UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY OF PONTIAC GENERAL EMPLOYEES' RETIREMENT SYSTEM,

Plaintiff,

v.

WESLEY G. BUSH, et al.,

Defendants.

Case No. 20-cv-06651-JST

ORDER GRANTING RULE 12(B)(6) MOTION TO DISMISS AND RULE 23.1 MOTION TO DISMISS

Re: ECF Nos. 45, 47, 48, 51

Before the Court are two motions to dismiss: a Rule 12(b)(6) motion to dismiss filed by current and former Cisco Board member Defendants, ECF No. 45, and a Rule 23.1 motion to dismiss filed by nominal defendant Cisco Systems, Inc., ECF No. 48. The Court will grant both motions.

I. BACKGROUND

Cisco is a Delaware corporation headquartered in San Jose, California that manufactures and sells networking hardware, software, and telecommunications equipment. Plaintiff City of Pontiac General Employees' Retirement System has been a Cisco shareholder since 2007. ECF No. 1 ("Compl.") ¶ 22. City of Pontiac brings this shareholder derivative action on Cisco's behalf against Cisco Board members, also known as directors, for breach of fiduciary duty, unjust enrichment and federal securities violations. *Id.* ¶ 1. City of Pontiac alleges that the directors publicly misrepresented Cisco's commitment to and promotion of diversity through materially false assertions in Cisco's 2017, 2018, and 2019 proxy statements, thus violating their fiduciary duty to the company and its shareholders.

In August 2020, City of Pontiac sent a pre-suit demand letter to Cisco's Board, raising derivative claims on Cisco's behalf and requesting the Board investigate the matters and take

remedial action by pursuing claims for damages and other relief. *See* ECF No. 1-1. The letter requested, among other things, the addition of black directors to the Board. *Id.* at 34. Six weeks later (on September 23, 2020), City of Pontiac filed this lawsuit and noted that "Defendants [] declined to respond to Plaintiff's demand for action" and that "Cisco's Board still has not publicly or otherwise committed to undertaking the relief sought in the pre-suit demand." Compl. ¶ 101.

On April 30, 2021, Defendants filed a Rule 12(b)(6) motion to dismiss the complaint. ECF No. 45. That same day, Cisco filed a Rule 23.1 motion to dismiss. ECF No. 48.

II. LEGAL STANDARD

A. Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." While a complaint need not contain detailed factual allegations, facts pleaded by a plaintiff must be "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter that, when accepted as true, states a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While this standard is not a probability requirement, "where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted). In determining whether a plaintiff has met this plausibility standard, the Court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

B. Rule 23.1

"A basic principle of corporate law is that a corporation is run by its management and the corporation itself has the right to make claims." *In re PayPal Holdings, Inc. S'holder Derivative Litig.*, No. 17-CV-00162-RS, 2018 WL 466527, at *2 (N.D. Cal. Jan. 18, 2018) (citing *Potter v. Hughes*, 546 F.3d 1051, 1058 (9th Cir. 2008)). Federal Rule of Civil Procedure 23.1 governs

derivative actions, *see Rosenbloom v. Pyott*, 765 F.3d 1137, 1148 (9th Cir. 2014), and requires a plaintiff to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors . . . and the reasons for the plaintiff's failure to obtain the action or for not making the effort." Fed. R. Civ. P. 23.1(b)(3). "Because [Cisco] is a Delaware corporation, Delaware law governs the pleading requirements applicable to this derivative action." *City of Orlando Police Pension Fund v. Page*, 970 F. Supp. 2d 1022, 1028 (N.D. Cal. 2013) (citing *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 989-90 (9th Cir. 1999), *superseded by statute on other grounds as recognized in In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1146 (9th Cir. 2017)). On a motion to dismiss, "the plaintiff must allege with particularity facts raising a reasonable doubt that the corporate action being questioned was properly the product of business judgment." *Brehm v. Eisner*, 746 A.2d 244, 254-55 (Del. 2000).

III. ANALYSIS

This order addresses two motions. In the first motion, Defendants move to dismiss the Complaint under Rule 12(b)(6), arguing that it fails to state any claim for relief. ECF No. 45. In the second motion, Cisco moves to dismiss the Complaint under Rule 23.1, arguing that City of Pontiac has not satisfied the particularity requirements of Rule 23.1. ECF No. 48.

