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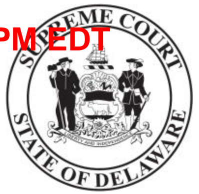

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARK EMPLOYEES' AND RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO, derivatively and on behalf of BioScrip, Inc.,

Plaintiff Below,
Appellant,

v.

RICHARD M. SMITH, MYRON Z. HOLUBIAK, CHARLOTTE W. COLLINS, SAMUEL P. FRIEDER, DAVID R. HUBERS, RICHARD L. ROBBINS, STUART A. SAMUELS, GORDON H. WOODWARD, KIMBERLEE C. SEAH, HAI V. TRAN, PATRICIA BOGUSZ, KOHLBERG & CO., L.L.C., KOHLBERG MANAGEMENT V, L.L.C., KOHLBERG INVESTORS V, L.P., KOHLBERG PARTNERS V, L.P., KOHLBERG TE INVESTORS V, L.P., KOCO INVESTORS V, L.P. and JEFFERIES LLC,

Defendants Below,
Appellees*,

and

BIOSCRIP, INC.,

Nominal Defendant Below,
Appellee.

No. 198, 2017

Court Below:
Court of Chancery of the State of Delaware,
C.A. No. 11000-VCG

PUBLIC VERSION--
FILED: August 10, 2017

APPELLEES' ANSWERING BRIEF

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* Although Richard Robbins is named in the caption as a defendant-appellant, Mr. Robbins is not referenced elsewhere in the Complaint and was not a director at the time the Complaint was filed.

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Dated: July 26, 2017

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NATURE OF PROCEEDINGS

When Plaintiff-Appellant Park Employees' and Retirement Board Employees' Annuity and Benefit Fund of Chicago filed suit on Thursday, May 7, 2015, Plaintiff had known for nearly a month that BioScrip Inc.'s ("BioScrip" or the "Company") Board—including three of the directors who had been named as defendants—would—and did—turn over at the annual stockholder meeting two business days later, on Monday, May 11, 2015. Yet in its complaint, in an attempt to circumvent Delaware law's requirement that a derivative plaintiff make a pre-suit demand on the company board—or else plead particularized facts explaining why such a demand would be futile—Plaintiff pleaded demand futility as to the obsolete May 7 Board. Plaintiff alleged that seven of its members named as defendants in this suit would be incapable of impartially evaluating a demand, even though Plaintiff was fully aware that, on May 11, three of the allegedly interested directors would be replaced and that a majority of the Board would then be unquestionably disinterested.[1]

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[1] "Director Defendants" refers to Myron Holubiak, Charlotte W. Collins, Samuel P. Frieder, David R. Hubers, Stuart A. Samuels, Richard M. Smith, and Gordon H. Woodward. "Officer Defendants" refers (collectively, with Smith) to Patricia Bogusz, Hai v. Tran, and Kimberlee C. Seah. "Kohlberg" refers to Kohlberg & Co., L.L.C., Kohlberg Management V, L.L.C., Kohlberg Investors V, L.P., Kohlberg Partners V, L.P., Kohlberg TE Investors V, L.P. and KOCO Investors V, L.P. "Jefferies" refers to Jefferies L.L.C.

In other words, if Plaintiff had just waited two more business days, making a demand unquestionably would not have been futile. The Court of Chancery correctly saw through the form of Plaintiff's filing to its substance and ruled that, in these circumstances, the May 11 Board was the appropriate board for purposes of determining whether demand was excused. The question for this Court is whether a plaintiff can strategically time a derivative action's filing to exploit Delaware's general practice of measuring demand futility on the date of filing—thus excusing demand based solely on a technical fiat—or whether the Court of Chancery was correct in concluding that equity requires applying a rule that serves the purposes of the demand requirement in rare cases like this one.

The timeline here establishes Plaintiff's gamesmanship. In August 2014, months after a BioScrip shareholder had filed a federal securities class action, Plaintiff made a Section 220 demand on BioScrip seeking books and records related to that class action's allegations. Plaintiff pressed its demand for months, following up on April 2, 2015 (after BioScrip had produced documents) to demand supplemental documents that Plaintiff described as "necessary and essential." On April 8, 2015, BioScrip mailed its annual proxy informing stockholders that ten directors would be sitting for uncontested election at the annual meeting on May 11, 2015: three new individuals, three existing directors not named as defendants

in this action, and four directors who were named as defendants in this action. Plaintiff concedes that it received timely notice of the BioScrip annual meeting and director election and therefore knew that a majority of the BioScrip board members would be replaced. So even though BioScrip promised on May 4, 2015, that the documents Appellant deemed "necessary and essential" would be forthcoming shortly, Plaintiff rushed to file its complaint on May 7, 2015, so that it could allege demand futility as to the lame duck board. Yet Plaintiff delayed until May 27, 2015—more than two weeks after the new board was seated—to serve the complaint.

This timeline reveals two facts that underscore the need to evaluate futility with respect to the May 11 Board. *First*, only the May 11 Board—not the May 7 Board—was in a position to evaluate a demand. Had Plaintiff made a demand on May 7, when it filed the complaint, the May 7 Board would have been left with fewer than two business days to evaluate it. Plaintiff's contention that demand futility should nevertheless be assessed as to the May 7 Board, based on a mechanical rule that would require courts woodenly to evaluate demand futility as of the date of a complaint's filing, would either (a) reduce Delaware's demand requirement to a mere formality, undermining Delaware's director-centric model of corporate governance or (b) encourage a hasty two-day review process without

any exigency justifying the rush, and where an orderly and thorough deliberative process would better serve the company's and its shareholders' interests. *Second*, Plaintiff's gamesmanship is transparent. Plaintiff filed the complaint while waiting for BioScrip to turn over "necessary and essential" documents in response to a Section 220 demand. If any circumstance cries out for equity to vary the usual practice of assessing demand futility on the complaint's filing date, it is this one.

This would not be the first time a Delaware court has determined that equity dictated evaluating demand as of a time other than the complaint's filing date. *See In re Puda Coal, Inc. S'holders Litig.*, C.A. No. 6476-CS (Del. Ch. Feb. 6, 2013) (TRANSCRIPT); *see also In re EZCORP, Inc. Consulting Agm't Deriv. Litig.*, 2016 WL 301245, at *9 (Del. Ch. Jan. 25, 2016). In circumstances like these, where changes to a board's composition following the complaint's filing would lead to a "Kafkaesque" exercise if demand futility were determined as of the complaint's filing date, courts have exercised their discretion to vary the ordinary practice. *In re Puda Coal*, A430.

