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Re: *Carole Kops v. Gerald Hassell, et al*., C.A. No. 11982-VCG

Dear Counsel:

This shareholder derivative action seeks, on behalf of The Bank of New York Mellon Corporation ("BNYM" or the "Company"), to recover from certain current and former directors, officers, and employees for losses arising from the Company's foreign exchange practices which resulted in liabilities of upwards of one billion dollars. A decision in a related action, *Murray Zucker v. Gerald Hassell et al.*,[1] was issued earlier today. The present action, although arising from the same underlying

[1] *See* C.A. No. 11625-VCG (Del. Ch. Nov. 30, 2016).

conduct, is addressed in this separate Letter Opinion to analyze certain unique issues raised by this Plaintiff, Carole Kops.[2] Interested readers are referred to the *Zucker* opinion for additional background. Because the applicable law is the same, this opinion focuses on the different theories pursued and facts pled by Kops. The differing facts and theories are laid out below to the extent necessary to determine whether Kops' litigation demand (the "Kops Demand") was wrongfully refused. To satisfy the requirements of Delaware Court of Chancery Rule 23.1, Kops must plead particularized facts "supporting an inference that the committee, despite being comprised solely of independent directors, breached its duty of loyalty, or breached its duty of care, in the sense of having committed gross negligence."[3] Absent such particularized pleadings, "the decision of the board is entitled to deference as a valid exercise of its business judgment. The pleading burden imposed by this standard is a heavy one . . . ."[4] As discussed below, the Plaintiff has failed to meet her burden.[5]

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[2] I note these two actions, Zucker and Kops, have worked through the litigation process on similar tracks. Their respective Section 220 actions were administratively consolidated. Then a combined oral argument on motions to dismiss their respective derivative actions was heard on July 26, 2016. The Defendants had moved to stay this Kops action in light of the fully briefed, and previously filed Zucker action. I declined to stay the Kops action and instead allowed for the combined oral argument to determine the similarity of the merits of the actions. This Letter Opinion addresses the differences as needed.

[3] *Espinoza on behalf of JPMorgan Chase & Co. v. Dimon*, 124 A.3d 33, 36 (Del. 2015).

[4] *Ironworkers Dist. Council of Philadelphia & Vicinity Ret. & Pension Plan v. Andreotti*, 2015 WL 2270673, at *24 (Del. Ch. May 8, 2015), *aff'd sub nom. Ironworkers Dist. Council of Philadelphia v. Andreotti*, 132 A.3d 748 (Del. 2016).

[5] Because the Plaintiff has failed to satisfy Rule 23.1, this Letter Opinion does not address the Defendants' other grounds for dismissal. I note, however, that given the delay between the refusal of the demand and the filing of this action a significant laches issue would exist going forward.

Certain temporal distinctions may be helpful to understand the differences between these two actions. The plaintiff in the Zucker action made his litigation demand on March 9, 2011. His demand was refused via letter of December 14, 2011. Zucker then initiated a Section 220 action, which was administratively consolidated with a similar action filed by Kops. After resolution of the consolidated Section 220 actions, Zucker filed his derivative complaint on October 20, 2015. Kops made her litigation demand on May 24, 2012.[6] The Special Committee met on May 30, 2012 to consider her demand,[7] and presented their recommendation to the Board by June 12, 2012.[8] Her demand was refused via letter of June 21, 2012.[9] She then sent a follow-up letter on June 22, 2012 which the Special Committee's counsel replied to by letter on July 9, 2012.[10] Kops ultimately filed her Complaint in this action on February 10, 2016.

Kops pursues four theories to demonstrate wrongful demand refusal: (1) that an October 6, 2011 New York Times advertisement, placed by BNYM, constituted an effective but wrongful refusal, (2) that the Special Committee was not "reasonably informed enough to make a good faith determination regarding the prior litigation demands," (3) that despite developments since the Zucker refusal, the

[6] Compl. ¶ 181.
[7] *Id.* at ¶ 215.
[8] *Id.* at ¶ 222.
[9] *Id.* at ¶ 183 n.13.
[10] *Id.* at ¶¶ 186–87.