A. Requests for Judicial Notice

The Court first addresses Defendants' and Cisco's unopposed requests for judicial notice. ECF Nos. 47, 51. "As a general rule, we may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *United States v. Corinthian Colleges*, 655 F.3d 984, 998-99 (9th Cir. 2011) (internal quotation marks and citations omitted). However, "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The Court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c).

First, the Court takes judicial notice of two Corporate Social Responsibility Reports for fiscal years 2018 and 2019 that Cisco published to its website (Rule 23.1 Motion Exhibits C and

D, and Rule 12(b)(6) Motion Exhibits C and D). A court may "take into account documents 'whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached the [plaintiff's] pleading." *Knievel*, 393 F.3d at 1076 (quotation omitted). These exhibits are referenced in the Complaint and City of Pontiac does not question the authenticity of these documents. Because the facts contained in the documents are subject to reasonable dispute, "the Court takes judicial notice only of the statements contained therein, but not for the purpose of determining the truth of those statements." *In re LDK Solar Sec. Litig.*, 584 F. Supp. 2d 1230, 1254 (N.D. Cal. 2008) (internal quotation marks and citations omitted).

Second, the Court takes judicial notice of several documents filed with the SEC, California Secretary of State, and Delaware Secretary of State (Rule 23.1 Motion Exhibits B, E-I and Rule 12(b)(6) Motion Exhibits A-B and E-I). These exhibits are properly subject to judicial notice. *See Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1064 n. 7 (9th Cir. 2008) (holding that the district court properly took judicial notice of publicly available financial documents and SEC filings); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Stumpf*, No. C 11-2369 SI, 2012 WL 424557, at *4 (N.D. Cal. Feb. 9, 2012) (granting request for judicial notice of documents that Wells Fargo filed with the SEC). Again, the Court takes judicial notice of the statements in the filings, but not for the purpose of determining the truth of those statements.

The Court now turns to the merits of Defendants' motion to dismiss and Cisco's motion to dismiss.

B. Rule 12(b)(6) Motion

City of Pontiac brings three claims on Cisco's behalf: Violation of Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a); breach of fiduciary duty; and unjust enrichment. Defendants move to dismiss City of Pontiac's claims for failure to state a claim under Rule 12(b)(6). ECF No. 45.

1. Violation of Section 14(a) of the Exchange Act

City of Pontiac alleges that Cisco's proxy statements – that Cisco supports diversity and inclusion at all levels of the company – are materially false because Cisco is in fact not committed

to true diversity. Compl. ¶ 112. In particular, City of Pontiac contends that Defendants failed to increase racial diversity at Cisco and knew that statements about Cisco's commitment to diversity were false and misleading.

To state a claim under Section 14(a), a plaintiff must allege that the proxy statements contained "either (1) a false or misleading declaration of material fact, or (2) an omission of material fact that makes any portion of the statement misleading." *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022 (9th Cir. 2000) (citing 15 U.S.C. § 78j(b); 17 C.F.R. § 240.14a-9). "The plaintiff must specify each statement alleged to be misleading and the reason or reasons why the statement is misleading." *Ocegueda on behalf of Facebook v. Zuckerberg*, 526 F. Supp. 3d 637, 651 (N.D. Cal. Mar. 19, 2021) (citing 15 U.S.C. § 78u-4(b)(1)); *see also Desaigoudar*, 223 F.3d at 1023. A plaintiff must also "demonstrate that the misstatement or omission was made with the requisite level of culpability and that it was an essential link in the accomplishment of the proposed transaction." *Id.* Moreover, contrary to its disclaimer, City of Pontiac's Complaint "clearly sounds in fraud" and thus receives heightened pleading scrutiny.[1] *Desaigoudar*, 223 F.3d at 1022 n.5 (affirming district court's rejection of plaintiff's disclaimer as "disingenuous" where complaint asserted "'knowing[] and intentional[]' misconduct"); *Ocegueda*, 526 F. Supp. 3d at 645 ("If a plaintiff's federal securities claim sounds in fraud, then the heightened pleading standards of Rule 9(b) apply." (citation omitted)); *see also* Fed. R. Civ. P. 9(b) ("In alleging fraud . . . a party must state with particularity the circumstances constituting fraud . . . Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Averments of fraud must be

