DONALD TAPERT **Plaintiff**	*	**IN THE**
	*	**CIRCUIT COURT**
v.	*	**FOR BALTIMORE CITY**
DAVID M. POPPE, et al., **Defendant(s)**	*	**CASE NO.: 24-C-17-005430**

* * * * *

MEMORANDUM OPINION

This is a shareholder derivative action brought by Donald Tapert, a holder of shares in nominal defendant Sequoia Fund, Inc. Defendants are current directors and a former director of Sequoia, and Ruane Cuniff & Goldberg, Inc. ("RCG"), Sequoia's investment advisor. The claims are based on the allegation that the defendants violated their duties to Sequoia by permitting imprudent and unsound investing in violation of the Fund's investment policies. Plaintiff further alleges that his demand that the corporation pursue these claims was wrongfully refused. All Defendants have filed motions to dismiss that have been fully briefed and argued. For the reasons set forth in this Memorandum Opinion, the motions to dismiss will be granted.

BACKGROUND

Dismissal for failure to state a claim is proper only if the plaintiff's allegations and the permissible inferences therefrom, if true, would not afford relief to the plaintiff. *Pittway Corp. v. Collins*, 409 Md. 218, 239 (2009). Hence, the court "must 'assume the truth of all well pleaded facts and allegations in the complaint, as well as all inferences that can reasonably be drawn from them.'" *Arfaa v. Martino*, 404 Md. 364, 380 (2008) (quoting *Lloyd v. General Motors Corp.*, 397 Md. 108, 121 122 (2007)) (internal citations omitted). The universe of facts pertinent to the analysis of the motion is limited generally to the four corners of the complaint and its incorporated

supporting exhibits. *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643 (2010). Accordingly, the factual summary that follows is derived from those sources.[1]

Sequoia is a no-load open end investment company registered under the Investment Company Act of 1940. Defendant RCG is responsible for managing the Fund's assets pursuant to an investment advisory contract. (¶ 2). The Fund has been advised by RCG since its inception in July 1970. (¶ 13). Defendant David M. Poppe is Sequoia's CEO, president and portfolio manager. Defendant Poppe was previously Sequoia's portfolio co-manager from 2005 to March 2016. Mr. Poppe is currently the CEO of RCG. Defendant Robert D. Goldfarb was Sequoia's president and a director, as well as portfolio co-manager, until March 2016. Mr. Goldfarb was also the CEO of RCG until March 2016.

The other defendants are directors of Sequoia. Edward Lazarus is Sequoia's chairman of the board and a director since 1970. Robert L. Swigett is a Sequoia director since 1998. Roger Lowenstein is a Sequoia director since January 2015. Tim Medley is a Sequoia director since March 2016. John B. Harris became a Sequoia director in May 2016 and has been an analyst at RCG since 2003. Peter Atkins is a Sequoia director since September 2016. Melissa Crandall has been a Sequoia director since September 2017. (¶¶ 14-22).

According to the complaint, the Fund's Offering Materials state that the Fund's investment objective is long-term growth of capital and that the Fund focuses principally on common stocks it believes are undervalued at the time of purchase and have potential for growth. The Offering Materials also posit a Sell Strategy by which Sequoia typically sells an equity security of a

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[1] The universe of facts that may be considered also includes exhibits attached to the complaint, which are considered to be a part thereof. *E.g., Skanska USA Bldg, Inc. v. Smith Mgmt. Constr., Inc.*, 184 Md. App. 659, 668 (2009). In addition, it may be appropriate to consider documents incorporated in the complaint by reference, as well as the contents of legally required disclosure documents filed with federal agencies. *See Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 74 n.13 (2015). In considering motions to dismiss, the court will not resolve any disputes of fact. In this case, there is no dispute concerning the contents of the documents relevant to the issues.

company when the company shows deteriorating fundamentals, its earnings progress falls short of expectations or its valuation appears excessive relative to its expected future earnings. (¶ 41). Sequoia's concentration policy prohibits the Fund from making purchases that would concentrate Sequoia's investments by more than 25% in any issuer or industry. (¶ 42).

The allegations of the complaint center around Sequoia's investment in Valeant Pharmaceuticals International, Inc. Valeant is a Canadian healthcare company that manufactures and markets generic pharmaceuticals. (¶ 43). Sequoia first purchased Valeant stock in 2010. At year-end 2010, Valeant was trading under $30 per share, and Sequoia's holdings in Valeant represented 9% of the Fund's total investments. By December 31, 2014, Valeant was trading at over $140 per share and Sequoia's holdings represented more than 20% of its total investments. (¶ 44). By March 31, 2015, as its share price increased, Valeant amounted to 26% of the Fund's total net assets. (¶ 45). Valeant's stock price peaked in August 2015, at which time Valeant represented 32% of the Fund's total net assets and 36% of its stock holdings. (¶ 47). Sequoia did not sell any shares of Valeant during 2015.

