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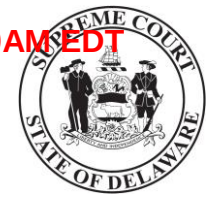

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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, 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 24, 2017

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INTRODUCTION

This is Plaintiff's reply to Defendants' Answering Brief dated July 26, 2017 ("Ans. Br."). Defendants' position in this appeal is wrong. Plaintiff filed its Opening Brief ("Op. Br.") on June 26, 2017.

First, Delaware law has long held that the question of demand futility is resolved against the Board in place when the action is filed (here, May 7, 2015). For that reason alone the 2016 Opinion must be reversed.

Plaintiff filed this derivative action seeking maximum recovery and benefits for the Company. However, Plaintiff and, in turn, the Company have been stymied at every juncture from pursuing that maximum benefit. If the Defendants and the May 11 Board have their way, no remedy can or will be afforded. No demand regarding the May 7 Board was made and no demand was required because it would have been futile. Nevertheless, Defendants, like the Court below, advance arguments premised upon an imaginary demand having been made on the May 7 Board. None of these arguments make sense given the demand excused posture of this action.

Second, even assuming the May 11 Board is relevant to the question of demand futility, the members of the May 11 Board (which includes only two of the Defendant wrongdoers) abandoned their duty of loyalty and good faith to the Company and instead endorsed Defendants' conduct choosing to seek dismissal of

the Company's claims with prejudice. Despite this, the May 11 Board now argues that it was ready, willing and able to consider any demand presented raising the Plaintiff's claims. But, with the May 11 Board having already deemed the claims to be without merit, the May 11 Board's position is illogical and indefensible. Demand would have been futile and requires reversal of the 2017 Opinion.

The May 11 Board, with knowledge of the wrongdoing, accepted the near-destruction of the Company despite being armed with all the information it could possibly need to aid in recovery from the harm. The claims set forth by Plaintiff on the Company's behalf offer the Company an opportunity to recoup losses from previous litigations and other damages, but the May 11 Board opposes this corporate opportunity. Instead the May 11 Board did little more than link arms with Defendants (including engaging the same counsel as the Individual Defendants) to oppose this action and to seek dismissal of the claims with prejudice. The May 11 Board's hostility toward the claims made on the Company's behalf creates more than a reasonable doubt about its ability to consider a demand, excusing any such demand against the May 11 Board as well.

ARGUMENT

I. Delaware Law Dictates May 7 is the Demand Futility Date

In its May 2016 Opinion, the Court of Chancery erred by deviating from long-settled Delaware law that whether a company's board of directors is capable of considering demand is determined as of the time of the filing – here, May 7, 2015. *See, e.g., Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993); *In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 985-986 (Del. Ch. 2007). Maintaining the rule that demand futility be judged as of the date of filing promotes both substantive and procedural predictability for litigants and should not be altered for the circumstances presented by this action. This is not to say that a subsequent board lacks authority to control the litigation. *See, Braddock v. Zimmerman*, 906 A.2d 776 (Del. 2006).

A. Defendants Advance Arguments Based on a Faulty Premise

Defendants, as did the Court below, repeatedly advance the argument that had Plaintiff made a demand on the date of its Complaint filing, the May 7 Board would have had only days to consider that demand. (2016 Opinion at 24-25; Ans. Br. at 3). And, for that reason, they all conclude that the May 7 Board is not the proper board for assessment of demand futility.

But, Plaintiff did not make a demand upon the Board on May 7 because it would have been futile. Whether the May 7 Board had two days, two months or

two years, demand would have been futile nevertheless. Thus, the Complaint was filed on May 7 and the board was constituted as it was on that day and was the board relevant for demand futility under Delaware law.

