IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

JOSEPH ROSENQUIST, Derivatively on Behalf of Nominal Defendant DRYSHIPS, INC., Plaintiff, GEORGE ECONOMOU, GEORGE DEMATHAS, CHRYSSOULA KANDYLIDIS (A/K/A CHRYSSOULA KANDYLIDI OR CHRYSOULA KANDYLIDIS), EVANGELOS MITILINAIOS (A/K/A EVANGELOS MYTILINAIOS OR EVANGELOS MYTILINAEOS), ANGELOS PAPOULIAS, AND GEORGE XIRADAKIS, Defendants, and DRYSHIPS, INC., Nominal Defendant.	)	CIVIL ACTION NO. 2009-056 ORDER GRANTING INDIVIDUAL DEFENDANTS' MOTION TO DISMISS THE VERIFIED AMENDED COMPLAINT

I. INTRODUCTION

This is a shareholder derivative action brought pursuant to 52 MIRC, Part I, § 79 and Rule 23.1 of the Marshall Islands Rules of Civil Procedure ("MIRCP"). The action is brought by plaintiff Joseph Rosenquist ("Plaintiff") on behalf of nominal defendant DryShips, Inc. ("DryShips" or the "Company"). Plaintiff asserts claims against certain members, and a former member, of its board of directors ("Board"): Chairman of the Board, President, Chief Executive Officer, and Interim Financial Officer George Economou; four outside directors, Chryssoula Kandylidis (A/K/A Chryssoula Kandylidi or Chrysoula Kandylidis), George Demathas, Evangelos Mitilinaios (A/K/A Evangelos Mytilinaios or Evangelos Mytilinaeos), and George Xiradakis; and former outside director, Angelos Papoulias (collectively "Individual Defendants"). Plaintiff alleges that the Individual Defendants breached their fiduciary duty of good faith and committed waste by approving certain transactions that were not the product of good faith business judgment and that served to enrich Economou and his sister at the Company's expense, and that Economou and his sister unjustly enriched themselves at the Company's expense.

Presently before the Court is Defendants' September 11, 2009 Motion to Dismiss the Verified Amended Derivative Complaint. The Court heard oral argument from the parties on January 20, 2010. Based upon the briefs submitted to date and oral argument, the Court finds that Plaintiff's August 12, 2009 Verified Amended Derivative Complaint (the "Amended Complaint") does not contain particularized allegations that raise a reasonable doubt that at the time the lawsuit was filed a majority of the directors were disinterested and independent or that the challenged transactions were the product of a valid exercise of business judgment.

Accordingly, the Court grants Defendants' Motion to Dismiss the Verified Amended Derivative Complaint and dismisses the Amended Complaint. The Court, however, will consider a motion by the Plaintiff for leave to amend the Amended Complaint.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Parties

1. The Plaintiff

Plaintiff Joseph Rosenquist is a shareholder of nominal defendant DryShips, was a shareholder of DryShips at the time of the wrongdoing alleged in this case, and has been a shareholder of DryShips continuously since that time. (¶ 6).[1]

2. The Company

DryShips is a corporation incorporated under the laws of the Republic of the Marshall Islands and headquartered in Athens, Greece. Defendant Economou founded the Company in 2004 as a holding company engaged in the ocean transportation of dry bulk cargoes worldwide. DryShips has been a publicly traded company since February 2005. Shares of DryShips' common stock are traded on the NASDAQ Global Market stock exchange under the symbol "DRYS." (¶¶ 7 and 8). DryShips also operates an offshore deepwater drilling segment (DryShips' FY08 Annual Report[2]). DryShips' assets are managed by Cardiff Marine, Inc. ("Cardiff"), an entity controlled by Economou and his sister, defendant Kandylidis. Defendants Economou and Kandylidis own 70% and 30% of Cardiff, respectively. (¶¶ 8 and 10). DryShips'

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[1]All paragraph references are to the Amended Complaint.

[2]DryShips' FY08 Annual Report can be found at http:dryships.irwebpage.com/files/DRYS20-F-A.PDF.

Articles of Incorporation contain an exculpation clause, which exempts directors from liability for breaches of the duty of care. (Articles of Amendment to Articles of Incorporation of DryShips Inc.)

3. The Individual Defendants

Defendant George Economou ("Economou") is the founder of DryShips. He has served as the Company's Chairman of the Board, President, and Chief Executive Officer since the Company's inception in 2004. He has also served as its interim Chief Financial Officer since May 29, 2007. (¶ 8). At the times the Company entered into the transactions at issue, Economou owned and controlled between approximately 9.0% and 31.0% of DryShips common stock. When the Amended Complaint was filed August 12, 2009, Economou owned approximately 14.4% of DryShips equity. (¶¶ 8 and 19).

Defendant Chryssoula Kandylidis ("Kandylidis") has served as a non-executive director of DryShips since March 5, 2008. Kandylidis is Economou's sister and a 30% owner of Cardiff. (¶¶ 10 and 31).

Defendant Angelos Papoulias ("Papoulias") served as a non-executive director of DryShips from April 2005 until December 22, 2008. (¶¶ 12 and 31).

Defendant George Demathas ("Demathas") has served as a non-executive director of DryShips since July 18, 2006, and at all relevant times as members of the Company's Audit, Compensation, and Nomination Committees. (¶¶ 9 and 31). According to public filings, since 1991 Demathas has been involved in Malden Investment Trust Inc. in association with Lukoil, working in the Russian petrochemical industry. (DryShips' FY08 Annual Report). Plaintiff does not allege otherwise.