Notably, Plaintiff has abandoned any argument that the members of the May 11 Board lack independence. And for good reason: those directors are disinterested and [REDACTED]

[REDACTED] Yet, Plaintiff still argues that even the May

11 Board cannot assess a demand because it has allegedly prejudged this action's merits by seeking its dismissal of this action under Rules 23.1 and 12(b)(6).[2] Astonishingly, Plaintiff claims that the May 11 Board has demonstrated that it is not disinterested because it has failed unilaterally to evaluate a demand that Plaintiff never made. If Plaintiff had presented the new Board with a demand, the Board *would have had a legal duty* to evaluate the claims in this litigation. Plaintiff cannot refuse to make a demand and, in the same breath, claim that the Board is incapable of evaluating that demand *because* it has failed to evaluate the claims. This Court should reject this circular argument.

Delaware has chosen to vest in the board of directors the power to run a corporation's affairs subject to fiduciary duties. This Court should eschew Plaintiff's attempt to transfer to themselves through technical fiat the authority that rightfully belongs to BioScrip's board. This Court should affirm the Court of Chancery's holdings.

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[2] Defendants note that the Court of Chancery's decisions and this appeal concern only the dismissal under Rule 23.1 for failure to plead demand futility, and so they have briefed only those issues. Defendants respectfully request that in the event this Court were to reverse and remand this action, it direct the Court of Chancery to consider Defendants' Rule 12(b)(6) arguments in the first instance. *See Sandys v. Pincus*, 152 A.3d 124, 134 n.46 (Del. 2016) (reversing dismissal based on demand futility but directing Court of Chancery to consider Rule 12(b)(6) arguments for dismissal "in the first instance").

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly determined that demand should be evaluated with respect to the May 11, 2015 Board. Delaware's demand requirement ensures fidelity to Delaware's director-centric model of corporate governance by permitting a board to make the important business decision whether to invest the corporation's resources in litigation. *See Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984). Although demand is generally evaluated as of the date of filing, *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993), courts have departed from that standard where blind adherence to it would frustrate equity. *See In re Puda Coal*, A414–441; *see also In re EZCORP, Inc.*, 2016 WL 301245, at *9. This Court has not yet had occasion to decide whether courts may—where equity demands—depart from the general practice of evaluating demand futility on the complaint's filing date. Certainly, this Court has not foreclosed this practice, and the Court of Chancery has embraced the authority to remedy injustice by departing from the date-of-filing standard in limited circumstances. The May 11 Board is the correct board for evaluating demand futility here.

2. Denied. The Court of Chancery correctly determined that the May 11 Board was capable of considering a demand. As an initial matter, "Delaware law presumes the independence of corporate directors." *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *12 (Del. Ch. Sept. 30, 2013) (citing *Aronson*, 473 A.2d at 815).

Plaintiff does not challenge the board's independence when it was seated on May 11, 2015. Instead, Plaintiff makes the novel argument that, by seeking dismissal of the instant suit, the May 11 Board has somehow demonstrated that it is incapable of impartially evaluating a demand. Plaintiff's Br. 35–39. This is not the case. The Board here took no action subject to the business judgment rule; so the issue of demand is assessed under the standard this Court articulated in *Rales*, 634 A.2d at 934. The question is whether "the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." *Id.* A majority of the May 11 Board is plainly independent and disinterested. And the Board [redacted] [redacted] This evidences the Board's independence and ability to evaluate a demand. Demand as to the May 11 Board is therefore not excused.

STATEMENT OF FACTS

A. Factual Background

Plaintiff brought this derivative action alleging that various directors, officers, and stockholders, aided and abetted by an investment advisor, breached their fiduciary duties in connection with (a) BioScrip's sale of a drug-product called Exjade through a long-ago divested legacy division, (b) certain of BioScrip's public securities disclosures, and (c) alleged stock sales by insiders.[3]

1. The Composition of the Board

The May 7 Board

The Complaint alleges that the following seven defendants were current directors of BioScrip as of May 7, 2015, the date on which Plaintiff filed its complaint: Charlotte W. Collins, Samuel P. Frieder, David R. Hubers, Myron Holubiak, Stuart A. Samuels, Gordon H. Woodward, and Richard M. Smith. A12–13. Mr. Smith currently serves as BioScrip's Chief Executive Officer and previously served as its Chief Operating Officer from 2009 until 2011. A41. The

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[3] In its brief, Plaintiff goes out of its way to assert allegations of purported misconduct by Kohlberg & Co. LLC, the Kohlberg designees on BioScrip's May 7 Board, and Jefferies LLC, even though these allegations have nothing to do with the issues on appeal. While it is not necessary or appropriate to respond to those allegations here, Kohlberg, the Kohlberg directors, and Jefferies reserve their rights to respond if it should become appropriate, including by asserting arguments they made below but which the Court of Chancery did not rule upon.

Complaint further alleges that the May 7 Board included three directors, who are not parties to this action: Yon Y. Jorden, Tricia H. Nguyen and Christopher Shackelton (collectively, the "Non-Defendant Directors" and, together with the Director Defendants, the ten-member "May 7 Board").

The May 11 Board

On April 8, 2015, BioScrip mailed its annual proxy, informing stockholders that three members of the Company's May 7 Board (Frieder, Hubers, and Woodward, all of whom are defendants in this action) would not sit for reelection at the annual meeting on May 11, 2015. *See* B12. The proxy explained that ten directors had been nominated for an uncontested election at the May 11 annual meeting, including three directors who had not previously served on BioScrip's board (David W. Golding, Michael Goldstein, and R. Carter Pate). *Id.* The proxy thus made clear that if the full slate were elected on May 11—when only ten directors were sitting for election—then BioScrip's board, as of May 11, would have been comprised of three "New Directors" (Golding, Golstein, and Pate), the three Non-Defendant Directors (Jorden, Nguyen, and Shackelton), and only four of the Director Defendants (Collins, Holubiak, Samuels, and Smith). Thus, after reviewing the proxy, Plaintiff had full knowledge that, as of May 11, it was all but certain that six of ten BioScrip directors would *not* have served on the Company board at any time relevant to the Complaint's allegations.

