IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

GEORGE R. COCKLE, derivatively on behalf of DANAOS CORPORATION, Plaintiff, v. JOHN COUSTAS, IRAKLIS PROKOPAKIS, DIMITRI J. ANDRITSOYIANNIS, ANDREW B. FOGARTY, MYLES R. ITKIN, MIKLOS KONKOLY-THEGE, and ROBERT A. MUNDELL. Defendants, and DANAOS CORPORATION, Nominal Defendant	CIVIL ACTION NO. 2010-194 MEMORANDUM OF DECISION AND ORDER

FILED
ASST. CLERK OF COURTS
REPUBLIC OF MARSHALL ISLANDS

I. INTRODUCTION

This is a shareholder derivative suit brought by plaintiff George Cockle on behalf of nominal defendant Danaos Corporation against certain members and a former member of the board of directors: John Coustas, Iraklis Prokopakis, Dimitri J. Andritsoyiannis, Andrew B. Fogarty, Myles R. Itkin, Miklós Konkoly-Thege, and Robert A. Mundell. Mr. Cockle alleges defendants breached their duties to the corporation of loyalty and good faith, and further wasted corporate assets. Additionally Mr. Cockle alleges certain of the defendants unjustly enriched

themselves through self-dealing transactions with the corporation.

The transactions questioned include the approval of two addenda to the management agreement with Danaos Shipping, to the benefit of majority shareholder and director John Coustas. Also challenged is the sale of stock to Mr. Coustas, two other board members, and others on a discounted basis. Plaintiff did not make a demand on the board of directors before filing this action and defendants have moved to dismiss for failure to show demand is excused and for failure to state a claim.

The plaintiff asserts that demand is necessarily excused because Mr. Coustas, the majority shareholder, benefitted from the questioned transactions. As a result, the legal standard of entire fairness must be applied at all stages of the litigation. Further, plaintiff contends the action adequately states a claim.

II. FACTS

A. The parties.

Plaintiff George R. Cockle is a shareholder of Danaos Corporation (¶ 6),[1] which is incorporated under the laws of the Republic of the Marshall Islands and maintains its principal executive offices in Piraeus, Greece (¶ 7). Danaos is a holding company which, through its subsidiaries, owns a fleet of container ships that it charters to companies that operate container shipping services (¶ 7).

Defendant John Coustas has served as the President, Chief Executive Officer and director of Danaos since the Company was formed in 1998 (¶ 8). At the time of the transactions of which

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[1]All paragraph references are to Plaintiff's Verified Derivative Complaint filed November 22, 2010.

Plaintiff complains, Coustas controlled approximately 80 % of the Company's stock (¶ 8). Defendant Iraklis Prokopakis serves as the Company's Senior Vice President, Treasurer and Chief Operating Officer and as a director (¶ 9). Defendant Dimitri J. Andritsoyiannis served as the Company's Vice President and Chief Financial Officer and as a director (¶ 10).[2] Defendants Andrew B. Fogarty, Myles R. Itkin, Miklós Konkoly-Thege, and Robert A. Mundell serve as directors of the Company (¶¶ 11-14).

In August 2010, George Economou became a member of the Danaos board of directors (¶¶ 48-49), increasing its membership from seven to eight. Economou's directorship was part of a transaction in which Sphinx Investment Corporation purchased shares of Danaos Corporation. Sphinx is a wholly owned subsidiary of Maryport Navigation Corp., which is controlled by Economou.[3] Economou is not named as a defendant and plaintiff does not seek relief from him, Sphinx or any entity associated with Sphinx.

Plaintiff challenges certain transactions of the corporation, in particular, two addenda to the management agreement Danaos Corporation ("Danaos") has with Danaos Shipping Co. Ltd. ("Danaos Shipping"), and a stock sale which was part of a debt refinancing for the corporation.

B. The Management Agreement Addenda.

Danaos conducts its operations through vessel-owning subsidiary companies whose principal activity is the ownership and operation of container ships that are under the exclusive

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[2]Andritsoyiannis left his positions on the board and as an officer of the company in June of 2011, after this action was filed.

