

**Elghanian-Halperin v Dimon**

2022 NY Slip Op 34981(U)

December 23, 2022

Supreme Court, Westchester County

Docket Number: Index No. 60924/2022

Judge: Gretchen Walsh

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION

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IREN ELGHANIAN-HALPERIN, derivatively  
on behalf of JPMORGAN CHASE & CO.,

Plaintiff,

Index No. 60924/2022  
Motion Seq. No. 2

-against-

**DECISION & ORDER**

JAMES DIMON, LINDA B. BAMMANN,  
STEPHEN P. BURKE, TODD A. COMBS,  
JAMES S. CROWN, TIMOTHY P. FLYNN,  
MELLODY HOBSON, MICHAEL A. NEAL,  
LEE R. RAYMOND, JAMES A. BALL,  
VIRGINIA M. ROMETTY, ASHLEY BACON,  
MARY CALLAHAN ERDOES,  
CARLOS HERNANDEZ, DANIEL E. PINTO,  
GORDON A. SMITH, and TROY ROHRBAUGH,

Defendants,

-and-

JPMORGAN CHASE & CO.,

Nominal Defendant.

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WALSH, J:

The following e-filed documents, listed in NYSCEF by document numbers 20-32 were read on this motion by Nominal Defendant JPMorgan Chase & Co. (“JPMorgan”, “JPM”, or the “Company”) and Individual Defendants Ashley Bacon, James Dimon, Mary Callahan Erdoes, Carlos Hernandez, Daniel E. Pinto, Gordon A. Smith, Troy Rohrbaugh, Linda B. Bammann, James A. Ball, James S. Crown, Stephen P. Burke, Todd A. Combs, Timothy P. Flynn, Mellody Hobson,

Michael A. Neal, Lee R. Raymond, and Virginia M. Rometty (“Individual Defendants”) (collectively “Defendants”) for an order pursuant to CPLR 3211(a)(1), (3), (7) and Business Corporation Law (“BCL”) § 626 dismissing the Verified Shareholder Derivative Complaint (the “Complaint”) of Plaintiff Iren Elghanian-Halperin derivatively on behalf of JPMorgan (“Plaintiff”). Plaintiff opposes the motion.

Upon the foregoing papers and for the reasons set forth herein, Defendants’ motion shall be granted.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff, a current JPMorgan shareholder, commenced this action on May 18, 2022 when she filed a Summons with Notice. Plaintiff filed her Complaint on July 11, 2022. The genesis of this action is the Company’s announcement on September 30, 2020 that the Company had agreed to pay more than \$920 million—including \$436.4 million in fines, \$311.7 million in restitution, and over \$172 million in disgorgement—to United States’ federal regulators. Plaintiff sues the Individual Defendants<sup>1</sup> (certain current and/or former members of its Board of Directors [the “Board”] and executive officers) because they allegedly breached their fiduciary duties when they allowed the Company (and its two subsidiaries JPMorgan Chase Bank, N.A. [“JPMCB”] and J.P. Morgan Securities, LLC [“JPMS”]) to engage in a multi-year trading scheme in the treasury futures and precious metals market from 2008 through at least 2016 (the “Relevant Period”). These violations resulted in two sets of regulatory resolutions: (1) resolutions with the U.S. Department of Justice (“DOJ”), the U.S. Commodity Futures Trading Commission (“CFTC”) and the U.S. Securities Exchange Commission (“SEC”) regarding “spoofing”—a form of market manipulation involving the rapid placement of buy or sell orders with the intent to cancel those orders before execution—by JPMorgan traders in precious metals and U.S. Treasury (“UST”) (the “Spoofing Resolutions”); and (2) a resolution with the U.S. Treasury Department’s Office of the Comptroller of Currency (“OCC”) concerning JPMCB’s past deficiencies in internal controls and internal audit for certain fiduciary activities.<sup>2</sup> This motion ensued.

### **SUMMARY OF COMPLAINT’S ALLEGATIONS SUPPORTING PLAINTIFF’S DERIVATIVE STANDING**

In her Complaint, Plaintiff details the violations various government regulators asserted against JPMorgan and its subsidiaries (Complaint at ¶¶ 3-10). According to Plaintiff, the CFTC pronounced that “despite numerous red flags, including internal surveillance alerts, inquiries from [CME Group, Inc. (‘CME’)] and the CFTC, and internal allegations of misconduct from a JPM trader, JPMS failed to provide supervision to its employees sufficient to enable JPMS to identify,

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<sup>1</sup> The titles, positions and tenures of each of the Individual Defendants are outlined at paragraphs 45-61 of the Complaint.

<sup>2</sup> In her Complaint, Plaintiff alleges that these deficiencies in internal controls and audits were necessary to avoid conflicts of interest in handling client accounts which may have resulted in self-dealing and/or impairment of JPMorgan’s ability to act in its client’s best interests (Complaint at ¶¶ 20-21).

adequately investigate, and put a stop to the misconduct” (*id.* at ¶ 10). Thus, Plaintiff is alleging that some of the Individual Defendants before 2014 “had failed to implement any system of internal controls to prevent illegal spoofing, in dereliction of their fiduciary duties to the Company and its shareholders. And even when a system of internal controls that would have detected this manipulation was belatedly implemented (purportedly in 2014), instances of illegal behavior were nonetheless ignored and the misconduct was allowed to continue through at least 2016 -- all in the name of profits” (*id.* at ¶ 11). Plaintiff further recites various public announcements concerning the wrongdoing by various other federal regulators (*id.* at ¶¶ 12-16; *see also* ¶¶ 85-98).

Plaintiff asserts that JPMorgan publicly admitted to wrongdoing in agreeing to these settlements with federal regulators and that, specifically, per the CFTC Order, the Company “consent[ed] to the use of the findings of fact and conclusions of law in [the CFTC Order] . . . and agree[d] that they shall be taken as true and correct and given preclusive effect therein, without further proof” (*id.* at ¶¶ 18, 99). According to Plaintiff, in the Deferred Prosecution Agreement (“DPA”) with DOJ, JPMorgan, JPMCB, and JPMS expressly “admit[ted], accept[ed], and acknowledge[d] that they are responsible under United States law for the acts of their officers, directors, employees, and agents as charged in the Information, and as set forth in the Statement of Facts, and that the allegations described in the Information and the facts described in the Statement of Facts are true and accurate” (*id.*). Plaintiff asserts that in the consent order entered into with the SEC, JPMS agreed to the SEC’s factual findings and that it “willfully violated Section 17(a)(3) of the Securities Act, which prohibits any person, in the offer or sale of securities, from engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser” (*id.*).

Plaintiff asserts that “[s]uch admissions of willful wrongdoing are virtually unheard of” and that “[p]ublic companies routinely enter into settlement agreements with federal (and state) regulators pursuant to which they are permitted to ‘neither confirm, nor deny’ the factual allegations and the legal claims underlying the complaints” (*id.* at ¶ 19). Plaintiff claims that “[f]or federal regulators to require admissions of wrongdoing, as was the case here in JPMorgan’s spoofing settlements, is almost without precedent in the past decade of corporate enforcement” (*id.*).

On January 22, 2021, Plaintiff issued a pre-suit demand (the “Litigation Demand” or “Demand”) to the Board to investigate and commence an action against the Individual Defendants (*id.* at ¶ 22, Ex. A [Litigation Demand]). Plaintiff alleges that, less than ten months later, on November 15, 2021, Plaintiff’s counsel received a letter from Defendant Stephen B. Burke (“Burke”), the Company’s “Lead Independent Director” and a longtime Board member since before the start of the Relevant Period (*id.* at ¶ 23). Plaintiff states that in his letter, Defendant Burke “informed Plaintiff’s counsel that the Litigation Demand had been refused by the Board in its entirety” (*id.*, Ex. B [the “Refusal”]). Plaintiff asserts that the Refusal stated that “the Litigation Demand had been referred by the Board in March 2021 ‘for review and recommendation’ to the Company’s Market Compliance Committee (the ‘MCC’), which consisted of four Board members: defendants Burke, Todd A. Combs, Mellody Hobson, and Virginia M. Rometty” (*id.* at ¶ 24).

Plaintiff alleges that the “MCC was a pre-existing committee which was not created for the purpose of reviewing the Litigation Demand (or any substantially similar pre-suit demands made by other shareholders)” and that, “[a]ccording to the Company’s website as well as its SEC filings,

the MCC is a so-called ‘Specific Purpose Committee’ of the Board, which purportedly ‘provides oversight in connection with certain orders (“Consent Orders”) issued by, and agreements with, the [Company’s] regulators and oversight of certain government inquiries, as well as related conduct and controls”’ (*id.* at ¶ 25). Plaintiff asserts that the “Refusal further stated that in connection with its review of the Litigation Demand, among other things, the MCC, assisted by outside counsel, ‘conducted informational meetings, other discussions, and interviews with individuals with direct knowledge of various aspects of the spoofing-related matters and fiduciary-related issues’ and ‘reviewed and analyzed more than twenty thousand documents and related materials”’ (*id.* at ¶ 26).

