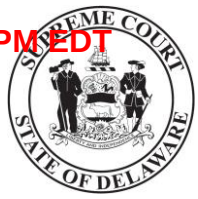

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IRONWORKERS DISTRICT COUNCIL OF PHILADELPHIA & VICINITY RETIREMENT & PENSION PLAN,

Plaintiff Below,
Appellant,

v.

LAMBERTO ANDREOTTI, BART BAUDLER, JOHN BEDBROOK, SAMUEL W. BODMAN, JAMES BOREL, RICHARD H. BROWN, ROBERT A. BROWN, DENNIS BYRON, BERTRAND P. COLLOMB, THOMAS M. CONNELLY, DANIEL J. COSGROVE, CURTIS J. CRAWFORD, ALEXANDER M. CUTLER, JOHN T. DILLON, ELEUTHERE I. DU PONT, ERIK FYRWALD, MARILLYN A. HEWSON, CHARLES O. HOLLIDAY, ROBERT C. IWIG, DANIEL E. JACOBI, LOIS D. JULIBER, JEFFREY L. KEEFER, ELLEN KULLMAN, MICHAEL LASSNER, TRACY LINBO, CARL J. LUKACH, JUDITH MCKAY, WILLIAM NIEBUR, DEAN OESTREICH, WILLIAM K. REILLY, THOMAS L. SAGER, PAUL SCHICKLER, JOHN SOPER, LEE M. THOMAS, PATRICK J. WARD,

Defendants Below,
Appellees,

and E. I. DU PONT DE NEMOURS AND COMPANY,

Nominal Defendant.

No. 286,2015 D

Court Below: Court of Chancery of the State of Delaware

C.A. No. 9714-VCG

PUBLIC VERSION

PLAINTIFF BELOW, APPELLANT'S OPENING BRIEF

PINCKNEY, WEIDINGER, URBAN & JOYCE LLC
Joanne P. Pinckney (DE No. 3344)
Elizabeth Wilburn Joyce (DE No. 3666)

REDACTED PUBLIC VERSION
FILED: AUGUST 7, 2015

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Dated: July 23, 2015

REDACTED PUBLIC VERSION
FILED: AUGUST 7, 2015

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NATURE OF THE PROCEEDINGS

This derivative action arises out of the refusal of a stockholder demand by the Board of Directors of E.I. DuPont de Nemours & Co. ("DuPont" or the "Company") that the Board investigate and rectify wrongdoing by the Company's directors and officers. Specifically, on December 21, 2012, a stockholder served a Rule 23.1 and Section 220 demand on the DuPont Board, relating to: (i) DuPont's development, marketing and public disclosures associated with its GAT ("GAT") herbicide resistant product, events which precipitated litigation with the Monsanto Company ("Monsanto"), (ii) misconduct during the Monsanto litigation resulting in severe sanctions against DuPont (the "Sanctions Order"),[1] and (iii) the jury returning a billion dollar verdict and judgment against the Company. ¶236 (A123-24).[2] DuPont ultimately settled with Monsanto (¶238 (A124-25)) for a minimum of $1.75 billion, but the Company and its stockholders were never compensated for the fiduciary breaches and other misconduct, nor were any of the wrongdoers held accountable.

On January 21, 2013, the Company expanded the scope of an evaluation committee (the "Committee"), previously formed to investigate allegations made by Monsanto, to include the stockholder claims, but the Board retained authority to

[1] Memo. & Order, *Monsanto Co. v. E.I. Du Pont de Nemours & Co.*, 2011 U.S. Dist. LEXIS 158214, 4:09-cv-00686-ERW (E.D. Mo. Dec. 21, 2011), ECF No. 1662.
[2] Record citations refer to the Appendix filed simultaneously herewith. The Complaint is cited as "Compl. at __" for page cites and "¶__" for paragraphs.

accept or refuse the demand. ¶249 (A130). In a January 17, 2014 letter, Plaintiff Ironworkers District Council of Philadelphia & Vicinity Retirement & Pension Plan ("Ironworkers" or "Plaintiff") lodged a demand (the "Demand"), which is substantively identical to the earlier demand. ¶242 (A127-28). The Committee issued a report dated November 21, 2013 (the "Report") recommending the Board reject the earlier demand.[3] ¶256 (A132). On January 28, 2014, the Board rejected the earlier demand, and provided the Report to Plaintiff. ¶244 (A128). After acknowledging its receipt and referring it to the Board, the Company never responded to Plaintiff's Demand, and it is deemed refused. ¶244 (A128); Ex. A at 65.[4]

Plaintiff filed suit in the Court of Chancery on May 29, 2014 (A21, D.I. 1) and amended its complaint on September 12, 2014 (*Id.* at A9, D.I. 60) (the "Complaint"). After briefing and argument on Defendants' motions to dismiss, the Court of Chancery (the "Trial Court") issued its Opinion and ordered dismissal. This appeal followed.

[3] In their Opening Brief seeking dismissal, Defendants offered to provide the Trial Court with copies of the attachments to the Report. A193 n. 3. The Trial Court did not request and Defendants did not submit the attachments to the Report for inclusion in the record.

[4] The Memorandum Opinion (the "Opinion") dated May 8, 2015 is attached hereto as Exhibit "A" and hereafter cited as "Op. __."

SUMMARY OF THE ARGUMENT

I. The Trial Court Made Reversible Errors in its Application of the Demand Refusal Standard.

1. The Trial Court Failed to Apply the Correct Demand Refusal Standards.

a) The Trial Court Failed to Accept Plaintiff's Allegations as True and Give it the Benefit of Reasonable Inferences.

b) The Trial Court Erroneously Held Plaintiff to a Higher Pleading Standard Than the Law Allows.

c) The Trial Court Erroneously Presumed Plaintiff had Conceded the Independence of the Board *Ex Post.*

d) The Trial Court Improperly Disregarded Plaintiff's Citation to *Zapata* Cases.

2. Based on the Foregoing Errors, the Trial Court Erroneously Found the Board's Decision to Reject the Demand was Fully Informed, Reasonable, and Made in Good Faith.

a) The Trial Court Approved the Board's Reliance on the Report Notwithstanding Facts and Omissions Particularized in the Complaint Giving Rise to a Duty to Inquire.

b) The Trial Court Ignored Particularized Allegations of Red Flags.

c) The Trial Court Ignored Particularized Allegations Regarding the Integral Roles of Holliday and Kullman.

d) The Trial Court Failed to Address the Consequences of Board Members Kullman and Eleuthere Keeping the Board in the Dark About the Sanctions Order.

e) The Board did not Conduct A Reasoned Cost-Benefit Analysis.

REDACTED PUBLIC VERSION
FILED: AUGUST 7, 2015

STATEMENT OF FACTS

A. DuPont and the Product at Issue

One of DuPont's primary businesses is developing products that increase agricultural yields, including herbicides and products that make plants resistant to those same herbicides, such as GAT. ¶¶3 (A32), 90 (A58). The Company's agriculture business is largely run through its wholly-owned subsidiary Pioneer Hi-Bred International, Inc. ("Pioneer"). ¶1 (A30); *see* ¶¶31-32 (A41-42). Monsanto, which owns Roundup® ("Roundup") and Roundup Ready ("RR"), a gene trait used to make crops resistant to Roundup, is among DuPont's chief competitors. ¶¶3 (A32), 91 (A59).

