SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CARMEN RIBBE, derivatively on behalf of XEROX CORPORATION, Plaintiff, v. JEFFREY JACOBSON, GREGORY Q. BROWN, JOSEPH J. ECHEVARRIA, WILLIAM CURT HUNTER, ROBERT J. KEEGAN, CHERYL GORDON KRONGARD, CHARLES PRINCE, ANN N. REESE, STEPHEN H. RUSCKOWSKI, SARA MARTINEZ TUCKER, KEITH COZZA, GIOVANNI G. VISENTIN, JONATHAN CHRISTODORO, NICHOLAS GRAZIANO, A. SCOTT LETIER, CARL C. ICAHN, ICAHN CAPITAL LP, and HIGH RIVER LIMITED PARTNERSHIP, Defendants, and XEROX CORPORATION, Nominal Defendant.	Index No. 652147/2019 Hon. Barry R. Ostrager, J.S.C. Part 61 Mot. Seq. No. 006

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO NOMINAL DEFENDANT XEROX CORPORATION'S MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR JOINDER AND LEAVE TO REARGUE AND RENEW

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Plaintiff Carmen Ribbe ("**Plaintiff**") respectfully submits this Memorandum of Law in opposition to the motion by nominal defendant Xerox Corporation ("**Xerox**" or the "**Company**") to dismiss the First Amended Derivative and Class Action Stockholder Complaint (NYSCEF Doc. No. 53, the "**Amended Complaint**"), and in support of his cross-motion for (i) joinder of Xerox Holdings Corp. ("**Xerox Holdings**") as a nominal defendant, and (ii) leave to reargue and renew the Court's Discovery Order dated February 27, 2020 (the "**Discovery Order**").[1]

PRELIMINARY STATEMENT

The fundamental question raised by Xerox is whether Plaintiff has standing to bring this action. The answer is an unequivocal yes.

Under binding authority from the Appellate Division, First Department in *Culligan Soft Water Co. v Clayton Dubilier & Rice, LLC*, 139 A.D.3d 621 (1st Dep't 2016), Plaintiff is free to bring the derivative claims which Xerox's board of directors (the "**Board**") refused to, without having to plead why the Board's refusal was wrongful. As shown below, it would have been futile to demand that the Board bring Plaintiff's other derivative claims because a majority of the Board has disabling ties to defendant Carl C. Icahn ("**Icahn**"), whose interests the claims implicate.

Alternatively, if the Court should decline to follow *Culligan* or find it inapplicable, then it should deny Xerox's motion under CPLR 3211(a)(5) and grant Plaintiff's cross-motion for leave to reargue and renew the Discovery Order so that Plaintiff can obtain the discovery surrounding the refusal of the Demand so that Plaintiff may fully oppose the Company's motion to dismiss.

[1] Capitalized terms used but not defined in this brief have the same meaning as in the Amended Complaint. The citation "¶__" refers to the paragraphs in the Amended Complaint. Reference is made to the accompanying Affirmation of Gregory M. Nespole ("**Nespole Aff.**") and the exhibits thereto ("**Nespole Ex.**"); the Affirmation of Tariq Mundiya in support of Xerox's motion (NYSCEF Doc. No. 124) and the exhibits thereto ("**Mundiya Ex.**"); and Xerox's memorandum of law in support of its motion (NYSCEF Doc. No. 123) ("**Xerox Br.**").

The Court should also grant Plaintiff's cross-motion to add Xerox Holdings as a nominal defendant if the Court should find that Xerox Holdings is a necessary party.

STATEMENT OF FACTS

Plaintiff respectfully refers the Court to the Statement of Facts in Plaintiff's Memorandum of Law in Opposition to the Director Defendants' Motion to Dismiss (Mot. Seq. No. 007), which is incorporated by reference.

PROCEDURAL HISTORY

Plaintiff filed his original shareholder derivative suit on behalf of Xerox on May 24, 2018, seeking redress against current and former members of Board for breaches of fiduciary duty in connection with a since-abandoned transaction between Xerox and Fujifilm Holdings Corp. ("**Fuji**") and the Company's subsequent settlement of litigation which resulted in Icahn and non-party Darwin Deason ("**Deason**") seizing control of the Board without a shareholder vote or so much as buying an additional share of stock. *See* Mundiya Ex. B.[2]

On December 6, 2018, the Court granted defendants' motion to dismiss the original suit without prejudice and instructed Plaintiff's counsel that "if you want to proceed derivatively, I

