[68] *Id.* at ¶ 216.
[69] *Id.* at ¶ 214.

November 23, 2015 the Defendants moved to dismiss the Complaint under Rules 23.1 and 12(b)(6). This matter was reassigned to me on April 21, 2016, and I then heard a combined oral argument with a related action on July 26, 2016.[70] This Memorandum Opinion addresses Defendants' motion.

II. ANALYSIS

The Defendants move to dismiss the Complaint under Court of Chancery Rule 23.1, for failure to adequately plead demand refusal, and Rule 12(b)(6) for failure to state a claim. Because I find that the Plaintiff has failed to satisfy the requirements of Rule 23.1, I decline to address Defendants' other grounds for dismissal.[71]

A. Standard of Review

To pursue a derivative claim, a shareholder must satisfy the demand requirement embodied in Delaware Court of Chancery Rule 23.1. The demand requirement exists because it is fundamental under Delaware law that "directors, rather than shareholders, manage the business and affairs of the corporation."[72] Rule 23.1 requires that a plaintiff must "*allege with particularity* the efforts, if any, made

[70] The related action is the Kops action, addressed in a separate letter opinion. *See Kops v. Hassell et al.*, C.A. No. 11982-VCG (Del. Ch. Nov. 30, 2016). The claim arises out of the same conduct by BNYM but a separate opinion is provided to answer the unique issues raised by Ms. Kops' complaint.

[71] I note that the Defendants strenuously advocate that this matter be dismissed due to laches, given the Plaintiff's delay in filing this action. Because I find that the Plaintiff lacks standing to proceed on behalf of the Company, I need not address this issue here.

[72] *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort."[73] Rule 23.1 can be met "by either (1) making a demand on the board to undertake a corrective action or (2) demonstrating that any such demand would have been futile and, therefore, that the demand is excused."[74] Our law recognizes that by making a demand on the board the shareholder "tacitly" concedes that the demand would not have been futile—that the majority of the board was capable of considering and evaluating the demand independently and objectively.[75] Thus, where a plaintiff makes a demand "the analysis and legal standards applicable are necessarily different from the case where a plaintiff is alleging demand would be futile."[76] Where a plaintiff pursues the first path, as the Plaintiff has here, and makes "a demand on the corporation's board and the board refuses that demand, then the plaintiff must demonstrate that the board wrongfully refused the demand."[77]

---

[73] Ch. Ct. Rule 23.1 (emphasis added).
[74] *Friedman v. Maffei*, 2016 WL 1555331, at *8 (Del. Ch. Apr. 13, 2016) (citing *Beam v. Stewart*, 845 A.2d 1040, 1044 (Del. 2004)).
[75] *See Levine v. Smith*, 591 A.2d 194, 212 (Del. 1991) ("A shareholder plaintiff, by making demand upon a board before filing suit, tacitly concedes the independence of a majority of the board to respond.") (citations and internal quotations omitted) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).
[76] *Ironworkers Dist. Council of Philadelphia & Vicinity Ret. & Pension Plan v. Andreotti*, 2015 WL 2270673, at *24 (Del. Ch. May 8, 2015) (citations and internal quotations omitted).
[77] *Friedman*, 2016 WL 1555331, at *8 (citations omitted).

As this Court has explained, "a board's decision to refuse a plaintiff's demand is afforded the protection of the business judgment rule *unless* the plaintiff alleges particularized facts that raise *a reasonable doubt* as to whether the board's decision to refuse the demand was the product of valid business judgment."[78] In assessing whether the decision to refuse demand was the product of a valid business judgment "the only issues to be examined are the good faith and reasonableness of its investigation."[79] Similarly, our Supreme Court has explained that Delaware law on demand refusal is "settled" and "the decision of an independent committee to refuse a demand should only be set aside if particularized facts are pled supporting an inference that the committee, despite being comprised solely of independent directors, breached its duty of loyalty, or breached its duty of care, in the sense of having committed gross negligence."[80]

Regarding the Plaintiff's pleading burden, the "pertinent 'reason to doubt' 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; it is doubt whether the Board's action, wise or foolish, *was taken in good faith and absent gross negligence*."[81] When analyzing a motion to dismiss based on Rule 23.1 the

[78] *Id.* (emphasis added).
[79] *Levine*, 591 A.2d at 212 (internal quotations and citations omitted).
[80] *Dimon*, 124 A.3d at 36.
[81] *Andreotti*, 2015 WL 2270673, at *26 (emphasis in original).