B. The Director and Officer Defendants[5]

A majority of the individual Defendants (including current directors Robert A. Brown, Richard H. Brown, Bertrand P. Collomb, Curtis J. Crawford, Alexander M. Cutler, Eleuthere I. du Pont ("Eleuthere"), Marillyn A. Hewson, Lois D. Juliber, Ellen Kullman, and former directors John T. Dillon, Charles O. Holliday, and William K. Reilly are long-tenured directors, having served on the Board during the time period pertinent to DuPont's competition with Monsanto, its development of GAT, and the Monsanto Litigation. ¶¶33-49 (A42-46), 72-82 (A51-55), 100-104 (A62-64), 133 (A78), 137 (A79-80), 159-161 (A90-91), 172-

[5] The Defendants named in ¶¶31-49 (A41-A46) of the Complaint are referred to as the "Director Defendants."

173 (A94-95), 239 (A125-26), 265-275 (A136-42). The Complaint provides detailed factual allegations regarding each of the Director Defendants' positions, duties, tenure and service on committees, as well as the number of times the relevant committees met. ¶¶30-87 (A40-58), 161 (A90-91), 239 (A125-26), 302 (A156). The Director Defendants served on the Board together for many years, and held positions on the Audit, Science and Technology, and Strategic Direction Committees, which had additional oversight duties for the Company. ¶¶33-50 (A42-46), 161 (A90-91). Certain Officer/Employee Defendants[6] were members of the Core GAT Team, were responsible for GAT development, and reported to senior management. ¶¶51-71 (A47-51), 109 (A66-67), n.20 (A67), n.22 (A68), n.23 (A74), 132 (A77-78), 147 (A84-85), 165 (A92).

C. DuPont Lacked Rights to "Stack" its Product With RR

In 2002, DuPont entered into non-exclusive license agreements with Monsanto for the right to use RR (the "2002 License Agreements"), which prohibited DuPont from combining traits of RR with DuPont's own products ("stacking") to circumvent the payment of licensing fees to Monsanto. ¶¶4 (A33), 8-9 (A33-34), 11 (A35), 92-95 (A59-61), 148 (A85). Internal emails from the Company's principal negotiators with Monsanto in 2002 show that the Company *knew* it had not negotiated for stacking rights in the 2002 License Agreements.

[6] The Defendants named in ¶¶51-70 (A47- A51) of the Complaint are referred to as the "Officer Defendants" or the "Officer/Employee Defendants."

E.g., ¶¶93-99 (A60-62), 125 (A75), 127 (A75-76), 139 (A81), 147-48 (A84-85), 163 (A91-92), 165 (A92), 168-71 (A93-94), 202 (A108), 289-90 (A148-40); *see* A323-31. From 2005 through 2007, DuPont tried to develop its own gene trait, GAT, to compete with RR. ¶¶2 (A31-32), 5-6 (A33), 100-104 (A62-64), 107 (A66); A303-04. By 2007, however, DuPont's internal trials determined that GAT was a failure. ¶¶108-113 (A66-69); A304-11. DuPont did not disclose the negative trials and continued an extensive public campaign to tout GAT as a lucrative product in the Company's pipeline. ¶¶7 (A33), 108 (A66), 114-17 (A69-71), 121-22 (A73-74), 129 (A76), 156-158 (A88-90), 174-78 (A95-97), 214 (A114), 314 (A162-63), 316 (A163-64).

Between July 2007 and January 2008, numerous members of the Company's senior management were discussing internally giving up on GAT as a stand-alone product and instead stacking GAT with RR. ¶¶119 (A72), 124-27 (A74-76), 130 (A76-77), 134 (A78), 138 (A80-81), 144-46 (A83-84), 177 (A97), 193 (A104), 197 (A106-07), 199 (A107), 310-11 (A159-61); *see* A311-17, A323, A729. However, as early as 2007, certain Defendants *knew* that DuPont did not have the right to stack: for example, on September 20, 2007, in response to an inquiry from [redacted] as to whether the Company could stack GAT with RR, [redacted] responded in an email that DuPont "can stack but *no* commercial rights." ¶¶127 (A75), 289-90 (A148-49); A327, A732-34. Six years

later, the Committee concluded that the [redacted] 2007 email was "shorthand" and that [redacted] had really "concluded that Pioneer had the right to commercialize the stack…." ¶¶289-90 (A148-49); A327, A733.

Nevertheless by January 2008, the Company had in fact abandoned GAT as a standalone product in favor of stacking GAT in violation of the 2002 License Agreements. ¶¶119 (A72), 120 (A72-73), 125-27 (A75-76), 130-31 (A76-77), 134 (A78), 138 (A80-81), 142-46 (A82-84), 310-11 (A159-61); *but cf.* A316, A402-03, A729-30. The Company's 2008 internal soybean Annual Report states [redacted] ¶¶145 (A81), 311 (A160-61); A730 (emphasis added). The Committee concluded "the evidence demonstrates that Pioneer had not abandoned the GAT standalone product in early 2008." A402; ¶311-12 (A160-62).

Meanwhile, during the very same time period, the Company was *negotiating* with Monsanto *for the right to stack GAT with RR*. ¶¶107 (A66), 138 (A80), 141-46 (A81-84), 162-173 (A91- 95); A319-23 (negotiations in 2006 and 2007); A331-32 (company initiates "Project Green" in late 2007 or early 2008 to negotiate soybean stacking rights); A333-35 (negotiations in 2008); A337 (parties began a contractually-mandated mediation in December 2008 and participated in formal mediation on May 4, 2009); A732. In other words, it was negotiating for rights it

did not then have. In August 2008, Monsanto offered to provide the Company "a full suite of rights," including stacking rights, for $1.5 billion, but the Company rejected this offer. ¶¶171-72 (A94), 297 (A153-54); A335.

D. The Monsanto Litigation and the Sanctions Order

In May 2009, Monsanto sued the Company for breach of the 2002 License Agreements and patent infringement caused by the GAT/RR stack (the "Monsanto Litigation"). ¶¶11 (A35), 203-41 (A109-27); A337-38. The United States District Court for the Eastern District of Missouri (the "District Court") ruled that the 2002 License Agreements were unambiguous and did *not* permit the Company to stack GAT with RR. ¶215 (A115); *see* A344-35. On December 21, 2011, the District Court issued the Sanctions Order against DuPont and its subsidiary, Pioneer, (under seal) for "egregious" behavior; the factual findings in the order were directly adverse to DuPont's litigation position, including, for example, that DuPont "repeatedly and systematically made and continued to make false misrepresentations to the Court about their subjective beliefs regarding stacking rights and restrictions" and "intentionally made statements to the Court that are directly contradicted by facts," including internal documents produced by DuPont in the Monsanto Litigation and relied upon in the Complaint. ¶¶215 (A115), 230-

232 (A121-22); A349-50; *see* A726, 736-38.[7] The Sanctions Order was later affirmed in substantial part by the United States Court of Appeals for the Eighth Circuit, which held that the Company "had abused the judicial process and acted in *bad faith* by making affirmative factual misrepresentations" to the District Court. ¶241 (A127) (emphasis added). The Committee, however, concluded that the findings of both federal courts with respect to the Sanctions Order were wrong. ¶18 (A37); A356-93.