On Monday, May 11, 2015, at the annual shareholder meeting, all ten directors sitting for election were elected. B64–65. Three of those directors—who had previously served on the May 7 Board—resigned from the Company Board shortly after the election: two of the Director Defendants (Collins and Samuels) and one Non-Defendant Director (Jorden). B64. Consequently, BioScrip's new seven member board was comprised of (a) the three New Directors elected on May 11 (Golding, Goldstein, and Pate), (b) two of the Non-Defendant Directors (Shackelton and Nguyen), and (c) only two of the seven individuals named as Director Defendants (Smith and Holubiak). The table below reflects the composition of BioScrip's Board as of May 7 and May 11, 2015:

BioScrip's 2015 Board of Directors	
May 7 Board	*May 11 Board*
Collins Frieder Hubers Holubiak Samuels Smith Woodward	Holubiak Smith
Non-Defendant Jorden Non-Defendant Nguyen Non-Defendant Shackelton	Non-Defendant Nguyen Non-Defendant Shackelton *Golding (new)* *Goldstein (new)* *Pate (new)*

2.

The May 11 Board

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███████████████████████ *See* B106.

3. Section 220 Demand

On August 11, 2014, Plaintiff sent BioScrip a request for books and records pursuant to Section 220. B68–74. Although the request was facially deficient, over the course of the nine months following receipt of the 220 request, BioScrip negotiated with Plaintiff, produced the requested documents on a rolling basis, and continued to exchange correspondence relating to requests for additional documents. B80. Indeed, as late as April 2, 2015—and notably three days *before* BioScrip mailed its annual proxy informing shareholders about the upcoming board election—Plaintiff demanded supplemental documents that it described as "necessary and essential." B93. On May 4, 2015—a mere two business days before Plaintiff filed its initial complaint—BioScrip's counsel notified Plaintiff that the Company was still in the process of gathering for review these documents and would produce "responsive, non-privileged copies . . . as soon as practicable." B89-92.

B. Procedural Background

1. The Initial Complaint

Instead of waiting for the documents that Plaintiff—before being notified of the upcoming board election—deemed "necessary and essential" in its April 2, 2015 supplemental demand, Plaintiff chose to race to the courthouse and file a complaint (the "Initial Complaint") on May 7, 2015, just two business days before the Board change Plaintiff knew was imminent.[4]

The Initial Complaint consists of six claims for relief, all of which are derivative:

- Count I (against the Director Defendants and Former Officers) alleges breach of fiduciary duties for failing to oversee BioScrip's operations and compliance. Specifically, Plaintiff alleges that the May 7 Director Defendants and Former Officers caused the Company to (a) participate in a kickback scheme with Novartis for a drug product known as Exjade, (b) cover up the alleged Exjade scheme, and (c) conceal a related government investigation. A106.
- Count II (against the Director Defendants and Former Officers) alleges breach of fiduciary duties in connection with federal securities disclosures. Specifically, Plaintiff alleges that the May 7 Director Defendants and Former Officers caused or allowed the Company to (a) omit from public filings the

[4] Plaintiff's complaint piggybacked on a prior-filed federal securities case then-pending in the United States District Court for the Southern District of New York (the "SDNY Complaint"). Although the claims in the SDNY Complaint arise under the Securities Act of 1933 and the Securities Exchange Act of 1934, rather than Delaware law, the facts pleaded in Plaintiff's Initial Complaint substantially overlap with those pleaded in the SDNY Complaint and involve many of the same parties. That suit was settled on June 16, 2016. *See* B120-130.

government's investigation into BioScrip's role in the alleged Exjade kickback scheme, (b) misstate in public filings the Company's compliance with applicable state and federal health laws; and (c) omit from public filings certain material information regarding the performance of its pharmacy benefit management business. A107.

- Count III (against the Director Defendants and Kohlberg) alleges breach of fiduciary duties in connection with the allegedly unlawful stock offerings in April 2013 and August 2013. A108-110.
- Count IV (against Bogusz, Frieder, Holubiak, Hubers, and Woodward, and Kohlberg) is a *Brophy*[5] claim alleging stock sales by insiders. A110-112.
- Count V (against Jefferies) alleges that Jefferies aided and abetted the alleged insider trading and fiduciary duty breaches referenced in Count II, III, and IV. A111-112.
- Count VI (against Kohlberg) alleging that Kohlberg aided and abetted the alleged insider trading and fiduciary duty breaches referenced in Count II, III, and IV. A112-113.

Under a confidentiality agreement between Plaintiff and the Company, Plaintiff was required to file its complaint under seal. Court of Chancery Rule 5.1 directs that any individual filing a confidential complaint must give the opposing party the opportunity to make objections to proposed redactions within three business days, after which a public version must be filed. Although Plaintiff complied with this procedure, it did not serve the Initial Complaint on BioScrip until May 27, 2015, nearly three weeks after Plaintiff had chosen to initiate the action on May 7 and more than two weeks after the May 11 Board was seated.

[5] *Brophy v. Cities Serv. Co.*, 70 A.2d 5 (Del. Ch. 1949).

2. The Court of Chancery's Ruling on the Initial Complaint

On June 16, 2015, Defendants filed three motions to dismiss. The motions to dismiss under Rule 23.1 asserted that (1) demand futility should be evaluated as to the May 11 Board, not the May 7 Board; and (2) even if demand futility were evaluated as to the May 7 Board, the directors were disinterested and demand is not excused. Defendants also filed motions to dismiss for failure to state a claim under Rule 12(b)(6). *See* A2.

On May 31, 2016—after holding oral argument and ordering supplemental briefing—the Court of Chancery (Glasscock, V.C.) held that demand futility should be evaluated as to the May 11 Board, not the May 7 Board. Recognizing that demand futility is ordinarily measured against the board in place at the time of filing, the Court of Chancery determined that a departure was warranted here because: (1) "[a]s a practical matter, even had the May 7 directors received a demand on May 7, 2015, they would not have had time to assess the Complaint in keeping with their fiduciary responsibilities before being replaced by the new members of the May 11 Board" and (2) the Company was not served until May 27, 2015, nearly three weeks after Plaintiff filed its complaint. Appellant's Br. Ex. A at 24–25. The Court of Chancery rejected a rigid filing-date rule for assessing demand futility because "it is axiomatic that equity regards substance rather than form." *Id.* at 27–28. Careful to make clear that the Court was not "disturb[ing] the

general rule," the Court found "under the unique facts presented by this case, a departure from the general rule is both equitable and in keeping with the policy behind Rule 23.1." *Id.* at 28. The Court thus ruled that Plaintiff could not proceed on the Initial Complaint, but reserved on the motions to dismiss and allowed Plaintiff to replead. *Id.* at 32.

3. The Amended Complaint

On June 30, 2016, Plaintiff filed a motion to amend the complaint, which the Court of Chancery granted. A17. The Amended Complaint includes the same causes of action as the Initial Complaint, but alleges that making a demand on the May 11 Board would be futile. A94–113.