[2] The settlements were initially memorialized in two documents dated May 13, 2018. *See* Director Appointment, Nomination and Settlement Agreement dated May 13, 2018, NYSCEF Doc. No. 1064 (the "***Deason* Settlement Agreement**") in *Deason v. Fujifilm Holdings Corp. et al.*, Index No. 650675/2018 (Sup. Ct., N.Y. County); and Memorandum of Understanding dated May 13, 2018, NYSCEF Doc. No. 553 (the "**New MOU**") in *In re Xerox Corp. Consol. S'holder Litig.*, Index No. 650766/2018 (Sup. Ct., N.Y. County) ("***In re Xerox***"). The New MOU established the framework for the contemplated settlement of *In re Xerox* (the proposed "**XCCSL Settlement**") set forth in the Stipulation and Agreement of Settlement dated June 18, 2018, NYSCEF Doc. No. 611 in *In re Xerox* (the "**XCCSL Settlement Agreement**"). The *Deason* Settlement Agreement, New MOU, and XCCSL Settlement Agreement are collectively referred to as the "**Settlement Agreements**." The Court subsequently declined to approve the proposed XCCSL Settlement. *See* Decision and Order on Motions dated September 10, 2019, NYSCEF Doc. No. 999 in *In re Xerox*, attached as Nespole Ex. F.

think you have to make a demand on the board to take action and if, as and when they decline to take action, at that point you are free to refile." Nespole Ex. C at 8:25-9:3.

The Board Refuses Plaintiff's Demand

In accordance with the Court's instructions, by letter dated January 14, 2019, Plaintiff (through counsel) demanded that the Board commence litigation against its current and former members for breach of fiduciary duty in connection with their approval of the Company's entry into the Settlement Agreements, which wrongfully conferred and cemented Icahn and Deason's control over the Board (the "**Demand**"). Nespole Ex. D.

Nearly a year later, by letter dated December 13, 2019, counsel to the Company informed Plaintiff's counsel that the Demand was refused in its entirety (the "**Refusal**"). Nespole Ex. G. Counsel's letter only summarized the steps purportedly taken by the Board to investigate the Demand, including the formation of a deeply conflicted two-man committee consisting of defendants Nicholas Graziano and A. Scott Letier to investigate the Demand (the "**Demand Committee**") and prepare a report for the Board (the "**Report**"). *Id.* The Portfolio Manager of Icahn Capital (Graziano) and the Managing Director of Deason Capital Services (Letier) were thus tasked with determining whether Icahn and Deason unlawfully usurped control of the Company. ¶ 4. The Refusal did not attach the Report.

Upon receiving the Refusal, Plaintiff (through counsel) exercised his common law right as a shareholder and demanded to inspect the Demand Committee's Report, all other books and records prepared by the Demand Committee, board materials concerning the Demand, and communications between the Board and Demand Committee concerning the Demand. Nespole Ex. H. The Board responded by refusing to provide Plaintiff a copy of the actual Report or any of the other documents which Plaintiff demanded; refusing to allow Plaintiff the opportunity to

discuss the Report with the Demand Committee's counsel (which was retained to assist with the investigation of the Demand); and refusing to allow Plaintiff to ask the Demand Committee's counsel any questions about its findings, the scope, or the process of the investigation. Nespole Aff. ¶ 3(h). Plaintiff has been denied a reasonable opportunity to explore whether the two-man Demand Committee was independent despite ample reasons to believe both of its members were beholden to Icahn and/or Deason. *See* ¶¶ 2, 218; Nespole Aff. ¶ 3(h).

Plaintiff Files the Amended Complaint and Serves Discovery Demands

Plaintiff filed the operative Amended Complaint in this action on January 6, 2020. Mundiya Ex. A. The Amended Complaint asserts the claims alleged in the Demand that the Board refused to litigate (Counts I and II, the "**Derivative Settlement Claims**"); two direct claims, which Xerox does not challenge in its motion; a derivative claim for breach of fiduciary duty arising out of the Company's sale to Fuji of Xerox's stake in their joint venture (Count III, the "**FX Sale Claim**"); and two derivative claims against Icahn and his affiliates for purchasing stock of HP Inc. ("**HP**") on the basis of material non-public information concerning Xerox's planned acquisition of HP, and the Icahn group's resulting unjust enrichment (Counts IV and V, the "**HP Claims**"). ¶¶ 195, 232-41; 271-2.

Plaintiff served discovery demands on Xerox on January 9, 2020, that included a request for the Company's books and records related to the Board's refusal of Plaintiff's Demand. Nespole Ex. I.; *id.* at Request 1. This discovery request sought substantially the same documents as Plaintiff previously demanded to inspect under his common law rights as a shareholder of the Company, albeit now under CPLR Article 30. *Compare* Nespole Ex. H.

