> in order to find that defendants lack independence, [the court] must conclude that they failed to exercise independent business judgment by approving self-interested transactions; and yet in order to find those very transactions beyond the bounds of business judgment, [the court] must conclude that the defendants lacked independence. Such a decision would be contrary to the presumption of business judgment that directors enjoy, however, and cannot be supported.

Id.

Similarly, in In re InfoUSA, Inc. Shareholders Litigation, 953 A.2d 963, 989 (Del. Ch. 2007), the court came to the same conclusion as in Tyson that the plaintiffs' argument was circular. In that case, the plaintiffs argued that the director defendants "must be interested" because of their prior actions, which included exempting the CEO and largest shareholder of the company from a poison pill plan, permitting him to use a corporate jet, and approving certain transactions. Id. The Delaware court held that the plaintiffs' "argument fails due to its circular nature." Id. The court explained:

> In most derivative suits claiming waste, excessive executive or director compensation, or harm from other self-interested transactions, a plaintiff will argue that the board's decision to allow a transaction was a violation of its fiduciary duties. If the plaintiff can then avoid the demand requirement by reasoning that any board that would approve such a transaction (or as here, a history of past transactions) is by definition unfit to consider demand, then in few (if any) such suits will demand ever

> be required. This does not comport with the demand requirement's justification as a bulwark to protect the managerial discretion of directors.
>
> To excuse demand in this case it is not enough to show that the defendants approved a discriminatory poison pill, granted [the company's CEO] generous share options or allowed the [CEO's] family to carry out self-interested transactions. Instead, the plaintiff must provide the Court with reason to suspect that each director did so not because they felt it to be in the best interests of the company, but out of self-interest or a loyalty to, or fear of reprisal from [the CEO].

Id. (emphasis added).

As in Tyson and InfoUSA, Plaintiff's argument here is circular. He points to prior transactions approved by Demathas and Xiradakis that benefitted Economou and argues that they establish a "pattern of differential and preferential treatment of Economou" that "demonstrates that Demathas and Xiradakis lack independence." However, as stated by the InfoUSA court, "it is not enough to show that the defendants approved . . . self-interested transactions." 953 A.2d at 989. Rather, Plaintiff "must provide the Court with reason to suspect that each director did so . . . out of self-interest or a loyalty to, or fear of reprisal from [Economou]." Id. However, the Amended Complaint lacks particularized facts alleging that Defendants' decisions were made out of loyalty to or fear of reprisal from Economou, that they are so "'beholden' to [Economou] or so under [his]

influence that their discretion would be sterilized," or that they "would be more willing to risk [their] reputation than risk the relationship with [Economou.]" Beam, 845 A.2d at 1054; InfoUSA, 953 A.2d at 989; Orman, 794 A.2d at 24. Without alleging such facts, Plaintiff fails to show that demand is excused based on the Board's prior decisions.

c. Director Compensation

Plaintiff argues that Defendants' director compensation further shows that they "are beholden to Economou and are incapable of acting in the Company's best interests." Plaintiff notes that "Demathas and Xiradakis received the first ever non-executive director equity grant mere days before approving the Primelead Divestment and October Purchase Agreements." Plaintiff argues that this equity grant "demonstrate[s] that Demathas and Xiradakis are incapable of acting independently of Economou."[7]

In the Amended Complaint, Plaintiff alleged that Demathas and Xiradakis "approved grants in the amount of 9,000 vested restricted shares and 9,000 unvested restricted shares to each non-executive director of the Company."

[7] In his appellate brief, Plaintiff also argued that Demathas's and Xiradakis's increase in compensation for services rendered in 2008 show they are not "independent" of Economou. In his brief, Plaintiff argued that each of Demathas's and Xiradakis's "compensation skyrocketed to US$705,000, a 729% increase over their 2007 compensation." However, at the oral argument before this Court, Plaintiff conceded that he agreed with the High Court and Defendants that the $705,000 compensation was divided between the various Board members.

Plaintiff explained that the equity grants were "made pursuant to the Company's 2008 Equity Incentive Plan." However, Plaintiff provides no allegations as to the value of the grants and how that value relates to the usual and customary fee typically received by directors. In re Nat'l Auto Credit, Inc. S'holders Litig., No. Civ. A. 19028, 2003 WL 139768, at *11 (Del. Ch. Jan. 10, 2003) ("This Court's view of the disqualifying effect of [directors'] fees might be different if the fees were shown to exceed materially what is commonly understood and accepted to be a usual and customary director's fee."). Without more, Plaintiff's allegations regarding the equity grant fail to show that Demathas and Xiradakis lacked independence from Economou. Jacobs v. Yang, No. Civ. A. 206-N, 2004 WL 1728521, at *4 (Del. Ch. Aug 2, 2004) ("[a]llegations [stating that] one's position as director and the receipt of director's fees, without more . . . are not enough for purposes of pleading demand futility").