Plaintiff alleges that “[a]ccording to the Refusal at the conclusion of its purported ‘review,’ the MCC unanimously adopted a resolution on September 12, 2021 to recommend to the full Board that it reject the Litigation Demand in its entirety and ‘decline to bring any potential claims referenced in or arising from [the Litigation Demand] as not in the best interests of the Company”’ (*id.* at ¶ 27). Plaintiff also asserts “that, thereafter, per the MCC’s recommendation, the ‘non-management members of the Board [] determined that it is not in [the Company’s] best interests to cause the Company to initiate litigation or other proceedings or to cause the Company to adopt any additional governance or other remedial measures with respect to the matters set forth in the [Litigation] Demand”’ (*id.*). According to Plaintiff, “[f]ollowing Plaintiff’s receipt of the Refusal, on December 2, 2021, Plaintiff issued an inspection demand to the Company pursuant to 8 *Del. C.* § 220 (the ‘Inspection Demand’)” (*id.* at ¶ 28, Ex. C). In the Inspection Demand, “Plaintiff demanded a production of Board-level corporate books and records from JPMorgan relating to the MCC’s ‘review’ and the Refusal” (*id.*). Plaintiff asserts that the Company “[o]n February 1, 2022 provided certain information requested by Plaintiff and a production of non-public corporate books and records in response to the Inspection Demand, which Plaintiff subsequently reviewed and analyzed” (*id.* at ¶ 29). It is Plaintiff’s contention that “[t]he Refusal was improper and is not entitled to the protections of the business judgment rule” (*id.* at ¶ 30). Plaintiff further alleges that “[d]espite the fact that the Company **publicly admitted to wrongdoing** when it entered into settlements with federal government agencies in 2020, according to the Refusal, the MCC concluded that there was no support for a claim for breach of fiduciary duty against any of the [Individual Defendants]” (*id.*). Plaintiff asserts that the “sweeping conclusion by the MCC that there was somehow ‘no basis’ for a breach of fiduciary duty claim of any kind against any of the Individual Defendants, juxtaposed with the Company’s prior public admissions of wrongdoing, creates reason to doubt that the MCC’s review was conducted reasonably and in good faith” (*id.*).

Plaintiff asserts that the Board’s inexplicable referral of the Litigation Demand to the MCC adds more doubt that the MCC’s review was conducted reasonably, independently, and in good faith (*id.* at ¶ 31). Plaintiff argues that “[t]he MCC supposedly provides oversight in connection with Consent Orders issued by, and agreements with, government regulators and oversight of government inquiries, as well as related conduct and controls” and, “[t]hus, the only reasonable inference based on the Company’s SEC filings regarding the MCC is that the MCC -- which is designated as a ‘Special Purpose Committee,’ as opposed to a ‘Principal Standing Committee’ that operates at all times -- played an oversight role for the Company’s response to at least some, if not all, of the government inquiries conducted by the CFTC, the FBI, the DOJ, the U.S. Attorney, the SEC, and/or the OCC, and/or the Company’s agreements to settle such inquiries with federal regulators” (*id.*). Plaintiff asserts that “the Company’s proxy statement on SEC Form DEF 14A issued in April 2021 states that the MCC ‘provides oversight in connection with certain markets-

related matters, including the Federal Reserve Consent order and the [DPA] entered into with the [DOJ] to resolve its precious metals and U.S. Treasuries investigations” (*id.* at ¶ 32). Based on the foregoing, Plaintiff claims, “there is reason to doubt that the MCC could have conducted an independent, objective review of the allegations in the Litigation Demand and/or that it could have made an independent, objective recommendation to the full Board regarding the Litigation Demand, because (a) this amounts to the MCC investigating its own (mis)conduct and/or (b) the MCC prejudged the allegations in the Litigation Demand” (*id.*).

“Notably,” Plaintiff alleges, “in announcing its record-setting settlement with the Company, the CFTC revealed that early in its investigation, *the Company responded to certain information requests in a manner which resulted in the CFTC being ‘misled’*” (*id.* at ¶ 33). Plaintiff asserts that, “[a]s stated in the CFTC Order, ‘*JPM’s cooperation with the Division of Enforcement during the early stages of its investigation was not satisfactory*’” and that “the DOJ’s announcement of the related DPA cited ‘*JPMorgan’s failure to fully and voluntarily self-disclose the offense conduct to the [DOJ]*’” (*id.*).<sup>3</sup> Plaintiff represents that “based on the Refusal and the information and documents produced to Plaintiff in response to the Inspection Demand, Plaintiff has no evidence that the MCC investigated or evaluated these issues as part of its review of the Litigation Demand” (*id.* at ¶ 34). Plaintiff alleges that “[t]his omission is troubling enough on its own, but even more so to the extent that the MCC may have (or likely) played an oversight role in connection with some or all of the government investigations and/or settlements with JPMorgan which preceded the Litigation Demand” (*id.*).

According to Plaintiff, “[a]s an example of the obvious concerns raised by the MCC’s ‘review’ of the Litigation Demand, there is the critical issue of witness interviews” (*id.* at ¶ 35). Plaintiff claims that, “[t]o be entitled to deference under the business judgment rule, the MCC’s investigation must have been reasonable, diligent and thorough” and that “[t]he number and contents of witness interviews is critical to this analysis” (*id.* at ¶ 132). Plaintiff alleges that “[o]n February 1, 2022, the Company’s counsel disclosed to Plaintiff (via letter) a list of all of the individuals that were interviewed during the MCC’s review of the Litigation Demand” and alleges that “[t]wenty-seven (27) individuals were listed, but this list is most notable for its omissions rather than its contents” (*id.*). Plaintiff asserts that it “is now readily apparent that the MCC *only chose to interview current and former Company personnel* as part of its ‘review’” (*id.* at ¶ 36). Plaintiff states that the “Refusal claims that the MCC interviewed ‘individuals with direct knowledge of various aspects of the spoofing-related matters and fiduciary-related issues,’” but Plaintiff points out that the MCC never interviewed CFTC’s then-Chairman and Chief Executive Heath P. Tarbert, nor any other knowledgeable individual from the CFTC and the MCC never interviewed then-Acting Assistant Attorney General of DOJ’s Criminal Division Brian C. Rabbitt,

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<sup>3</sup> Plaintiff further states that “[f]ollowing the announcement of these settlements for the long-running spoofing scheme, defendant Pinto, the Co-President and COO of JPMorgan and CEO of the [Corporate and Investment Bank] division, stated that ‘[t]he conduct of the individuals referenced in today’s resolutions is unacceptable and they are no longer with the firm’” (*id.* at ¶ 102). “Defendant Pinto added that the Company had invested ‘considerable resources’ in boosting its internal compliance policies, surveillance systems, and training programs” (*id.*). Plaintiff asserts that nevertheless, “none of the Individual Defendants faced any repercussions for permitting the illegal conduct to continue for more than eight years” (*id.*).

nor any other knowledgeable individual from the DOJ (*id.*). Plaintiff further states that the MCC never interviewed the then-serving U.S. Attorney for the District of Connecticut John H. Durham, nor any other knowledgeable individual from the US Attorney and the MCC never interviewed the then-serving Assistant Director in Charge of the FBI's New York Field Office William F. Sweeney, nor any other knowledgeable individual from the FBI (*id.*). Plaintiff alleges that the MCC never interviewed the SEC's then-Director of the Division of Enforcement Stephanie Avakian nor any other knowledgeable individual from the SEC and the MCC never interviewed anyone from the OCC (*id.*).<sup>4</sup>

Plaintiff asserts that “in conducting interviews with ‘individuals with direct knowledge of various aspects of the spoofing-related matters and fiduciary-related issues’ as part of its ‘review,’ the MCC failed to interview anyone who might be able to corroborate Plaintiff’s allegations of wrongful conduct on the part of any of the [Individual Defendants]” (*id.* at ¶ 37). Plaintiff further asserts that “[i]n light of: (a) the Company’s historic settlements with federal regulators totaling over **\$1.17 billion**; (b) the Company’s own public admissions of wrongdoing as part of certain settlements; (c) the CFTC’s disclosure that the Company’s illicit spoofing scheme continued even after a new surveillance system flagged issues in 2014; (d) the CFTC’s assertion that it was ‘misled’ by the Company during the early stages of its inquiry; and (e) the DOJ’s statement regarding ‘JPMorgan’s failure to fully and voluntarily self-disclose the offense conduct to the [DOJ],’ any reasonable, good faith investigation into the allegations raised in the Litigation Demand should have, at minimum, included interviews with knowledgeable representatives from the CFTC, the FBI, the DOJ, the US Attorney, the SEC, and/or the OCC” (*id.*). Plaintiff then alleges that “the MCC’s and the Board’s disregard for the serious allegations and events set forth in the Litigation Demand is improper, demonstrates a lack of diligence and good faith, and creates reason to doubt that the Refusal was proper” (*id.* at ¶ 38). And Plaintiff asserts that “[i]n light of the wrongful Refusal, this derivative action, which seeks to recover damages for the benefit of the Company from the true wrongdoers — the officers and directors of JPMorgan — should proceed” (*id.* at ¶ 39).

### **DEFENDANTS’ MOTION TO DISMISS**

#### ***A. Defendants’ Contentions in Support of Their Motion to Dismiss***

In support of their motion, Defendants submit: (1) an Affirmation of Shane M. Palmer, Esq., dated July 29, 2022 (“Palmer Aff.”), together with accompanying exhibits; and (2) a memorandum of law, dated July 29, 2022 (“Defs’ Mem.”).

The essence of Defendants’ motion is that Plaintiff’s Complaint should be dismissed because the Board’s Refusal of Plaintiff’s Demand is protected by the business judgment rule. The primary purpose of the Palmer Affirmation is to submit various exhibits in support of Defendants’ motion (Palmer Aff. at ¶¶ 1-3, Exs. 1-3).

In their memorandum of law, Defendants argue that in this case, because Plaintiff is seeking to bring this derivative claim after making a demand on JPMorgan’s Board, which was

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<sup>4</sup> All of these named individuals are the persons from the federal regulatory agencies that made the public announcements concerning the wrongdoing that is alleged in Plaintiff’s Complaint.

investigated and refused,<sup>5</sup> she must satisfy an extremely high standard and that over the past decade, “every New York court that has addressed a wrongful refusal claim under Delaware law has concluded that the plaintiff failed to meet this virtually insurmountable pleading burden” (Defs’ Mem. at 1).

