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

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 fiduciary duties to the corporation and committed other actionable misconduct by approving certain transactions to the detriment of the corporation and minority

shareholders. 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. Plaintiff also challenges the sale of stock to Mr. Coustas, two other board members, and others on a discounted basis.

The court dismissed the original complaint in this matter on December 20, 2103, but granted plaintiff leave to amend the complaint. Plaintiff filed an amended complaint on January 30, 2012. Plaintiff did not make a demand on the board of directors before filing the amended complaint and defendants have moved to dismiss. In briefing and oral argument, the issue was narrowed to whether the amended complaint contains particularized facts that raise a reasonable doubt that the Board adequately informed itself or acted in bad faith with regard to the challenged transactions.

The court finds the plaintiff has failed to allege particularized facts raising a reasonable doubt either that the defendants were not properly informed or that they acted in bad faith in approving the management addenda. Similarly, the court finds plaintiff has failed to allege particularized facts raising a reasonable doubt either that defendants were not properly informed or that they acted in bad faith in approving the stock issuance.

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

[1]All paragraph references are to plaintiff's Verified Amended Complaint filed January 30, 2012.

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 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).

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 management of a related entity, Danaos Shipping, pursuant to an amended and restated management agreement dated September 18, 2006 (¶ 21). 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

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[2]Andritsoyiannis left his positions on the board and as an officer of the company in June of 2011 (¶ 10).

(¶ 21). 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 (¶ 21). 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 (¶ 21). The 2006 agreement also provided that after three years, the fees would be adjusted annually through mutual agreement at a sufficient level to maintain the manager's average profit margin during each of the preceding three years (¶ 22).

During the second half of 2008 and the first half of 2009, the ocean-going container shipping industry experienced an "abrupt and dramatic downturn." (¶ 23). The downturn 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 (¶ 23). In addition, Danaos encountered difficulty in obtaining financing for the acquisition of new containerships that were under construction.

On February 12, 2009, Danaos executed an addendum to the management agreement increasing the management fees paid by the company to Danaos Shipping (¶ 24). 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 vessels on time charges ($500 per vessel per day to $575 per vessel per day); and in the fee for supervision of newbuilding contracts ($400,000 per vessel to $725,000 per vessel) (¶ 30).

The downturn in the container shipping industry continued throughout the remainder of 2009 and into 2010 (¶ 25). The company's Third Quarter 2009 Report stated that demand for

container shipping was at "the lowest levels in decades" and discussed the resulting effect on the company's financial performance (¶ 25):

> 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.
> * * *
> 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 (¶ 28). 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 (¶ 28).

On February 8, 2010, Danaos executed another addendum to the management agreement, further increasing the management fees paid to Danaos Shipping (¶ 29). 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 vessels on time charter ($575 per vessel per day to $675 per vessel per day) (¶ 30).

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." (¶ 24, ¶ 29).

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" (¶ 23). 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. (¶ 44). 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]."[3] 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 (¶ 44). The purpose of the stock sale was to fund the completion of 16 newbuilding ships that were under construction (¶ 44). The largest investors in the stock sale were Danaos Investments, as trustee/protector of the Coustas Trust, and members of the Coustas family, who together purchased more than $100 million in discounted shares (¶ 45). Other investors in the transaction included defendant Prokopakis; defendant Andritsoyiannis; Acclaim Shipping, Inc., which is controlled by defendant Coustas' father; and Sphinx Investments Corp.,

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[3]Declaration of Dennis J. Reeder in Support of Motion to Dismiss the Verified Amended Complaint, filed March 15, 2012 ("Reeder Declaration"), Exhibit 7, Danaos' Form 20-F and Annual Report for the Fiscal Year Ended Dec. 31, 2009 that was filed with the SEC on June 18, 2010, p. F-9.

an entity controlled by George Economou, who was appointed to the Danaos Board in connection with the transaction (¶ 45).