DuPont and Monsanto agreed to a partial unsealing of the Sanctions Order so it could be shared with Kullman, Borel, Sager, Schickler, Eleuthere, and lawyers Justin Miller (Deputy Chief IP Counsel) and McKay (Pioneer General Counsel), but not the whole Board. ¶¶299-300 (A155-56); A350-51; *see* A726, 736-38. The Company relied on the protective order in the Monsanto Litigation and this limited unsealing to avoid full Board disclosure, yet nothing in that protective order restricted a party's use of its own confidential information, and there was no Monsanto confidential information in the Sanctions Order. ¶¶299 (A155), 301 (A156). The litigation continued; the Board was involved in strategy discussions and informed of pre-trial settlement negotiations (which ultimately failed), but was not informed of the Sanctions Order. A352, 354-55, A739-40. At the same time,

[7] The District Court found that the emails examined in the Sanctions Order "demonstrates that Defendants were aware of the stacking restrictions." ¶292 (A150) (citing the Sanctions Order at 18-19).

the Board was advised [redacted] ¶¶305-307 (A157-58). The Report, as described below, did not analyze the legal, strategic, internal control, or other consequences of withholding the Sanctions Order from the Board.

In August 2012, a jury found DuPont had willfully infringed Monsanto's patent, and the District Court issued a $1 billion judgment against it (the "Judgment"). ¶236 (A123-24); A355. After the verdict, DuPont and Monsanto settled, and DuPont agreed to pay Monsanto a minimum of $1.75 billion. ¶238 (A124-25); A356-58. The settlement did not include resolution of the Sanctions Order. ¶238 (A124-25). In November 2012, the Sanctions Order was unsealed for all purposes and the full Board learned of its contents. ¶¶215 n.29 (A115), 232 (A122), 306 (A158); A356.

E. The Committee and its Report

In September 2012, after the Judgment, the Board appointed an "Evaluation Committee" of two to investigate Monsanto's allegations regarding Defendants' misrepresentations concerning GAT. ¶¶16 (A36-37), 245-47 (A129); A247-50. The Board later expanded the investigation to include stockholder demands.[8]

[8] The Committee was charged with considering the pending stockholder demands, in addition to the allegations of a stockholder derivative action against DuPont filed in the United States District Court for the District of Delaware (the "Zomolosky Action") arising out of substantially the same facts as this action. DuPont moved to dismiss the Zomolosky Action on grounds of *demand futility*. A246-47.

¶¶242-49 (A127-30); A248. On November 21, 2013, the Committee issued a Report, which the Board relied on to refuse the stockholder demands in January 2014. ¶256 (A132).

The Committee concluded that "pursuing the claims in the [d]emands and the [Zomolosky] Complaint is not in the best interest of the Company and its shareholders because (1) none of the claims has factual or legal merit; and (2) even if they did, the costs and risks of pursuing litigation far outweigh any potential benefit." A244, A414.

The Complaint alleges that the Committee's investigation was flawed for a number of reasons, including the following: the Committee, through its counsel, interviewed 23 individuals, but elected not to interview current CEO/Board Chair Kullman and former CEO/Board Chair Holliday, who were key individuals responsible for communicating with the Board and DuPont's investors. ¶¶114 (A69-70), 116 (A70-71), 120 (A72-73), 132 (A77-78), 160 (A90), 174 (A66), 176 (A95), 201 (A108), 205 (A110), 212 (A114), 299 n.72 (A55); *see* A243-44, A255-57; A727. Kullman and Holliday were key witnesses and the Chairs of the Board with unique knowledge and perspective unavailable through any of the other witnesses interviewed by the Committee or the Monsanto Litigation transcripts it reviewed; the Report affirms their importance in contending that Holliday and Kullman were advised of the stacking strategy and the likelihood of litigation with

Monsanto on October 31, 2008, despite the fact that the Board was not advised until May 15, 2009. A336, A379; ¶¶201 (A108), 204 (A109); A727, A748-49. Kullman and Holliday were the repositories of the Company's institutional information about GAT, dating back to the inception of the GAT program, and their knowledge included the parameters of the licensing agreements. ¶216 (A115). Kullman served as the legal liaison to the Board regarding litigation status, strategy, and negotiations, and was the sole Board member to receive trial updates directly from counsel. A346, A355, A360. Holliday received reports about GAT concerns in July 2007. A309. Ultimately, the Committee's recommendation relied upon undisclosed, after-the-fact interviews excluding Kullman and Holliday and which also contradicted contemporaneous documents and sworn testimony. ¶309 (A159); A728-29.[9]

The Committee devoted nearly 40 pages of its Report to the Company's alleged extensive internal controls to support its recommendation to refuse the Demand. ¶¶265-81 (A107-45); A257-81; *see* A408-18; A727-28. Absent from the Report is any analysis whatsoever of the breakdown of controls that resulted in the Board remaining ignorant of the stacking strategy and dispute with Monsanto from 2006 until May 15, 2009, or the Sanctions Order, when the Company was involved in high-stakes litigation and related settlement negotiations with its chief

[9] The Report also relied on information not made available to Plaintiff through its Section 220 demand.

competitor. ¶¶204 (A109), 265 (A136), 268 (A138), 274 (A141), 277 (A142-43), 279 (A144), 282-307 (A146-58), 325 (A167); A336, A352, A354-55, A760-61. The Report states that a May 15, 2009 email update from Kullman to the Board reporting that Monsanto had filed suit "was *the first time* the Board had been informed of the GAT stacking strategy and/or the dispute with Monsanto regarding the same," but includes no analysis of this failure to inform. ¶265 (A136-37), 277 (A142-43), 325 (A167); *see* A335, A338 (emphasis added). Instead, the Committee found that "there were no red flags" regarding the failures of GAT, the high potential for litigation with Monsanto, and ultimately the Sanctions Order, and acknowledges these issues "were not raised at the Board level." A408-09, n.587; ¶265 (A136-37). In contrast, the Complaint alleges that there were significant "red flags under not just one, but several of the Company's own risk management policies." ¶265 (A136-37). The Committee conducted no meaningful analysis to determine the actual costs and burdens the litigation would impose on the Company. ¶¶258-63 (A132-35); A742-43, A756-57, A414.

Although the Company agreed to pay Monsanto a minimum of $1.75 billion under the global settlement reached between DuPont and Monsanto subsequent to the verdict, the Committee concluded, without explanation, that "there was no litigation gain or loss" as a result of the Judgment and that it had no negative impact on the Company. ¶19 (A37-38); A364.

ARGUMENT

I. The Trial Court Made Reversible Errors in its Application of the Demand Refusal Standard.

A. Question Presented.

Did the Trial Court err by misapplying the Rule 23.1 demand refusal standard and holding Plaintiff to a higher standard than the law requires? Plaintiff preserved this issue for appeal in its Answering Brief filed November 19, 2014 (A463-65) and at oral argument on February 10, 2015 (A728-29; A751-56).

B. Scope of Review.

This Court's review applying Rule 23.1 is *de novo* and plenary.[10]

C. Merits of the Argument.

Even in the 20 years since *Grimes*, "[t]he law regarding wrongful refusal is not [ ] well developed," and "the standard is not entirely consistently stated ... in the case law."[11] Although demand futility standards have evolved from *Aronson* to *Rales*, demand refusal standards have not advanced since *Levine* and *Grimes*, and no case has addressed the factual scenario at issue here.