Defendants then recite the legal standard for pleading wrongful demand refusal and contend that “[a] ‘cardinal precept’ of Delaware corporate law ‘is that directors, rather than shareholders, manage the business and affairs of the corporation’ . . . including ‘[t]he decision to bring a law suit or to refrain from litigating a claim on behalf of a corporation’ . . . [and] [a]ccordingly, a shareholder may substitute her judgment for that of the board and assert claims belonging to the corporation in a derivative action only after she ‘has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so[,] or where demand is excused’” (*id.* at 12 [citations omitted]). Defendants assert that “[w]here a ‘shareholder mak[es] a demand upon a board before filing suit,’ the shareholder ‘tacitly concedes the independence of a majority of the board to respond,’ and ‘the only issues to be examined are the good faith and reasonableness of its investigation’” (*id.* [citations omitted]). They assert that “[i]f the shareholder makes a demand and it is rejected, the board decision is entitled to the presumption of the business judgment rule,’ . . . which requires that courts presume ‘the directors of a corporation 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’” (*id.* [citations omitted]). They argue that “[t]o overcome the business judgment rule, and establish that a pre-suit demand was wrongfully refused, a derivative plaintiff must ‘allege particularized facts that raise a reasonable doubt that (1) the board’s decision to deny the demand was consistent with its duty of care to act on an informed basis, that is, was not grossly negligent; or (2) the board acted in good faith, consistent with its duty of loyalty’” (*id.* [citation omitted]). They assert that “[d]isagreement with the Board’s ultimate conclusion, as well as its subsidiary conclusions leading thereto, [is] insufficient to raise a reasonable doubt that the Board acted in good faith and on an informed basis” (*id.* at 12-13 [citations omitted]).

Defendants assert that the “gross negligence inquiry focuses on whether the board properly informed itself of material information reasonably available to it before refusing the demand” (*id.* at 13 [citation omitted]). They contend that “[a] grossly negligent investigation is one where the board did not investigate at all or pursued such an inadequate investigation, in light of the seriousness of the demand, that a court may reasonably infer a breach of the duty of care” (*id.* [citations omitted]). Defendants argue that “[d]emonstrating that directors have breached their

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<sup>5</sup> In this regard, Defendants assert that after receiving Plaintiff’s Demand, the non-management Board Directors in March 2021 tasked the MCC to investigate the Demand and report to the Board (Defs’ Mem. at 2, 9). The MCC in turn hired Debevoise & Plimpton, LLP (“Debevoise”) whose lead counsel on this matter was former SEC Chair and former U.S. Attorney for the Southern District of New York Mary Jo White, Esq. (“White”) to perform the investigation that occurred over a seven-month period involving tens of thousands of documents and 27 witness interviews (*id.*). Defendants contend that after hearing the conclusions of this investigation, the Board decided that it was not in the Company’s best interest to initiate litigation and the Board refused the Demand by providing Plaintiff with a seven-page single-spaced letter explaining the reasons for the refusal (*id.*, *citing* Complaint, Ex. B).

duty of loyalty by acting in bad faith goes far beyond showing a questionable or debatable decision on their part' . . . 'To show bad faith, Plaintiff must plead with particularity that the Board intentionally act[ed] in disregard of the Company's best interest in deciding not to pursue the litigation the Plaintiff demanded'" (*id.* [citations omitted]).

Defendants contend that the Complaint fails to plead gross negligence or bad faith based on the Board's referral of the Demand to the MCC for investigation. Defendants contend that Plaintiff alleges that because the MCC provides oversight in connection with markets-related matters, the MCC could not have investigated in good faith because "(a) this amounts to the MCC investigating its own (mis)conduct and/or (b) the MCC prejudged the allegations" in the Demand (*id.* at 14, *citing* Complaint at ¶¶ 32, 128-29). According to Defendants, Plaintiff may not assert this as a basis to challenge the Board's independence because Plaintiff elected to make a pre-suit demand on the Board thereby foreclosing her from later contending that the Board was interested, conflicted, or lacked independence (*id.*). Defendants further argue that Plaintiff also cannot challenge the independence of the MCC because the Board, which the Court must assume to not have been conflicted, was entitled to consult with whoever it saw fit in its business judgment to advise it on the merits of Plaintiff's claims (*id.*).

According to Defendants, Plaintiff fails to provide specific factual allegations supporting why the MCC's oversight of the Spoofing Resolutions would lead it to "prejudge" the Demand or otherwise act in bad faith (*id.* at 15). Defendants contend that accepting the allegations of the Complaint as true, through its work implementing the DPA with DOJ and related agreements, "the MCC gained familiarity with the complex issues underlying the Demand" but that "[t]he Board's decision to refer the investigation of allegations concerning issues about which the MCC was already familiar was not 'inexplicable' (Compl. ¶ 31), but entirely reasonable" (*id.*). Defendants contend that "Plaintiff's suggestion that a committee cannot investigate matters with which it has experience and expertise makes no sense and is inconsistent with Delaware law" (*id.*).

Defendants argue that Plaintiff's claim that the MCC was tasked with "investigating its own (mis)conduct" is similarly inadequate to meet the pleading requirement because "the Complaint does not allege any spoofing-related misconduct that the independent directors on the MCC were allegedly involved in, nor does the DPA identify any," and two of the four members of MCC were not even Board members until after the alleged spoofing took place and were not involved in the prior oversight role (*id.*). Defendants further point out that MCC had no role in overseeing the OCC Order (*id.*).

Defendants argue that "Plaintiff fails to plead any particularized facts showing that the Board's seven-month investigation was unreasonable, much less that it was grossly negligent or undertaken in bad faith—to the contrary, they claim, the Board's diligent investigation, advised by unassailably independent counsel, was exemplary and Courts have found substantially less robust investigations to be adequate under Delaware law" (*id.*). Defendants assert that Plaintiff seeks to challenge the Board's reliance on the MCC by pointing to two supposed inadequacies in the Board's investigation, but that neither inadequacy comes close to pleading gross negligence or bad faith (*id.*).

According to Defendants, relying on the allegations contained in the Complaint at paragraphs 34 and 131, the first alleged failure on which Plaintiff relies is the alleged cooperation failures early in the spoofing investigation (*id.*). Defendants contend that in these allegations, Plaintiff is referring to the CFTC's criticism that initially JPMorgan did not respond to CFTC's requests with sufficient speed or thoroughness and that JPMorgan's responses to regulators during the early investigation were not explicitly discussed in the Refusal (*id.* at 17). In response, Defendants argue that Plaintiff cannot establish any lack of independence, gross negligence or bad faith based on this omission because Plaintiff does not allege that any of the Individual Defendants were involved in any alleged cooperation failures (*id.*). Moreover, Defendant argues that Plaintiff ignores the fact that "[w]hile the CFTC complained about JPMorgan's initial responses, it later praised JPMorgan for the 'significant time and resources' provided to the CFTC 'later in the investigation'" (*id.*).

According to Defendants, it is well-settled that a refusal letter does not have to respond to each point raised in a demand letter and the burden is on Plaintiff to allege particularized facts showing gross negligence. Defendants further assert that Plaintiff's allegation that the MCC's investigation did not address the Company's cooperation with regulators is wrong because "[a]s the Refusal makes clear, the MCC's investigation included the review of, among other things, '[c]ommunications, presentations, analyses, and other materials created during and for the DOJ and other investigations that led to the Spoofing Resolutions' . . . [and] the investigation included interviews with JPMorgan's internal legal team and JPMorgan's outside counsel in the underlying investigations, who were knowledgeable about all dealings with regulators" (*id.* at 18, *quoting* Complaint, Exs. B at 3 and D at 2). It is Defendants' contention that Plaintiff points to no facts to suggest that the MCC failed to consider Plaintiff's contentions about the adequacy of cooperation with the CFTC or any other regulator (*id.* at 18).

In response to Plaintiffs' allegation that, although the MCC interviewed 27 witnesses, the investigation "should have, at a minimum, included interviews with knowledgeable representatives from the CFTC, the FBI, the DOJ, the US Attorney, the SEC, and/or the OCC" (*id.*, *quoting* Complaint at ¶ 134), Defendants argue that Plaintiff's assertion fails to support that the investigation was unreasonable or that there was gross negligence or bad faith because "Delaware courts have recognized that 'in any investigation, the choice of people to interview or documents to review is one on which reasonable minds may differ,' meaning that 'there will be potential witnesses, documents and other leads that the investigator will decide not to pursue'" (*id.* [citation omitted]). According to Defendants, "[c]ourt[s] repeatedly ha[v]e held that a stockholder's criticisms regarding the types of documents reviewed or the persons interviewed in connection with an investigation do not rise to the level of gross negligence" (*id.* at 18-19 [citation omitted]).

Defendants further argue that: (1) even if MCC requested the regulators to be interviewed, there is no reason to believe that regulators would have agreed to be interviewed; and (2) any such interviews would have been inconsequential because the regulators had no personal knowledge of the underlying conduct as they relied on information that JPMorgan provided (*i.e.*, "interviewing regulators could not have provided the MCC with any additional information that it would not

have already discovered from its review of ‘[c]ommunications, presentations, analyses, and other materials’ sent to regulators or its interviews of JPMorgan’s internal legal team and outside counsel”) (*id.* at 19). Defendants assert there is no case in which a New York or Delaware court concluded that a board’s investigation was inadequate because of a failure to interview government regulators (*id.*).

Defendants contend that at its essence, Plaintiff is claiming that the Board’s decision to refuse the Demand was incorrect, but that disagreement with the Board’s conclusion is insufficient to raise a reasonable doubt that the Board acted in good faith and on an informed basis (*id.*). According to Defendants, “the weakness of a potential *Caremark*<sup>6</sup> claim against the Individual Defendants was only one of several factors the Board here considered in refusing the Demand. Other factors included the difficulty of proving any such claim, the significant business disruption that bringing suit would cause, the substantial up-front cost of indemnifying Defendants, and the absence of any further remedial objectives that would be served by a lawsuit” (*id.* at 20). Defendants assert that the Complaint contains no allegations that cast doubt on these additional reasons which support “that the Board acted neither recklessly nor outside the bounds of reason when refusing the Demand” (*id.*).