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, a 6.6% discount to the 60-day volume weighted average share price of $3.96 per share, and a 13.1% discount to the then-current $4.26 trading price of Danaos shares (¶ 46). 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. (¶ 47). 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,[4] *Rosenquist v. Economou.* "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. . . . Where a shareholder plaintiff fails to make such a demand, he must

[4]*Rosenquist v. Economou*, RMI 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)).

allege 'with particularity' the reasons why that demand would have been futile."[5] (internal citations omitted.)

Marshall Islands law directs the court to look to Delaware corporate law.[6] "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). . . . 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.'"[7]

Plaintiff's theory of demand futility proceeds under the latter part of *Aronson's* second prong which has been further refined in *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275:

> Plaintiffs may rebut the presumption that the board's decision is entitled to deference by raising a reason to doubt whether the board's action was taken on an informed basis or whether the directors honestly and in good faith believed that the action was in the best interests of the corporation. Thus, plaintiffs must plead particularized facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision.[8] (footnote omitted.)

While a board is required to consider that material information which is reasonably available, Delaware courts maintain that there is "no prescribed procedure or a special method

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[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.* p. 11.

[8] *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275, 286 (2003.)

that must be followed" under Delaware law. *Sutherland v. Sutherland*, Civ. A. No. 2399-VCN, 2010 WL 1838968, at *10 (Del. Ch. May 3, 2010) (internal citation and quotation omitted); *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989) ("there is no single blueprint that a board must follow to fulfill its duties").

In considering the allegations of a complaint, the court may make reasonable inferences, but such inferences must be based upon particularized facts:

> The Court should draw all *reasonable* inferences in the plaintiff's favor. Such reasonable inferences must logically flow from particularized facts alleged by the plaintiff. "[C]onclusory allegations are not considered as expressly pleaded facts or factual inferences." Likewise, inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor.[9] (footnotes omitted, emphasis in the original.)

A. The Management Addenda

1. Plaintiff's allegations about the board's failure to inform itself are not "particularized statements of fact."

Plaintiff alleges the board approved the 2009 and 2010 management addenda without adequate information. In support of this contention, the amended complaint alleges defendants

- "made no effort to inform themselves of 'the rates we would need to pay an unaffiliated third party to provide us with these management services';"
- "did not conduct any sort of market check;"
- "did not retain any advisors or experts to advise them regarding market rates;"
- "did not attempt to contact any unaffiliated third parties to check rates;"
- "did not review any data, publications, or other documents regarding market

[9]Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1048 (Del. 2004)

rates;"

- "did not form a committee of disinterested and independent directors to evaluate and negotiate the terms of 2009 and 2010 Addenda;"
- "did not retain any independent legal counsel, financial advisor, or other advisors or experts to advise them in connection therewith;"
- "did not seek or obtain any 'fairness opinion' regarding these transactions;"
- "did not engage in any negotiation with Coustas or Danaos Shipping;" and
- "did not consider any alternative transactions or terms." (¶¶ 31, 32)

These alleged failings of the board mirror the nature of the allegations made in *In Re the Limited, Inc.*, where the court found the complaint failed to allege gross negligence or the insufficiency of the information used by the Board in making its decision. The court noted:

> The only allegation in the Complaint speaking to the directors' alleged breaches of care states that:
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> > A Special Committee was apparently formed the very day the transaction was approved, solely to "rubber stamp" the transaction, without adequate deliberation, without adequate advice from independent legal counsel and independent financial advisors, without adequate consideration of the cost to the Company, and without any genuine exploration of alternative means through which the Company's excess cash could be used to benefit shareholders (without causing forfeiture of the valuable right). The Special Committee [also failed to] negotiate the transaction with [Mr.] Wexner.
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> Compl. ¶ 46. Such general and conclusory allegations, however, fail to support the inference that the Board breached its duty of care.[10]

The allegations made in paragraphs 31 and 32 of the amended complaint in the present case are similarly flawed, in that they amount to "general and conclusory allegations" rather than particularized statements of fact necessary to support a determination that demand on the board was excused.

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[10] *In Re Limited, Inc.*, 2002 WL 537692, fn 64.

