IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THEODORE DRACHMAN and DIANA KNIGHT, derivatively on behalf of BIODELIVERY SCIENCES INTERNATIONAL, INC., and individually and on behalf of themselves and all other similarly situated stockholders of BIODELIVERY SCIENCES INTERNATIONAL, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2019-0728-LWW
HERM CUKIER, TODD C. DAVIS, PETER S. GREENLEAF, KEVIN KOTLER, FRANCIS E. O'DONNELL JR., MARK A. SIRGO, and WILLIAM MARK WATSON,	)	
Defendants,	)	
and	)	
BIODELIVERY SCIENCES INTERNATIONAL, INC., a Delaware Corporation,	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

Date Submitted: August 2, 2021
Date Decided: October 29, 2021

Brian E. Farnan and Michael J. Farnan, FARNAN LLP, Wilmington, Delaware; Steven J. Purcell, Douglas E. Julie, Robert H. Lefkowitz, and Anisha Mirchandani, PURCELL JULIE & LEFKOWITZ LLP, New York, New York; *Counsel for Plaintiffs Theodore Drachman and Diana Knight*

Blake Rohrbacher and Alexander M. Krischik, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Caroline H. Bullerjahn, GOODWIN PROCTER LLP, Boston, Massachusetts; *Counsel for Defendants Herm Cukier, Todd C. Davis, Peter S. Greenleaf, Kevin Kotler, Francis E. O'Donnell, Jr., Mark A. Sirgo, and William Mark Watson*

Peter B. Ladig and Brett M. McCartney, BAYARD P.A., Wilmington, Delaware; *Counsel for Nominal Defendant BioDelivery Sciences International, Inc.*

WILL, Vice Chancellor

This controversy arises from BioDelivery Sciences International, Inc.'s adoption of two amendments to its certificate of incorporation. One amendment declassified BioDelivery's board of directors over several years. The second changed its director voting standards from plurality to "majority of the votes cast." Neither amendment initially received the number of stockholder votes necessary to pass under Section 242(b) of the Delaware General Corporation Law. Nonetheless, BioDelivery's board deemed the proposals approved, filed a corresponding certificate of amendment with the Delaware Secretary of State, and proceeded as though the charter amendments were valid.

The plaintiffs made a pre-suit demand on the board informing them of the error and, following BioDelivery's inaction and the board's rejection of the demand, brought direct claims for breach of fiduciary duty. The plaintiffs filed a motion for summary judgment and the defendants filed a cross-motion to dismiss. Both motions were denied. BioDelivery went on to moot much of the original complaint by successfully ratifying the contested amendments.

The plaintiffs then filed an amended complaint asserting derivative breach of fiduciary duty claims and alleging demand futility while also describing the board's refusal of the demand. The defendants filed a partial motion to dismiss which I granted in part. This decision resolves the defendants' remaining argument that

demand is unexcused for the plaintiffs' breach of fiduciary duty claims concerning the approval and implementation of the charter amendments.

At the court's request (given that the plaintiffs had, in fact, made a demand), the parties submitted supplemental briefing on wrongful refusal. And, indeed, wrongful refusal—not demand futility—is the applicable legal framework. In this decision, I conclude that the amended complaint satisfies the heightened pleading standard of Court of Chancery Rule 23.1 and supports a reasonable inference that the demand was wrongfully refused. The plaintiffs made a valid demand on the Board to correct the violation of Section 242(b) but were rebuffed until the amendments were ratified nearly a year later. The remainder of the defendants' partial motion to dismiss is therefore denied.