1. The Trial Court Failed to Apply the Correct Demand Refusal Standards.

The Trial Court acknowledged that to survive a Rule 23.1 demand refused challenge, "a plaintiff must allege particularized facts that raise a reasonable doubt

[10] *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000) (holding review is not deferential, does not give discretion to the Trial Court and looks at the derivative complaint in the same manner "as the Court of Chancery in making its decision in the first instance.").
[11] *Grimes v. Donald*, 673 A.2d 1207, 1217-18 (Del. 1996) overruled on other grounds by *Brehm*, 746 A.2d 244; A711.

that (1) ***the board's decision*** to deny the demand was consistent with its duty of care to act on an informed basis, that is, was not grossly negligent; ***or*** (2) ***the board*** acted in good faith, consistent with its duty of loyalty."[12] Nevertheless, the Trial Court then erroneously departed from that standard by: (i) failing to accept Plaintiff's particularized facts as true or give Plaintiff the benefit of reasonable inferences; (ii) holding Plaintiff to a higher standard; (iii) presuming the Plaintiff had conceded the independence of the Board *ex post*; and (iv) failing to consider the relevance of *Zapata* cases. Any one of the foregoing errors requires reversal.

a) The Trial Court Failed to Accept Plaintiff's Allegations as True and Give it the Benefit of Reasonable Inferences.

On a Rule 23.1 motion to dismiss, "[p]laintiffs 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."[13] The Complaint in this action is highly particularized and results from a substantial § 220 demand, among other document review.[14]

Although the Trial Court recognized its "focus is not on deciding merits of the causes of action asserted in the Complaint," the Court essentially made a

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[12] Op. 67 (emphasis added); *compare id.*, at 4, 66, 68, 69, 71, 72, 73, 74, 76, 79, 84, 90.
[13] *White v. Panic*, 783 A.2d 543, 549 (Del. 2001); *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) ("On a motion to dismiss, the Court of Chancery [is] not free to disregard [a] reasonable inference, or to discount it by weighing it against other, perhaps contrary, inferences that might also be drawn.").
[14] *See, e.g.*, ¶¶1-2 (A30-31), 12 (A35), 15 (A36), n.3 (A45-46), 133 (A78), 195 (A105), 242 (A127-28), 243 (A128), 248 (A130).

merits-based determination in Defendants' favor.[15] When highly particularized factual allegations in the Complaint were at odds with the Committee's "facts" in the Report, the Trial Court erred ***by accepting the conclusions of the Report as true***, effectively giving the benefit of all reasonable inferences to the Defendants, in contravention of settled Delaware law.[16] The Trial Court effectively performed a *Zapata*-like resolution of disputes of material fact in the Committee and Board's favor, without having shifted the burden as *Zapata* requires.[17] The Trial Court improperly re-characterized Plaintiff's allegations of *contested fact*, as *conclusions* or mere "*disagreement*" with the findings and conclusions of the Report.[18] In the face of such factual disputes, Rule 23.1 requires all such disputes to be resolved in

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[15] Op. 8, n.6. Defendants seem to agree that the *procedural* standard here does not permit inquiry into whether the Committee got it right, or "got it wrong" (A759-60), yet that is exactly the Trial Court's analysis.

[16] *See* Op. 19-20 ("Despite the documents [cited in the Complaint] and Plaintiff's allegation that stand-alone GAT had been abandoned by early 2008, ***the Committee's Report makes clear*** that throughout the spring and summer of 2008, the Company continued trials of GAT as a stand-alone product, in addition to conducting trials of the GAT/RR stack.") (emphasis added); *Id.* at 82 (finding "*contrary to findings* in the Report," "the pleadings do not raise a reasonable doubt that the Board relied on the Report in good faith") (emphasis added); *Id.* at 82-83 (repeatedly citing Committee's *conclusions* and *findings* with no analysis of the Plaintiff's particularized allegations of fact calling into question *the factual basis* for such conclusions); *Id.* at 79, 84 (finding Plaintiff had not pled cognizable damages); *Id.* at 87 (characterizing "allegations contrary to findings set forth by the Committee" as "conclusory"); *but see* Op. 22 (citing ¶172 (A 94)). *Compare* Op. 79, 84 *with* ¶¶329 (A168), 334 (A170), 338 (A171), 343 (A172), 350 (A174), 356 (A175), 362 (A177), 366 (A178) (allegations of damages).

[17] *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788 (Del. 1981).

[18] *See* Op. 19-20, n.56, 75-76, 90. An example of this altered characterization of the facts is the Committee's view of the September 20, 2007 email regarding Cosgrove's instruction to Jacobi that DuPont had no commercial right to stack, which the Committee reads as confirming the right to stack, i.e. no means yes. ¶289 (A148-49). At this procedural posture, the Trial Court's acceptance of this characterization over Plaintiff's contrary particularized allegations is error.

Plaintiff's favor. Thus denial of the motion to dismiss was warranted.[19]

Improperly accepting the Committee's findings as true, the Trial Court condoned, without question, the Board's reliance on such findings. The Trial Court wholly ignored the particularized allegations regarding the material information "missed" by the Committee.[20] For example, "[t]he committee does not actually tell the board that the internal controls failed," (A760) as set forth in detail in the Complaint.[21] The Trial Court failed to consider the extent to which the factual basis for the Committee's recommendation relied on (i) an incomplete record due to the Committee's failure to interview current and former CEO and Board chairs Holliday and Kullman,[22] (ii) information not made available to Plaintiff through its Section 220 demand,[23] or (iii) undisclosed after-the-fact interview summaries, instead of contemporaneous documents and sworn testimony that speak for themselves.[24] The Trial Court committed reversible error when it

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[19] *See, e.g., Cal. Pub. Emps' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *11 (Del. Ch. Dec. 18, 2002) (accepting as true for limited purpose of ruling on Rule 23.1 motion to dismiss, particularized allegations related to challenged options, that, if true, could indicate the stock option committee failed to exercise business judgment under the second prong of *Aronson*, and denying motion to dismiss as to those allegations); *see id.* at n.29 (refusing to resolve competing claim for inference due to defendant's failure to produce documents under § 220, but accepting factual allegation of complaint as true).

[20] Defendants acknowledged at oral argument that if the "evaluation committee missed some issue" "[t]hat's maybe gross negligence or bad faith." A759.

[21] ¶¶265-281 (A136-45).

[22] *See supra* at 11; *infra* at 30-31.

[23] ¶246 n.35 (A129).

[24] ¶309 (A159).

accepted Defendants' construction of controverted-facts in order to find that the Board acted reasonably and in good faith in relying upon them.

b) The Trial Court Erroneously Held Plaintiff to a Higher Pleading Standard Than the Law Allows.