4. The Court's Teleconference

On September 13, 2016, the Court of Chancery held a status teleconference to discuss scheduling, during which Vice Chancellor Glasscock stated that he would consider a Rule 12(b)(6) motion simultaneously with the Rule 23.1 motion before the Court. *See* B139-141.

5. Dismissal of Amended Complaint

On April 18, 2017, the Court of Chancery dismissed Plaintiff's Amended Complaint. The Court first rejected Plaintiff's "novel argument" that, by filing a Rule 12(b)(6) motion, the May 11 Board demonstrated demand futility. Appellant's Br. Ex. B at 13–14. "Although I appreciate the creativity of Plaintiff's

argument here," the Court noted, "[t]he Plaintiff essentially presents a circular argument that demand is excused because it is clear that the Board would reject demand." *Id* at 14. The Court concluded that Plaintiff fell far short of demonstrating that BioScrip's position in the instant litigation means it would "*wrongfully* reject demand" if presented with one. *Id.* The Court then went on to hold that Plaintiff failed to demonstrate that a majority of the Board lacks independence or is otherwise interested with respect to any of the six counts. The Court accordingly dismissed the Amended Complaint without addressing the Rule 12(b)(6) dismissal grounds. This appeal followed.

ARGUMENT

I. The Court of Chancery's Rulings Must Be Affirmed Because Plaintiff's Failure To Make Demand To The May 11 Board Cannot Be Excused.

A. Question Presented

Did the Court of Chancery correctly conclude that the May 11 Board was the proper board for evaluating demand futility? Appellant's Br. Ex. A at 6, 20-26; A245-251; B105-117.

B. Scope of Review

This Court reviews *de novo* a decision dismissing a derivative suit under Rule 23.1. *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008). The derivative plaintiff bears the burden of pleading with particularity facts that show that any effort to make a demand would be futile. Del. Ct. Ch. R. 23.1. While the Court may draw reasonable inferences in the plaintiff's favor, "[c]onclusory allegations are not considered as expressly pleaded facts or factual inferences [and] inferences that are not objectively reasonable cannot be drawn in plaintiff's favor." *Wood*, 953 A.2d at 140 (quotation marks and citations omitted).

C. Merits of the Argument

1. The May 11 Board is the correct board for purposes of evaluating demand futility under Rule 23.1.

The requirement to make demand on a board of directors before initiating a shareholder derivative suit is, as this Court has observed, a critical component of

Delaware's director-centric model of corporate governance. *See Braddock v. Zimmerman*, 906 A.2d 776, 784 (Del. 2006) ("In derivative litigation, the demand requirement is a recognition of the fundamental statutory precept that section 141(a) vests boards of directors with the power to manage the business and affairs of corporations."). Section 141(a) of the Delaware Code vests boards of directors with exclusive authority to manage the business and affairs of corporations. *See* 8 *Del. C.* § 141(a) ("[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors"). In recognition of this director-centric model of corporate governance, Rule 23.1 requires a plaintiff bringing a derivative suit to give the directors the opportunity to exercise this critical, substantive right unless the plaintiff can establish that the board is somehow incapable of evaluating a demand. *See* Del. Ch. Ct. R. 23.1; *see also Kaplan v. Peat, Marwick, Michell & Co.*, 540 A.2d 726, 731 (Del. 1988) ("The requirement of pre-suit demand in Chancery Court Rule 23.1 recognizes that the decision to pursue claims belonging to the corporation falls within the scope of the directors' power to manage the business and affairs of the corporation.").

As the Court of Chancery aptly noted, *see* Appellant's Br. Ex. A at 22, the demand requirement ensures fidelity to Delaware's statutory scheme by permitting the board to make the important business decision of whether to invest a

corporation's time and resources in litigation. *See Aronson*, 473 A.2d at 811 ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation."); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981) ("Directors of Delaware corporations derive their managerial decision making power, which encompasses decisions whether to initiate, or refrain from entering, litigation, from 8 *Del. C.* § 141(a)."). Rule 23.1's demand requirement is, therefore, much more than a mere formality. It is both a "substantive right," which affords the board of directors "the opportunity to rectify an alleged wrong without litigation, and to control any litigation which does arise" and an acknowledgment of the directors' attendant duties. *Aronson*, 473 A.2d at 809. This Court has described directors' obligation to evaluate carefully and thoroughly a demand consistently with their fiduciary duties: "First, the directors must determine the best method to inform themselves of the facts relating to the alleged wrongdoing and the considerations, both legal and financial, bearing on a response to the demand. If a factual investigation is required, it must be conducted reasonably and in good faith. Second, the board must weigh the alternatives available to it, including the advisability of implementing internal corrective action and commencing legal proceedings." *Rales*, 634 A.2d at 935.

Although demand futility is generally evaluated as of the filing date, *see id.*, this Court and others have departed from that practice where it would not serve equity. For example, where claims not validly in litigation are added in an amended filing, demand is evaluated based on the company board as of the date of the amended filing. *See Braddock*, 906 A.2d at 786.

In *In re Puda Coal*, A414–441, the Court of Chancery held that events that occurred *after* the complaint was filed compelled a departure from the general practice of evaluating demand futility as of the complaint's filing date. There, the court confronted the inverse of the situation here: a board of directors sought to dismiss a complaint for failure to make a demand because, at the filing date, three of the board's five directors were disinterested and independent. A418. Over the next ten months, however, all three of the independent directors and one of the allegedly conflicted directors resigned, leaving the company under the control of the sole remaining director, whom the Court of Chancery recognized was the "principal suspected wrongdoer." A419. Two of the independent directors—who had chosen to resign instead of pursuing the suit on behalf of the corporation—then moved to dismiss the complaint for failure to make a demand pursuant to Rule 23.1. A418. They argued that plaintiffs should have made a demand because three

of the board's five directors were independent when the complaint was filed. A419.

Eschewing an inflexible default rule, then-Chancellor Strine rejected the board's invitation to dismiss the suit on Rule 23.1 grounds. A427. While recognizing the general practice of evaluating demand futility as of the date the complaint is originally filed, the court looked to the reality before it, considering the director resignations that occurred after the complaint's filing. A419–420. Granting the motion to dismiss would have left control of the litigation in the hands of the sole remaining director of the company, the chairman who had allegedly misappropriated the company's funds, A429, leading to an inequitable "Kafkaesque" result. A430.