Defendant Evangelos Mitilinaios ("Mitilinaios") has served as a non-executive director of DryShips and the Chairman of the Audit Committee since December 22, 2008. (¶¶ 11 and 31). According to public filings, Mitilinaios has over twenty years of experience in the shipping industry and presently heads a diversified group of companies involved in tourism and real estate development in Greece and the United Kingdom. (DryShips' FY08 Annual Report). Plaintiff does not allege otherwise.

Defendant George Xiradakis ("Xiradakis") has served as a non-executive director of DryShips since 2006, and at all relevant times as members of the Company's Audit, Compensation, and Nomination Committees. (¶¶ 13 and 31). According to public filings, Xiradakis has been the Managing Director of XRTC Business Consultants Ltd., a consulting firm providing financial advice to the maritime industry. (DryShips' FY08 Annual Report). Plaintiff does not allege otherwise.

The DryShips Board of Directors (the "Board") has two additional members, Harry Kerames ("Kerames") and Vassilis Karamitsanis ("Karamitsanis"), both of whom joined the Board on July 29, 2009. (¶ 31). Neither is named as a defendant in this action.

B. Plaintiff's Allegations

Plaintiff alleges that defendant Economou dominates and controls DryShips through a number of devices, including without limitation:

- equity ownership of 9 to 31% (¶¶ 19-22);
- anti-takeover provisions in the Company's articles and bylaws (including a staggered board, board authority to issue "blank check" preferred stock, an 150-day notice

requirement for shareholder board nominations and resolutions, a "poison pill plan," and others) (¶¶ 23-30);

- director appointments and compensation (¶¶ 31-38), including an increase of 729% in annual compensation for non-employee directors (i.e., all except for Economou) from $85,000 in 2007 to $705,000 in 2008 (¶ 36) and the appointment of Demathas and Xiradakis as Ocean Rigs directors (¶ 31); and

- Economou's tenure as the Company's Chairman of the Board, President, Chief Executive Officer, and interim Chief Financial Officer along with Cardiff's operation of the Company's vessels under contract (¶¶ 37, 39 and 40).

Further, the Plaintiff alleges that Economou's control has resulted in Board approval of transactions that appear to have been designed to benefit Economou, not DryShips. The Plaintiff has not sought relief for all such transactions. Those transactions for which Plaintiff seeks relief include: the July and October Purchase Agreements (¶¶ 63-87); the Primelead Transaction (¶¶ 52-62); and the Compensation Awarded to Economou and Fabiana (¶¶ 41 and 42). These transaction will be described in detail below. The Plaintiff alleges the other transactions establish a pattern of director-control by Economou.[3]

1. <u>The July and October Purchase Agreements</u>

[3]Other transactions that Plaintiff alleges demonstrate Economou control over the Board include the following: the lease of office space from Economou (¶ 43); the issuance to Economou of stock in place of a cash dividend (¶ 45); the issuance of Goodwill Shares to Economou at the lowest 8-day average in the third quarter of 2006 (¶ 46); the purchase of Ocean Rig stock from Economou for an $8.0 million profit (¶ 50); and the payment of a $14 million commission to Cardiff for arranging the Ocean Rig purchase (¶¶ 47, 51). With respect to these transactions, Plaintiff also alleges that Demathas and Xiradakis served on the Board when all but the office lease were approved.

a. The July Purchase Agreements

On July 3, 2008, DryShips entered into agreements to purchase four Panamax bulk carriers for $400 million from companies beneficially owned by Economou (the "July Purchase Agreements"). (¶ 63). According to the Company's SEC filings, DryShips paid a cash deposit of $55 million to the selling entities, 13.75% of the purchase price. (¶ 63). Plaintiff alleges that the industry standard, and the Company's ordinary practice, is to pay 10% deposits so that the Company overpaid Economou and his associates $15 million, or 3.75%. (¶64).

As set forth in public filings, during the final months of 2008, the shipping market rapidly deteriorated, resulting in a precipitous drop of more than 90 percent in daily charter rates for drybulk vessels of the sort DryShips acquired in the July Purchase Agreements. (Form 6-K, dated 11/6/2008; ¶ 72-73).

Six months later, on December 10, 2008, DryShips announced its decision to terminate the July Purchase Agreements. (¶ 74). In connection with the termination, the selling companies retained the $55 million deposit and received from DryShips a $105 million fee. DryShips received an exclusive option to purchase the four Panamax ships at a later date for $160 million. (Form 6-K, dated 1/28/2009[4]; ¶ 76). As set forth in public filings, the termination was negotiated and approved by a committee consisting of Demathas, Xiradakis, and Papoulias. (Form 6-K, dated 1/28/2009).

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[4]DryShips' SEC filings are properly considered by the Court on a motion to dismiss. *See Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) (document may be considered on motion to dismiss "when the document is integral to a plaintiffs claim and incorporated into the complaint"); Am. Compl. ¶¶ 40-41, 65 (citing a variety of Company's SEC filings); *see also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 n.9 (Del. 1995) (court may take judicial notice of SEC filings).

