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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHELLY BIRCH, Plaintiff and Appellant, v. KEVIN W. SHARER et al., Defendants and Respondents.	B231202 (Los Angeles County Super. Ct. No. BC431411)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Reversed with directions.

Rosman & Germain, Daniel L. Germain; Kessler Topaz Meltzer & Check and Eric L. Zagar for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Steven O. Kramer and Jonathan D. Moss for Defendants and Respondents Kevin W. Sharer et al.

Latham & Watkins, Miles N. Ruthberg, Pamela S. Palmer and Brendan K. Kelleher for Defendant and Respondent Amgen, Inc.

In this shareholder derivative action, plaintiff alleged she made a written demand on the board of directors to remedy the board's repeated breach of its fiduciary duty to shareholders and, in response, the board failed to investigate and remedy the alleged wrongdoing. Plaintiff named the company as the nominal defendant, and named as individual defendants fourteen current and former officers and directors. After bringing an unsuccessful demurrer, defendants filed an answer.

Subsequently, defendants filed a motion for judgment on the pleadings, contending they had responded to plaintiff's demand and properly refused it, as reflected in letters sent to plaintiff after this action was filed. The trial court took judicial notice of the letters and granted the motion on the ground that the evidence proved the board had taken appropriate steps in response to the demand. Judgment was entered for defendants.

On appeal, plaintiff argues that the trial court not only took judicial notice of the company's letters but improperly accepted their contents as true. We conclude the trial court erred in accepting the letters for the truth of their contents. Further, even if the trial court acted properly in that respect, the correspondence merely created a factual conflict in light of the contrary allegations of the complaint. That conflict could not be resolved by way of a motion for judgment on the pleadings. Accordingly, we reverse the judgment.

I

BACKGROUND

On February 8, 2010, plaintiff Shelly Birch filed this shareholder derivative action against fourteen current and former officers and directors on the board of Amgen, Inc. (Amgen). The corporation was named as a nominal defendant. Birch owns stock in Amgen.

A. Complaint

The verified complaint contained a single cause of action for breach of fiduciary duty. Attached as an exhibit to the complaint, and incorporated therein, was a six-page single-spaced letter dated October 29, 2009, from Birch to Amgen, describing in detail various alleged wrongful acts and omissions of the officers and directors. The details described "numerous governmental investigations and private and public lawsuits" brought against the company. The alleged wrongful acts and omissions fell into one or more of three categories:

(1) knowing failure to implement and maintain adequate internal reporting controls to provide the board with important information; (2) knowing failure to take corrective action when put on notice that Amgen was violating applicable laws and regulations; and (3) knowingly violating Amgen's internal policies and procedures of governance. The wrongdoing described in the demand letter was also alleged in the body of the complaint.

The demand letter concluded: "I hereby demand that the Board take action against each of the Officers and Directors to recover the damages described herein for the benefit of the Company and to correct the deficiencies in the Company's internal controls that allowed the misconduct to occur.

"If within a reasonable period after receipt of this letter, the Board has not commenced an action as demanded herein, or in the event the Board refuses to commence an action as demanded herein, [I] will commence a shareholder derivative action on behalf of Amgen seeking appropriate relief."

Near the end of the complaint, Birch alleged: "On October 29, 2009, [I] made a demand (the 'Litigation Demand') on the Board. . . . [¶] . . . The Board has acknowledged receipt of the Litigation Demand, but, [u]pon information and belief, has not conducted any investigation of the Litigation Demand, has not retained any independent counsel or other advisors in connection with the Litigation Demand, has not formed a committee to consider or investigate the Litigation Demand, and has not in fact done anything to consider or respond to the Litigation Demand. Despite being well aware of the Litigation Demand's allegations as a result of the governmental investigations and litigations described in the Litigation Demand and in this Complaint, the Board, as it has done consistently, has abdicated its responsibility to take action when put on notice of serious problems with the Company's business, operations, and legal compliance. Once again, the Board has failed to act in good faith."

B. Demurrer and Motion for Sanctions

On June 30, 2010, Amgen filed a demurrer to the complaint. The individual defendants filed a notice of joinder in Amgen's demurrer and separately filed a demurrer of their own. Collectively, defendants argued Birch had not alleged with *particularity* that she

had made a litigation demand on Amgen's board of directors and that the board had *wrongfully* refused the demand. Nor had Birch alleged facts sufficient to defeat the business judgment rule: She did not allege with particularity that the board had failed to make a reasonable inquiry in response to the litigation demand or that it had failed to act in good faith in conducting its investigation.