B. There is No Reason to Deviate from Precedent to Permit Shifting Dates for Demand Futility Assessment

Plaintiff submits that the law, logic and policy embraces maintaining the date of filing a complaint for fixing the demand futility assessment date. First, Delaware law has consistently held that demand futility is measured when the action is filed. Second, the imposition of a bright-line rule provides predictability and avoids the need to analyze motivations, on either side, for evading that date certain or engaging in gamesmanship.[1] And, third, a later-seated Board suffers no

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[1] Defendants, for example, claim the Complaint was not served upon them in a "timely manner" for demand futility to apply to the May 7 Board. (*See, e.g.* Ans. Br. at 13, 22 n. 6). Filing, not service, fixes the demand date. *InfoUSA*, 953 A.2d 963 at 985 ("First and foremost, it is important to remember that demand is made against the board of directors at the time of filing of the complaint."). Moreover, Defendants ignore that the documents provided to Plaintiff in its §220 investigation and cited in the Complaint were marked "confidential" by the Company. As a result, Plaintiff was bound to treat them as such under the agreement entered at the Company's request in the §220 investigation. Plaintiff could not (and did not), without and until obtaining the Company's permission, provide the Complaint to any party aside from the Nominal Defendant. Plaintiff following the Court's rules and honoring its agreement with the Company should not result in prejudice against the claims brought on behalf of the Company. More importantly, however, the Complaint was provided almost immediately upon filing to the Company. In other words, the May 7 Board had the Complaint and knew its contents on the date

impairment in its exercising control over the matter in a manner consistent with its fiduciary duties as contemplated by *Braddock v. Zimmerman.*

Whether the board is capable of considering a demand is determined at the time the action is filed. A change in board composition after the filing of a derivative action does not require a demand be made upon the new board. (Op. Br. at 25). On this point, Defendants challenge (Ans. Br. at 26-27) Plaintiff's reliance 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), asserting that those cases are inapposite because notice of the BioScrip annual meeting was issued one month before the filing of the Complaint. However, Defendants misread both cases. Defendants' assertion that notice of a potential change in board makeup, by itself, requires a different assessment is found nowhere in Delaware law.[2]

First, *China Agritech* and *Needham* rigidly adhere to the fundamental principle under Delaware law that requires the Court to assess demand futility at

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of filing. Its successor, the May 11 Board, had the Complaint as of May 11. The Court below failed to recognize these facts.

[2] Creating a "notice" rule is unworkable. First, after a company issues an annual meeting notice there is no assurance that the meeting will actually occur or not get delayed, or that the proposed directors will be elected and seated. Because such "notice" is only that, a notice with a proposal for a shareholder vote, the Court should not rest its analysis on what may only have been a "proposed" Board at the time the complaint gets filed. Defendants' position invites unpredictability and chaos in demand futility assessments.

the time of the filing of the operative complaint – which here is the May 7, 2015 Complaint. *See China Agritech,* 2013 WL 2181514, at *16-*23 (despite a "parade of resignations" after a complaint was filed, futility is still determined based on the board in place at the time of the complaint whether or not all the directors remained on the board.); *Needham,* 1993 WL 179336, at *4 ("Disinterestedness is clearly determined as of the time the original complaint is filed...[citation omitted.] Therefore, just because [two directors] may no longer have distributorships does not affect the inquiry as to whether they were disinterested at the time the complaint was filed.").

Second, neither *China Agritech* nor *Needham* considered or addressed either the timing of the change in directors' positions or any notice of a potential change in directors' interestedness as having any bearing on its analysis. Each Court premised its holding solely on the basis of the date on which the complaint was filed. The reason is obvious. The concept that advance notice of a board change should be a consideration is irrelevant in assessing demand futility against the then legally constituted board.

In a similar vein, Defendants distort the analysis in *infoUSA* by truncating the full quote in the Court's opinion and suggesting that the Court adopted some alternative analysis for demand futility purposes. (Ans. Br. at 27 n. 7). Plaintiff in *infoUSA* asserted "allegations [of misconduct] stretching back several years." The

Court emphasized that "[f]irst and foremost, it is important to remember that demand is made against the board of directors at the time of filing of the complaint. [footnote omitted] It is that board, and no other, that has the right and responsibility to consider a demand." *infoUSA*, 953 A.2d at 985. The Court of Chancery went on to find demand futility against the board in place at the time of the filing of the complaint – which was, in fact, not the board in place at the time of the Court's analysis. *infoUSA* says nothing about which board to evaluate for demand purposes other than the one implicated in the operative complaint.