Plaintiff's well-pled allegations are taken as true, but vague or conclusory allegations are not and cannot be sufficient to avoid dismissal.[82] Thus the question here is whether the Plaintiff has alleged facts with particularity sufficient to create a reasonable doubt that the Special Committee and the Board breached fiduciary duties in relying on Cravath's investigation and reaching their conclusions.[83]

B. Plaintiff fails to Support an Inference of Gross Negligence

As this Court has recently explained, when analyzing whether demand was properly refused, "[t]he 'gross negligence' inquiry focuses on whether the directors considered 'all material information reasonably available to them.'"[84] "Gross negligence has been defined as 'conduct that constitutes *reckless indifference* or actions that are without the bounds of reason.'"[85] While the inquiry of whether claims amount to gross negligence is necessarily fact-specific, "[t]he burden to plead gross negligence is a difficult one."[86] The Plaintiff's theory appears to be that "the

[82] *See, e.g.*, *Brehm*, 746 A.2d at 255 ("Plaintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences."); *see also id.* at 254 ("Rule 23.1 is not satisfied by conclusory statements or mere notice pleading."); *Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 553205, at *4 (Del. Ch. Feb. 29, 2008) ("[v]ague or conclusory allegations do not suffice, rather the pleader must set forth particularized factual statements that are essential to the claim") (citation omitted).

[83] I note the Plaintiff's briefing did not clearly pursue a bad faith theory, nor did Plaintiff's counsel at oral argument pursue such theory. Rather the Plaintiff primarily relies on a theory that the Board was grossly negligent in reaching its conclusion, or that in the absence of gross negligence, the Board could not have reached the conclusion it did.

[84] *Friedman*, 2016 WL 1555331, at *10 (quoting *Aronson*, 473 A.2d at 812).

[85] *Andreotti*, 2015 WL 2270673, at *26 n.254 (emphasis added) (quoting *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. Ch. 2008)).

[86] *Dimon*, 124 A.3d at 36 (Del. 2015).

Special Committee either knew of, or in the absence of gross negligence should have known of, the wrongdoing."[87] The Plaintiff's allegations of gross negligence have been somewhat of a moving target in this litigation.[88] To the extent they can be grouped into separate theories, each is addressed in turn. Although I analyze the theories separately, I have considered them in the aggregate, and find no reason to doubt that the Directors complied with their duty of care, based on the facts pled.

1. Cravath and the Special Committee's Failure to Uncover Wrongdoing

The Plaintiff argues that the 2015 foreign exchange settlements with government agencies are "irreconcilable" with the Special Committee's conclusion—adopted by the Board in 2011—that there was no actionable wrongdoing.[89] Much of Plaintiff's argument has focused on Cravath's failure to discover the wrongdoing, and is premised on a *res ipsa loquitur* styled theory—that failure to uncover the wrongdoing is only explainable by gross negligence.[90] When pressed at oral argument how one could conclude, from an admission of wrongdoing

[87] Pl's Answering Br. 18.
[88] I note the Plaintiff concedes he is "not arguing with the amount of information that the Special Committee or Board had when making the decision . . . ." Pl's Answering Br. 40.
[89] *See id.*
[90] *See* Oral Arg. Tr. 24:23–25:4 ("[H]ow is it that [Cravath] can interview these people and look at these documents and say, 'Gee, I don't see any wrongdoing here,' and then a year or two later, somehow the government is able to get these people to say, 'Yes, we did it, we're guilty."); *id.* at 25:11–16 ("I just don't understand how a firm like Cravath who interviewed these people and [could] not get the answers that the government got just a couple of years later. How can Cravath and how can the special committee say, 'Yup, we did a great job.'").

years after the fact, that Cravath should have exposed such conduct, and that the Special Committee was grossly negligent in its reliance on Cravath's investigation, the Plaintiff argued that such a conclusion should be reached "[b]ecause it's an astounding admission that this company made."[91] Plaintiff's briefing follows the same line alleging that "[i]t is unfathomable that if Cravath had interviewed the witnesses, with even a low standard of care, that Cravath would not have learned, and reported to the Special Committee, that key persons to the [Standing Instruction] business had engaged in conduct so egregious that BNYM would have to admit responsibility and pay close to $1 billion to resolve the wrongdoing."[92] Of course, it is the Directors—not Cravath—who are charged with a duty of care, and our statute allows the Directors to rely on advisors.[93] The Defendants argue, for their part, that this theory, "of wrongfulness premised on settlements and large monetary payments," has been repeatedly rejected by this Court and does not create, with the requisite particularity, a reasonable doubt that the Special Committee acted with care.[94]