Plaintiff alleges that the four ships were worth only $120 million at the time of the termination, so that the $160 million option price was $40 million out of the money. Further, Plaintiff alleges that the $105 million fee was payment for the option (not for cancellation), but that the option was only worth $8 million, and so that Dryships overpaid Economou by $97 million, or 1,213%, for a $40 million-out-of-the-money option. (¶ 78).

b. The October Purchase Agreements

On October 6, 2008, the Company announced that it had entered into agreements to purchase nine special-purpose companies that each owned one Capesize ship (the "October Purchase Agreements"). As set forth in public filings, the special-purpose companies were each controlled by Cardiff or clients of Cardiff, including Economou. (Form 6-K, dated 11/6/2008; ¶ 67). To acquire the special-purpose companies, DryShips agreed to pay at least $689 million in newly authorized DryShips stock and to assume $216 million in debt and $262 million in remaining shipyard installments to complete construction of some of the ships, for a total of approximately $1.17 billion. (¶ 68).

As set forth in public filings, during the final months of 2008, the shipping market rapidly deteriorated, resulting in a precipitous drop of more than 90 percent in daily charter rates for drybulk vessels of the sort DryShips acquired in the October Purchase Agreements. (Form 6-K, dated 11/6/2008; ¶ 72-73).

Three and a half months later, on January 22, 2009, DryShips announced its decision to terminate the October Purchase Agreements. (¶ 80). To consummate the termination, DryShips gave the selling entities 6.5 million shares of DryShips stock worth $68,185,000 as of January 28, 2009, as well as "out of the money" warrants to purchase 3.5 million shares of DryShips

common stock with strike prices from $20-$30 per share and with an intrinsic value of $82,500,000. (¶¶ 81-82). As set forth in public filings, this transaction was approved by Board members Demathas, Xiradakis, and Mitilinaios. (Form 6-K, dated 1/28/2009).

Plaintiff does not allege that Economou has exercised the warrants. The strike price is still several times higher than the current stock price. (Compare Form 6-K, dated 5/6/2009) (listing strike prices of between $20 and $30 share) with http://www.google.com/finance?q=NASDAQ:DRYS (indicating that DryShips's stock price closed at $5.59 on February 18, 2010)). Nonetheless, Plaintiff alleges that the January 28, 2009 value of the 6.5 million shares, $68,185,000, plus the intrinsic value of the warrants to purchase 3.5 million shares, $82,5000,000, equals $150,685,000, or 12.88% of the $2.27 billion purchase price. Further Plaintiff alleges that the standard termination fee was 10%, and so that the Company overpaid Economou and the Cardiff clients by 2.88% or $33,685,000. (¶ 83).

2. <u>The Primelead Transaction</u>

On October 3, 2008, Primelead Shareholders Inc. ("Primelead"), at the time a wholly owned subsidiary of DryShips, entered into an agreement to acquire the equity interests of DrillShips Holdings ("DrillShips"). DrillShips was controlled by clients of Cardiff, including Economou, and had contracted for the building and purchase of two advanced capability drillships for use. (¶ 52). In exchange for the drillships, Primelead gave DrillShips newly issued shares equal to 25% of Primelead's then issued and outstanding shares. DryShips also assumed installment payment obligations of $1.1 billion and debt obligations of $261.1 million. (¶ 52).

Nine months later, on July 9, 2009, DryShips announced that it entered into an agreement to acquire the remaining 25% of the total issued and outstanding stock of Primelead. (¶ 55). In

exchange, DryShips paid to the sellers, which included Economou and other clients of Cardiff, $50 million in cash and 33,955,224 convertible preferred stock, which will mandatorily convert into common shares in four equal increments corresponding to the delivery of the four new drillships to Primelead. (Form 6-K, date 7/9/2009; ¶ 57). The Plaintiff alleges that the preferred stock was worth $185 million as of July 9, 2009, that with the $50 million in cash, the Company paid $235 million, but that the 25% interest in Primelead was worth only $122 million, an overpayment of $113 million, or 93%. (¶ 58).

In connection with this transaction, DryShips disclosed in its public filings that the transaction was negotiated and approved by the Audit Committee, which is comprised of Demathas, Xiradakis, and Mitilinaios, acting as a Special Committee, and that the Audit Committee "took the appropriate steps necessary to evaluate the transaction and determine its fairness." (Form 6-K, dated 7/9/2009; ¶ 59).

3. Compensation Awarded to Economou and Fabiana

On January 21, 2009, the Compensation Committee, consisting of Demathas and Xiradakis, approved an increase in the annual fee paid to Fabiana Services S.A., a Marshall Islands Corporation controlled by Economou that provides Economou's services to DryShips, from 2,000,000 dollars to 2,000,000 Euros, an increase of $597,000. (¶ 42).

On the same day, January 21, 2009, the Compensation Committee approved a $6.98 million bonus to Economou for services rendered during 2008. (¶ 42).

C. Procedural History

On March 2, 2009, Plaintiff filed this lawsuit. Three months later, on June 1, 2009, the Defendants moved to dismiss the complaint. On July 22, 2009, the parties stipulated that the

Plaintiff may amend his complaint. On August 12, 2009, the Plaintiff filed the Amended Complaint.

In the Amended Complaint, Plaintiff asserts nine causes of action: Counts I, II and III for breach of fiduciary duty of good faith; Counts IV, V and VI for waste; and Counts VII, VIII, and IX for unjust enrichment.