[3]Danaos 2010 Proxy Statement, p. 3, filed with the SEC on October 12, 2010, (Exhibit A, attached to plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, filed May 16, 2011).

management of a related entity, Danaos Shipping, pursuant to an amended and restated management agreement dated September 18, 2006 (¶ 23). Under the terms of the management agreement, Danaos Shipping and its affiliates provide Danaos and its subsidiaries with technical, administrative and certain commercial services in exchange for management fees paid by Danaos (¶ 23). Danaos Shipping was founded by defendant Coustas' father in 1972 and is now ultimately owned by Danaos Investments, as trustee/protector of the Coustas Trust (¶ 23). Thus, defendant Coustas and his family, as beneficiaries of the Coustas Trust, receive the financial benefit of the fees paid by Danaos under the management agreement (¶ 23). The 2006 agreement also provided that after three years, the fees would be adjusted annually through mutual agreement and that if no agreement were reached, the rate would be set at least to maintain the manager's average profit margin for the immediately preceding three years.[4]

During the second half of 2008 and the first half of 2009, the ocean-going container shipping industry experienced an "abrupt and dramatic downturn." (¶ 25). In its quarterly financial statement filed with the United States Securities and Exchange Commission on September 23, 2009, Danaos disclosed that the downturn had adversely affected the company's business, by drastically reducing the average daily charter rates for containership vessels to mere fractions of their previous amounts and reducing the value of the company's vessels (¶ 25). In addition, Danaos encountered difficulty in obtaining financing for the acquisition of nearly half of its new containerships that were under construction, and warned that it may not be able to finance the construction of these new ships, potentially resulting "in the loss of our deposit

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[4]Prospectus, p. 125, (Exhibit 6, attached to Defendant's Motion to Dismiss, filed February 11, 2011.)

money and additional liability to shipyards and charterers." (¶ 23).

On February 12, 2009, Danaos executed an addendum to the management agreement increasing the management fees paid by the company to Danaos Shipping, and thus, to defendant Coustas (¶ 27). The increase in fees paid by Danaos to Danaos Shipping pursuant to the 2009 addendum contributed to a significant increase in the company's expenses compared to those incurred in the previous year (¶¶ 28-30). Danaos' general and administrative expenses increased by 25% from fiscal year 2008 to fiscal year 2009, primarily due to the increase in fees paid to Danaos Shipping (¶ 30). Specifically, the Danaos' Annual Report for the Fiscal Year Ended December 31, 2009, filed with the SEC on June 18, 2010, stated (¶ 28):

> General and administrative expenses increased 25.0%, or \$2.9 million, to \$14.5 million in the year ended December 31, 2009, from \$11.6 million in the year ended December 31, 2008. The increase was mainly a result of increased fees of \$1.7 million paid to our Manager in the year ended December 31, 2009 compared to the year ended December 31, 2008 due to the increase in the average number of our vessels in our fleet and an increase of the fees paid to our manager since January 1, 2009.

The 2009 addendum provided for an increase in fees for commercial, chartering and administrative services (\$500 per day to \$575 per day); for management of ships on bareboat charter (\$250 per vessel per day to \$290 per vessel per day); for management of remaining ships in fleet (\$500 per vessel per day to \$575 per vessel per day); and in the flat fee for supervision of newbuilding contracts (\$400,000 per vessel to \$725,000 per vessel) (¶ 27, ¶ 37). There was no increase in commissions on charter revenue or on sales and purchases of vessels (¶ 27).

As detailed in Danaos' public filings, the downturn in the container shipping industry continued throughout the remainder of 2009 and into 2010 (¶ 31-34). The company's quarterly financial statement filed with the SEC on November 12, 2009 stated that demand for container

shipping was at "the lowest levels in decades" and discussed the resulting effect on the company's financial performance (¶ 31):

> In the second half of 2008 and in 2009, the ocean-going container shipping industry has experienced severe declines, with charter rates at significantly lower levels than the historical highs of the past few years.
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> * * *
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> If the charter market is depressed, as it has been in the latter half of 2008 and in 2009, when our vessels' charters expire, with the next vessels scheduled to be up for rechartering being eight containerships in 2010, we may be forced to recharter the containerships, if we are able to recharter such vessels at all, at sharply reduced rates and even possibly at a rate whereby we incur a loss, which may reduce our earnings or make our earnings volatile.

The 2009 Annual Report disclosed that Danaos' financial performance had continued its sharp decline throughout the year (¶ 34). Net income decreased from approximately $115.2 million in fiscal year 2008 to approximately $36.1 million in fiscal year 2009, and earnings per share shrank from $2.11 in fiscal year 2008 to $0.66 in fiscal year 2009 (¶ 34).