The complaint alleges that Valeant's fundamentals were unsound due to unscrupulous actions and unconventional accounting methods. (¶ 51-52). There were numerous red flags surrounding Valeant's financial statements and questionable business model, and its stock price was trading at nearly 100 times Valeant's forward earnings. (¶ 54). Following the stock's August 2015 peak, Valeant's stock price precipitously declined. On August 14, 2015 Senator Bernie Sanders and Congressman Elijah Cummings began publicly investigating Valeant's "price gouging." In September 2015, Citron Research published a report criticizing Valeant's limited spending on research and development relative to its vast increase in drug prices. (¶ 57). Over the next few weeks Valeant faced additional scrutiny and received two subpoenas from prosecutors

regarding its drug pricing strategy. (¶ 58). Citron Research released another report raising serious questions about accounting practices in Valeant. Between September 18, 2015 and the end of October 2015, Valeant's stock price lost more than 61% of its value. (¶ 59). Sequoia purchased an additional 1.5 million Valeant shares on or about October 20, 2015. At this point, two of Sequoia's independent directors – Vinod Ahooja and Sharon Osberg – resigned. (¶ 59). From August 2015 to November 2015 the Fund lost 25% of its value, amounting to $2 billion. (¶ 60).

According to the complaint, Defendants' decision to continue to hold a highly concentrated position in Valeant violated Sequoia's investing principles. The complaint further alleges that Defendants breached their duty of loyalty and good faith through imprudent and unsound investing. Various allegations of conspiracy are also included.

Plaintiff seeks to bring this action derivatively on behalf of Sequoia to redress injuries it suffered due to Defendants' conduct. (¶ 67). On April 29, 2016, Plaintiff made demand upon Sequoia's board to investigate and commence proceedings against those responsible for the losses. (¶ 72). Inter alia, Plaintiff demanded that the directors commence proceedings against RCG and "certain current and former directors and officers" of Sequoia for reckless management of Sequoia's assets and improper deviation from the Fund's investment policies. (Complaint Ex. A). By letter dated May 23, 2016, Sequoia's board chair advised that the board had formed a demand review committee to consider the issues and that two independent directors – Messrs. Lazarus and Medley – were designated as the members of the committee. (¶ 73). On July 23, 2016, Plaintiff was advised that the law firm of Goodwin Procter LLP had been retained to assist the committee and was solicited to provide assistance and additional information. (¶ 74). Plaintiff responded on October 27, 2016. (¶ 75). On September 29, 2017, a letter was sent advising Plaintiff that the Demand Review Committee had completed its investigation and the Board had determined that

Sequoia did not have any meritorious claims against RCG or members of the Board, and that pursuing the claims set forth in the demand letter would not be in the best interests of the Fund. (¶ 76).

According to the letter refusing Plaintiff's demand, in addition to retaining Goodwin Procter LLP as independent counsel, the Committee retained Charles Porten, a consultant with expertise in portfolio management, to assist in the investigation. The letter states that from summer of 2016 to May 2017, the Committee, Goodwin Proctor LLP and Mr. Porten reviewed 5,000 documents. The Committee conducted two interviews. David Poppe was interviewed concerning his "role at the Fund and RCG; the other individuals at RCG who had significant roles in managing the Fund's investment in Valeant; RCG's investment philosophy, structure, and process; the Fund's initial investment in Valeant; RCG's day-to-day management of the Fund's investment in Valeant; RCG's application of the SEC's guidance on concentration; the Board's reactions to the Valeant investment; the Board's interactions with RCG regarding the investment; the Board's and RCG's concerns regarding Valeant, including the decline in its value; and the liquidation of the Fund's Valeant holdings." (Complaint Ex. E, Pg. 3). Mr. Lowenstein was interviewed concerning the Board's discussions about Valeant after the additional purchase in October 2015 and the reactions of the independent directors to the initial investment and RCG's leadership. The Committee attempted to interview Mr. Goldfarb, but he declined to be interviewed.

Over the year, the Committee conducted regular meetings with Mr. Porten and Goodwin Proctor LLP and analyzed whether the Fund had violated its policies through the purchase and retention of the Valeant holdings. The Committee prepared a detailed written report and presented its findings and recommendations to the Board. The Board voted unanimously to accept the Committee's recommendations not to pursue the actions demanded by Plaintiff.