- Count I charges the Individual Directors with breach of their fiduciary duty of good faith with respect to payments made in connection with the July and October Purchase Agreements;
- Count II charges Individual Directors with breach of their fiduciary duty of good faith with respect to payments made in connection with the Primelead Transaction;
- Count III charges Defendants Demathas and Xiradakis with breach of their fiduciary duty of good faith with respect to payments made in connection with the Compensation Awarded to Economou and Fabiana;
- Count IV charges the Individual Directors with waste with respect to payments made in connection with the July and October Purchase Agreements;
- Count V charges Individual Directors with waste with respect to payments made in connection with the Primelead Transaction;
- Count VI charges Defendants Demathas and Xiradakis waste with respect to payments made in connection with the Compensation Awarded to Economou and Fabiana;
- Count VII charges Defendants Economou and Kandylidis with unjust enrichment with respect to payments made in connection with the July and October Purchase Agreements;

- Counts VIII charges Defendant Economou with unjust enrichment with respect to payments made in connection with the Primelead Transaction; and
- Count IX charges Defendant Economou[5] with unjust enrichment with respect to the payments made in connection with the Compensation Awarded to Economou and Fabiana.

On September 11, 2009, the Individual Defendants moved this Court, pursuant to MIRCP 7(b)(1)(A), to dismiss the Amended Complaint in its entirety with prejudice, on the ground that Plaintiff had failed to plead with particularity, as he is required to do by 52 MIRC, Part I, § 79(3) and MIRCP 23.1, that demand upon the Board to initiate litigation would have been futile. That is, the Plaintiff failed to pled with particularity sufficient facts to demonstrate reasonable doubt that at the time the lawsuit was filed a majority of the directors were disinterested and independent or that the challenged transactions were the product of a valid exercise of business judgment.

III. LEGAL STANDARD

Because DryShips is a Marshall Islands corporation, Marshall Islands law controls. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98-99 (1991). Under Marshall Islands law, in order to assert claims derivatively on behalf of a corporation, a shareholder ordinarily must first make demand upon the board of directors to initiate the litigation. 52 MIRC, Part I, § 79(3). Where, as here, a Plaintiff fails to make a demand, he must allege with particularity the reasons why that demand would have been futile. 52 MIRC, Part I, § 79(3); MIRCP 23.1.

[5]The Amended Complaint's inclusion of Kandylidis in Count IX seems inconsistent with other allegations.

Marshall Islands law instructs this Court to look to Delaware corporate law. 52 MIRC, Part I, § 13. Because the Amended Complaint challenges specific Board action, Delaware law calls for this Court to apply the two-part test for demand futility announced in the case of *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), namely whether Plaintiff has, by particularized factual allegations, created a reasonable doubt that: (1) a majority of the directors at the time the suit was filed are disinterested and independent or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. *Aronson*, 473 A.2d at 814; *see Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000) (tests are disjunctive).

In evaluating whether demand is excused, the Court will accept well-pled allegations as true. *See Beam ex rel. Martha Steward Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 976 (Del. Ch. 2003) *aff'd*, 845 A.2d 1040 (Del. 2004). Furthermore, "[t]he Court should draw all reasonable inferences in the plaintiff's favor. Such reasonable inferences must logically flow from particularized facts alleged by the plaintiff. [C]onclusory allegations are not considered as expressly pleaded facts or factual inferences. Likewise, inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor." (internal quotation marks and citations omitted). *Beam ex rel. Martha Steward Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004).

IV. CONCLUSIONS OF LAW

A. The Plaintiff has not demonstrated that at the time the lawsuit was filed there was reasonable doubt that a majority of the directors were disinterested and independent.

At the time this suit was filed, March 2, 2009, the Board comprised five directors.[6] By the time the Amended Complaint was filed, August 12, 2009, the Board comprised seven directors.[7] Accordingly, must the Plaintiff establish reasonable doubt as to three of the initial five directors or four of the subsequent seven?

Delaware law requires that demand futility be evaluated based on the board existing at the time of the amended complaint, unless the allegations in the amended complaint "were already validly in litigation." *In re Affiliated Computer Servs. Inc. S'holders Litig.*, No. C. A. 2821-VCL, 2009 WL 296078, at *7 (Del. Ch. Feb. 6, 2009). *Cf. Braddock v. Zimmerman*, 906 A.2d 776, 786 (Del. 2006) (Claims are "validly in litigation" if: (1) "the original complaint was well pleaded as a derivative action;" (2) "the original complaint satisfied the legal test for demand excusal;" and (3) "the act or transaction complained of in the amendment is essentially the same as the act or transaction challenged in the original complaint."). This Court, however, need not decide whether Plaintiff's claims were validly in litigation. As explained below, although the Plaintiff has demonstrated that Economou and Kandylidis had financial and familial interests in the transactions at issue, the Plaintiff has not established reasonable doubt that other directors of either the old five-member board or the new seven-member board were disinterested and independent.

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[6]Economou, Kandylidis, Demathas, Mitilinaios, and Xiradakis.

[7]Economou, Kandylidis, Demathas, Mitilinaios, Xiradakis, Kerames and Karamitsanis.

1. Economou and Kandylidis

With respect to the transactions at issue, the July and October Purchase Agreements, the Primelead Transaction, and the Compensation Awarded Economou and Fabiana, Plaintiff asserts that in the context of demand excusal Economou and Kandylidis are not "disinterested." In this context, "[d]isinterested 'means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.'" *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 821 (Del. Ch. 2005) *quoting*, 473 A.2d at 812.

Plaintiff's particularized factual allegations assert that Economou stands on both sides of the subject transactions. *See* ¶ II.B. These allegations of self-dealing create a reasonable doubt that Economou is disinterested. The Defendants have not argued otherwise.