The applicable question here is not whether the conclusion of Cravath, the Special Committee or the Board was "wrong"; "the question is whether the Board

[91] *See id.* at 27:2–9.
[92] Pl's Answering Br. 39–40.
[93] *See* 8 *Del. C.* § 141(e).
[94] Defs' Reply Br. 18.

was grossly negligent in failing to inform itself, or intentionally acted in disregard of the Company's best interests in deciding not to pursue the litigation the Plaintiff demanded."[95] To inform themselves, the Special Committee hired Cravath to conduct an investigation. Cravath reviewed over 10,000 documents and conducted thirteen interviews of various current and former company officials, most of which were multiple hours in length. The Special Committee met several times with Cravath throughout the investigation, and Cravath asked for additional information from the Company and its outside advisors when necessary. Cravath presented the Special Committee a "detailed overview" of its fact-finding and reviewed specific documents with the Committee.[96] After Cravath substantially completed its fact-finding process, the Special Committee yet again met with Cravath to review the results of additional work the Committee requested of Cravath. At this point, the Special Committee deliberated and reached its conclusions. The Board was given a presentation by the Chair of the Special Committee and Cravath describing the investigative process and conclusions, which the Board adopted following deliberation.

The Plaintiff asks that I look past the steps the Board took via the Special Committee to inform itself, and conclude that based on the existence of large

[95] *Andreotti*, 2015 WL 2270673, at *32.
[96] *See* Dec. 14, 2011 Demand Refusal Letter at 3.

settlements later in time, the Board must have been grossly negligent. That is not our law,[97] nor does it follow logically, in my view, from the facts pled. The steps described above taken by the Special Committee are not consistent with a conclusion that the Special Committee failed to inform itself, or that the investigation was inadequate in scope.[98] The existence and size of the settlement standing alone, in light of the process discussed above,[99] does not raise an inference here that the Board failed to inform itself such that it breached its duty of care.[100] I turn to whether the Plaintiff has created a reasonable doubt that the Special Committee was grossly negligent via his challenges to the particulars of the investigation.

---

[97] *See Andreotti*, 2015 WL 2270673, at *26 (explaining that a plaintiff must plead "particularized facts that reasonably imply gross negligence, in that the board acted in an uninformed manner by failing either to investigate the demand at all or in pursuing such an inadequate investigation, in light of the seriousness of the demand, that a court may reasonably infer a breach of the duty of care").

[98] *See id.*

[99] *See Levine*, 591 A.2d at 214 ("While a board of directors has a duty to act on an informed basis in responding to a demand . . . there is obviously no prescribed procedure that a board must follow.").

[100] The Plaintiff points to a California case, *City of Orlando Police Pension Fund v. Page*, 970 F.Supp.2d 1022 (N.D. Cal. 2013), and argues that, under that court's rationale, "the admissions and acceptances of responsibility alone by BNYM and [an individual Defendant] provide a basis for this Court to find the Litigation Demand was improperly refused." Pl's Answering Br. at 24. This Court has already declined to follow the decision the Plaintiff cites in a demand-refused context. *See Andreotti*, 2015 WL 2270673, at *28. In any event, *Page* is inapplicable here; there, a $500 million forfeiture occurred *before* that board of directors considered the demand, not (as here) years after the Board's decision. *See Page*, 970 F.Supp.2d at 1031 (indicating the committee was aware of the $500 million forfeiture at the time it rejected the stockholder's demand).

2. Specifics of the Investigative Process

The Plaintiff asserts that the sampling of documents reviewed by the Special Committee evinces gross negligence. The Plaintiff argues that, subsequent to the production under Section 220, he now "knows exactly what was reviewed with the Special Committee, [and] Plaintiff is in a position to show that it could only have been because of gross negligence that the Special Committee could have concluded that there was no wrongdoing at BNYM."[101] The Plaintiff points out that the Special Committee reviewed fewer than thirty documents.[102] "[W]here the Special Committee only reviews [twenty-eight] documents, one would think that, absent gross negligence" they could not reach the conclusion of no wrongdoing when some documents were neutral but others were "inconsistent with the conclusion that there was no wrongdoing."[103] The Plaintiff alleges some documents show certain Defendants knew that BNYM reaped benefits by not having full transparency in its Standing Instruction service, and asserts that "it is unreasonable to believe that anyone reviewing these documents could have concluded that there was no wrongdoing."[104] Further, the Plaintiff asserts that the documents selected by Cravath do not bear at all on the second conclusion reached by the Special Committee: that

