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[Additional Counsel Listed on Signature Page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL BROWN, Derivatively on Behalf of HANSEN MEDICAL, INC.,

Plaintiff,

v.

FREDERIC H. MOLL, STEVEN M. VAN DICK, GARY C. RESTANI, JOHN G. FREUND, JAMES M. SHAPIRO, CHRISTOPHER P. LOWE, THOMAS C. MCCONNELL, RUSSELL C. HIRSCH, JOSEPH M. MANDATO, KEVIN HYKES, CHRISTOPHER SELLS, and DOES 1-25, inclusive,

Defendants,

HANSEN MEDICAL, INC., a Delaware Corporation,

Nominal Defendant.

Case No. 09-CV-05881-SI

(Derivative Action)

NOMINAL DEFENDANT HANSEN MEDICAL, INC.'S AND INDIVIDUAL DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS THE AMENDED VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT OF

Date: November 5, 2010
Time: 9:00 a.m.
Judge: Hon. Susan Illston

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on November 5, 2010 at 9:00 a.m., or as soon thereafter as may be heard, at the U.S. District Court, Northern District of California, located at 455 Golden Gate Avenue, San Francisco, California, before the Honorable Susan Illston, Nominal Defendant Hansen Medical, Inc. ("Hansen" or the "Company") and Individual Defendants Frederic H. Moll, Steven M. Van Dick, Gary C. Restani, John G. Freund, James M. Shapiro, Christopher P. Lowe, Thomas C. McConnell, Russell C. Hirsch, Joseph M. Mandato, Kevin Hykes and Christopher Sells (collectively, the "Defendants") will and hereby move for an Order dismissing the Amended Verified Shareholder Derivative Complaint ("Amended Complaint" or "Am. Compl. at ¶_") filed by Nominal Plaintiff Michael Brown ("Plaintiff"), pursuant to Federal Rule of Civil Procedure 23.1, 12(b)(6), and applicable state law.

This motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the Declaration of Lucy Wang and the exhibits thereto ("Ex. __") previously filed in this action [Docket Item No. 33]; the Request for Judicial Notice previously filed in this action [Docket Item No. 32]; the pleadings, records and papers on file in this action; and all other matters properly before this Court.

ISSUES TO BE DECIDED

1. Whether Plaintiff has pled particularized facts sufficient to excuse his failure to make a pre-suit demand on the Company's Board of Directors, as required by Federal Rule of Civil Procedure 23.1 and Delaware law.

2. Whether the Amended Complaint should be dismissed for failure to state a claim.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's Amended Complaint suffers from the same defects as his prior complaint. Plaintiff has not added any specific factual allegations supporting either his contention that demand would be futile or any of the underlying causes of action. Therefore, for the reasons set out in the Court's July 21, 2010 Order, and for the additional reasons set forth

herein, the Amended Complaint should be dismissed, with prejudice.

Plaintiff has failed to establish demand futility. Instead of alleging particularized facts, Plaintiff has added the conclusory allegations that the Individual Defendants had "intimate, detailed knowledge of [Hansen's] revenue recognition policies and issues," and thus, they "knew that [Hansen's] financial reports contradicted its revenue recognition policies," but has not added any new particularized *facts* supporting those conclusory allegations of "knowledge." There are still no particularized facts demonstrating that any director knew of any material misstatement in any of Hansen's financial statements, either prior to the issuance of those statements or at any time prior to the investigation that led to the restatement. As this Court already noted, conclusory allegations, without any factual support, are insufficient to establish demand futility. The Amended Complaint should be dismissed on that basis.

Moreover, even if the Court were to consider the merits of Plaintiff's claims, it would find that Plaintiff's boilerplate allegations of unjust enrichment and breaches of fiduciary duty by Hansen's officers and directors, as well as allegations of insider trading against Gary Restani, are utterly deficient. As discussed above, Plaintiff has not pointed to any specific fact demonstrating that any of the Individual Defendants participated in, or knew of, any of the irregularities that led to the financial restatements. Plaintiff's failure to plead any specific facts of wrongdoing renders his other claims similarly deficient.

Accordingly, Plaintiff's deficient Amended Complaint should be dismissed with prejudice.

II. BACKGROUND

A. RELEVANT FACTS

The relevant facts remain essentially the same in the Amended Complaint as in the original complaint. Hansen designs, manufactures and sells medical robotics designed for accurate positioning, manipulation and stable control of catheters and catheter-based technologies. (Am. Compl. at ¶ 3). Hansen's core product is the Sensei Robotic Catheter System (the "Sensei"), which is a robotic navigation system for use in cardiac surgery. (Am. Compl. at ¶ 3).

In August 2009, Hansen received an anonymous "whistleblower" report alleging that an irregularity with respect to a single Sensei transaction resulted in improper revenue recognition in the quarter ending December 31, 2008. *See* Ex. 1 at 2 (October 19, 2009 8-K).[1] Following an investigation into Hansen's historical revenue recognition practices, on October 19, 2009, Hansen disclosed that it was restating its fiscal 2008 through second quarter 2009 financial results to correct improper revenue recognitions in connection with sales of its Sensei systems. (Am. Compl. at ¶ 9). Hansen also disclosed that the whistleblower report, regarding accounting irregularities, triggered the discovery of the improper revenue recognition. (Am. Compl. at ¶ 9). On November 16, 2009, Hansen filed the restatements with the U.S. Securities and Exchange Commission. (Am. Compl. at ¶ 10).