Plaintiff's particularized factual allegations assert that Kandylidis (through Cardiff) stands on both sides of two transactions, the July and October Purchase Agreements and the Primelead Transaction. *See* ¶ II.B. Also Plaintiff alleges that Kandylidis is the sister of Economou (¶ 10), who is interested all three transaction. These allegations of self-dealing and familial interest create a reasonable doubt that Kandylidis is disinterested. The Defendants have not argued otherwise.

2. Demathas, Mitilinaios, and Xiradakis

With respect to Demathas, Mitilinaios, and Xiradakis, non-family outside director defendants, Plaintiff has not argued that they have a financial or family interest in the transactions at issue. Rather, Plaintiff argues that they are not "independent" of interested

director Economou. "Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson*, 473 A.2d at 816. "Such extraneous considerations or influences may exist when the challenged director is controlled by another. To raise a question concerning the independence of a particular board member, a plaintiff asserting the 'control of one or more directors must allege particularized facts manifesting "a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling." The shorthand shibboleth of "dominated and controlled directors" is insufficient.'" *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 821 (Del. Ch. 2005) (*quoting Aronson*, 473 A.2d at 816, *quoting Kaplan v. Centex Corp.*, 284 A.2d 119, 123 (Del. Ch. 1971)). "This lack of independence can be shown when a plaintiff pleads facts that establish 'that the directors are "beholden" to [the controlling person] or so under their influence that their discretion would be sterilized.'" *Id., citing Rales v. Blasband*, 634 A.2d at 936 (Del. Supr. 1993), *and Aronson*, 473 A.2d at 815. The Plaintiff has failed to pled such facts.

Plaintiff's allegations challenging director independence generally fall into three categories: (1) allegations that Economou controls the Company, and so the directors (2) allegations that Demathas's, Mitilinaios's, and Xiradakis's past approval of various transactions demonstrates their lack of independence; and (3) allegations that Demathas, Mitilinaios, and Xiradakis are disabled from objectively considering demand by virtue of the amount of their director compensation.

The first set of allegations, allegations about Economou control and dominance over the Company (through stock ownership (14.4%), anti-takeover provisions, corporate office, and

Cardiff's operation of the Company (*see* II.B.)), are insufficient to show that Economou dominates and controls Demathas, Mitilinaios, and Xiradakis. Control of a company is distinct from control over directors. "A stockholder's control of a corporation does not excuse presuit demand on the board without particularized allegations of relationship between the directors and the controlling stockholder demonstrating that the directors are beholden to the stockholder." *Beam*, 845 A.2d at 1054 (finding that plaintiffs did not establish lack of director independence even where Martha Stewart owned 94 percent of company's stock). "[I]t is well settled that a director's appointment at the behest of a controlling shareholder does not suffice to establish a lack of independence." *In re Tyson Foods*, 919 A.2d 563, 588 (Del. Ch. 2007) (*citing Aronson*, 473 A.2d at 816, and *In re Walt Disney Co, Derivative Litig.*, 731 A.2d 342, 356.

"[I]n the demand context even proof of majority ownership of a company does not strip the directors of the presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation. There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person." *Aronson*, 473 A.2d at 815.[8]

In an attempt to demonstrate Demathas, Mitilinaios, and Xiradakis are beholden to Economou, the Plaintiff alleges that they have a history of approving transactions that favor Economou and that they are disqualified by virtue of director compensation from DryShips.

[8]*See* (*Stroud v. Milliken Enters., Inc.*, 585 A.2d 1306, 1307 (Del. Ch. 1988) (stating that control of a corporation by a majority stockholder who nominates or elects the directors is not sufficient to raise a reasonable doubt about a director's independence; rather, the nature of the relationships between them must demonstrate that the director is beholden to the stockholder).

However, as explained below, these allegations are not sufficient, the alleged facts do not demonstrate that the non-family outside directors were beholden to Economou.[9]

The second set of allegations, allegations about Demathas's, Mitilinaios's, and Xiradakis's past approval of various transactions (the transactions at issue[10] and others[11]), fails to rebut the presumption that the non-family directors are independent.

As the Court said in *In re Tyson Foods*, 919 A.2d at 588, "Plaintiffs' [argument is] wholly circular: in order to find that defendants lack independence, I must conclude that they failed to exercise independent business judgment by approving self-interested transactions; and yet in order to find those very transactions beyond the bounds of business judgment, I must conclude that the defendants lacked independence. Such a decision would be contrary to the presumption of business judgment that directors enjoy, however, and cannot be supported."

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[9]Similarly, Plaintiff's allegations that Demathas and Xiradakis lack independence due to their service along with Economou on the board of Ocean Rig ASA, a wholly owned subsidiary of DryShips (¶¶ 8, 29), fail because under Delaware law a director does not lack independence from another director simply because they share outside professional associations or relationships. *See e.g., Kahn v. Portnoy*, No. 3515-CC, 2008 Del. Ch. LEXIS 184, at *46 (Del. Ch. Dec. 11, 2008) ("Under *Aronson*, receiving reasonable compensation for serving as a director for one other company related to an interested director, without more, will usually not be enough to create a reasonable doubt as to director independence."); *see also Beam*, 845 A.2d at 1051-52 ("Mere allegations that [directors and insider defendants] move in the same business and social circles, or a characterization that they are close friends, is not enough to negate the independence for demand excusal purposes.").

[10]The July and October Purchase Agreements, the Primelead Transaction, and the Compensation Awarded Economou and Fabiana.