On February 8, 2010, Danaos executed another addendum to the management agreement, further increasing the management fees paid to Danaos Shipping (¶ 35). The addendum provided for an increase in fees for commercial, chartering and administrative services ($575 per day to $675 per day); for management of ships on bareboat charter ($290 per vessel per day to $340 per vessel per day) ; and for management of remaining ships in fleet ($575 per vessel per day to $675 per vessel per day) (¶ 35, 37). There was no increase in the flat fee for supervision of newbuilding contracts (¶ 37). There was no increase in commissions on charter revenue or on sales and purchases of vessels (¶ 35).

In relation to the 2009 and 2010 addenda, Danaos stated "[w]e believe these fees and commission are no more than the rates we would need to pay an unaffiliated third party to

provide us with these management services." (¶ 27, ¶ 35).

C. The Stock Sale

With the severe economic downturn in the containership market, Danaos suffered financial strains with outstanding debt obligations and difficulties in obtaining financing. In its report to the SEC for the second quarter of 2009, the company stated: "As a result of this dramatic downturn in the container shipping industry, including any of these factors, it is possible that we could become unable to service our debt and other obligations" (¶ 25). The company revealed it did not have financing in place for new containerships under construction, and in light of the difficulties in obtaining financing, if it could not secure such financing, it faced the possibility of losing its deposit money and incurring additional liability to shipyards and charterers (¶ 26).

In response, on August 6, 2010 the company entered into a commitment letter with its lenders for the restructuring of existing debt obligations and approximately $426 million of new debt financing. (¶ 45). The agreement was "conditioned upon . . . the receipt of $200 million in net proceeds from equity issuances, including an investment from the Company's Chief Executive Officer [Coustas]."[5] Danaos entered into agreements with several investors to sell to them 54,054,055 shares of the company's common stock for an aggregate purchase price of $200 million in cash at a discount from market value (¶ 45). The stated purpose of the stock sale was to fund the completion of 16 newbuilding ships that were under construction (¶ 45). The largest investors in the stock sale were Danaos Investments, as trustee/protector of the Coustas Trust,

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[5]2009 Annual Report, p. F-9, (Exhibit 5, attached to Defendant's Motion to Dismiss, filed February 11, 2011.)

and members of the Coustas family, which together purchased over $100 million in discounted shares (¶ 46). Other investors in the transaction included defendant Prokopakis; defendant Andritsoyiannis; Acclaim Shipping, Inc., which is controlled by defendant Coustas' father; and Sphinx Investments Corp., an entity controlled by George Economou, who was appointed to the Danaos Board in connection with the transaction (¶¶ 46, 49).

The stock was sold at $3.70 per share, which represented a 5.9% discount to the 30-day volume weighted average share price of $3.93 per share and a 6.6% discount to the 60-day volume weighted average share price of $3.96 per share (¶ 47). The stock sale was completed on August 12, 2010. Danaos Investments, as trustee/ protector of the Coustas Trust, purchased 23,945,945 shares. Acclaim Shipping purchased 8,108,109 shares. Defendant Prokopakis purchased 108,109 shares, while defendant Andritsoyiannis purchased 270,271 shares. Sphinx Investments purchased 11,471,621 shares. (¶ 48). On August 27, 2010, Danaos filed with the SEC Form 6-K, which stated, in part (¶ 53): "After evaluating market conditions . . . the Company perceived that the terms on which the above described equity transaction could be executed were more favorable than those that would be available in a broader offering, which would have had no assurance of successful completion."

III. DISCUSSION

Danaos is a Marshall Islands corporation, and therefore Marshall Islands law controls. *Rosenquist v. Economou*, Supreme Court Case No. 2010-002, October 5, 2011 Opinion, at p. 10 (citing *Kamen v. Kemper Finan. Servs., Inc.*, 500 U.S. 90, 98-99 (1991)). "Under Marshall Islands law, a shareholder asserting claims derivatively on behalf of a corporation shall first make a demand on the board of directors to initiate the litigation." *Id.* (citing 52 MIRC, Part I, §

79(3)). "Where a shareholder plaintiff fails to make such a demand, he must allege 'with particularity' the reasons why that demand would have been futile." *Id.* (citing 52 MIRC, Part I, § 79(3) and MIRCP 23.1).