The letter detailed the reasons for the committee's conclusions:

> [T]he Committee concluded that the Board's oversight of the Fund with respect to the Valeant holding was consistent with its obligations [under Maryland law]. Specifically, the Committee found that from 2010 to 2016, the Board received regular updates regarding the Fund's portfolio, including its holding in Valeant, and the Board's attention to Valeant increased in direct correlation with the value of the Fund's position in Valeant. In fact, the Board discussed the Valeant holding regularly, both in and out of official meetings, elicited details from Mr. Goldfarb and Mr. Poppe regarding the stock, and generally evidenced care, attention, and concern regarding the Valeant holding.
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> The Committee did not uncover any conduct that meets the legal standard necessary to support a claim against the Board – that is to say, none of the Board's conduct was such that it rises to the level of willful misfeasance, bad faith, gross negligence, or reckless disregard of its duties. The Committee also failed to uncover any conduct that evidenced a breach of the duties imposed on the Board by the Fund's internal governing documents. Rather, the evidence the Committee reviewed clearly established a good-faith effort by the Board to probe RCG's decisions to continue to hold Valeant shares and to provide oversight of the Fund with respect to the Valeant investment. On this basis, the Committee concluded that the Board fulfilled its duty to shareholders.
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> The Committee concluded that bringing an action against RCG or any of its present or former employees would not be in the best interests of the Fund or its shareholders. The Committee reached this conclusion after determining that RCG served the Fund in good faith, provided full disclosure of all material facts, and used reasonable care in managing the Fund's investment in Valeant. RCG conducted thorough and rigorous due diligence on the Fund's holding in Valeant throughout the Relevant Period, and that due diligence increased as the Fund's holdings in the stock grew. RCG acted independently and prudently in assessing whether Valeant had a reasonable basis for making its decisions throughout the Fund's holding period. Mr. Porten also specifically found that RCG's analysis of the risks versus the rewards of the Fund's holdings in Valeant did not constitute imprudence. The Committee therefore concluded that none of RCG's conduct evidenced gross negligence, bad faith, or willful misfeasance.
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> The Committee also analyzed whether the Fund violated its stated concentration policy.
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> The text of the Fund's SAI sets forth the investment restrictions the Fund has adopted with regard to concentration. The Committee analyzed the SAI and

> relevant industry guidance on concentration and concluded that the Fund never violated its own concentration policies. . . .
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> The Committee also determined that RCG and the Board did not violate the Fund's stated sell policy with regard to its Valeant holding. RCG's investment decisions were consistent with the Fund's investment policies, as shown by the fact that RCG conducted extensive research on Valeant and analyzed the stock throughout the Relevant Period. RCG made an informed decision to hold the Fund's position in Valeant. The Board also fulfilled its duty to the Fund's shareholders because it was aware of the Fund's large position in Valeant and adequately probed RCG's decision to continue to hold the security. . . .

(Complaint Ex. E, Pgs. 4 – 7).

Plaintiff alleges that the Demand Review Committee lacked independence. Defendant Lazarus was a director throughout the entire time that the fund maintained its excessive Valeant holdings. (¶ 77). Defendant Medley is not independent because his advisory firm purchased many shares of Sequoia. Mr. Medley also stated in an article in the Wall Street Journal that he had confidence in RCG. (¶ 78). Plaintiff further alleges that the investigation was inadequate. (¶ 79). The basis for this allegation is the fact that the investigation did not include interviews of Mr. Ahooja, Ms. Osberg or Mr. Goldfarb. (¶¶ 80-81).

The substantive claims asserted in the complaint are: Count I against all Defendants for breach of fiduciary duty; Count II against RCG for aiding and abetting breach of fiduciary duty; Count III against the individual defendants for waste of corporate assets; and Count IV against the individual defendants and RCG for unjust enrichment.

Attached to the complaint as exhibits are Plaintiff's demand (Exhibit A); the response announcing appointment of the Demand Review Committee (Exhibit B); a letter from the Committee's attorney soliciting input from Plaintiff (Exhibit C); Plaintiff's response to that letter (Exhibit D); and the letter refusing demand (Exhibit E).

Defendants RCG, Goldfarb, Harris and Poppe filed a motion to dismiss the complaint (Pleading No. 19). They attached as exhibits the transcript of oral argument on a motion to dismiss filed in a derivative action initiated by a Sequoia shareholder in the Supreme Court of New York, various Offering Materials of Sequoia, the Investment Advisory Contract between Sequoia and RCG, a Wikipedia page for Roger Lowenstein, and Sequoia's articles of incorporation.

Defendants Lazarus, Swigett, Lowenstein, Medley, Atkins and Crandall filed a separate motion to dismiss. (Pleading No. 20). Attached as exhibits are the same letters that were exhibits to the complaint, various Offering Materials of Sequoia, an excerpt from Sequoia's articles of incorporation, and a copy of the hearing transcript from the Supreme Court of New York.

Plaintiff filed an omnibus opposition to the motions to dismiss. Attached as exhibits were Sequoia's Shareholder Reports, the Citron Research Reports referred to in the complaint, and a letter from Congressman Cummings dated September 28, 2015 requesting a subpoena compelling Valeant to provide information to Congress.

