

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RYAN OSWALD,

Plaintiff,

v.

IDENTIV, INC., et al.,

Defendants.

Case No. [16-cv-00241-CRB](#)

**ORDER DENYING MOTION TO
DISMISS**

Ryan Oswald brings this shareholder derivative lawsuit on behalf of Identiv, Inc., claiming that Defendants, Identiv's Board of Directors and an executive,¹ breached their fiduciary duties and committed waste. See generally Second Amended Complaint ("SAC") (dkt. 38-3). Before Oswald can proceed on behalf of Identiv, he must plead particularized facts demonstrating that a demand upon the Identiv Directors would have been futile. This Court previously granted without prejudice Defendants' Motion to Dismiss Oswald's Amended Complaint for failure to adequately allege demand futility, and stayed the case to allow Oswald to investigate further and amend his complaint. Order (dkt. 34). Oswald has now amended, and Defendants again move to dismiss. See SAC; MTD (dkt. 43). As discussed below, Oswald's Second Amended Complaint includes new

¹ Identiv is the nominal defendant in a derivative capacity. The defendants in this action are: current Identiv directors Steven Humphreys, Gary Kremen, and James E. Ousley; former directors Jason Hart, Saad Alazem, and Daniel S. Wenzel; and Identiv's former Chief Financial Officer, Brian Nelson.

1 particularized facts sufficient to show demand futility. The Court therefore DENIES the
2 Motion to Dismiss.

3 **I. BACKGROUND**

4 Identiv is a security technology company incorporated under the laws of the State of
5 Delaware. SAC ¶ 16. Jason Hart was its CEO, and Ana Ruggiero was Hart's executive
6 assistant until she was fired. See id. ¶¶ 18, 44–51. In April 2015, Ruggiero brought suit in
7 Alameda Superior Court alleging a number of employment-related causes of action. Id.;
8 see also Ruggiero v. Identiv, Inc., No. HG15764795 (Cal. Super. Ct. Alameda County.,
9 filed Apr. 2, 2015). In her complaint, Ruggiero alleged that Hart had improperly charged
10 Identiv for numerous personal expenses. SAC ¶¶ 45–50.

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13 About a month after Ruggiero filed her complaint, Identiv disclosed that it would be
14 unable to timely file certain executive compensation information with the U.S. Securities
15 and Exchange Commission (SEC). Id. ¶ 2. Identiv's Board of Directors—
16 then composed of Humphreys, Hart, Ousley, Kremen, Alazem, and Wenzel—formed a
17 Special Committee to investigate the allegations in Ruggiero's lawsuit and any similar or
18 related facts. Id. ¶¶ 53, 96. In November 2015, Identiv publicly disclosed that its
19 independent auditor, BDO, had resigned because it was “unwilling to be associated with
20 the consolidated financial statements prepared by management for any of the fiscal periods
21 within 2015.” Id. ¶ 4.

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24 Oswald then brought this shareholder derivative lawsuit against Identiv's Board of
25 Directors, alleging that the Identiv Directors breached their fiduciary duty and wasted
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1 corporate assets.² See Complaint (dkt. 1); FAC (dkt. 21). In November 2016, this Court
 2 granted without prejudice Defendants’ Motion to Dismiss Oswald’s Amended Complaint
 3 for failure to allege demand futility with particularity, and stayed the case “so that Oswald
 4 can exercise his rights under [Delaware law] to inspect Identiv’s books and records.”
 5 Order at 8. Oswald’s Second Amended Complaint includes new facts and details obtained
 6 through this inspection.
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8 Oswald’s Second Amended Complaint alleges that the Board allowed Hart to
 9 systematically misuse and misappropriate Identiv’s funds for his own personal indulgence.
 10 Oswald alleges that Hart spent tens of thousands of dollars on two parties in Las Vegas,
 11 then submitted the charges to Identiv for reimbursement.³ SAC ¶¶ 48, 50. Board members
 12 Kremen and Humphreys attended these parties. Id. One party in early July 2014 included
 13 \$8,700 in “champagne showers,”⁴ \$1,900 in massages for Kremen, \$5,000 in vodka, and
 14 \$5,000 at a restaurant. Id. ¶ 48. In September 2014, Hart, Nelson, Humphreys, Kremen,
 15 and five other people spent \$28,959 in Las Vegas, including \$14,500 at a nightclub and
 16 \$8,000 on upgraded hotel accommodations. Id. ¶ 50. Oswald alleges that Hart routinely
 17 submitted business expense reimbursement requests for other non-business purchases,
 18 including two drones, for approximately \$5,000, six computer servers for his home, for
 19 \$18,000 each, and \$3,000 in American Express gift cards. Id. ¶ 46.
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24 ² This Court also handled the related securities class action, which involved the same facts as
 25 those in Oswald’s original Complaint. See generally Rok v. Identiv, No. 15-cv-5775 CRB, 2017
 26 WL 35496 (N.D. Cal. Jan. 4, 2017). The Court dismissed the securities case, observing that the
 “allegations might support a derivative shareholder suit, . . . but they do not provide the necessary
 scienter in a securities fraud case.” Id., 2017 WL 35496, at *13.

27 ³ The documents Identiv produced in response to Oswald’s books and records demand
 corroborate these expenses, originally described in the Ruggiero Complaint. See id. ¶ 56.

28 ⁴ A champagne shower involves shaking a champagne bottle in celebration and spraying it on
 oneself and one’s friends. See, e.g., <https://www.youtube.com/watch?v=Dj-O9Dr1kSA>.

Oswald further alleges that, as detailed in the Ruggiero Complaint, Ruggiero raised her concerns about Hart's charges with the CFO, defendant Nelson, but Nelson took no action. Id. ¶ 48. In addition, Nelson gave Hart a personal loan of \$26,000, after which the Compensation Committee "suddenly" awarded Nelson equity compensation worth \$902,850. Id. ¶ 49. Identiv's public filings and Board materials corroborate the timing and amount of this award. Id. ¶ 49 n.2. Oswald alleges that Hart orchestrated the award as repayment for the loan and "in exchange for [Nelson's] silence" about Hart's misuse of corporate funds. Id. ¶ 6.