Plaintiff alleges again that the Individual Defendants signed false annual and quarterly statements that did not properly account for Hansen's Sensei system revenues, and maintained ineffective internal controls over financial reporting. (Am. Compl. at ¶¶ 149, 154). Plaintiff also adds new conclusory allegations that the Individual Defendants have "intimate, detailed knowledge of Hansen Medical's revenue recognition policies and issues," and thus, they "knew that Hansen Medical's financial reports contradicted its revenue recognition policies." (Am. Compl. at ¶¶ 128(c), 133(a)-(c), 136). But what Plaintiff does not allege is any facts to support its allegations that the Defendants knew that Hansen's financial reports contradicted its revenue recognition policies. (*See* Am. Compl. at ¶¶ 128(c), 133(a)-(c), 136). Indeed, the only "issues" of which the Individual Defendants are alleged to have had knowledge are Hansen's revenue recognition policies and how they apply to Hansen's business. (Am. Compl. at ¶¶ 64-65, 68, 70-72, 76). There is no allegation that any director knew of any transaction where

[1] The Court, in its July 21, 2010 Order Denying Motion to Stay and Granting Motion to Dismiss ("July 21, 2010 Order"), granted Defendants' June 11, 2010 Request for Judicial Notice of various SEC filings, Hansen's Certificate of Incorporation, two state court complaints, and an order consolidating those complaints. *See* July 21, 2010 Order at 2 n.1 [Docket Item 48]. Accordingly, all citations in this memorandum to Exhibits ("Ex.") refer to exhibits attached to the June 11, 2010 Declaration of Lucy Wang [Docket Item 33], of which the Court took judicial notice in its July 21, 2010 Order.

revenue was recognized improperly; the Amended Complaint's own allegations show that only after the investigation commenced was there any knowledge of improper revenue recognition. (*See* Am. Compl. at ¶ 9). Finally, Plaintiff attempts to add conclusory allegations of "bad faith" to get around the exculpatory provision in Hansen's certificate of incorporation. (Am. Compl. at ¶¶ 88, 134).

B. PROCEDURAL HISTORY

Following Hansen's October 19, 2009 announcement of its intention to restate prior financial statements, several lawsuits were filed in federal and state court against Hansen and certain of its officers and directors relating to the restatements. In November, 2009, two virtually identical shareholder derivative cases were filed in Santa Clara Superior Court against certain of Hansen's current and former officers and directors, as well as the Company's independent auditor, PricewaterhouseCoopers LLP ("PwC"). *See* Exs. 5, 6. The state court complaints assert claims for breach of fiduciary duties, waste of corporate assets, unjust enrichment and insider trading against certain of the individual defendants and professional negligence against PwC. Specifically, the complaints allege that certain of the individual defendants disseminated false and misleading information, failed to maintain adequate internal controls and failed to appropriately oversee the operations of the Company. On December 22, 2009, the Santa Clara Superior Court consolidated the cases into a single state derivative action. *See* Ex. 7.

Plaintiff filed this derivative suit on December 15, 2009, largely mimicking the previously-filed state court derivative actions. *See* Verified Shareholder Derivative Complaint ("Complaint" or "Compl. at ¶_"). [Docket Item 1]. In addition, in December, two Hansen shareholders made written demands on Hansen's Board that it initiate legal action against certain of Hansen's officers and directors based on the same underlying events as alleged in this lawsuit. *See* Ex. 3 at 71 (March 16, 2010 10-K).

On June 11, 2010, Defendants filed their motion to stay or alternatively to dismiss the Complaint. [Docket Item 30]. On July 21, 2010, the Court denied Defendants' motion for a stay but granted Defendants' motion to dismiss with leave to amend. [Docket Item 48]. The

Court found the Complaint deficient for failing to plead sufficient particularized facts showing that a majority of Hansen's board was not disinterested, and thus found Plaintiff necessarily failed to demonstrate demand futility. The Court did not address the issue of whether demand futility has been mooted by the previous shareholder demands described above and did not address Defendants' alternate ground for dismissal, that the Complaint should be dismissed for failure to state a claim. The Court ordered Plaintiff to file an amended complaint by August 9, 2010.

Plaintiff filed the Amended Complaint on August 9, 2010, bringing the same eight causes of action as contained in the Complaint. [Docket Item 51]. As discussed above, Plaintiff adds scant new conclusory allegations to support his demand futility allegations and causes of action for Breach of Fiduciary Duties (Counts I though III). Plaintiff does not add any new allegations to support his causes of action for Unjust Enrichment (Count IV), Waste of Corporate Assets (Count V), and claims against Defendant Gary Restani (Counts VI through VIII).

III. ARGUMENT

A. PLAINTIFF LACKS STANDING TO BRING THIS DERIVATIVE ACTION

Federal Rule of Civil Procedure 23.1 provides that a shareholder "seeking to enforce the right of a corporation . . . must 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. Stated otherwise, the shareholder must first demand action from the corporation's directors or plead with particularity the reasons why such demand would have been futile." *In re Linear Tech. Corp. Deriv. Litig.*, No. 06-3290, 2006 WL 3533024, at *2 (N.D. Cal. Dec. 7, 2006) (citing Fed. R. Civ. P. 23.1) (internal quotations omitted); *see also In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 989 (9th Cir. 1999). Thus, Plaintiff lacks standing to bring a derivative action unless he either: (1) alleges that the Board wrongfully rejected pre-suit demand, or (2) alleges with particularity why he was justified in not having made the effort to obtain Board action. *See Aronson v. Lewis*, 473 A.2d 805, 811-12, 815 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746

A.2d 244, 254 (Del. 2000).[2] Since Plaintiff did not and cannot allege that he made any demand on the Board, this action may only proceed if he has alleged sufficient facts to establish demand futility. He still has not.

1. PLAINTIFF HAS NOT ESTABLISHED DEMAND FUTILITY

Demand may be excused only when it is clear from the particularized facts alleged that more than half of the board members have a personal and substantial interest in the subject matter of the proposed lawsuit that renders them unable to exercise independent judgment in responding to a demand. *See Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993). Under Delaware law, directors are presumed to act in the best interests of the corporation, in a disinterested manner and independent of other influences, unless a plaintiff pleads specific facts showing otherwise. *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048-49 (Del. 2004); *Aronson*, 473 A.2d at 812. Consequently, demand is rarely excused on this basis. *See Aronson*, 473 A.2d at 815.