As Vice Chancellor Glasscock stated, "the same Kafkaesque quality would attach to a decision" that the May 7 Board—rather than the May 11 Board—is the appropriate board for assessing demand futility. *See* Appellant's Br. Ex. A at 31. That is so for three reasons.

First, as the Court of Chancery recognized, *see id.* at 24, the May 11 Board, not the May 7 Board, was in the exclusive position actually to evaluate a demand. Plaintiff filed its Complaint on May 7, 2015. Just four days—or only two business days—later, BioScrip held a *previously publicly disclosed* and *uncontested* election

for its board of directors that materially changed the board's composition. Vice Chancellor Glasscock properly recognized that, had the May 7 directors received a demand on May 7, 2015, they would not have had time to assess the Complaint in accordance with their fiduciary duties—as this Court described in *Rales*, 634 A.2d at 935—before being replaced by the May 11 Board. Plaintiff's position that May 7 is the proper date for evaluating demand would charge the May 7 Board with the impossible task of evaluating a Complaint in the only two business days between filing and turning over to a new board.[6]

Second, the Company's annual proxy, which was mailed to Plaintiff and all shareholders on April 8, reveals that Plaintiff's decision to file on May 7 was strategic. The proxy informed stockholders that three New Directors were up for election (Golding, Goldstein, and Pate) and that three current directors (Frieder,

[6] Plaintiff contends that it was prevented from formally perfecting service by its § 220 confidentiality agreement with the Company and Court of Chancery Rule 5.1. But Rule 5.1 requires only that a plaintiff filing a confidential complaint wait *three business days* before filing a public version. What is more, Plaintiff did not seek the issuance of any summons until May 21, 2015. Plaintiff's decision to wait nearly three weeks before perfecting service is not, as it insists, explained by Delaware law. Instead, it is a signal that despite Plaintiff's rush to the courthouse to get its complaint filed before the board changeover—to attempt to usurp the BioScrip Board's power to decide whether to pursue this litigation—Plaintiff was in no rush to have its claim heard. In any event, Vice Chancellor Glasscock was clear in his ruling that even if Plaintiff did not unreasonably delay service, the May 7 Board would not have had adequate time to evaluate the demand consistently with the directors' fiduciary duties. *See* Appellant's Br. Ex. A at 24–25.

Hubers, and Woodward) would not sit for reelection. B12. The proxy further informed shareholders that the election was uncontested. Thus, Plaintiff was on notice in early April that, as of the afternoon of May 11, the Company's board would be unquestionably independent and disinterested; three New Directors would join the board on which three Non-Defendant Directors sat.

Third, Plaintiff's delay both in lodging its Section 220 demand and in filing the instant suit further underscores its strategic motive in filing before the May 11 Board change. Despite borrowing heavily from the SDNY Complaint—filed in 2013—Plaintiff waited until May 2015 to file this action. Plaintiff initiated an involved Section 220 demand process with BioScrip, sending a follow-up request as late as April 2 demanding certain documents Plaintiff deemed "necessary and essential." B93. On May 4, a mere *three days* before Plaintiff filed its Complaint, BioScrip informed Plaintiff that, as requested, the Company would supplement its prior production with these documents "as soon as practicable." B91. Rather than await the production of these "necessary and essential" documents, *see* B93, or initiate a Section 220 books-and-records proceeding in the Court of Chancery—*i.e.*, what would have been the next logical step—Plaintiff raced to the courthouse on May 7 and filed the Initial Complaint before the May 11 Board change about which it had learned since its April 2 document demand. *See, e.g.*, *Duffy v. Rieger*,

C.A. No. 12607-VCS (Del. Ch. Apr. 24. 2017) (TRANSCRIPT), B150 (noting that when company's response to derivative plaintiff's request for books and records was deficient, derivative plaintiff should have "take[n] full advantage of the most effective of the so-called 'tools at hand,' . . . Section 220" before filing a derivative action). Plaintiff's affirmative choice to file its complaint then—without the "essential" documents it sought—speaks volumes about its true motivations.

Indeed, the Court of Chancery has dismissed derivative complaints where the derivative plaintiff would have been better served by first initiating a books-and-records proceeding. *See, e.g.*, *South v. Baker*, 62 A.3d 1 (Del. Ch. 2012) (dismissing complaint where, while company was in the process of responding to two 220 demands, a third plaintiff rushed to the courthouse to file suit on the heels of federal securities litigation). What is more, Plaintiff's complaint was identical in many material respects to the SDNY Complaint that had been publicly filed *years* earlier. This underscores that Plaintiff's decision to file on May 7 arose not from its investigation, but rather its transparent desire to evade making a demand to the May 11 Board.

2. This Court should not adopt an inflexible bright-line rule that strips the Court of Chancery of its inherent equitable authority.

The Delaware Court of Chancery has long been recognized as a court of equity. *See, e.g.*, *DiGiacobbe v. Sestak*, 743 A.2d 180, 182 (Del. 1999)

("Delaware's equity court traces its jurisdiction and powers to the High Court of Chancery in Great Britain at the time of the American Revolution."). Courts invoke their equity jurisdiction precisely when the letter of the law is too confining, that is, when the bright-line rule yields an unjust result. 3 William Blackstone, Commentaries on the Laws of England 429–442 (1768) (noting that equity follows "the spirit of the rule" rather than "the strictness of the letter"). Indeed, it is axiomatic that equity "regards substance rather than form." *In re EZCORP, Inc.*, 2016 WL 301245, at *9; *cf. Redeemer Comm. of Highland Crusader Fund v. Highland Capital Mgmt., L.P.*, 2017 WL 713633, at *1 (Del. Ch. Feb. 23, 2017) (recognizing that "[b]right-line rules" are "troubling to equity"). And it is clear that "to use doctrinal law in some sort of gotcha way is just not appropriate." A428; *In re Puda Coal,* A414–441. But that is precisely what Plaintiff has attempted here.

BioScrip embraces the rule that, in the usual case, demand futility should be measured on the date of filing. Unlike Plaintiff, however, BioScrip recognizes that courts of equity should be able to address injustice by deviating from that practice in rare cases where equity warrants it. Plaintiff advances an inflexible rule—elevating form over substance—that strips the Court of Chancery of any discretion to use its inherent equitable powers to remedy injustice.