[101] Pl's Answering Br. 27.
[102] *Id.*
[103] *Id.* at 28.
[104] *Id.* at 34.

assuming actionable wrongdoing, it was nonetheless not in the Company's interests to pursue an action.[105] Thus the Plaintiff concludes, "considering the evidence gathered, . . . the documents shown to the Board . . . , without gross negligence, could not have resulted in the determination that was reached . . . ."[106]

The Defendants argue that criticisms of the nature and number of documents reviewed cannot support a finding of gross negligence, and that the arguments "simply reflect [Plaintiff's] disagreement with the substance of the Board's decision" which is protected by the business judgment rule.[107] Additionally, the Defendants assert that the Plaintiff "has not demonstrated any basis for focusing entirely on the documents reviewed by the Committee and discounting the substantially broader review of documents by the Committee's counsel, Cravath."[108]

Generally, 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.[109] This Court has noted in past decisions that choices regarding which

---

[105] *Id.*

[106] *Id.* at 35. I note the Plaintiff folds back in his *res ispa loquitur* argument while challenging the specifics of the investigation—he asserts that "any remaining doubt should be washed away when the Court considers the investigation conducted and the result reached in light of the admissions of wrongdoing" in the Department of Justice settlement. *Id.* at 36.

[107] *See* Defs' Reply Br. 24–25.

[108] *Id.* at 25.

[109] *See Belendiuk v. Carrion*, 2014 WL 3589500, at *6 (Del. Ch. July 22, 2014) ("This Court repeatedly has held that a stockholder's criticisms regarding the types of documents reviewed or the persons interviewed in connection with an investigation do not rise to the level of gross negligence, because those choices are ones on which reasonable minds may differ.").

documents or interview subjects are appropriate to an investigative process are a matter of business judgment.[110] Here, the Plaintiff has properly utilized Section 220 to investigate the refusal of his demand and determine the universe of documents before the Special Committee when they made their decision. He argues that a review of those documents creates a reasonable doubt the Board complied with its duty of care. Again, the applicable question here is not whether the conclusion of the Special Committee ultimately proved correct, but rather, under the specific facts pled has the Plaintiff created a reasonable doubt as to the Board's compliance with its fiduciary duty of care.[111]

As a threshold matter, the "informed decision to delegate a task is as much an exercise of business judgment as any other."[112] There has been no allegation that the selection of Cravath was conflicted or otherwise improper. Cravath conducted the investigation previously discussed in this Memorandum Opinion, and directed the fact-finding process. I credit this step as one the Special Committee took to avail

---

[110] *See, e.g., Mount Moriah Cemetery v. Moritz*, 1991 WL 50149, at *4 (Del. Ch. Apr. 4, 1991) ("In any investigation, the choice of people to interview or documents to review is one on which reasonable minds may differ. This is especially so in a case such as this, where the challenged conduct covers a period of more than ten years. Inevitably, there will be potential witnesses, documents and other leads that the investigator will decide not to pursue. *That decision will not be second guessed by this Court on the showing made here*.") (emphasis added).

[111] *See Andreotti*, 2015 WL 2270673, at *25 ("In order to survive a motion to dismiss under Rule 23.1 in the demand-refused context, a plaintiff must point to a pleading of particularized facts which, taken as true, raise a reasonable doubt that the refusal was a valid exercise of business judgment.").

[112] *Grimes v. Donald*, 673 A.2d 1207, 1214 (Del. 1996) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

itself of available information.[113] The Special Committee received a presentation from Cravath of the results of the firm's fact-finding and the Committee reviewed the twenty-eight documents.

The Plaintiff's Complaint lays out the various documents reviewed, including a document that the Plaintiff finds to be the most "damning."[114] That "damning" document is troubling; it is an email between two individual Defendants and reflects their knowledge that the Standing Instruction gave "traders a free intra-day option to time" the trade, and opines that when a client trades through a different platform, with full transparency, BNYM's pricing benefits disappear.[115] In light of this document, the Complaint concludes that the "Special Committee must have agreed that it is acceptable to be non-transparent if it increases the profitability of [BNYM]"—that is, the Special Committee acted in bad faith;[116] or that it acted in conscious disregard of the evidence before it. But the Special Committee's conclusion was necessarily based on all the information before it, including Cravath's presentation. The existence of one or a few troubling documents is insufficient for me to infer bad faith or gross negligence on the part of the Special