The relevant test is whether Plaintiff has pled *with particularity* facts that show *a reasonable doubt* that the Board could have properly exercised its independent and disinterested business judgment in responding to a demand. *See Rales*, 634 A.2d at 934; *see also Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003). Plaintiff's Amended Complaint does not cure the defects that led the Court to grant Defendants' motion to dismiss to the prior complaint for failure to meet this requirement. The Amended Complaint again relies on, and adds even more bare boilerplate allegations that the Board was not independent because of: (1) the financial interests of certain board members, (2) their prospects of personal liability for violations of the

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[2] Delaware law controls because Hansen is incorporated under the law of that state. *See* Am. Compl. at ¶ 19; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108-09 (1991) ("[Court] must apply the demand futility exception as it is defined by the law of the State of incorporation."); *In re Verisign, Inc., Deriv. Litig.*, 531 F. Supp. 2d 1173, 1188 (N.D. Cal. 2007) (applying Delaware law); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d at 990 (Delaware law applied to shareholder derivative action involving Delaware corporation).

securities laws, (3) their alleged participation in the wrongdoing at issue here, and (4) their potential loss of director and officer liability insurance coverage. What the Amended Complaint fails to do is add any new *particularized facts* to cure the defects identified by the Court.

a. Plaintiff's Allegations Of Financial Interest Do Not Establish That The Board Lacked Disinterestedness Or Independence

To plead that the Board's financial interests interfered with its independence, Plaintiff "must plead facts *specific to each director*, demonstrating that at least half of them could not have exercised disinterested business judgment in responding to a demand." *Desimone v. Barrows*, 924 A.2d 908, 943 (Del. Ch. 2007). Not only does Plaintiff fail to allege particular facts sufficient to show that a majority of the Board possessed financial interests that would interfere with their independence, the *only* director for whom Plaintiff alleges a personal financial interest is Dr. Frederic Moll. Indeed, the Amended Complaint does not allege *any* new facts to show that anyone other than Dr. Frederic Moll possessed financial interests that would interfere with their independence. *See* Am. Compl. at ¶¶ 129-31.

The Amended Complaint, like the previous complaint, merely points out that, in addition to being a director, Dr. Moll is a co-founder of Hansen and the Chief Executive Officer and President. Plaintiff alleges that these positions, together with the fact that Dr. Moll is paid "substantial monetary compensation" from the Company, establish a financial interest on his part. *See* Am. Compl. at ¶¶ 129-31. As explained in the previous motion to dismiss, these facts alone do not suggest that Dr. Moll lacked disinterestedness or independence in connection with the claims alleged here. A director may be sufficiently interested to be unable to exercise independent business judgment when he or she will receive a personal financial benefit that is not equally shared by the shareholders. *See Aronson*, 473 A.2d at 812; *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993), *modified in part on reargument*, 636 A.2d 956 (Del. 1994). In particular, a director is considered not disinterested where the director "appear[s] on both sides of a transaction [or] expect[s] to derive [a] personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally . . . [or] where a corporate decision will have a materially detrimental

impact on a director, but not on the corporation and the stockholders." *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002) (refusing to find improper interest in merger where director's stock would be cashed out for the same consideration as all other shareholders and director's interest in maximizing stock price was aligned with other shareholders) (internal citations and quotations omitted); *see also Cede & Co.*, 634 A.2d at 364 (declining to find director interest where plaintiffs alleged only "director self interest, standing alone and without evidence of disloyalty"). The Amended Complaint does not allege facts demonstrating that Dr. Moll's positions or compensation give him a financial interest in either the claims made in the Amended Complaint, or the underlying transactions, that is different from the interests of Hansen or its shareholders.

Moreover, even assuming that Plaintiff's allegations related to Dr. Moll's financial interest were sufficient to raise doubts about his disinterestedness or independence, those allegations still say nothing about the financial interests of the remaining six directors (Bruce Barclay, Russell Hirsch, James Shapiro, Joseph Mandato, Christopher Lowe and Kevin Hykes), whose financial interests the Amended Complaint ignores. Plaintiff thus has not alleged facts showing the futility of making a demand on the Board.

b. Plaintiff's Allegation That The Board Faces Possible Personal Liability Does Not Excuse Demand

Plaintiff again alleges that each of the directors lacks independence due to his potential liability for breaches of fiduciary duty and violation of the securities laws. *See* Am. Compl. at ¶¶ 138-141. The Delaware Supreme Court has squarely rejected the notion that such conclusory allegations excuse demand. *See Aronson*, 473 A.2d at 818 (bare allegation that "directors otherwise would have to sue themselves" does not excuse demand); *Brehm*, 746 A.2d at 257 n. 34 ("It is no answer to say that demand is necessarily futile because [] the directors 'would have to sue themselves . . . .'").

Instead, to establish that a director is not disinterested because he faces potential liability, the complaint must set forth particularized facts establishing that the "potential for [the directors'] liability is not 'a mere threat' but instead may rise to 'a *substantial likelihood.*'" *Rales*, 634 A.2d at 936 (emphasis added) (quoting *Aronson*, 473 A.2d at 815); *see also Wood v.*

Baum, 953 A.2d 136, 141 n.11 (Del. 2008). A derivative plaintiff does not satisfy this requirement simply by naming the directors as defendants and making conclusory allegations that they may be liable for wrongdoing. *Wood*, 953 A.2d at 141-42. Delaware courts demand that plaintiffs plead specific facts: "cursory contentions of wrongdoing [do not] substitute for the pleading of particularized facts." *Desimone*, 924 A.2d at 928.