Plaintiff insists that this Court has already adopted a bright-line rule for assessing demand on the date of filing. This is incorrect. This Court has not yet confronted a case where equity demands departure from the general practice of assessing demand on the date of filing. While these departures should be rare, the Court of Chancery has, on at least three occasions (including this case), found a departure warranted. *See In re Puda Coal*, A414–441 (determining that measuring demand futility on date of filing would yield "Kafkaesque" result); *see also In re EZCORP, Inc.*, 2016 WL 301245, at *35 n.32 (measuring demand both as to board on complaint-filing date and superseding board and concluding demand was excused as to both).

Plaintiff mistakenly relies on *In re China Agritech, Inc. Stockholder Derivative Litigation*, 2013 WL 2181514, at *35 (Del. Ch. May 21, 2013), and *Needham v. Cruver*, 1993 WL 179336, at *11 (Del. Ch. May 12, 1993), to argue that changes in board composition after the complaint's filing are irrelevant to demand futility. Those cases are inapposite, however, because here, the key event—the changeover from the May 7 to the May 11 Board—was known for a month before the Initial Complaint was filed; BioScrip's action (the annual meeting notice announcing the change to the board composition) *preceded* the Initial Complaint filing by many weeks. But in *China Agritech* and *Needham*, the

actions to nullify alleged board conflicts occurred in response to the derivative action's filing. *See In re China Agritech, Inc.*, 2013 WL 2181514, at *17, *20–22 (board resignations announced after the derivative action was commenced); *Needham*, 1993 WL 178336, at *4 (directors divested themselves of certain assets months after derivative lawsuit was filed and then argued that their action neutralized conflicts).[7]

Plaintiff erroneously argues that policy considerations support an unbending adherence to the complaint filing date for the demand futility analysis to "avoid gamesmanship." Appellant's Br. 26. Plaintiff's postured fear that "[p]laintiffs will rush to the courthouse to bring suit against a conflicted board, while defendants will delay pre-litigation proceedings such as § 220 actions in an attempt to put a new board in place," *id.* at 27, is both ironic and overblown. The very reason for affording the Court of Chancery the power to depart from a bright-line filing-date

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[7] *In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963 (Del. Ch. 2007), which Plaintiff cites, supports Defendants. There, derivative plaintiffs had made a host of "allegations stretching back several years," *In re infoUSA, Inc.*, 953 A.2d at 986, and argued that demand was futile because the company's board had previously approved the allegedly illegal conduct. The Court of Chancery rejected this argument, noting that only the then-current board with the "*right and responsibility* to consider a demand" was relevant to the demand futility analysis, not some former board that no longer exists. *Id.* at 985. Here, Vice Chancellor Glasscock correctly concluded that "as a practical matter" the May 11 Board, not the May 7 Board would have evaluated demand, Appellant's Br. Ex. A at 24, and so the May 11 Board had the "*right and responsibility* to consider a demand" under *In re infoUSA*. 953 A.2d at 985 (emphasis added).

rule is to thwart the sort of gamesmanship in which Plaintiff engaged (yet feigns to fear) here: Plaintiff raced to the courthouse to freeze in the May 7 Board and freeze out the May 11 Board, with knowledge that the new directors' election was imminent. Even assuming that Plaintiff's position had merit, such a changeover would actually *benefit* stockholders by ensuring that an independent directorate could address stockholder concerns, advancing the goals of Delaware corporate law. And were a shareholder or board engaged in gamesmanship, the Court of Chancery would have the discretion under BioScrip's formulation of the rule to "sniff out and preempt improper manipulation of board composition in this context." Appellant's Br. Ex. A at 27. Plaintiff's inflexible bright line, by contrast, would prohibit the Court of Chancery from thwarting gamesmanship where a plaintiff—knowing that a board change was only a matter of minutes away—chooses to plead futility as to the board in place the moment before the changeover.

Plaintiff's reliance on a grab bag of cases extolling the effectiveness of bright-line rules in a variety of other contexts (but not demand futility), disregards the fundamental principle that equity "regards substance rather than form." *In re EZCORP, Inc.*, 2016 WL 301245, at *9. While bright-line rules may be appropriate in some contexts, they are ill suited to a variety of others, including

demand futility. *See Nixon v. Blackwell*, 626 A.2d 1366, 1381 (Del. 1993) (explaining that the "doctrine of entire fairness does not lend itself to bright line precision or rigid doctrine"); *Sample v. Morgan*, 914 A.2d 647, 672–73 (Del. Ch. 2007) (rejecting invitation to adopt a bright-line rule constricting boards from contracting away their right to issue equity because "Delaware law uses equity . . . to ensure that directors do not injure their corporations"); *Hamilton P'rs, L.P. v. Englard*, 11 A.3d 1180, 1200 (Del. Ch. 2010) ("[T]he question of whether a related corporation is an indispensable party . . . should not be answered by rote adherence to a bright-line rule of dubious origin. It should rather turn on the facts of the case and the standards set forth in Court of Chancery Rule 19(b)."); *Rapoport v. Litig. Trust of MDIP Inc.*, 2005 WL 3277911, at *2 (Del. Ch. Nov. 23, 2005) (explaining that the court does not perform *McWane* first-filed analyses "mechanically or using a bright-line test," but rather conducts "a more nuanced analysis"). The Court should reject Plaintiff's wooden bright-line formulation in favor of a general rule evaluating demand on the complaint filing date while allowing courts of equity to retain their discretion to remedy injustice in the rare instances in which it is necessary.

3. If the Court concludes that demand must be evaluated on the complaint-filing date, the Court should remand to the Court of Chancery to determine, in the first instance, whether demand is excused as to the May 7 Board.

If this Court were to conclude that demand should be evaluated on the complaint-filing date, then the Court should remand to the Court of Chancery to determine, in the first instance, whether demand is excused as to the May 7 Board. A "fact-intensive, director-by-director analysis is required to meet the pleading standard for demand futility." *LVI Grp. Invs., LLC v. NCM Grp. Hldgs., LLC*, 2017 WL 1174438, at *8 (Del. Ch. Mar. 29, 2017). It would be premature to rule on this issue when this Court does not have the benefit of the Court of Chancery's considered ruling, nor of full briefing before this Court. *See also Sandys*, 152 A.3d at 134 n.46 (reversing dismissal based on demand futility but directing Court of Chancery to consider Rule 12(b)(6) arguments for dismissal "in the first instance").[8]

If the Court nevertheless chooses to reach this question, then it should conclude that the May 7 Board was capable of evaluating a demand. As BioScrip's briefing below demonstrates, Plaintiff has failed adequately to plead, on

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[8] In the Court of Chancery, Defendants argued both that the May 11 Board was the correct board for evaluating demand futility, and that, in any event, Plaintiff had not adequately pleaded demand futility with respect to the May 7 Board. The Court of Chancery did not reach the second issue.

each of the counts, that at least five of the seven Director Defendants face substantial liability. For instance, under Count I—a *Caremark* claim—Plaintiff acknowledges that the Director Defendants "received regular legal and regulatory updates" and put into place reporting systems and internal controls such as BioScrip's Code of Business Conduct and Ethics, Insider Trading Policy, and the Audit Committee. A47-50, 63, 65, 82. And, Plaintiff failed to plead *specific* facts indicating that five of the seven Director Defendants knowingly or intentionally violated any duties, thus failing to meet the requisite standard.