Finally, Defendants contend that JPMorgan’s purported admissions of wrongdoing do nothing to establish that the Refusal was wrongful (*id.*). Defendants argue that the purported admissions on which Plaintiff relies relate to historical spoofing conduct by certain traders employed by two JPMorgan subsidiaries and none of the admissions relates to any of the Individual Defendants (*id.*). Defendants point out that “[n]othing in the Spoofing Resolutions suggests that any senior executive of JPMorgan or any member of the Board had any contemporaneous knowledge of any spoofing conduct” (*id.*). Instead, the MCC specifically found that based on the investigation conducted by outside counsel, there was no evidence linking the Individual Defendants to any wrongdoing (*id.* at 21, *citing* Complaint, Ex. B at 4-5). It is Defendants’ contention that there is no reason to doubt the Board’s good faith because the business judgment rule forecloses courts from second-guessing the merits of the Board’s ultimate conclusion (*id.*).

Defendants contend that the “Complaint’s only attempt to tie the Individual Defendants to any unlawful conduct is the generic assertion that ‘prior to 2014, certain of the defendants had failed to implement any system of internal controls to prevent illegal spoofing,’ and ‘even when a system of internal controls was belatedly implemented which would have detected this manipulation (purportedly in 2014), instances of illegal behavior were nonetheless ignored’” (*id.*, *quoting* Complaint at ¶ 11). They assert, however, that “the MCC investigated precisely this allegation and found that ‘evidence . . . established that throughout the [relevant] periods . . . the Company had established and was continuing to enhance compliance and reporting policies and procedures, as well as taking other remedial actions in response to concerns and issues identified internally or by regulators or enforcement authorities’” (*id.*, *quoting* Complaint, Ex. B at 5). Again,

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<sup>6</sup> *Matter of Caremark Intl. Inc. Deriv. Litig.*, 696 A2d 959 [Del Ch Ct 1996].

Defendants reiterate that Plaintiff's disagreement with that conclusion is insufficient to support gross negligence or bad faith (*id.*).

**B. Plaintiff's Contentions in Opposition to Defendants' Motion to Dismiss**

In opposition to Defendants' motion, Plaintiff submits a memorandum of law dated August 31, 2022 ("Plf's Opp. Mem.").

In her memorandum of law, Plaintiff argues that Defendants motion should be denied because Plaintiff's Complaint raises reason to doubt the independence, good, faith, and/or reasonableness of JPMorgan's Board in refusing Plaintiff's Demand under Delaware law (Plf's Opp. Mem. at 1).

Plaintiff first summarizes the Complaint and background of the litigation and recites the legal standard for demand refusal under Delaware law (Plf's Opp. Mem. at 1-11). Plaintiff asserts that, under Delaware law, shareholders must make a pre-suit demand on the board of directors and when making a demand, stockholders do not waive the right to claim that demand has been wrongfully refused (*id.* at 11). Instead, Plaintiff argues that "shareholders concede 'one – but only one – "arrow" in the "quiver" . . . the right to claim that demand is excused'" (*id.* [citation omitted]). Plaintiff refutes Defendants' contention that "a demand concedes independence 'conclusively and *in futuro* for all purposes relevant to the demand'" (*id.* [citation omitted]). Plaintiff contends that "[e]ven if a board appears independent *ex ante* when demand is made, 'it does not necessarily follow *ex post* that the board in fact acted independently, disinterestedly or with due care in response to the demand'" (*id.* [citation omitted]). Plaintiff argues that "[t]he '[f]ailure of an otherwise independent-appearing board or committee to act independently is a failure to carry out its fiduciary duties in good faith or to conduct a reasonable investigation', and such 'failure[] constitute[s] wrongful refusal'" (*id.* [citation omitted]).

According to Plaintiff, after demand is made, a board can decide whether to pursue litigation, resolve the grievance short of litigation, or reject the demand and if the board accepts the demand, it assumes control of derivative claims (*id.* at 12). Plaintiff contends that "in virtually every reported case," the board rejects the demand as purportedly not serving the best interests of the corporation (*id.*). Plaintiff asserts that if the shareholder nevertheless files a derivative suit, the shareholder must demonstrate the decision to reject the demand is not protected by the business judgment rule (*id.*).

Plaintiff concedes that "the business judgment rule creates the 'presumption that in making a business decision the directors of a corporation 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'" (*id.* [citation omitted]). Plaintiff states that "[a] demand refusal is presumptively protected unless facts are alleged supporting the inference that the board's investigation was unreasonable, or its decision-making process was not undertaken in good faith" (*id.*). Plaintiff argues that "[a] board 'must investigate and evaluate the charges in order to discharge its duty to the shareholders and manage corporate affairs responsibly'" (*id.* at 13 [citation omitted]). She claims that "[i]n the demand context, this means directors must inform themselves of *all material information reasonably available to them*" and that "[a]lthough there is 'no prescribed procedure that a board must follow'

. . . and ‘directors need not show that they performed a perfect investigation,’ . . . the process must be sufficient for the court to conclude confidently that it reflects an ‘earnest attempt to investigate a shareholder’s complaint’” (*id.* [citations omitted]). Plaintiff further asserts that “[t]his is especially the case when ‘it is the wrongfulness of certain conduct -- and not the factual issue of whether certain conduct took place -- that the board is investigating’” (*id.* [citation omitted]). Plaintiff contends that “[b]usiness judgment protection does not apply where ‘the investigation has been so restricted in scope, so shallow in execution, or otherwise so *pro forma* or half-hearted as to constitute a pretext or sham’” (*id.* [citation omitted]).

According to Plaintiff, “where a shareholder identifies witnesses who should have been interviewed but were not, the investigation may be deemed unreasonable” (*id.*). She claims that “[t]his can occur where the investigation omits interviews of regulators (or anyone outside the corporation) that could corroborate the shareholder’s allegations” (*id.* at 13-14). Plaintiff argues that “[s]uch concerns are significantly heightened in rare instances where the demand arises from **massive financial penalties for admitted lawbreaking**” (*id.* at 14). Plaintiff further argues that, “[c]onversely, a board’s willingness to interview potentially adverse witnesses suggests that its decision should not be second guessed” (*id.* [citation omitted]). Plaintiff asserts that “based on the unique record here -- where JPMorgan paid **\$1.17 billion** and admitted to regulators’ factual and legal findings, including **intentional violations of federal laws**, and where regulators criticized JPMorgan for **misleading them and/or otherwise failing to cooperate or be fully forthcoming** – the Board and MCC were duty-bound to inform themselves by interviewing the regulators” (*id.*). Plaintiff argues that, “[i]nstead, they avoided witnesses outside the ‘JPMorgan tent’ that might corroborate Plaintiff’s allegations . . . [and] [a]ccordingly, for this and other reasons discussed herein, the Refusal was wrongful and is not entitled to business judgment protection” (*id.*).

Second, Plaintiff refutes Defendants’ contention that by making Demand, Plaintiff has conceded a future investigation is reasonable or conducted in good faith (*id.* at 15). According to Plaintiff, the Delaware Supreme Court in *Scattered Corp. v Chicago Stock Exch., Inc.* (701 A2d 70 [Del 1997], *overruled in part on other grounds Brehm v Eisner*, 746 A2d 244 [Del 2000]) “long ago debunked this fallacy” (*id.*).

Third, Plaintiff contends that Defendants’ motion should be denied “because there is reason to doubt the MCC’s diligence and good faith, and that it adequately informed itself of material information” (*id.*). Plaintiff points out that “the MCC did not interview *any* regulators, even though: (a) JPMorgan **paid \$1.17 billion for admitted, intentional violations of federal law**; and (b) regulators charged that JPMorgan ‘**misled**’ them, failed to cooperate, and was not fully forthcoming” (*id.*). Plaintiff further asserts that “the MCC failed to interview any potentially dissenting voices outside JPMorgan” and that, “[u]nder these circumstances, there is reason to doubt the reasonableness of the MCC’s investigation and conclusions” (*id.*). According to Plaintiff, contrary to Defendants’ assertion that Plaintiff is making “unprecedented suggestion that a board’s investigation could or should include interviews of regulators involved in investigating and

regulating the corporation” (Defs’ Mem. at 18), there are at least two cases that support Plaintiff’s position (Plf’s Opp. Mem. at 16).<sup>7</sup>

Plaintiff claims that “Defendants try to justify the discrepancy between JPMorgan’s admitted, intentional lawbreaking and the Refusal’s conclusion of ‘no basis’ for breach of fiduciary duty claims against the Individual Defendants, by arguing that: (i) ‘[t]he spoofing-related resolutions contain not a single allegation of any failures of duty or misconduct by any Board members’ (Def. Br. at 4); (ii) ‘[n]one of [JPMorgan’s] factual “admissions” relate in any way to any of the Individual Defendants’ (Def. Br. at 6, 20); (iii) ‘the “admissions” Plaintiff cites relate to historical spoofing conduct by certain traders employed by two JPMorgan subsidiaries’; and (iv) ‘the Regulatory Resolutions contain [no] admissions tying senior management or the Board to any wrongdoing’ (Def. Br. at 22),” but that these arguments fail (Plf’s Opp. Mem. at 18).

Plaintiff points out that Defendants’ arguments fail to address the Individual Defendants’ breach of fiduciary duty for repeated false statements and internal controls related failures and that these same defenses were raised in *Microsoft* and rejected (*id.*) Plaintiff argues that the alleged “significant remedial measures” taken at JPMorgan are irrelevant for pleading purposes and do not excuse the failure to interview regulators based on *Google* and *Microsoft* (*id.*). Plaintiff further argues that Defendants’ reliance on *Sciabacucchi v Burns* (2016 WL 4074446 [SDNY July 29, 2016] [“*Xerox*”]) is misplaced because although the court found that the omission of regulator interviews did not support that the investigation was unreasonable, in *Xerox*, unlike *Google* or *Microsoft*, the investigation included interviews of individuals from outside of *Xerox* (*id.* at 19). Furthermore, Plaintiff points out that in *Xerox*, unlike JPMorgan here, *Xerox* “did not suffer any regulatory penalty” and never admitted any misconduct (*id.*). Plaintiff contends that *Xerox* demonstrates precisely why this Court should follow *Google* and *Microsoft* and deny Defendants’ motion (*id.* at 20).