I. FACTUAL BACKGROUND

The following facts are drawn from the plaintiffs' Amended Verified Stockholder Derivative and Class Action Complaint (the "Complaint") and the

documents it incorporates by reference.[1] Any additional facts are subject to judicial notice.[2]

A. The Charter Amendments

Nominal defendant BioDelivery Sciences International, Inc. (the "Company"), a Delaware corporation with its principal place of business in North Carolina, is a specialty pharmaceutical company focused on therapies for patients living with chronic conditions.[3] At the Company's 2018 annual stockholder meeting, proposals were submitted for a stockholder vote, including two amendments to BioDelivery's certificate of incorporation relevant here.[4] One amendment proposed declassifying BioDelivery's Board of Directors in phases over

[1] Am. Verified Stockholder Derivative and Class Action Compl. (Dkt. 44) (hereinafter "Am. Compl."); Ct. Ch. R. 10(c); *see Freedman v. Adams*, 2012 WL 1345638, at *5 (Del. Ch. Mar. 30, 2012) ("When a plaintiff expressly refers to and heavily relies upon documents in her complaint, these documents are considered to be incorporated by reference into the complaint . . . ."), *aff'd*, 58 A.3d 414 (Del. 2013); *Winshall v. Viacom Int', Inc.*, 76 A.3d 808, 818 (Del. 2013) ("[A] plaintiff may not reference certain documents outside the complaint and at the same time prevent the court from considering those documents' actual terms." (quoting *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2011 WL 1167088, at *3 n.17 (Del. Ch. Mar. 29, 2011))).

[2] *See, e.g.*, *In re Books–A–Million, Inc. S'holders Litig.*, 2016 WL 5874974, at *1 (Del. Ch. Oct. 10, 2016) (explaining that the court may take judicial notice of "facts that are not subject to reasonable dispute" (citing *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006))). The court declines to take judicial notice of certain discovery materials that were placed in the record on a prior summary judgment motion.

[3] Am. Compl. ¶ 8; *see* BioDelivery Sciences Int'l, https://www.bdsi.com (last visited Oct. 29, 2021).

[4] Am. Compl. ¶ 44.

several years.[5] The second amendment proposed changing the voting standard for uncontested director elections from plurality to "majority of the votes cast."[6] The Company's 2018 proxy statement (the "Proxy") explained that "[t]he affirmative vote of a majority of the votes entitled to vote [wa]s required to approve" the proposals and that "broker non-votes w[ould] have the same effect as a vote against" the proposals.[7]

The Company's annual meeting was held on August 2, 2018, with 59,351,956 shares of BioDelivery common stock issued and outstanding.[8] Each share was entitled to one vote.[9] A majority vote of 29,675,979 shares was therefore required for an amendment to pass.[10] After the 2018 annual meeting, BioDelivery filed a Form 8-K disclosing that the declassification and voting standard proposals had received 27,824,544 and 25,509,720 votes, respectively.[11]

Despite neither proposal garnering the requisite number of votes, the Board deemed the two proposals approved.[12] BioDelivery proceeded to file an amendment

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[5] *Id.* ¶ 2.

[6] *Id.*

[7] *Id.* ¶ 71 (quoting BioDelivery, Proxy Statement (Form 14A), at 4 (July 2, 2018)).

[8] *Id.* ¶¶ 39-42; *see* BioDelivery, Proxy Statement (Form 14A), at 1 (July 2, 2018).

[9] Am. Compl. ¶ 40.

[10] *Id.* ¶ 42.

[11] *Id.* ¶¶ 4, 46-47, 49.

[12] *Id.* ¶¶ 5, 54, 64. BioDelivery's Form 8-K stated that "[a]ll matters submitted to a vote of the Company's stockholders at the [2018] Meeting were approved." *Id.* ¶ 54.

to its certificate of incorporation with the Delaware Secretary of State.[13] And the Board began to implement the amendments.[14] The Company used the "majority of votes cast" voting standard at its 2019 annual stockholder meeting and began to declassify its Board.[15]

B. The Demand

On July 31, 2019, plaintiffs Theodore Drachman and Diana Knight—both stockholders of the Company—made a pre-suit demand on the BioDelivery Board (the "Demand").[16] The plaintiffs challenged the 2018 charter amendments as invalid under 8 *Del. C.* § 242(b), which requires the affirmative vote of "a majority of the outstanding stock entitled to vote thereon" to amend a certificate of incorporation.[17] The Demand explained that the proposals failed to receive the 29,675,979 votes needed for approval and requested, among other things, that the Board deem the amendments ineffective (or seek effective stockholder approval).[18] The Demand

[13] *Id.* ¶¶ 54-55.