Plaintiff's discovery request was raised at a hearing on the record on February 25, 2020. Nespole Ex. J at 6:25 *et seq*. Later that day, the Court issued an Order directing the parties to

submit letters outlining the discovery dispute. Nespole Ex. K. The parties submitted their respective letters to the Court on February 26, 2020. Nespole Ex. L (Xerox's letter); Nespole Ex. M (Plaintiff's letter). On February 27, 2020, the Court issued the Discovery Order which, in relevant part, denied Plaintiff's request to inspect Xerox's internal documents relating to the Board's decision to reject the Demand. Nespole Ex. N. Notice of Entry of the Discovery Order was filed on October 1, 2020. *Id*.

ARGUMENT

I. Plaintiff is Entitled to Bring the Derivative Settlement Claims Because the Board Refused Plaintiff's Demand

Xerox argues that the Board's refusal to bring the Derivative Settlement Claims is protected by the business judgment rule and that Plaintiff must overcome the presumption that the Board's Refusal was a proper exercise of business judgment. Xerox Br. at Point I. This is a gross misinterpretation of New York law. New York Business Corporation Law ("**BCL**") § 626(c) requires a shareholder derivative complaint to "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board ***or*** the reasons for not making such effort." (emphasis added). In *Culligan*, the Appellate Division, First Department held that "under BCL § 626(c), ***there is no pleading standard requiring that a shareholder bringing a derivative action*** who alleges the efforts he or she made, in making a pre-suit demand on the board to take action, also ***allege that the board wrongfully rejected the demand***." (emphasis added). 139 A.D.3d at 621-622. In other words, under New York law it is enough that Plaintiff made his Demand for the Board to bring the Derivative Settlement Claims and it was refused. The Board's refusal – alone – allows Plaintiff to bring these claims on the Company's behalf. *Id.; see* ¶¶ 205-19.

The Company's reliance on outdated, inapplicable and overruled authority lends no support to its argument. Indeed, several of Xerox's cases do not even concern BCL § 626(c). For example, *Sanford v. Colgate Univ*., 36 A.D.3d 1060, 1061 (3d Dep't 2007), does not interpret BCL § 626(c) but rather Not-For-Profit Corporation Law ("**NPCL**") § 623(c). In *Culligan*, the First Department expressly stated that its decision in *Tomczak v. Trepel*, 283 A.D.2d 229 (1st Dep't 2001), interpreting NPCL § 623(c) and relied upon in *Sanford,* "should not be read to support [the] conclusion" that a shareholder derivative plaintiff must allege wrongful refusal under BCL § 626(c).[3] 139 A.D.3d at 622.

Similarly, *Kenney v. Immelt*, Index No. 650542/2012, 2013 WL 5976625 (Sup. Ct., N.Y. County Nov. 7, 2013), relied on *Tomczak* and inapposite Delaware law in holding that a shareholder derivative plaintiff in a demand refused case must plead why the refusal was wrongful. *Id.* at *7-8. But the holding and analysis in *Kenney*, like *Tomczak*, was specifically rejected by the First Department in *Culligan*:

> ***Contrary to the…decision in Kenney*** *v. Immelt*, under Business Corporation Law § 626(c), ***there is no pleading standard requiring that a shareholder*** bringing a derivative action who alleges the efforts he or she made, in making a pre-suit demand on the board to take action, also ***allege that the board wrongfully rejected the demand***[.]

139 A.D.3d at 621-22 (citation omitted, emphasis added). *Kenney* was thus overruled by *Culligan.*

Lerner v. Prince, 119 A.D.3d 122, 128 (1st Dep't 2014), and *Reese ex rel. Bristol-Meyers Squibb Co.,* 2017 WL 4679679, at *7 (Sup. Ct., N.Y. County Oct. 18, 2017), applied Delaware

[3] In *Tomczak,* the Appellate Division affirmed the trial court's dismissal because "the complaint provides no indication as to who made the demands, when they were made, which Board members they were made to, content of the demands or why the Board refused to take action." That is manifestly not the case here. *See* ¶¶ 205-19, Nespole Ex. D.

law (Delaware Chancery Rule 23.1) and not BCL § 626(c).[4] *Sciabacucchi v. Burns*, Case No. 15-7506, 2016 WL 4074446, at *5 (S.D.N.Y. July 29, 2016), applied the pleading standard under federal law (Rule 23.1(b)(3) of the Federal Rules of Civil Procedure) and not BCL § 626(c).[5] *Lerner, Reese* and *Sciabacucchi* are therefore irrelevant to the pleading standard under New York law.