Fourth, Plaintiff contends that her “allegations are even stronger than those in *Google* and *Microsoft* because those cases involved no allegations or admissions that regulators were ‘misled’ or that the companies failed to cooperate with regulators or otherwise were not forthcoming” (*id.*). According to Plaintiff, “JPMorgan ‘*misled*’ the CFTC and its ‘*cooperation with the Division of Enforcement during the early stages of its investigation was not satisfactory*’” (*id.*). Further, Plaintiff asserts that “JPMorgan did not ‘*fully and voluntarily self-disclose the offense conduct to the [DOJ]*’” and that, in *Google* and *Microsoft*, “the investigations were insufficient because they omitted interviews with regulators who investigated underlying, admitted misconduct,” which Plaintiff argues “is on another level entirely when a shareholder *also alleges dishonest or uncooperative corporate interactions with such regulators while under investigation*” (*id.* at 20-21). According to Plaintiff, Defendants’ motion admits the Refusal fails to address these allegations (*id.* at 21, *citing* Defs’ Mem. at 5]). Plaintiff argues that Defendants claim “[n]one of the criticisms of JPMorgan’s early cooperation with the CFTC concerns the Individual Defendants” but they fail to support it with evidentiary or factual support (*id.*, *quoting* Defs’ Mem.

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<sup>7</sup> *City of Orlando Police Pension Fund v Page*, 970 F Supp 2d 1022 (ND Cal 2013) (“*Google*”); *Barovic v Ballmer*, 72 F Supp 3d 1210 (WD Wash 2014) (“*Microsoft*”).

at 7]). Plaintiff contends that Defendants also argue that “‘Plaintiff points to no facts to suggest that the MCC failed to consider allegations about the adequacy of cooperation with the CFTC or any other regulator’” (*id.*, quoting Defs’ Mem. at 18), “but the MCC -- which was responsible for overseeing the very cooperation with government regulators . . . those regulators allege was lacking -- *never interviewed the regulators*” (*id.*).

Fifth, in support of her contention that there is reason to doubt the MCC’s and its’ counsel’s objectivity, Plaintiff asserts that the Board never should have referred the Demand to the MCC for evaluation in the first place (*id.*). In this regard, Plaintiff argues that “[t]he MCC provides oversight in connection with Consent Orders issued by, and agreements with, government regulators and oversight of government inquiries, as well as related conduct and controls” (*id.*). She contends that “[b]efore evaluating the Demand, the MCC oversaw ‘the Federal Reserve Consent Order and [DPA] entered into with the [DOJ] to resolve its precious metals and U.S. Treasuries investigations,’ and Defendants admit the MCC played an oversight role in all settlements underlying this Action except the OCC settlement” (*id.* at 21-22). As such, Plaintiff argues that “an investigation in response to the Demand necessarily involved matters concerning the MCC, at least in part, including allegations regarding JPMorgan misleading or failing to cooperate with regulators during their inquiries” (*id.* at 22). Plaintiff contends that “[b]y referring the Demand to the MCC, the Board did not even give an appearance of objectivity to the ‘investigation’ of allegations raised therein” (*id.*).

Plaintiff asserts that Defendants repeatedly tout White’s role in the MCC’s legal team, but when she served as SEC Chair, White recused herself from investigating JPMorgan based on her previous representation of JPMorgan while she was in private practice at Debevoise (*id.* at 22-23). Plaintiff argues that “[i]f Ms. White could not independently investigate matters implicating JPMorgan and its officers and directors while serving as a regulator, there is reason to doubt she could do so independently now” (*id.* at 23).

### ***C. Defendants’ Contentions in Further Support of their Motion***

In further support of their motion, Defendants submit a reply memorandum of law dated September 12, 2022 (“Defs’ Reply Mem.”).

In reply, Defendants again argue that the Complaint’s allegations fail to overcome the strong presumption of the business judgment rule. According to Defendants, “over the last decade, every New York court that has addressed a wrongful refusal claim under Delaware law has concluded that the plaintiff failed to meet this stringent pleading burden” (Defs’ Reply Mem. at 1).

First, Defendants repeat their argument that MCC’s decision not to interview regulators does not constitute gross negligence under Delaware law and point out that Plaintiff does not dispute this authority; instead, she argues that it does not apply here because JPMorgan publicly admitted wrongdoing and paid substantial penalties in the Spoofing Resolutions, but that Plaintiff fails to support her position with any authority from Delaware or New York and relies exclusively on *Google* (a decision out of California) and two other cases (also decided by non-Delaware courts)

that applied *Google's* reasoning: *Microsoft* and *Big Lots*<sup>8</sup> (*id.*). Defendants assert that Delaware courts have expressly rejected *Google* and have held that “[t]he existence and size of the settlement standing alone . . . does not raise an inference . . . that the Board failed to inform itself such that it breached its duty of care” (*id.* at 5 [citation omitted]).

Defendants further distinguish the pro forma investigations conducted in those cases as compared to the extensive investigation conducted in this case, including the MCC’s access to regulatory findings, materials produced to regulators, and interviews with internal and external counsel involved in dealings with regulators (*id.*). Defendants assert that, unlike *Google* and *Microsoft*, this case does not involve violations of regulatory agreements, but instead relates to trader conduct that was the subject of the Company’s own internal investigation (*id.* at 5-6).

Defendants repeat their argument that “unlike in *Google*, *Microsoft* or *Big Lots*, Plaintiff has not alleged any facts to suggest that any Individual Defendant knew about or was involved in any misconduct” and the “publicly admitted wrongdoing” in the Spoofing Resolutions does not involve any Individual Defendant and instead involved the spoofing conduct by former traders (*id.* at 6). Defendants assert that “in *Google*, *Microsoft* and *Big Lots*, unlike here, the plaintiffs identified with particularity information possessed by the regulator that could not otherwise be obtained” (*id.* at 6). In support, Defendants contend that nowhere in the Complaint does Plaintiff identify any material information that was uniquely within the possession of the regulators. Instead, Defendants argue that the regulators had no personal knowledge of the underlying conduct because they relied on information provided by JPMorgan (*id.* at 7). Defendants further assert that multiple courts have distinguished *Google* on precisely this ground (*id.*).

Second, in response to Plaintiff’s claim that the need for interviews with the regulators are even stronger here than in *Google* or *Microsoft* because the CFTC alleged certain cooperation failures by JPMorgan, which resulted in the CFTC being misled, Defendants contend that the Complaint contains no factual allegations supporting that any Individual Defendant played any role in these cooperation failures and that contrary to Plaintiff’s contention, it is not their burden to provide evidentiary support that the Individual Defendants had no involvement (*id.*).

In response to Plaintiff’s argument that because of alleged cooperation failures early in the CFTC’s investigation,<sup>9</sup> the Board could not rely on interviews of JPMorgan witnesses and counsel because those witnesses were somehow tainted by their purported failure to cooperate, Defendants argue that cooperation failures by unidentified individuals do not show that the Board could not independently evaluate the Demand (*id.* at 9). Defendants further argue that Plaintiff fails to allege any facts to support that regulators are the only individuals capable of “corroborat[ing]” Plaintiff’s allegations (*id.*). According to Defendants, without these particularized allegations, Plaintiff fails to plead wrongful refusal based on the MCC’s decision not to interview regulators (*id.*).

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<sup>8</sup> *Brosz v Fishman*, 2016 WL 7494883 (SD Ohio 2016) (“*Big Lots*”).

<sup>9</sup> Defendants again point out that CFTC Order noted that, “[a]lthough JPM’s cooperation was not satisfactory during the earlier stages of the [CFTC’s] investigation,” “JPM’s cooperation later in the investigation was significant and allowed the Division to conserve resources and expedite its investigation” (Defs’ Reply Mem. at 9).

Defendants repeat their argument that the Board was not required in the Refusal letter to address that the CFTC was allegedly “misled” by purported cooperation failures and that Plaintiff concedes this in her opposition (*id.* at 10).

Third, Defendants repeat their contention that Plaintiff alleges no facts showing that the Board was grossly negligent or acted in bad faith in referring the Demand to the MCC (*id.* at 10). In response to Plaintiff’s argument that the Board should have never referred the matter to the MCC because the MCC played an oversight role in all settlements underlying this Action except the OCC settlement, Defendants assert that Plaintiff cannot attack the independence or objectivity of the Board because Plaintiff elected to make a pre-suit demand and effectively conceded that it had “the requisite independence and disinterest to evaluate the demand objectively” (*id.* [citation omitted]). In response to Plaintiff’s argument that the making of a demand does not concede independence in futuro for all purposes relevant to the demand, and that the failure of an otherwise independent-appearing board or committee to act independently could constitute wrongful refusal, Defendants contend that this is irrelevant here because Plaintiff fails to allege any facts to suggest that the Board failed to act independently or in good faith (*id.* at 10-11).

Defendants also contend that Plaintiff’s attack on the MCC overlooks that the Board did not delegate authority for the Demand to the MCC; the Board merely tasked the MCC with the responsibility to investigate and report to the Board (*id.* at 11). In response to Plaintiff’s argument that the Board’s referral to the MCC failed to “even give an appearance of objectivity” because the Demand included allegations regarding JPMorgan misleading or failing to cooperate with regulators during their inquiries, Defendants point out that this is irrelevant because the Complaint does not contain any allegations that the MCC played any role in the alleged early cooperation failures or the alleged misleading of the CFTC (*id.*). Defendants also contend that Plaintiff’s argument over the lack of objectivity of the MCC overlooks that two of the four members of the MCC were not even Board members until after the alleged spoofing conduct took place and were not involved in any prior oversight role (*id.* at 11-12). Defendants further argue that, even after Plaintiff was notified by letter in May 2021 (Ex. 7) that the Board had referred the investigation to the MCC, Plaintiff raised no objection, despite the fact that the MCC’s purported “oversight role” with respect to the spoofing investigations was already public knowledge (*id.* at 12).