[11]The lease of office space (¶ 43); the issuance of a cash dividend to Economou (¶ 45); the issuance of Goodwill Shares to Economou (¶ 46); the purchase of Ocean Rig stock from Economou (¶ 50); and the payment of a $14 million commission to Cardiff (¶¶ 47, 51).

Similarly, the Court in *In re INFOUSA, Inc. S'holders Litig.*, 953 A.2d 963, 989 (Del. Ch. 2007) recognized that, "In most derivative suits . . . a plaintiff will argue that the board's decision to allow a transaction was a violation of its fiduciary duties." The Court continued: "If [a] plaintiff can then avoid the demand requirement by reasoning that any board that would approve such a transaction (or as here, a history of past transactions) is by definition unfit to consider demand, then in few (if any) such suits will demand ever be required," which "does not comport with the demand requirement's justification as a bulwark to protect the managerial discretion of directors." *Id.*

Taken separately or together, the transactions at issue, and the others cited by Plaintiff, fail to rebut the presumption of the business judgment rule that the non-family outside director defendants, all of whom are sophisticated business people with years of experience, were independent.

The third set of allegations, allegations about Demathas's, Mitilinaios's, and Xiradakis's 2008 compensation, also are insufficient to cast reasonable doubts on their independence. Plaintiff maintains that each non-family outside director received compensation of $705,000 in 2008. If each director did received $705,000 for his 2008 service on the Board, and if the $705,000 were a substantial portion of his annual income[12], these facts (in the absence of facts to the contrary) would tend to demonstrate that the non-family outside directors were beholden to the interested and controlling director Economou.

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[12]*See In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 536 (Del. Ch. 2003) (directors are not beholden where their compensation "is not a material part of their annual incomes or net worth").

However, the Company's 2008 Annual Report states that $705,000 is an aggregate amount. (See FY08 Annual Report ("Non-executive directors received annual compensation in the **aggregate** amount of $705,000.") (emphasis added)). The Annual Reports appears to say that together, in the aggregate, the non-executive directors received $705,000, not that each received $705,000.[13]

If as Plaintiff claims, the word "aggregate" means the total each director received, not the total of what all non-executive directors received, he could have confirmed his interpretation by exercising his right, under 52 MIRC, Part I, § 81, to examine the Company's books and records. Plaintiff conceded at oral argument that he failed to do so either formally or even informally. Absent such confirmation that the term "aggregate" means the total compensation for each, rather than all non-executive directors, the Court finds that Plaintiff is not entitled to the inference that each non-family outside director received $705,000.[14]

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[13]Even on a motion to dismiss, this Court is not required to accept Plaintiff's allegations when they are at odds with documents, like securities filings, of which this Court may take judicial notice. *See Lagrone v. American Mortell Corp.*, Nos. 04C-10-116-ASB, 07C-12-019-JRS, 2008 WL 4152677, at *4 (Del. Super. Sept. 4, 2008) ("To the extent Plaintiffs' complaint alleges facts regarding [documents of which the Court may take judicial notice] that are at odds with [those documents], such allegations will not be regarded as well pled and will not be regarded as true for purposes of the motion [to dismiss]."); *see also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d at 70 (court may take judicial notice of SEC filings).

[14]Plaintiff suggested in his Opposition brief that the increase in director compensation from 2007 to 2008 served as a quid pro quo for director approval of certain transactions (Opp. 23). But Plaintiff appeared to concede at oral argument that he did not allege sufficient facts to establish such a quid pro quo. Accordingly, the Court will not consider this argument. The Court notes that the apparent increase was not alleged to be contemporaneous with any of the challenged decisions such that an inference of a quid pro quo would be proper at this stage. *Cf. In re National Auto Credit, Inc. S'holders Litig.*, No. Civ. A. 19028, 2003 WL 139768, at *9 (Del. Ch. Jan. 10, 2003) (accepting at pleadings stage theory that increase in director compensation was a quid pro quo where resolutions at issue were "adopted at the same meeting, within minutes of each other").

The Plaintiff also alleges that Demathas and Xiradakis received an equity grant and compensation as members of Ocean Rig board. The Plaintiff, however, does not allege the value of the grant or the amount of the Ocean Rig compensation. Without allegations as to value and amount, and their relation to the defendants' annual incomes, they do not rebut the presumption that the directors were independent. Moreover, the equity grant to Demathas and Xiradakis tends to align their interests with those of the DryShips' shareholders.

3. Kerames and Karamitsanis

Directors Kerames and Karamitsanis were not on the Board at the time of the transactions at issue. Plaintiff alleges Kerames was once a director of company founded by Kandylidis' son (¶ 38), but he fails to allege facts challenging Kerames's and Karamitsanis's independence or disinterestedness. Accordingly, both are deemed capable of objectively considering a demand. In order to overcome the presumption of director independence and cast a reasonable doubt on the independence of non-family outside directors, Plaintiff must show, by particularized facts, that the directors are so beholden to Economou that they would be "more willing to risk [their] reputation[s] than risk the relationship" with Economou by authorizing a suit against him. *See Beam*, 845 A.2d at 1052. Plaintiff has failed to allege such particularized facts.

B. Plaintiff fails to allege sufficient facts to show that any of the transactions at issue was not, at the time, a valid exercise of the board's business judgment.

Plaintiff has failed to overcome the business judgment presumption with respect to any of the transactions at issue.