DISCUSSION

Ordinarily the management of a corporation's affairs is committed to its directors. Their authority includes decisions relating to the institution of litigation on behalf of the corporation or the conduct of litigation to which the corporation is a party. Hanks, Maryland Corporation Law § 7.21. A derivative lawsuit is a limited intrusion upon the directors' authority. *Werbowsky v. Collomb*, 362 Md. 602 (2001). Its purpose is to afford the shareholder a means to protect the corporation from malfeasance and misfeasance of directors and managers. *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 342 (2009). Through the derivative lawsuit device, a shareholder may, in certain circumstances, assert a corporation's rights and enforce a claim belonging to the corporation. *Werbowsky*, 362 Md. at 599.

Before a shareholder may bring a derivative suit, the shareholder must make demand on the corporation's board of directors for the corporation to bring the suit, unless demand is excused because it would be futile. The demand requirement effectuates the basic principle of corporate governance pursuant to which the decisions of the corporation are made by the directors. *Werbowsky*, 362 Md. at 608. Once demand is made, the board must conduct an investigation into the allegations of the demand and determine whether pursuing the litigation is in the best interests of the corporation. *Shenker v. Laureate Educ., Inc.*, 411 Md. at 344. The business judgment rule applies to a decision by a board of directors to deny a shareholder litigation demand. As a result, the court must defer to that decision unless the shareholder can show that the investigation was not conducted independently or in good faith or that it was not within the realm of sound business judgment. *Boland v. Boland*, 423 Md. 296, 330 (2011); *Bender v. Schwartz*, 172 Md. App. 648, 666 (2007).

The business judgment rule has been explicated in the following fashion:

> The business judgment rule is a common-law standard of judicial review designed to protect the wide latitude conferred on a board of directors in handling the affairs of the corporate enterprise. The rule refers to the judicial policy of deferring to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. Under the rule, courts will not second-guess a business decision, so long as corporate management exercised a minimum level of care in arriving at the decision. It has been said that in reviewing a corporate transaction under the business judgment rule, only when a decision lacks any rationally conceivable basis will a court infer bad faith and a breach of duty.

3A Fletcher Cyc. Corp. § 1036. The business judgment rule establishes a presumption that the corporation's directors acted in accordance with the standards of Md. Code, Corps. & Ass'ns. Art., § 2-405.1(a), which provides that a director shall perform his duties in good faith, in a manner he reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily

prudent person in a like position would use under similar circumstances. *See Yost v. Early*, 87 Md. App. 364 (1991); Md. Code, Corps. & Ass'ns. Art., § 2-405.1(e).

Defendants argue that the complaint should be dismissed because Plaintiff's demand was properly refused. As stated previously, in deciding a motion to dismiss for failure to state a claim the court's task is to determine whether Plaintiff's allegations, if proven, entitle him to relief. *Pendleton v. State*, 398 Md. 447 (2007). In the context of the issues posed by these motions, making that determination requires the court to assess whether the facts alleged by Plaintiff support the conclusion that demand was improperly refused. In order to grant the motion to dismiss, the court must conclude as a matter of law that Plaintiff's allegations are insufficient to overcome the business judgment rule or to show that the investigation was not conducted independently or in good faith.

In this case, Plaintiff's challenge to the Board's decision not to bring suit essentially rests on two grounds. First, Plaintiff asserts that the Board failed to appoint disinterested and independent directors to the Demand Review Committee that was charged with conducting the investigation. Second, he contends that the Demand Review Committee failed to interview critical witnesses or to conduct complete interviews regarding all the issues material to the Board's refusal decision. For these reasons, he alleges that the investigation was not conducted independently and in good faith, and that consequently the Board's decision is not protected by the business judgment rule. The court will consider each of these contentions in turn.

A. Independence of the Demand Review Committee

In support of his first argument, Plaintiff argues that the lack of independence of the Demand Review Committee members tainted the investigation and establishes that the Board did not act with the requisite independence and objectivity in responding to Plaintiff's demand. There

were two members of the Demand Review Committee, Defendants Lazarus and Medley, and the complaint asserts that each of them lacked independence. The specific facts alleged in support of the claim of lack of independence are as follows:

Defendant Lazarus was a director throughout the time that the Fund maintained its excessive Valeant holdings, and, therefore, faces potential liability for the issues he was tasked with investigating. (¶ 77).

Defendant Medley's independent advisory firm (Medley & Brown) purchased tens of millions of Valeant shares for its clients before he joined the Board in March 2016, and he defended Sequoia's actions publicly, stating "I cannot think of a mutual fund management firm that I have more confidence in than these people." Plaintiff also points to a disclosure letter from Medley & Brown to its clients advising that Defendant Medley's election to Sequoia's board posed a conflict of interest because of the firm's holding of shares of Sequoia Fund for its clients. (¶ 78).