[1] Defendants argue that City of Pontiac's allegations sound in fraud and should thus receive heightened pleading scrutiny. The Court agrees with Defendants. City of Pontiac's opposition brief pleads a culpability that indicates the Section 14(a) claim is based on fraud. ECF No. 83 at 28 (section on § 14(a) culpability titled "Defendants *Knew or Recklessly Disregarded* that the Proxy Statements Were Materially False and Misleading" (emphasis added)); *id.* at 29 ("Taken as true, these facts adequately plead defendants' knowledge of the falsity of the challenged Proxy Statements."). Moreover, two paragraphs after City of Pontiac's Complaint disclaims fraud in its Section 14(a) cause of action, Compl. ¶ 110, the Complaint asserts that "Defendants have confirmed through their actions (and lack thereof) that they are not committed to true diversity throughout Cisco's ranks, including in the boardroom, facts that Defendants *were aware of and participated in* as set forth herein." *Id.* ¶ 112 (emphasis added).

accompanied by the 'who, what, when, where, and how' of the misconduct charged.").

For the reasons below, City of Pontiac does not plausibly plead a Section 14(a) violation claim because the aspirational assertions in Cisco's proxy statements are non-actionable and the Complaint does not allege that the proxies were an essential link to a loss-generating corporate action.

a. Material Misrepresentation or Omission

The parties dispute whether Cisco's diversity statements pleaded in the Complaint constitute actionable material misstatements. These statements include: (1) Cisco "embraces diversity across the spectrum at every level," Compl. ¶ 5, (2) the Cisco "Board believes it is important to consider diversity of race . . . in evaluating board candidates in order to provide practical insights and diverse perspectives," *id.* ¶ 17, and (3) "Diversity, inclusion, collaboration, and technology are fundamental to who we are, how we create the best teams, and how we will succeed in this age of digital transformation," *id.* ¶ 64.

An actionable material misrepresentation or omission has two components in federal securities law: First, a plaintiff "must allege a misrepresentation or a misleading omission with particularity and explain why it is misleading;" and second, "applying an objective standard, that misrepresentation or omission must have been material to investors." *Retail Wholesale & Dep't Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275 (9th Cir. 2017).

Cisco's diversity statements are not actionable because they are neither misleading nor material to investors. For one, aspirational statements like the ones in dispute, which emphasize a desire to commit to and embrace diversity, "provide a 'vague statement[ ] of optimism' . . . not capable of objective verification." *Id.* (quoting *Oregon Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 606 (9th Cir. 2014)); *see also cf. Oregon Pub. Emps. Ret. Fund*, 774 F.3d at 606 ("Statements by a company that are capable of objective verification are not 'puffery' and can constitute material misrepresentations."). For another, these statements are immaterial because they are "quintessential, non-actionable puffery." *Retail Wholesale & Dep't Store Union Loc. 338 Retirement Fund v. Hewlett-Packard Co.*, 52 F. Supp. 3d 961, 970 (N.D. Cal. 2014), *aff'd sub nom. Retail Wholesale & Dep't Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d

1268 (9th Cir. 2017); *see also In re Cutera Sec. Litig.*, 610 F.3d at 1111 ("When valuing corporations, however, investors do not rely on vague statements of optimism like 'good,' 'well-regarded,' or other feel good monikers."); *Ocegueda*, 526 F. Supp. 3d at 651 ("[C]ourts hold that similar statements are non-actionable puffery or aspirational (and hence immaterial)." (collecting cases)).

b. Essential Link

Even if Cisco's diversity statements were actionable, City of Pontiac's Section 14(a) claim fails because the Complaint does not plead the requisite "essential link" between the statements and the "loss-generating corporate action" *Kelley v. Rambus, Inc.*, No. 07-CV-1238-JF-HRL, 2008 WL 5170598, at *7 (N.D. Cal. Dec. 9, 2008) ("The essential link requirement can 'only be established when the proxy statement at issue directly authorizes the loss-generating corporate action.'" (internal citation omitted)), *aff'd*, 384 F.App'x 570 (9th Cir. 2010); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 385 (1970) (requiring proof "that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction").