To overcome the presumption that the directors' actions were the valid exercise of their business judgment, Plaintiff must allege facts rebutting the presumption that "in making a

business decision the directors of [DryShips] acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson*, 473 A.2d at 812. Because the Company's Articles of Incorporation contain an exculpation clause, Plaintiff can only overcome the business judgment presumption by "plead[ing] facts suggesting that the . . . directors breached their duty of loyalty by somehow acting in bad faith for reasons inimical to the best interests of the [DryShips] stockholders." *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 648 (Del. Ch. 2008). Furthermore, demand is not excused where a plaintiff's "sole argument appears to be that [he does] not agree with the course of action taken by the Board," because that does not "suffice to create a reasonable doubt that the Board's decision . . . was the product of an exercise of business judgment." *Brehm*, 746 A.2d at 266 (internal quotation marks and citations omitted).

1. The July and October Purchase Agreements

Plaintiff has failed to plead with particularity facts relating to the July and October Purchase Agreements sufficient to overcome the business judgment presumption.

a. The July Purchase Agreements

Plaintiff alleges that the $55 million deposit the Company paid upon entering into the July Purchase Agreements (13.75% of the purchase price) is "considerably higher that the industry standard 10% deposit," and so is outside the bounds of business judgment (¶ 64). This allegation must fail because Plaintiff has failed to plead adequately that Demathas, Mitilinaios, and Xiradakis negotiated the deposit term in bad faith. *See In re Lear Corp.*, 967 A.2d at 652 (board's actions not outside bounds of business judgment where plaintiff failed to allege facts "that support a fair inference that the directors consciously acted in a manner contrary to the

interests of [the company] and its stockholders"). And in any event, Plaintiff fails to allege any facts showing that, in light of the terms and context of the agreements, the deposit was excessive at all, or that the three percent "excess[]" was somehow beyond the bounds of rationality.

Similarly, upon termination of the July Agreement, Plaintiff's allegation that Demathas, Mitilinaios, and Xiradakis overpaid Economou-related entities by 1,213% when they negotiated to pay $105 million as part of the termination of the July Purchase Agreements. This allegation also does not suffice to overcome the business judgment presumption.

Plaintiff contends that the $105 million was payment solely for an option to repurchase ships that had plummeted in value (¶ 76), but the Company's public disclosures (on which Plaintiff relies in this context) state that the $105 million was consideration paid for the cancellation of the contract (see Form 6-K, dated 12/10/2008) — a contract under which DryShips owed $400 million for ships then worth only $120 million, as Plaintiff alleges. (¶ 78). The Court is not required to credit Plaintiff's unsubstantiated allegation that the $105 million was payment for the option only, when that allegation is contradicted by the Company's securities filings. *See Lagrone*, 2008 WL 4152677, at *4. Moreover, Plaintiff's allegations fail to explain why, in light of deteriorating market conditions, Demathas's, Mitilinaios's, and Xiradakis's decision to pay $105 million for relief from a $400 million contract for ships worth far less than that, while obtaining an option to purchase the ships at a later date, was not a rational exercise of the Board's business judgment.

b. The October Purchase Agreements

As with the July Purchase Agreements, Plaintiff's allegation that the termination fee paid in connection with the October Purchase Agreements (warrants for 3.5 million shares and 6.5 million shares worth $150,685.000, or 28.8% of the purchase price) is higher than the industry standard 10% (¶ 83) does not demonstrate a breach of Demathas's, Mitilinaios's, and Xiradakis's business judgment, particularly where the Company has in another context paid unaffiliated third parties higher termination fees than that alleged here. (See Form 6-K, dated 1/28/2009 (Company paid $116.4 million to terminate contract costing $364 million, or 31.9%)). Moreover, the warrants for 3.5 million shares have not been, and may never be, exercised. The strike price for the shares is several times their current value.

2. The Primelead Transaction

Plaintiff has failed to plead with particularity facts relating to the Primelead Transaction sufficient to overcome the business judgment presumption. Plaintiff first alleges that the Company overpaid Economou by 93 percent in order to reacquire the Primelead shares. Plaintiff did not explain the basis for this calculation until the January 20, 2010 hearing, when he stated that he had hired an expert who reached this valuation. Given that Plaintiff failed to explain in his Amended Complaint the basis for this calculation, and still provides no explanation other than that he hired an expert to make the calculation, Plaintiff's allegation fails to meet the law's particularity requirements. See 52 MIRC, Part I, § 79(3); MIRCP 23.1.

But even were this Court to determine that Plaintiff had adequately pleaded some form of overpayment, the allegations still would not suffice to overcome the business judgment presumption. The Company stated in its public filings that a Special Committee of the Board

"took the appropriate steps necessary to evaluate the transaction and determine its fairness." (Form 6-K, dated 7/9/2009). Plaintiff asserts that his expert's evaluation of the fairness of the transaction conflicts with the Special Committee's evaluation of fairness, and that this is therefore a factual issue requiring this Court to deny the motion to dismiss. But this assertion misunderstands the nature of the business judgment rule and Plaintiff's pleading burden: Plaintiff cannot overcome the presumption that the directors acted in good faith by arguing that the terms of the transaction were unfair or pointing out that he disagrees with the Board's decision. This Court may only evaluate the fairness of a transaction at this stage of the litigation if the "entire fairness" doctrine applies. *See In re Tyson Foods*, 919 A.2d at 596. It does not apply in this case because the burden only shifts where a plaintiff has overcome the presumptions of independence and of the business judgment rule, such as by establishing that a majority of the board was conflicted with respect to the transactions at issue. *Cf. Gantler v. Stephens*, 965 A.2d 695, 707 (Del. 2009) (holding that entire fairness review applied to transaction where plaintiffs had overcome business judgment presumption by sufficiently alleging that "a majority of the Board was conflicted"); *Orman v. Cullman*, 794 A.2d 5, 20 n.36 (Del. Ch. 2002) ("Usually, the entire fairness standard only applies at the outset . . . in certain special circumstances, viz, a squeeze out merger or a merger between two companies under the control of a controlling shareholder.").