Fourth, Defendants assert that Plaintiff has not alleged the MCC’s gross negligence or bad faith in retaining White as independent counsel (*id.*). Defendants point out that Plaintiff’s assertions concerning the lack of independence of White is not contained in Plaintiff’s Complaint; instead, it is raised for the first time in Plaintiff’s opposition and that the Court should simply reject this new contention (*id.* at 11-12). Alternatively, Defendants assert that Plaintiff’s attack fails on its merits. They point out that White recused herself as a regulator from an investigation against JPMorgan in 2013 pursuant to an executive order that prohibited executive appointees from participating for two years after appointment in matters involving former clients. As such, Defendants argue that it has nothing to do with her ability to represent the MCC free of any conflicts of interest in 2021, eight years later (*id.* at 13). Finally, they distinguish the case on which Plaintiff relies, *Klein v FPL Group, Inc.* (2004 WL 484372 [SD Fla 2004], *amended and superseded* 2004 WL 302292 [SD Fla 2004]) since in that case, the board’s evaluation committee

retained counsel that was also representing the board in the derivative litigation and had drafted language in the long-term incentive plans that was at issue in the litigation (*id.*).

### STANDARD OF REVIEW

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence, the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582 [2005]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Held v Kaufman*, 91 NY2d 425 [1998]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]; *Cohen v Nassau Educators Fed. Credit Union*, 37 AD3d 751 [2d Dept 2007]; *Sheridan v Town of Orangetown*, 21 AD3d 365 [2d Dept 2005]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *Museum Trading Co. v Bantry*, 281 AD2d 524 [2d Dept 2001]; *Jaslow v Pep Boys-Manny, Moe & Jack*, 279 AD2d 611 [2d Dept 2001]; *Brunot v Joe Eisenberger & Co.*, 266 AD2d 421 [2d Dept 1999]). To qualify as "documentary," the evidence relied upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Letters, affidavits, notes, and deposition transcripts are generally not documentary evidence (*Fontanetta*, 73 AD3d at 84-86).

If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*Snyder v Voris, Martini & Moore, LLC*, 52 AD3d 811 [2d Dept 2008]; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530 [2d Dept 2007]).

Regarding Defendants' motion made pursuant to CPLR 3211(a)(3), "[o]n a defendant's motion to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" (*New York Community Bank v McClendon*, 138 AD3d 805, 806 [2d Dept 2016]). "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*id.*, quoting *Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59 [2d Dept 2015]).

The legal standards to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well-settled. "In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action" (*Cooper v 620 Props. Assoc.*, 242 AD2d 359, 360 [2d Dept 1997]). "If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail" (*Cooper*, 242 AD2d at 360; *511 W. 232nd Owners Corp.*, 98 NY2d 144). The court's function is to "accept . . . each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts" (*Cooper*, 242 AD2d at 360, quoting *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 W. 232nd Owners Corp.*, 98 NY2d at 152).

Where the plaintiff submits evidentiary material, the court must determine whether a cause of action exists, rather than whether one has been stated (*Leon*, 84 NY2d 83; *Simmons v Edelstein*, 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern*, 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]). “On the other hand, a plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint” (*Martin v Restaurant Assoc. Events Corp.*, 35 Misc 3d 215, 221 [Sup Ct, Westchester County 2013], *affd* 106 AD3d 785 [2d Dept 2013]; *Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]).

Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined to determine whether there is evidentiary support for the pleading (*Rovello*, 40 NY2d 633; *Pace v Perk*, 81 AD2d 444 [2d Dept 1981]; *Kempf*, 37 AD3d 763; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action (*Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.*, 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.*, 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis*, 95 AD2d 822 [2d Dept 1983]).

## DISCUSSION

### ***1. Delaware's Legal Standard for Pleading Wrongful Demand Refusal***

As a threshold matter, the parties all agree that the adequacy of a complaint alleging wrongful refusal of a shareholder demand is determined under Delaware law, JPMorgan's state of incorporation (*Glaubach v Slifkin*, 171 AD3d 1019 [2d Dept 2019], *lv dismissed* 34 NY3d 1138 [2020]; *see also Espinoza v Dimon*, 807 F3d 502 [2d Cir 2015]).

Delaware has a strong presumption in favor of the business judgment rule. A cardinal precept of Delaware's General Corporation Law is that directors, rather than shareholders, manage the business and affairs of the corporation (*Aronson v Lewis*, 473 A2d 805, 811 [Del 1984], *overruled in part on other grounds Brehm v Eisner*, 746 A2d 244 [Del 2000]).<sup>10</sup> “The decision to bring litigation on behalf of a corporation is a quintessential exercise of business judgment, involving as it does a complex array of costs (both monetary and otherwise), potential benefits, and the risk of uncertain outcomes” (*Ironworkers Dist. Council of Phila. & Vic. Retirement & Pension Plan v Andreotti*, 2015 WL 2270673 at \*25 [Del Ch Ct 2015], *affd* 132 A3d 748 [Del 2016] [“the decision to pursue litigation on behalf of the entity is entrusted to the directors, who must approach that decision in light of their fiduciary duties. Only where the directors will not or

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<sup>10</sup> *Brehm v Eisner* (746 A2d 244 [Del 2000]) overruled several prior cases by holding that the appellate review on a motion to dismiss a shareholder derivative suit for failing to allege with particularity the efforts to obtain action from directors is de novo and plenary rather than deferential.

cannot act in a manner consistent with those duties, may stockholders pursue such litigation derivatively, on behalf of the corporation”] [*Ironworkers*”).

It is well-settled that a stockholder may not maintain a derivative action without first making a demand on the board or pleading that it would be futile to do so (*Rales v Blasband*, 634 A2d 927 [Del 1993]). “By making a demand, a stockholder tacitly acknowledges the absence of facts to support a finding of futility . . . thus, when a demand is made, the question of whether demand was excused is moot” (*Spiegel v Buntrock*, 571 A2d 767, 775 [Del 1990]). “Since a conscious decision by a board of directors to refrain from acting may be a valid exercise of business judgment, ‘where demand on a board has been made and refused, [courts] apply the business judgment rule in reviewing the board’s refusal to act pursuant to a stockholder’s demand’ to file a lawsuit” (*id.* at 774-75; quoting *Aronson*, 473 A2d at 812; *Rales*, 634 A2d at 933 [“Because such derivative suits challenge the propriety of decisions made by directors pursuant to their managerial authority, we have repeatedly held that the stockholder plaintiffs must overcome the powerful presumptions of the business judgment rule before they will be permitted to pursue the derivative claim”]).

“Whenever any action or inaction by a board of directors is subject to review according to the traditional business judgment rule,” the court must consider the board’s independence, the reasonableness of its investigation and its good faith (*Spiegel*, 571 A2d at 777). “By electing to make a demand, a shareholder plaintiff tacitly concedes the independence of a majority of the board to respond.” (*id.*). “Therefore, when a board refuses a demand, the only issues to be examined are the good faith and reasonableness of its investigation” (*id.*; *Ironworkers*, 2015 WL 2270673 [Where a shareholder makes a demand on the board to consider or bring legal action, the shareholder has necessarily conceded that, at least at the motion to dismiss stage of the pleadings, he cannot allege facts showing that the board is disqualified from the decision by self-interest or lack of independence]).

“The burden is on the party challenging the decision to establish facts rebutting th[is] presumption . . . Thus, the business judgment rule operates as a judicial acknowledgement of a board of directors’ managerial prerogatives” (*Spiegel*, 571 A2d at 774; *Ironworkers*, 2015 WL 2270673 at \* 25[“The burden is on the derivative plaintiff in that case to refute the presumption of a valid exercise of business judgment on the part of the board”]; see also *Espinoza*, 807 F3d at 505 [“[O]ur review of a wrongful refusal suit starts from the premise that the decision to initiate a lawsuit is an internal corporate matter within the board’s discretion. Any plaintiff attempting to bring a derivative suit therefore bears the ‘difficult’ burden to plead facts sufficient to rebut the strong presumption that the board’s decision not to take action was a valid exercise of its business judgment”]).

As the court held in *Ironworkers*:

In order to survive a motion to dismiss . . . in the demand-refused context, a plaintiff must point to a pleading of particularized facts which, taken as true, raise a reasonable doubt that the refusal was a valid exercise of business judgment. Where the plaintiff has made a demand, and thus conceded that he has no basis to contest

the independence of a majority of the board, the only issue subject to challenge is the good faith and reasonableness of the board's investigation of its demand. Where a plaintiff has pled particularized facts which, taken as true, create a reasonable doubt that the board's investigation complied with its duty of loyalty—that is, was undertaken in good faith—or with its duty of care—that is, was not grossly negligent—he has rebutted the business judgment rule with respect to the board's refusal of his demand, and may proceed with the litigation; otherwise . . . the derivative litigation must be dismissed (*Ironworkers*, 2015 WL 2270673 at \*25).

“Stated otherwise, to survive a motion to dismiss . . . where demand has been made and refused, a plaintiff must allege particularized facts that raise a reasonable doubt that (1) the board's decision to deny the demand was consistent with its duty of care to act on an informed basis, that is, was not grossly negligent; or (2) the board acted in good faith, consistent with its duty of loyalty. Otherwise, the decision of the board is entitled to deference as a valid exercise of its business judgment” (*id.*; *Friedman v Maffei*, 2016 WL 1555331 [Del Ch Ct 2016]).

