IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LAWRENCE ZUCKER,	)	
	)	
Plaintiff,	)	
v.	)	
	)	C.A. No. 6014-VCP
MARC L. ANDREESSEN, LAWRENCE T. BABBIO, Jr., SARI M. BALDAUF, RAJIV L. GUPTA, JOHN H. HAMMERGREN, JOEL Z. HYATT, JOHN R. JOYCE, ROBERT L. RYAN, LUCILLE S. SALHANY, and G. KENNEDY THOMPSON,	)	
	)	
Defendants,	)	
and	)	
	)	
HEWLETT-PACKARD COMPANY, a Delaware Corporation,	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

Submitted: March 5, 2012
Decided: June 21, 2012

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PARSONS, Vice Chancellor.

This is a derivative action brought on behalf of Hewlett-Packard Company ("HP" or the "Company") accusing certain HP directors of committing waste and breaching the duty of care in connection with the August 2010 termination of then-CEO, Mark Hurd. Specifically, the plaintiff contends that Hurd was not entitled to, and did not deserve, any severance upon his termination from the Company. Nevertheless, the defendant directors granted Hurd a severance package estimated to be worth $40 million or more. Additionally, the plaintiff challenges the Company's lack of a long term CEO succession plan as a breach of the directors' duty of care. In that regard, the plaintiff claims that Hurd's unexpected termination harmed the Company by effectively leaving HP leaderless, a harm that would not have occurred if the defendants had anticipated that risk and adopted a formal succession plan in advance.

Currently before the Court is the Company's motion to dismiss under Court of Chancery Rule 23.1 (the "Motion"). Under Rule 23.1, a stockholder must either make a demand on the board to instigate the legal action that the stockholder seeks to bring on the corporation's behalf or allege with particularity why such a demand is excused. There is no dispute that the plaintiff decided not to make a presuit demand. Hence, the issue before the Court is whether the Amended Verified Shareholder Derivative Complaint (the "Complaint") alleges a basis to excuse presuit demand. For the reasons stated in this Memorandum Opinion, the Complaint fails to do so. Therefore, the Court grants the Motion.

I. BACKGROUND

A. The Parties

Plaintiff, Lawrence Zucker, is a purported stockholder of HP. According to the Complaint, he continuously has held stock in the Company at all relevant times.

The Complaint names the following ten individuals as Defendants: Marc L. Andreessen, Lawrence T. Babbio, Jr., Sari M. Baldauf, Rajiv L. Gupta, John H. Hammergren, Joel Z. Hyatt, John R. Joyce, Robert L. Ryan, Lucille S. Salhany, and G. Kennedy Thompson. At all relevant times, these individuals constituted a majority of the Company's board of directors (the "Board").

Nominal Defendant, HP, is a publicly traded Delaware corporation with its principal place of business in Palo Alto, California. It is a global information technology company that manufactures, among other items, computers, printers, data storage devices, networking hardware, and design software. HP's certificate of incorporation contains a provision pursuant to 8 *Del. C.* § 102(b)(7) exculpating its directors "[t]o the fullest extent permitted by the Delaware General Corporation Law" from "monetary damages for breach of fiduciary duty."[1]

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[1] Defs.' Op. Br. Ex. C art. X (HP's articles of incorporation). Delaware courts may take judicial notice of certificates of incorporation filed with the Secretary of State on a motion to dismiss under Rule 23.1. *In re Baxter Int'l, Inc. S'holders Litig.*, 654 A.2d 1268, 1270 (Del. Ch. 1995) (citing *In re Wheelabrator Techs. Inc. S'holders Litig.*, 1992 WL 212595, at *12 (Del. Ch. Sept. 1, 1992)); *see also* D.R.E. 201(b), (f).

B. Facts[2]

As an initial matter, I must address a dispute as to the scope of the record this Court may consider on the Motion. Plaintiff argues that, in addition to the Complaint, the Court may consider a report of an independent committee of the Board dated May 25, 2011 (the "Committee Report") to substantiate his allegations of demand futility. That argument, however, is unpersuasive.

"Matters extrinsic to a complaint generally may not be considered in a ruling on a motion to dismiss. . . . [D]ocuments outside the pleadings may be considered only in 'particular instances and for carefully limited purposes.'"[3] Such "particular instances" include consideration of documents attached to or incorporated by reference in the complaint, matters "integral" to the complaint, and facts of which a court may take judicial notice (*e.g.*, a certificate of incorporation).[4] Furthermore, under Court of Chancery Rule 15(aaa), when a plaintiff is confronted with a motion to dismiss under Rules 12(b)(6) or 23.1, he or she must either "seek leave to amend [the] complaint or

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2 Unless otherwise indicated, the facts recited herein are taken from the Complaint and presumed true for purposes of the pending Motion.

3 *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004) (footnote omitted) (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995)).

4 *In re Santa Fe*, 669 A.2d at 69-70; *Breedy-Fryson v. Towne Estates Condo. Owners Ass'n, Inc.*, 2010 WL 718619, at *9 (Del. Ch. Feb. 25, 2010) ("A motion under Rule 23.1 requires the court to limit its inquiry to the well-pled allegations of the complaint, documents incorporated into the complaint by reference, and judicially noticed facts.").

stand on [the] complaint and answer the motion to dismiss. . . . [The plaintiff] cannot supplement the complaint through [his or her] brief."[5]

Plaintiff relied on the Committee Report for the first time in his answering brief to this Motion. The Committee Report is not attached to or incorporated by reference in the Complaint; indeed, it post-dates the Complaint by approximately three months. Nor is it "integral" to the Complaint.[6] Therefore, the Committee Report is outside the pleadings.