Moreover, Plaintiff conceded both in his brief (see, e.g. Opp. 13-14) and at argument that this Court must apply the business judgment presumption to the Board's actions, and in order to do so, this Court looks instead to the process employed by and the motivations of the Board. *See Brehm*, 746 A.2d at 259 (demand excused only where particularized facts in complaint create

reasonable doubt that "the informational component of the directors' decision making process, measured by concepts of gross negligence, included consideration of all material information reasonably available") (emphasis omitted). At oral argument, Plaintiff relied on *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009) to argue that this Court can evaluate the substance of the Board's decision in determining whether Plaintiff has overcome the business judgment presumption. This Court finds the context of *In re Citigroup* inapposite. There the Court held that demand was excused as to the plaintiffs' claims that the Citigroup board committed waste when it awarded $68 million plus an office, assistant, and car and driver, to the CEO upon his departure from the company. The Court explained that it could not tells from the terms of the agreement with the CEO what value the company had received in return. *Id.* at 138. Here, there is no dispute that DryShips received something of value when it obtained the rights to the drillships (or when it cancelled the burdensome July and October purchase agreements). The Court will not put itself in a position to second guess such a Board decision unless it has reason to doubt that the process in which those decisions were made was a fair one. Moreover, to the extent the Delaware Chancery Court's holding in *In re Citigroup* conflicts with that of *Brehm*, where the Delaware Supreme Court held that the plaintiff could not overcome the business judgment presumption by arguing that the Board awarded too much money to its CEO because demand is not excused where a plaintiff's "sole argument appears to be that [he does] not agree with the course of action taken by the Board," *Brehm* controls.

In this case, Plaintiff's allegations that Demathas, Mitilinaios, and Xiradakis employed a faulty process when negotiating the Primelead Transaction fail to overcome the business judgment presumption because Plaintiff simply alleges that the Company did not adequately

disclose the procedures used in negotiating the Primelead Transaction (¶ 60); Plaintiff does not make any particularized allegations indicating that the process itself was flawed. *See In re Tyson Foods*, 919 A.2d at 595 (In order to overcome the business judgment presumption, "a successful complaint will need to make detailed allegations with regard to the [faulty] process by which a committee conducted its deliberations: the amount of time a committee took in considering a specific motion . . . or the experts relied upon in making a decision."). This Court declines to draw the inference that the Board members employed an improper process based on allegations that the Company simply did not disclose the specifics of that process, particularly where there was no duty to do so.[15] Moreover, the Plaintiff could have exercised his rights under 52 MIRC, Part I, § 81, to examine the Company's books and records regarding the Primelead negotiating process but failed to do so.

3. Executive Compensation

Finally, Plaintiff has failed to plead with particularity facts relating to the compensation awarded to Economou and Fabiana sufficient to overcome the business judgment presumption. "It is the essence of business judgment for a board to determine if a particular individual warrants large amounts of money." *See Brehm*, 746 A.2d at 263 ("[T]he size and structure of executive compensation are inherently matters of judgment.") (internal quotation marks and citations omitted); *Mercier v. Blankenship*, No. C.A. 2:07-0555, --- F. Supp. 2d ---, 2009 WL 3188234, at *11 (S.D. W. Va. Sept. 30, 2009) (dismissing claim of excessive compensation because even though CEO's pay of $44.5 million plus stock over three years was "by any standard, remarkably

[15] *See Lazard Debt Recovery GP, LLC. v. Weinstock*, 864 A.2d 955, 964 (Del. Ch. 2004) ("The requirement to draw reasonable inferences [in favor of plaintiffs on a motion to dismiss] is not an invitation to irrational, plaintiff-friendly speculation, however.").

generous, Delaware law dictates that the size and structure of executive compensation are inherently matters of judgment") (internal quotation marks and citations omitted).

C. Plaintiff's Claims for Waste Fall Short of Satisfying the Standard for Demand Futility

In order to overcome the business judgment presumption on his waste claims, Plaintiff must plead particular facts showing "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *Brehm*, 746 A.2d at 263 (internal quotation marks and citations omitted).

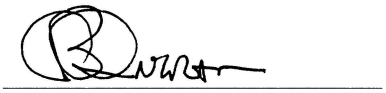
Plaintiff has failed to meet this burden. Each of the alleged wasteful transactions involved some form of valuable consideration, such that the transactions cannot be deemed "irrational[] squander[ing of] assets." *Brehm*, 746 A.2d at 263.

V. CONCLUSION

As explained above, Plaintiff has failed adequately to plead that demand is excused, as he is required to do pursuant to 52 MIRC, Part I, § 79 and MIRCP 23.1. Accordingly, the Court grants the Individual Defendants' motion to dismiss, and the Amended Complaint is dismissed.

The Court, however, will consider a motion by the Plaintiff for leave to amend the Amended Complaint.

Date: February 19, 2010.



Carl B. Ingram
Chief Justice, High Court