[113] And a reasonable step at that; there are no well-pled allegations creating a reasonable doubt that the Committee was grossly negligent in the sense that they overly-delegated to Cravath, or in their selection of Cravath. The Committee remained an active participant in the process, deliberated, and reached its ultimate conclusion.
[114] Compl. ¶ 204.
[115] *Id.*
[116] *Id.*

Committee in reaching the decision not to proceed with legal action. While the process used to reach that conclusion is subject to review, unless that process is shown to rise to gross negligence or bad faith, the conclusion itself is subject to business judgment protection. The fact that the Committee had before it certain "bad" documents is, obviously, not entirely inconsistent with the Committee's conclusion—one would expect that in a presentation of its findings Cravath would put before the decision-maker the documents of greatest concern. It is the Committee's prerogative to evaluate such documents, along with *all* of the other work it or Cravath performed, and then employ its business judgment to reach its conclusion.

That is not to say there are no circumstances where a document would be so incriminating or a process would be so deficient such that the business judgment rule would be rebutted.[117] Here, however, the Plaintiff has not pled facts sufficient to create a reasonable doubt that the Defendants breached fiduciary duties, in that the process and conclusion of the Special Committee were so deficient as to be grossly negligent.

---

[117] *See, e.g.*, *Belendiuk*, 2014 WL 3589500, at *7 (analyzing demand refusal cases where a plaintiff has succeeded and stating such cases "illustrate the *specificity* of the allegations and the *egregiousness* of the conduct that this Court has found rises to the level of wrongful refusal") (emphasis added); *Andreotti*, at *26 n.255 (Del. Ch. May 8, 2015) ("[F]ailure to conduct a thorough investigation could, *if sufficiently egregious*, support a reasonable inference of gross negligence.") (emphasis added).

The Plaintiff, in an attempt to buttress the facts he actually pled, seeks an inference in his favor arising from the fact that Cravath gave an oral presentation, and not a written report, to the Special Committee. He argues that, because there was no written report (which I note is not required by Delaware law),[118] and because the information produced via the Section 220 action was heavily redacted, I should infer such redacted documents are *not* consistent with the Special Committee's conclusion.[119] I recognize the tension created by the Plaintiff's redaction argument. He partially prevailed in a contested Section 220 action, and argued successfully that certain information provided by Cravath to the Special Committee must be produced despite allegations of attorney-client privilege and work product.[120] When those documents, including notably Cravath's talking points used in its oral presentation, were produced, they were heavily redacted. The Plaintiff seeks an inference that the redacted material would support his gross negligence argument. While I have before me a clear description of the work performed by Cravath and the Special Committee and the conclusion reached by the Special Committee, much that occurred between the process and the conclusion is not before this Court. The Plaintiff argues that, if

[118] *Gatz v. Ponsoldt*, 2004 WL 3029868, at *5 (Del. Ch. Nov. 5, 2004) (noting "there is no authority that suggests that Delaware law requires a formal 'report' as a matter of law").
[119] *See, e.g.*, Pl's Answering Br. 41 ("It is only to the extent that the talking points have been redacted, that the Plaintiff has not been able to make specific allegations regarding those and urges the court to *make inferences against the Defendants* so that Defendants cannot use privilege as a shield and a sword.") (emphasis added).
[120] *See* July 16, 2015 Trial Tr. at 52–64 (C.A. No. 10102-VCG).

the inference he requests is not granted, the result will be an incentive to directors to eschew written reports in favor of oral presentations beyond the review of stockholders. The place to have addressed such a potentially-perverse incentive, however, is not here, in the face of the Plaintiff's burden to show wrongful refusal; it was at the Section 220 phase of the litigation. If the Plaintiff believed the redactions were such that he could not effectively evaluate the actions of the Special Committee, he should have sought relief there. In that forum, I could evaluate the competing interests involved. Given the facially-reasonable process engaged in here by the Special Committee and its advisor (and given the candid statement from related-Plaintiff's counsel that the choice not to object to the Defendants' redactions was tactical)[121] the inference that the Plaintiff seeks is inappropriate, and I decline to employ it here. "The burden is on the derivative plaintiff . . . to refute the presumption of a valid exercise of business judgment on the part of the board."[122] The Plaintiff here has failed to meet his burden.