[14] *Id.* ¶ 56.

[15] *Id.* ¶¶ 5, 49-54. The nature of the election of two directors at the 2018 annual stockholder meeting was dependent on the declassification amendment. Because it "passed," the directors were elected to one-year terms instead of three-year terms. *Id.* ¶¶ 26-27. Similarly, three directors were elected to one-year terms at the 2019 annual stockholder meeting. *Id.* ¶ 59.

[16] *Id.* ¶¶ 62-63.

[17] 8 *Del. C.* § 242(b).

[18] Am. Compl. Ex. A.

closed by stating that, if the Board did not respond, the plaintiffs would pursue remedial action "including but not limited to the commencement of litigation."[19]

BioDelivery and its Board responded to the Demand through their counsel on August 30, 2019 (the "Response"), stating that "the Board ha[d] determined that the Demand [wa]s without merit" and "declined to take the actions demanded therein."[20] The Response maintained that the "amendments were properly approved by shareholders" because the Company had excluded broker non-votes from the number of outstanding shares entitled to vote.[21] The Response explained that the "Amendments were both approved by an overwhelming majority at the 2018 Annual Meeting, and were properly adopted and implemented by the Board following these votes."[22]

C. This Litigation

On September 11, 2019, the plaintiffs filed a class action complaint against BioDelivery and its individual directors in this court.[23] The complaint alleged violations of Section 242(b) and breaches of fiduciary duty and requested a

[19] *Id.*

[20] Am. Compl. Ex. B.

[21] *Id.*

[22] *Id.*

[23] Verified Class Action Compl. (Dkt. 1).

declaratory judgment on the validity of the amendments.[24] The complaint explained that neither proposal had received the affirmative vote of a majority of the company's outstanding common stock, as required by Section 242(b).[25] The complaint further stated that the Board had "excluded broker non-votes" from the vote tabulation "in direct contravention of Section 242 of the DGCL and the representations in the [Company's] 2018 Proxy."[26]

The plaintiffs moved for summary judgment before the defendants responded to the complaint,[27] and the defendants subsequently filed a joint opposition to the plaintiffs' motion and a cross-motion to dismiss.[28] Both motions were denied by Chancellor Bouchard in April 2020.[29]

In July 2020, BioDelivery's stockholders voted to approve the ratification of the challenged amendments in accordance with 8 *Del. C.* § 204, mooting the plaintiffs' claims for violations of Section 242(b) and for a declaratory judgment.[30] The plaintiffs were granted leave to file an amended complaint.

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[24] *Id.* ¶¶ 80-93.

[25] *Id.* ¶ 52.

[26] *Id.* ¶ 71.

[27] Dkt. 7.

[28] Dkts. 13-14.

[29] Mot. for Summ. J. Hr'g Tr. Apr. 14, 2020, at 46-47 (Dkt. 35).

[30] Am. Compl. ¶¶ 75-76.

The operative Complaint was filed on October 13, 2020 with the Demand and Response attached as exhibits. It alleged both direct and derivative claims for breach of fiduciary duty against BioDelivery and its Board. The breach of fiduciary duty claims were brought on five grounds: "(a) deeming the [proposals] approved in violation of the DGCL, (b) filing the Amendments with the Delaware Secretary of State, (c) implementing the Amendments, (d) refusing to take appropriate action in response to the Demand, and (e) moving to dismiss [the] action."[31] Despite alleging that the Board refused the Demand, the Complaint included a section called "Demand Futility Allegations."[32] The Complaint detailed the Demand and the Board's rejection of that Demand in its Response.[33]

The defendants filed a partial motion to dismiss, arguing that moving to dismiss the original complaint could not constitute a breach of fiduciary duty, that BioDelivery was no longer a proper defendant, and that the derivative claim—except insofar as it challenged the Board's response to the Demand—should be dismissed for failure to plead demand futility.[34]

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[31] *Id.* ¶¶ 91-97.