Special Committee "relied entirely" on its prior investigations to refuse the Kops Demand, and (4) the Company's failure to revisit the investigation after the demand was refused, in light of subsequent settlements.[11] Two of these theories (regarding whether the Special Committee was adequately informed in rejecting the Zucker demand, and the Directors' failure to reopen the investigation to consider developments subsequent to the demand) were addressed in the *Zucker* opinion, which determined that they failed to support an inference that demand was wrongfully refused. I will not revisit those theories here, because, for the same reasons as in *Zucker*, they are insufficient to satisfy the pleading requirement under Rule 23.1.[12] The remaining two—the New York Times advertisement theory, and the purported entire reliance on prior investigations—I address in this Letter Opinion. For the reasons that follow, Defendants' motion to dismiss is granted.

I. DISCUSSION

A. Review of Applicable Standards

Under Delaware Law, "a board's decision to refuse a plaintiff's demand is afforded the protection of the business judgment rule *unless* the plaintiff alleges particularized facts that raise *a reasonable doubt* as to whether the board's decision

[11] Pl's Answering Br. 14–15 (citing Compl. ¶ 202).

[12] I note that, with respect to these issues, this Complaint does not raise additional well-pled facts sufficient to cause me to revisit the analysis or require a different outcome from that in *Zucker*. I incorporate the *Zucker* Memorandum Opinion here, as appropriate, as dispositive of issues raised by Kops not explicitly here addressed.

to refuse the demand was the product of valid business judgment."[13] Further, the "pertinent 'reason to doubt' is *not* doubt about the propriety of the underlying conduct, nor is it doubt about whether the Board, in rejecting the demand, made a wise decision; it is doubt whether the Board's action, wise or foolish, *was taken in good faith and absent gross negligence*."[14] This Court has recently explained that to show demand was wrongfully refused on the basis of gross negligence, a Plaintiff must plead "particularized facts that reasonably imply gross negligence, in that the board acted in an uninformed manner by failing either to investigate the demand at all or in pursuing such an inadequate investigation, in light of the seriousness of the demand, that a court may reasonably infer a breach of the duty of care."[15] Alternatively, a Plaintiff can show demand was wrongfully refused by alleging facts with particularity that create a reasonable doubt that the Special Committee and Board acted in good faith in refusing the demand. However, "[d]emonstrating that directors have breached their duty of loyalty by acting in bad faith goes far beyond showing a questionable or debatable decision on their part."[16] Our case law has described situations that would evince a failure to act in good faith to include, "for instance, where the fiduciary intentionally acts with a purpose other than that of

[13] *Friedman v. Maffei*, 2016 WL 1555331, at *8 (Del. Ch. Apr. 13, 2016) (citations omitted) (emphasis added).
[14] *Andreotti*, 2015 WL 2270673, at *26 (emphasis in original).
[15] *See id.* (citations omitted).
[16] *Id.* at *27.

advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[17]

B. The Newspaper Advertisement

The Plaintiff points to an October 6, 2011 newspaper advertisement in the New York Times, where the Company proclaimed innocence in foreign exchange practices; she argues that placing the ad constituted a "*de facto*" demand rejection, and shows the investigation of her demand was not undertaken in good faith and evinces gross negligence.[18] The Plaintiff argues that the decision to refuse the demand "was made, at the latest, on October 6, 2011."[19] I find Plaintiff's rationale difficult to follow: the Plaintiff's demand was not made until *May 24, 2012*. Kops, in light of the advertisement, nonetheless made her demand, implicitly conceding that the directors were able to bring their business judgment to bear as of that time; odd, considering her current contention that BNYM had preemptively "denied" all future demands via its public profession of innocence in the New York Times. Interestingly, this "effective refusal" theory originally arose in a separate New York action brought by the current plaintiff in *Zucker*, in support of an action Zucker

[17] *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005) (citations omitted).
[18] Pl's Answering Br. 29.
[19] *See id.* at 34.

brought *before* his demand was officially refused on December 14, 2011. That action was dismissed without prejudice; the plaintiff in Zucker, I note, has abandoned this effective-refusal theory.