3. Directors Kerames and Karamitsanis

Kerames and Karamitsanis became Board members after this action was commenced. In the Amended Complaint, Plaintiff states: "Kerames and Karamitsanis, who were appointed to the Board after this action was commenced, are not relevant to the issue of demand futility." On appeal to this Court, Plaintiff provides no argument as to these directors' actions at all – much less that they

affect demand futility – and thus the Court concludes that they do not excuse the demand requirement.

4. Summary of the First Prong of the Aronson Test

As discussed above, the Court concludes that only Defendants Economou and Kandylidis were "interested" in the subject transactions. The Court concludes that none of the other Board members was "interested" or "dependent" under the Aronson test. Consequently, Plaintiff has failed to establish a reasonable doubt as to "the lack of independence or disinterestedness of a majority of the directors." Aronson, 473 A.2d at 817. The Court therefore moves to the second prong of the Aronson test for demand futility.

B. Whether Plaintiff Alleges Particularized Facts Creating a Reasonable Doubt That the Challenged Transactions Were Otherwise the Product of a Valid Exercise of Business Judgment

In order to establish a reasonable doubt that the challenged transactions were the product of a valid exercise of business judgment, Plaintiff must set forth particularized facts rebutting the "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson, 473 A.2d at 812. This is a high burden, where "a

plaintiff must plead specific facts to 'overcome the powerful presumptions of the business judgment rule before they will be permitted to pursue the derivative claim.'" InfoUSA, 953 A.2d at 972 (quoting Rales v. Blasband, 634 A.2d 927, 933 (Del. 1993)). "This presumption protects decisions unless they cannot be 'attributed to any rational business purpose.'" Id. (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)). Because DryShips's articles of incorporation contain an exculpation clause, the Amended Complaint must "plead facts suggesting that the . . . directors breached their duty of loyalty by somehow acting in bad faith for reasons inimical to the best interests of [DryShips's] stockholders." In re Lear Corp. S'holder Litig., 967 A.2d 640, 648 (Del. Ch. 2008).

Mere disagreement with a director's decision "cannot serve as grounds for imposing liability." Brehm, 746 A.2d at 266. Indeed, courts do not second-guess business decisions, for doing so "would invite courts to become super-directors, measuring matters of degree in business decisionmaking and executive compensation" and "would run counter to the foundation of our jurisprudence." Id. Rather than question the merits of Board decisions, courts question "the informational component of the directors' decisionmaking process" and "the motivations or the good faith of those charged with making the decision."

Id. at 259 ("in making business decisions, directors must consider all material information reasonably available"); InfoUSA, 953 A.2d at 984 ("[A] skilled litigant, and particularly a derivative plaintiff . . . places before the Court allegations that question not the merits of a director's decision, a matter about which a judge may have little to say, but allegations that call into doubt the motivations or the good faith of those charged with making the decision.").

1. Primelead Transaction

The Amended Complaint alleges that Demathas and Xiradakis approved the Primelead Divestment and that Demathas, Xiradakis, and Mitilinaios approved the Primelead Acquisition. Plaintiff argues on appeal that the "Primelead Acquisition resulted in the Company paying to Economou 93% more than the fair market value of his US$122 million Primelead equity interest" and that approval of the Acquisition "clearly exceeds the bounds of rationality, and is therefore not protected by the business judgment rule." Plaintiff also asserts that Demathas, Mitilinaios, and Xiradakis "failed to properly apprise themselves of the value of Primelead and the assets being exchanged therefore."

The Court rejects Plaintiff's first argument that the Board's decision as to the Primelead Transaction "exceeds the bounds of rationality." That Plaintiff disagrees with the Board's decision is insufficient to rebut the "powerful

presumptions of the business judgment rule." InfoUSA, 953 A.2d at 972. Indeed, this Court will not second-guess the Board's decision unless that decision "cannot be 'attributed to any rational business purpose.'" Id. However, the allegations of the Amended Complaint reveal a rational business purpose for approving the Primelead Acquisition. The Amended Complaint expressly states that the Primelead Transaction took place over nine months in which "the Company's financial condition deteriorated dramatically as the shipping and oil industries buckled under the pressure of the world-wide economic downturn." Further, the Amended Complaint alleges that "oil prices plummeted in 2008" and "the Company had no means of financing the $1.1 billion in installment payments needed to complete the newbuilding drillships." The Amended Complaint also alleges that the "offshore drilling industry is replete with risk." The downturn of economic conditions for DryShips and the entire industry, as well as the risk involved in the offshore drilling industry, provide a "rational business purpose" for the Board's decision to approve the Primelead Acquisition. The Court therefore concludes that this decision is not one of the "rare cases" that is "so egregious on its face that board approval cannot meet the test of business judgment." InfoUSA, 953 A.2d at 972.