City of Pontiac contends that it sufficiently alleges an "essential link" between Cisco's false proxy statements and the election of the Cisco Board. ECF No. 83 at 29-30. But it is not the Board's re-election, but rather the Board's wrongdoing – here, Cisco's failure to nominate a black director – that allegedly hurts profits.[2] And the multi-step theory that false proxy statements mislead shareholders into re-electing directors who fail to nominate a black director and thus harm the company is too tenuous to rise to the level of "essential link." *See In re Danaher Corp. S'holder Derivative Litig.*, No. 1:20-CV-02445-TNM, 2021 WL 2652367, at *11 (D.D.C. June 28, 2021) (rejecting shareholders' causation theory that "the misleading proxy statements caused the election of the Directors, who then failed to nominate an African American director, which

[2] Perhaps this is City of Pontiac's attempt to avoid insurmountable case precedent rejecting Section 14(a) claims tying directors' wrongdoing to director re-election. *See PayPal Holdings, Inc.*, 2018 WL 466527, at *4 ("A complaint alleging generally that the mere election of directors was an essential link to the directors' subsequent wrongdoing does not satisfy Section 14(a)'s requirements." (collecting cases)).

harmed the company because companies with less diverse boards are less profitable" because "[t]he proxy statements at issue did not directly cause the non-nomination of a black director"). This is because losses caused by the election of directors are simply too indirect to find an "essential link" under Section 14(a). *See id.* ("Courts routinely reject Section 14(a) claims based on the election of directors because the losses are indirect" (simplified) (quoting *In re The Home Depot, Inc. S'holder Derivative Litig.*, 223 F. Supp. 3d 1317, 1331 (N.D. Ga. 2016)); *cf. Gen. Elec. Co. by Levit v. Cathcart*, 980 F.2d 927, 933 (3d Cir. 1992) ("the mere fact that omissions in proxy materials, by permitting directors to win re-election, indirectly lead to financial loss through mismanagement will not create a sufficient nexus with the alleged monetary loss").

The connection between proxy statements and the non-nomination of a black director by way of director election is too tenuous to bear an "essential link." City of Pontiac tries to avoid this by crafting a causation theory built on the deficient contention that Board director election itself somehow constitutes a loss-generating action. It is not. City of Pontiac's causation theory thus fails to satisfy the "essential link" requirement.

For these reasons, the Court grants Defendants' motion to dismiss City of Pontiac's Section 14(a) claim.

2. Breach of Fiduciary Duty

City of Pontiac's second cause of action alleges that Defendants made allegedly false and misleading statements in Cisco's SEC filings in breach of their fiduciary duties. Because the Court concludes above that the diversity statements in Cisco's SEC filings were neither false nor misleading, City of Pontiac's fiduciary duty claim fails because the Complaint fails to plead any "legally improper" conduct. *See Wood*, 953 A.2d at 141. Accordingly, the Court grants Defendants' motion to dismiss City of Pontiac's fiduciary duty claim.

3. Unjust Enrichment

City of Pontiac's third claim for unjust enrichment is premised on its breach of fiduciary duty claim. Compl. ¶ 122 ("Defendants were unjustly enriched by their receipt of compensation while breaching fiduciary duties owed to Cisco."). Because City of Pontiac has failed to plead Defendants are liable for breach of fiduciary duty, it has also failed to plead that Defendants are

liable for unjust enrichment. *See PayPal Holdings, Inc.*, 2018 WL 466527, at *6. Accordingly, the Court grants Defendants' motion to dismiss City of Pontiac's unjust enrichment claim.

C. Rule 23.1 Motion

Cisco moves to dismiss the Complaint under Rule 23.1 for failure to satisfy the particularity requirements of Rule 23.1. ECF No. 48.

Under Delaware law, "shareholders seeking to assert a claim on behalf of the corporation [must] first exhaust intracorporate remedies by making a demand on the directors to obtain the action desired." *Spiegel v. Buntrock*, 571 A.2d 767, 772-73 (Del. 1990). "However, the Delaware Corporations Code specifically permits members of a limited liability corporation to bring derivative suits on behalf of the corporation even if the management refuses to do so or where demand would be futile in the first instance." *Veros Software, Inc. v. First Am. Corp.*, No. SACV061130JVSANX, 2008 WL 11338610, at *3 (C.D. Cal. June 13, 2008) (citing 6 Del. Code Ann. § 18-1001).