In the circumstances of this case, Plaintiff could have sought leave to amend the Complaint rather than stand on the sufficiency of his allegations when he responded to HP's Motion. In fact, according to HP's counsel, the Company provided Zucker and his counsel with a copy of the Committee Report before filing the pending Motion "in order to give them the opportunity to decide whether they wanted to amend or stand pat on their complaint."[7] "Having chosen the latter course of action, [Zucker] is bound to the factual allegations contained in [his] complaint."[8] Moreover, consistent with the purpose of Rule 15(aaa), the Court has not treated the Company's Motion under Rule 23.1 as one for summary judgment under Rule 56. This fact distinguishes many of the cases on

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5 *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *5 (Del. Ch. May 5, 2010) (footnotes omitted).

6 *See e4e, Inc. v. Sircar*, 2003 WL 22455847, at *3 (Del. Ch. Oct. 9, 2003) (finding document neither attached to nor incorporated by reference in the complaint to be "integral" where it "was referred to extensively" and made a defined term in the complaint, and "much of the wrongful conduct alleged . . . was taken directly from" the document).

7 Hr'g Tr. 52.

8 *MGM Capital Corp.*, 2010 WL 1782271, at *5.

which Plaintiff's counsel relied at argument, all of which also predated the adoption of Rule 15(aaa).[9] Accordingly, neither the following recitation of facts nor the Analysis, *infra*, considers the Committee Report.

1. Hurd's termination from HP

On June 24, 2010, Hurd received a letter from Gloria Allred, Esq., representing HP contractor Jodie Fisher, alleging that Hurd had sexually harassed Fisher and threatening litigation against both Hurd and the Company. Fisher also accused Hurd of falsifying expense reports over a two-year period and disclosing HP's then-prospective and confidential multibillion dollar acquisition of Electronic Data Systems (EDS). "Hurd forwarded the letter to the Board, which . . . immediately initiate[d] an internal investigation" conducted by the law firm of Covington & Burling.[10] At least at first, Hurd denied all allegations of impropriety and seemed to cooperate with Covington & Burling's investigation.

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[9] *See* Hr'g Tr. 23-24 (counsel citing *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726 (Del. 1988), *Kahn v. Tremont Corp.*, 1994 WL 162613 (Del. Ch. Apr. 21, 1994), and *Good v. Getty Oil Co.*, 518 A.2d 973 (Del. Ch. 1986)). The Court of Chancery adopted Rule 15(aaa) effective June 1, 2001.

[10] Compl. ¶ 32. For the sake of clarity, I note that the internal investigation conducted by Covington & Burling in June and July 2010 is not the internal investigation that resulted in the Committee Report discussed *supra*. The Committee Report is dated nearly one year later, May 25, 2011, and the cover page indicates that Dechert LLP, not Covington & Burling, provided legal counsel in connection with its production.

According to the Complaint, however, the investigation's findings, presented to the Board on July 28, 2010, "did not match Hurd's statements and denials."[11] Covington & Burling found "that Hurd filed inaccurate expense reports to conceal the personal relationship with Fisher, constituting a breach of the Company's standards of business conduct."[12] The Board also remained concerned about Hurd's alleged disclosure of the EDS acquisition. Thus, although the internal investigation did not confirm the allegations in Allred's June 24 letter and "determined that Hurd did not violate the Company's sexual harassment policy,"[13] the majority of the Board apparently believed that "trust had been broken" and, therefore, "were unsure whether Mr. Hurd could continue to lead the [C]ompany."[14]

Beginning on August 4, 2010—one week after the Board first discussed the internal investigation's findings—the Board considered whether to terminate Hurd as HP's CEO. Two directors, Defendants Hyatt and Joyce, opposed terminating Hurd at that time. The following day, August 5, Hurd reached a confidential settlement with Fisher. In connection with that confidential settlement, "Fisher sent a letter to Hurd

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11 Compl. ¶ 34.

12 *Id.* ¶ 38.

13 *Id.*

14 *Id.* ¶ 34.

absolving HP of responsibility and declaring that there were 'many inaccuracies' in the earlier letter," but Fisher's later letter provided no further elaboration.[15]

Still, the Board's loss of confidence in Hurd was beyond repair. On August 6, Hyatt and Joyce withdrew their support of Hurd's continued employment at HP, and the Board voted unanimously to terminate him. Hurd released a statement the same day "acknowledge[ing] that '[he] did not live up to the standards and principles of trust, respect and integrity that [he] espoused at HP' and that it would be 'difficult' for him 'to continue as an effective leader at HP.'"[16] Also on August 6, the Board entered into an agreement with Hurd that, among other things, provided him with cash and other severance benefits (the "Severance Agreement") estimated by Plaintiff to be worth over $40 million. That Severance Agreement forms the basis of Plaintiff's waste claim.

2. The Severance Agreement

The Severance Agreement awarded Hurd: (1) over $12 million in cash; (2) an extension of the expiration date for any outstanding options to purchase 775,000 shares of

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15 *Id.* ¶ 37.