[32] *Id.* ¶¶ 85-90.

[33] *E.g.*, *id.* ¶¶ 6, 62-71.

[34] Defs.' Opening Br. 2-3 (Dkt. 47).

Oral argument on the partial motion to dismiss took place on June 17, 2021.[35] I dismissed BioDelivery as a defendant and the claims alleging that the Board members breached their fiduciary duties by moving to dismiss this action.[36] I took the portion of the motion related to demand futility under advisement.[37] Because neither party addressed the wrongful refusal standard in their briefing despite the plaintiffs' Demand, I requested supplemental briefing on the topic.[38] Specifically, I asked that the parties address "whether [they] agree that wrongful refusal is the relevant framework for assessing [the p]laintiffs' derivative claims; whether the [] Complaint pleads wrongful refusal; and, assuming that wrongful refusal applies and is asserted in the [] Complaint, whether [the p]laintiffs' derivative claim should be dismissed under Rule 23.1."[39] The parties submitted supplemental briefs on those issues.

[35] Mot. to Dismiss Hr'g Tr. June 17, 2021 (Dkt. 92).

[36] *Id.* at 53-54.

[37] *Id.* at 56.

[38] Dkt. 87, at 2 ("As I raised with the parties at oral argument, it is not apparent to me how the Court can apply a demand futility analysis to claims that were the subject of a pre-suit litigation demand which Plaintiffs allege was wrongfully refused.").

[39] *Id.* at 4.

II. LEGAL ANALYSIS

The defendants' motion to dismiss briefing argued that the derivative breach of fiduciary duty claims should be dismissed (with one exception)[40] for failure to plead demand futility.[41] In their supplemental briefing, the defendants asserted that wrongful refusal is the proper standard, that dismissal is appropriate because the plaintiffs lack derivative standing and, alternatively, that the Complaint does not satisfy the heightened pleading standard for wrongful refusal.[42] The plaintiffs' supplemental brief also recognized wrongful refusal as the applicable standard but contended that the Demand was refused in bad faith.[43]

As discussed below, wrongful refusal (rather than demand futility) is the relevant framework at this juncture. Because I find that the Complaint alleges wrongful refusal, the plaintiffs have not lost their derivative standing. I also conclude that the plaintiffs have adequately pleaded particularized facts supporting a reasonable inference that the Board's refusal of the Demand was not made in good faith. The pending portion of the partial motion to dismiss is therefore denied.

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[40] The defendants did not move to dismiss the claims brought in Paragraph 96(d) of the Amended Complaint (alleging that the defendants breached their fiduciary duty by "refusing to take appropriate action in response to the Demand").

[41] Defs.' Opening Br. 2-3.

[42] *See* Defs.' Suppl. Opening Br. 4, 6, 10 (Dkt. 94).

[43] Pls.' Suppl. Opp'n Br. (Dkt. 97).

A. The Wrongful Refusal Standard Applies.

The parties originally briefed the motion to dismiss under a demand futility standard.[44] The Complaint includes a "Demand Futility Allegations" section stating that demand would have been futile because the Board members "breached their fiduciary duties and acted in bad faith in connection with deeming the Amendments approved and refusing Plaintiffs' Demand."[45] The defendants' opening brief maintained that the plaintiffs had not "allege[d] that the [Demand] constituted a demand for purposes of Rule 23.1."[46] At oral argument, the plaintiffs' counsel confirmed that the Demand was intended to satisfy Rule 23.1.[47] Both parties acknowledged in their supplemental briefs that the derivative claims are properly analyzed under a wrongful refusal framework—not demand futility.[48] I agree.

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[44] *E.g.*, Defs.' Opening Br. 19-30.

[45] Am. Compl. ¶ 90.

[46] Defs.' Opening Br. 19 n.11.