Here, the Court finds that City of Pontiac does not adequately plead either that the Board wrongly refused its demand or that demand was futile. The Complaint states that "[o]n August 5, 2020, Plaintiff made a pre-suit demand on Cisco's Board to . . . achieve the Company's publicly stated diversity objective of having a diverse board of directors by adding African American directors to Cisco's Board." Compl. ¶ 101. It continues, "[t]o date, Defendants have declined to respond to Plaintiff's demand for action . . . Cisco's Board still has not publicly or otherwise committed to undertaking the relief sought in the pre-suit demand." *Id.* But the Complaint, which City of Pontiac filed seven weeks after it made its demand request, does not argue that demand would be futile. And it does not mention, as Cisco's motion claims, ECF No. 48 at 8, that the Cisco Board formed a committee to investigate its demand, let alone identify any facts that raise a reasonable doubt "that the Board's decision to reject the demand was the product of a valid business judgment." *Grimes v. Donald*, 673 A.2d 1207, 1219, 1220 (Del. 1996) ("The complaint fails to include particularized allegations which would raise a reasonable doubt that the Board's decision to reject the demand was the product of a valid business judgment."), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

City of Pontiac argues that "Cisco's Rule 23.1 motion reveals facts that raise a reason to doubt the integrity and objectivity of the Special Committee." ECF No. 83 at 17. But when "determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." *Schneider v. California Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir.1998). Yet even if the Complaint had alleged the facts raised in Cisco's Rule 23.1 Motion, drawing all reasonable inferences in City of Pontiac's favor, the Court concludes that City of Pontiac does not raise a reasonable doubt that the Board's refusal to act pursuant to City of Pontiac's demand to file a lawsuit was not reasonable or in good faith.

Where a demand on a board has been made and refused, courts under Delaware law apply the business judgment rule in reviewing the board's refusal of the stockholder's demand to file a lawsuit. *Spiegel*, 571 A.2d at 774. The directors are entitled to the "business judgment rule" presumption that they were faithful to their fiduciary duties, and the burden is on the plaintiff in a derivative action to overcome that presumption. *Ocegueda*, 526 F. Supp. 3d at 646 (citation omitted). "Absent an abuse of discretion, if the requirements of the traditional business judgment rule are met, the board of directors' decision not to pursue the derivative claim will be respected by the courts. In such cases, a board of directors' motion to dismiss an action filed by a shareholder, whose demand has been rejected, must be granted." *Spiegel*, 571 A.2d at 777-78 (internal citations omitted); *see also Starrels v. First Nat. Bank of Chicago*, 870 F.2d 1168, 1174 (7th Cir. 1989) (Easterbrook, J., concurring) ("If Courts would not respect the directors' decision not to file suit, then demand would be an empty formality.").

"[W]hen a board refuses a demand, the only issues to be examined are the good faith and reasonableness of its investigation." *Spiegel*, 571 A.2d at 777. "While the business judgment rule creates a presumption that the Board made an informed decision, Plaintiff may rebut such presumption of deference by pleading particularized facts that create a reasonable doubt that the Board was informed and validly exercised its business judgment." *Morefield v. Bailey*, 959 F. Supp. 2d 887, 898 (E.D. Va. 2013) ("Although this reasonable doubt standard initially arose in the context of demand futility, Delaware law applies this heightened pleading requirement to wrongful

refusal situations as well, as both situations are subject to a rebuttal of the business judgment rule and its protections of corporate decisions." (collecting cases)). City of Pontiac bears the burden of demonstrating that a board's decision was in bad faith or unreasonable, a "considerable" burden presenting an obstacle that "few, if any, plaintiffs surmount." *Id.* (quoting *RCM Sec. Fund, Inc. v. Stanton*, 928 F.2d 1318, 1328 (2d Cir. 1991) (applying Delaware law)); *City of Orlando*, 970 F. Supp. 2d at 1030 (plaintiff "bears the burden of raising a reasonable doubt that the board investigated the demand reasonably and in good faith").

According to Cisco's Rule 23.1 Motion and accompanying declarations, the "Board initially met on August 20, 2020 to discuss plaintiff's demand and, at that time, appointed two highly experienced directors, Mr. Capellas and Mr. McGeary, to serve as a DRC ['Demand Review Committee']." ECF No. 48 at 14; ECF No. 49 (Capellas Decl.) ¶ 5. Over the following three months, the DRC "conducted an extensive investigation and review," interviewing twenty-two witnesses and two third-parties. ECF No. 48 at 14-15; ECF No. 49 (Capellas Decl.) ¶ 6-10. "Based on its review, the DRC found that [Cisco] had accurately described its diversity initiatives, goals, and beliefs, including with respect to Board refreshment considerations, and that none of its public statements in the Proxy Statements, CSR Reports, or elsewhere were false or misleading." ECF No. 48 at 15; ECF No. 49 (Capellas Decl.) ¶ 12. The DRC further "concluded that pursuing the claims would be contrary to Cisco's best interests, lacked merit, and were unlikely to result in any recovery, and would impose unwarranted burden and expense on [Cisco]." ECF No. 48 at 17; ECF No. 49 (Capellas Decl.) ¶ 13. After recommending that the Board reject City of Pontiac's claims, the full Board accepted the DRC's recommendation, and provided a detailed summary to City of Pontiac's counsel. ECF No. 48 at 18; ECF No. 49 (Capellas Decl.) ¶¶ 13-14.