Plaintiff asserts[11] he has made sufficient allegations to excuse demand similar to the allegations made in *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275 (2003.) The court excused demand in that case only after the initial complaint was dismissed subject to leave to be amended, which plaintiffs did, using "the 'tools at hand,' a request for books and records as authorized under 8 Del. C. § 220, to obtain information about the nature of the Disney Board's involvement in the decision to hire and, eventually, to terminate Ovitz."[12] Based upon "the information gained from that request, plaintiffs drafted and filed the new complaint,"[13] which survived defendants' motion to dismiss. However, the allegations in the new complaint in *Disney* were based upon particularized facts, as opposed to conclusory generalities. The *Disney* court reviewed the facts alleged in the complaint:

> The Old Board met immediately after the committee did. Less than one and one-half pages of the fifteen pages of Old Board minutes were devoted to discussions of Ovitz's hiring as Disney's new president. Actually, most of that time appears to have been spent discussing compensation for director Russell. No presentations were made to the Old Board regarding the terms of the draft agreement. No questions were raised, at least so far as the minutes reflect. At the end of the meeting, the Old Board authorized Ovitz's hiring as Disney's president. No further review or approval of the employment agreement occurred. Throughout both meetings, no expert consultant was present to advise the compensation committee or the Old Board. Notably, the Old Board approved Ovitz's hiring even though the employment agreement was still a "work in progress." The Old Board simply passed off the details to Ovitz and his good friend, Eisner.[14]

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[11]Plaintiff's Memorandum of Law in Oppostiion to Defendants' Motion to Dismiss Pursuant to MIRCP 23.1. filed May 15, 2012, at f.n. 7.

[12]825 A.2d 275, 279.

[13]825 A.2d 275, 279.

[14]825 A.2d 275, 288.

These particularized facts, based upon the plaintiffs' use of the "tools at hand," are in stark contrast to the allegations in the present case, which show no evidence of the use of such "tools at hand." The recitation of numerous allegations by plaintiff does not change the absence of any particularized factual basis for those general and conclusory allegations.

2. Plaintiff's references to management fees and agreements of other shipping companies are insufficient to create a reasonable inference leading to a reasonable doubt that the Board was informed about the management addenda.

The requirement of "particularized facts" has not been met through the reference of management fees in place for other shipping companies. Plaintiff cites three management agreements for shipping companies that plaintiff asserts are industry peers to Danaos: Eagle Bulk Shipping, Inc. ("Eagle"), Diana Shipping, Inc. ("Diana"), and Global Ship Lease Inc. ("Global") (¶ 34). Eagle paid a daily per vessel fee of $304 in 2009 and $315 in 2010 (¶ 35). Diana paid a daily vessel fee of $493 in 2009 and 2010 (¶ 36). Global paid a daily vessel fee of $312 in 2009 and 2010 (¶ 37). Based upon those "comparables," fees which were lower than those paid by Danaos and which showed little or no increase in 2009 and 2010, plaintiff infers the increases in fees contained in the Addenda were in excess of what was required in the management agreement.

> From 2008 to 2010, Eagle's management fees increased by less than 6% cumulatively, and Diana's and Global's did not increase at all. During the same period, however, Danaos' management fees increased by 35% as a result of the 2009 and 2010 Addenda. These increases were far in excess of the amounts that would have been necessary to "maintain [Danaos Shipping's] average profit margin for the immediately preceding three years." (¶ 40).

Plaintiff asserts that if defendants had "informed themselves of 'the rates we would need

to pay an unaffiliated third party to provide us with these management services,' they would have discovered that, contrary to their unsubstantiated 'belief', the rates they agreed to pay Danaos Shipping vastly exceeded the rates charged by unaffiliated third parties" (¶ 33). According to plaintiff, these particularized facts raise a reasonable doubt that defendants properly informed themselves of material facts related to the board's decision to approve the addenda.

Defendants argue plaintiff has provided no authority for the use of such "comparables" in the demand context. Further, defendants assert that plaintiff has failed to show that the offered agreements are in fact comparable to the Danaos agreement, and thus the inference drawn by plaintiff, that the Danaos board was uninformed based upon the disparity in fees between Danaos and the "comparables" is unreasonable.