Here, Plaintiff still alleges no facts supporting either his conclusory claim that the directors face potential liability for the events leading to the restatement or his insinuation that the directors could be liable for allowing Christopher Sells to resign from employment at Hansen.[3] *See* Am. Compl. at ¶¶ 137-38. Plaintiff has not alleged any new facts with respect to directors Shapiro or Lowe to establish a substantial likelihood of their liability. *Compare* Compl. ¶¶ 93-96 to Am. Compl. ¶¶ 137-40; *see also infra* section III.A.1.c.(1). As to directors Hirsch, Mandato, and Hykes, Plaintiff has merely added the conclusory allegation that those three directors "knew that Hansen Medical's financial reports contradicted its revenue recognition policies." Am. Compl. at ¶ 136. That is not enough. *See In re Verifone Holdings, Inc. S'holder Deriv. Litig.*, No. 07-06347, 2009 WL 1458233, at *8 (N.D. Cal. May 26, 2009) (stating plaintiffs hard pressed to establish substantial likelihood of liability for false SEC filings where no particularized facts about what directors knew about filings when they were issued); *see also* July 21, 2010 Order at 5-6 (the complaint "fails to allege that *issues* with Hansen's revenue recognition policy or accounting methods were discussed by the Board. The fact that revenues were discussed and touted in press releases – revenues that plaintiff claims were improperly accounted for – cannot imply that the Board members knew of the alleged accounting problems that led to improperly recognizes revenue. Moreover, there are no allegations that internal company metrics or information discussed at the Board level contradicted the earnings statements contained in Hansen's SEC filings or press releases."). And as to Dr. Frederic Moll,

[3] Indeed, the allegation regarding potential liability based on Mr. Sells' departure from the Company is still the only allegation with respect to Mr. Hykes, who Plaintiff concedes joined the Board in July 2009 and was not a member of the Board at the time of the original issuance of the later restated financial statements. *See* Am. Compl. at ¶¶ 29, 137.

Plaintiff attempts through a myriad of new conclusory allegations to establish liability, such as Moll's participation in board meetings; his "desire and efforts to inflate Hansen Medical's revenues and, in turn, stock price"; and Moll's "intimate, detailed knowledge of revenue recognition policies and issues." Am. Compl. at ¶ 128. But what the Amended Complaint fails to do is actually allege any new *facts* to support its new conclusory allegations of "knowledge" and "participation."

These omissions are particularly glaring in the present case because Plaintiff's burden of showing a substantial likelihood of director liability is especially heavy here given the exculpatory provision in Hansen's certificate of incorporation, as permitted by Delaware law. This provision limits its Directors' liability to actions that are made in bad faith or constitute intentional misconduct.[4] *See Guttman*, 823 A.2d at 501 ("[I]n the event that the charter insulates the directors from liability for breaches of the duty of care, then a serious threat of liability may only be found to exist if the plaintiff pleads a *non-exculpated* claim against the directors based on particularized facts."); *In re Sagent Tech., Inc., Deriv. Litig.*, 278 F. Supp. 2d 1079, 1095 n.9 (N.D. Cal. 2003) (claim which alleges negligent breach of duty precluded by corporation's exculpatory provision). Thus, Plaintiff cannot show a substantial likelihood of director liability without alleging particularized facts demonstrating that the Directors "acted with scienter, *i.e.*, that they had 'actual or constructive knowledge' that their conduct was legally improper." *In re Extreme Networks, Inc. S'holder Deriv. Litig.*, 573 F. Supp. 2d 1228, 1239 (N.D. Cal. 2008) (internal citation omitted). In *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106 (Del. Ch. 2009), for example, the court held that when a claim of liability is based on the allegation that

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[4] Section 102(b)(7) of Delaware's General Corporation Law allows shareholders to adopt an exculpatory provision to shield directors from liability for monetary damages where they act in good faith and do not commit intentional wrongdoing. *See* Del. Code Ann. Tit. 8, § 102(b)(7). Article XI of Hansen's Certificate of Incorporation provides: "The liability of the directors for monetary damages shall be eliminated to the fullest extent under applicable law. If the [Delaware General Corporation Law] is amended to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the corporation shall be eliminated to the fullest extent permitted by the [Delaware General Corporation Law], as so amended." Ex. 4.

directors failed to exercise appropriate oversight over the corporation's activities, the plaintiff must allege particularized facts demonstrating that the directors "*knew* they were not discharging their fiduciary obligations or that the directors demonstrated a *conscious* disregard for their responsibilities such as by failing to act in the face of a known duty to act." *Id.* at 123; *see also In re Dow Chemical Co. Deriv. Litig.*, No. 4349-CC, 2010 WL 66769, at *12 (Del. Ch. Jan. 11, 2010).

Here, Plaintiff's only apparent attempt to meet this pleading requirement is his insertion of a conclusory allegation of "bad faith." *See* Am. Compl. at ¶¶ 85-88; 137 ("[T]he Director Defendants acted in bad faith in allowing Sells to resign and allowing Hansen Medical to enter into the separation agreement."). But the Amended Complaint still lacks the required *factual allegations* indicating that this act, or any act taken by any director was in bad faith or involved intentional misconduct. *See id.*; *see also* July 21, 2010 Order at 7 ("Plaintiff's attempt to equate [allegations that defendants let Christopher Sells resign and 'essentially bestowed gifts on him' when there were grounds to terminate him for cause] with intentional bad faith, however, fails."); *Fisk Ventures, LLC v. Segal*, No. 3017-CC, 2008 Del. Ch. LEXIS 158, at *42 (Del. Ch. May 7, 2008) ("[T]he hollow invocation of 'bad faith' does not magically render a deficient complaint dismissal-proof; this Court will not blindly accept conclusory allegations."); *Guttman*, 823 A.2d at 501. The Amended Complaint therefore necessarily fails again to allege a basis to excuse demand based on potential personal liability by the Hansen directors.

c. Plaintiff's Allegations Regarding Participation In Alleged Wrongful Conduct Do Not Excuse Demand

(1) Plaintiff's Allegations Regarding The Audit Committee Are Insufficient To Establish Demand Futility

Plaintiff also repeats his argument that demand would be futile as to members of the Audit Committee because the Audit Committee reviewed and approved the Company's improper financial statements. *See* Am. Compl. at ¶¶ 132. But as this Court noted, "[t]here are no allegations in this case demonstrating that the improper revenue recognition at issue was so egregious or its existence so 'clear on its face' that audit committee approval of financial

statements and audit controls would suffice to show bad faith on the part of the audit committee members." *See* July 21, 2010 Order at 9; *see also In re MIPS Techs., Inc. Deriv. Litig.*, No. 06-06699, 2008 WL 3823726, at *5 (N.D. Cal. Aug. 13, 2008) (the assertion that membership on a committee is a sufficient basis to infer scienter is contrary to well-settled Delaware law).