16 *Id.* ¶ 11 (second alteration in original). Although the Complaint does not provide a citation, the internal quotation attributed to Hurd is from a press release issued by the Company and attached to a Form 8-K filed with the SEC on August 6, 2010 (the "August 6 Press Release"). Defs.' Op. Br. Ex. A, Ex. 99.1 ("Aug. 6 Press Release"), at 1. In that regard, the Complaint explicitly references the August 6 Press Release on several occasions. Compl. ¶¶ 40-41, 47. A number of other allegations also stem from materials disclosed in or attached to that same Form 8-K. *See* Compl. ¶¶ 4, 38, 43, 52. Therefore, although the August 6 Press Release and Form 8-K are extrinsic to the Complaint, the Court has considered them in ruling on this Motion. *See supra* notes 3-4 and accompanying text.

HP common stock; (3) pro rata vesting and settlement of 330,177 performance-based restricted stock units; and (4) settlement on December 11, 2010 of 15,853 nonperformance-based restricted stock units at a price equal to the lesser of (a) the closing price of HP's common stock on August 6, 2010 or (b) the per share closing trading price of HP common stock on December 11, 2010. The Severance Agreement states explicitly that the compensation Hurd was receiving "exceed[s] any payment and benefits to which you are otherwise entitled."[17] Indeed, because Hurd's employment agreement with the Company expired in April 2009, HP had no contractual obligation to pay him any severance in August 2010. Additionally, while HP maintains a general executive officer severance policy, a departing officer has no right to participate in that general policy unless, among other things, he or she is "involuntarily terminated without Cause."[18] The Company's 2010 proxy materials assert that Hurd would not have been entitled to any severance if he voluntarily resigned or was terminated for Cause.

In exchange for the benefits he received in the Severance Agreement, Hurd agreed to extend certain provisions of his earlier confidentiality agreements with the Company

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[17] Defs.' Op. Br. Ex. A, Ex. 10.1 ("Severance Agreement") § 2.

[18] Compl. ¶ 45. The Complaint does not provide a definition for the capitalized term "Cause" as used in HP's executive officer severance policy. Drawing all inferences in Plaintiff's favor, the Court presumes that filing inaccurate expense reports, disclosing confidential acquisition plans, and "failing to live up to [HP's] standards and principles of trust, respect and integrity," Aug. 6 Press Release, at 1, each constitutes a ground to terminate an executive officer for "Cause."

from one to two years and, as to one particular provision, in perpetuity.[19] He further agreed: not to disparage the Company[20]; to cooperate with the Company (i) concerning requests for information about the business, (ii) in connection with any future investigative or legal matters involving the Company, and (iii) "with respect to transition and succession matters"[21]; and to release any claims he ever had, then had, or may have in the future against the Company.[22] Plaintiff focuses on this final element of consideration, *i.e.*, the general release. The Complaint alleges:

> [N]either the Severance Agreement, nor any press release or SEC filing by the Company states any facts identifying a basis for any claim against HP by Hurd. Absent the basis for a claim against the Company, Hurd has provided nothing of value to the Company in exchange for the compensation in excess of that which the Company was obligated to provide to him pursuant to his employment agreement, or otherwise. In fact, there was nothing for Hurd to release at all, certainly not $40 million worth of consideration.[23]

Thus, Plaintiff argues, "the Board provided Hurd with a $40 million gift for absolutely nothing in return."[24] The Complaint, however, does not address any of the other items of

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19 Severance Agreement § 5.

20 *Id.* § 6.

21 *Id.* § 7.

22 *Id.* § 8.

23 Compl. ¶ 52.

24 Pl.'s Ans. Br. 10.

consideration besides the general release that were given by Hurd to the Company and reflected in the Severance Agreement.

3. Relevant events after Hurd left HP

On September 6, 2010, exactly one month after Hurd entered into the Severance Agreement and left HP, he accepted a position at Oracle Corporation. The following day, HP sued Hurd for breaching his confidentiality agreements with the Company by accepting employment with a competitor. On September 20, the Company settled that litigation for Hurd's waiver of some of the equity-based compensation to which he was entitled under the Severance Agreement. Based on the cash and stock options Hurd retained, however, Plaintiff estimates that "Hurd still gained approximately $42.5 million from his resignation."[25]

Meanwhile, upon Hurd's termination from HP in August 2010, the Board immediately appointed CFO Cathie Lesjak as interim CEO and formed a search committee to find a permanent replacement for Hurd. The Complaint impugns those actions as reflecting a "resort" to Lesjak and "putting the Company in a crisis mode."[26] It also alleges that Hurd's ultimate replacement, Leo Apotheker, was "widely criticized for not being a good choice," causing HP's stock to drop 3.1% after the announcement of his appointment.[27] Hence, according to Plaintiff, "[t]he absence of a succession plan is

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25 Compl. ¶ 51.

26 *Id.* ¶ 53.

27 *Id.* ¶ 55.

costly to the Company, in terms of time and monetary expense, in order to find a successor quickly."[28] The Complaint makes no other allegation of harm caused by either Lesjak's or Apotheker's service as CEO.

C. Procedural History

On September 22, 2010, Plaintiff made demand upon the Board to inspect the Company's books and records pursuant to 8 *Del. C.* § 220. The Board complied and produced documents on November 3, subject to a confidentiality agreement. With the benefit of that production, Plaintiff filed his initial Shareholder Derivative Complaint on November 24, 2010 and, thereafter, the amended, operative Complaint on February 28, 2011. By mutual agreement, the parties then delayed moving forward with this action pending resolution of a related action in this Court and the Supreme Court, regarding the scope of production due from HP in another shareholder's § 220 action.[29]

On December 2, 2011, the Company filed the instant Motion. This Memorandum Opinion reflects the Court's ruling on that Motion.