City of Pontiac argues that Cisco's motion "reveals facts demonstrating a reason to doubt the independence of Cisco's investigation."[3] ECF No. 83 at 12. City of Pontiac points to facts:

[3] In its opposition, City of Pontiac also takes issue with the thoroughness of Cisco's investigation. ECF No. 83 at 15, 18-21. "A plaintiff who files a derivative suit alleging that demand is excused as futile must demonstrate futility within the four corners of the complaint." 2 McLaughlin on Class Actions § 9:12 (18th ed. 2021) (citing *Breedy-Fryson v. Towne Ests. Condo. Owners Ass'n, Inc.*, No. CIV.A. 3577-VCS, 2010 WL 718619, at *9 (Del. Ch. Feb. 25, 2010)). City of Pontiac's complaint makes no mention of Cisco's investigation.

(1) that the Board retained ultimate decision-making authority over the Company's response to the Demand; and (2) that the two members appointed to the Special Committee are defendants in this action fully aware of the investigation's charges. But even considering allegations as part of the Complaint, they do not adequately allege a reasonable doubt as to whether the Board's investigation was properly the product of sound business judgment for multiple reasons.

First, the Cisco Board's retention of ultimate authority over any decisions the Committee would make is insufficient to raise a reasonable doubt about the Committee's independence.[4] *See City of Orlando*, 970 F. Supp. 2d at 1030 ("[W]hen plaintiff chose to submit its demand to the board, the only reasonable expectation was that the board itself would consider the demand. There was no promise of an independent committee, nor any requirement that the board establish such a committee."). Second, contrary to City of Pontiac's claims, reasonable doubts do not arise merely where the Committee comprised two Defendant board members "interested in the outcome" of the investigation. *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984) ("[T]he mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge either the independence or disinterestedness of directors."), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). And City of Pontiac's allegation that the members were "fully aware of the charges that the Committee would be investigating" does not carry any force either.

Accordingly, City of Pontiac has not sufficiently alleged facts from which to conclude "there is reason to doubt that the board acted independently or with due care in responding to the demand." *Grimes*, 673 A.2d at 1219.

[4] City of Pontiac goes one step further and attempts to analogize the present circumstances to Delaware cases finding board-appointed committees to have failed in conducting a good faith investigation of reasonable scope. *London v. Tyrrell*, 2010 WL 877528, at *25 (Del. Ch. Mar. 11, 2010); *Sutherland v. Sutherland*, 958 A.2d 235, 243 (Del. Ch. 2008). But City of Pontiac's reliance on those cases is misplaced because "those cases involve a specific Delaware procedure which was not invoked here, and which requires the committee to bear the burden of proving that there is no material issue of fact as to its independence." *City of Orlando*, 970 F. Supp. 2d at 1030; *see Zapata Corp. v. Maldonado*, 430 A.2d 779, 785 (Del. 1981). The other two cases are also inapposite. *Janssen v. Best & Flanagan*, 662 N.W.2d 876, 889 (Minn. 2003) reviewed an investigation performed by a special litigation committee appointed by a nonprofit corporation's board of directors under Minnesota state law, and *City of Orlando* denied a motion to dismiss based upon a factual analysis that a litigation committee's conclusory findings raised a reasonable doubt that the investigation was conducted reasonably and in good faith. 970 F. Supp. 2d at 1031.

CONCLUSION

For the reasons set forth above, the Court rules as follows:

1. Cisco's Rule 23.1 motion to dismiss is **GRANTED**. Because the Court cannot conclude that amendment would be futile, dismissal is made with leave to amend.

2. Defendants' Rule 12(b)(6) motion to dismiss is **GRANTED**. Because the Court cannot conclude that amendment would be futile, dismissal is made with leave to amend.

Leave to amend is granted solely to cure the deficiencies identified in this order. Any amended complaint must be filed within 28 days of the date of this order and must include a redline of the amended complaint as an exhibit.

IT IS SO ORDERED.

Dated: March 1, 2022

JON S. TIGAR
United States District Judge