[47] *See* Mot. to Dismiss Hr'g Tr. June 17, 2021, at 33-35. The Demand was a formal letter addressed to the Board with the title "Stockholder Litigation Demand." Am. Compl. Ex. A. It described alleged technical violations of the Delaware General Corporation Law, demanded that certain "immediate actions" be taken by the Board, and closed by stating that litigation might be pursued if the Board did not promptly respond. *Id.* The letter easily satisfies the test for treating a pre-suit communication as a demand for purposes of Rule 23.1. *See Yaw v. Talley*, 1994 WL 89019, at *7 (Del. Ch. Mar. 2, 1994) (describing the test for treating a pre-suit communication as a demand as one that looks at whether the communication notes "(i) the identity of the alleged wrongdoers, (ii) the wrongdoing they allegedly perpetrated and the resultant injury to the corporation, and (iii) the legal action the shareholder wants the board to take on the corporation's behalf").

[48] Defs.' Suppl. Opening Br. 1; Pls.' Suppl. Opp'n Br. 3.

"The decision whether to initiate or pursue a lawsuit on behalf of the corporation is generally within the power and responsibility of the board of directors."[49] Before a stockholder can usurp this role by pursuing derivative claims, Court of Chancery Rule 23.1 requires that she demonstrate either (1) that the corporation's directors wrongfully refused a demand to authorize the corporation to bring the suit or (2) that a demand would have been futile because the directors were incapable of impartially considering the demand.[50]

A plaintiff cannot have it both ways.[51] In *Spiegel v. Buntrock*, the Delaware Supreme Court stated that "a stockholder who asserts a derivative claim cannot stand neutral, in effect, with respect to the board of directors' ability to respond to a request to take legal action, by simultaneously making a demand for such action and

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[49] *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009) (citing 8 *Del. C.* § 141(a)).

[50] *See Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993).

[51] *See Raj & Sonal Abhyanker Family Tr. v. Blake*, 2021 WL 2477025, at *5 (Del. Ch. June 17, 2021) ("Rule 23.1 presents a stockholder wishing to bring a derivative action with two options. Either the stockholder makes a pre-suit demand that the board of directors pursue the claims at issue, or the stockholder must plead with particularity that it would have been futile to present the matter to the board."); *Scattered Corp. v. Chi. Stock Exch., Inc.*, 701 A.2d 70, 74 (Del. 1997) ("If a demand is made, the stockholder has spent one—but only one—'arrow' in the 'quiver.' The spent 'arrow' is the right to claim that demand is excused. The stockholder does not, by making demand, waive the right to claim that demand has been wrongfully refused."), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

continuing to argue that demand is excused."[52] "[W]hen a demand is made, the question of whether demand was excused is moot."[53]

Because the issues raised by demand futility and demand refusal are different, the legal standards applied are also different.[54] When a stockholder files a derivative suit asserting demand futility, "the basis for such a claim is that the board is (1) interested and not independent; and (2) that the transaction attacked is not protected by the business judgment rule."[55] If a stockholder elects to make a demand before filing suit, the stockholder has "tacitly conceded the independence of a majority of the [] Board to respond to his demand."[56] As a result, the decision of the concededly independent and disinterested board to refuse a demand is subject to the business

[52] 571 A.2d 767, 775 (Del. 1990).

[53] *Id.* (citing *Stotland v. GAF Corp.*, 469 A.2d 421, 422-23 (Del. 1983)); *see also Levine v. Smith*, 591 A.2d 194, 212 (Del. 1991) ("A shareholder plaintiff, by making demand upon a board before filing suit, 'tacitly concedes the independence of a majority of the board to respond.'" (quoting *Spiegel*, 571 A.2d at 777)).

[54] *Levine*, 591 A.2d at 212 ("The focus of a complaint alleging wrongful refusal of demand is different from the focus of a complaint alleging demand futility. The legal issues are different; therefore, the legal standards applied to the complaints are necessarily different.").