In May 2015, the Board established a Special Committee, composed of Board members Ousley and Wenzel, in response to the allegations in the Ruggiero Complaint. Id. ¶ 53. The Special Committee was to "consider, investigate, review, evaluate and analyze the facts, allegations and circumstances" of the Ruggiero Complaint, and "any similar or related facts . . . relating to expense reimbursements or payments on behalf of executive officers of the company." Id.; McGrath Decl. (dkt. 43-1), Ex. 15. The Special Committee was not empowered to make a final decision regarding its investigation or take any final action, only to "report its findings to the full Board and . . . recommend to the full Board what action to take, if any, in response to its findings." SAC ¶ 53. The Special Committee retained independent counsel⁵ and the accounting firm, Deloitte, to assist in its investigation. Id. ¶¶ 54, 56.

Deloitte reviewed 1,987 expense reimbursement submissions, totaling

⁵ The source for this allegation, the BDO resignation letter discussed below, defines independent counsel as the "independent law firm" retained by the Special Committee together with a "forensic consultant hired by the law firm." See id. ¶ 78.

1 \$1,011,185.02.⁶ See id. ¶ 62; McGrath Decl. Ex. 17 (“Deloitte Spreadsheet”).⁷ Deloitte
 2 raised concerns about charges from one of the Las Vegas parties attended by defendants
 3 Hart, Kremen, and a “U.S. Marshals Contact,” John Bailey, repeatedly flagging the trip in
 4 its report as involving “potential bribery issues.” SAC ¶¶ 57, 58. Bailey was a federal
 5 employee “believed to have been subsequently influential in assisting Identiv obtain
 6 certain government contracts worth millions of dollars.” Id. ¶ 48. According to the
 7 Ruggiero Complaint, Hart initially labelled the expenses as “customer event – senior exec
 8 and Board plus customers including us marshall [sic].” Id. In the course of the Special
 9 Committee’s investigation, Hart reclassified the charges for Bailey’s lodging as “100%
 10 personal,” but maintained that his own lodging for the trip was “100% business.” Id. ¶ 58.
 11 Deloitte noted the inconsistency in its review: “How can Jason Hart’s lodging be 100%
 12 business when Mr. Bailey’s lodging is listed as 100% personal. Either Mr. Hart took Mr.
 13 Bailey to Las Vegas as a personal friend with no business intent or he took Mr. Bailey to
 14 Las Vegas with a business intent.” Id.

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 18 Deloitte identified many other red flags in addition to the bribery issue. In the
 19 Deloitte Report, it repeatedly observed that billing many of the challenged charges as
 20 business expenses might “not be acceptable for IRS purposes.” Id. ¶ 59. In connection
 21 with a \$14,500 dinner in Las Vegas at which defendants Hart and Kremen were present,
 22 Deloitte wrote: “This is not a ‘closing celebration dinner.’” Id. ¶ 60. Regarding the same
 23 trip to Las Vegas, Deloitte noted, “[t]o assist the Board of Directors in carrying out its
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 27 ⁶ Identiv produced the Deloitte Report to Oswald in response to his books and records demand.
See Opp’n (dkt. 44-2) at 2 n.4.

28 ⁷ The Court requested and reviewed an electronic searchable version of the Deloitte Spreadsheet.
See Order Directing Filing (dkt. 50).

1 fiduciary duties, Deloitte is prepared to provide the Board in excess of 1,000 pictures
2 documenting this trip.” Id. Deloitte also flagged multiple expenses with the note,
3 “Deloitte believes that the lack of support [for the charge] represents a business and
4 potentially a tax issue,” and “Identiv should consult its tax attorneys on these matters.”
5 See, e.g., Deloitte Spreadsheet, ID# 1591, 1715 at Column L.
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7 According to Identiv’s books and records production to Oswald, Deloitte discussed
8 these issues with the independent counsel and the Board. SAC ¶¶ 57, 59. In its report,
9 Deloitte stated that the reasons Hart gave for expenses associated with the Las Vegas
10 parties (and many other expenses) were not sufficient to support a business purpose. Id.
11 The Board “[noted] Deloitte’s position,” then made a “policy decision” to allocate the
12 challenged charges, in whole or in part, as business expenses anyway. Id. The Board
13 decided to treat the expenses associated with the U.S. Marshal contact, Mr. Bailey, as
14 personal expenses. Id.
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17 Deloitte concluded that \$518,601.36 of the charges it reviewed were non-business
18 personal expenses, expenses that violated Company policy and could not be supported as
19 business expenses, or possible business expenses that were incurred in violation of
20 Company policy. See id. ¶ 62. The Board approved classification of an additional
21 \$257,260.85 in expenses as business expenses, in many instances overriding Deloitte’s
22 conclusion that the purpose provided was not sufficient to support a business purpose. See
23 id.; compare Deloitte Spreadsheet column Q (“no”) with id. column S (amount approved
24 by Board as business expense).
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27 Oswald alleges that independent counsel asked the Special Committee to allow
28 further investigation. See SAC ¶ 78 (“multiple requests by . . . the Independent Counsel. .

