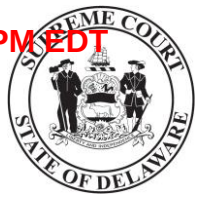

SUPREME COURT OF THE STATE OF DELAWARE

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 Court Below: Court of Chancery of the State of Delaware, C.A. No. 9714-VCG PUBLIC VERSION FILED SEPTEMBER 8, 2015

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NATURE OF PROCEEDINGS

This action arises out of the refusal of the Board of Directors (the "Board") of nominal defendant E. I. du Pont de Nemours and Company ("DuPont") to pursue claims relating to an adverse trial verdict in a dispute with Monsanto Company ("Monsanto"). After the verdict, the Board formed an Evaluation Committee (the "Committee") to investigate issues relating to the Monsanto dispute. A129 (¶ 245); A247. The Committee was comprised of two independent members who joined the Board after the initiation of the Monsanto litigation, and the Committee retained William B. Chandler III, former Chancellor of the Court of Chancery, to serve as its counsel in connection with the investigation. A129 (¶ 247); A248–251. In response to subsequent shareholder demands relating to the Monsanto dispute, the Board expanded the authority of the Committee to investigate those demands. A130 (¶ 249); A244–248.

The Committee conducted a nine-month investigation that involved review of thousands of documents and interviews of twenty-three witnesses. At the conclusion of the investigation, the Committee issued a comprehensive 179-page report (the "Report") and recommended that the demands be rejected in full. A132 (¶¶ 256–257); A236–420. Consistent with the Committee's recommendation, the Board rejected the shareholder demands. A128 (¶ 244).

Plaintiff Ironworkers District Council of Philadelphia & Vicinity Retirement & Pension Plan ("Plaintiff"), one of the shareholders that made a demand, filed a Verified Derivative Complaint for the ostensible benefit of DuPont against the individual Defendants, who are current and former directors, officers, and employees of DuPont. Defendants moved to dismiss for failure to plead adequately wrongful refusal of Plaintiff's demand under Court of Chancery Rule 23.1. Instead of filing an opposition, Plaintiff filed a Verified Amended Derivative Complaint. A23–180. Because Plaintiff's amended complaint failed to address the deficiencies in the original filing, DuPont and the individual Defendants again moved to dismiss under Rule 23.1.[1] A181–233.

The Court of Chancery heard argument on February 10, 2015. A696–772. On May 8, 2015, the Court of Chancery granted the motion and dismissed Plaintiff's amended complaint with prejudice, explaining that while "[t]he Plaintiff disagrees with the Committee's conclusions, . . . disagreement, however vehement, with the *conclusion* of an independent and adequately represented committee is not the same as pleading particularized facts that create a reasonable doubt that the Board acted in what it perceived as the best interests of the corporation." Op. 90. This appeal followed.

[1] Five individual defendants additionally moved to dismiss for lack of personal jurisdiction. The Court of Chancery did not address the jurisdictional issue in light of its holding with respect to Rule 23.1. Op. 91.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery applied the correct legal standard that, "[i]n 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." Op. 69; *Levine v. Smith*, 591 A.2d 194, 212 (Del. 1991). The Court of Chancery further correctly held that, in order to satisfy this standard, "a plaintiff must allege particularized facts that raise a reasonable doubt 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." Op. 67; *Levine*, 591 A.2d at 212.

2. Denied. The Court of Chancery correctly determined that the facts alleged in the amended complaint failed to raise a reasonable doubt either as to the reasonableness or good faith of the Board's investigation. It explained that the allegations in the amended complaint establish only that Plaintiff *disagrees* with the Board's refusal to pursue the claims requested in the demand. Op. 75, 90. The court further explained, however, that "[t]he question is not whether [the Board] was wrong; the question is whether the Board was grossly negligent . . . or intentionally acted in disregard of the Company's best interests." Op. 90.

STATEMENT OF FACTS[2]

DuPont is a world leader in market-driven innovation and science and invests over $2 billion annually in research and development. A41 (¶ 31); A276. The claims at issue in this lawsuit primarily concern one of DuPont's wholly-owned subsidiaries, Pioneer Hi-Bred International, Inc. ("Pioneer"), and a prior dispute between DuPont and its competitor, Monsanto.

A. The Underlying Dispute Between DuPont And Monsanto

Pioneer is the largest U.S. producer of hybrid seeds for agriculture. A41 (¶ 32); A281–282. In 2002, Pioneer entered into a non-exclusive License Agreement (the "License Agreement") with Monsanto for the right to use Monsanto's Roundup Ready® ("RR") genetic trait in its soybean seeds. A59 (¶ 92). The RR trait makes crops resistant to glyphosate-based herbicides, including Monsanto's Roundup® herbicide. A59 (¶ 91).

Pioneer subsequently undertook efforts to develop its own glyphosate-resistant trait called "GAT" or "Optimum GAT." A62–63 (¶¶ 100, 102). GAT combined glyphosate tolerance with "tolerance to herbicides designed to complement glyphosate." A303. Pioneer intended GAT to compete with RR,

[2] The following is a summary of the factual allegations as set forth in the amended complaint, which Defendants accept as true solely for purposes of this appeal. This brief also summarizes the content of the Evaluation Committee's Report, which the Court may consider because it is integral to, referenced in, and quoted throughout the amended complaint, *see* p. 19, *infra*.

including Monsanto's anticipated release of a second generation of RR ("RR2"). A62 (¶ 100). In 2006, after several promising field trials, Pioneer publicly announced its development of the GAT genetic trait. A65 (¶ 105); A303.

Between 2006 and 2008, further testing of soybeans with the GAT trait indicated some stunting under extreme stress conditions. A66–79 (¶¶ 108–137). Pioneer scientists noticed, however, that when GAT was "stacked" with RR, there was an improved tolerance to glyphosate-based herbicides and greater crop yields. *Id.*; A312.[3] In early 2009, Pioneer publicly announced that it would not introduce GAT-only seeds, and would transition to the development of stacked seeds. A106 (¶ 197). "Analysts received the information with little reaction." A318.