The independent directors argue that making demand concedes the independence of the board or the Demand Review Committee. They cite *Bender v. Schwartz*, 172 Md. App. 648, 666 (2007) for this proposition. The independent directors further argue that Plaintiff never raised any issue with the independence of Messrs. Lazarus and Medley prior to commencing this action.

The RCG Defendants note that the decision to refuse Plaintiff's demand was made by the full board of directors, not the Demand Review Committee. They state that Plaintiff's independence allegations focus on Defendants Lazarus and Medley, and that there are no allegations concerning Sequoia's four other independent directors. They also state that none of Sequoia's six independent directors is affiliated with RCG, and therefore they are not interested directors under the Investment Company Act of 1940, pointing to the provisions of Md. Code, Corps. & Ass'ns. Art., § 2-405.3 that such a director is deemed to be independent and disinterested

when taking any action as a director. Defendants claim, therefore, that the decision to refuse demand cured any lack of independence of the Demand Review Committee because the decision was ultimately made by a board of majority independent and disinterested directors.

Both motions challenge Plaintiff's allegations that Messrs. Lazarus and Medley lacked independence. As to Defendant Lazarus, they point to Maryland authority for the principle that a director does not lack independence merely because the director is a potential defendant or allegedly participated in the challenged conduct. As to Defendant Medley, Defendants argue that the fact that Mr. Medley's clients invested in Sequoia does not undermine his ability to evaluate a demand impartially. They also suggest that the interests of Sequoia shareholders and Mr. Medley's firm are aligned, and that the claims of his lack of objectivity are speculative because they are based on the supposition that he might be exposed to liability based on Medley & Brown's investment in Sequoia.

In response to the motions to dismiss, Plaintiff contests the assertion that making demand concedes board independence. He argues that Defendants' reliance on *Bender* is misplaced in light of a later statement from the Court of Appeals in the *Boland* case. Plaintiff points to a passage in footnote 25 of the *Boland* opinion, particularly the statement therein that "it is clear that the derivative plaintiff may continue to contest the independence of the board members after filing such a demand and should not be prejudiced by such a choice." 423 Md. at 332. Plaintiff also points to the Court of Special Appeals opinion in *Oliveira*, where the court considered (and rejected) the allegation of lack of independence on the merits, implicitly eschewing adoption of the waiver principle. 225 Md. App. at 543.

As to the substance, Plaintiff argues that Mr. Medley's statement to the Wall Street Journal in October 2015 concerning his confidence in Sequoia was a "virtual declaration" that no

wrongdoing had occurred. He also argues that Mr. Medley's purchases of Sequoia stock gave him a compelling interest in rejecting the demand to defend his own advice to his clients to purchase Sequoia stock.

It should first be noted that Plaintiff does not appear to allege that the Board itself was incapable of considering his demand due to lack of independence. The subject of independence is raised only in the context of the membership of the Demand Review Committee. As such, Plaintiff's contention is that the investigation was tainted by the lack of independence of the Committee – was not carried out independently and in good faith – and that due to that taint the Board's decision in turn is not protected by the business judgment rule.

The court does not agree that because Plaintiff made demand his ability to challenge the independence of the Committee is automatically waived. The notion that making demand waives a claim of independence seems to stand on an inversion of the demand futility rule: If making a claim of futility expresses the position that the Board is conflicted, then not making a claim of futility presumably connotes Plaintiff's position that the board is not conflicted. The *Bender* court finds its source for this rule in *Scattered Corporation v. Chicago Stock Exchange*, 701 A.2d 70 (1997), which does not identify the authority therefor. Defendants also suggest that not applying waiver allows plaintiffs to have their cake and eat it too, by eschewing the difficult election of whether to claim demand futility and then contending that the board was not independent after its decision was known. Nevertheless, in this court's view, the equation is less than satisfactory. The futility exception as carved out in *Werbowsky* is "very limited." 362 Md. at 619. As the *Boland* court pointed out, courts have encouraged plaintiffs to make demand, and it may be advisable for a shareholder to do so, regardless of whether it could be regarded as futile. A plaintiff's choice to make demand may proceed more from caution than an acknowledgment that the board is

independent. This fact is recognized in the statement in *Boland* cited by Plaintiff. Therefore, the court believes that the statement of the Court of Appeals, albeit dicta, is the better rule, and that making demand does not necessarily concede board independence.