D. Parties' Contentions

The Complaint advances two causes of action: in Count I, Plaintiff challenges the Severance Agreement as corporate waste; in Count II, he accuses the Board of breaching its duty of care by failing to adopt a long term succession plan before Hurd's unexpected termination. In its Motion, HP contends that demand is not excused as to either count

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[28] *Id.* ¶ 57.

[29] Hr'g Tr. 52; *see generally Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365 (Del. 2011), *aff'g* 2011 WL 941464 (Del. Ch. Mar. 17, 2011).

and, therefore, the Complaint must be dismissed. As to the waste claim, the Company argues that there are no particularized allegations that the Board was interested or lacked independence, was uninformed, or acted in bad faith when it took the challenged action. Nor, according to HP, was the Severance Agreement so one-sided that it could not have been based on a valid exercise of business judgment. Hence, the Company asserts that the transaction is entitled to the presumptions of the business judgment rule, which would mean that demand is not excused under *Aronson v. Lewis*.[30] Regarding the succession planning claim, HP avers that any claim for money damages predicated on a breach of care is exculpated by its corporate charter. According to the Company, therefore, the Board is shielded from liability regarding Count II of the Complaint and could have responded to a presuit demand by making a disinterested, good faith assessment of the Company's best interests, thereby precluding a determination of demand excusal under *Rales v. Blasband*.[31]

For his part, Zucker argues that the Severance Agreement, in fact, was so one-sided that it essentially constituted a gift for which the Company received no consideration and to which the business judgment rule does not apply. Accordingly, he maintains that demand is excused under *Aronson* as to his waste claim. Regarding his succession planning claim, Plaintiff asserts that the Board acted in bad faith in disregard

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[30] 473 A.2d 805, 814-15 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

[31] 634 A.2d 927, 933-34 (Del. 1993).

of a known duty and that the corporate charter may not exculpate directors from liability for such conduct. Without that protection, Plaintiff continues, the Board faced a substantial risk of liability and, therefore, could not have exercised valid business judgment in responding to a presuit demand, compelling a conclusion of demand futility under *Rales*. Furthermore, and in any event, Plaintiff contends that the Motion should be denied because the Board effectively conceded demand excusal as to both counts by forming a special litigation committee to evaluate his Complaint.

II. ANALYSIS

A. Legal Standard

Under Court of Chancery Rule 23.1, a derivative complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors . . . [or] the reasons . . . for not making the effort."[32] The demand requirement embodied in this Rule "is a recognition of the fundamental precept that directors manage the business and affairs of corporations,"[33] which includes controlling litigation brought on the corporation's behalf.[34]

Demand may be excused as futile, however, when obtaining the action the plaintiff desires will require the board to sue itself on the corporation's behalf,[35] *i.e.*, where there

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32 Ct. Ch. R. 23.1(a).

33 *Aronson*, 473 A.2d at 811-12; *see also* 8 *Del. C.* § 141(a).

34 *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990).

35 *Ryan v. Gifford*, 918 A.2d 341, 352 (Del. Ch. 2007) (citing *Sanders v. Wang*, 1999 WL 1044880, at *12 (Del. Ch. Nov. 10, 1999)).

is reason to believe "that the board could not properly consider a demand, thereby excusing the effort to make demand as futile."[36] Thus, under the familiar test set forth in *Aronson*, demand futility exists where "the particularized facts alleged [create] a reasonable doubt . . . that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[37] For claims based on board inaction, however, "it [is] impossible to perform the essential inquiry contemplated by *Aronson*" because there is no "challenged transaction" to review.[38] Thus, in reviewing allegations of a board's failure to act, demand futility is assessed under the standard developed by the Delaware Supreme Court in *Rales*. That standard requires particularized factual allegations raising "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."[39]

In this case, Plaintiff's challenge of the Severance Agreement concerns a discrete transaction and, therefore, is reviewed under *Aronson*. Plaintiff's succession planning claim, by contrast, accuses the Board of failing to take action; accordingly, it is reviewed under *Rales*. Whichever test applies, the Court affords plaintiffs "all reasonable factual

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36 *La. Mun. Police Empls.' Ret. Sys. v. Pyott*, -- A.3d --, 2012 WL 2087205, at *21 (Del. Ch. June 11, 2012).

37 *Aronson*, 473 A.2d at 812.

38 *Rales*, 634 A.2d at 933.

39 *Id.* at 934.

inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences."[40]

B. Defendants Have Not Conceded Demand Futility

As a threshold matter, I reject Plaintiff's contention "that Defendants waived any arguments they may have regarding [P]laintiff's election not to make a demand" by delegating authority to assess the merits of the pending lawsuit to a special litigation committee.[41] Plaintiff is correct that, in some circumstances, "the act of establishing a special litigation committee constitutes an implicit concession by a board that its members are interested in the transaction and that its decisions are not entitled to the protection of the business judgment rule."[42] Nevertheless, appointment of a special litigation committee "is not, *in all instances*, an acknowledgement that demand was excused and *ergo* that a shareholder's lawsuit was properly initiated as a derivative action."[43] Rather, as this Court has held, "to find that a board of directors conceded the futility of demand, a derivative plaintiff *must allege particularized facts* that support a factual finding that the board made the concession."[44]

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40 *Brehm*, 746 A.2d at 255.

41 Pl.'s Ans. Br. 23.

42 *Levine v. Smith*, 591 A.2d 194, 209 (Del. 1991) (citing *Abbey v. Computer & Commc'ns Tech. Corp.*, 457 A.2d 368, 374 (Del. Ch. 1983)).