Pioneer disclosed to Monsanto that it was pursuing development of a GAT/RR stack in early 2008. A333. During the following months, "no one at Monsanto raised any concerns about Pioneer's stacking activity." A335. It was not until August 25, 2008, that Monsanto first indicated its belief that the License Agreement did not permit stacking. *Id.* After learning that Monsanto might become an obstacle, Pioneer senior management consulted with in-house and outside counsel concerning Pioneer's rights under the License Agreement and determined that its interpretation that the agreement permitted stacking was

[3] "Stacking" refers to the concept of creating a plant with a combination of two or more unique genetic traits. A34 (¶ 8 n.2).

reasonable and "that the negotiating history would favor Pioneer if the Court looked beyond the language of the agreement." A336. And on October 31, 2008, Pioneer senior management made a presentation to certain officers and members of the Board regarding the legal implications of a stack and advised "that the likelihood of litigation with Monsanto was high." A336–337.

Pioneer never commercialized or sold the "stacked" soybean seeds. A121 (¶ 229). On May 4, 2009, however, Monsanto filed a complaint against DuPont and Pioneer, alleging a breach of the License Agreement, patent infringement, inducement to infringe, and unjust enrichment. A109 (¶ 203). DuPont and Pioneer denied the allegations and asserted antitrust, contract, and patent counterclaims. A111 (¶ 207); A342. The case was bifurcated, with the contract and patent claims and counterclaims proceeding to discovery and trial before the antitrust counterclaims. A342. The district court granted partial judgment on the pleadings in favor of Monsanto, holding that the License Agreement did not permit stacking. A115 (¶ 215). DuPont successfully moved for reconsideration and was granted permission to amend its answer and counterclaims to add details supporting its claim that the agreement should be reformed to permit stacking. A344–347.

On September 6, 2011, Monsanto filed its fifth motion for sanctions.[4] A120 (¶ 227). Monsanto argued that contrary to the allegations in support of their

[4] The four prior motions for sanctions were denied.

reformation defense, the defendant companies had not always believed that Pioneer had the right to stack. *Id.* On December 21, 2011, the district court granted the motion, struck the reformation defense, and awarded Monsanto attorneys' fees relating to the assertion of that defense. A350. Consistent with the protective order in the case, DuPont's legal team promptly applied for and received approval to share the sanctions order with DuPont's Chief Executive Officer (who was also Chairman of the Board, *see* p. 8, *infra*), General Counsel, and the head of the Board's Audit Committee. *Id.* Once the legal team received permission to share the order, it did so; members of the legal department additionally met with the head of the Audit Committee on March 14, 2012, to discuss the order. A350–351.

The first phase of the case proceeded to a jury trial on the remainder of DuPont's and Pioneer's defenses and counterclaims, apart from the antitrust counterclaims. A123 (¶ 236). On August 1, 2012, the jury returned a $1 billion verdict in favor of Monsanto, despite the fact that DuPont had never sold a single stacked seed. *Id.* At that time, phase two of the litigation remained pending, and counsel for DuPont had identified multiple grounds on which it intended to appeal the unprecedented verdict. A355–356.

B. DuPont And Monsanto Settle The Monsanto Litigation

On March 25, 2013, DuPont and Monsanto entered into a global agreement that resolved several outstanding matters between them, including the Monsanto

litigation. A124 (¶ 238); A357. Accordingly, DuPont's antitrust counterclaims never proceeded to trial, nor was DuPont ever required to appeal or to pay the verdict. A124 (¶ 238). Pursuant to new license agreements related to the settlement agreement, DuPont obtained, *inter alia*, (1) a license for RR which included stacking rights, (2) a non-exclusive royalty bearing license for RR2 and Dicamba (which confers tolerance to auxin herbicides), and (3) broad rights of access to Monsanto regulatory data for five different genetic traits. *Id.*; A358–360. In return for these extensive rights, DuPont agreed to pay Monsanto at least $1.75 billion in licensing and royalty fees over 10 years. A124 (¶ 238).

The settlement agreement did not cover the sanctions order, which DuPont appealed to the United States Court of Appeals for the Federal Circuit. A124 (¶ 238). On May 9, 2014, the Federal Circuit affirmed the order. A127 (¶ 241). Applying a deferential standard of review, the Federal Circuit determined that the district court did not "clearly err" in imposing "narrowly-tailored sanctions" relating to the reformation defense. *Monsanto Co. v. E.I. du Pont de Nemours & Co.*, 748 F.3d 1189, 1200 (Fed. Cir. 2014).

C. An Evaluation Committee Of The Board Investigates Claims Relating To The Monsanto Dispute

During the relevant period, DuPont's Board was composed of ten to thirteen members, all of whom were independent, with the exception of the Chair, who was always DuPont's Chief Executive Officer. A257. After the verdict in the

Monsanto litigation, the Board formed an Evaluation Committee to investigate allegations made by Monsanto. A129 (¶ 245). The Committee was comprised of Defendants Lamberto Andreotti and Lee M. Thomas, both of whom joined the Board after the initiation of the Monsanto litigation. A247–250. In response to subsequent shareholder demands concerning the Monsanto dispute, the Board expanded the authority of the Committee to investigate those demands. Am. Compl. ¶ 249; A248. The Board retained the ultimate authority to act on the demands. A130 (¶ 249); A248.

The Committee retained William B. Chandler III, a partner at Wilson Sonsini Goodrich & Rosati ("WSGR") and former Chancellor of the Court of Chancery, to serve as its counsel. A250. Former Chancellor Chandler also has served as a Vice Chancellor of the court and as a Resident Judge of the Delaware Superior Court. *Id.* WSGR had not represented DuPont for more than twenty years, nor had it represented any of the individuals named in the demands. A251.