Marshall Islands law directs the Court to look to Delaware corporate law. *Id.* (citing 52 MIRC, Part I, § 13). "Pursuant to Delaware law, where a plaintiff fails to make a demand on the board of directors to initiate litigation, courts apply the two-part test for demand futility set forth in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984)." *Id.* at 10-11. "Under that test, courts 'must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Id.* at 11 (quoting *Aronson*, 473 A2.d at 814). "'These prongs are in the disjunctive. Therefore, if either prong is satisfied, demand is excused.' *Brehm v. Eisner*, 746 A.2d at 256. Further, as to the first prong of the test, a plaintiff shall 'establish[] the lack of independence or disinterestedness of a <u>majority</u> of the directors.' *Aronson*, 473 A.2d at 817 (emphasis added)." *Id.* at 11.

A. Is demand on the board excused because of Coustas' status, such that the "entire fairness" rather than the "business judgment" standard applies?

Mr. Cockle asserts that demand on the board of directors may be excused if a majority shareholder benefits from a corporate transaction, essentially standing on both sides of transaction. His reasoning is that Coustas, as the majority shareholder of Danaos, is necessarily a "controlling" shareholder. Plaintiff then relies upon "the entire body of Delaware Supreme Court case law that uniformly holds that self-dealing transactions between the corporation and its controlling shareholder, like those challenged in this action, are not protected by the business

judgment rule, but rather must meet the entire fairness standard."[6] For instance, plaintiff cites *Kahn v. Tremont Corp.* for this proposition:

> Ordinarily, in a challenged transaction involving self-dealing by a controlling shareholder, the substantive legal standard is that of entire fairness, with the burden of persuasion resting upon the defendants. . . Regardless of where the burden lies, when a controlling shareholder stands on both sides of the transaction the conduct of the parties will be viewed under the more exacting standard of entire fairness as opposed to the more deferential business judgment standard. (citations omitted.)[7]

"Under the entire fairness standard, the burden is on the defendant to establish the fairness to the corporation of the questioned transaction."[8] Because the burden to establish fairness is on the defendant, plaintiff contends the requirement in shareholder derivative suits for the plaintiff to show a demand on the board is futile must be excused. Plaintiff suggests that *Aronson*, cited approvingly by the Marshall Islands Supreme Court in *Rosenquist*, supports this position:

> if this is an "interested" director transaction, such that the business judgment rule is inapplicable to the board majority approving the transaction, then the inquiry ceases. In that event futility of demand has been established by any objective or subjective standard. . . . This includes situations involving self-dealing directors.[9]

Plaintiff regards the present case as involving "self-dealing directors" and therefore futility of demand has been established.

The facts of *Aronson* lead to a different conclusion. In that case plaintiffs alleged misconduct by the board of Meyers Parking System, Inc. by entering into improper transactions

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[6]Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, filed May 16, 2011, p. 15.

[7]*Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (1997).

[8]*Weinberger v. UOP*, 475 A.2d 701, 710 (Del. 1983).

[9]*Aronson*, at p. 15.

with one of the board members, Leo Fink, who owned 47% of the company's outstanding stock. Together, defendants owned 57.5% of the outstanding stock. The questioned transactions included a lifetime employment and consulting agreement that was not affected by Fink's inability to perform services for Meyer. Fink was 75 years old when the agreement was made. Plaintiffs contended, and the Chancery Court agreed, that demand was excused as Fink controlled the other directors.

The Delaware Supreme Court disagreed, setting out the two prong test: first, whether the majority of the board lacked independence or was interested, and second, whether the board's decision was the product of a rational business judgment. The court specifically rejected the finding that Fink controlled the board in the circumstances of that case and stated

> Moreover, in the demand context even proof of majority ownership of a company does not strip the directors of the presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation. There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person.[10]

For the present case, two important points are made here. First, the demand context differs from other contexts so as to justify a differentiated approach to specific issues. Second, in the demand context majority ownership of a company does not, without further allegations of control, equate to a loss of independence of the directors of the company; allegations which plaintiff fails to make in the present case.

This recognition of the demand context as warranting differentiated treatment reinforces the policies behind the demand requirement. As stated in *Aronson*:

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[10]*Aronson*, at p. 15.