In any event, the New York Times advertisement, in my view, does not imply wrongful refusal of the Kops Demand.[20] Absent from the Complaint are well-pled facts showing that the Board or the Special Committee were involved in drafting, preparing, or authorizing the advertisement. Rather, the Complaint simply concludes that the Company's Chief Executive Officer, Defendant Gerald Hassell, "*would* be directly involved in approving such a publication."[21] The Complaint also asserts that "[e]ven if the Demand Board had no knowledge of the publication" it was "certainly on notice" once it was published.[22] In a large and complex company such as BNYM, absent well-pled facts showing Board or Special Committee involvement, it is not reasonable to infer that the Defendants had sufficient involvement in this advertisement so that they considered its denial of wrongdoing binding on them. Absent such a pleading, I have no basis to infer bad faith or gross

[20] *See, e.g.*, *Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at *6 (Del. Ch. Mar. 17, 2006) (declining to find demand futile, noting "[t]he bare allegation that a company publicly announced that it believed the litigation lacked merit cannot by itself reach the heightened pleading standard of Rule 23.1. Public statements about the merits (or lack thereof) of derivative litigation are routinely made in SEC filings. It would be unreasonable for this court to conclude that a board made up of a majority of independent directors could not be asked to pursue this litigation simply because the company expressed a belief in a public filing that the claims in a series of related litigations were unfounded.") (citations omitted).
[21] Compl. ¶ 205 (emphasis added).
[22] *Id.*

negligence, on the theory that the Special Committee could not evaluate a demand in light of the advertisement. I find the Plaintiff's allegations regarding the advertisement do not create a reasonable inference that demand was wrongfully refused.

C. Developments between the Zucker Refusal and the Kops Refusal

The Complaint alleges that in refusing the Kops Demand the Special Committee relied solely on the prior investigation of the Zucker demand (which Kops characterizes as inadequate), and failed to consider developments after that investigation. I found in *Zucker* that the plaintiff in that case had failed to support an inference that the Special Committee's investigation of his demand involved gross negligence or bad faith.[23] The pleadings in this Complaint, and this Plaintiff's characterization of her pleadings in briefing and at oral argument, do not add to that analysis such that I need to revisit that issue.[24] Thus, for the reasons stated in *Zucker*, I start with the proposition that the Board acted within its fiduciary duties when it rejected the Zucker demand on December 14, 2011. My examination of the Board's subsequent actions turns on whether intervening developments following the Zucker refusal, and the corresponding actions by the Special Committee, raise a reasonable

[23] *See Zucker v. Hassell*, C.A. No. 11625-VCG (Del. Ch. Nov. 30, 2016).

[24] I note that the Plaintiff pursued primarily a gross negligence theory, rather than a bad faith theory, at oral argument. *See, e.g.*, Oral Arg. Tr. 50:11–17 ("Now, let's talk about really why we're here. Last night—my partner is here. I sort of threw my argument out because I read *Andreotti* – I believe it's *Andreotti*, not Ironworkers, but I read *Andreotti* again, and I said, yeah, this is very difficult. But there was gross negligence here.").

doubt as to the Board's compliance with its fiduciary duties in rejecting the Kops Demand.

The Zucker demand was refused on December 14, 2011 following an approximately seven month investigation by the Special Committee and their counsel, Cravath, Swaine & Moore LLP ("Cravath"). Cravath performed an extensive fact-finding process described in detail in the *Zucker* opinion. The Kops Demand was made on May 24, 2012 after the Special Committee, and the Board reached their December 2011 conclusions.