Teamsters Allied Benefit Funds v. McGraw, 2010 WL 882883 (S.D.N.Y. Mar. 11, 2010), relied on *Stoner v. Walsh*, 772 F. Supp. 790, 799 (S.D.N.Y. 1991), in holding that a shareholder derivative plaintiff must plead wrongful refusal. 2010 WL 882883 at *6. But *Stoner* is inconsistent with New York law, as recently explicated by the First Department in *Culligan*. Moreover, a federal district court's interpretation of New York law is not binding on this Court but the decisions of the Appellate Division, First Department are controlling. *See D'Alessandro v. Carro,* 123 A.D.3d 1, 6 (1st Dep't 2014) ("It is axiomatic that [the] Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department…. Thus, a particular Appellate Division will require the lower courts within its Department to follow its rulings, despite contrary authority from another Department, until the Court of Appeals makes a dispositive ruling on the issue.").

[4] The two statutes are different. BCL § 626(c) requires plaintiff to "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board ***or*** the reasons for not making such effort." (emphasis added). It is disjunctive ("or"). In stark contrast, Del. Ch. Rule 23.1(a) requires a plaintiff to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority ***and*** the reasons for the plaintiff's failure to obtain the action or for not making the effort." (emphasis added). It is conjunctive ("and").

[5] Fed. R. Civ. P. 23.1(b)(3) requires plaintiff to "state with particularity (A) any effort by plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; ***and*** (B) the reasons for not obtaining the action or not making the effort." (emphasis added). Like Del. Ch. Rule 23.1(a), Fed. R. Civ. P. 23.1(b)(3) is conjunctive. As previously noted, BCL § 626(c) is disjunctive. *See* n.4, *supra.*

Here, Plaintiff alleges in detail his efforts, as directed by the Court, in making a pre-suit demand on the Board to take action. *See* ¶¶ 205-19, Nespole Ex. D. The Board refused Plaintiff's Demand. *See* ¶¶ 295-306, Nespole Ex. G. Once the Demand was refused, *Culligan* holds that Plaintiff is not required to "also allege that the board wrongfully rejected the demand." 139 A.D.3d at 622. Accordingly, Plaintiff has satisfied BCL § 626(c) with respect to the Derivative Settlement Claims.

II. Alternatively, the Court Should Deny Xerox's Motion under CPLR 3211(d)

Should the Court decline to apply the First Department's controlling decision in *Culligan* and still mandate Plaintiff to plead the Board's wrongful refusal, then Xerox's motion to dismiss the Derivative Settlement Claims should be denied under CPLR 3211(d), which provides that if:

> it appear[s] from affidavits submitted in opposition to a motion [to dismiss]… that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Because Plaintiff is deprived of the facts that he needs to fully oppose Xerox's motion, relief under CPLR 3211(d) should be granted if *Culligan* is not applied.

In particular, Plaintiff is prejudiced to argue that the Refusal was not a proper exercise of the Board's business judgment because the Company has refused his requests to inspect the Demand Committee's Report, the books and records prepared by the Demand Committee, board materials concerning the Demand, and communications between the Board and Demand Committee concerning the Demand. Plaintiff sought to inspect these books and records in accordance with his common law right as a shareholder and also requested that the Company produce such records in discovery. Nespole Ex. H and I. The Company refused to do so and the Court declined to compel the production. Nespole Ex. H, L and N.

Consequently, the only information provided to Plaintiff regarding the refusal of his Demand is the non-probative hearsay in the Refusal from the Company's counsel, a different law firm than the Demand Committee's counsel that conducted the investigation. Nespole Ex. G (the Refusal via letter from the Company's counsel Willkie Farr & Gallagher LLP), *id*. at 2 (identifying the Demand Committee's counsel as Dewey Pegno & Kamarsky LLP). It is unreasonable and unfair to require Plaintiff and the Court to unquestioningly accept opposing counsel's self-serving, second-hand assurances that the Board conducted a fulsome investigation and gave proper consideration to his Demand, particularly when the investigation was performed by a deeply conflicted, two man Demand Committee. *See* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:49 ("It may be unfair to grant the CPLR 3211 motion in a situation in which the opposing party must depend entirely on the moving party's testimony to support her own position.").

The Court of Appeals has held that under CPLR 3211(d), Plaintiff "need only demonstrate that facts 'may exist' whereby to defeat the motion [to dismiss]. It need not be demonstrated that they *do* exist." *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 466 (1974). *See also Cerchia v. V.A. Mesa, Inc.*, 191 A.D.2d 377, 378 (1st Dep't 1993) ("[U]nder CPLR 3211(d), a plaintiff opposing a motion to dismiss need only show that facts available to the plaintiff *may* exist which will justify denial of the motion, and need not demonstrate the actual existence of such facts.") (emphasis original). To that end, Plaintiff need only make a "sufficient start" and show that his position is not frivolous. *Peterson*, 33 N.Y.2d at 467. Plaintiff has done so. The Refusal sets forth the materials that the Demand Committee and the Board purportedly considered and the actions they purportedly took in investigating and considering Plaintiff's

Demand. This is not a question of facts that "may exist" because the facts which Plaintiff seeks *indisputably do exist*, as they are characterized in the Refusal.