> By its very nature the derivative action impinges on the managerial freedom of directors. Hence, the demand requirement of Chancery Rule 23.1 exists at the threshold, first to insure that a stockholder exhausts his intracorporate remedies, and then to provide a safeguard against strike suits. Thus, by promoting this form of alternate dispute resolution, rather than immediate recourse to litigation, the demand requirement is a recognition of the fundamental precept that directors manage the business and affairs of corporations.[11]

The demand requirement and the two prong test established by *Aronson* (and adopted in the Marshall Islands by *Rosenquist*) are bulwarks designed to protect that "fundamental precept." Imposing the entire fairness standard, developed initially in the context of analyzing interested merger transactions,[12] in the demand context as proposed by plaintiff would undermine these policies.

Plaintiff has offered no authority where the entire fairness standard was applied in the demand context apart from an ambiguous footnote in *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211 (2001):

> For that independent reason, the defendants' motion also lacks force. The complaint pleads particularized facts that suggest that the entire fairness standard of review-rather than the business judgement rule-would apply to the Transactions and that the Transactions might not have been fair. As a result, the complaint satisfies the second prong of Aronson.[13]

In *Parfi*, shareholders of Mirror Image Internet, Inc. alleged transactions between Mirror and its parent company, Xcelera.com, Inc., harmed Mirror and shareholders. Plaintiffs alleged defendants forced Mirror Image to issue stock to Xcelera at below fair market value, and did not

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[11]*Aronson*, at pp. 11-12.

[12]See discussion in *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 116-117 (1994.)

[13]*Parfi*, p. 1231, f.n. 47.

permit minority stockholders to participate in those subscriptions. Mirror Image had a five person board, of which two members were clearly disinterested, and two were clearly interested. "The resolution of this issue turns on whether a majority of the Mirror Image board can disinterestedly and independently consider a demand."[14] The question was whether the fifth director, Fajerson, was disinterested and independent. Based upon Fajerson's dual directorships on both the Mirror Image board and the Xcelera board, the court determined he was unable to consider the demand impartially and thus, coupled with the two other interested directors, a majority of the board was not disinterested and independent, and demand was thus excused as futile.

Mr. Cockle apparently assumes the "particularized facts" referred to by the court in footnote 47 relate to the position of the majority shareholder on both sides of the transaction. However, in light of the extended discussion of the independence issue by the *Parfi* court under the first prong of *Aronson*, this assumption may be questioned. If the issue were simply disposed on the basis of the majority shareholder standing on both sides of the challenged sale of stock, there would have been no need for the court's extensive analysis of the independence of the directors.

On the other hand, if the "particularized facts" refer to the interested nature of the majority of the board, it is consistent with *Aronson's* instruction that " if such director interest is present, and the transaction is not approved by a majority consisting of the disinterested directors, then the business judgment rule has no application whatever in determining demand futility."[15]

Another explanation may be offered as well. As noted by the Supreme Court in

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[14] *Id.*, p. 1230.

[15] *Aronson*, p. 812.

Rosenquist, at p. 23, for the purposes of considering the business judgment prong of the *Aronson* test: "Rather than question the merits of Board decisions, courts question 'the informational component of the directors' decisionmaking process' and 'the motivations or the good faith of those charged with making the decision.'" (citing *Brehm v. Eisner* 746 A.2d 244.) The sentence in *Parfi* preceding the cited footnote states: "Consistent with § 144, it has also been the practice to consider directors such as Fajerson conflicted for purposes of evaluating whether a transaction is subject to the business judgment rule or entire fairness standards of review."[16] In this light, it could be argued that the "particularized facts" to which the *Parfi* court refers are those establishing Fajerson's conflict of interest through his service on the board of a corporation on each side of the questioned transaction. The conflict of interest for Fajerson would color his motivations or his good faith in making the decision, for the purposes of determining whether the transaction was the product of a valid exercise of business judgment and thus satisfying the second prong of *Aronson*, as stated by the court in the footnote. Because of the ambiguity in the language of the footnote, the court does not find *Parfi* particularly supportive of Mr. Cockle's position.

Indeed, in *Kahn v. Tremont*, cited by plaintiffs for the proposition that entire fairness applies to any case where majority shareholder stands on both sides of transaction, the *Aronson* test was applied by the Chancery Court, recognizing the business judgment standard for determination of demand futility.[17]

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[16] *Parfi*, p. 1231.

[17] *Kahn v. Tremont Corp.*, 1994 WL 162613, at *2 (Del. Ch. Apr. 21, 1994.) The Chancery Court found that demand was excused on the basis of the first prong of *Aronson* and that specific issue was not appealed and is not reported in Delaware Supreme Court case cited by

In the absence of compelling authority to the contrary and in light of the confirmation of the *Aronson* two part test for determination of demand futility, including the use of the business judgment standard, by the Marshall Islands Supreme Court, the court finds that demand on the board is not excused on the basis of entire fairness.