While the complaint states Eagle, Diana and Global are "peers" of Danaos (¶ 34), defendants argue there is no factual basis for this assertion. None of the three is identified by Danaos as a competitor in Danaos's public filings.[15] The 2010 Danaos Annual Report further identifies the company's area of competition as "the containership sector of the international shipping industry."[16] However, Eagle and Diana, two of the three examples cited by plaintiff, are dry bulk carriers, as opposed to containership carriers.[17]

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[15]Reeder Declaration, Exhibit 3, excerpts from Danaos Corporation's Form 20-F and Annual Report for the Fiscal Year Ended December 31, 2010 that was filed with the U.S. Securities and Exchange Commission on April 6, 2011, at p. 39 ("Competition for providing containership services comes from a number of experienced shipping companies. In the containership sector, these companies include Zodiac Maritime, Seaspan Corporation and Costamare Inc"),

[16]*Ibid.*

[17]Reeder Declaration, Exhibit 13, excerpts of Eagle Bulk Shipping, Inc. Form 10-K filed with the SEC on March 4, 2011 (referenced in footnote 6, Verified Amended Complaint) at p. 4: "Eagle Bulk Sipping, Inc. . . . is engaged primarily in the ocean transportation of a broad range of

Defendants further note that the agreements offered by plaintiff have not been shown to be comparable to the management agreement with Danaos Shipping. For instance, information in the Form 10-K filed by Eagle Bulk Shipping, Inc., indicates Eagle outsources only the technical management of its ships to third parties.[18] In contrast, Danaos' daily management fee includes not only the same technical services covered by Eagle's management contract, but also includes extensive administrative and commercial services.[19] While there may be a difference in fees under the Diana management agreement compared to the Danaos management agreement, there was also a difference in the services provided under the respective agreements.

With respect to Diana, defendants point to publicly available information about the management fee that suggests Diana's fee is higher than the amount alleged in the amended complaint. In addition to daily fees for managing the vessel, the agreement with Danaos Shipping provides a commission to the manager based on the overall charter revenue. The commission paid by Danaos was 0.75% "on all gross fright, charter hire, ballast bonus and demurrage with respect to each vessel in our fleet,"[20] which was not changed by either of the Addenda (¶ 29). In contrast, Diana paid a commission of 2.0% of charter revenue,[21] resulting in

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major and minor bulk cargoes. . . ." See also Reeder Declaration, Exhibit 14, Diana Shipping, Inc. Form 20-F filed with the SEC on March 31, 2011 (referenced in footnote 7, Verified Amended Complaint) at p. 30: "We specialize in transporting dry bulk cargoes. . ."

[18]Eagle Form 10-K, *ibid.* at p. 11.

[19]Reeder Declaration, Exhibit 6, excerpts from Danaos' Prospectus filed with the SEC on October 5, 2006, pp 124-125 (describing the technical, administrative and commercial services provided under Danaos's management agreement.)

[20]*Ibid.*, p. 125.

[21]Diana Form 20-F, *supra* footnote 17, at p. 34.

a higher management fee than suggested by plaintiff's calculations.

With respect to Global, plaintiff does not mention information in Global's public filings identifying other sources of fees paid to its manager, such as reimbursement of ship operating expenses under a global expense agreement.[22] While such expenses are subject to a per diem cap ranging from $5,400 to $8,800 per vessel, the amended complaint does not address how these payments may affect comparability to the Danaos management agreement.

The failure of the amended complaint to provide facts to explain how these other arrangements which are part of the management agreements may affect the overall monies paid to the managers undermines the assertion that these agreements may be regarded as comparable to the Danaos management agreement and addenda.

The amended complaint acknowledges that the 2006 management agreement required that after three years, the fees would be adjusted annually through mutual agreement with the manager (¶ 22). There is no showing that any of the three "comparables" had similar contractual provisions that would require such periodic modifications of the respective agreements. The amended complaint also makes reference to the requirement in the Danaos management agreement that the rate be set so as to maintain the manager's average profit margin for the immediately preceding three years (¶ 22). None of the "comparables" are alleged to have similar provisions.