Aided by former Chancellor Chandler and WSGR, the Committee conducted a thorough nine-month investigation. To start, WSGR reviewed thousands of documents, including documents produced in the Monsanto litigation. A252–253. More specifically, WSGR reviewed all documents used as deposition exhibits and trial exhibits, as well as all documents used as exhibits in support of relevant pleadings in the Monsanto litigation. *Id.* WSGR also reviewed documents that

DuPont had identified as potentially relevant, documents responsive to at least fourteen different requests the Committee submitted to the company, and pertinent publicly available documents. *Id.*

WSGR additionally interviewed twenty-three witnesses, some of whom the firm interviewed more than once. A255–257 (listing interviewees). The firm also reviewed more than twenty-five days of sworn testimony from the Monsanto litigation. A254–255 (listing witnesses). Finally, the Committee offered to meet with each shareholder who had made a demand prior to the release of the Committee's Report, but no shareholder accepted the Committee's invitation. A251. Counsel for Plaintiff here represented one of those shareholders and chose not to meet with the Committee, despite former Chancellor Chandler's four separate invitations to do so. A244 & n.2.

D. The Evaluation Committee Recommends That The Demands Be Rejected In Full

The Evaluation Committee issued its Report on November 21, 2013. A132 (¶ 256). The Report is 179 pages long and is accompanied by an appendix consisting of 211 documents. The Report comprehensively analyzed the facts and claims asserted in the shareholder demands.

Demand Relating to the Development of GAT. The Committee concluded that any fiduciary duty or waste claims relating to the development of GAT lacked merit. A373–385. Pioneer's legal counsel was involved during the "three key

stages of the stack's development" and reasonably believed that Pioneer had the right to test and commercialize soybeans stacked with GAT and RR. A378–379. In particular, the Committee noted that three in-house counsel "had personal recollections of the stacking negotiations," and "all believed that the Company had secured stacking rights." A378.[5]

In reaching this conclusion, the Committee specifically addressed the documents relied on in the sanctions order and again by Plaintiff here. A383–384. The Committee determined that, on balance, the negotiation history of the License Agreement supported DuPont's interpretation. *Id.* Given the emails cited in the sanctions order, the Committee reasoned that Pioneer's legal team "may have been too bullish in their belief that the negotiation history would support their view" of the License Agreement. A383. It found, however, that "those few emails" were not "reflective of the overall history of the negotiations." *Id.* [redacted] "Moreover," the Committee noted that when Pioneer's legal team was "analyzing the contract in

[5] Plaintiff suggests that DuPont's interpretation was disingenuous because it subsequently attempted to negotiate with Monsanto the right to stack. Op. Br. 7. The Committee considered this fact and concluded that the company simply "decided to try to wrap the stacking issue . . . into the out-licensing negotiations," and that this desire for clarity and explicit coverage did not undermine the company's interpretation. A332.

2008" in order to advise the company as to its rights, "the team understandably did not recall the few contrary emails" cited in the sanctions order. A383–384.

Demand Relating to the Monsanto Litigation. The Committee further concluded that any fiduciary duty or waste claims relating to the Monsanto litigation lacked merit. A385–396. The Committee explained that DuPont retained "well-respected counsel" and that the litigation was "well-managed, with thoughtful, reasonable strategic decisions made throughout the Litigation."[6] A386. Notably, the Committee also found that DuPont reasonably believed its damages exposure was limited because Pioneer never sold a stacked product. A386–387. Although the Committee recognized that the litigation "ultimately led to a large verdict," it concluded that this fact was not indicative of any misconduct. *Id.*

The Committee rejected the idea that the fact of the sanctions order against DuPont suggested wrongdoing. A387–388. "To the contrary," the Committee sharply criticized the order and found that it "was not well reasoned and reflects a fundamental misunderstanding by the Court of the key issues and statements made by the Company during the Monsanto Litigation." A387. Unlike the district court or the Federal Circuit, the Committee formed its conclusion after interviewing many witnesses and reviewing the emails relied on in the order in the context of

[6] DuPont retained Leora Ben-Ami and Thomas Fleming of Kaye Scholer LLP and David Boies and James Denvir of Boies, Schiller & Flexner LLP. A339.

the entire record. A387–392. The Committee concluded that "the alleged misrepresentations [to the district court] were true statements taken out of context or non-frivolous legal arguments." A388.

The Committee further found no misconduct as to the disclosure of the sanctions order to the Board. Consistent with the protective order, the legal team promptly applied for and received approval to share the order with DuPont's Chief Executive Officer, General Counsel, and the head of the Board's Audit Committee, and additionally met with the head of the Audit Committee to discuss the order and the documents on which it was based. A350–351.

Finally, the Committee found no misconduct regarding the global settlement. A393–394. With the assistance of PwC and American Appraisal, DuPont reasonably determined that the agreements improved the value of the company by $700 million. A364; A394. Notably, the Committee found "no basis to the shareholders' assertions that the [$1 billion] verdict was somehow incorporated into the new RR2 Agreement." A395. "Indeed," the Committee found, "using a method accepted by the SEC, the Company determined that it did not need to record a gain or loss for the settlement given that there was no delta between the value of the agreement and the agreement's payment obligations." A395–396.

Demand Relating to Disclosures Concerning GAT. The Committee additionally concluded that any claims alleging that DuPont made false or

misleading disclosures concerning GAT lacked merit. A396–405. The Committee found that "while research results from Optimum GAT testing in 2006 to mid-2007 showed some limited [negative] crop response," these results "were only found under stress conditions and were viewed as outliers." A399. The Committee further explained that, after Pioneer received and analyzed the complete "results of the summer 2007 testing," DuPont promptly disclosed during an earnings call that the development timeline of GAT soybean seeds might be affected. A400–401.