43 *Spiegel*, 571 A.2d at 777.

44 *Seminaris v. Landa*, 662 A.2d 1350, 1353 (Del. Ch. 1995) (emphasis added); *see also* 13 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 5965 (perm. ed., rev. vol. 2012) ("To demonstrate that the board conceded

The Complaint contains no allegations, particularized or otherwise, that the Board formed a special litigation committee and thereby evidenced an intent to concede demand futility.[45] Instead, Plaintiff cites a two-paragraph letter opinion in *Sutherland v. Sutherland* for the proposition that, once a special litigation committee is established, "arguments advanced in favor of dismissal . . . under Court of Chancery Rule 23.1 for failure to make a demand[] are no longer justiciable."[46] Based on that ruling in *Sutherland*, Plaintiff apparently contends that he did not need to allege facts regarding the appointment of a special committee in the Complaint. Plaintiff takes that quoted language out of context, however.

In *Sutherland*, a subset of defendant directors moved to dismiss the complaint within weeks of its filing in late 2006. Before briefing was complete on that motion,

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demand futility, the shareholder must allege particularized facts to support a factual determination that the board intended to concede demand." (citing *Seminaris*)).

45 *See supra* note 6 and accompanying text. Furthermore, while preserving its argument that the Court should treat the Committee Report as beyond the pleadings, HP noted in a footnote to its Reply Brief that the committee was empowered "only [to] make a recommendation to the board, which retained full authority to render a decision." Defs.' Reply Br. 5 n.3. Therefore, even if the Court were to consider the Committee Report, further analysis would be necessary to determine if formation of that committee, in fact, demonstrated an intent by the Board to concede demand excusal. *See Abbey*, 457 A.2d at 374 (noting that "merely appoint[ing] a committee to investigate the allegations and to report back to the board for whatever action the board might choose to take on the merits of the charges" would not concede demand futility); *accord Spiegel*, 571 A.2d at 777 (citing *Abbey*).

46 *Sutherland v. Sutherland*, 2008 WL 3021024, at *1 (Del. Ch. Aug. 5, 2008).

however, the defendant company created a special litigation committee that formally moved to dismiss by invoking the procedures established in *Zapata Corp. v. Maldonado*.[47] In May 2008, after extensive briefing and argument on that second motion to dismiss (as well as rulings on interim motions for a protective order and to supplement the record), Vice Chancellor Lamb issued an opinion denying the special litigation committee's motion.[48] In the following weeks, the Vice Chancellor denied the defendants' motion for reargument,[49] and the Supreme Court refused their application for an interlocutory appeal.[50] Then, approximately one month later, in July 2008, the initial subset of directors attempted to revive their nearly two-year-old 2006 motion to dismiss. In the two-paragraph letter opinion that Plaintiff here relies upon, the Court denied the directors' 2006 motion "[i]n light of all that has happened in this case since that motion was filed"[51] and because the May 2008 opinion "refusing to dismiss the complaint on the basis of the special litigation committee's report reflects a clear understanding that the full boards of directors had conceded their own disability to consider a demand or to investigate or take action with respect to the complaint."[52]

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47 430 A.2d 779 (Del. 1981).

48 *Sutherland v. Sutherland*, 958 A.2d 235, 244-45 (Del. Ch. 2008).

49 *Sutherland v. Sutherland*, 968 A.2d 1027, 1028 (Del. Ch. 2008).

50 *Dardanelle Timber Co. v. Sutherland*, 2008 WL 2461803, at *1 (Del. June 19, 2008) (ORDER).

51 *Sutherland v. Sutherland*, 2008 WL 3021024, at *1.

52 *Id.* at *1 n.1.

The procedural posture of this case bears no resemblance to that of *Sutherland*. Furthermore, *Sutherland* does not stand for the proposition Plaintiff claims. In determining that the 2006 motion to dismiss no longer was justiciable, Vice Chancellor Lamb also accepted counsel's "suggestion that the plaintiff prepare and file an amended complaint."[53] That amended complaint, filed September 15, 2008, alleged that the board formed a special litigation committee.[54] Unlike Plaintiff here, therefore, the plaintiff in *Sutherland* amended her complaint after the committee in question was formed. Thus, nothing in *Sutherland* undermines the holding of *Seminaris* that, "[t]o demonstrate that [defendants] conceded demand futility, [a] plaintiff must allege particularized facts to support a factual determination that the board intended to concede demand."[55] Because Zucker's Complaint contains no such allegations, his waiver argument fails.

C. Plaintiff Has Not Pled Demand Futility on His Waste Claim

Count I of the Complaint claims that, by approving the Severance Agreement for allegedly nominal consideration, the HP Board committed waste. Regarding whether demand is excused as to this claim, Plaintiff has conceded that the HP directors had no

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53 *Id.* at *1.

54 Am. Deriv. Compl., *Sutherland v. Sutherland*, C.A. No. 2399-VCN, Docket Item No. 162, ¶ 141 ("As this Court previously held, the Individual Defendants have conceded that they are under a conflict of interest and thus disabled from appropriately responding to a demand by Martha. The Individual Defendants did so by and through constituting the SLC and having it proceed under this Court's precedent in *Zapata*.").

55 *Seminaris*, 662 A.2d at 1353.

interest in the Severance Agreement and were independent of Hurd.[56] As a result, the only question in terms of demand excusal is whether Plaintiff has satisfied *Aronson*'s second prong by alleging particularized facts that raise a reasonable doubt that the Severance Agreement was the product of a valid exercise of business judgment.