Regarding the plaintiff's pleading burden, the “pertinent ‘reason to doubt’ is *not* doubt about the propriety of the underlying conduct, nor is it doubt about whether the Board, in rejecting the demand, made a wise decision; it is doubt whether the Board's action, wise or foolish, *was taken in good faith and absent gross negligence*” (*Zucker v Hassell*, 2016 WL 7011351 at \*7 [Del Ch Ct 2016], *aff'd* 165 A3d 288 [Del 2017], *quoting Ironworkers*, 2015 WL 2270673 at \* 26). “[M]ere disagreement with the Committee's ultimate conclusion, as well as its subsidiary conclusions leading thereto, will be insufficient to raise a reasonable doubt that the Board acted in good faith and on an informed basis” (*Ironworkers*, 2015 WL 2270673 at \*27; *see also Reese v Andreotti*, 57 Misc 3d 1210[A], 2017 NY Slip Op 51373[U] [Sup Ct, NY County 2017]).

“The gross negligence inquiry focuses on whether the board properly informed itself of material information reasonably available to it before refusing the demand” (*Andersen v Mattel, Inc.*, 2017 WL 218913 at \*4 [Del Ch Ct 2017]). “A grossly negligent investigation is one where the board did not investigate at all or pursued ‘such an inadequate investigation, in light of the seriousness of the demand, that a court may reasonably infer a breach of the duty of care’” (*id.*, *quoting Ironworkers*, 2015 WL 2270673 at \*26; *Zucker*, 2016 WL 7011351 at \*7 [defining “gross negligence” as “conduct that constitutes *reckless indifference* or actions that are without the bounds of reason”]). With respect to bad faith, “[d]emonstrating that directors have breached their duty of loyalty by acting in bad faith goes far beyond showing a questionable or debatable decision on their part” (*Andersen*, 2017 WL 218913 at \*5, *quoting Ironworkers*, 2015 WL 2270673 at \*27). “To show bad faith, [Plaintiff] must plead with particularity that the Board ‘intentionally act[ed] in disregard of the Company's best interest in deciding not to pursue the litigation the Plaintiff demanded’” (*Busch v Richardson*, 2018 WL 5970776 at \*9 [Del Ch Ct 2018], *quoting Friedman*, 2016 WL 1555331 \*12).

“The pleading burden imposed by this standard is a heavy one” (*Ironworkers*, 2015 WL 2270673 at \*24). Moreover, as Defendants point out, numerous New York courts addressing a wrongful refusal claim have concluded that the plaintiffs have failed to meet this pleading burden (*see Defs' Mem.* at 1 n 2).

**2. The Allegations in the Complaint Do Not Permit a Reasonable Inference that the Board's Decision was Grossly Negligent or Made in Bad Faith and the Board's Refusal of Plaintiff's Demand is Protected by the Business Judgment Rule**

**a. Plaintiff Alleges No Facts Showing that the Board was Grossly Negligent or Acted in Bad Faith in Referring the Demand to the MCC for Investigation**

Plaintiff argues that “[a]s is clear from the Complaint, Plaintiff’s central theory of why demand was wrongfully refused is rooted in MCC’s failure to interview the regulators who investigated JPMorgan’s spoofing scheme” (Plf’s Opp. at 2; see Complaint at ¶¶ 32, 128-29). Plaintiff contends that the MCC’s purported failure to interview regulators was “entirely predictable” because “the Board never should have referred the Demand to the MCC for evaluation in the first place” because it lacked “objectivity” given its oversight role in all settlements underlying this action other than the OCC settlement (Plf’s Opp. at 21-22). This allegation, however, is insufficient to plead gross negligence or bad faith.

As set forth above, because Plaintiff made a pre-suit demand upon the Board, any argument that the Board was interested, conflicted, or otherwise lacked independence is foreclosed (*Friedman*, 2016 WL 1555331 at \*8 [“[A] plaintiff who makes demand on the board concedes that the board had the requisite independence and disinterest to evaluate the demand objectively”]; *Spiegel*, 571 A2d 774). The Board, which the Court must assume to not have been conflicted, was entitled to consult with whoever it saw fit, in its business judgment, to advise it on the merits of Plaintiff’s claim (*Bresalier v Good*, 246 F Supp 3d 1044, 1054 [D Del 2017] [“T]here is no ‘prescribed procedure that a board must follow’ in forming a review committee and responding to a demand, and the Board’s decisions with respect to the Committee’s composition and to not appoint a special litigation committee are presumptively valid”]; *Reese*, 57 Misc 3d 1210[A]).

Although Plaintiff asserts that the “failure of an otherwise independent-appearing board or committee to act independently” could constitute wrongful refusal (Plf’s Opp. at 11, 15), Plaintiff fails to allege any facts to suggest that the Board failed to act independently or in good faith. Plaintiff also does not dispute that two of the four MCC members were not Board members until after the alleged spoofing took place and were not involved in any prior oversight role.<sup>11</sup> The Board

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<sup>11</sup> Plaintiff also argues that the MCC’s retention of White as independent outside counsel in reviewing the Demand creates reason to doubt the MCC’s independence because she recused herself from working on JPMorgan matters while she was the SEC’s Chair due to her past representation of JPMorgan in private practice (Plf’s Opp. at 22-23). As these allegations do not appear anywhere in Plaintiff’s Complaint and are raised for the first time in Plaintiff’s opposition brief, the Court rejects this contention because a “claim for relief may not be amended by the briefs in opposition to a motion to dismiss” (*Zutty v Rye Select Broad Mkt. Prime Fund, L.P.*, 33 Misc 3d 1226[A], 2011 NY Slip Op 52121[U] at \* 15 [Sup Ct, NY County 2011], quoting *Rubin v Nine W. Group*, 1999 WL 1425364 at \*4 [Sup Ct., Westchester County 1999]; *MediaXposure Ltd. (Cayman) v Omnireliant Holdings, Inc.*, 29 Misc 3d 1215[A], 2010 NY Slip Op 51835[U] [Sup Ct, NY County 2010]). In any event, Plaintiff has failed to identify any specific work White has done for JPMorgan since recusing herself in 2013 and cites no case law or rules of professional conduct on which to base any claim of conflict of interest impairing her independence in this case.

chose to refer it to the MCC to make a recommendation to the full Board. Based on the foregoing, the Board's decision about how to investigate the Demand is therefore a judgment within the Board's discretion.

*b. Plaintiff Fails to Plead that the MCC's Decision Not to Interview Regulators Was Grossly Negligent or Made in Bad Faith*

Regarding the conduct of MCC's investigation, Plaintiff argues "there is reason to doubt MCC's diligence and good faith, and that it adequately informed itself of material information" based on MCC's failure to interview any regulators "even though: (a) JPMorgan paid \$1.17 billion for admitted, intentional violations of federal law; and (b) regulators charged that JPMorgan 'misled' them, failed to cooperate, and was not fully forthcoming" (Plf's Opp. at 15).

However, Delaware courts have "repeatedly . . . held that a stockholder's criticisms regarding the types of documents reviewed or the persons interviewed in connection with an investigation do not rise to the level of gross negligence, because those choices are ones on which reasonable minds may differ" (*Belendiuk v Carrión*, 2014 WL 3589500 at \*6 [Del Ch Ct 2014]; *Gatz v Ponsoldt*, 2004 WL 3029868 [Del Ch Ct 2004]). These choices regarding which documents or interview subjects are appropriate to an investigative process are a matter of business judgment and, generally, "cavils about the types of documents reviewed, or the choice of persons to be interviewed, in an investigation will not support a finding of gross negligence" (*Zucker*, 2016 WL 7011351 at \*9). "Inevitably, there will be potential witnesses, documents and other leads that the investigator will decide not to pursue" (*Mount Moriah Cemetery v Moritz*, 1991 WL 50149 at \*4 [Del Ch Ct 1991], *affd* 599 A2d 413 [Del 1991] [holding, where the challenged conduct covered a period of more than ten years, choice of people to interview and documents to review would not be second guessed by the court]).

Here, the MCC oversaw an investigation conducted by independent counsel that involved months of work, the review of tens of thousands of documents, and interviews with 27 individuals (Complaint Ex. B [Demand]; Ex. D [list of interviewed witnesses]). Delaware courts have held interviews of far fewer people to be not unreasonable or in bad faith (*see, e.g., Gatz*, 2004 WL 3029868 at \*3 [not unreasonable or in bad faith to interview only two people]). Moreover, in its Demand Refusal Letter, the Board expressly and in detail set forth the evidence it considered, as well as the legal and factual rationale for its Demand Refusal based on this evidence (Complaint, Ex. B).

In her opposition brief, Plaintiff does not dispute the facts of the investigation, or the line of authority discussed above. Instead, Plaintiff relies on three cases, none of which was decided by Delaware or New York courts and is based on a line of reasoning Delaware courts have expressly rejected. In support of her contention that it was unreasonable for the MCC to have failed to interview regulators, Plaintiff cites to *Google* and two other cases that followed *Google's* reasoning (*Microsoft* and *Big Lots*) to argue that these cases "mandate" that the Board's investigation include interviews of regulators involved in investigating and regulating the corporation (Plf's Opp. Mem. at 15-19).

First, the Court notes that Delaware courts have explicitly declined to follow *Google's* holding in a demand refusal context (*see Zucker*, 2016 WL 7011351 at \*8 n100 [“This Court has already declined to follow [*Google*] in a demand-refused context”]; *Ironworkers*, 2015 WL 2270673 at \*28 [rejecting *Google* and noting that the board’s decision not to sue following a sanctions order and a \$1.2 billion jury verdict against the company was “not so clearly erroneous as to raise a reasonable doubt” about the board’s refusal]).