The Court likewise rejects Plaintiff's argument that Demathas, Mitilinaios, and Xiradakis "failed to properly apprise themselves of the value of Primelead and the assets being exchanged therefore." Plaintiff contends that these Defendants "took undisclosed 'appropriate steps' to ensure the fairness of the Primelead Acquisition." Plaintiff argues that "the Company's failure to describe these 'appropriate steps' . . . creates a reasonable inference that [Defendants] . . . failed to properly inform themselves in connection with the Primelead Round-Trip Transaction."

As noted above, "in making business decisions, directors must consider all material information reasonably available." Brehm, 746 A.2d at 259. Further, presuit demand will only be excused where "particularized facts in the complaint create a reasonable doubt that the informational component of the directors' decisionmaking process . . . included consideration of all material information reasonably available." Here, the Amended Complaint lacks particularized facts creating such reasonable doubt. It only contains allegations that DryShips "has not disclosed what 'appropriate steps' were taken in connection with the negotiation of the Primelead Acquisition" but does not include particularized facts that Defendants "act[ed] in bad faith for reasons inimical to the best interests of [DryShips's] stockholders." Lear, 967 A.2d at 648.

Without alleging facts that Defendants failed to consider all material information reasonably available to them, Plaintiff does not meet the second prong of the Aronson test with respect to the Primelead Transaction.

2. July and October Agreements

Plaintiff contends that facts relating to Defendants' decisions with respect to the deposit amount for the July Agreement, as well as the termination fee amounts for the July and October Agreements, rebut the presumption that their decisions were "attributed to any rational business purpose." InfoUSA, 953 A.2d at 972.

With respect to the 13.75% deposit that DryShips paid in connection with entering the July Agreement, the Amended Complaint alleges that the industry standard is a 10% deposit and that DryShips had previously paid 10% deposits in other transactions. As for the termination fees of the Agreements, the Amended Complaint alleges that DryShips paid $105 million with respect to the July Agreement and granted Economou warrants worth $82.5 million as to the October Agreement. Importantly, the facts alleged do not indicate that Defendants negotiated the deposit or fees in bad faith. Lear, 967 A.2d at 648, 652 n.47 (noting

the complaint must contain "allegations that the defendant directors breached their duty of loyalty by engaging in intentional, bad faith, or self-interested conduct that is not immunized by the exculpatory charter provisions").

Furthermore, the Amended Complaint lacks any facts discussing the context of entering the July Agreement, which would have dictated the July deposit amount. With respect to the termination fees, the Amended Complaint states that, "[a]s 2008 progressed, . . . the health of the shipping industry deteriorated" and "the world fell further into economic crisis." Indeed, "daily average of charter rates . . . [fell] 90%." In light of these facts as to the global economic downturn, it was entirely rational for the Board to terminate the agreement to purchase the various carriers for hundreds of millions of dollars. InfoUSA, 953 A.2d at 972 (the business judgment presumption "protects decisions unless they cannot be 'attributed to any rational business purpose'" (quoting Sinclair Oil, 280 A.2d at 720)).

Additionally, as noted above, courts do not second-guess business decisions but instead question "the informational component of the directors' decisionmaking process" and "the motivations or the good faith of those charged with making the decision." Brehm, 746 A.2d at 266; InfoUSA, 953 A.2d at 984. However, the Amended Complaint lacks any particularized facts that Defendants

failed to consider all available information or were motivated by bad faith or lacked good faith in deciding the termination fee amounts.