"The standard for waste under the second prong of *Aronson* may be expressed as akin to *res ipsa loquitur*, and is difficult to meet . . . ."[57] Pleading waste requires a "showing that the board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests."[58] Indeed, the challenged transaction must reflect "an exchange of corporate assets for consideration so disproportionately small" that it effectively could be characterized as a mere gift serving no corporate purpose.[59] "Where, however, the corporation has received '*any substantial* consideration' and where the board has made 'a *good faith judgment* that in the circumstances the transaction was worthwhile,' a finding of waste is inappropriate, even

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56 Pl.'s Ans. Br. 12.

57 *Protas v. Cavanagh*, 2012 WL 1580969, at *9 (Del. Ch. May 4, 2012) (footnote omitted).

58 *White v. Panic*, 783 A.2d 543, 554 n.36 (Del. 2001); *accord Sample v. Morgan*, 914 A.2d 647, 669-70 (Del. Ch. 2007) (Waste entails "a transaction that is on terms so disparate that no reasonable person acting in good faith could conclude the transaction was in the corporation's best interest.").

59 *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997); *see also In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 137-38 (Del. Ch. 2009) (finding allegations of $68 million severance "to a departing CEO whose failures as CEO were allegedly responsible, in part, for billions of dollars of losses" in exchange for various promises of uncertain "real value, if any," sufficient to plead a claim of corporate waste).

if hindsight proves that the transaction may have been ill-advised."[60] "This is obviously an extreme test, very rarely satisfied by a shareholder plaintiff."[61]

The Complaint adequately alleges that the Company was not required to offer Hurd a severance. For example, it alleges that Hurd had no employment agreement with HP, and thus no contractual right to severance, when he left. It also alleges that the Board could have avoided paying Hurd severance under the Company's general executive officer severance policy by terminating him for Cause based on, among other things, his inaccurate expense reports or his disclosure to Fisher of the multibillion dollar EDS acquisition months before any public announcement of the transaction. In these circumstances, drawing the inferences in Plaintiff's favor, the Company conceivably could have terminated Hurd without paying him any severance whatsoever. Instead, Defendants allegedly decided to give him more than $40 million in cash and other equity-based compensation under the Severance Agreement.

Although the Board *could* have elected to pay Hurd nothing, determining whether it *should* have done so, or whether making the deal it did constitutes waste, involves a broader legal analysis. While "the discretion of directors in setting executive compensation is not unlimited,"[62] "[i]t is the essence of business judgment for a board to determine if 'a particular individual warrant[s] large amounts of money, whether in the

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60 *Protas*, 2012 WL 1580969, at *9 (quoting *Vogelstein*, 699 A.2d at 336).

61 *Steiner v. Meyerson*, 1995 WL 441999, at *1 (Del. Ch. July 19, 1995) (Allen, C.).

62 *In re Citigroup*, 964 A.2d at 138.

form of current salary or severance provisions.'"[63] The "outer limit" necessary to sustain a claim of waste is "executive compensation . . . so disproportionately large as to be unconscionable,"[64] but a finding of waste is inappropriate "[s]o long as there is some rational basis for directors to conclude that the amount and form of compensation is appropriate and likely to be beneficial to the corporation."[65]

On its face, the Severance Agreement memorializes an exchange in which at least some consideration runs to HP. Hurd agreed: (1) to extend certain confidentiality agreements; (2) not to disparage the Company; (3) to cooperate, among other things, "with respect to transition and succession matters"[66]; and (4) to release all claims he had against the Company. Plaintiff alleges that Hurd's release "provided nothing of value to the Company" because he had no claims against the Company to release.[67] While Zucker is entitled to the presumption for purposes of this Motion that the Board could have decided to terminate Hurd for Cause, there is no allegation from which the Court reasonably can infer that Hurd necessarily would have acquiesced in such a decision. Indeed, the Board "determined that Hurd did *not* violate the Company's sexual

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63 *Brehm*, 746 A.2d at 263 (second alteration in original) (quoting *In re The Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 362 (Del. Ch. 1998)).

64 *Id.* at 262 n.56.

65 *Steiner*, 1995 WL 441999, at *8.

66 Severance Agreement § 7.

67 Compl. ¶ 52.

harassment policy"[68] and "recognize[d] the considerable value that [Hurd] has contributed to HP."[69] Creative counsel advocating on Hurd's behalf could have claimed that he, in fact, was entitled to severance under HP's general executive officer severance plan notwithstanding the expense report violations. The Board ultimately might have prevailed on that claim, but the Company would need to incur considerable costs of time, resources, and negative publicity in the interim.[70] Instead, Hurd's general release avoided those possible costs. That is, even if the release was worth relatively little, Plaintiff overstates his case to say it was worthless.

Furthermore, the Complaint fails to address the other consideration given by Hurd. As Defendants' counsel noted at argument, the "doubling of the time period for Mr. Hurd's confidentiality obligation to the company . . . became important afterwards when Mr. Hurd, in fact, accepted employment with a competitor, the Oracle company."[71] Finally, the internal logic of the Complaint itself belies an inference that the Severance Agreement provided nothing of value to HP: if, as Plaintiff alleges, "[t]here is no good reason not to have an effective succession plan,"[72] then Hurd's agreement to cooperate in succession planning presumably would be valuable to the Company.

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68 *Id.* ¶ 38 (emphasis added).