The Committee similarly determined that DuPont's 2008 disclosures were not misleading. A402. The Committee explained that at that time "the evidence demonstrates that Pioneer had not abandoned the Optimum GAT standalone product." *Id.* Rather, Pioneer was simultaneously working on developing soybean seeds with a standalone GAT trait as well as stacked seeds. A403; *see also* A314–317 (noting that Pioneer continued to work on trials of both a standalone and a stacked product throughout 2008). "Consistent with this dual path approach," the Committee stated, "on February 12, 2008, the Company disclosed that it was pursuing a 'new approach' to Optimum GAT, which could have included either the Optimum GAT/RR stack or Optimum GAT standalone if breeding had resolved the issues being encountered under stress conditions." A403.

The Committee rejected the idea that DuPont was required to disclose immediately that it was testing a stacked product, instead of "shortly after

management had decided to pursue the stack as its sole Optimum GAT strategy" in early 2009. A403. Indeed, the Committee found that the company's decision to "wait to expressly disclose its stacking strategy was reasonable and did not render any public statements misleading." *Id.* "Further," the Committee noted, the company's decision "was made in consultation with legal advisors who advised management that the information was not material." *Id.*

***The* Caremark *Claim*.** The Committee also concluded that a *Caremark* claim against the Board for lack of appropriate oversight lacked merit, A405–410, noting that a *Caremark* claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." A405 (quoting *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 372 (Del. 2006) (quoting *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996))).

Regarding the first prong of the *Caremark* test, the Committee found that "the Board has implemented 'information and reporting systems that are reasonably designed to provide to senior management and to the Board itself, timely, accurate information.'" A406 (quoting *Caremark*, 698 A.2d at 969–70). And regarding the second prong, the Committee explained that there was no evidence that the Board had abdicated its oversight responsibilities. A408–410. The Committee determined that "the Board reasonably relied on proper business processes . . . that were in place to ensure oversight and the development of

Optimum GAT." A408. The Committee further determined that—for reasons discussed above and more fully in the Report, A303–337; A373–385—"the interim testing issues" regarding GAT and "the potential for litigation" regarding the GAT/RR stack were not "red flags" that should have been raised to the Board pursuant to these processes. A409 nn.587–588. The Committee also concluded that "the evidence shows that the Board was well informed throughout the life of the [l]itigation and that the Board was engaged with the issues." A410.

Litigation Was Not in the Company's Best Interest. The Committee additionally concluded "even if [the claims asserted in the demands] did [have merit], the costs and risks of pursuing litigation far outweigh any potential benefit." A412–414. First, if DuPont were to sue its directors and officers, DuPont would be "required to advance all [their] legal fees" and those amounts "would not be recouped if DuPont were to lose the lawsuit." A412–413. Second, "certain claims may be time barred" and "subject to a laches defense based (by analogy) on the three-year statute of limitations of 10 *Del. C.* § 8106." A413–414. Finally, "litigation also ha[d] the potential for significant distraction and impairment of morale for directors, officers, and employees of the Company." *Id.*

The Committee accordingly recommended that the demands be rejected in full. A414–418. Consistent with the Committee's recommendation, after careful consideration, the Board rejected the demands. A128 (¶ 244).

E. Plaintiff's Demand And Amended Complaint

Plaintiff alleges that it is, and at all relevant times was, a shareholder of DuPont. A40 (¶ 30). On January 17, 2014, Plaintiff submitted a demand letter concerning the Monsanto dispute. A127 (¶ 242). In response, on January 30, 2014, DuPont's counsel sent Plaintiff a letter noting that its demand was essentially identical to previous demands and provided Plaintiff with a copy of the Report. A128 (¶ 244). Plaintiff alleges the Board has taken no further action with respect to its demand, and thus that the Board has refused the demand.[7] *Id.*

Plaintiff claims that the Board's refusal was wrongful and on that basis filed the Verified Amended Derivative Complaint. A131 (¶ 254). Plaintiff alleges that various Defendants breached their respective duties in connection with the dispute with Monsanto over stacking GAT and RR; breached their fiduciary duties by not sharing the sanctions order with the full Board until November 2012; made intentional misrepresentations relating to GAT and the company's rights under the License Agreement; wasted company resources based on the development of GAT, the Monsanto verdict, and the global settlement; and failed to oversee properly the company's conduct. A166–178 (Counts I–VIII).

[7] For the purposes of this appeal, Defendants do not contest Plaintiff's argument that the Board has rejected its demand.

ARGUMENT

THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFF HAS NOT PLED PARTICULARIZED FACTS CREATING A REASONABLE DOUBT AS TO THE REASONABLENESS OR GOOD FAITH OF THE BOARD'S INVESTIGATION

A. Question Presented

Whether Plaintiff failed to plead particularized facts creating a reasonable doubt as to the reasonableness or good faith of the Board's investigation. A181–233; A645–685.

B. Scope Of Review

This Court reviews *de novo* the Court of Chancery's decision to dismiss the amended complaint under Rule 23.1. *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008). Thus, the Court applies "the law to the allegations of the Complaint as does the Court of Chancery." *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000).

"The function of the business judgment rule is of paramount significance in the context of a derivative action." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). The rule operates as a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Id.* Under Rule 23.1, to overcome the presumption, a plaintiff must plead particularized facts that raise a reasonable doubt regarding the good faith or reasonableness of the Board's investigation. *Levine*, 591 A.2d at 211–12; *see also*

Spiegel v. Buntrock, 571 A.2d 767, 777 (Del. 1990); *Aronson*, 473 A.2d at 813. While the Court should draw "all *reasonable* inferences in the plaintiff's favor," "[s]uch reasonable inferences must logically flow from particularized facts alleged by the plaintiff." *Wood*, 953 A.2d at 140 (internal quotation marks omitted). "Conclusory allegations are not considered as expressly pleaded facts or factual inferences," nor may "inferences that are not objectively reasonable . . . be drawn in the plaintiff's favor." *Id.* (alteration and internal quotation marks omitted).