II. The Court of Chancery Court Correctly Determined That the May 11 Board was Capable of Considering Demand.

A. Question Presented

Did the Court of Chancery correctly determine that the May 11 Board was capable of considering demand? Appellant's Br. Ex. B at 3, 11-12; A247-248; B105-117.

B. Scope of Review

This Court reviews *de novo* dismissals for failure to plead demand futility adequately. *See Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000). This particularized pleading requirement is "an exception to the general notice pleading standard of the Rules" and "more onerous than that required to withstand a Rule 12(b)(6) motion to dismiss." *Levine v. Smith*, 591 A.2d 194, 207, 210 (Del. 1991), *overruled on other grounds by Brehm*, 746 A.2d 244. Rule 23.1 places the burden on a derivative plaintiff to allege with particularity the efforts, if any, made to obtain the desired action from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort. Del. Ct. Ch. R. 23.1.

C. Merits of the Argument

Where, as here, a plaintiff has not made a demand before initiating derivative litigation, the derivative plaintiff must plead with particularity facts

showing that any demand would have been futile. Del. Ct. Ch. R. 23.1. As the Court of Chancery correctly held, Plaintiff has failed to shoulder this burden as to the May 11 Board.

To evaluate whether demand should be excused, this Court has adopted two related tests, each of which applies in distinct circumstances. In *Rales v. Blasband*, 634 A.2d at 934, this Court held that where, as here, a board has taken no action, the plaintiff must allege particularized facts giving rise to a reasonable doubt that "the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand," had one been made. Where, however, a board makes a conscious decision to act or refrain from acting, that decision is assessed under the standard articulated in *Aronson v. Lewis*, 473 A.2d at 814, which prescribes that the plaintiff must allege particularized facts giving rise to a reasonable doubt that "the directors are disinterested and independent" or the "challenged transaction was otherwise the product of a valid exercise of business judgment." This Court subsequently explained "[w]here there is no conscious decision by directors to act or refrain from acting, the business judgment rule," and correspondingly *Aronson*, "has no application." *Rales*, 634 A.2d at 933.

As the Court of Chancery correctly held, *see* Appellant's Br. Ex. B at 13–14, Plaintiff fails to meet either test. On May 11, BioScrip's seven-member board was comprised of (a) three New Directors elected on May 11 (Golding, Goldstein, and Pate), (b) two Non-Defendant Directors (Shackelton and Nguyen), and (c) only two of the seven individuals named as Director Defendants (Smith and Holubiak). After Plaintiff challenged the independence of Directors Pate, Shackelton, and Goldstein—based on far-fetched arguments that Plaintiff unsurprisingly has abandoned on appeal—the Court of Chancery properly determined that each director was independent. *Id.* at 17. These directors, together with the rest of the May 11 Board,[9] are entitled to Delaware's presumption of independence. *See DiRienzo*, 2013 WL 5503034, at *12 (citing *Aronson*, 473 A.2d at 815) ("Delaware law presumes the independence of corporate directors."). Indeed, Plaintiff is not raising any objection now to the Board's disinterestedness in this litigation when it took over on May 11. And for good reason: the directors have demonstrated, through their actions, that they are disinterested in this litigation.

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[9] The Court of Chancery assumed without deciding that Defendant Directors Smith and Holubiak were not disinterested. Although not necessary for purposes of this appeal, BioScrip believes that Smith and Holubiak were independent and, in the event of a remand, reserves the right to make such a showing.

The independent May 11 Board [redacted]

[redacted]

[redacted] Because Plaintiff chose to proceed with this litigation without making a demand, however, the May 11 Board exercised its lawful power and chose to avail itself of its "substantive right" under Rule 23.1 to seek dismissal of this action. *Aronson*, 473 A.2d at 809. It is well within the board of directors' power to require a shareholder seeking to bring a derivative action to present that claim to the board first so that it may choose the proper course for the corporation. *See* 8 *Del. C.* § 141(a); *supra* at 17–18 (describing Delaware's director-centric model of corporate governance).

Plaintiff argues that the May 11 Board's decision to seek dismissal of this action—instead of evaluating a demand that Plaintiff has never made—the May 11 Board "cannot now argue against demand futility." Appellant Br. 35. To clarify Plaintiff's misconception: the Board did not pre-judge the merits of the claim when it filed a motion to dismiss under Rule 12(b)(6). Under the familiar *Central Mortgage* standard, the inquiry is whether, even after assuming the well pleaded allegations are true and drawing all reasonable inferences in plaintiff's favor, plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances. *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs.*

LLC, 27 A.3d 531 (Del. 2011). Thus, the Board did not make a judgment as to the merits of Plaintiff's allegations. Rather, it concluded that, even assuming the allegations were true, Plaintiff did not state a claim for relief. There is no reason the Board cannot make that judgment without doing a factual investigation of the allegations.

Plaintiff's theory, moreover, would disrupt standard practice in Delaware courts. Plaintiff asserts that when a board files a Rule 12(b)(6) motion in a derivative case, it somehow taints itself, demonstrating that it is incapable of evaluating a demand impartially. When a board is served with a complaint, it has 20 days to answer it. Del. Ct. Ch. R. 12. It is accordingly standard practice in Delaware courts to file both a Rule 23.1 motion and a Rule 12(b)(6) motion simultaneously. *See, e.g.*, *Desimone v. Barrows*, 924 A.2d 908 (Del. Ch. 2007); *White v. Panic*, 793 A.2d 356 (Del. Ch. 2000); *Ravenswood Inv. Co., L.P. v. Winmill*, 2011 WL 2176478 (Del. Ch. May 31, 2011). And where a derivative plaintiff fails adequately to plead futility, the Court of Chancery routinely grants Rule 23.1 motions, even where the board has also made a 12(b)(6) motion. *See Desimone*, 924 A.2d at 913 (dismissing claims on Rule 23.1 grounds, where defendant sought dismissal on both Rule 23.1 and Rule 12(b)(6) grounds); *White*, 793 A.2d at 372–73 (same); *Ravenswood Inv. Co., L.P.*, 2011 WL 2176478, at *5

(same). Indeed, Plaintiff fails to cite a single case where the Court of Chancery held that by filing a 12(b)(6) motion, a board that was otherwise capable of evaluating demand—as Plaintiff concedes the May 11 Board was when it took over—foreclosed itself from making a 23.1 motion.