In response to the Court's concerns, Plaintiff lists supposed "specific facts giving rise to the Audit Committee Defendants' liability." But the added "facts" are just conclusory claims that the Audit Committee Defendants had "intimate, detailed knowledge" of Hansen's revenue recognition policies. *See* Am. Compl. at ¶ 133. Knowledge of Hansen's revenue recognition policies is not the same as knowledge of any act inconsistent with those policies. The Amended Complaint alleges no actual facts indicating that one or more members of the Audit Committee knew that the Company's financial statements were materially misstated prior to their issuance, as required to establish the substantial likelihood of liability to show a lack of independence. *See In re Verifone Holdings, Inc. S'holder Deriv. Litig.*, 2009 WL 1458233, at *8; *see also In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d at 128 (noting that plaintiffs failed to plead particularized facts suggesting that the Board was presented with "red flags" alerting it to potential misconduct and "plaintiffs' allegations do not even specify how the board's oversight mechanisms were inadequate or how the director defendants knew of these inadequacies and consciously ignored them"). Moreover, as shown above, Plaintiff's conclusory allegation of "bad faith" is not sufficient. *See* Am. Compl. at ¶ 134; *Fisk Ventures*, 2008 Del. Ch. LEXIS 158, at *42.

(2) Plaintiff's Allegations Regarding Directors' Financial Reporting Roles Are Insufficient To Establish Demand Futility

Likewise, Plaintiff cannot establish demand futility by repeating conclusory allegations that other directors holding financial reporting roles were disabled from considering demand because they made "false financial statements in Hansen Medical's fiscal 2008 annual report on Form 10-K that did not properly account for Hansen Medical's Sensei system revenues." Am. Compl. at ¶¶ 129, 138. Courts have repeatedly held that such boilerplate allegations are insufficient to excuse demand. *See In re Finisar Corp. Deriv. Litig.*, No. 06-

07660, 2009 WL 3072882, at *14 (N.D. Cal. Sept. 22, 2009) ("[B]oilerplate allegations that directors signed SEC filings do not meet the particularized pleading requirements for demand futility."); *Decker v. Clausen*, No. 10,684, 1989 WL 133617, at *2 (Del. Ch. Nov. 6, 1989) (conclusory allegations that directors "participated in and/or approved the alleged wrongs . . . have been rejected consistently by our courts"); *In re MIPS Techs., Inc. Deriv. Litig.*, 2008 WL 3823726, at *6 ("A director's execution of financial reports, without more, is insufficient to create an inference that he had actual or constructive notice of any illegality."). And as shown above, Plaintiff has not alleged any new facts with respect to any of the directors to show that their financial reporting roles were substantially likely to lead to any liability. *See supra* section III.A.1.b.

d. Plaintiff's Allegations Regarding Potential Loss Of Director And Officer Liability Insurance Do Not Excuse Demand

Finally, Plaintiff again contends that the directors are not disinterested because the "insured versus insured exclusion" in the Company's insurance policy eliminates coverage for any action brought directly by Hansen against the defendants, leaving the directors facing a "large uninsured liability" if they were to bring the suit themselves. Am. Compl. at ¶ 143. This Court already rejected that allegation. *See* July 21, 2010 Order at 8. This purported basis for showing "interest" has also been rejected repeatedly by courts as nothing more than a "variation[] on the 'directors suing themselves' and 'participating in the wrongs' refrain." *Decker*, 1989 WL 133617, at *2 (internal citation omitted); *see also Jones ex rel. CSK Auto Corp. v. Jenkins*, 503 F. Supp. 2d 1325, 1341 (D. Ariz. 2007) (holding that "[c]ourts have routinely rejected" the argument that an "insured versus insured exclusion" creates interest); *In re VistaCare, Inc., Deriv. Litig.*, No. 04-1740, 2007 WL 2460610, at *4 (D. Ariz. Aug. 23, 2007) (argument that "demand is futile because [d]efendants would have to 'sue themselves,' resulting in a loss of insurance . . . ha[s] been consistently rejected by courts"); *In re Infosonics Corp. Deriv. Litig.*, No. 06-1336, 2007 WL 2572276, at *7 n. 1 (S.D. Cal. Sept. 4, 2007) ("The court does not find persuasive [p]laintiffs' argument that [d]efendants are conflicted because [defendant's] insurance policies contain an 'insured versus insured exclusion.'").

2. PLAINTIFF'S CLAIM OF DEMAND FUTILITY IS MOOT

The two demand letters sent by shareholders to Hansen's Board in December 2009 seeking that it take action to remedy breaches of fiduciary duty based on the same underlying allegations as this action moots Plaintiff's claim of demand futility.[5] *See Stepak v. Addison*, 20 F.3d 398, 412 (11th Cir. 1994) (motion to dismiss demand-excused derivative suit properly granted under Delaware law where another shareholder made demand); *Boeing Co. v. Shrontz*, No. 11273, 1992 WL 81228, at *5 (Del. Ch. Apr. 20, 1992) (granting motion to dismiss; plaintiffs cannot "cover all the bases" by having one shareholder make a demand and another allege demand futility). By making a demand, the Company's shareholders have tacitly acknowledged "the absence of facts to support a finding of [demand] futility." *Spiegel v. Buntrock*, 571 A.2d 767, 775 (Del. 1990); *see also Levine v. Smith*, 591 A.2d 194, 212-14 (Del. 1991), *overruled on other grounds by Brehm*, 746 A.2d at 254 (shareholder's demand essentially concedes the independence of a majority of the board to consider demand). Hansen's shareholders have conceded that the majority of the Board is independent and they cannot now challenge the Board's independence.