The Court may consider not only the amended complaint, but also the Evaluation Committee's Report. *See Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013); *Malpiede v. Townson*, 780 A.2d 1075, 1083 n.19 (Del. 2001); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69–70 (Del. 1995). "Having premised their recitation of the facts squarely on [an extrinsic] document and incorporated it, the plaintiffs cannot fairly, even at the pleading stage, try to have the court draw inferences in their favor that contradict that document, unless they *plead* non-conclusory facts contradicting it." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1026 (Del. Ch. 2012).[8]

[8] *See also Levine*, 591 A.2d at 214 (noting that "Levine's allegation that the Board 'did nothing' is contradicted by the Board's letter of reply rejecting Levine's demand"); *Morefield v. Bailey*, 959 F. Supp. 2d 887, 899–901 (E.D. Va. 2013) (discussing Delaware law and noting that "Plaintiff's conclusory allegations, when compared with the contents of the Board's letter, do not demonstrate the Board acted in an uninformed manner"); *In re Merrill Lynch & Co. Sec., Deriv. & ERISA Litig.*, 773 F. Supp. 2d 330, 347–48 (S.D.N.Y. 2011) (applying Delaware law and

C. Merits Of Argument

Plaintiff's amended complaint falls far short of rebutting the presumption of the business judgment rule. Plaintiff has not alleged any facts, much less particularized facts, showing that the Board failed to consider its demand with objectivity and in good faith. Plaintiff also does not allege any facts that the Board failed to investigate reasonably the demand. Nor could it in light of the Committee's thorough investigation and Report. This is not, in short, one of the rare cases in which the Court can disregard a board's business judgment in rejecting a demand.

1. The Court Of Chancery Applied The Correct Legal Standard

Plaintiff agrees that the Court of Chancery identified the correct legal standard under Rule 23.1. Op. Br. 14–15 (citing Op. 67). Plaintiff nevertheless argues that the Court of Chancery "erroneously departed from that standard." Op. Br. 15. As an initial matter, even if the Court of Chancery applied the incorrect standard, this is "not reversible error . . . in light of [the Court's] *de novo* review." *Brehm*, 746 A.2d at 255; *see also Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988) ("[T]he [legal] errors do not require reversal if we, under our review of the pleadings and applying the proper standard of reasonable doubt, conclude that a

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noting that the board's letter rejecting a demand "belies plaintiff's assertions" in the complaint).

claim of demand futility has not been pleaded."). In other words, the question on appeal is not whether the Court of Chancery erred, but "whether plaintiff[] ha[s] alleged particularized facts creating a reasonable doubt that the actions of the [Board] were protected by the business judgment rule." *Brehm*, 746 A.2d at 255. For the reasons discussed in the next section, Plaintiff has not done so. *See* pp. 28–35, *infra*. Regardless, Plaintiff's argument that the Court of Chancery applied an incorrect standard is wrong on all counts.

a) The Court Of Chancery Did Not Resolve Questions of Disputed Fact

Plaintiff incorrectly characterizes the Court of Chancery as "essentially ma[king] a merits-based determination in Defendants' favor." Op. Br. 15–16. In Plaintiff's view, "[w]hen highly particularized factual allegations in the Complaint were at odds with the Committee's 'facts' in the Report, the [court] erred by accepting the conclusions of the Report as true." *Id.* at 16 (emphasis omitted).

The Court of Chancery did not resolve questions of disputed fact in Defendants' favor. Rather, the Court of Chancery accurately noted that the gravamen of Plaintiff's amended complaint is that Plaintiff *disagrees* with the Committee's assessment of the evidence and ultimate recommendation. Op. 75, 90.[9] And as the Court of Chancery also accurately explained, "disagreement,

[9] *See, e.g.*, A132 (¶ 257) ("The Committee's recommendation to reject Plaintiff's Demand outright and the 'facts' and conclusions that underlie it, raise a

however vehement, with the *conclusion* of an independent and adequately represented committee is not the same as pleading particularized facts that create a reasonable doubt that the Board acted in what it perceived as the best interests of the corporation." Op. 90. Simply put, "Delaware does not permit a court [to] second-guess the substantive merits of a demand's refusal." *In re Bank of Am. Corp. Sec., Deriv., & ERISA Litig.*, 2013 WL 1777766, at *8 (S.D.N.Y.) (citing

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reasonable doubt as to the reasonableness and good faith nature of the Committee's investigation and recommendation and the Board's vote thereon."); A134 (¶ 261) ("The Committee's conclusion that Plaintiff's claims have no merit because the Individual Defendants did nothing wrong, in the face of the record set forth in the Report, replete with red flags, is consistent with the Defendants' strident *presumption of success* throughout the Monsanto Litigation, notwithstanding each interim defeat."); A143 (¶ 277 n.54) ("The Committee's conclusions in the face of these facts demonstrates its unreasonableness and lack of good faith."); *id.* ("To the extent that the Committee failed to conclude as much calls into question the reasonableness and good faith of the Committee's recommendation and the Board's endorsement of same."); A146 (¶ 282) ("The Committee's rejection of the Sanctions Order by failing to recognize the significance of DuPont's wrongdoing and the breakdown of internal controls raises serious doubt as to the reasonableness and good faith nature of the Committee's investigation and conclusions."); A147 (¶ 284) ("Contrary to the Committee's contentions, the relevant evidence demonstrates that the Defendants were well aware that they were not permitted to stack GAT with RR both at the time they entered into the 2002 License Agreement and in 2007 and 2008."); A148 (¶ 287) ("[T]he Committee ignores or misconstrues the relevant evidence from 2007 and 2008 in concluding that Defendants believed they had the right to stack GAT/RR."); A151 (¶ 294) ("The Committee's contentions are unsupported."); A153 ¶ 297 ("[The Committee's] conclusions raise a reasonable doubt that the Committee and the Board acted reasonably and in good faith in their respective investigation and decision to reject the Demand."); A155 (¶ 298) ("[T]he Committee's flawed conclusion is based on a Rule 11 type analysis . . . ."); A161 (¶ 312) ("The Committee's conclusion is directly contrary to the evidence and, at a minimum, raises a reasonable doubt that its investigation and conclusions were the product of a reasonable and good faith process.").