1 . . . Independent Counsel has communicated various other limitations in the scope of the
 2 Independent Investigation, including that the Independent Investigation was halted before
 3 Independent Counsel completed its planned investigative procedures. . . . limited advice
 4 provided by Independent Counsel”); id. ¶ 99 (“Special Committee’s counsel believed that
 5 additional investigation should be conducted”); id. ¶ 102 (same).
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7 There was no further investigation. On August 28, 2015, the Special Committee
 8 reported its findings and presented recommendations to the Board.⁸ Id. ¶ 70. Hart was not
 9 present. Id. The Special Committee members, Ousley and Wenzel, expressed their view
 10 that the investigation “had been very extensive and thorough,” but “noted input from
 11 independent counsel to the Committee with respect to possible additional investigative
 12 work on certain items.” Id. ¶ 71. The non-committee board members present—
 13 Humphreys, Kremen, and Alazem—“unanimously accepted the recommendation of the
 14 [Special] Committee” to conclude the investigative phase of the Special Committee. Id.
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17 Identiv’s independent auditor, BDO, requested on multiple occasions that the Board
 18 investigate further, and resigned on November 23, 2015, essentially because the Board
 19 refused. Id. ¶ 78. BDO’s resignation letter⁹ to the Board states that after it became aware
 20 of Hart’s “improper expenses, including relating to the entertainment of an employee of
 21 the US Marshals Service,” “in accordance with the requirements of Section 10A [of the
 22 Securities Exchange Act of 1934,] . . . BDO has sought to determine whether it is likely
 23 that an illegal act has occurred; and if so, the possible effect of each illegal act on the
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 27 ⁸ Identiv produced the Special Committee Report to Oswald in response to his books and records
 demand. See Opp’n at 2 n.5.

28 ⁹ Identiv produced the BDO letter to Oswald in response to his books and records demand. See
 Opp’n at 3 n.6.

1 financial statements of the Company.” Id. Despite “multiple requests by BDO,” the
2 Special Committee refused to seek any legal advice from independent counsel regarding
3 whether an illegal act had occurred, and halted the investigation “before Independent
4 Counsel completed its planned investigative procedures.” Id. BDO determined that “the
5 Company ha[d] not taken timely and appropriate remedial actions because of, at a
6 minimum, the limitations on the scope of the Independent Investigation, the limited advice
7 provided by Independent Counsel, and the limited actions taken regarding the on-going
8 role and involvement of Mr. Hart with the Company.” Id. BDO advised that it was
9 “unwilling to be associated with the consolidated financial statements prepared by
10 management for the quarterly and annual financial reporting periods for the fiscal year
11 ending December 31, 2015,” and resigned effective immediately. Id.

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14 In addition to the allegations concerning Identiv’s investigation of the claims in the
15 Ruggiero Complaint, Oswald also alleges that the Board gave Hart a golden parachute. In
16 September 2015, Humphreys replaced Hart as the CEO of Identiv, but—despite the
17 Special Committee’s conclusion that “Mr. Hart’s entertainment of a U.S. government
18 employee in 2014 violated the Company’s Code of Conduct and Ethics,” id. ¶ 70—Hart
19 continued to serve as President, id. ¶ 74. Identiv entered into a new compensation
20 agreement with Hart, worth up to \$875,000 per year, including commissions and bonuses,
21 plus valuable non-cash benefits. Id. After this action was filed, Hart resigned for reasons
22 purportedly unrelated to the wrongdoing. Id. ¶ 86. Because Hart was not fired for cause,
23 he received full severance. Id. ¶¶ 86, 107. Although Identiv’s amended Form 10-K for the
24 year 2014 indicates that Hart was improperly reimbursed for \$111,015 in non-business
25 expenses, he only repaid \$35,784 upon leaving Identiv. Id. ¶¶ 81, 89. Oswald alleges that
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the true amount of company funds that Hart diverted is significantly higher than the \$111,015 that Defendants admit to in Identiv’s 10-K filings. Id. ¶ 8.

Since this action was filed, Hart, Alazem, and Wenzel left the Board, and non-defendant director Nina B. Shapiro joined it. SAC ¶ 96. The current Board is Humphreys, Kremen, Ousley, and Shapiro. Id.

II. LEGAL STANDARD

“The derivative form of action permits an individual shareholder to bring suit to enforce a corporate cause of action against officers, directors, and third parties.” Rosenbloom v. Pyott, 765 F.3d 1137, 1147 (9th Cir. 2014) (quoting Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95 (1991)). “A shareholder seeking to vindicate the interests of a corporation through a derivative suit must first demand action from the corporation’s directors or plead with particularity the reasons why such demand would have been futile.” Id. at 1148 (citing Fed. R. Civ. P. 23.1). “The purpose of this demand requirement in a derivative suit is to implement ‘the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders.’” Id. (quoting In re Pfizer Inc. S’holder Derivative Litig., 722 F. Supp. 2d 453, 458 (S.D.N.Y. 2010)).

Rule 23.1 requires a plaintiff to “allege with particularity . . . the reasons for the plaintiff’s failure to” make a demand. Fed. R. Civ. P. 23.1(b)(3). However, “[t]he substantive law which determines whether demand is, in fact, futile is provided by the state of incorporation of the entity on whose behalf the plaintiff is seeking relief.” Rosenbloom, 765 F.3d at 1148 (citation omitted). Identiv is a Delaware corporation and Delaware law therefore applies.

In the context of pre-suit demand, the directors of a corporation enjoy the benefit of the business judgment rule, which “is a presumption that in making a business decision, the directors . . . 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 v. Lewis, 473 A.2d 805, 812 (Del. 1984). Demand is excused as futile where the plaintiff creates a reasonable doubt that the directors’ action was entitled to the protections of the business judgment rule. Id. at 808. “Plaintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences.” Rosenbloom, 765 F.3d at 1148 (quoting Brehm v. Eisner, 746 A.2d 244, 255 (Del. 2000)).

III. DISCUSSION

Defendants move to dismiss Oswald’s Second Amended Complaint on the grounds that (A) Oswald lacks standing because some of the alleged wrongdoing occurred before he was an Identiv shareholder, and (B) Oswald has not alleged particularized facts to demonstrate demand futility. As discussed below, both of Defendants’ arguments fail.