Defendants criticize Plaintiff for citing cases in favor of a "bright-line" rule for demand futility because those cases do not specifically addresses the topic at hand, *i.e.*, demand futility. In fact, Plaintiff has cited cases (Op. Br. at 26) that address bright-line-rules in the context of date sensitive conditions such as statutes of limitations. Defendants then cite (Ans. Br. at 29) cases holding against imposition of bright-line rules – none of which addresses demand futility.

Defendants also ignore *Braddock* with respect to their May 7 Board argument. Defendants avoid confronting the balance of powers, articulated by *Braddock* and its predecessors –particularly the powers that a later-seated board has in addressing derivative litigation that alleges demand futility against an earlier board.

C. The Cases Relied Upon by Defendants Do Not Support Deviation from the Rule

Defendants acknowledge this appeal presents a question of first impression (Ans. Br. at 6) but insist that two cases from the Court of Chancery support their position that the date for determining demand futility is not fixed by the date of filing. Neither case supports Defendants' position.

The *EZCORP* case upon which Defendants rely does not support the shifting date for demand futility. Rather, in a footnote, it suggests a difference of fifty-seven minutes between filing and a change in board composition presents an "interesting doctrinal question." *In re EZCORP Inc. Consulting Agreement Derivative Litig.*, 2016 Del. Ch. LEXIS 14, *111 n.32 (Jan. 25, 2016). It does not change the underlying principle.

Similarly, the *Puda Coal* decision upon which Defendants rely does not support Defendants' position that the date for demand futility should shift based on a subsequent change to the board. Rather, *Puda Coal* presents, essentially, the opposite proposition. The Complaint was judged for demand futility based on the filing date, but the Court considered later events to determine whether demand was indeed futile. Defendants argue, citing the 2016 Opinion, (Ans. Br. at 21) that the Company would face a "Kafkaesque" situation if the May 7 Board was considered for demand. The logic simply does not hold in these circumstances because the later-seated May 11 Board was not stripped of any of its rights and powers with respect to the previously filed derivative litigation.

For the reasons stated above and in Plaintiff's previous filings, there is no reason for this Court to depart from long-standing precedent and look to a date for assessment of demand futility other than the one on which the Complaint was filed.[3]

[3] Defendants argue (Ans. Br. at 30-31) that, if the Court reverses the Court of Chancery's decision, there should be a remand for additional proceedings pursuant to Rule 12(b)(6). At this point the full pleading record has been in front of the Court of Chancery for years and briefed and heard twice. There is no practical or legal value in hearing the 12(b)(6) issue for a third time in the event of reversal. Rather, the matter is positioned to move forward in a substantive way. This Court can and should exercise its plenary power to order reversal with denial of the 12(b)(6) motions.

II. Even if the May 11 Board is Deemed Relevant for Demand Futility, Its Conduct Disqualifies It from Considering Demand

The May 11 Board cannot and could not consider a demand. Although demand futility is correctly considered against the May 7 Board, demand is also excused with respect to the May 11 Board.

> A board can consider demand properly, and a plaintiff therefore can seek to "obtain the action he desires from the directors," if a majority of the directors can exercise their independent and disinterested business judgment about whether to consider litigation. Conversely, demand is futile when "the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."

EZCORP, 2016 Del. Ch. LEXIS 164 at *107-*108 *citing Aronson v. Lewis*, 473 A.2d 805 (Del. 1984); *Rales*, 634 A.2d at 934. The reasonable doubt standard is meant to provide the stockholder with the "keys to the courthouse" in those matters where "the claim is not based on mere suspicions or stated solely in conclusory terms." *Id. citing Grimes v. Donald*, 673 A.2d 1207, 1217 (Del. 1996). There is more than a "reason to doubt" that the May 11 Board is capable of considering demand in view of its conduct since it was empaneled. The May 11 Board took no independent action but immediately adopted the position of the wrongdoers against which it purports to be able to render judgment – that is not a tenable posture for a supposed fiduciary. (*See*, Op. Br. at 38-39).