69 Aug. 6 Press Release, at 1-2.

70 In this context, Hurd's nondisparagement agreement also provides some value to HP.

71 Hr'g Tr. 11.

72 Compl. ¶ 54.

Additionally, the questions confronting the Board of (1) whether to terminate Hurd for Cause and (2) whether to give him a severance are not entirely congruent. As this Court has recognized,

> in the context of executive compensation, Delaware courts recognize an exception to the general rule barring retroactive consideration. In *Zupnick v. Goizueta*, this court found compensation given in consideration for previously completed performance was not improper "[w]here the amount awarded is not unreasonable in view of the services rendered."[73]

Hence, even if the Board terminated Hurd for Cause, it arguably still could have compensated him for his past stewardship of HP. In that regard, and unlike in *Citigroup* and *Brehm*, for example, Plaintiff does not allege that the Company suffered significant losses during Hurd's tenure as CEO or that he otherwise was an ineffectual executive.[74] Under such circumstances, at least some portion of Hurd's severance could represent "reasonable" compensation for his successful past performance. This possibility further

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[73] *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *10 n.92 (Del. Ch. May 30, 2008) (alteration in original) (quoting *Zupnick v. Goizueta*, 698 A.2d 384, 388 (Del. Ch. 1997)).

[74] *Compare In re Citigroup*, 964 A.2d at 137-38 (challenging $68 million severance "to a departing CEO whose failures as CEO were allegedly responsible, in part, for billions of dollars of losses") *and Brehm*, 746 A.2d at 249 ("it appears from the Complaint that . . . the compensation and termination payout for Ovitz were exceedingly lucrative, if not luxurious, compared to Ovitz' value to the Company") *with* Aug. 6 Press Release, at 1-2 ("[The Board] recognizes the considerable value that [Hurd] has contributed to HP over the past five years in establishing us as a leader in the industry. . . . The departure was not related in any way to the company's operational performance or financial condition, both of which remain strong.").

undermines Plaintiff's waste claim, which effectively requires a showing that the Severance Agreement constitutes an "egregious or irrational" exchange of corporate assets "that could not have been based on a valid assessment of the Corporation's best interests."[75]

Finally, even if neither the consideration given by Hurd in the Severance Agreement nor his past performance at HP warranted $40 million, there still could have been external "rational bas[es] for [the Board] to conclude that the amount and form of compensation [wa]s appropriate and likely to be beneficial to the corporation."[76] For example, as alleged in the Complaint, two directors initially opposed firing Hurd at all, but they "agreed to vote with the rest of the Board" on the same day that the Severance Agreement was approved.[77] One reasonable inference from these facts is that the directors who initially dissented also would have opposed terminating Hurd for Cause and ultimately agreed to vote with the rest of the Board only because Hurd received the severance benefits he did. In addition, because the Company's public announcement of Hurd's termination "recognize[d] that this change in leadership is abrupt news,"[78] the resulting unanimity may have been valuable to HP from an investor-relations standpoint. The Complaint also alleges that the Board found no violation of HP's sexual harassment

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75 *White*, 783 A.2d at 554 n.36.

76 *See Steiner*, 1995 WL 441999, at *8.

77 Compl. ¶ 36.

78 Aug. 6 Press Release, at 2.

policy and immediately formed a search committee for a permanent replacement. That is, the Company was terminating Hurd for expense report violations and mere allegations of scandal at the same time that it was trying to put its best foot forward to replacement candidates. Denying Hurd any severance despite the admittedly "considerable value that [he] has contributed to HP" could have undermined its efforts to attract outside executive talent.[79] The Complaint offers no particularized allegations raising a reasonable doubt that the Board could have considered such external factors in good faith in approving the Severance Agreement.

Having found that the Severance Agreement reflects at least some element of bilateral exchange and that there were rational bases for the Board to agree to it, Plaintiff's waste claim reduces to his belief that $40 million was just too much. Be that as it may, "the size of executive compensation for a large public company in the current environment often involves large numbers,"[80] and "amount alone is not the most salient aspect of director compensation" for purposes of a waste analysis.[81] Without question, the amount of Hurd's severance may appear extremely rich or altogether distasteful to some. But, "[t]he waste doctrine does not . . . make transactions at the fringes of reasonable decision-making its meat."[82] Rather than by judicial predilection, "[t]he value

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79 *Id*.

80 *Brehm*, 746 A.2d at 259 n.49.

81 *Steiner*, 1995 WL 441999, at *8.

82 *Protas*, 2012 WL 1580969, at *10.

of assets bought and sold in the marketplace, including the personal services of executives and directors, is a matter best determined by the good faith judgments of disinterested and independent directors, men and women with business acumen appointed by shareholders precisely for their skill at making such evaluations."[83] Plaintiff concedes that HP's directors were both disinterested and independent, and the Complaint fails to raise a reasonable doubt that the Board's decision on the amount of severance it would agree to pay Hurd was the product of a valid exercise of business judgment. Therefore, Plaintiff has failed to satisfy his burden under *Aronson* to show demand futility as to his waste claim. Accordingly, I dismiss Count I of his Complaint.

D. Plaintiff Has Not Pled Demand Futility on His Succession Planning Claim

Count II of Plaintiff's Complaint claims that, "[b]y the Board's decision not to have a succession plan, it failed to act with due care for the benefit of the Company."[84] Because this claim challenges board inaction, the *Rales* test applies. "To properly plead demand futility under *Rales*, a plaintiff must allege particularized facts which create a reasonable doubt that 'the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand.'"[85]

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83 *In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 984 (Del. Ch. 2007).