B. Is plaintiff's demand on the board otherwise excused as futile under *Aronson*?

Under the first prong of *Aronson*, in order to excuse demand, the plaintiff must plead with particularity facts that create a reasonable doubt that at least four of the members of the board were incapable of acting in a disinterested and independent manner. Under the second prong, plaintiff must raise a reasonable doubt that the challenged transactions were the products of a valid exercise of business judgment. Further, the determination is based upon the circumstances when the action was filed.[18]

1. Was a majority of the board of directors independent and disinterested?

At the time this action was filed, the board of directors consisted of eight members: John Coustas, Iraklis Prokopakis, Dimitri J. Andritsoyiannis, Andrew B. Fogarty, Myles R. Itkin, Miklós Konkoly-Thege, Robert A. Mundell , and George Economou, who became a member after the questioned transactions were done, but before the action was filed. Coustas, Prokopakis

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plaintiff at 694 A.2d 422 (Del. 1994). However, the court specifically recognized both prongs of the *Aronson* test: "The Delaware Supreme Court has articulated the two-part test for motions under Rule 23.1. . ." and goes on to quote the test from *Aronson*. While the court disposed of the demand futility issue on the basis of director interest, the court went on to state: "At least possibly as problematic **under *Aronson's* second prong** is the fact that the pleadings and evidence raise a significant issue concerning **whether there was any legitimate business interest** served by Tremont's substantial investment in a 15% block of NL Industries." (emphasis added.)

[18]*Aronson*, p. 810.

and Andritsoyiannis are conceded to be interested by defendants, at least in regard to the stock sale, as they all purchased stock and are defendants in the case.

Andrew B. Fogarty, Myles R. Itkin, Miklós Konkoly-Thege, and Robert A. Mundell are alleged to be interested in the complaint on the grounds that they face substantial likelihood of liability, "as alleged in detail herein." However, the court finds this conclusory statement to fall short of the particularized facts necessary under *Aronson*. Mr. Cockle has not addressed the interest of these four directors in his Opposition which suggests he does not contest their disinterestedness.

With three interested directors and four disinterested directors, the interestedness or independence of the board turns on Mr. Economou. In regard to the addenda to the management agreement, there is no argument that Economou is interested or not independent. He has not received any benefit from the addenda transactions. He is not controlled by another interested party. Consequently, with respect to the management agreement addenda, plaintiff has not plead with particularity facts that create a reasonable doubt that a majority of the board were incapable of acting in a disinterested and independent manner and demand is not excused on that basis.

With respect to the stock sale, plaintiff asserts Mr. Economou is an interested party and, with Coustas, Prokopakis, and Andritsoyiannis being interested parties, there is no majority of the board which can consider the demand in a disinterested manner. The basis of Economou's interest, according to plaintiff, lies in his relationship with Sphinx Investment Corp. which purchased 11,471,621 shares from Danaos at a discounted price. Because Economou controlled Maryport Navigation Corp., which owned Sphinx, he was regarded as the beneficial owner of the Danaos shares purchased and owned by Sphinx. Economou was not a director of Danaos at the

time the stock sale was completed and only became a director after the completion of the sale as part of the agreement for that sale.

Aronson sets the standard for interestedness of a director. "From the standpoint of interest, this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally."[19] Plaintiff asserts Economou is interested because he received a personal benefit from the stock sale (through his relationships with Sphinx, the purchaser of Danaos stock) not shared by the other shareholders.

However, the critical issue is whether the director's decision will be based upon the corporate merits of the subject, rather than outside or personal considerations.[20] While Economou may have benefitted from the stock sale, he did not derive the benefit "in the sense of self-dealing." Further, none of the relief sought in the complaint would affect any interest Economou has from the transaction. He is not a defendant in the action.[21] Plaintiff's case does not threaten whatever benefit Economou received from the stock sale. No facts have been brought forth to suggest he would have any reason to view a demand from plaintiff based on interests other than the interests of Danaos Corporation. There are no particularized facts that raise a reasonable doubt as to his disinterestedness or independence. Consequently, a majority of the board may consider the demand in an independent and disinterested manner.

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[19]*Aronson*, p. 812.

[20]*Aronson*, p. 816.