After the relevant discovery is completed, Defendants are free to move for summary judgment. Robert L. Haig, 4B Commercial Litigation in New York State Courts § 93:14 (3d Ed., 2010) ("Once a derivative complaint is filed, however, the regular rules of discovery take effect and the shareholder may conduct discovery on the allegations."); *Davidowitz v. Edelman*, 153 Misc. 2d 853, 854 (Sup. Ct., N.Y. County 1992), *aff'd*, 203 A.D.2d 234 (2d Dep't 1994) (denying summary judgment after allowing discovery into composition and interestedness of special committee).

Additionally, if the Court should depart from binding First Department authority under *Culligan,* then, for the reasons set forth in Points VI and VII below, the Court should also grant Plaintiff's cross-motion for leave to reargue and leave to renew the Court's Discovery Order so that Xerox will be compelled to produce the above-referenced materials, allowing Plaintiff to support his argument that the Demand was wrongfully refused.

III. Demand to Bring the FX Sale Claim and the HP Claims is Excused as Futile

Plaintiff has adequately pleaded that demand to bring the FX Sale Claim and HP Claims would have been futile.[6]

In the FX Sale Claim, Plaintiff alleges that the Board breached its fiduciary duty by hastily selling the Company's interest in the Fuji-Xerox joint venture to Fuji at an unfairly low price in order to quickly fund Icahn's ill-fated and self-serving effort to use Xerox to acquire HP. ¶¶ 235-38. In the HP Claims, Plaintiff alleges that Icahn and his affiliates, to whom a majority of

[6] The demand futility analysis applies only to the FX Sale Claim (Count III) and the HP Claims (Counts IV and V) because the Board refused Plaintiff's Demand to bring the Derivative Settlement Claims (Counts I and II).

the Board is beholden, used Xerox's confidential information to trade in HP securities and were unjustly enriched by doing so. ¶¶ 271-72.

"Demand is futile, and excused, when the directors are incapable of making an impartial decision as to whether to bring suit." *Bansbach v. Zinn*, 1 N.Y.3d 1, 9 (2003). In New York, demand is excused "if a complaint alleges with particularity that (1) a majority of the directors are interested in the transaction, ***or*** (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, ***or*** (3) the directors failed to exercise their business judgment in approving the transaction." *Marx v. Akers*, 88 N.Y.2d 189, 198 (1996) (emphasis added). The *Marx* tests are disjunctive, so satisfying any one of them is enough to excuse demand under BCL § 626(c). 88 N.Y.2d at 198.

Demand futility is analyzed "at the time the complaint was filed." *Miller v. Schreyer*, 257 A.D.2d 358, 360 (1st Dep't 1998). At the time the Amended Complaint was filed, the Board had seven directors. ¶ 4.[7] For the reasons stated below, Plaintiff satisfies demand futility for the FX Sale Claim and the HP Claims because demand is excused as to at least five of the Company's seven directors.

A. The FX Sale Claim

Plaintiff alleges in the FX Sale Claim (Count III) that the Board agreed to sell Xerox's interest in its joint venture with Fuji at an unfairly low price in order to quickly fund Icahn's campaign for Xerox to acquire HP (the "**FX Sale**"). ¶¶ 235-238. Demand is excused as to this claim under any one of the three disjunctive tests in *Marx,* 88 N.Y.2d at 198.

[7] The seven directors were: (1) Christodoro; (2) Cozza; (3) Echevarria; (4) Graziano; (5) Krongard; (6) Letier; and (7) Visentin. All of them are defendants.

1. The First *Marx* Test: A Majority of the Board was Interested

A majority of the Board is unable to consider whether to bring the FX Sale Claim with disinterested independence because of their disabling ties to Icahn. *Id.* at 200 (a director without a personal interest in a transaction is not independent for demand futility purposes if he is "controlled" by a self-interested director); *Barr v. Wackman*, 36 N.Y.2d 371, 380 (1975) (the fact that directors "may not have personally profited from challenged actions does not necessarily end the question of their potential liability to the corporation and the consequent unlikelihood that they would prosecute the action"); *Auerbach v. Bennett*, 47 N.Y.2d 619, 631 (1979) (The business judgment rule "does not foreclose inquiry into the disinterested independence of [the] members of the Board" who cannot "stand in a dual relation which prevents an unprejudicial exercise of judgment."); *see also Ripley v. Int'l Railways of Central America*, 8 A.D.2d 310, 318 (1st Dep't 1959) ("futility of demand was shown by the evidence establishing interest or bias on the part of the directors"). Numerous facts demonstrate that the independence of five of the seven Board members was compromised.