84 Compl. ¶ 72.

85 *In re Goldman Sachs Gp., Inc. S'holder Litig.*, 2011 WL 4826104, at *18 (Del. Ch. Oct. 12, 2011) (quoting *Rales*, 634 A.2d at 934).

"Normally, 'the mere threat of personal liability . . . is insufficient to challenge either the independence or disinterestedness of directors . . . .'"[86] Rather, only "defendant directors who face a 'substantial likelihood of personal liability' are deemed interested" for purposes of a *Rales* analysis,[87] "else the demand requirement itself would be rendered toothless, and directorial control over corporate litigation would be lost."[88] In that regard, the threat of "directors' liability is significantly lessened where, as here, the corporate charter exculpates the directors from liability to the extent authorized by 8 *Del. C.* § 102(b)(7)."[89] Therefore, for the HP directors to suffer a disabling likelihood of personal liability, the alleged breach of care for failing to implement a succession plan

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86 *Rales*, 634 A.2d at 936 (second alteration in original) (quoting *Aronson*, 473 A.2d at 815).

87 *In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *12 (Del. Ch. Jan. 11, 2010) (quoting *Rales*, 634 A.2d at 936); *accord Ryan v. Gifford*, 918 A.2d 341, 355 (Del. Ch. 2007) ("Directors who are sued have a disabling interest for pre-suit demand purposes when 'the potential for liability is not a mere threat but instead may rise to a substantial likelihood.'" (quoting *In re Baxter Int'l, Inc. S'holders Litig.*, 654 A.2d 1268, 1269 (Del. Ch. 1995))).

88 *In re Goldman Sachs*, 2011 WL 4826104, at *18.

89 *Id.* (citing *Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003)); *see also supra* note 1 and accompanying text.

must rise to the level of bad faith,[90] such as a conscious disregard of a known duty to act.[91]

The Complaint contains a handful of conclusory allegations that "the failure to have a succession plan also cannot be said to be sound business judgment" and "amounts to a breach of the duty of good faith."[92] Yet, Plaintiff's brief does not cite, nor is the Court aware of, any Delaware precedent that stands for the proposition that failure to adopt a long-term succession plan amounts to a breach of duty. Instead, Plaintiff relies upon a number of academic articles and regulatory releases emphasizing the importance of succession planning to corporate health and characterizing it as a significant corporate governance issue.[93] Similarly, at argument, Plaintiff's counsel candidly requested that the Court take this opportunity to establish for the first time, as a specific application of the duty of care, a rule requiring directors to adopt succession plans.[94]

The circumstances of this case, however, do not justify departing from this Court's traditional reluctance to engage in establishing new standards of liability in corporate

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90 *Guttman*, 823 A.2d at 501 (Where "the charter insulates the directors from liability for breaches of the duty of care, then a serious threat of liability may only be found to exist if the plaintiff pleads a *non-exculpated* claim against the directors based on particularized facts." (citing *In re Baxter*, 654 A.2d at 1270)); *see also* 8 *Del. C.* § 102(b)(7)(ii) (precluding exculpation of bad faith conduct).

91 *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009); *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 66-67 (Del. 2006).

92 Compl. ¶¶ 58, 65.

93 *See* Pl.'s Ans. Br. 19-22 & sources cited therein.

94 Hr'g Tr. 33-34.

governance by judicial fiat. Even accepting at face value Plaintiff's assertions that (1) long term succession planning is so critical to sound corporate governance that there ought to be a fiduciary duty expressly requiring it[95] and (2) the public stockholders of HP were harmed because the Board carelessly failed to implement such a plan, Plaintiff has not identified any case law or alleged any facts that suggest that directors have been or are on notice that such a failure is a breach of fiduciary duty. Accordingly, the Board could not have *consciously* disregarded a *known* duty to act sufficient to rise to the level of bad faith. In the absence of bad faith, the exculpatory provision of HP's certificate of incorporation eliminates the threat of personal liability for alleged breaches of care. Thus, if Plaintiff had made presuit demand regarding his succession planning claim, the Board could have "impartially consider[ed] its merits without being influenced by improper considerations."[96] In these circumstances, there is no basis on which to find demand futility, regardless of whether Delaware, as a normative matter, should adopt an express requirement that corporate fiduciaries must implement long term succession plans.

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95 *But see Brehm*, 746 A.2d at 256 ("Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal legal requirements of the corporation law are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and can usually help directors avoid liability. But they are not required by the corporation law and do not define standards of liability.").

96 *Rales*, 634 A.2d 934.

In reaching this conclusion, the Court has no need to address whether the duty of care requires directors to adopt succession plans, and it expresses no view on that issue. Rather, the limited holding of the Court's analysis as to Count II of the Complaint is that there can be no substantial threat of personal liability predicated on bad faith disregard of a known duty to implement a succession plan because the Complaint fails to allege a basis from which the existence of such a known duty reasonably could be inferred. Any threat of personal liability, therefore, is insufficient to raise a reasonable doubt that Defendants could have responded disinterestedly and independently to a presuit demand, had Plaintiff made one. Thus, demand is not excused on Plaintiff's succession planning claim, Plaintiff failed to comply with Rule 23.1, and Count II must be dismissed.

III. CONCLUSION

For the foregoing reasons, Plaintiff failed to satisfy his burden under Rule 23.1 to plead demand futility as to either count of the Complaint. Therefore, I grant the Company's Motion and dismiss the Complaint in its entirety.

IT IS SO ORDERED.