Brehm, 746 A.2d at 264). As the Court explained in *Brehm*, "[c]ourts do not measure, weigh or quantify directors' judgments," nor do they "even decide if they are reasonable." 746 A.2d at 264.

The primary "particularized allegation" that Plaintiff identifies here—that "[t]he committee does not actually tell the board that the internal controls failed," *see* Op. Br. 17 (quoting A760)—falls far short. This allegation seemingly relates to Plaintiff's *Caremark* claim against the director Defendants. Op. 87. But the Court of Chancery noted the Committee's finding "that the Company's internal control systems . . . [were] not sufficiently deficient so as to satisfy the first prong of *Caremark*, and that there were no 'red flags' that would enable a finding that the Board consciously failed to monitor those controls, as required by the second prong of *Caremark*." Op. 87–88. The Court of Chancery further explained that, "[o]nce again, the Plaintiff disagrees with the conclusions of the Committee." Op. 88. The Court of Chancery *did not*, however, reject Plaintiff's allegation in favor of the Committee's conclusion. Rather, the Court of Chancery properly explained simply that "[t]he Committee informed itself about the *Caremark* claims and did not find an actionable breach of duty worth pursuing; nothing about the Board's acceptance of this recommendation implies bad faith." *Id.*[10]

[10] Plaintiff similarly contends that the Court of Chancery accepted the Committee's "characterization [of a September 20, 2007 email] over Plaintiff's contrary particularized allegations." Op. Br. 16 n.18. Again, the Court of

b) The Court Of Chancery Applied The Demand-Refused Pleading Standards Articulated By This Court

Plaintiff next incorrectly argues that the Court of Chancery "applied a heightened pleading standard." Op. Br. 18. First, Plaintiff argues that the court erred by "pre-supposing that the Committee's investigation . . . was sufficiently 'informed.'" *Id.* But the court simply noted the undisputed fact that the Committee "hired well-regarded independent counsel to assist in its investigation, and over nine months vigorously investigated the circumstances alleged in the Stockholder Demands," and "[a]t the end of this process . . . produced the 179-page Report." Op. 73. "In light of this background," the court concluded, "no successful argument can be made that the Board was uninformed in a manner approaching gross negligence, and thus the Plaintiff is forced to argue bad faith." *Id.* Indeed, "*[t]he Plaintiff's counsel conceded at oral argument that, in light of*

Chancery did no such thing. Based on the Committee's interviews with numerous witnesses, including the author of the email, and review of the email in the context of the entire record, the Committee explained that the email reflected the legal department's policy "to limit advice to non-speculative bright-line rules only as to what was necessary for the researcher's next step." A325. Thus, while the email stated that the "[c]urrent" advice was "they can stack but no commercial rights," the Committee found that statement reflected, *inter alia*, the fact that "Optimum GAT was . . . nowhere near commercialization so all that was needed was research clearance." A327. The Court of Chancery did not credit the Committee's interpretation of the email over Plaintiff's, but instead explained simply that Plaintiff's differing interpretation is "insufficient to raise a reasonable doubt that the Board acted in good faith and on an informed basis." Op. 75.

the facts pled, to successfully defend the Rule 23.1 Motion, rejection of the demand must have been in bad faith." *Id.* (emphasis added).

Second, Plaintiff contends that the Court of Chancery "impermissibly rais[ed] the [reasonable doubt] standard to one akin to 'likelihood of success on the merits' or 'clear and convincing' evidence." Op. Br. 19. Yet, in the paragraph that Plaintiff quotes in support of this argument, the Court of Chancery twice cites the reasonable doubt standard. *Id.* at 18 (quoting Op. 78–79). Plaintiff takes issue with the Court of Chancery's statement that "the recommendation by the Committee to forego 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." *Id.* However, this statement simply recognizes the fact that this is not one of the rare cases in which a board's decision is "so egregiously unreasonable" that it is "essentially inexplicable" on any ground other than bad faith. *Allen*, 72 A.3d at 107 (internal quotation marks omitted).

c) The Court Of Chancery Properly Considered The Reasonableness And Good Faith Of The Board's Investigation

Plaintiff further contends that the Court of Chancery erred by "focus[ing] exclusively on the good faith and reasonableness of the Committee." Op. Br. 20. Plaintiff appears to base this argument on two points: (1) that the Court of Chancery did not address the reasonableness and good faith of the Board, and (2)

that the Court of Chancery "missed the import of this Court's distinction in *Grimes* between the Board's independence *ex ante* and the Board's independence *ex post*." *Id.* Neither point survives scrutiny.