A. The *Ex Post* Conduct of the May 11 Board Creates a Reason to Doubt its Ability to Consider a Demand

Although Defendants ask the Court to determine the May 11 Board is the only board relevant for demand, their theories are logically and internally inconsistent. Defendants argue that May 11, not May 7, is the relevant date for demand consideration relying upon *Puda Coal* for that proposition. *Puda Coal*, however, looked to *ex post* actions to determine futility as of the filing date. The Court did so because, among other factors, the company there faced the possibility of being left without the ability to obtain a remedy for known wrongdoing. Given the actual damages that Bioscrip suffered from governmental investigations, insider trading and class actions, among other things, that same threat exists in this action.

Rather than assess the merits of the claims presented on behalf of the Company, the May 11 Board decided, as discussed below, to give itself the power of the Court and decide that the allegations, even if true, do not not state a claim. (Ans. Br. at 35). That behavior by the May 11 Board was irrational, disloyal and faithless. If, as Defendants suggest, invoking *Puda Coal*, the date for considering demand is May 11 based on equitable factors, then the May 11 Board cannot be allowed to walk away from its conduct in the days and weeks following May 11. The actions of the May 11 Board were antagonistic to the Company's best interests and conflict with the faithful discharge of fiduciary duties.

B. The May 11 Board with Knowledge of the Wrongdoing Ignored the Claims and Embraced Defendants' Harmful Conduct Against the Company

Defendants advance the argument – a red herring – that Plaintiff claims the May 11 Board has demonstrated it is not disinterested because it has failed unilaterally to evaluate a demand Plaintiff never made. (*See*, Ans. Br. at 5). Plaintiff has made no such argument.[4]

Rather, with respect to the May 11 Board (which includes two of the wrongdoers who have complete knowledge of the harm visited upon the Company), Plaintiff has argued that, despite every opportunity to do otherwise, the members of that body have chosen to embrace the conduct of the wrongdoers. These May 11 Board members have done so despite having received notice of the well-researched and developed claims in this action.[5] The May 11 Board members

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[4] Citing the Court of Chancery's holding, Defendants also argue that Plaintiff's allegations regarding the May 11 Board fall short because Plaintiff has failed to show that its "demand" was "wrongfully rejected." (Ans. Br. at 38). Again, no demand was made and, as such, there can be no wrongful rejection analysis.

[5] Defendants go so far as to argue (Ans. Br. 24) that Plaintiff's extensive 8 *Del. C.* §220 investigation in this matter is a nullity because Plaintiff filed its Complaint while Defendants were still dribbling out documents. That argument makes no sense and does not undo the fact that Plaintiff's Complaint was based in large part on documents obtained from its §220 investigation and those allegations were provided to the Company upon filing of Plaintiff's Complaint on May 7.

also took their actions with full knowledge of the related allegations in the government and federal securities actions and the outcomes of those actions.[6]

The very first actions undertaken by the May 11 Board demonstrate a board with no intention of acting loyally or in the Company's best interests. For example, the May 11 Board allowed the Individual Defendants and Company to be represented by the same counsel creating a host of conflicts. Those conflicts manifested in the Company's filing a motion to dismiss the claims brought on its behalf on the merits with prejudice.[7] The process leading to that motion to dismiss as described in Defendants' Answering Brief is remarkable.

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[6] Defendants also argue (Ans. Br. 12 n. 4) that Plaintiff's claims "piggyback" on a federal securities claim. This argument serves no real purpose in the context of this appeal. Nevertheless, it ignores material facts. First, Plaintiff in this action specifically demanded and obtained a carve-out from the settlement of the federal securities action to ensure its claims were not compromised. (A0684, 0751). Second, Plaintiff's claims arise under Delaware law, including *Caremark*, *Brophy*, breaches of common law fiduciary duties and aiding and abetting those breaches. These claims are distinct from the federal securities action altogether and offer the Company an opportunity in Delaware to recoup its losses and recover other damages. That corporate opportunity was opposed by the May 11 Board.