In any event, even if making demand concedes the independence of the Board as a whole, it is not clear why it should prevent a shareholder from claiming that the investigation by the Demand Review Committee was tainted by lack of independence of its members. The premise for the waiver conclusion as applied to the Board is that demand is a tacit concession that the *majority of the Board* is not "so personally and directly conflicted or committed to the decision in dispute that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule." *Werbowsky v. Collomb*, 362 Md. 581, 620 (2001). That logic does not extend to the Demand Review Committee, whose composition was not known at the time that demand was made.[2] Therefore, the court will consider the issue of lack of independence on the merits.

A detailed discussion of the subject of the independence of Committee members and an instructive application of those principles can be found in *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917 (Del. Ch. 2003)(involving a Special Litigation Committee). In that case, the court stated that the question of independence "turns on whether a director is, *for any substantial reason*, incapable of making a decision with only the best interests of the corporation in mind. This test ultimately focuses on impartiality and objectivity." 824 A.2d at 938 (emphasis in original). Such an inquiry is context-dependent. *Id.* at 941. This measuring stick is useful in considering the issues posed in this case.

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[2] The court recognizes that in a footnote in *Bender v. Schwartz*, the court apparently extended the same principle to the demand review committee. 172 Md. App.667 n 2. However, there is nothing in the *Bender* court's reasoning or in the *Scattered Corp.* opinion cited in support that would resolve the apparent illogic of this proposition.

Plaintiff's allegation that Defendant Lazarus lacked independence is based on the fact that he was a member of the Board during the period when the events in question occurred. Therefore, his participation in the investigation required him to review his own actions. Furthermore, because he is potentially subject to suit based on those actions, a conclusion to proceed would require him to authorize a suit against himself.

Although such assertions might seem at first blush to raise significant concerns about one's ability to be objective, they are not sufficient under Maryland law to impugn a director's independence. It is well established that the fact that a director participated in the acts in question is insufficient to establish lack of independence, as is the allegation of potential liability. *See, e.g.*, *Werbowsky v. Collomb*, 362 Md. 581, 618-619 (2001); *Oliveira v. Sugarman*, 226 Md. App. 524, 543 (2016), aff'd, 451 Md. 208 (2017); *Gomes v. American Century Cos.*, 710 F.3d 811, 817-18 (8th Cir. 2013)(applying Maryland law). Otherwise, naming the directors as defendants would be sufficient to disqualify them from considering the demand. *See Werbowsky, supra,* 362 Md. at 618-19; *Aronson v. Lewis, supra*, 473 A.2d at 818. The important considerations identified in *Werbowsky* "would be nullified in every shareholder's derivative suit that named directors as defendants if simply naming them as parties provided excuse for pre-suit demand." *Weinberg ex rel. BioMed Realty Trust, Inc. v. Gold*, 838 F.Supp.2d 355, 361 (D. Md. 2012). Plaintiff does not identify a reason why this rule does not apply here, and in his opposition to the motions to dismiss did not seriously contest Defendants' contention that there was no issue of independence as to Defendant Lazarus.

Plaintiff's first contention concerning Mr. Medley is based on his investment firm's purchase of shares of the Fund and the disclaimer sent by his firm to its clients upon his election to the Sequoia board. These facts do not undermine his independence. The argument that Mr.

Medley is conflicted because a decision to authorize suit would subject him to liability is speculative, as his recommendations to his clients are not equivalent to the conduct of the putative targets of the demand claim. And if the involvement of directors in the challenged conduct is not enough to affect their independence under Maryland law, then Mr. Medley's possible exposure is surely insufficient. Furthermore, the disclosure letter sent by Medley & Brown upon Mr. Medley's joining the Board cannot reasonably be read to evince a conflict that would affect his performance of his duties. The letter relates to decisions concerning client portfolios, and does not bear upon his ability to consider objectively a potential claim on behalf of Sequoia relating to conduct before he joined the Board.

Furthermore, Mr. Medley's statement to the Wall Street Journal is, in the court's view, insufficient to demonstrate a lack of objectivity on his part. Plaintiff cites *Biondi v. Scrushy*, 820 A.2d 1148 (Del. Ch. 2003) in support of his argument that Mr. Medley's statement shows that he had prejudged the issue. The facts of that case are far removed from those presented here. In *Biondi*, the SLC Chair was quoted in a company press release, at about the time of his appointment to the SLC, as stating that the company's CEO, who was the target of the SLC's investigation, had been cleared by an outside counsel review. In this case, the statement made by Mr. Medley occurred months before his election to the Sequoia board, the demand letter, or the formation of the Demand Review Committee. Mr. Medley's statement is more comparable to those involved in *In re Oracle Corp. Derivative Litig.*, 824 A.2d at 924 n. 11, involving statements made by a SLC member prior to the investigation. Mr. Medley's statement is not sufficient to show that he was unable to make an objective determination as a Committee member.

For these reasons, the court rejects Plaintiff's contentions that the Demand Review Committee members were not independent.