As to Plaintiff's argument that the Court of Chancery did not consider the reasonableness and good faith of the Board, this argument is belied by the Court of Chancery's opinion—which extensively analyzes the Board's duties of due care and loyalty in connection with its refusal of the demand. *See, e.g.*, Op. at 71–73, 75–84, 86–90. And as to Plaintiff's argument regarding independence, the Court of Chancery correctly noted that, "at least *ex ante*," Op. 89, "[a] shareholder plaintiff, by making a demand upon a board before filing suit, tacitly concedes the independence of a majority of the board to respond," Op. 66 (quoting *Levine*, 591 A.2d at 212). To be sure, "[f]ailure 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." *Scattered Corp. v. Chi. Stock Exch., Inc.*, 701 A.2d 70, 75 (Del. 1997). As the Court of Chancery explained, however, Plaintiff "d[id] not challenge, *ex post*, the Board's interest or independence." Op. 89–90.[11]

[11] Plaintiff makes no effort to explain how the allegations it cites raise a reasonable doubt as to the Board's independence *ex post*, *see* Op. Br. 20 nn.33–34, and Plaintiff did not challenge the Board's independence *ex post* in opposition to the motion to dismiss, A432–493.

d) The Court Of Chancery Accurately Distinguished Plaintiff's Citation To *London v. Tyrrell*

Finally, Plaintiff argues that the Court of Chancery erred in "refus[ing] to consider Plaintiff's reliance on *Zapata* cases." Op. Br. 21. Plaintiff does not identify the *Zapata* cases it cited—much less explain how their consideration would have altered the Court of Chancery's analysis—but it appears that Plaintiff is referring to the Court of Chancery's distinction of *London v. Tyrrell*, 2010 WL 877528 (Del. Ch.), which arose in the *Zapata* context. Op. 75–76.

Before the Court of Chancery, Plaintiff cited *London* for the proposition that "the Committee's alleged mischaracterization of key facts strips the Board's reliance on the Report of any presumption of proper business judgment." Op. 75. The Court of Chancery correctly explained, however, that "*London* was in the *Zapata* context, in which a derivative suit is brought, demand is excused, and *then* the company attempts to cleanse conflicts by creating a special litigation committee," and "[i]n that context, unlike in the pre-suit demand context, the special litigation committee bears the burden of demonstrating that there are no genuine issues of material fact as to its independence, the reasonableness of its investigation, and that there are reasonable bases for its decision." Op. 75–76 (citing *London*, 2010 WL 877528, at *12–13) (alteration and internal quotation marks omitted). This distinction is entirely proper. *See Levine* 591 A.2d at 209–210.

2. Plaintiff Has Not Pled Particularized Facts Creating A Reasonable Doubt As To The Reasonableness Or Good Faith Of The Board's Investigation

Plaintiff's allegations fail to create a reasonable doubt as to the reasonableness or good faith of the Board's investigation. Plaintiff's arguments in support of the contrary proposition are unavailing.

a) The Evaluation Committee's Report Provides An Informed Basis For The Board's Decision

Plaintiff argues 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." Op. Br. 26 (internal quotation marks omitted). Plaintiff identifies three purportedly "material omissions" 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 . . . ; and (iii) the disclosure in the Report that the Board was intentionally kept in the dark about the Sanctions Order." *Id.* The argument regarding the Committee's decision to not interview Holliday and Kullman fails for the reasons discussed below. *See* pp. 31–34, *infra*. The remaining two arguments are also meritless.

To start with, the Report did not fail to analyze the alleged breakdown of internal controls. The Committee analyzed the company's internal controls and

determined that—for reasons discussed above and more fully in the Report, A303–337; A373–385—"the interim testing issues" regarding GAT and "the potential for litigation" were not "red flags" that should have been raised to the Board. A409 nn.587–588. The Report similarly did not fail to address the disclosure of the sanctions order. The Committee determined that, consistent with the protective order, DuPont's team properly applied for approval to share the order with the CEO, General Counsel, and the head of the Board's Audit Committee. A350–351. As explained, Plaintiff's disagreement with these conclusions does not establish that the Board's decision was uninformed. *See* pp. 21–23, *supra*.

Moreover, even if the Report had failed to address either of these issues (it did not), that would not raise a reasonable doubt as to the good faith or reasonableness of the Board's investigation. Even where a response "fail[s] to contain a point-by-point response to all allegations in the demand," such a failure "does not stand for the proposition that the Board did not consider the demand before refusing it." *Baron v. Siff*, 1997 WL 666973, at *3 (Del. Ch.); *see also Sutherland v. Sutherland*, 2013 WL 2362263, at *11 (Del. Ch.). The Committee's Report thoroughly addresses the claims requested in the demands and explains the Committee's conclusion that those claims lack merit. If the comprehensive Report at issue here does not provide an informed basis for the Board's decision, it is difficult to imagine one that would.

b) The Alleged "Red Flags" Do Not Create A Reasonable Doubt As To The Reasonableness Or Good Faith Of The Board's Investigation

Doubling down on its internal controls argument, Plaintiff repeats its argument 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." Op. Br. 29 (internal quotation marks omitted). Plaintiff continues that, "[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." *Id.* "Because of this knowledge," the argument follows, "these directors had reason to doubt both the completeness and accuracy of the information on which the Committee relied." *Id.*

Contrary to Plaintiff's assertion, the amended complaint is woefully devoid of particularized facts that the Board members' personal knowledge should have led them to reject the Committee's recommendation and that their contrary decision was in bad faith. Plaintiff cites, without elaboration, a handful of paragraphs in the amended complaint purportedly establishing such knowledge, but the cited paragraphs do not come close to supporting Plaintiff's ambitious argument. Op. Br. 29 n.59 (citing A42–46 (¶¶ 33–49) (reciting the director Defendants' positions); A51–55 (¶¶ 72–82) (reciting the director Defendants'

duties); A62–64 (¶¶ 100–104) (alleging that the Board was generally updated regarding Project Choice); A78 (¶ 133) (alleging that the Board was generally updated regarding GAT); A79 (¶ 137) (alleging that certain members should have known of GAT); A90–91 (¶¶ 159–161) (allegations regarding public statements concerning GAT); A94–95 (¶¶ 172–173) (alleging that the decision to proceed with GAT stack should have been elevated to Board); A125 (¶ 239) (alleging that certain members likely knew of GAT); A136–142 (¶¶ 265–275) (alleging a breakdown of internal controls). At bottom, this contention simply repackages Plaintiff's primary, and legally insufficient, argument that the Board's decision was wrong.

c) The Committee's Decision Not To Interview Two Witnesses Does Not Create A Reasonable Doubt As To The Reasonableness Of The Board's Investigation

Plaintiff further criticizes the Committee's decision not to interview Ellen Kullman and Charles Holliday, DuPont's current and former Chairs and CEOs. Op. Br. 30. Even if this were a valid criticism (which it is not), this alleged failure would not create a reasonable doubt as to the reasonableness of the investigation. In *Levine*, this Court stressed that "[w]hile 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." 591 A.2d at 214. As a result, "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." *Belendiuk v. Carrion*, 2014 WL 3589500, at *6 (Del. Ch.) (emphasis added).