With respect to the termination fee for the July Agreement, Plaintiff alleges in the Amended Complaint that the $105 million fee was paid solely "for the 'opportunity' to purchase the Panamax vessels . . . in the event that the world-wide economy recovers." However, the High Court discredited that "unsubstantial allegation . . . [because] that allegation is contradicted by the Company's securities filings." The High Court and this Court may take judicial notice of Securities and Exchange Commission documents and may disregard facts in the Amended Complaint that are "at odds" with those documents. See Lagrone v. American Mortell Corp., Nos. 04C-10-116-ASB, 07C-12-019-JRS, 2008 WL 4152677, at *4 (Del. Sept. 4, 2008). In Form 6-K filed on December 10, 2008, DryShips's public disclosures stated that the $105 million was paid "[i]n consideration of the cancellation of the acquisitions and the exclusive purchase option granted to [DryShips]." Therefore, the $105 million was paid not only for the "'opportunity' to purchase the Panamax vessels" but it was also consideration for cancelling a $400 million contract. The decision to pay $105 million for relief from a $400 million contract for ships worth far less than that, while obtaining an option to purchase the ships at a later date, is a rational decision by the Board. InfoUSA,

953 A.2d at 972 (noting the business judgment presumption "protects decisions unless they cannot be 'attributed to any rational business purpose'" (quoting Sinclair Oil, 280 A.2d at 720)).

Absent particularized facts creating reasonable doubt that the fees paid in relation to the July and October Agreements were the product of a valid exercise of business judgment, the Court concludes that Plaintiff fails to meet the second prong of the Aronson test with respect to these Agreements. Aronson, 473 A.2d at 814.

3. Economou's Compensation

According to the Amended Complaint, Demathas and Xiradakis approved a $6.98 million bonus to Economou for services rendered during 2008 and an increase in the annual fee to Fabiana, which "increased Economou's annual compensation by approximately $576,000." On appeal, Plaintiff contends that "such a significant increase in Economou's compensation at such a perilous time cannot be considered a good faith decision."

According to the Supreme Court of Delaware, "[i]t is the essence of business judgment for a board to determine if a particular individual warrants large amounts of money, whether in the form of current salary or severance provisions." Brehm, 746 A.2d at 263 (internal quotation marks and brackets omitted). Stated

differently, "the size and structure of executive compensation are inherently matters of judgment." Id.; see also Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1051 (Del. Ch. 1996) ("In the absence of facts casting a legitimate shadow over the exercise of business judgment reflected in compensation decisions, a court, acting responsibly, ought not to subject a corporation to the risk, expense and delay of derivative litigation, simply because a shareholder asserts, even sincerely, the belief and judgment that the corporation wasted corporate funds by paying far too much."). Although the compensation paid to Economou was generous, the Board's decision as to the amount of his compensation is inherently a matter of business judgment. The Court therefore concludes that Plaintiff fails to meet the second prong of the Aronson test with respect to Economou's compensation. Aronson, 473 A.2d at 814.

C. Allegations of Waste

Plaintiff argues that the Amended Complaint contains "particularized allegations demonstrat[ing] that Demathas, Mitilinaios, and Xiradakis wasted corporate assets in connection with the Primelead Round-Trip Transaction, the [July and October] Agreements, the 2008 Bonus, and the Services Agreement."

A transaction constitutes "waste" if it is "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." Brehm, 746 A.2d at 263.

> [A] waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade. Most often the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received. Such a transfer is in effect a gift. If, however, there is any substantial consideration received by the corporation, and if there is a good faith judgment that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder would conclude ex post that the transaction was unreasonably risky. Any other rule would deter corporate boards from the optimal rational acceptance of risk . . . . Courts are ill-fitted to attempt to weigh the "adequacy" of consideration under the waste standard or, ex post, to judge appropriate degrees of business risk.

Id.

The Court concludes that the Amended Complaint lacks facts establishing that the transactions challenged by Plaintiff served no purpose, involved less than substantial consideration to DryShips, or were so one-sided as to constitute waste. In the Primelead Transaction, DryShips received drillships. With the termination of the July and October Agreements, DryShips reduced its capital expenditures at a time when the company was financially suffering. As to

Economou's compensation, the Amended Complaint lacks facts showing that the "directors irrationally squander[ed] or g[a]ve away corporate assets." Brehm, 746 A.2d at 263. Accordingly, the facts alleged in the Amended Complaint do not establish that the challenged transactions constitute "waste" and do not excuse Plaintiff's failure to make a demand on the Board.

## CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiff failed to plead particularized facts in the Amended Complaint establishing that demand is excused. The Court therefore AFFIRMS the High Court's February 19, 2010 Order Granting Individual Defendants' Motion to Dismiss the Verified Amended Complaint.

AFFIRMED.

Dated: October 3, 2011

Daniel N. Cadra
Chief Justice

Dated: October ___, 2011

J. Michael Seabright
Associate Justice

Dated: October 3, 2011

Barry M. Kurren
Associate Justice