As a result, Plaintiff's claim of demand futility is moot, and this action must be dismissed. *See Spiegel*, 571 A.2d at 775 (refusing to hear the merits of plaintiff's demand futility argument after plaintiff made demand on the board).

B. EACH CAUSE OF ACTION IS INSUFFICIENT AS A MATTER OF LAW

1. PLAINTIFF'S FIRST THROUGH THIRD CAUSES OF ACTION FAIL BECAUSE PLAINTIFF DOES NOT PLEAD FACTS SUFFICIENT TO SUSTAIN A CLAIM FOR BREACH OF FIDUCIARY DUTY

Plaintiff's bare allegations, including his deficient new allegations, do not support the Amended Complaint's conclusory allegations of knowledge of improper accounting or mismanagement. Accordingly, Plaintiff cannot maintain his breach of fiduciary duty claims

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[5] *See* Ex. 3 at 71 (March 16, 2010 10-K).

against the Defendants. *See* Am. Compl. at ¶¶ 55-88; 146-161. Under Delaware law, directors and officers of a Delaware corporation are presumed to have acted on an informed basis (i.e., with due care), in good faith and in the honest belief that their actions were in the company's best interests. *See Cede & Co.*, 634 A.2d at 361. To state a claim for breach of fiduciary duty, Plaintiff must overcome this presumption by alleging well-pleaded facts showing that the directors and officers did not act in accordance with their duties of due care, good faith and loyalty. *Id.*[6] "[T]he burden required for a plaintiff to rebut the presumption of the business judgment rule by showing gross negligence is a difficult one, and the burden to show bad faith is even higher." *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d at 125. Indeed, the level of proof required for a defendant's knowledge and intent to disseminate false information "is similar to, but even more stringent than, the level for scienter in a common law fraud action." *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc*., 854 A.2d 121, 158 (Del. Ch. 2004).

The Amended Complaint contains no facts, let alone particularized facts, supporting the claim that the Individual Defendants knew that the accounting for the Sensei was improper, that the Company's reported financial results were thereby inaccurate or even that any of the Individual Defendants knowingly did anything improper. *See Malone v. Brincat*, 722 A.2d 5, 9-10 (Del. 1998) (plaintiff must plead facts showing that defendants "knowingly" and "deliberately" disseminated false or misleading statements); *In re PMC-Sierra, Inc. Deriv. Litig.*, No. 06-05330, 2008 WL 2024888, at *3 (N.D. Cal. May 8, 2008) ("[A]ny amended complaint must more clearly delineate *each* defendant's alleged role in the purported wrongdoing.")

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[6] *See also Malpiede v. Townson*, 780 A.2d 1075, 1082-83 & 1082 n.16 (Del. 2001) (dismissing breach of fiduciary duty claims because "no set of facts that may be inferred from the well-pleaded allegations in the complaint" support claim; "'well-pleaded allegations' include *specific allegations of fact and conclusions supported by specific allegations of fact*" (emphasis added)) (citing *Solomon v. Pathe Commc'n Corp.*, 672 A.2d 35, 38 (Del. 1996)); *In re McKesson HBOC Sec. Litig.*, 126 F. Supp. 2d 1248, 1278 (N.D. Cal. 2000) ("[C]onclusory assertions that directors breached their fiduciary duty of care are inadequate; rather, the complaint must contain well-pleaded allegations to overcome the presumption that the directors' decisions were informed and reached in good faith.").

(emphasis added). Plaintiff attempts to meet his burden through allegations about Defendants' knowledge of Hansen's revenue recognition policies. Am. Compl. at ¶¶ 62-72. But that attempt misses the target. What Plaintiff must, but does not allege, is knowledge that those revenue recognition polices were not being followed.

Plaintiff's allegations of mismanagement are similarly deficient, as the Amended Complaint fails to allege facts with particularity showing that any Defendant consciously disregarded his responsibilities such as by failing to act in the face of a known duty to act or utterly failing to discharge his responsibilities. *See In re Caremark Int'l, Inc. Deriv. Litig.*, 698 A.2d 959, 969-71 (Del. Ch. 1996) (plaintiff must show that directors knew or should have known that violations of law were occurring, and that the directors took no steps in good faith effort to prevent or remedy that situation, and that such failure resulted in the losses complained of); *Stone ex rel. AmSouth Bancorp. v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (director oversight liability requires that the directors utterly failed to implement any reporting or information system or controls, or having implemented such system or controls consciously failed to monitor its operations). Plaintiff's stand-alone, conclusory allegation that the "Individual Defendants abdicated their duties" in maintaining control over Hansen's financial reporting is insufficient to show a breach of the duty of care. *See Desimone*, 924 A.2d at 935 ("[T]o hold directors liable for a failure in monitoring, the directors have to have acted with a state of mind consistent with a conscious decision to breach their duty of care."). Similarly, the allegation that "Moll admitted that mismanagement caused the revenue restatement" fails to demonstrate a conscious decision to breach his duty of care, and does not establish knowledge of mismanagement at the time of the misstatements. *See Prince v. Bensinger*, 244 A.2d 89, 94 (Del. Ch. 1968) ("[T]o become liable, directors must *knowingly* publish a written false statement.") (emphasis added); *see also In re Verifone Holdings, Inc. S'holder Deriv. Litig.*, 2009 WL 1458233, at *8 (allegations of false SEC filings and other public statements hinge on when the directors knew about accounting deficiencies).

Plaintiff also attempts to parlay several statements from the *Curry* complaint into the requisite support for its mismanagement claim. But, in addition to being conclusory, those

statements allege no factual wrongdoing on the part of any Individual Defendant. *See* Am. Compl. at ¶¶ 79-84. And, Plaintiff cannot rely on the *Curry* complaint for the truth of the matters alleged therein. *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. Cal. 2001) ("[A] court may not take judicial notice of a fact that is 'subject to reasonable dispute.'") (quoting Fed. R. Evid. 201(b)); *see also* July 21, 2010 Order at 4 n.2 ("The [court] will not take judicial notice of the truth of the matters alleged in the *Curry* complaint[.]").