In light of the absence of authority for the use of a comparability methodology at the demand stage of litigation, and the absence of facts to show the comparability of the offered management agreements to the Danaos management agreement and addenda, the court does not

[22]Reeder Declaration, Exhibit 12, excerpts from Global Form 20-F, dated May 9, 2011, at pp. 22, 23.

find plaintiff has raised a reasonable doubt that defendants were reasonably informed in making their decision to approve the challenged Addenda.

3. Plaintiff has not alleged particularized facts to raise a reasonable doubt that defendants acted in good faith.

Plaintiff fares no better under a theory that the defendants acted in bad faith. Absent allegations regarding a director's subjective intent to do harm (which have not been made in this case), bad faith requires a plaintiff to point to objective indicators that a decision was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1247 (Del. 1999) (citation omitted). "The decision must be 'egregious,' lack 'any rational business purpose,' constitute a 'gross abuse of discretion,' or be so thoroughly defective that it carries a 'badge of fraud.'" *Alidina v. Internet.com Corp.*, Civ. A. No. 17235-NC, 2002 WL 31584292, at *4 (Del. Ch. Nov. 6, 2002) (citation omitted). Showing bad faith requires "an extreme set of facts." *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 654-55 (Del. Ch. 2008). No such facts have been alleged. Just as the allegations of the complaint fail to raise a reasonable doubt to the informational component of the defendants' decisions to approve the management addenda, so to they fail to raise a reasonable doubt as to the good faith of defendants in their decision-making.

B. The Stock Issuance

1. Plaintiff's allegations about the board's failure to inform itself are not "particularized statements of fact."

Plaintiff has listed a number of failings of the Board to properly inform itself about the stock issuance. At paragraph 49 of the amended complaint, plaintiff states the defendants

- "made no effort to inform themselves of 'market conditions' or the terms 'that would be available in a broader offering'";
- "did not retain any advisors or experts to advise them regarding market conditions or alternative financing options" and
- "did not attempt to contact any investors, investment bankers, or others to evaluate market conditions or alternative financing options."

Further, at paragraph 50 plaintiff alleges defendants

- "did not form a committee of disinterested and independent directors to evaluate and negotiate the terms of Discounted Share Issuance;"
- "did not retain any independent legal counsel, financial advisor, or other advisors or experts to advise them in connection therewith;"
- "did not seek or obtain any 'fairness opinion' regarding the transaction;"
- "did not engage in any negotiation with any of the Related Investors;" and
- "did not consider any alternative transactions or terms."

In the absence of particularized fact statements as a basis, these are nothing more than conclusory and general allegations which do not provide a basis for waiver of demand on the board.

2. Plaintiff's references to stock sales of other shipping companies are insufficient to create a reasonable inference leading to a reasonable doubt that the Board was informed about the stock issuance.

Similar to his employment of "comparables" in the challenge to the management addenda, plaintiff has offered four stock offerings of shipping companies which he contends are

comparable to the Danaos stock issuance. In each case, he contends the discount of the offering to the then current trading price was less than the discount in the Danaos issuance.

> 52. On June 18, 2010, shipping company General Maritime Corporation announced a public offering of 30.6 million shares of common stock at a discount of 4.5% to their then current trading price.
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> 53. On July 21, 2010, shipping company Genco Shipping & Trading Limited announced a public offering of 3.125 million shares of common stock at a discount of 1.1% to their then-current trading price.
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> 54. On August 17, 2010, shipping company Teekay Offshore Partners, LP announced a public offering 5.25 million common units at a discount of 4.5% to their then-current trading price.
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> 55. On September 30, 2010, shipping company Knightsbridge Tankers Limited announced a public offering 4.25 million shares of common stock at a discount of 2.2% to their then-current trading price.
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> 56. All of these discounts are far smaller than the 13.1% discount the Individual Defendants agreed to take pursuant to the Discounted Share Issuance.[23]

From these transactions and the disparity of the discounts to that in the Danaos stock offering, plaintiff argues it may be inferred that the defendants failed to properly inform themselves about the market conditions and the terms that would have been available in a broader offering (¶ 51).