The Trial Court applied a heightened pleading standard to the Sanctions Order that went far beyond the standard articulated in *Levine* and *Grimes*:

> The Board, through the Committee and its extensive review of the record, informed itself with respect to the Sanctions Order. For me to find that its informed decision was in bad faith, I would have to find that a viable fiduciary duty action exists as a corporate asset, arising from the conduct cited in the Sanctions Order. In other words: (1) that a finder of fact in the theoretical fiduciary duty action contemplated by the demand would, like the District Court, find the defense in the Monsanto Litigation to have been in bad faith (2) that the decision to so litigate had been taken in actionable breach of fiduciary duty by a theoretical defendant, and (3) that recoverable damages would have resulted. More fundamentally, I would ***then*** have to find that the forgoing appears ***with such clarity,*** and that the resulting damages were ***so clearly*** in excess of risks and costs, that a reasonable doubt exists about the good faith of the Board's refusal to bring the litigation.... In this context, the recommendation by the Committee to forgo fiduciary duty litigation in connection with the Sanctions Order ***is not so clearly erroneous*** as to raise a reasonable doubt about the good faith of the Board's reliance on the Report.[25]

In so holding, the Trial Court erred by first pre-supposing the Committee's investigation on this point was sufficiently "informed,"[26] and second, by

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[25] Op. 78-79 (emphasis added, citations omitted).

[26] The Committee and the Trial Court were unfazed by senior management's reliance on a protective order to justify shielding the Board from the Sanctions Order - an order containing only the Company's own confidential information, while at the same time advising the Board that [redacted]" ¶¶305-07 (A157-58).

impermissibly raising the standard to one akin to "likelihood of success on the merits" or "clear and convincing" evidence.[27] Such a heightened standard eviscerates the flexibility the reasonable doubt rule is intended to allow.[28]

In *Grobow*, this Court rejected a similar misapplication of the law. There, this Court found error in the trial court's use of a "judicial finding criterion for judging a derivative claim for demand excusal," instead of the *Aronson* standard requiring that a complaint allege particularized facts "which create a reasonable doubt that the directors' action was entitled to the protection of the business judgment rule."[29] This Court found error because the "judicial finding criterion would impose a more stringent standard for demand futility than is warranted under *Aronson*."[30] Unlike in *Grobow*, Plaintiff alleged extensive and particularized facts that create a reasonable doubt that the Board's decision to refuse the Demand was the product of an informed, reasonable and good faith decision-making process. The Trial Court's use of a higher standard was reversible error.

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[27] *See also* Op. 73 (in light of the factors associated with the Committee's work and its counsel, "no successful argument can be made that the Board was uninformed in a manner approaching gross negligence").

[28] *See Levine v. Smith*, 591 A.2d 194, 210 (Del. 1991) overruled on other grounds by *Brehm*, 746 A.2d 244 (the demand refusal review "is factual in nature"); *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."); *Grobow v. Perot*, 539 A.2d 180, 186 (Del. 1988) overruled on other grounds by *Brehm*, 746 A.2d 244 (the Rule 23.1 review is "highly factual").

[29] *Grobow*, 539 A.2d at 186 (citing *Aronson v. Lewis*, 473 A.2d 805, 808 (Del. 1984)).

[30] *Id* at 186-87 (this Court did not reverse because the claim of demand futility lacked the necessary particularity) (quotations omitted).

c) The Trial Court Erroneously Presumed Plaintiff had Conceded the Independence of the Board *Ex Post.*

Although the Complaint is replete with particularized facts showing that there is reasonable doubt as to the independence, *ex post*, good faith and reasonableness of the *Board's* decision to refuse the Demand (as well as the Committee's investigation), the Trial Court erroneously concluded that Plaintiff "conceded that he has no basis to contest the independence of a majority of the board." As a result of this error, the Trial Court focused exclusively on the good faith and reasonableness of the Committee.[31] But the Trial Court was obligated to consider the good faith and reasonableness of both the Committee *and* the Board.

The Trial Court missed the import of this Court's distinction in *Grimes* between the Board's independence *ex ante* and the Board's independence *ex post*.[32] The Complaint contains particularized allegations raising a reasonable doubt as to independence and care of the Board *ex post*.[33] A majority of the Director Defendants are long-tenured, having served on the Board during DuPont's development of GAT, its pursuit of the stacked product, its competition with Monsanto, and the Monsanto Litigation.[34]

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[31] Op. 69.
[32] *Grimes*, 673 A.2d at 1219.
[33] *Compare* Op. 89-90 *with* A723, A727-29, A733-34, A748-49, A753, A755-56.
[34] ¶¶33-49 (A42-46), 72-82 (A51-55), 100-04 (A62-64), 133 (A78), 137 (A79-80), 159-61 (A90-91), 172-73 (A94-95), 239 (A125-26), 265-75 (A136-42).

Grimes requires a qualitative analysis of the Board's disinterest, independence, and due care when the Board, by its ***act***, rejects the demand based solely upon its review of the Committee's investigation and Report. Doing so divorces any analysis of the reasonableness and good faith of the Committee's investigation, as embodied in its Report, from an analysis of the Board's decision to accept or reject the Committee's recommendation – thus improperly insulating the Board's decision from review. This cannot be an intended result.

Here, Plaintiff alleged particularized facts raising a reasonable doubt that *the Board* acted independently, disinterestedly, or with due care in rejecting the Demand, and was therefore not entitled to the benefit of the business judgment rule.[35] The Trial Court committed reversible error in its departure from *Grimes*.[36]

d) The Trial Court Improperly Disregarded Plaintiff's Citation to *Zapata* Cases.

The Trial Court refused to consider Plaintiff's reliance on *Zapata* cases[37] as persuasive or instructive.[38] In disregarding Plaintiff's cited authority, the Trial Court focused on the burden of proof distinction between this Committee and a special litigation committee ("SLC"), noting that an SLC holds the burden in the

[35] *See Scattered Corp. v. Chicago Stock Exch.*, 701 A.2d 70, 75 (Del. 1997) overruled on other grounds by *Brehm*, 746 A.2d 244. ("Failure of an otherwise independent-appearing board or committee to act independently is a failure to carry out its fiduciary duties in good faith or to conduct a reasonable investigation. Such failure could constitute wrongful refusal.").
[36] *See e.g.*, A760-61.
[37] *Zapata*, 430 A.2d 784.
[38] Op. 75-76; A477, A480, A482-83.

Zapata context, whereas the burden falls on the plaintiff in demand-refused cases. Op. 75-76; n.261. But this distinction ignores the parallels between the roles and obligations of an SLC created post-filing, and an evaluation committee formed pre-filing, as well as the overlapping legal analysis as to good faith and reasonability. This is particularly true here, where the Committee in fact was charged with considering both the pre-suit demands and the Zomolosky Action alleging *demand futility*. A414.

"Evaluation" committees and SLCs are charged with the same duties to thoroughly investigate, evaluate, and report on a stockholder's derivative claims when a company seeks to reject them. An SLC evaluates a stockholder's claims after a suit has been filed;[39] an evaluation committee evaluates a stockholder's demand to initiate such a suit.[40] Indeed, the Committee here was appointed "to review, analyze, and investigate the matters set forth" in the demands and make a recommendation to the Board regarding whether to pursue or reject litigation.[41]

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[39] *See Zapata,* 430 A.2d at 788 (An SLC may seek dismissal only "[a]fter an objective and thorough investigation of a derivative suit," upon a motion in "the best interests of the corporation" that "include[s] a thorough written record of the investigation and its findings and recommendations.").

[40] *See Scattered Corp.*, 701 A.2d at 75 (Particularized "allegations that the Special Committee (as the investigating committee) . . . was biased, lacked independence, or failed to conduct a reasonable investigation . . . could have created a reasonable doubt that demand was properly refused.").