Moreover, Delaware law allows corporations to eliminate their directors' personal liability for acts amounting to negligence or recklessness, so long as the acts do not constitute a breach of their duty of loyalty, intentional misconduct or a knowing violation of law. *See* Del. Code Ann. Tit. 8, § 102(b)(7). Where a company adopts such an exculpatory provision in its corporate governance documents, its directors may not be held liable for money damages for non-intentional breaches of their fiduciary duties. *See Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009) (holding that directors breach duty of loyalty only if they "knowingly and completely failed to undertake their responsibilities"); *Arnold v. Soc'y for Sav. Bancorp., Inc.*, 650 A.2d 1270, 1287-88 (Del. 1994) (Section 102(b)(7) provision barred certain individual liability claims); *Emerald Partners v. Berlin*, 787 A.2d 85, 92 (Del. 2001) ("[I]n actions against the directors of Delaware corporations with a Section 102(b)(7) charter provision, a shareholder's complaint must allege well-pled facts that, if true, implicate breaches of loyalty or good faith.").

Hansen has adopted such an exculpatory provision in its Articles of Incorporation. *See* Ex. 4. Thus, to plead a basis for liability, Plaintiff must allege well-pleaded facts showing that the Director Defendants breached their duty of loyalty, acted in bad faith, or committed intentional misconduct. *See, e.g., In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 732-33 (Del. Ch. 1999), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000). As discussed above, Plaintiff's boilerplate and conclusory allegations of "bad faith" fall far short of this standard.

2. THE FOURTH CAUSE OF ACTION FAILS BECAUSE PLAINTIFF HAS NOT PLED FACTS SUFFICIENT TO STATE A CLAIM FOR UNJUST ENRICHMENT

To plead unjust enrichment, Plaintiff must allege facts demonstrating that each Defendant was enriched, that the Company was impoverished, that a relation existed between those facts, that justification was absent, and that no remedy existed. *See Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999); *Cantor Fitzgerald, L.P. v. Cantor*, No. C.A. 16297, 1998 WL 326686, at *6 (Del. Ch. June 16, 1998); *Fleer Corp. v. Topps Chewing Gum, Inc*., 539 A.2d 1060, 1062 (Del. 1988) ("Before the court may properly order restitution, it must find that the defendant was unjustly enriched at the expense of the plaintiff.").

Plaintiff's conclusory allegation that "[b]y their wrongful acts and omissions, the Individual Defendants were unjustly enriched at the expense of and to the detriment of Hansen" is insufficient because it neither states what benefit was conferred on any particular defendant at the Company's expense, nor explains why it would be unjust for Defendants to retain such "benefits." Am. Compl. at ¶ 163; *see also id.* at ¶¶ 162-66. Plaintiff does not allege that any of the Individual Defendants failed to provide benefit to Hansen through their employment, or that the directors and officers were remunerated in a manner that was disproportionate to the value of their services. As such, the Amended Complaint fails to allege that these defendants were unjustly enriched.

3. THE FIFTH CAUSE OF ACTION FAILS BECAUSE PLAINTIFF HAS NOT PLED FACTS SUFFICIENT TO STATE A CLAIM FOR WASTE OF CORPORATE ASSETS

Plaintiff alleges that Defendants wasted corporate assets by paying incentive compensation to certain of its executive officers and "incurring potentially hundreds of millions of dollars of legal liability and/or legal costs to defend defendants' unlawful actions." Am. Compl. at ¶ 168; *see generally id.* at ¶¶ 167-70. A claim for waste, however, requires the pleading of particularized facts demonstrating that defendants caused the Company to bestow an asset on another in exchange for something that no person of ordinary, sound business judgment would deem worth that which was paid. *See Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979) (essence of claim for waste is "the diversion of corporate assets for improper or

unnecessary purposes"); *Saxe v. Brady*, 184 A.2d 602, 610 (Del. Ch. 1962).

Under Delaware law, it is well settled that "[t]he standard for a waste claim is high and the test is 'extreme . . . very rarely satisfied by a shareholder plaintiff.'" *In re 3COM Corp. S'holders Litig.*, No. 16721, 1999 WL 1009210, at *4 (Del. Ch. Oct. 25, 1999) (quoting *Steiner v. Meyerson*, No. 13139, 1995 WL 441999, at *1 (Del. Ch. July 19, 1995)). The Delaware Supreme Court stated that "[m]ost 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." *Brehm*, 746 A.2d at 263; *see also Navellier v. Sletten*, 262 F.3d 923, 937 (9th Cir. 2001) (holding that under Delaware law, "the legal test for waste is 'severe. Directors are guilty of corporate waste, only when they authorize an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.'") (quoting *Glazer v. Zapata Corp.*, 658 A.2d 176, 183 (Del. Ch. 1993)); *White v. Panic*, 783 A.2d 543, 554 n.36 (Del. 2001) (corporate waste requires plaintiff to show that expenditures were egregious and irrational).

Plaintiff's general allegations about incentive-based compensation and potential legal costs do not rise to the level of waste as Plaintiff neither does nor could assert that the compensation and legal costs serve no corporate purpose. Additionally, Delaware law recognizes that "'[c]ourts are ill-fitted to attempt to weigh the 'adequacy' of consideration under the waste standard.'" *In re Countrywide Fin. Corp. Deriv. Litig.*, 554 F. Supp. 2d 1044, 1077-78 (C.D. Cal. 2008) (dismissing claim of waste; quoting *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997)). Rather, "[i]t is the essence of business judgment for a board to determine if a particular individual warrant[s] large amounts of money, whether in the form of current salary or severance provisions." *Brehm*, 746 A.2d at 263 (internal quotations omitted). The allegations regarding legal costs are further deficient insofar as they are speculative. *See In re Cray Inc.*, 431 F. Supp. 2d 1114, 1133-34 (W.D. Wash. 2006) (following cases holding "that derivative claims are foreclosed when they merely allege damages based on the potential costs of investigating, defending, or satisfying a judgment or settlement for what might be unlawful conduct"); *In re Symbol Techs. Sec. Litig.*, 762 F. Supp. 510, 516-17 (E.D.N.Y. 1991) (claims

contingent on outcome of other litigation are premature as defendants cannot be held liable for the costs of potentially baseless suits). As a result, Plaintiff's waste claim must be dismissed.