B. The Demand Review Committee's Investigation

Plaintiff's second argument is based on the allegedly insufficient investigation performed by the Demand Review Committee. Plaintiff contends that the investigation was "woefully inadequate." (¶ 79). Specifically, Plaintiff alleges that the Committee failed to interview Defendant Goldfarb, who was co-manager of the Fund and who was specifically blamed by Defendant Lowenstein for Sequoia's overweight Valeant holdings. (¶ 81). Plaintiff also cites the failure to interview independent directors Mr. Ahooja and Ms. Osberg, who resigned due to their concerns about Sequoia's concentration in Valeant stock. (¶ 80).

Defendants note that there is no prescribed procedure that a board must follow in responding to a demand. Defendants enumerate a list of six non-exhaustive factors employed by Maryland courts to determine whether an investigation is reasonable. They are: whether the committee engaged independent counsel to assist in the investigation; whether the investigating committee produced a report; the length of the report; whether the report documented the committee's procedures, reasoning, and conclusions; whether the committee properly identified the claims at issue; whether the committee reviewed the testimony of or interviewed directors, officers, and employees; whether the committee reviewed documents regarding the complained-of transactions; and the number of times the demand committee met. *See Bender v. Schwartz*, 172 Md. App. 648, 672-73. Defendants point to the description of the committee's activities set forth in the demand refusal letter as satisfying this test and contend that challenges to the exact contours of the investigation are insufficient to demonstrate its inadequacy.

With respect to Plaintiff's claims concerning the failure to interview certain witnesses, Defendants argue that courts should not micromanage the investigation, and remind the court that the Committee is not required to interview every possible witness who may shed light on the

conduct that is the subject of the demand. Defendants specifically note that Mr. Goldfarb refused to be interviewed and the Committee had no legal mechanism to compel him. They also argue that Plaintiff does not explain what information Mr. Goldfarb might possess that would not be duplicative of information from other sources, such as Mr. Poppe. As to Mr. Ahooja and Ms. Osberg, they assert that the complaint makes no allegations why Messrs. Lazarus and Lowenstein were not in possession of the same facts as these two directors.

In response to the motion to dismiss, Plaintiff argues that the failure to interview Mr. Ahooja and Ms. Osberg was unreasonable. He asserts that their public resignations indicate a serious disagreement among the board of directors. Plaintiff argues that even if the Committee learned what these directors said at Board meetings, "fairly evaluating the viability of the derivative claims demanded" interviews of these directors.

In reply, Defendants state that Plaintiff offers no explanation why interviews of Mr. Ahooja and Ms. Osberg were necessary. They note that the reasons for Mr. Ahooja and Ms. Osberg's resignations were discussed at Board meetings and reflected in the minutes, and publicly discussed in the press.

To enjoy the protection of the business judgment rule, the conclusion to reject a demand must have an informed basis. *Werbowsky v. Collomb*, 362 Md. 581, 608 (2001). Therefore, the Demand Review Committee is required to conduct a reasonable investigation. *Oliveira v. Sugarman*, 226 Md. App. 524, 542 (2016). What is reasonable depends on the nature and characteristics of the subject being investigated. *Bender*, 172 Md. App. 648, 672 (2007)(*citing Auberbach v. Bennett*, 47 N.Y.2d 619 (1979)). Decisions about the scope and extent of the investigation are subject to the business judgment rule. *Boland v. Boland*, 423 Md. 296, 345-46 (2011)(citing *Auerbach*, 47 N.Y.2d 619, 632 (1979)). Accordingly, the burden is on plaintiff to

show why the investigation was insufficient. *Mona v. Mona Elec. Group, Inc.*, 176 Md. App. 672, 397 (2007).

As Plaintiff appears to concede, the failure to interview Mr. Goldfarb can hardly be considered a failure on the part of the Demand Review Committee since there was no legal mechanism to compel him to submit to an interview. The Committee is only required to consider facts that are "reasonably available, not those that are immaterial or out of the Board's reasonable reach." *Bender*, 172 Md. App. at 676 (citing *Brehm*, 746 A.2d at 259). As the Committee had no way to compel Mr. Goldfarb to submit to an interview, he was beyond the reasonable reach of the Committee.