Regardless, Plaintiff's criticism is misplaced. To start with, Plaintiff's allegation that the Committee did not interview 2 witnesses must be viewed in light of the fact that the Committee interviewed 23 other witnesses and reviewed more than 25 days of testimony from the Monsanto litigation. "[T]he choice of people to interview or documents to review is one on which reasonable minds may differ," *Mount Moriah Cemetery v. Moritz*, 1991 WL 50149, at *4 (Del Ch.), and "there is no rule of general application that a board must interview every possible witness who may shed some light on the conduct forming the basis of the litigation," *Halpert Enters., Inc. v. Harrison*, 2008 WL 4585466, at *2 (2d Cir.) (applying Delaware law). Indeed, Delaware law does not impose "any rule that requires a board to interview anyone." *Quantum Tech. Partners II, L.P. v. Altman Browning & Co.*, 2009 WL 1795574, at *12 (D. Or.) (citing *Levine*, 591 A.2d at 214); *see also Copeland v. Lane*, 2012 WL 4845636, at *8 (N.D. Cal.) (same) (applying Delaware law).

Additionally, Plaintiff does not allege that Kullman and Holliday possessed unique information, nor what they might have said that could have altered the Board's decision. *See Quantum Tech.*, 2009 WL 1795574, at *12; *Halpert*, 2008

WL 4585466, at *3. Plaintiff claims that "Kullman and Holliday were the repositories of the Company's institutional information dating back to the inception of the GAT program." Op. Br. 31. But Plaintiff fails to show that the 23 witnesses the Committee interviewed (together with the 25 days of testimony from the Monsanto litigation) could not have adequately provided a full view of the facts relating to these issues. Indeed, the Committee interviewed numerous witnesses with extensive knowledge regarding DuPont's development of and representations concerning GAT.[12]

Furthermore, had Plaintiff's counsel accepted any of former Chancellor Chandler's four separate invitations to meet, counsel could have requested that the Committee interview Kullman and Holliday. *See Mount Moriah*, 1991 WL 50149, at *4 ("During that time, plaintiff was asked to identify potential witnesses and there was a fairly regular exchange of correspondence as well as several meetings between counsel for plaintiff and counsel for the Special Committee."). Plaintiff's

[12] *See* A256–257 (noting that the Board interviewed, *inter alia*, the Pioneer Director of Agricultural Biotechnology Business Operations and Director, Platform Management; the Pioneer Controller for Crop Production, Agriculture and Nutrition, Global Controller, and Director of Investor Relations; the Pioneer Communications Manager; and the DuPont Vice President of Investor Relations).

counsel instead chose to sit on the sidelines during the investigation, and as such its Monday-morning quarterbacking should be disregarded.[13]

d) The Disclosure Of The Sanctions Order Does Not Create A Reasonable Doubt As To The Reasonableness Or Good Faith Of The Board's Investigation

Plaintiff contends that the timing of the disclosure of the sanctions order "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." Op. Br. 33 (alteration and internal quotation marks omitted). As explained, the legal team was constrained in sharing the sanctions order with the Board by the protective order in the Monsanto litigation. *See* pp. 7, 13, *supra*; *see also* Op. 84 ("[T]he Board can hardly be said to have acted in bad faith in failing to pursue a fiduciary duty action against Kullman, Borel, Shickler, McKay, and E. du Pont for abiding by the confidentiality directive imposed by the District Court, which had just *sanctioned* the Company.").

Without making any particularized allegations about the actual terms of the protective order, Plaintiff baldly asserts that "nothing in that protective order

[13] Plaintiff additionally faults the Committee for not disclosing privileged meeting summaries from the 23 witnesses it interviewed. Op. Br. 12 n.9, 17. Plaintiff did not ask for the summaries, and, in any event, Delaware law does not require a board to issue a written report at all, much less dictate precisely what documents must be appended as exhibits. *See Belendiuk*, 2014 WL 3589500, at *6; *Gatz v. Ponsoldt*, 2004 WL 3029868, at *5 (Del. Ch.).

restricted a party's use of its own confidential information," and "there was no Monsanto confidential information in the Sanctions Order." Op. Br. 9. At best, however, this contention suggests that the Committee's (and the legal team's) interpretation of the protective order was mistaken. It in no manner suggests that the Board's investigation was grossly negligent or conducted in bad faith. Moreover, as the Court of Chancery explained, "[e]ven if it had been a breach of fiduciary duty not to disclose the sealed Sanctions Order, it is not clear that there would be damages for such a breach, let alone the potential for damages so compelling that [one] may infer bad faith from a refusal to bring the action." Op. 84.[14]

CONCLUSION

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

[14] Plaintiff further contends that "[t]he Board's cost-benefit analysis was nothing more than a 'check the box' exercise." Op. Br. 34. Defendants disagree with this characterization and, contrary to Plaintiff's suggestion, never "conceded" this point. *Id.*; *see* p. 16, *supra*. Because Plaintiff has failed particularly to allege that the Board's decision with respect to the merits of the claims requested in the demands was uninformed or in bad faith, whether the Report's analysis of the costs of litigation constitutes an independent basis for the Board's decision is inconsequential.

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