[7] After the 2016 Opinion and the Court of Chancery's Order permitting the Amended Complaint, the Company (*i.e.,* the May 11 Board) once again moved to dismiss the claims on the merits with prejudice. Defendants appear to blame the Court of Chancery for leaving the May 11 Board with no option but to do so again. (Ans. Br. at 40). In reality, the May 11 Board, aligned with Defendants – including the representation of the same counsel as the Individual Defendants – and chose to act disloyally and in bad faith.

Defendants, including the Company (as Nominal Defendant acting through the May 11 Board and represented by Individual Defendants' counsel) advance an extraordinary argument regarding the Company's decision to move for a dismissal on the merits with prejudice against the claims brought on the Company's behalf. (Ans Br. at 35-36).

The May 11 Board had a menu of options (*See*, Op. Br. at 19, 29), established by *Braddock* and its predecessors, regarding how it might address this action loyally and in good faith.[8] Rather than do so, the May 11 Board in effect, took on the role of the Court. The May 11 Board in its adopted role decided, as a matter of law, that the claims failed to state a claim for which relief could be granted. In advancing this explanation of the May 11 Board's conduct, Defendants invoke the standard under Rule 12(b)(6) stated in *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531 (Del. 2011). Thus, the Company (by and through the May 11 Board) and the Defendants armed with knowledge of the wrongdoing, make the astonishing admission that the May 11 Board was entitled to make its judgment without doing any factual investigation of the allegations. Rather, the May 11 Board, fancying itself a Court, purports to

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[8] Defendants relegate *Braddock* to a footnote in the May 11 Board Argument. (Ans. Br. at 39). Defendants' explanation is that *Braddock* is inapplicable because the May 11 Board was the demand board and not the May 7 Board. That position necessarily assumes the result in the Court of Chancery but does not address Plaintiff's argument.

have accepted all allegations as true and determined that Plaintiff, on behalf of the Company, did not state a claim upon which relief could be granted. This explanation begs the question.[9]

The May 11 Board was in possession of actual information regarding the wrongdoing. This is a fact it cannot and does not deny. Not only were two of the members directly implicated in the conduct challenged in the action, but the rest had possession of detailed allegations developed through §220 and the details of related actions brought by the government and federal securities plaintiffs and their respective outcomes which were harmful to the Company.

Meanwhile, the May 11 Board insists that, if presented with a demand, it would be considered in good faith, despite all its motions to dismiss with prejudice on the merits, the improper alignment of interests with Defendants, and the passage of time. The May 11 Board turned a blind eye to the known merits, and stands in a conflicted position and should not be afforded any credulity.

Defendants also attempt to paint the Company's merits-based motion to dismiss as typical in derivative litigation. They insist that Plaintiff's position would require that any board moving to dismiss on the merits would result in a

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[9] At the time the Company, by and through the May 11 Board, engaged in this supposed analysis, it had no reason to expect that the Court would deviate from Delaware law and hold that the May 7 Board was not the demand futility board. Instead the May 11 Board undertook its "process" prior to advancing a novel legal argument while taking a position antagonistic to the Company.

finding of demand excused. That is not the case. Defendants' argument ignores the specific facts here including that the newly constituted board (with only two members named as Defendants) retained the same counsel as the wrongdoers (*See*, Op Br. at 20) and turned a blind-eye to not only the detailed allegations presented by Plaintiff but also, remarkably, to the known and documented investigations and actions against the Company which resulted in direct harm to the Company.

In this regard, it is important to remember that the May 11 Board is acting as the Company and is not identical to the Individual Defendants (save two overlapping individuals). In these circumstances, the sublimation of the May 11 Board to the positions of the Individual Defendants and the other Defendants cannot simply be ignored as business judgment. Plaintiff does not, as the Court of Chancery suggested, rely upon a *res ipsa loquitur* theory. Rather Plaintiff urges that the circumstances command a critical view of the actions of the May 11 Board to assess whether there is a reason to doubt its ability to assess a demand and submit that such a review yields only one answer: "yes."