[21]Distinguishing Economou from Geller, a director who took his seat after the challenged transaction that benefitted him and was found to be interested, in *Katz v. Halperin*, No. 13811, 1996 Del. Ch. 1996 WL 66006 (Feb. 5, 1996.)

2. Was each of the challenged transactions the product of a valid exercise of business judgment?

The Marshall Islands Supreme Court in *Rosenquist* (at p. 22) stated:

> In order to establish a reasonable doubt that the challenged transactions were the product of a valid exercise of business judgment, Plaintiff must set forth particularized facts rebutting 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." Aronson, 473 A.2d at 812

Such decisions are protected unless they cannot be "attributed to any rational purpose."[22] In making such determinations, the courts do not review the merits of the board's decisions, but rather look to "the informational component of the directors' decisionmaking process" and "the motivations or the good faith of those charged with making the decision."[23]

(a) The Addenda to the Management Agreement.

Plaintiff attacks two addenda to the management agreement with Danaos Shipping, one in 2009 and one in 2010, as irrational. "It is impossible for Defendants to be able to justify their decision, in the middle of this economic turmoil, to increase the amount of fees paid to Danaos Shipping - not just once, but twice." (¶ 40).

While defendant has offered facts about the economic circumstances of the shipping industry and the increases in the fees under the addenda, he fails to rebut the presumption of rationality, particularly in view of the justifications set forth by defendants in support of the decision. The management agreement provides for renegotiation after three years and then annually after that, and, in the event no agreement is negotiated, certain increases are mandated

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[22]*Rosenquist*, p 23, quoting *Sinclair Oil Corp. V. Levien*, 280 A.2d 717, 720 (Del. 1971), as cited in *Info USA*, 953 A.2d at 972.

[23]*Rosenquist* at p. 23, quoting *Brehm v. Eisner*, 746 A.2d at 259.

by the agreement itself. (¶ 24). Plaintiff offers no facts to suggest the increases in fees in the two addenda exceeded those called for by the agreement itself, in the event there was no negotiated resolution. Plaintiff offers no facts to dispute the company's statement that '[w]e believe these fees and commission[s] are no more than the rates we would need to pay an unaffiliated third party to provide us with these management services." (¶¶ 27, 35). Plaintiff offers no particularized facts challenging the "informational component of the directors' decisionmaking process." Plaintiff has not offered particularized facts that defendants acted in bad faith.

Plaintiff has failed to create a reasonable doubt that the two addenda to the managment agreement were not the product of a valid exercise of business judgment.

(b) The Stock Sale.

Plaintiff's attack on the stock sale is predicated upon a determination that the "entire fairness" standard applies and he has not offered argument based upon the business judgment standard. Defendants respond similarly as to the addenda challenge. There is no claim the board was uninformed or lacked information. There are no particularized facts to create a reasonable doubt as to the motivation or good faith of the majority of the board. Plaintiff's complaint confirms that Danaos was in desperate financial straits and needed access to financing. Plaintiff may disagree with the board's decision, but has not offered particularized facts to create a reasonable doubt it was not a product of a valid exercise of business judgment.

IV. CONCLUSION

Plaintiff did not present a demand on the board of directors of Danaos Corporation before filing suit. The demand was not excused based upon the "entire fairness" standard because that standard does not apply in the demand context. The demand was not excused on either of the

two parts of the test for futility set out in *Aronson v. Lewis* and adopted in the Marshall Islands in *Rosenquist v. Economou*. As a result, the complaint must be dismissed.

ORDER

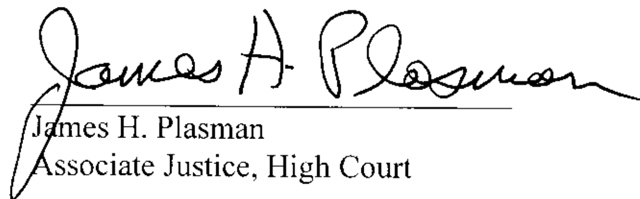
Based upon the foregoing, it is hereby ORDERED as follows:

1. The individual defendants' motion to dismiss pursuant to MIRCP 23.1 is GRANTED;

2. Leave is given to plaintiff to file an amended complaint; and

3. In the event plaintiff does not file an amended complaint by the close of business on January 31, 2012 (Majuro time), the action will be dismissed with prejudice.

Date: December 21, 2011.



James H. Plasman
Associate Justice, High Court