[41] A244, A248. This is the same purpose SLCs serve. *Compare with Kaplan v. Wyatt*, 484 A.2d 501, 504-05 (Del. Ch. 1984) (company appointed an SLC "to investigate and make a recommendation as to [the] complaint and its allegations of injury"); *London v. Tyrrell*, 2010 WL 877528, at *16-17 (Del. Ch. Mar. 11, 2010) (an SLC evaluating whether to dismiss a

Vice Chancellor Laster has recognized the parallels in these two contexts:

> I recognize that the *Zapata* Court was commenting on the decision that a special litigation committee faces when addressing derivative claims being actively pursued by a stockholder plaintiff after demand has been excused. The act of considering a litigation demand without a prior finding of demand excusal presents directors with a decision of the same kind. If the directors take up the invitation to litigate, the outcome for the litigation targets is no different than if an SLC assumed the derivative claims under *Zapata*. In both cases, the directors have deployed the resources of the corporation against their fellow directors and officers (and theoretically against themselves).[42]

A committee evaluating and making a board recommendation regarding a shareholder's claims must act in accordance with traditional business judgment rule standards – independence, reasonableness, and good faith – regardless of whether the claims arise in the form of a complaint or a demand.[43] Thus, on a motion to dismiss arising from either shareholder litigation context, the court's inquiry centers on the business judgment rule.[44] Indeed, the question in *Zapata*

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stockholder's complaint must "determine the merits of the suit and the best interests of the corporation," "investigate all theories of recovery asserted in the plaintiffs' complaint," and "explore all relevant facts and sources of information that bear on the central allegations in the complaint").

[42] *La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co.*, 2011 WL 773316, at *7 (Del. Ch. Mar. 4, 2011) (citation omitted) ("An SLC's decision to dismiss a post-demand-excusal derivative claim is reviewed under *Zapata*'s two-step standard, which effectively amounts to reasonableness review and a context-specific application of enhanced scrutiny.").

[43] *London*, 2010 WL 877528, at *12 (following *Zapata*, noting the SLC must be independent, conduct an investigation reasonably and in good faith, and have reasonable bases for its conclusions); *Scattered Corp.*, 701 A.2d at 73 (demand refused case stating that the board's decision is reviewed "under traditional business judgment rule standards, which are the board's disinterest and independence and the good faith and reasonableness of its investigation").

[44] *Aronson*, 473 A.2d at 813-14 ("where demand on a board has been made and refused, we apply the business judgment rule in reviewing the board's refusal"; similarly, in the post-filing SLC context, "the right to prosecute [a shareholder's case] may be terminated upon the

cases and demand-refused cases is identical: did the investigator or decision-maker act unreasonably or in bad faith?[45] In this case, the Trial Court was obligated to review both the Committee and the Board's respective actions under these standards. *Zapata* cases are instructive and should not have been disregarded by the Trial Court.[46]

2. Based on the Foregoing Errors, the Trial Court Erroneously Found the Board's Decision to Reject the Demand was Fully Informed, Reasonable, and Made in Good Faith.

a) The Trial Court Approved the Board's Reliance on the Report Notwithstanding Facts and Omissions Particularized in the Complaint Giving Rise to a Duty to Inquire.

The Board's decision to reject the Demand is entitled to the presumption of the business judgment rule only if the decision was made on an informed basis, in

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exercise of applicable standards of business judgment") (citations omitted); *but see Zapata*, 430 A.2d at 787-89 (noting that a properly-initiated shareholder litigation requires "caution beyond adherence to the theory of business judgment" and allowing courts to make a second inquiry, not applicable to a demand-refusal analysis, in which the court should "apply[] its own independent business judgment [to decide] whether the motion should be granted.").

[45] *Spiegel v. Buntrock*, 571 A.2d 767, 777 (Del. 1990) ("Whenever any action or inaction by a board of directors is subject to review according to the traditional business judgment rule, the issues before the Court are independence, the reasonableness of its investigation and good faith."); *compare e.g., Zapata*, 430 A.2d at 788 (in post-filing SLC context, "the Court should inquire into the independence and good faith of the committee and the bases supporting its conclusions") *with e.g., Spiegel,* 571 A.2d at 777 ("when a board refuses a demand, the only issues to be examined are the good faith and reasonableness of its investigation").

[46] Other Courts have relied on *Zapata* cases in the demand refused context. *See e.g., Halpert Enters. v. Harrison*, 2008 WL 4585466, at *1 (2d Cir. Oct. 15, 2008) (citing *Spiegel*'s quotation of *Zapata* for proposition that a board's ultimate conclusion is not subject to judicial review); *Stepak ex rel. S. Co. v. Addison*, 20 F.3d 398, 403 (11th Cir. 1994) (citing *Smith v. Van Gorkom*'s citation to *Zapata* regarding the policy behind the business judgment rule); *Hartsel v. Vanguard Group, Inc.*, 2015 WL 331434, at *5 (D. Del. Jan. 26, 2015) (citing *Gamoran v. Neuberger Berman, LLC* (2013 WL 1286133, at *5-6 (S.D.N.Y. March 29, 2013) citation to *Zapata* regarding whether a board may retain authority to render a final decision).

good faith, and in the honest belief that the action taken was in the best interests of the Company.[47] Whether a business judgment is an informed one turns upon whether or not the directors informed themselves "of all material information reasonably available to them" prior to making the decision.[48] Uninformed directors are not entitled to the business judgment rule's presumption. Here, the Trial Court invoked 8 *Del. C.* § 141(e) to buttress its conclusion that the "board benefits from the presumption of a proper exercise of business judgment" in conjunction with its reliance on the Report.[49] But § 141(e) allows "good faith, not blind, reliance."[50]

The Trial Court concluded that: (i) "only where a board has reason to doubt that a committee's report is a good faith and informed recommendation can I infer breach of duties arising from that board's reliance on the report,"[51] and (ii) "[w]hile the Plaintiff makes numerous attacks on the methodology and conclusions of the Committee in the Report …, ***none are of the type that would have been apparent to the Board so as to call into question the Board's good-faith reliance on the***

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[47] *Aronson*, 473 A.2d at 812.
[48] *Id.*; *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Brehm*, 746 A.2d at 259 (board charged with duty to consider material facts reasonably available and within its reasonable reach).
[49] Op. 76, n.262. The parties did not brief § 141(e) below; the Trial Court raised it *sua sponte*. *See* A720, A723-24 (During argument, the Trial Court ultimately acknowledged the distinction between hiring counsel versus an expert.).
[50] *Van Gorkom*, 488 A.2d at 875.
[51] Op. 76.

Report."[52] But this conclusion contradicts Plaintiff's particularized allegations.