[55] *Id.* (citing *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984)); *see also United Foods & Com. Workers Union v. Zuckerberg*, 2021 WL 4344361, at *16-17 (Del. Sept. 23, 2021) (describing the three-part "universal test" for demand futility that is "consistent with and enhances" *Aronson*, *Rales* and their progeny).

[56] *Levine*, 591 A.2d at 212-13 (citing *Spiegel*, 571 A.2d at 777).

judgment rule.[57] The "only issues to be examined" by the court "are the good faith and reasonableness" of the board's investigation in response to the demand.[58]

To survive a motion to dismiss under Rule 23.1 where a demand has been made and refused, a plaintiff must allege with particularity facts raising a reasonable doubt that "(1) the board's decision to deny the demand was consistent with its duty of care to act on an informed basis, that is, was not grossly negligent; or (2) the board acted in good faith, consistent with its duty of loyalty."[59] In either case, the plaintiff must climb a "steep road" to prevail.[60]

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[57] *Id.* ("[U]nder the traditional business judgment rule, the only issue remaining to be resolved is the reasonableness of the [] Board's investigation of [the plaintiff's] demand."); *Blake*, 2021 WL 2477025, at *6 ("By operation of the tacit-concession doctrine, a board's decision to refuse a demand is subject to the business judgment rule.").

[58] *Levine*, 591 A.2d at 212 (internal quotation marks omitted).

[59] *Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan v. Andreotti*, 2015 WL 2270673, at *24 (Del. Ch. May 8, 2015), *aff'd*, 132 A.3d 748 (Del. 2016) (TABLE); *see also Espinoza v. Dimon*, 124 A.3d 33, 36 (Del. 2015) ("[T]he decision of an independent committee to refuse a demand should only be set aside if particularized facts are pled supporting an inference that the committee, despite being comprised solely of independent directors, breached its duty of loyalty, or breached its duty of care, in the sense of having committed gross negligence.").

[60] *Zucker v. Hassell*, 2016 WL 7011351, at *1 (Del. Ch. Nov. 30, 2016) ("Where, by contrast [to demand futility], the stockholder *does* make demand on the board, and the board nonetheless finds pursuit of the cause of action to be against the corporate interest, the path before the stockholder-plaintiff is steeper yet."); *Blake*, 2021 WL 2477025, at *5 (describing pleading demand excusal as a "steep road" and demand refusal as "steeper yet").

In applying this standard, all reasonable inferences from the allegations in the Complaint are drawn in favor of the plaintiffs.[61] "Rule 23.1 is not satisfied by conclusory statements or mere notice pleading."[62] Instead, "[w]hat the pleader must set forth are particularized factual statements that are essential to the claim."[63]

B. The Plaintiffs Maintain Derivative Standing.

Although the parties agree that wrongful refusal is the applicable framework, they disagree about whether the Complaint facially pleads wrongful refusal. The defendants argue that, because the plaintiffs "never asserted wrongful refusal as their basis for derivative standing" and the Complaint "explicitly (and only) pleads demand futility as that basis," the plaintiffs have waived their opportunity to assert wrongful refusal.[64] If true, the plaintiffs would lack derivative standing.

"Derivative standing is a 'creature of equity' that was created to enable a court of equity to exercise jurisdiction over corporate claims asserted by stockholders 'to prevent a complete failure of justice on behalf of the corporation.'"[65] Stockholders must show adequacy, contemporaneous and continuous stock ownership, and fulfill

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[61] *Brehm*, 746 A.2d at 255.

[62] *Id.* at 254.

[63] *Id.*

[64] Defs.' Suppl. Opening Br. 1.

[65] *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016) (quoting *Schoon v. Smith*, 953 A.2d 196, 202, 208 (Del. 2008)).

the demand requirement—either by pleading demand futility or wrongful refusal—to have standing.[66] Only the final requirement is at issue here. To determine whether wrongful refusal was pleaded, this court will "look to all the facts of the complaint and determine for itself" what type of claims are alleged.[67]

The plaintiffs' "inartful drafting"[68] caused confusion about their purported basis for derivative standing.[69] But the court must consider the complaint as a whole.[70] The demand futility allegations are isolated to a specific section of the Complaint. But the plaintiffs made wrongful refusal allegations throughout the Complaint.[71] The Complaint, which attaches a copy of the Demand and Response as exhibits, states that the Board's refusal of the Demand was "improper" and the

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[66] *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 11.03 (2021) (listing corporate derivative standing requirements).