A. Standing

A derivative plaintiff has no standing to sue unless he meets Rule 23.1’s requirements, Kona Enters., Inc. v. Estate of Bishop, 179 F.3d 767, 769 (9th Cir. 1999), and Rule 23.1 requires that a derivative plaintiff be a shareholder at the time of the alleged wrongful acts, Fed. R. Civ. P. 23.1(b)(1). Defendants argue that Oswald does not have standing to bring derivative shareholder claims because some of the alleged misconduct occurred before he became a shareholder. MTD at 2.

Oswald has been a shareholder of Identiv since September 24, 2014. SAC ¶ 15. He

therefore has standing to bring claims for alleged breaches of fiduciary duty or waste that occurred after September 24, 2014, but not before. See Kona, F.3d at 769. To the extent that Defendants allowed Hart to misuse corporate funds prior to September 2014, Oswald does not have standing to challenge this conduct.⁴ However, even conduct that occurred before an individual was a shareholder may be relevant to the extent that it demonstrates a pattern of wrongful conduct. See In re MRV Commons., Inc., No. 08-cv-3800-GAF, 2010 WL 1891717, at *2 (C.D. Cal. May 10, 2010) (citing In re Zoran Corp. Derivative Litig., 511 F. Supp. 2d 986, 1010 (N.D. Cal. 2007))). Therefore, even though Oswald lacks standing to bring claims arising out of pre-September 2014 conduct, such conduct is still relevant for this limited purpose.

Oswald also has standing to bring claims based on the Board's failing to conduct a legitimate investigation into Hart's wrongdoing, failing to hold Hart and Nelson to account, allowing Hart to repay substantially less than the total amount of money he diverted, and awarding Hart severance, because all of this conduct occurred after September 2014. See SAC ¶¶ 8, 44, 53. The Board took these actions in response to the Ruggiero Complaint, which was not filed until April 2015. Id.

B. Demand Futility

There are two tests for demand futility under Delaware law: (1) the test articulated in Aronson, 473 A.2d at 814, and (2) the test articulated in Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993). The Aronson test applies where a majority of the board of directors

⁴ Hart incurred many charges between 2013 and September 2014 for which he allegedly received improper reimbursement. See SAC ¶¶ 45–50. It is not clear when the reimbursements were granted or when the Board allowed the misuse.

1 who would consider a shareholder demand also made the challenged decision. See 473
 2 A.2d at 814; see also Ryan v. Gifford, 918 A.2d 341, 353 (Del. Ch. 2007). The Rales test
 3 applies where the board on which demand would be made did not make the business
 4 decision challenged in the litigation (e.g., where a majority of the directors who made the
 5 decision have since been replaced, or where the challenged conduct is inaction by the
 6 board). 634 A.2d at 934. Here, because Oswald alleges that a majority of the current
 7 Board made the challenged business decisions, the Aronson test applies.

9 To demonstrate demand futility under Aronson, a shareholder plaintiff must create a
 10 reasonable doubt that either: “(1) the directors are disinterested and independent [or]
 11 (2) the challenged transaction was otherwise the product of a valid exercise of business
 12 judgement.” Aronson, 473 A.2d at 814. The test is disjunctive—a reasonable doubt as to
 13 either prong will establish demand futility. See id. at 815.

15 The parties are at odds regarding whether Oswald must plead demand futility as to a
 16 majority of the original six-member Board, or as to the current four-member Board. See
 17 SAC ¶¶ 96–109 (alleging demand futility as to six original directors); but see id. ¶ 96 n.4
 18 (asserting that “[a]lthough plaintiff believes that demand futility is assessed as to the board
 19 in place when this action was commenced, demand would also be excused if demand
 20 futility were evaluated against the current Board. . . .”); MTD at iv (arguing that Oswald is
 21 incorrect to allege demand futility as to six original directors). However, because
 22 Defendants do not dispute that Hart is interested, Oswald can reach a majority of either
 23 Board by successfully challenging any two of Humphreys, Kremen, and Ousley.¹⁰

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 28 ¹⁰ No one suggests that there is any basis to challenge current Board member Shapiro.

Oswald argues that demand is futile based on both Aronson prongs.

1. Aronson Prong 1: Interest

Under the first prong of Aronson, a plaintiff can displace the protection of the business judgement rule by alleging particularized facts that raise a reasonable doubt that a majority of the directors are either independent or disinterested. Aronson, 473 A.2d at 814–15. Directors are considered to lack independence if they are “under an influence which sterilizes their discretion,” or beholden to and controlled by an interested party. Id. at 815. Directors are considered interested if they either “appear on both sides of a transaction [or] expect to derive any 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.” Id. at 814. A plaintiff can also show interest if a director faces a “substantial likelihood” of personal liability for approving the questioned transaction. See id. at 815 (noting that this is rare, and that a “mere threat” of liability alone is insufficient).

Here, Oswald attempts to satisfy the first Aronson prong by showing that Humphreys and Kremen are not disinterested, either because (a) they personally participated in Hart’s misuse of corporate funds, or (b) they voted to prematurely end the Special Committee investigation. Neither argument succeeds.

a. Kremen’s and Humphreys’ participation in the misuse of Identiv’s funds in Las Vegas

Oswald argues that Kremen and Humphreys are complicit in Hart’s improper business expense reimbursements because they participated in the parties, enjoyed the benefits of the company’s funds, and themselves submitted improper expenses related to the Las Vegas trips. See SAC ¶¶ 98, 101. Oswald argues that this behavior (i) exposes

Kremen and Humphreys to a substantial likelihood of liability, and (ii) amounts to self-dealing, making both directors interested. Id. ¶¶ 99, 102.¹¹

i. Likelihood of Liability

Defendants argue that Kremen and Humphreys do not face any likelihood of liability in connection with improper expenses because they are both exculpated by their corporation's certificate of incorporation for alleged breaches of their duty of care consistent with tit. 8 Del. Code § 102(b)(7). See McGrath Decl. Ex. 1 at 2. But Oswald alleges that Defendants breached their fiduciary duty of loyalty, see SAC ¶ 115, and Defendants are not exculpated for a breach of loyalty, see McGrath Decl. Ex. 1 at 2 ("A director of the Corporation shall not be personally liable . . . for breaches of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty . . .").