Second, in *Google*, as well as in *Microsoft* and *Big Lots*<sup>12</sup> relying on *Google*, the failure to interview regulators was only one of multiple reasons on which the courts relied in finding the investigations insufficient. The court in *Google* cited a number of factors in its determination that the plaintiff met its burden to raise a reasonable doubt that the investigation of its demand was conducted reasonably and in good faith, in addition to the fact that one DOJ investigator was not interviewed. Importantly, the *Google* court explicitly noted that the demand refusal letter “merely recites the conclusion that refusal was proper without explaining how the committee reached that conclusion” (*Google*, 970 F Supp 2d at 1031). Here, after summarizing the evidence relied upon in the MCC’s review, the Demand Refusal Letter expressly recites in detail the rationale underlying the MCC’s determination, including that there was no factual or legal basis to assert *Caremark* claims against current or former outside directors, or breach of fiduciary duty claims against management directors or current or former members of management, based on either the fiduciary or conflict of interest issues underlying the OCC Consent Order or the spoofing and market conduct practices at issue in the Spoofing Resolutions. The Demand Refusal Letter then summarizes in detail the factors taken into account by the Board in refusing the Demand including, inter alia: (1) the difficulty of establishing the demanded causes of action; (2) the potential negative consequence that pursuing such litigation could have on JPMorgan’s business; (3) the fact that litigation against current or former directors and officers would likely require significant advancement and (given the low probability of success) indemnification for defense costs; and (4) the absence of any further remedial objectives that litigation against current or former officers and directors would achieve given that the OCC and DOJ resolutions both recognized that the Company has appropriately remediated the identified weaknesses and/or enhanced relevant compliance functions (Complaint, Ex. B). A reasonable board of directors is well within its rights to consider factors such as the financial and reputational costs necessarily incurred by filing suit when it concludes that not pursuing litigation is in the best interests of the company (*Reese*, 57 Misc 3d 1210[A]).

Similarly, in *Microsoft*, the claim there related to the violation of a regulatory settlement, which was the subject of the regulator’s external investigation. The court stated that “far more relevant” than the fact that the investigation consisted solely of interviewing the company’s own employees, directors, and executives was the fact that Microsoft was under a duty to self-monitor its compliance with the terms of the settlement (*Microsoft*, 72 F Supp 3d at 1215). And in *Big Lots*, as in *Google*, the court’s primary concern with the investigation was that “the Board offered only the conclusory statement that this conduct did not breach any fiduciary duties owed to the Company” and stated that the “Board’s failure to interview anyone outside the Company only compounds this concern” (*Big Lots*, 2016 WL 7494883 at \*5-6).

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<sup>12</sup> *Big Lots* is also unpersuasive because it was decided under Ohio law.

Third, *Google* makes clear that it is Plaintiff's "burden to show that the un-interviewed [regulators] 'had knowledge that was unique and unobtainable without those interviews . . .'" (*Google*, 970 F Supp 2d at 1032, quoting *Copeland v Lane*, 2012 WL 4845636 at \*8 [ND Cal 2012]). Plaintiff has not alleged any facts that would be uniquely in the possession of the regulators and unobtainable; here, the regulators had no personal knowledge of the underlying conduct and instead relied on information that JPMorgan provided and, therefore, regulator interviews would not have provided any information not already captured by the MCC's review, which included regulatory materials, and interviews with current and former JPMorgan executives and internal and external counsel involved in dealing with regulators (Complaint Exs. B, D; see *Levine v Damico*, 2016 NY Slip Op. 30784[U] at \*7-8 [Sup Ct, NY County 2016] [reliance on *Google* and *Microsoft* found to be "misplaced because they are neither binding nor relevant" where "Plaintiff fails to allege with particularity what information the FDIC could have provided to the Special Committee that Intralinks did not already possess" and, accordingly, "the fact that the Special Committee did not interview FDIC employees does not demonstrate that the investigation was unreasonable, let alone grossly negligent"]; *Ironworkers*, 2015 WL 2270673 [plaintiff's conclusory claim that committee's failure to interview current and former DuPont CEOs was grossly negligent was inadequate where plaintiff did not disclose how information unique to these individuals would have changed Board's determination to refuse the demand]).

In Plaintiff's October 24, 2022 letter submitted after the motion was fully submitted, Plaintiff cites to *Turnbull v JPMorgan Chase & Co.* (2022 WL 608708 [SD NY 2022]) as additional support for her argument. However, the case is inapposite because the court in that case simply denied JPMorgan's motion to dismiss a claim of wrongful termination based on inter alia, violations of the whistle blowing laws and is irrelevant to the issue of whether the Board's rejection of Plaintiff's Demand was done in bad faith or with gross negligence. The Court further does not credit Plaintiff's claim that the MCC's failure to interview the plaintiff in the *Turnbull* action supports the Board's bad faith or gross negligence. Again, "choices regarding which documents or interview subjects are appropriate to an investigative process are a matter of business judgment" (*Zucker*, 2016 WL 7011351 at \*9).<sup>13</sup> In any event, JPMorgan conducted extensive interviews with Turnbull, albeit prior to the MCC undertaking its investigation.

Under settled Delaware law, a plaintiff cannot plead wrongful refusal simply by pointing to additional individuals that the Board could have interviewed but chose not to (*Reese*, 57 Misc 3d 1210[A] at \*5 ["Here, at best, plaintiff has identified further steps that Morris Nichols could have taken in its investigation. These alleged inadequacies (*e.g.*, that additional witnesses should

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<sup>13</sup> Regarding Plaintiff's request that she be permitted to amend her Complaint to add allegations related to the *Turnball* action (*i.e.*, that the MCC should have interviewed Turnbull during its investigation), for the reasons stated herein, such allegations would do nothing to rectify the deficiencies in Plaintiff's Complaint. Further, although the court's decision denying JPMorgan's motion to dismiss in *Turnball* did not occur prior to the motion in this case being fully submitted, all of the allegations in the *Turnball* action were a matter of public record prior to Plaintiff's filing of her Complaint in this action.

have been interviewed), even assuming them to have merit, merely raise the possibility that Morris Nichols conducted a negligent investigation. That is not enough”).<sup>14</sup>

*c. Plaintiff Fails to Plead that the MCC Ignored Allegations that Regulators Were Misled*

Further relying on *Google* and *Microsoft*, which again are not controlling precedent and which Delaware courts have declined to follow, Plaintiff argues that her allegations regarding interviews of regulators are “even stronger” in this case because, during the early stages of the spoofing investigation, the CFTC alleged certain cooperation failures by JPMorgan that resulted in the CFTC being misled (Plf’s Opp. Mem. at 20-21). However, the Complaint contains no factual allegations suggesting that any Individual Defendant played any role in the cooperation failure identified by the CFTC, ignores the fact that it is Plaintiff’s burden to allege particularized facts in demonstrating that the Demand was wrongfully refused, and essentially repeats in a conclusory fashion her criticism of the MCC for failing to interview the regulators.

As set forth above, under Delaware law, choices regarding which interview subjects are appropriate to an investigative process are a matter of business judgment. Moreover, Plaintiff has failed to specify which alleged cooperation failures are attributed to which Individual Defendant and how those cooperation failures prevented the Board from independently evaluating the Demand. Additionally, as a factual matter, the CFTC Order noted that “[a]lthough JPM’s cooperation was not satisfactory during the earlier stages of the [CFTC’s] investigation,” “JPM’s cooperation later in the investigation was significant and allowed the Division to conserve resources and expedite its investigation” (Palmer Aff. Ex. 5 at 7). Also as set forth above, Plaintiff fails to allege any facts to suggest that regulators are the only individuals capable of corroborating Plaintiff’s allegations. In the absence of such particularized allegations, Plaintiff fails to plead wrongful refusal based on the MCC’s decision not to interview regulators.

Regarding Plaintiff’s argument that the MCC ignored allegations that the CFTC was misled by cooperation failures because the Demand Refusal Letter did not explicitly address the topic, a Demand Refusal Letter need not include a point-by-point response to each of the claims raised in the Demand and mere silence on the topic does not show that the MCC failed to investigate it (*Espinoza*, 807 F3d 502; *Baron v Siff*, 1997 WL 666973 at \*3 [Del Ch Ct 1997] [“There is no prescribed procedure that a Board must follow when investigating a demand . . . The refusal letter’s failure to state that the Board held a meeting and failure to contain a point-by-point response to all allegations in the demand letter does not stand for the proposition that the Board did not consider the demand before refusing it.”]).

Finally, even if the Court were to conclude that reasonable minds could disagree with the Board’s conclusion, disagreement about such questions of business judgment requires deference

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<sup>14</sup> To the extent that Plaintiff argues Defendants are engaging in “unsupported speculation” when they contend that interviews with regulators that “could not have provided the MCC with any additional information that it would not have otherwise discovered,” (Plf’s Opp. at 16 n 14), as set forth above, it is Plaintiff’s burden to alleged particularized facts demonstrating that the Demand was wrongfully refused, which she has failed to do.

to the Board. Neither Plaintiff nor the Court is permitted to second-guess the Board's decision. Plaintiff has not proffered any basis for the Court to conclude that, under these circumstances, no reasonable board would forgo the opportunity to file suit or that the Board's decision to do so was grossly negligent or made in bad faith. Because Plaintiff cannot state a claim for wrongful refusal, her Complaint must be dismissed.

### CONCLUSION

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Nominal Defendant JPMorgan Chase & Co. and Individual Defendants Ashley Bacon, James Dimon, Mary Callahan Erdoes, Carlos Hernandez, Daniel E. Pinto, Gordon A. Smith, Troy Rohrbaugh, Linda B. Bammann, James A. Bell, James S. Crown, Stephen P. Burke, Todd A. Combs, Timothy P. Flynn, Mellody Hobson, Michael A. Neal, Lee R. Raymond, and Virginia M. Rometty to dismiss the Verified Shareholder Derivative Complaint of Plaintiff Iren Elghanian-Halperin derivatively on behalf of JPMorgan Chase & Co. is granted; and it is further ordered that

ORDERED that each of the Causes of Action in the Verified Shareholder Derivative Complaint shall be and hereby are dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
December 23 2022

E N T E R:



Hon. Gretchen Walsh  
Justice of the Supreme Court

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