As to Mr. Ahooja and Ms. Osberg, the issue turns on whether the failure to interview them produced an investigation that provided an insufficient basis for the Board to make an informed decision based on its business judgment.[3] Defendants correctly point out that there is no hard and fast rule as to what witnesses must be interviewed. However, the failure to interview witnesses whose information is important may result in an investigation that is insufficient. *City of Orlando Police Pension Fund v. Page*, 970 F.Supp.2d 1022 (N.D. Cal. 2013); *Barovic v. Ballmer*, 72 F.Supp.3d 1210 (W.D. Wash. 2014). Whether it is insufficient turns on the significance of the information that was not gained because of the failure to interview those witnesses. For a plaintiff to allege successfully that a failure to interview certain witnesses has resulted in an insufficient investigation, the plaintiff must not only identify those missing individuals but also explain how their knowledge and testimony was unique and unobtainable without those interviews. *Levine v.*

[3] Two months after the hearing on the motions to dismiss, defendants filed a Joint Notice of Supplemental Board Actions and Supplemental Authority. Appended to that filing was a letter dated November 12, 2018 from Goodwin Procter LLP to counsel for plaintiff. In brief, it stated that Sequoia's Board had directed the Demand Review Committee to formally interview (sic) Ms. Osberg and Mr. Ahooja. It recounted the contents of interviews with them. Plaintiff vigorously objects to consideration of this information by the court in connection with the motions to dismiss. In light of the court's decision upon the motion, the issue of whether this information should be considered is moot.

Liveris, 216 F.Supp.3d 794 (E.D. Mich. 2016), appeal dismissed sub nom. *S.M. Levine v. Andrew Liveris, et al.* (6th Cir. February 15, 2017).

In consequence, the question is whether Plaintiff has sufficiently alleged that these directors had unique, otherwise unobtainable knowledge that could have changed the outcome of the investigation. Defendants suggest that interviews with Mr. Ahooja and Ms. Osberg were unnecessary because Messrs. Lowenstein and Lazarus were members of the Board at the time of their resignation and privy to the same information. Plaintiff claims that the scope of Mr. Lowenstein's interview was limited and did not address the same concerns repeatedly raised by Mr. Ahooja and Ms. Osberg about the Valeant investment. However, Mr. Poppe would also have been privy to these conversations and Plaintiff does not address the scope of his interview.

Contrary to plaintiff's suggestion, the mere fact that Mr. Ahooja and Ms. Osberg questioned the investment in Valeant and the investment decisions made by RCG and the Board does not necessarily indicate that they possessed information that was essential to the investigation and not available from other sources. That Mr. Ahooja and Ms. Osberg had concerns about the continued holding, and had expressed those concerns for some time, is a known fact. The underlying issue at the bottom of any potential claim considered by the Committee is whether it was imprudent to maintain such a large stake in Valeant in the light of the facts that were known at that time. Since their opinions were well known, it is not clear why interviewing these directors would add to the sum total of information on that subject available to the Committee, which included the expert opinion of its consultant.

The other possible area of knowledge of these directors relates to the discussions among the Board members during the relevant period. However, there were other sources of information available to the Committee on this subject, including documentary evidence, and it is simply

speculation to assert that these directors might contradict that information. Therefore, Plaintiff's allegations do not establish that Mr. Ahooja and Ms. Osberg had such unique knowledge that interviewing them could have changed the outcome of the investigation.

Ultimately Plaintiff's position comes down to the assertion that it was *per se* unreasonable not to interview dissenting directors, regardless of whether their information was available from other sources. He contends that the failure to interview them indicates that the investigation was not conducted in good faith, despite the fact that there is no identifiable essential fact that is missing because they were not interviewed. It certainly seems to the court that it would have been preferable to interview them in light of their noisy resignations based on the Valeant issue, and the lack of any explanation for the failure to interview them is somewhat troubling. However, the fact that the court is troubled by the failure to interview them does not necessarily carry the day for plaintiff. *See Zucker v. Hassell*, 2016 WL 7011351, at *10 (Del. Ch. Nov. 30, 2016). Whether an investigation is adequate depends on whether it was conducted in a way that resulted in the omission of necessary information in the specific context, not upon conclusory labels.

For these reasons, the court concludes that, as a matter of law, the allegations of the complaint are insufficient to establish that the members of the Demand Review Committee did not act independently and in good faith. Therefore, the issue is whether the decision of the Board to refuse Plaintiff's demand is protected by the business judgment rule. It is presumed that such a decision was the product of the Board's proper exercise of its business judgment, and the burden is on the plaintiff to overcome that presumption. *Oliveira v. Sugarman*, 451 Md. 208, 221-34 (2017). In this case, Plaintiff fails to allege facts sufficient to overcome that presumption. Therefore, the complaint fails to state a claim on which relief may be granted.

CONCLUSION

Accordingly, the motions to dismiss must be granted. Plaintiff requested that he be given to leave to amend if the court grants the motions. However, Plaintiff does not explain what amendments would be requested or show how they would cure the deficiencies in Plaintiff's case. Therefore, leave to amend will not be granted. A separate order will be entered.

W. Michel Pierson
Judge's Signature Appears
On Original Document

Dated: August 14, 2019

Judge W. Michel Pierson
Circuit Court for Baltimore City, Part 3

TRUE COPY
TEST
Marilyn Bentley
MARILYN BENTLEY, CLERK