On January 17, 2012, after Zucker's demand was refused, BNYM entered into a partial settlement with the United States Attorney for the Southern District of New York.[25] As part of that settlement, the government indicated that it would continue to press its claims that BNYM engaged in a fraudulent scheme and to seek recovery.[26] The settlement "concerned only injunctive relief" regarding changes BNYM was required to make to its foreign exchange disclosures, and indicated that the BNYM would continue to oppose the government's claims for civil penalties.[27] The Complaint alleges that the Special Committee failed to consider this settlement

[25] Compl. ¶ 215.
[26] *Id.* at ¶ 216.
[27] *Id.* at ¶¶ 217–19.

when reviewing the Kops Demand, and that this intervening settlement required a more expansive review than the Special Committee undertook.[28]

The Plaintiff asserts demand was wrongfully refused because the Special Committee "relied wholly" on "the previous inadequate Zucker 'investigation.'"[29] The Plaintiff argues that there is "no evidence" that shows intervening developments, principally the settlement, were given consideration by the Special Committee or the Board.[30] However, the Complaint and the June 12, 2012 full-board meeting talking points indicate that Cravath and the Special Committee discussed and considered "developments that have occurred since [finishing] the prior investigation, *including developments in the various foreign exchange lawsuits and regulatory actions*—none of which impacted [their] prior analysis."[31] The June 21, 2012 demand refusal letter also indicates that during the May 30, 2012 Special Committee meeting where Plaintiff's demand was considered, the Committee and Cravath discussed "whether any developments subsequent to [the Zucker] investigation might affect the validity of the Committee's prior conclusions."[32] The Plaintiff asserts that other documents, such as the May 30, 2012 Special Committee

[28] *Id.* at ¶¶ 220–21.
[29] *Id.* at ¶ 202.
[30] Pl's Answering Br. 39.
[31] Compl. ¶ 224; July 15, 2016 Aff. of David B. Anthony, Ex. S at 1 (emphasis added) (the "June 12, 2012 Talking Points").
[32] July 21, 2016 Aff. of David B. Anthony, Ex. F at 2 (the "June 21, 2012 Demand Refusal Letter").

meeting minutes, and the May 30, 2012 talking points do not include this description and thus there is an inconsistency in the record.[33] Further, the Plaintiff argues that even absent this inconsistency, due consideration was "impossible" because the Special Committee's meeting at which it evaluated the demand lasted only "approximately thirty minutes."[34] Finally, the Plaintiff concludes that in light of the January, 2012 partial settlement, the determination that there was no sound legal basis for a claim was "entirely false at the time it was made and evinces that" there was "little interest in conducting an actual good faith demand review process."[35]

The Defendants argue that Plaintiff's assertion is wrong on the facts and the law. First, they assert the documents show there was consideration of intervening developments by the Special Committee. Further, they stress that although the Plaintiff now focuses on the January 2012 partial settlement, it was not mentioned in the Plaintiff's litigation demand or follow-up letter.[36] Second, regarding the law, the Defendants argue that reliance on prior investigations is proper, especially in light of the Special Committee's consideration of intervening developments, and that

[33] Compl. ¶ 224
[34] *Id.* at ¶ 225.
[35] Pl's Answering Br. 41. I note, I reject this conclusory assertion of bad faith for the same reasons discussed in *Zucker*. The Plaintiff must plead particularized facts to create a reasonable doubt that the decision was made in violation of the duty of care or duty of loyalty. A Plaintiff's conclusion that a determination was "false" in light of intervening partial settlements does not rise to that level.
[36] Defs' Reply Br. 22 n.20.

challenges to this process do not create a reasonable doubt of gross negligence or bad faith.[37]

The question, then, is whether the purported inconsistencies in the contemporaneous documentation regarding consideration of developments since the Zucker refusal, and the brevity of the time spent evaluating the Kops Demand, rise to the level of creating a reasonable doubt that the Special Committee acted in good faith or in compliance with its duty of care. I note that in evaluating a stockholder's demand, directors must act on an informed basis, but "there is obviously no prescribed procedure that a board must follow."[38] This Special Committee primarily relied on a prior investigation, which I have already found to not be so insufficiently informed as to constitute gross negligence or bad faith. The prior investigation included many hours of fact-finding work by Cravath, and numerous meetings of the Special Committee to reach their conclusion regarding the Zucker demand. As to intervening events, I note that the June 12, 2012 board meeting talking points and the June 21, 2012 demand refusal letter specifically indicate that the Special Committee discussed and considered developments since the Zucker refusal,[39]