Plaintiff alleged that the Board's reliance on the Report was unreasonable because it contained material omissions and the "omitted information that the Board allegedly should have considered was so obvious and reasonably available that it was gross negligence for the Board to fail to consider it, regardless of expert advice, or lack thereof."[53] Plaintiff need not show that the Board's reliance on the Report was itself a breach of fiduciary duty; the focus instead is on the reasonability of the totality of the process.[54] Here, Plaintiff has raised a reasonable doubt as to the process. The Complaint adequately pleads material omissions in the Report regarding (i) the controls and the breakdown of such controls; (ii) the integral role of Holliday and Kullman as repositories of information material to the Report, including Kullman's role as one of only two Board members who had early access to the Sanctions Order; and (iii) the disclosure in the Report that the Board was intentionally kept in the dark about the Sanctions Order by Defendants Kullman, Eleuthere, Sager, Borel, Schickler and McKay at a material time during the litigation. The directors were "duty bound to make reasonable inquiry into

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[52] Op. 80 (emphasis added).
[53] *Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062, at *17 (Del. Ch. Feb. 26, 2010); *Brehm*, 746 A.2d at 262.
[54] *Koehler v. NetSpend Holdings, Inc.*, 2013 WL 2181518, at *16, n.211 (Del. Ch. May 21, 2013) (Finding reliance on a weak and deficient fairness opinion provides context for the Board's decisions and "pushes those decisions farther towards the limits of the range of reasonableness.").

[these] inadequacies" of the Report.[55] Likewise, the Court was bound to accept these well-pled allegations as true.[56]

The substantive analysis called for under the second prong of *Aronson* requires reviewing the demand refusal "in light of the facts *alleged in the complaint* to discern whether there is a reasonable doubt under the circumstances that the board's decision was a valid exercise of business judgment." *Id.* at *16 (emphasis added). When faced with material deficiencies in their decision-making process, directors must make reasonable inquiry. *Id.* Here, "a conscientious board member would have had reason to question . . . important information the board needed to consider." *Id.* at *17. Again, "the board was duty bound to take steps to inform itself" as to the material omissions and accuracy of the statements in the Report, which, based on the Director Defendants' knowledge, they had reason to question. "If the board members who voted in favor of the [decision to reject the demand] took no steps to inform themselves about the" material omissions or "the reasons" for the omissions, "then the action was not a valid exercise of business judgment." *Id.*

A majority of the Board considering the Demand had personal knowledge that gave them reason to doubt the reliability of the Report. They knew the Report

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[55] *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *17, n.103 (Del. Ch. May 5, 2010) (citing *Van Gorkom*, 488 A.2d at 875).

[56] *Id.* at *17 ("Assuming the truth of these facts [regarding Board's approval of bonus], I find this behavior would not be a valid exercise of business judgment").

failed to take into account material issues, such as: (i) the breakdown of the internal controls (known as a result of the directors' service on the Board committees charged with oversight of such controls); (ii) the failure to interview Holliday and Kullman (which was material given their unique status as Chairs of the Board and repositories of information missing from the Report); and (iii) the disclosure in the Report that the Board was intentionally kept in the dark about the Sanctions Order at a material time during the litigation. The Director Defendants abandoned their duties to inform themselves of all material information before voting to reject the demand.

b) The Trial Court Ignored Particularized Allegations of Red Flags.

The most glaring example of a material omission in the Report is the Committee's assertion that May 15, 2009 "was the first time the Board had been informed of the GAT stacking strategy and/or the dispute with Monsanto regarding same."[57] The Trial Court finds no fault with this assertion, or the Committee's claim that "there were no red flags which would make the Board aware that the 'internal controls were inadequate, that these inadequacies would result in illegal activity, and that the board chose to do nothing about problems it allegedly knew

[57] Op. 26; A338.

existed.'"[58] This finding ignores the Complaint's particularized allegations that there were significant "red flags under not just one, but several, of the Company's own risk management policies as articulated by the Committee." ¶265 (A136-37).

A majority of the Board members considering the Demand were long-tenured directors who sat on Board committees that: (i) contemporaneously received information referenced in the Report, or (ii) were charged with oversight and/or implementation of the internal controls touted in the Report and by the Trial Court.[59] Because of this knowledge, these directors had reason to doubt both the completeness and accuracy of the information on which the Committee relied and to question the Committee's failure to even ***acknowledge***, much less ***reconcile***, the breakdown of internal controls, including those to which certain Board members (e.g., Kullman and Holliday), were subject as Company officers.

The Complaint specifically details the manner in which each internal control/risk management policy broke down. These breakdowns should have given the directors a reason to doubt the conclusions of the Report, which fails to acknowledge any breakdown, much less recommend the Board take action.[60] The Trial Court either dismissed each of these particularized allegations in favor of contrary statements in the Report or disregarded material omissions in the Report.

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[58] Op. 62; A408 (quoting *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006)).
[59] ¶¶33-49 (A42-46), 72-82 (A51-55), 100-04 (A62-64), 133 (A78), 137 (A79-80), 159-61 (A90-91), 172-73 (A94-95), 239 (A125-26), 265-75 (A136-42).
[60] *See* ¶265-76 (A136-42).

This impermissibly resolves factual disputes in Defendants' favor.

c) The Trial Court Ignored Particularized Allegations Regarding the Integral Roles of Holliday and Kullman.

The Trial Court dismissed the Complaint's allegations regarding the integral roles of CEOs Holliday and Kullman without any analysis of the Committee's failure to interview either of them in the context of this action.[61] The Complaint contains particularized allegations detailing the extent of their personal knowledge and status as the former and current chairpersons and CEOs, respectively, and as the point persons for disclosure of material information regarding Monsanto to the Board.[62] The Trial Court's reliance on *Mt. Moriah* for the proposition that reasonable minds may differ as to whom the Committee should have interviewed requires an analysis of the showing made by the Plaintiff.[63] Here, the Trial Court made no such analysis.

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[61] Op. 73, n.255 ("The allegations with respect to the CEOs are conclusory, however."); ¶299 (A155), n.72 (A155) ("In the context of the Report alleging the Board had no knowledge of GAT, the Committee failed to interview Kullman and Holliday, the current and former CEOs of DuPont, who the Company's own documents demonstrate were the point persons responsible for communicating with the Board, as well as with the public and investors.").

[62] *See* ¶¶48 (A46), 80 (A54-55), 114 (A69-70), 116 (A70-71), 120 (A72-73), 123 (A74), 132 (A77-78), 160 (A90), 173 (A94-95), 174 (A95), 176 (A96-97), 186 (A100-01), 187 (A101), 192 (A104), 194 (A104-05), 204 (A109-10), 209 (A112), 216 (A115-16), 270 (A139), n.33 (A126), 35 (A42), 72 (A51) (Holliday); *id.* ¶¶42 (A44-45), 80 (A54-55), 111 (A68), 137 (A79-80), 173 (A94-95), 174 (A95), 176 (A96-97), 192 (A104), 194 (A104-05), 201 (A108), 204 (A109-10), 205 (A110), 208 (A111-12), 209 (A112), 212 (A114), 216 (A115-16), 217 (A116), 220 (A118), 221 (A118-19), 225 (A120), 265 (A136-37), 270 (A139), 299 (A155), 300 (A155), 301 (A156), 302 (A156), 303 (A156-57), 305 (A157-58), 306 (A158) (Kullman). These allegations might conflict with the Report – but, taken together, they are not "conclusory".

[63] *See* Op. 73, n.255 (citing *Mt. Moriah Cemetery on Behalf of Dun & Bradstreet Corp. v. Moritz*, 1991 WL 50149, at *4 (Del. Ch. Apr. 4, 1991), *aff'd,* 599 A.2d 413 (Del. 1991) (court would not second guess the choice of persons interviewed based upon "showing made here.").