4. PLAINTIFF'S SIXTH THOUGH EIGHTH CAUSES OF ACTION AGAINST MR. RESTANI FOR INSIDER TRADING FAIL

Under Delaware law, corporate officers and directors may trade company stock "at will, and without any liability to the corporation." *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 8 (Del. Ch. 1949). As long as an insider "is not profiting by inside information he is free to trade in the market place in [the] company's stock." *Rosenberg v. Oolie*, No. Civ. A. 11,134, 1989 WL 122084, at *4 (Del. Ch. Oct. 16, 1989); *see Field v. Allyn*, 457 A.2d 1089, 1099 (Del. Ch. 1983), *aff'd*, 467 A.2d 1274 (Del. 1983) (same).

To state a claim for insider trading, on the other hand, Plaintiff must allege that (1) "the corporate fiduciary possessed material, nonpublic company information" and (2) "the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information." *In re Oracle Corp. Deriv. Litig.*, 867 A.2d 904, 934 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005). Plaintiff must demonstrate that "'each sale by each individual defendant was entered into and completed on the basis of, and because of, adverse material non-public information.'" *Guttman*, 823 A.2d at 505 (quoting *Stepak v. Ross*, No. Civ. A. 7047, 1985 WL 21137, at *5 (Del. Ch. Sept. 5, 1985)).

Plaintiff has failed to plead a claim for insider trading against Mr. Restani because he has not pled *any* particularized facts to show that Mr. Restani had material non-public information, traded stock while in possession of that information, and traded with the intent to exploit that information. *See, e.g., Guttman*, 823 A.2d at 505 (scienter is an element of breach of fiduciary duty by insider trading); *see also Rattner v. Bidzos*, No. Civ. A. 19700, 2003 WL 22284323, at *10 (Del. Ch. Oct. 7, 2003) (rejecting insider trading allegations because complaint was "devoid of any particularized facts that could lead to the inference that the timing of the trades reflected . . . impermissible insider trading"); *Jones ex rel. CSK Auto Corp.*, 503 F. Supp. 2d at 1339 (dismissing insider trading claim under Delaware law for failure to allege unusual trading patterns or suspicious timing of sales). Plaintiff here offers only conclusory and

boilerplate allegations of alleged insider trading, without any particularized allegations as to what material non-public information Mr. Restani had at the time of the alleged trades and how he obtained that information or how the timing of the alleged trades reflected impermissible insider trading. *See* Am. Compl. at ¶¶ 13, 22, 176-84. This is insufficient to state a claim.

Plaintiff claims that Mr. Restani violated California Corporations Code § 25402 (Am. Compl. at ¶¶ 176-84) and that the Director Defendants violated California Corporations Code § 25403 by failing to exercise control and influence over Mr. Restani (Am. Compl. at ¶¶ 185-87). Under California Corporations Code Section 25402, it is unlawful for a corporate insider:

> to purchase or sell any security of the issuer in this state at a time when he knows material information about the issuer . . . which would significantly affect the market price of that security and which is not generally available to the public, . . . unless he has reason to believe that the person selling to or buying from him is also in possession of the information.

Section 25502.5 permits companies to recover damages for violations of Section 25402. *See* Cal. Corp. Code §§ 25502.5(a), (c); *Friese v. Superior Court*, 134 Cal. App. 4th 693, 705 (2006), *cert. denied, Moore v. Friese*, 127 S.Ct. 138 (2006).[7] A claim under Section 25402, however, has a significant limitation. As *Friese* noted: "[B]y its terms section 25402 is only limited to securities transactions which occur *in this state*." 134 Cal. App. 4th at 704 (emphasis added). Plaintiff fails to allege any facts supporting his claim that any of the challenged stock sales by Mr. Restani occurred in California.

Moreover, a claim under Section 25402 must be pled with particularity. *In re Verisign, Inc., Deriv. Litig.*, 531 F. Supp. 2d at 1221 (citing *Bowden v. Robinson*, 67 Cal. App. 3d 705, 711 (1977)). As noted above, Plaintiff relies on conclusory allegations of knowledge

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[7] Courts have disagreed over the application of these statutes. *Compare Friese*, 134 Cal. App. 4th at 709-10 (California's insider trading statutes are intended to apply to officers and directors of foreign corporations) *with In re Sagent Tech., Inc. Deriv. Litig.*, 278 F. Supp. 2d at 1090-92 (dismissing Section 25402 claim because nominal defendant was a Delaware corporation and therefore only Delaware law applied to claims based on improper insider trading by the officers and directors).

(Am. Compl. at ¶¶ 177-81), that are consistently rejected as insufficient to state a claim.

Accordingly, the Amended Complaint fails to allege a claim under the California statutes.[8]

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's Amended Complaint with prejudice.

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[8] Because the Section 25402 claim fails, the control person claim under Section 25403 also fails. *See In re Verisign Deriv. Litig.*, 531 F. Supp. 2d at 1221 (dismissing Section 25403 claim for failure to allege a Section 25402 claim).

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ATTESTATION PURSUANT TO GENERAL ORDER 45

I, John D. Pernick, attest that concurrence in the filing of this document has been obtained from any signatories indicated by a "conformed" signature (/s/) within this e-filed document.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 8th day of September, 2010, at San Francisco, California.

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