Defendants note, however, plaintiff has not shown any authority for the use of such "comparables" in the demand context. Further, plaintiff has not shown these offered transactions to be "comparable" to the Danaos stock issuance to allow such an inference. To this point, defendants argue

- plaintiff has not shown the "shipping" companies were container shipping companies operating in the same competitive sphere as Danaos;
- plaintiff has not shown the share issuance was the same size as that of Danaos;
- plaintiff has not shown why the discount set forth in the complaint (13.1% to the "then-current" trading price) is a more appropriate measure of the discount than

[23]Verified Amended Complaint.

that offered by the Danaos Board (5.9% on the 30 day weighted average share price and 6.6% on the 60 day weighted average share price); and

- plaintiff has not shown the circumstances surrounding the "comparable" issuances were similar to Danaos, specifically that the company faced financial ruin in the absence of new capital, and that the lenders required the participation of defendant Coustas.[24]

Perhaps most importantly, defendants point out the "comparables" set out in the complaint were all public offerings, whereas the Danaos issuance was a private, restricted stock offering. Because restricted shares sold in a private offering may not be transferred for a period of time after purchase, a discount is warranted. In *Onti, Inc. v. Integra Bank* the court found that "restricted shares must carry some discount from the market price."[25] In that case, the court applied a restricted stock discount of 31.3% based on the mean discount found in eighteen market studies, a discount which significantly exceeds the discount in the Danaos stock issuance, whether measured by defendants or by plaintiff.

Plaintiff's attempted use of comparables, even if appropriate in the demand context, does not warrant an inference that the Board did not adequately inform itself prior to the stock

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[24]The failure of plaintiff to address the stressed economic circumstances of Danaos and the lenders' insistence on the participation of Coustos in the stock sale may be suggestive that plaintiff is not focused on the process, but rather the substance of the board's decision. See *In re Dow Chemical Co. Derivative Litigation*, 2010 WL 66769 at *9: "Even accepting all the well-pled allegations as true, plaintiffs do not rebut or address the accepted facts that the board was negotiating in a seller's market and R & H demanded certain deal protections. Fearing that R & H would walk away, Dow made a clear business decision to approve the R & H deal and sign the Merger Agreement without a financing contingency. **Plaintiffs' failure to address these facts is highly suggestive that they do not focus on the process but rather on the substantive content of the directors' decision."** (emphasis added, footnote omitted)

[25]751 A.2d 904, 913 (Del. Ch. 1999)

issuance. Plaintiff's other allegations are general and conclusory allegations which do not meet the required standard of particularized facts in the complaint which create a reasonable doubt as to the adequacy of that the informational component of the directors' decision-making process.

3. Plaintiff has not alleged particularized facts to raise a reasonable doubt that defendants acted in good faith.

Just the plaintiff failed to raise a reasonable doubt as to the good faith of the defendants in the decision to approve the two management addenda, so too he has failed to do so in regard to the stock issuance decision.

IV. CONCLUSION.

Plaintiff has contended he is excused from placing a demand with the Board because such demand would be futile, asserting the board has lost the protection of the business judgment rule because it failed to properly inform itself of material facts, or acted in bad faith, relating to the approval of the two management agreement addenda and the stock issuance. The court has found that the plaintiff has failed to offer particularized factual allegations so as to raise a reasonable doubt as to the informational component of the board's actions or to the board's good faith. His demand on the board is not excused and his complaint must be dismissed.

The matter has come before the court on plaintiff's amended complaint after prior dismissal. Plaintiff has had ample opportunity to cure the deficiencies in his pleading. The court will make this dismissal with prejudice.

ORDER

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

1. The individual defendants' motion to dismiss pursuant to MIRCP 23.1 is **GRANTED**; and
2. The dismissal is **WITH PREJUDICE.**

Date: July 3, 2013.

James H. Plasman
Associate Justice, High Court