[37] *See id.* at 23–24.
[38] *Levine v. Smith*, 591 A.2d 194, 214 (Del. 1991) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *see FLI Deep Marine LLC v. McKim*, 2009 WL 1204363, at *4 (Del. Ch. Apr. 21, 2009) ("There, of course, is no prescribed procedure that a special committee must follow when responding to a shareholder demand.") (citations omitted).
[39] June 21, 2012 Demand Refusal Letter.

including lawsuits and regulatory actions,[40] and determined their analysis had not changed. Other documents, as the Plaintiff points out, are silent to whether certain developments, including the January 2012 settlement, were discussed. These omissions, however, in light of the affirmative language of other contemporaneous documents, do not create a reasonable inference that intervening events were not considered. The inference the Plaintiff is seeking, that there was complete reliance on prior investigations, and a conscious disregard of superseding events, would require that I infer Cravath made false statements in the June 21, 2012 demand refusal letter, and that the June 12, 2012 talking points fabricated that the Special Committee had discussions with Cravath about developments in the various foreign exchange lawsuits and regulatory actions. On this record, in light of the facts pled, that is not a reasonable inference. Because the record shows that the Special Committee discussed developments subsequent to the Zucker refusal, and specifically "lawsuits and regulatory actions,"[41] the record does not imply a grossly-negligent or bad-faith reliance solely on the earlier investigation.

I turn to the Plaintiff's remaining allegation: that the brevity of the meeting on May 30, 2012 at which the Special Committee considered her demand creates a reason to doubt the propriety of the investigation. The Plaintiff alleges that the

[40] June 12, 2012 Talking Points.
[41] *Id.*

meeting time—around thirty minutes—was insufficient to consider the merits of the Kops Demand and the developments since the Zucker refusal. A corporate board, in considering a stockholder demand to take action, must take sufficient time and effort to inform itself, consistent with its fiduciary duty of care, before acting. Our Courts have recognized, however, that directors, while under an obligation to make an informed decision, have constraints on their time, and that brevity alone does not imply gross negligence.[42] Here, looking at the approximately thirty-minute meeting in a vacuum would create concern about the Special Committee's actions to inform itself. However, at the time this decision was reached, the Special Committee had been constituted for over a year, and had already become closely familiar with Cravath's investigation, as I have found in the *Zucker* decision.[43] Further, earlier that month, on May 8, 2012, the Special Committee met to consider yet another demand, by another shareholder.[44] The minutes of that May 8, 2012 meeting, submitted as an affidavit to Plaintiff's answering brief, indicate that meeting included discussion between the Special Committee and Cravath about developments which occurred subsequent to the Zucker investigation and refusal.[45] The Special Committee, when it made its decision to recommend refusal of the Kops

[42] *See, e.g.*, *Levine*, 591 A.2d at 214 (noting"[c]orporate directors normally have only limited available time to deliberate, and a determination of what matters will (and will not) be considered must necessarily fall within the board's discretion") (citations omitted).
[43] *See Zucker v. Hassell*, C.A. No. 11625-VCG (Del. Ch. Nov. 30, 2016).
[44] July 15, 2016 Aff. of David B. Anthony Ex. I. at BNY_KOPS_00000079–82.
[45] *See id.*

Demand, was not standing on the May 30, 2012 meeting alone, but all of the work and investigation that came before it. In light of the contemporaneous documentation of consideration of changed circumstances, and the prior work of Cravath and the Special Committee, I cannot find the length of the meeting alone creates a reasonable doubt that the Special Committee acted inconsistently with its duty of care or duty of loyalty.

Finally, considering all of Plaintiff's allegations as a whole, I find that the Complaint fails to raise a reasonable doubt that the Defendants complied with their fiduciary duties in considering, and rejecting, Kops' demand.

II. CONCLUSION

For the reasons discussed above, Defendants' motion is granted and Plaintiff's Complaint is dismissed for failure to meet the requirements of Rule 23.1. To the extent the foregoing requires an Order to take effect, IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III