The Trial Court not only failed to consider the allegations regarding Holliday and Kullman, but also failed to consider the fact that the Board that considered the Committee's recommendation was composed of directors who *knew* Kullman and Holliday were the repositories of the Company's institutional information dating back to the inception of the GAT program, and *knew* that their knowledge included the parameters of the 2002 License Agreements. As to the Monsanto Litigation, the Director Defendants' only source of information was Kullman and Sager.[64] The Committee's failure to interview Holliday or Kullman at any time during its nine-month investigation[65] deprived the Board of material information necessary for it to comply with its fiduciary obligation to fully inform itself before voting to refuse the Demand.[66]

Instead of quality, the Trial Court improperly focused on the quantitative aspects of the investigation and, in doing so, disregarded relevant authority. Op. 73. An investigating committee "should explore *all* relevant facts and sources of information that bear on the central allegations in the complaint [here, the demand]."[67] Even a lengthy investigation involving "distinguished" counsel and

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[64] ¶¶204 (A109-10), 208-209 (A111-12), 216-217 (A115-16), 220 (A118), 225 (A120), 265 (A136-37), 270 (A139), 299 (A155).

[65] This fact is particularly acute given that the Company's principal place of business is in Wilmington, Delaware and the Committee's counsel has offices in Wilmington and Georgetown.

[66] A481-82.

[67] *London*, 2010 WL 877528, at *17; *See also Sutherland v. Sutherland*, 958 A.2d 235, 242 (Del. Ch. 2008) (although the investigation was "exhaustive and time-consuming," the failure to analyze certain information led to material issue of fact as to reasonableness and good faith); *In*

employing an array of methods to gather the information is insufficient when it fails to consider and analyze material information.[68]

d) The Trial Court Failed to Address the Consequences of Board Members Kullman and Eleuthere Keeping the Board in the Dark About the Sanctions Order.

After the sealed Sanctions Order was issued in December 2011, the only Board members with whom it was shared (after it was partially unsealed) were Kullman (February 2012) and Eleuthere (March 2012).[69] In November 2012, months *after* the verdict, the Sanctions Order was unsealed for all purposes and the directors learned of the information previously withheld from them. ¶¶306 (A158). The Trial Court found no issue with the Company's reliance on the protective order during the Monsanto Litigation and the 9-month delay in sharing the Sanctions Order with the full Board.[70] Moreover, the Trial Court found no issue with the Committee's finding as to the Sanctions Order, that the District Court and the Eighth Circuit were *wrong*. Op. 97. The Sanctions Order included key factual

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re Oracle Deriv. Litig., 824 A.2d 917, 921, 925-26, 948 (Del. Ch. 2003) (finding committee bias despite a report of over 1,100 pages, with a large volume of documents reviewed and 70 witnesses interviewed).

[68] *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985).

[69] ¶¶230 (A121-22), 300-307 (A155-58).

[70] Op. 106. *But see Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1063 n.84 (Del. Ch. 2004). (citing to *Mills Acquisition Corp. v. MacMillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1989) ("[F]iduciaries, corporate or otherwise, may not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations.")); *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 442 (Del. 1996) (stressing the importance of duty to be candid with fellow directors); *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 119 (Del. Ch. 1999) (directors have an "'unremitting obligation' to deal candidly with their fellow directors" (citations omitted)).

findings that were directly adverse to DuPont's litigation position, (¶¶215 (A115), 230-32 (A121-22); A349-50; *see* A726, A736-38), yet it was withheld from the Board at the time the litigation and settlement negotiations were taking place, ¶¶305 (A157-58), 307(A158); A352, A354-55, A739-40. The Board relied on the Report despite its failure to analyze the legal, strategic, and internal control consequences of withholding the Sanctions Order at this material time. Still, the Trial Court failed to find reasonable doubt in the Board's endorsement of the Report.[71]

At the very least, the directors had a duty to inquire when they received the Report. However, the Board did nothing. "This creates a reasonable doubt that the board's decisions regarding [the decision to reject the Demand] are the product of a valid exercise of business judgment."[72]

The Trial Court's conclusions regarding the Report's factual errors and omissions (Op. 80-81.) miss the crux of Plaintiff's allegations: it is not that the

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[71] *Compare* Op. 95-98; 106-107 *with* ¶¶303-307 (A156-58).

[72] *MCG*, 2010 WL 1782271, at *3, 14, 16-17, 26 (finding Board's failure to respond created reasonable doubt); *Id.* at *17 ("Thus, the board allegedly learned after approving the 2002 Bonus that they had been misled by Maginn and Barr. But the board allegedly has 'done nothing to rescind th[e] [2002 Bonus]'. In my mind, this creates a reasonable doubt that the board's decisions regarding the 2002 Bonus are the product of a valid exercise of business judgment. Once Maginn and Barr had allegedly come clean about the 2002 Bonus, the board would have been aware that their prior decision was an uninformed one, made in reliance on misrepresentation. For the board to do nothing to rescind the decision leads me to reasonably doubt that their decisions regarding the 2002 Bonus have been made honestly and in good faith. This is sufficient to excuse demand under the second prong of *Aronson*.") (internal citation omitted).

Board should have "inferred" problems with the investigation and Report, but rather that the Board had actual knowledge of underlying problems.

> If the SLC's recommendation is *based on an error of law* then the basis for that recommendation is not reasonable. Moreover, if the SLC gets the *undisputed facts wrong in its report*, and then relies on its erroneous recitation of the undisputed facts in making its dismissal recommendation, it also goes without saying that the basis for the recommendation is not reasonable.[73]

This is exactly what Plaintiff alleges: the manifest factual errors – of which Defendants were aware – render reliance on the Report unreasonable.[74]

e) The Board did not Conduct a Reasoned Cost-Benefit Analysis.

At argument, Defendants' counsel conceded the Board's cost-benefit analysis was nothing more than a "check the box" exercise, because it had concluded the Demand had no legal or factual merit. A756-57; A742. Where a committee "prejudge[s] the merits of the suit and then conducted the investigation with the object of putting together a report that demonstrates the suit has no merit," it creates "a material question of fact as to the [committee's] independence."[75] As

[73] *London*, 2010 WL 877528, at *17 (emphasis added) (citing *Lewis*, 502 A.2d at 968-70).
[74] *See* A476-77, A484.
[75] *London*, 2010 WL 877528, at *15. It is clear that the Committee prejudged the suit as a whole, not just the cost-benefit aspect. The Committee was in place prior to the Demand to investigate Monsanto's "allegations that DuPont's senior leadership and Board repeatedly failed to investigate Monsanto's claim that DuPont publicly praised the virtues of its GAT technology while concealing evidence that the GAT technology was failing." ¶16 (A36-37). Rather than acting independently (either by creating a new committee or ensuring the Committee acted independently), the Board extended the role of the same two-person Committee to allow it to investigate the demands. *Id.* The Committee had previously been in

a result, the Defendants may not rely on the Board's deficient cost-benefit analysis as a basis for it to have rejected the demand.

CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the Trial Court's May 8, 2015 Order.

Dated: July 23, 2015

PINCKNEY, WEIDINGER, URBAN & JOYCE LLC

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the defensive posture of investigating claims made by its long-time adversary while in the midst of litigation; the Committee's subsequent appointment to evaluate the demands, particularly in light of the numerous failures in the Report and the Committee's investigation, gives rise to a reasonable doubt that the Board and Committee *acted* independently, i.e., in good faith and/or reasonably. *See London*, 2010 WL 877528, at *15.