Christodoro was handpicked to serve on the Board by Icahn. ¶ 289. He was employed by Icahn and served as a Managing Director of defendant Icahn Capital LP, a company controlled by Icahn. ¶ 292(a). He also served as a director on the board of at least one other Icahn-controlled company and at least nine companies where Icahn owned a non-controlling interest. ¶ 4. Christodoro admitted that he has never been elected to a board of directors without Icahn's endorsement. His lack of independence is universally known. Defendant Ann N. Reese testified that "as a designee of the largest shareholder," Christodoro "had an agenda… there was a connection with Mr. Icahn that at least informed his service on the Xerox board." ¶ 55. *The Wall Street Journal* described Christodoro as a "top lieutenant of Carl Icahn," and defendant Letier testified that Christodoro was Icahn's "deal guy" and manager." *Id.*

Cozza was also handpicked to serve on the Board by Icahn. ¶¶ 22, 289. He is employed by Icahn and served as the Chief Operating Officer of Icahn Capital LP. ¶ 292(c). He is a director at no less than two other companies controlled by Icahn, a member of the Executive Committee of at least one Icahn-controlled company, and a director of at least one company where Icahn owned a non-controlling interest. ¶¶ 4, 292(c).

Graziano was also handpicked to serve on the Board by Icahn. He is employed by Icahn as Portfolio Manager of Icahn Capital LP. ¶ 292(d). Graziano was nominated by Icahn to the board of Sandridge Energy Inc. as part of Icahn's proxy contest for control of that company and has served alongside Icahn on the board of WCI Communities, Inc. as part of a resolution of Icahn's attempted takeover of that company. Graziano also joined Corvex Management LP when it was founded in 2010 by Keith Meister, an Icahn protégé who was also on the WCI Communities board. *Id.*

Krongard was also handpicked to serve on the Board by Icahn. ¶¶ 21, 284, 289. She and Icahn have a preexisting social relationship. ¶ 284. She served as Icahn's representative on the boards of at least two other companies. ¶ 285. Her husband, a schoolmate of Icahn at Princeton, was a director of Icahn Enterprises GP, a general partner of Icahn Capital LP. ¶ 287.

Visentin was also handpicked to serve on the Board by Icahn and is the Company's CEO. ¶¶ 23, 289, 292(e). Visentin was a consultant to Icahn in connection with the Xerox proxy contest in Spring 2018, when he worked for Icahn Enterprises LP. ¶ 292(e).

A majority of the Board thus has disabling ties to Icahn in addition to having been hand-picked by him.[8] Accordingly, demand on the Board to bring the FX Sale Claim (which implicates wrongdoing by Icahn) is excused as futile.

2. The Second Marx Test: The Board Did Not Adequately Inform Itself

Demand is also futile because the Board did not adequately inform itself about the FX Sale. Directors have an affirmative duty to make informed decisions. "Whether a board has validly exercised its business judgment must be evaluated by determining whether the directors exercised procedural (informed decision) and substantive (terms of transaction) due care." *Marx*, 88 A.D.2d at 195-196. The "long-standing rule" is that a director "does not exempt himself from liability by failing to do more than passively rubber-stamp the decisions of the active managers." *Id.* at 200, quoting and citing *Barr,* 36 N.Y.2d at 380, 381. Here, Xerox did not file a proxy with projections, analysis or a fairness opinion about the FX Sale. ¶ 234. Instead, it appears the Board merely rubber-stamped Icahn's decisions. On a motion to dismiss where Plaintiff is entitled to the benefit of every favorable inference, the Board's failure to file a proxy with such basic information gives rise to the inference that the FX Sale was not the product of an adequately informed Board.

Alternatively, the Court may also deny Xerox's motion under CPLR 3211(d) and allow Plaintiff to take discovery into the fairness of the FX Sale and what, if anything, the Board reviewed in approving the FX Sale. *See* Point II, *supra*.

[8] Xerox thus misplaces its reliance on *Zacharius v. Kensington Publ'g Corp.*, Index No. 652460/2012, 2014 WL 52892, at *8 (Sup. Ct., N.Y. County Jan. 6, 2016) ("The ***sole*** averment in the Complaint relating to the directors is that they were appointed by [defendant]. New York requires a description of . . . control with greater particularity than ***simply stating*** that the board was 'hand-picked.'") (emphasis added). Here, Plaintiff does far more than just state that the conflicted directors were appointed by Icahn.