[67] *See Dieterich v. Harrer*, 857 A.2d 1017, 1027 (Del. Ch. 2004) (describing the court's approach to determining whether a claim is direct or derivative).

[68] Mot. to Dismiss Hr'g Tr. June 17, 2021, at 34. The plaintiffs explained that the inconsistency results from the demand futility section being "directed specifically at the *amended* complaint, not the 'action' itself." Pls.' Suppl. Opp'n Br. 5-6.

[69] *See* Am. Compl. ¶¶ 62-63 (alleging that the plaintiffs "attempted to redress the misconduct raised herein by making a pre-suit demand on the Board," and that "[they], through their counsel, made a pre-suit demand on the Board").

[70] *See NACCO Indus. v. Applica Inc.*, 997 A.2d 1, 27 (Del Ch. 2009) (taking "into account the particularized allegations in the Complaint as whole" to rule on a motion to dismiss); *Morris, Nichols, Arsht & Tunnell v. R-H Int'l, Ltd.*, 1987 WL 33980, at *2 (Del. Ch. Dec. 29, 1987) ("[T]he Court must review the complaint as a whole to determine what [the plaintiff] is really seeking.").

[71] Am. Compl. ¶¶ 61-63.

product of "a patently results-driven analysis"[72] and describes the Board's Response as "indefensible on its face" and "suggestive of bad faith."[73] On balance, these allegations demonstrate that the plaintiffs affirmatively pleaded wrongful refusal and did not waive that basis for derivative standing.[74]

C. The Plaintiffs Plead Wrongful Refusal with Sufficient Particularity.

The defendants also argue that, if the plaintiffs maintain derivative standing, the Complaint should be dismissed because the plaintiffs have failed to plead wrongful refusal with particularity, as Rule 23.1 requires. The plaintiffs contend that they have adequately pleaded that the Response constituted bad faith.[75] To demonstrate wrongful refusal based on bad faith, the plaintiffs must show that the Board's decision was "so inexplicable that a court may reasonably infer that the directors must have been acting for a purpose unaligned with the best interest of the

[72] *Id.* ¶¶ 63-65, 73.

[73] *Id.* ¶ 70.

[74] This action is therefore different from *Blake*, where the court dismissed claims for breach of fiduciary duty because the plaintiff had made a pre-suit demand but asserted demand futility as the basis for derivative standing. 2021 WL 2477025, at *7. In *Blake*, the plaintiff maintained that its pre-suit communication was not a demand for purposes of Rule 23.1 and it did not plead wrongful refusal of that demand in its complaint. *Id.* Here, by contrast, the plaintiffs contend that the Demand should be considered as such for purposes of Rule 23.1, attached the Demand and Response to the Complaint, and made multiple allegations concerning the Board's wrongful refusal of the Demand.

[75] *See* Pls.' Suppl. Opp'n Br. 3-6.

corporation."[76] In other words, the plaintiffs must allege particularized facts from which the court could reasonably infer that the Board's refusal of the Demand was not a valid exercise of its business judgment.[77]

Although the plaintiffs faced a high hurdle in pleading wrongful refusal, it was not an insurmountable one.[78] In *Thorpe v. CERBCO, Inc.*, for example, Chancellor Allen found that the plaintiffs had raised a reasonable doubt concerning a board's good faith response to a demand after a special litigation committee prepared a report on the demand and the board failed to act on the report or respond to the stockholder.[79] Similarly, in *Rich v. Chong*, this court held that, because the plaintiff alleged that the board began and then abandoned its investigation of a demand, "the protections of the business judgment rule [did] not apply."[80]

The plaintiffs here have satisfied Rule 23.1 through particularized allegations raising a reasonable doubt that the Board acted in good faith in rebuffing the

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[76] *Ironworkers*, 2015 WL 2270673, at *26.