Defendants next argue that Humphreys and Kremen do not face a substantial likelihood of liability for improper expenses because Oswald has not pled that either knew that Hart was expensing the Las Vegas trips to Identiv. MTD at 5. But Oswald pled that Humphreys and Kremen themselves submitted reimbursement requests for expenses incurred at the parties. SAC ¶¶ 98, 101. At this stage, Oswald is entitled to the reasonable inference that if the directors submitted their own reimbursement requests (and thereby demonstrated a belief that the trip was a business trip), they knew that Hart would expense charges as well. See Rosenbloom, 765 F.3d at 1148. As Oswald remarks: "How Humphreys and Kremen could think they were attending a business event . . . and simultaneously not know the Company was paying the bill is a mystery." See Opp'n at 8

¹¹ In its Order dismissing Oswald's Amended Complaint, the Court noted that "[t]he Las Vegas trips raise questions about the independence and disinterest of both Kremen and Humphreys," but held that Oswald had not pled interest with particularity. Order at 3.

(citing MTD at 5 (arguing in one breath that the trip might have had a legitimate business purpose and in the next that Humphreys and Kremen did not know that Hart submitted any expenses)).¹²

Still, Oswald has not shown that the threat of liability that Humphreys and Kremen faced on this subject was substantial, or more than a “mere threat” of liability, as required by Aronson. The Delaware Supreme Court in Aronson noted that there will only be a substantial threat of liability “in rare cases [where] a transaction may be so egregious on its face that Board approval cannot meet the test of business judgment.” 473 A.2d at 815. The allegations that Kremen received massages costing \$1,900, or that Humphreys submitted nearly \$1,000 in expenses for reimbursement in connection with a Las Vegas party, standing alone, are not “so egregious on [their] face” that the two directors face a substantial likelihood of liability. See id.

ii. Self-Dealing

Similarly, Oswald’s claims of self-dealing on the basis of these expenses fails, because Oswald has not shown that the benefits that Humphreys and Kremen gained from their participation in Hart’s wrongdoing were material to them.

“[W]hen a party challenges a director’s action based on . . . self-interest, that party

¹² Defendants argue that “[t]his case is on all fours with In re Polycom, Inc. Deriv. Litig., 78 F. Supp. 3d 1006 (N.D. Cal. 2015).” MTD at 6. Not quite. In re Polycom sounds similar, as it involved allegations that a CEO “claimed reimbursements for numerous inappropriate personal expenses.” Id. at 1011. In that case, the plaintiffs argued that demand should be excused because the board faced substantial liability for failing to adequately oversee the company’s auditing and accounting controls. Id. at 1014. The court held that absent any evidence that the board knew that violations were occurring, it could not “simply infer the board knew or should have known of the problems with [the CEO’s] expense reports.” Id. at 1015–16. In this case, Oswald does not contend that the Board “must have known” of Hart’s misconduct due to some vague “duty to be informed,” see id. at 1016, but points to Humphreys’ and Kremen’s own conduct alongside Hart’s. See Opp’n at 8 (“Kremen and Humphreys were both present, received personal luxuries paid for by Identiv, and submitted for reimbursement expenses incurred at those parties.”).

1 must allege that the director’s interest is material to that director.” Solomon v. Armstrong,
 2 747 A.2d 1098, 1118 (Del. Ch. 1999), aff’d, 746 A.2d 277 (Del. 2000); see also Cinerama,
 3 Inc. v. Technicolor, 663 A.2d 1156, 1167 (Del. 1995) (courts must consider whether the
 4 benefit is material to the “actual person,” not use an objective “reasonable person”
 5 standard). “Materiality means that the alleged benefit was significant enough ‘in the
 6 context of the director’s economic circumstances, as to have made it improbable that the
 7 director could perform her fiduciary duties to the . . . shareholders without being
 8 influenced by her overriding personal interest.” Orman v. Cullman, 794 A.2d 5, 23 (Del.
 9 Ch. 2002). Establishing that a director “expect[s] to derive [a] personal financial benefit
 10 from [a transaction]” that is not enjoyed by the corporation or all stockholders generally,
 11 Aronson, 473 A.2d at 814, does not alone establish that the director is interested—the
 12 benefit must also be material to that director. Cinerama, 663 A.2d at 1167.

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 16 However, materiality is not required for classic self-dealing, where the director
 17 “appear[s] on both sides of a transaction.” Orman, 794 A.2d at 25 n.50. Oswald’s
 18 argument that the benefits Kremen and Humphreys received need not be material relies on
 19 such cases. See Opp’n at 9 (citing Calma v. Templeton, 114 A.3d 563, 576 (Del. Ch.
 20 2015) (challenging directors’ award of restricted stock units to themselves); Cambridge
 21 Ret. Sys. v. Bosnjak, No. 9178-CB, 2014 Del. Ch. LEXIS 107, at *11 (Ch. June 26, 2014)
 22 (challenging directors’ payment of compensation to themselves); London v. Tyrrell, Civil
 23 Action No. 3321-CC, 2008 Del. Ch. LEXIS 75, at *14–15 (Ch. June 24, 2008)
 24 (challenging directors’ grant of stock options to themselves); In re Investors Bancorp, Inc.
 25 Stockholder Litig., No. 12327-VCS, 2017 Del. Ch. LEXIS 53, at *16 n.9 (Ch. Apr. 5,
 26 2017) (challenging directors’ grant of equity awards to themselves)). These cases stand for
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the proposition that when directors decide matters of their own compensation, they stand on both sides of a transaction with the company, and so materiality is not required. Id.