---

[121] *See* Oral Arg. Tr. 71:8–20 ("THE COURT: You'll have to remind me, I don't believe there was litigation about the redactions, was there? MR. NESPOLE: No. We did not move to compel the production of the redacted material once Your Honor gave us access to materials because I figured enough is enough already, we need to proceed. I didn't think I was going to get it anyway because they would make a strong attorney-client privilege argument, and we'd get bogged down again for another year on that. We thought we had enough to proceed with the complaint we filed concerning the process."). I note that Mr. Nespole is Carole Kops' counsel, however, the Section 220 action in which these documents were produced was administratively consolidated with Mr. Zucker's Section 220 action and his counsel similarly failed to challenge such redactions.

[122] *Andreotti*, 2015 WL 2270673, at *25

3. The Special Committee's Failure to Revisit its Conclusions

The Plaintiff points out that the Special Committee has not reevaluated his demand, subsequent to the 2015 foreign exchange settlement; he argues that the "failure [by the Special Committee] to revisit its conclusions when superior information came to light is a further sign of unreasonableness."[123] The Plaintiff, however, did not renew his demand once that settlement became public. Nonetheless, he points to language in the demand refusal letter which indicated that the Special Committee would remain constituted (for at least a year) to review new information that came to light after the refusal and evaluate the remedial measures implemented by management.[124] The Plaintiff asserts that even if the decision to refuse the demand was reasonable when made in December 2011, subsequent developments rendered it unreasonable and the Special Committee had a duty to revisit its conclusion. The Defendants assert that no duty exists in the law requiring a board of directors to revisit conclusions after rejecting a demand, and emphasize that the Plaintiff never asked the Special Committee or Board to revisit their conclusions.

I find no general duty for a board to revisit prior demands in perpetuity once conditions change, although nothing prevents a stockholder from making a new

[123] Pl's Answering Br. 20, 32 n.20.
[124] *See* Dec. 14, 2011 Demand Refusal Letter at 4.

demand based on those changed circumstances. To the extent that the Plaintiff argues that the language in the demand refusal letter itself imposes a fiduciary duty on the Board to, *sua sponte,* revisit its prior conclusions, I find no such self-imposed duty; the logic of Rule 23.1 and its protection of director supremacy are inconsistent with such a result. In any event, to my mind, the language of the demand-refusal letter did not imply that the Defendants meant to take on such a duty. The fairest reading of the language is that the Committee would stay constituted to review further demands—as they did here, as an administrative efficiency for the Corporation. Such review is the subject of a Letter Opinion in the companion case to this matter, *Carole Kops v. Gerald Hassell et al.*,[125] also issued today.

C. Plaintiff fails to Support an Inference of Bad Faith

While the Plaintiff drops fleeting references to allude that the investigation was not conducted in good faith, his major challenge is that the investigation was grossly negligent—or more precisely that in the absence of gross negligence Cravath and the Special Committee could not have reached the conclusions they did. Passing allegations of bad faith included that "the [S]pecial [C]ommittee either *knew of*, or in the absence of gross negligence should have known of, the wrongdoing."[126] However, "[d]emonstrating that directors have breached their duty of loyalty by

[125] C.A. No. 11982-VCG (Del. Ch. Nov. 30, 2016).
[126] Pl's Answering Br. 18 (emphasis added).

acting in bad faith goes far beyond showing a questionable or debatable decision on their part."[127] Such allegations are absent here. To the extent the Plaintiff has not waived an argument that the Defendants acted in bad faith, I find no well-pled allegations rising to support a reasonable doubt that the Board was acting in good faith.

III. CONCLUSION

Because I find that the Plaintiff has failed to meet his pleading burden under Rule 23.1, he lacks standing to bring this action; accordingly, Defendants' Motion to Dismiss is granted. A Final Order accompanies this Memorandum Opinion.

[127] *Andreotti*, 2015 WL 2270673, at *27; *see id.* (quoting *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755-56 (Del. Ch. 2005) ("A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.")).

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MURRAY ZUCKER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 11625-VCG
	)	
GERALD L. HASSELL, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
THE BANK OF NEW YORK MELLON CORPORATION,	)	
	)	
Nominal Defendant.	)	

Order

AND NOW, this 30th day of November, 2016,

The Court having considered Defendants' Motion to Dismiss, and for the reasons set forth in the Memorandum Opinion dated November 30, 2016, IT IS HEREBY ORDERED that Defendants' Motion is GRANTED.

SO ORDERED:

/s/ Sam Glasscock III

Vice Chancellor