[77] *See, e.g.*, *City of Tamarac Firefighters' Pension Tr. Fund v. Corvi*, 2019 WL 549938, at *5 (Del. Ch. Feb. 12, 2019) (noting that "[a]fter making a pre-litigation demand . . . the stockholder is limited to a claim that the board wrongfully refused the demand" and that decision is "subject to the business judgment rule"); *Brehm*, 746 A.2d at 254-55 ("Chancery Rule 23.1 requires . . . that the plaintiff must allege with particularity facts raising a reasonable doubt that the corporate action being questioned was properly the product of business judgment.").

[78] Wolfe & Pittenger, *supra* note 66, § 11.03 (noting that the "burden of showing lack of good faith is not an insurmountable one").

[79] 611 A.2d 5, 8, 11 (Del. Ch. 1991).

[80] 66 A.3d 963, 978-79 (Del. Ch. 2013).

Demand.[81] The plaintiffs alleged that they made a pre-suit demand that notified the Board about the Company's errors in tabulating the votes for the 2018 declassification and voting amendments.[82] The Demand made plain that the proposals did not receive the number of votes required. According to the Complaint, after receiving the Demand, the "Board did what no responsibly advised directors acting in good faith would ever do: nothing."[83] Rather than acknowledge its mistake and take prompt corrective action, the Board, through its counsel, sent the Response and effectively gave the Demand the "back of the hand,"[84] stating that it had found "the Demand [to be] without merit" and would "decline[]" to take remedial actions.[85] The Response set forth a method of tabulating votes that excluded broker non-votes "in direct contravention of Section 242 and the representations in the [Company's] 2018 Proxy."[86]

There are a number of inferences that can be drawn from these allegations. It may well be that the independent Board acted in good faith and was simply misinformed. Whether and how the Board was advised on this issue is, however,

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[81] Am. Compl. ¶ 73.

[82] *See generally* Am. Compl. Ex. A.

[83] Am. Compl. ¶ 6.

[84] Mot. for Summ. J. Hr'g Tr. Apr. 14, 2020, at 54.

[85] Am. Compl. ¶ 70.

[86] *Id.* ¶ 71.

outside of the pleadings. As Chancellor Bouchard explained in denying an earlier motion to dismiss the plaintiffs' direct claims, it is also reasonable to infer that "the directors just did not care about complying with the legal requirements of Delaware law."[87] The Demand pointed out a straightforward violation of Section 242(b), yet—despite the language of the 2018 Proxy explaining how votes would properly be tabulated—the Board rejected the Demand and waited nearly a year to remedy the mistake. Drawing all reasonable inferences in favor of the plaintiffs, as I must at this stage, the particularized allegations of the Complaint raise a reasonable doubt that the Demand was refused in good faith and satisfy Rule 23.1.

III. CONCLUSION

For the foregoing reasons, the pending aspect of the defendants' partial motion to dismiss is denied.

[87] Mot. for Summ. J. Hr'g Tr. Apr. 14, 2020, at 54-55 (explaining that those allegations "would support a reasonably conceivable claim of bad faith"). The plaintiffs put forward a "law of the case" theory that Chancellor Bouchard's ruling controls the issue of bad faith in this case. Pls.' Suppl. Opp'n Br. 6-10. "It is . . . established that a trial court's previous decision in a case will form the law of the case for the issue decided." *State v. Wright*, 131 A.3d 310, 321 (Del. 2016). The doctrine is not an "absolute restriction," however, and issues affected by changed circumstances or that have not been fully briefed and "squarely decided" after a hearing on the merits are generally improper targets of the doctrine. *Id.* Then-Chancellor Bouchard's bench ruling was in the context of a Rule 12(b)(6) motion and in response to the plaintiffs' original, direct claims. Though still the law of the case and relevant to this decision, the different standard applied to this decision requires further analysis.