Here, there is no allegation that Kremen and Humphreys approved their own expenses, set their own salaries, or awarded themselves stock options. They did not stand on both sides of that kind of transaction. Thus, in order to show their interest, Oswald must show that the benefits that Kremen and Humphreys received by participating in Hart's Las Vegas parties were material. See Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 364 (Del. 1993). Oswald has not pled with particularity that these benefits (Kremen's \$1,900 in massages and Humphreys' nearly \$1,000 in reimbursed expenses) were material. Oswald has not raised a reasonable doubt that Kremen and Humphreys are disinterested on the basis of their receiving benefits from Hart's misuse of corporate funds.

b. The Board's vote to end the Special Committee's investigation prematurely

Oswald also argues that Humphreys and Kremen were interested in any demand regarding their vote to end the Special Committee investigation because they participated in the conduct that was under investigation.¹³

Defendants argue that Humphreys and Kremen could not have been interested because the scope of the Special Committee's investigation was so narrow that it only included Hart's improper expenses and conduct. See MTD at 13. In fact, the Board

¹³ In its Order dismissing Oswald's Amended Complaint, the Court held that Oswald had not pled interest with particularity, noting that "the procedures, findings, conclusions, and recommendations of the Special Committee remain unknown." Order at 4. Although the Amended Complaint vaguely referred to a "sham Special Committee investigation," see, e.g., FAC ¶¶ 83–84, the Second Amended Complaint includes more extensive allegations about the circumstances of the Board's "premature conclusion" of the investigation, see, e.g., SAC ¶¶ 70, 71, 78, 79, 106.

1 directed the Special Committee to investigate “the facts, allegations and circumstances” of
 2 the Ruggiero Complaint, and “any similar or related facts.” SAC ¶ 53; McGrath Decl. Ex.
 3 15. Kremen and Humphreys were named in the Ruggiero Complaint, and the Deloitte
 4 Report shows inspection of expenses that Kremen and Humphreys enjoyed and possibly
 5 incurred. See id. ¶¶ 99, 102; see generally Deloitte Spreadsheet. At this stage, Oswald is
 6 entitled to a broad reading of the scope of the investigation, because it is a reasonable
 7 inference that investigators considered the conduct of Kremen and Humphreys to be
 8 similar or related to that of Hart. See Rosenbloom, 765 F.3d at 1148.

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 11 Oswald argues that Humphreys and Kremen “stood on both sides” here because
 12 they voted to end an investigation into their own conduct. Opp’n at 11. Although
 13 intuitively it seems correct that Humphreys and Kremen would be “interested” in an
 14 investigation into their participation in alleged wrongdoing, it is not clear that voting to
 15 end an internal investigation falls within the definition of a “self-dealing transaction” as
 16 contemplated by Delaware law. Oswald has not cited any precedent for the assertion that
 17 transactions bestowing non-financial benefits qualify as self-dealing.¹⁴ Every case that
 18 Oswald cites in his brief involves self-dealing in the context of financial transactions. See,
 19 e.g., Opp’n at 11 (citing In re Brocade, 615 F. Supp. 2d at 1047 (evaluating interest where
 20 “Defendants received and exercised failed options”); Calma, 114 A.3d 563, 575
 21 (evaluating interest where defendants awarded themselves restricted stock units as
 22 compensation)). It does not appear that any court has applied the self-dealing doctrine in
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 27 ¹⁴ Defendants incorrectly cite Cinerama, 663 A.2d at 1169, for the proposition that self-dealing
 28 only occurs “when a director deals directly with the corporation, or has a stake in or is an officer
 or director of a firm that deals with the corporation.” See MTD at 7–8. In fact, Cinerama cites
 these as “example[s]” of self-dealing. 663 A.2d at 1169.

1 this way yet.

2 Oswald does cite to one Delaware case which evaluated a non-financial transaction
3 similar to the one here, but the court in that case seems to have excused demand under the
4 second prong of Aronson, not the first. See Opp’n at 11 (citing In re China Agritech, Inc.,
5 No. 7163-VCL, 2013 Del. Ch. LEXIS 132, at *68 (May 21, 2013)); In re China Agritech,
6 Inc., 2013 Del. Ch. LEXIS 132, at *65 (“The members of the Audit Committee could not
7 properly consider a litigation demand regarding the termination of the Company’s outside
8 auditors because the allegations of the Complaint support a reasonable inference that they
9 failed to act in good faith.”) (emphasis added); id., at *68 (“The actions of four of the
10 seven members of the Demand Board were at issue in the Special Committee investigation.
11 . . . these directors could not properly consider a demand under Aronson that asked them to
12 assert litigation relating to the Audit Committee’s termination of the outside auditors or
13 management’s related activities.”).¹⁵

14 Rather than rely on a novel interpretation of self-dealing, the Court will follow In re
15 China Agritech. Analysis of the Board’s decision to end the investigation prematurely and
16 without investigating the potential bribery issue fits squarely in the good faith analysis of
17 the second prong of Aronson.

18 **2. Aronson Prong 2: Valid Exercise of Business Judgment**

19 Under the second prong of Aronson, demand is excused as futile where a plaintiff
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22 ¹⁵ In re China Agritech did recognize that a CEO risked liability in connection with his company’s
23 terminating its outside auditors, see id., at *65 (“Chang could not properly consider a litigation
24 demand regarding the termination of the Company’s outside auditors because his role in
25 management as the Company’s CEO gives rise to a reasonable inference that he would face
26 personal and professional risk in any litigation over the dispute, making him interested in the
27 outcome.”), arguably invoking the first Aronson prong, but it did not characterize such conduct
28 (much less the rest of the board’s conduct) as “self-dealing.”

can raise a reasonable doubt that the challenged transaction was a valid exercise of business judgement. Aronson, 473 A.2d at 814. A showing that directors were grossly negligent or acted in bad faith directly rebuts the business judgement presumption. In re Walt Disney Co. Deriv. Litig., 906 A.2d 27, 52 (Del. 2006). Aronson explained that “to invoke the rule’s protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them,” and they “must then act with requisite care¹⁶ in the discharge of their duties.” 473 A.2d at 812.