C. Defendants Improperly Rely Upon a "Committee" that is Outside the Record and Not Relevant to this Action

Defendants repeatedly and, inappropriately, refer to a Board committee created to consider a demand made by another stockholder. (*See, e.g.*, Ans. Br. at 7). First, and most importantly, that committee, to the extent it actually exists, is

not properly in the record of this action. Plaintiff refers to it nowhere in the pleadings. Rather, Defendants have injected its supposed existence into the proceeding below and now on appeal. The demand committee or any purported committee to which Defendants refer is improperly before the Court and cannot be considered. It was not incorporated into any of the pleadings. Nor is it the type of document that is subject to judicial notice. *Microstrategy Inc. v. Acacia Research Corp.*, 2010 Del. Ch. LEXIS 254, *16-*17 (Del. Ch. Dec. 30, 2010) (finding the Court could not take judicial notice of documents outside the complaint because facts within them were subject to reasonable dispute).

In any event, assuming the May 11 Board created such a committee, it is irrelevant to this action.[10] Here, Plaintiff has alleged demand futility, including, for among other reasons, that the May 7 Board was interested and otherwise disabled and that, subsequently, the May 11 Board eschewed its duties and disloyally deferred to and embraced the conduct of the Defendants. Further, the May 11 Board sought dismissal with prejudice on the merits of Plaintiff's claims. That an unnamed committee, presumably consisting of board members, is "standing by,"

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[10] Defendants appear to rely upon the existence of this committee to justify the dual representation by counsel of both the Individual Defendants and the Company (and, thus, the May 11 Board). (*See* Ans. Br. 40-41). As argued herein, the committee is not part of the record and, more importantly, has never taken any action. Rather, the May 11 Board relies on its quasi-legal judgments in the face of known wrongdoing as its basis to seek dismissal of this action on the merits.

but has done nothing for its years of existence (aside from act against the Company's best interests), including under the many powers provided by Delaware, also supports Plaintiff's claim that there is reason to doubt the May 11 Board can fairly consider a demand it references.[11] The May 11 Board's supposed preparation to consider a litigation demand underscores Plaintiff's argument. Although it could have investigated the claims in good faith rather than moving under Rule 12(b)(6), the May 11 Board, as set forth above, took an adversarial position on the claims raised in this litigation long before receiving the litigation demand. The May 11 Board cannot now properly consider a demand of the same claims by and through a so-called "Demand Committee." Defendants' denial that the May 11 Board had made a determination as to the merits of Plaintiff's claims because a committee was "standing by" to review identical claims is more direct evidence of its bias and lack of good faith.[12] That the May 11 Board claims to be

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[11] Rather than assert the Company's rights, the members of the May 11 Board have embraced several motions to dismiss, with prejudice, valuable claims owned by the Company on the merits and without any consideration (in any sense of the word).

[12] If anything, the reliance on this committee indicates a realization by the May 11 Board that it faithlessly ignored claims of documented wrongdoing and aligned itself with Defendants with the same legal representation. Under these circumstances, it is useful to consider the types of factors a properly-functioning board or committee would have considered before making a rash decision – as the May 11 Board did – to seek the dismissal with prejudice of valuable claims. Among those relevant here and militating in favor of the claims are: magnitude of corporate injury; culpability of officers and directors for the injury; and the balance

"considering" a litigation demand, having already moved to dismiss materially identical claims on their merits, is disingenuous and evidences the May 11 Board's lack of impartiality and good faith.

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of likelihood of recovery versus corporate costs. *See* Gregory P. Williams, "Advising Committees of Board of Directors Formed to Investigate Stockholder Demands," 5 Insights, Jan. 1991, at 30 (a copy of which article is attached as Exhibit 1 to this Brief) (setting forth seven factors that an SLC "may wish to consider"). Simply put, when a committee of a board – or in this case the full May 11 Board – considers a stockholder demand the primary requirement is "thoroughness and carefulness." *Id.* Neither occurred here.

CONCLUSION

For the reasons stated herein, in Plaintiff's Opening Brief, and in the record below, Plaintiff respectfully requests the Court reverse and remand with instruction that the case proceed on its merits.

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