3. The Third Marx Test: The Board Could Not Have Exercised its Business Judgment

Demand is also excused because the Board failed to exercise its business judgment in approving the FX Sale. *Marx,* 88 N.Y.2d at 201. The business judgment rule applies only to actions "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530 (1990). Selling valuable corporate assets on the cheap to further the interests of the Company's controlling shareholder is corporate waste, which is not protected by business judgment. ¶ 232. *Stravrouakis v. Pelakanos*, Index No. 653478/2015, 2018 WL 846677, at *10 (Sup. Ct., N.Y. Co. Feb. 13, 2018) ("where, as here, there is corporate waste – 'the diversion of corporate assets for improper or unnecessary purposes' – the business judgment rule does not apply."), *citing SantiEsteban v. Crowder*, 92 A.D.3d 544 (1st Dep't 2012). Further, disposing corporate assets for ulterior purposes is bad faith, and the business judgment rule "will not be enforced when the good faith…directors is in issue." *S.H. & Helen R. Scheuer Family Foundation, Inc. v. 61 Assocs.,* 179 A.D.2d 65, 69 (1st Dep't 1992).

Accordingly, demand as to the FX Sale Claim is excused as futile under any of the three tests set forth in *Marx*. *See also Bansbach,* 1 N.Y.3d at 1-2 (finding demand futile based on the totality of the circumstances).

B. The HP Claims

Plaintiff alleges in the HP Claims (Counts IV and V) that Icahn and his affiliates unjustly enriched themselves by trading in HP securities using Xerox's confidential information in violation of their confidentiality agreement with Xerox. ¶¶ 271-2. Demand is excused as to the HP Claims because, as discussed above, a majority of the Board has disabling ties to Icahn and thus cannot consider these claims with disinterested independence. *See* Point III(A)(1), *supra*.

Specifically, it would be futile to demand that Board members who are economically beholden to Icahn pursue claims against Icahn that might be economically detrimental to him.

IV. Plaintiff's Failure to Name Xerox Holdings Corp. as a Nominal Defendant is Curable and Not Dispositive

Xerox contends the Amended Complaint must be dismissed under CPLR 3211(10) because Xerox Holdings has not been joined and is a necessary party. Xerox Br. at Point III. Dismissal on these grounds is not warranted.

The Court may find that Xerox Holdings need not be added as a party because it already has notice of the claims in this proceeding. *See* ¶ 11, defining "Xerox" to mean Xerox Corporation prior to the reorganization and Xerox Holdings after the reorganization. If, however, the Court deems Xerox Holdings to be a necessary party, Xerox Holdings can simply be added as a party under CPLR 1001(b) and 1003, as requested in Plaintiff's cross-motion below. Should the Court nevertheless dismiss the Amended Complaint under CPLR 3211(10), such dismissal must be without prejudice under the plain language of CPLR 1003.

Xerox's argument that joinder of Xerox Holdings would require a new double derivative suit to pursue the Derivative Settlement Claims is nonsense. Xerox concedes that the corporate reorganization resulting in the conversion of Plaintiff's Xerox shares into Xerox Holdings shares was consummated on August 1, 2019 – *seven months after Plaintiff made his Demand and four months before the Board's Refusal*. *See* Xerox Br. at 21, Nespole Ex. D and G.

Xerox's failure to mention the reorganization in the Refusal should be treated as the waiver that it plainly is. All seven members of the Xerox Holdings board of directors were members of the nine-member Xerox Board when the Demand was made.[9] Therefore, there is no reason that the Demand should not be deemed as having been refused by Xerox Holdings, or to believe that a new demand upon Xerox Holdings would have a different result, or that requiring Plaintiff to make such a new demand would accomplish anything but waste time and judicial resources.

V. Plaintiff's Cross-Motion for Joinder of Xerox Holdings Corp. as a Nominal Defendant Should be Granted

If the Court nevertheless deems Xerox Holdings to be a necessary party, then Plaintiff moves the Court pursuant to CPLR 1003 for leave to add Xerox Holdings as a nominal defendant. Xerox Holdings is a New York corporation and thus subject to the Court's jurisdiction. Nespole Ex. O. Plaintiff requests that this cross-motion be granted *nunc pro tunc* pursuant to CPLR 1001(b), which provides that "[w]hen a person who should be joined under [CPLR 1001(a) because it is a necessary party] has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned."