Here, Oswald attempts to satisfy the second Aronson prong by showing that Humphreys and Kremen (a) acted in bad faith when they voted to prematurely end the Special Committee investigation, and (b) committed waste by awarding Hart severance and permitting him to only repay a portion of the funds that he diverted for personal use. The Court agrees that Oswald has raised a reasonable doubt that Humphreys and Kremen acted in good faith.

a. Bad Faith

Under Delaware law, bad faith exists where a director acts with “intentional dereliction of duty” or “conscious disregard for [his or her] responsibilities.” In re Walt Disney, 906 A.2d at 66. It is also bad faith where a fiduciary “acts with the intent to violate applicable positive law” or “intentionally acts with a purpose other than that of advancing the best interests of the corporation.” Id. at 67.

Oswald urges the Court to infer that the Board knowingly decided not to find out if a crime had been committed. See Opp’n at 13. This is a reasonable inference to make at

¹⁶ Under Delaware law, director liability is predicated upon concepts of gross negligence. Id.

1 this stage, and it is based entirely on information that is newly alleged in the Second
 2 Amended Complaint. Because Deloitte discussed its review of the challenged expenses
 3 with the Board, see SAC ¶¶ 57, 59, it is reasonable to infer that before the Board voted to
 4 end the investigation, Humphreys and Kremen knew that their participation and expenses
 5 had turned up as improper in the Deloitte Report, and that the entire Board knew that
 6 Deloitte believed that there was a “potential bribery issue” during one of the Las Vegas
 7 parties. Id. The Court can also reasonably infer that Humphreys, Kremen, and Ousley
 8 knew of BDO’s position that further investigation was vital, as described in BDO’s
 9 November 23, 2015 letter addressed to the entire Board. See id. ¶ 78 (describing “multiple
 10 requests by BDO” to investigate further “[s]ince October 17, 2015”).
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 13 With this knowledge, the Board nonetheless chose to terminate the Special
 14 Committee’s investigation, and to keep it closed. The “knowing and intentional” approval
 15 of wrongdoing to the benefit of insiders “cannot be an exercise of business judgment.” See
 16 Ryan, 918 A.2d at 354; see also In re Atmel Deriv. Litig., No. 06-4592 JF (HRL), 2008
 17 U.S. Dist. LEXIS 91909, at *22 (N.D. Cal. June 25, 2008). Where a Board “intentionally
 18 conceals the nature of its earlier actions, it is reasonable for a court to infer that the act
 19 concealed was itself one of disloyalty that could not have arisen from a good faith business
 20 judgment.” In re Tyson Foods, Inc. Consol. S’holder Litig., No. 1106-CC, 2007 Del. Ch.
 21 LEXIS 120, at *12–13 (Ch. Aug. 15, 2007).
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 24 Defendants argue that rather than adequately alleging bad faith, Oswald is
 25 improperly second-guessing the Board’s actions. See MTD at 10 (citing In re Autodesk,
 26 Inc., S’holder Deriv. Litig., No. 06-cv-7185-PJH, 2008 U.S. Dist. LEXIS 101015, at *21
 27 (N.D. Cal. Dec. 15, 2008) (“an attack on a Board’s internal investigation is improper in the
 28

context of a demand futility argument, because such an argument depends on the premise that the plaintiff has necessarily abandoned the Board as a vehicle for righting the wrongs complained of”). But Oswald does not second-guess the decision to end the investigation; he alleges that it was not made in good faith. See Opp’n at 13. Additionally, in In re Autodesk, the court was evaluating interest under the Rales test, not good faith under Aronson’s second prong (which is not available as a path to establish demand futility under the Rales test), and “the actions being investigated (options backdating) were not actions of the Audit Committee or the Board.” In re Autodesk, 2008 U.S. Dist. LEXIS 101015, at *25. In contrast, here half the current Board participated in the conduct being investigated.¹⁷

Defendants also rely on In re Am. Apparel, Inc., 2014 Deriv. S’holder Litig., 2015 WL 12724070, at *19–20 (C.D. Cal. April 28, 2015), which held that “disputes” about the “appropriate response” to misconduct were subject to “difference[]s in interpretation” and were, in that case, “insufficient to establish the [board] acted in bad faith.” See MTD at 10 n.18. As in In re Autodesk, the misconduct at issue in In re American Apparel was entirely that of the CEO, not the board itself. See id. at *2 (“[t]his action emerges out of the behavior of American Apparel founder . . . Charney, and the Company’s decision to

¹⁷ Defendants argue that it is irrelevant whether Humphreys and Kremen were under investigation, because “at the time the Special Committee’s recommendations were approved, the Board consisted of five outside directors (Humphreys, Kremen, Alazem, Ousley, and Wenzel), and so “even without Humphreys’ and Kremen’s votes, there was still a majority and quorum on the Board to approve concluding the investigation.” MTD at 13. There are at least two problems with that assertion. First, it is problematic that Humphreys and Kremen even participated in the discussion and decision of whether to end the Special Committee’s work, rather than recusing as Hart presumably did. Second, the SAC alleges that it was only “the non-committee board members” who “unanimously accepted the recommendation of the Committee,” suggesting that Humphreys and Kremen were two of three Board members who made the decision, rather than two of five. See SAC ¶ 71. This is a reasonable inference to draw at this stage of the litigation.