After starting from an incorrect premise, Plaintiff mistakenly continues, arguing that "[b]ecause of the unusual procedural posture of this action the affirmative actions taken by the May 11 Board . . . should be analyzed under *Aronson*." *See* Appellant's Br. at 34. Plaintiff then withholds critical information to make it appear as though the May 11 Board is incapable of evaluating a demand.

First, the question whether demand should be excused is an *ex ante* question that looks to whether a plaintiff should have made a demand before filing a complaint. *See Rales*, 634 A.2d at 934. The fact that the May 11 Board subsequently decided to seek dismissal under Rule 12(b)(6) gives rise to no inference that the May 11 Board would not have fairly evaluated a properly presented demand in May 2015. If that were sufficient, it would "prov[e] too much," as the Court of Chancery correctly held, because it would effectively excuse demand any time a board makes a motion to dismiss. Plaintiff's Br. Ex. A at 31.

Second, Plaintiff offers no facts to indicate that the May 11 Board's decision to seek dismissal under Rule 12(b)(6) was anything other than a proper exercise of business judgment. While Plaintiff insists that, in seeking to dismiss this action, the May 11 Board "did so irrationally, disloyally and in bad faith," conclusory allegations of faithless conduct such as these—let alone false ones—do not satisfy the pleading standard for demand futility. *See* Del. Ct. Ch. R. 23.1(a) (a derivative plaintiff must "*allege with particularity* . . . the reasons for the plaintiff's failure . . . for not making the [demand]" (emphasis added)); *Levine,* 591 A.2d at 207, 210 ("Rule 23.1 is an exception to the general notice pleading standard" and a plaintiff's burden is "more onerous than that required to withstand a Rule 12(b)(6) motion to dismiss.").

Stripped of these conclusory assertions, Plaintiff's allegations fall far "short of a demonstration that the Board would *wrongfully* reject demand." Appellant's Br. Ex. B at 14 (emphasis in original). When presented with a demand, it is within a board's discretion to determine that litigation is not the right course. *See Aronson*, 473 A.2d at 809 (holding that board may choose "to rectify an alleged wrong without litigation, and to control any litigation which does arise"). To be clear, the May 11 Board has not made that decision because Plaintiff never presented it with a demand. Plaintiff nonetheless insists that the Board—which is

empowered by Delaware law to exercise judgment in taking action on behalf of the corporation—should have chosen an alternative course merely because *this plaintiff* believes that pursuing this litigation is valuable. This is squarely contrary to Rule 23.1, which vests the authority to decide whether to pursue litigation in the Board and not in the shareholder. Plaintiff substitutes its own judgment for the Board and makes the bizarre claim that the May 11 Board should have unilaterally decided to evaluate the claims in this suit. *See* Appellant Br. 37.[10] Ironically, Plaintiff could have achieved what it wanted and compelled the Board to evaluate the claims (as specifically required in the demand context) by making a demand. *See Rales*, 634 A.2d at 935 (describing the Board's obligations when presented

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[10] Plaintiff argues that the Board had authority under *Braddock v. Zimmerman*, 906 A.2d at 786, to take control of the litigation, to move to dismiss the case as not in the best interests of the corporation, to take no action, or to appoint a special litigation committee. Appellant's Br. 36–37. *Braddock* is, quite expressly, about a *new* superseding board. *See* 906 A.3d at 786. Plaintiff itself recognizes this. *See* Appellant's Br. 37 (explaining that *Braddock* applies "[w]hen during the pendency of a derivative litigation there occurs a change in the composition of a board"). Here, however, the Court of Chancery determined that the May 11 Board is the proper board for assessing demand futility because it was the board that "[a]s a practical matter" would have been in a position to assess the demand *in the first instance*. Appellant's Br. Ex. A at 25. There thus was no "change" in the board and *Braddock* is inapposite. In any event, the power to control a lawsuit through the various *Braddock* mechanisms, as Vice Chancellor Glasscock aptly recognized, "falls far short of the plenary authority over litigation assets a board wields if the Court determines that demand is not excused." *Id.* at 31.

with a demand).[11] But one thing is absolutely clear: Plaintiff cannot refuse to make a demand and then insist that demand is excused because the Board chose to take a course in litigation—appropriately exercising their fiduciary duties—instead of evaluating the claims in a hypothetical demand it never received.

Third, the May 11 Board made a renewed Rule 12(b)(6) motion—which is fully within its authority under Delaware law, *see* 8 *Del. C.* § 141(a)—because Vice Chancellor Glasscock ordered that any Rule 12(b)(6) motion be considered simultaneously with a Rule 23.1 motion. *See* B139-141. The Company's decision to file such a motion in accordance with Vice Chancellor Glasscock's ruling is far from an overt demonstration that the May 11 Board is not disinterested. Petitioner likewise makes the misleading complaint that "a later-seated board can apparently simply ignore valuable, meritorious claims without rationale while being represented by the same counsel as those individuals that have harmed the Company." Appellant Br. 35. Aside from providing no support, much less particularized facts, for its conclusory assertion that the May 11 Board "ignore[d]" Plaintiff's claims "without rationale," *id.*, Plaintiff fails even to mention the ██████

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[11] Notably, Plaintiff does not contend that the directors on the May 11 Board undertook any action with respect to this suit in violation of their fiduciary duties. That is, they do not claim that the Board failed to assess whether bringing motions to dismiss under Rule 23.1 and 12(b)(6) was in the best interest of the Company.

[redacted] As discussed above, [redacted] [redacted] *See supra* 10–11.

In short, the May 11 Board was—as Plaintiff now concedes—disinterested on May 11, and continued to be disinterested throughout this litigation. The disinterested board [redacted] [redacted] [redacted]. Simply stated, Plaintiff cannot adequately plead particularized facts necessary to overcome the presumption of the individual directors' disinterestedness. This Court should reject Plaintiff's manufactured conflict of interest, and affirm the Court of Chancery's determination that demand is not excused as to the May 11 Board.

CONCLUSION

For the reasons set forth, Defendants respectfully request that this Court affirm the Court of Chancery.

Dated: July 26, 2017

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