VI. Plaintiff's Cross-Motion for Leave to Reargue Should be Granted

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion," and "shall not include any matters of fact not offered on the prior motion." CPLR 2221(d)(2).

[9] *See* https://www.xerox.com/en-us/about/executive-leadership#board-of-directors (last accessed September 23, 2020). The seven directors of Xerox Holdings are, in the order listed on Xerox's website: (1) Cozza; (2) Visentin; (3) Christodoro; (4) Echevarria; (5) Graziano; (6) Krongard, and (7) Leiter.

Should *Culligan* not be applied, and Plaintiff required to plead that his Demand was wrongfully refused, *see* Point I, *supra*, Plaintiff moves for reargument of the Discovery Order dated February 27, 2020 (Nespole Ex. N) denying Plaintiff's motion to compel the Company to produce the Demand Committee's Report, all other books and records prepared by the Demand Committee, board materials concerning the Demand, and communications between the Board and Demand Committee concerning the Demand. These documents are essential for Plaintiff to argue that his Demand was wrongfully refused. *See* Points I and II, *supra.*

Respectfully, Plaintiff submits that the Court of Appeals' decision in *Parkoff v. General Tel. & Elecs. Corp.*, 53 N.Y.2d 412, 417-18 (1981) cited in Plaintiff's letter to the Court dated February 26, 2020 (Nespole Ex. M) is instructive. In *Parkoff,* the Court of Appeals recognized that shareholder plaintiffs often lack access to facts, necessitating discovery concerning a board's refusal of a litigation demand prior to the determination of whether the refusal is protected by the business judgment rule. As the Court of Appeals explained:

> Inasmuch as almost all possible evidentiary data with respect to the areas of permissible inquiry were within the exclusive possession of defendants . . . it would be unreasonable to hold plaintiff in cases such as this to the customary requirement that he show that facts essential to the defeat of the motion may exist although they cannot be stated. The business judgment doctrine should not be interpreted to stifle legitimate scrutiny by stockholders of decisions of management which, concededly, require investigation by outside directors and present ostensible situations of conflict of interest.

53 N.Y.2d at 417-18. The Court of Appeals' holding in *Parkoff* controls over *Lerner*, *supra*, an inapposite case decided under Delaware law in which the court mused only in dicta that New York law would not allow discovery following rejection of a shareholder demand directed to a *Delaware* company. *See also Auerbach*, 47 N.Y.2d at 634 (holding that "the court may properly inquire as to the adequacy and appropriateness of the [special] committee's investigative

procedures and methodologies" and criticizing the plaintiff for not having sought discovery); *Joy v. North*, 692 F.2d 880, 893 (2d Cir 1982) ("We simply do not understand the argument that derivative actions may be routinely dismissed on the basis of secret documents.").

However, the First Department's subsequent clarification of the law in *Culligan* means that Plaintiff is not required to plead that the Refusal was wrongful. *See* Point I. But should *Culligan* not be applied here, the Court should grant Plaintiff leave to reargue the Discovery Order, and upon reargument, amend the Discovery Order to direct the Company to produce the materials sought by Plaintiff that he needs to oppose the Company's motion on the grounds that the Refusal was not the product of business judgment.

VII. Plaintiff's Cross-Motion for Leave to Renew Should be Granted

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e). There was no pending motion to dismiss when Plaintiff moved to compel the Company to produce discovery concerning the Demand Committee and the Board's deliberations. Now that Xerox has moved to dismiss on the grounds that the Refusal was a proper exercise of business judgment, Plaintiff needs discovery to fully oppose the motion for the reasons set forth in Point II *supra.* Of course, this issue is moot if the Court applies the First Department's controlling authority in *Culligan* holding that there is no requirement that Plaintiff plead wrongful refusal. *See* Point I, *supra*.

CONCLUSION

For the foregoing reasons, the Court should deny Xerox's motion in its entirety; and if necessary, grant Plaintiff's cross-motion to add Xerox Holdings Corp. as a party and leave to reargue and/or renew the February 27, 2020 Discovery Order; and upon reargument and/or renewal, to amend the foregoing Discovery Order to compel Xerox to produce the minutes and

materials concerning the Board and Demand Committee's evaluation of Plaintiff's Demand; and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 1, 2020

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CERTIFICATION UNDER COMMERCIAL DIVISION RULE 17

I am the counsel who e-filed the foregoing brief. I certify pursuant to Rule 17 of the Commercial Division that the foregoing brief was prepared on a computer using Microsoft Word, according to which the total number of words in the brief, excluding the caption, Table of Contents, Table of Authorities and signature block, is 6,144.

Dated: New York, New York
October 1, 2020

/s/ Gregory M. Nespole
Gregory M. Nespole