1 terminate him as CEO in June 2014.”). Moreover, the plaintiffs in that case had alleged
 2 that the board breached its duty “by not acting earlier,” and therefore had to allege with
 3 specificity “why the Board’s delay in suspending and ultimately terminating Charney was
 4 a breach of their duties.” Id. at *19. Plaintiffs failed to allege “the point at which the
 5 Board was acting in bad faith by retaining Charney.” Id. Here, Oswald has not alleged
 6 that the Board should have taken action against Hart at some earlier point. The issue is
 7 instead the Board’s decision to conclude the Special Committee investigation, where that
 8 investigation involved Humphreys’ and Kremen’s own expenses along with Hart’s, and a
 9 “potential bribery issue,” despite being urged not to do so by Deloitte, independent
 10 counsel, and BDO. See SAC ¶¶ 57, 59, 71, 78.¹⁸

13 Defendants’ further argument that the Board must have acted in good faith because
 14 the company spent “nearly \$3 million” on the investigation only to recover “pennies” also
 15 falls flat. See MTD at 12. “[D]irectors [are] entitled to a presumption that they can and
 16 should be allowed to manage the business affairs of a corporation, including the decision
 17 of whether and how to investigate errors.” In re Comput. Scis. Corp. Derivative Litig., 244
 18 F.R.D. 580, 591 (C.D. Cal. 2007). But this presumption is rebutted if a plaintiff pleads
 19 “particularized allegations showing the Board is unworthy of this deference.” Id.
 20 Defendants argue that Deloitte’s investigation only identified approximately \$164,000
 21 worth of expenses that had insufficient documentation submitted to support a business
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25 ¹⁸ Defendants also cite to In re FalconStor Software, Inc., 966 N.Y.S.2d 642, 655 (N.Y. Sup. Ct.
 26 2013) for the proposition that “conduct[ing] its internal investigation [is] exactly the kind of
 27 action[] that [is] entrusted to a board of directors and which the Delaware courts state they are
 28 reluctant to question.” MTD at 10 n.18. But the court in that case, a New York Supreme Court,
 prefaced that observation by stating that “not a single one of the current members of the board of
 directors was implicated [in the litigation],” or “knew or indeed had reason to know that they were
 violating the shareholder plan.” Id. at 654–55. That makes In re FalconStor distinguishable.

1 expense or that “appear[ed] to be non-business, personal” expenses. MTD at 12. This
2 figure does not include the \$354,528.36 in charges that Deloitte classified as possible
3 business expenses incurred in violation of Company policy. See SAC ¶ 62. It also does
4 not account for the items that the Board approved classifying as business expenses,
5 overriding Deloitte’s conclusion that the purpose provided was not sufficient to support
6 business purpose. See id. According to the Deloitte Spreadsheet, many of Hart’s Las
7 Vegas expenses fall into this category. See generally Deloitte Spreadsheet; compare id.
8 column Q (“no”) with id. column S (amount approved by Board as business expense).
9 Even if \$164,000 is the proper figure, Identiv only recovered \$35,784 from Hart. SAC
10 ¶ 89. These figures, combined with the inference that the Board knowingly chose not to
11 investigate whether a crime had been committed, raise a reasonable doubt that the Board’s
12 “decision of whether and how to investigate errors” is worthy of deference. See In re
13 Comput. Scis., 244 F.R.D. at 591.

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17 Oswald has raised a reasonable doubt that the Board acted in good faith when it
18 voted to end the investigation. Oswald has pled particularized facts raising an inference
19 that the Board knowingly decided—contrary to the advice of independent counsel,
20 Deloitte, and BDO—not to get to the bottom of its executives’ expenses or find out if a
21 crime had been committed. This amounts to a “conscious disregard for [their]
22 responsibilities,” which is bad faith. See In re Walt Disney, 906 A.2d at 66.

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24 Because Oswald has raised a reasonable doubt that the challenged action was made
25 in good faith, demand on the Board is excused as futile. See Aronson, 473 A.2d at 814.
26 The Court therefore DENIES the Motion to Dismiss.
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b. Waste

Because Oswald prevails on his argument about bad faith, he need not also prevail on his argument about waste. Indeed, the Court holds that Oswald has not established demand futility on this ground.

To state a claim for corporate waste, a plaintiff must show that “the Board’s decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation’s best interests.” White v. Panic, 783 A.2d 543, 554 n.36 (Del. 2001). This requires the plaintiff to demonstrate that “an exchange was so one-sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.” In re Walt Disney, 906 A.2d at 74. Waste often entails “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. A “mere disagreement cannot serve as grounds for imposing liability based on alleged . . . waste.” Id. at 266. Thus, a corporate waste claim fails “if there is any substantial consideration received by the corporation, and . . . there is a good faith judgment” that under the circumstances the transaction was worthwhile. White, 783 A.2d at 554.

Oswald argues that the Board committed waste because it chose not to fire Hart for cause, allowed him to receive severance under his employment agreement, and allowed him to repay only a fraction of the funds he allegedly diverted for personal use. Opp’n at 15. These allegations do not overcome the “high hurdle” necessary to challenge the “great deference” the Board is granted in this area. See Brehm, 746 A.2d at 262–63. Oswald has not pled that Hart was of zero value to Identiv. Thus, the Court cannot assume that his severance was in exchange for nothing. Furthermore, whether to terminate Hart for cause

1 and risk litigation is left to the sound discretion of the Board. See White, 783 A.2d at 554.

2 Because Identiv's decision not to fire Hart for cause could "have been based on a
3 valid assessment of the corporation's best interests," it cannot be considered wasteful for
4 purposes of demand futility. See White, 783 A.2d at 554 n.36

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6 **IV. CONCLUSION**

7 For the foregoing reasons, Oswald has pled sufficient particularized facts to
8 demonstrate demand futility under the second prong of Aronson. Oswald has created a
9 reasonable doubt that the Board acted in good faith in its decision to end the Special
10 Committee investigation. Thus Oswald has met his burden under Rule 23.1. The Court
11 DENIES Defendant's Motion to Dismiss the Second Amended Complaint.

12 **IT IS SO ORDERED.**

13 Dated: October 27, 2017



14 CHARLES R. BREYER
15 United States District Judge
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