Amgen also filed a motion for sanctions (Code Civ. Proc., § 128.7) based on the ground that it had sent Birch a letter on *February 3, 2010* (by email and United States mail) — five days *before* she filed suit — stating the board of directors was "currently evaluating the matters set forth in your *October 29, 2009* demand letter." (Italics added.) The February 3 letter went on to summarize the contents of Birch's litigation demand and asked her to contact Amgen immediately if the February 3 letter did not "fairly reflect" her allegations. The letter also requested any additional information that might assist the board in its investigation. Last, the letter requested that Birch promptly provide documentation showing when she became an Amgen shareholder, the period of time she owned the shares, and her current status as a shareholder.

The demurrers and motion for sanctions were heard on September 29, 2010. The trial court overruled the demurrers and denied the motion for sanctions. In a written ruling, the trial court explained: "Allowing more than three months to pass from October 29, 2009 to February 3, 2010, and then only acknowledging receipt of the demand with no substantive response is not enough, and Birch's pleading as to the sufficiency of the demand is sufficient. Inaction as reflected in the February 3, 2010 letter . . . is enough to satisfy the need to plead wrongful refusal."

C. Motion for Judgment on the Pleadings

The trial court ordered defendants to file answers by October 29, 2010. Amgen filed an answer, and the individual defendants filed a joint answer. One of Amgen's former officers filed his own answer. In its answer, Amgen explained in detail what the board of directors had done in response to Birch's litigation demand. That explanation included a lengthy description of four letters Amgen sent to Birch; all four were attached as exhibits to

the answer. Two of the letters were sent before Birch filed this action, and two sent thereafter.

On November 15, 2010, Amgen filed a motion for summary judgment or summary adjudication or, in the alternative, a motion for judgment on the pleadings. Amgen asserted that Birch had failed to prove the board of directors had wrongfully refused her litigation demand. As argued, the business judgment rule created a presumption that, in making business decisions, the directors had acted on an informed basis and in good faith. Under the business judgment rule, the only issue to be determined by the trial court was whether the board had conducted an investigation in a reasonable way and in good faith. Birch had not established that the board's consideration of the litigation demand was unreasonable or not in good faith. For their part, the individual defendants filed a notice of joinder in Amgen's motions.

In support of the motions, Amgen requested that the trial court take judicial notice of the four letters attached to its answer. That correspondence consisted of: (1) a November 11, 2009 letter acknowledging Amgen's receipt of Birch's October 29, 2009 litigation demand and stating the demand was under consideration; (2) the February 3, 2010 letter previously described, which summarized Birch's litigation demand and asked for any additional information that might be helpful; (3) an April 23, 2010 letter in which Amgen stated the investigation into Birch's litigation demand was ongoing and suggested that the parties postpone any law-and-motion matters until after Amgen had finished its investigation; and (4) a May 19, 2010 letter, consisting of six single-spaced paragraphs, explaining what the board of directors had done in response to Birch's litigation demand and closing with: "The Board met on May 12, 2010, and after due consideration, and at the recommendation of the [Governance and Nominating] Committee, the Board determined in its business judgment that it is not in the best interests of Amgen to pursue the claims alleged in the Demand against any of the individuals mentioned in the Demand. The Board voted to accept the Committee's recommendation to reject the Demand."

Before the filing of the motions, Birch had conceded in one way or another that the four letters were authentic and had been received. In opposing defendants' alternative

motions, Birch disputed the truth of the letters' contents, arguing the trial court could not accept the letters for their truth.

At the January 31, 2011 hearing on the motions, defendants withdrew the summary judgment and summary adjudication motions and proceeded with the motion for judgment on the pleadings. The trial court stated that its September 29, 2010 order overruling the demurrers "was ill-considered as a matter of law. I'll give you notice that I am reconsidering it and will take that off the books, recognizing that it was unduly hasty on my part to decide that lapse of time itself constituted wrongful refusal."

With regard to taking judicial notice of the four letters, the trial court stated: "So we know that these four letters were sent. Insofar as they would assert that a good or thorough investigation [was] done, I will not be taking [notice of] them for the truth of any such assertion, but just for the fact that in particular on May 19th of 2010, [a] communication was sent to Plaintiff's counsel . . . advising that a decision had been made not to proceed with the claim that had been tendered to the Board, which is the same claim that is before this Court to be a derivative suit. [¶] . . . [¶]

". . . [T]he question presented at this point, notwithstanding how the complaint is pled, because the complaint was filed before May 19th of 2010[,] is whether or not informed of the fact of that communication, where the board expressed its sentiments about whether or not this derivative suit should be pursued by Amgen in its own name, under its own control, was that a violation of the business judgment rule by the board?

"And not surprisingly, since the [complaint] predates the sending of the [May 19, 2010] communication, the [complaint] . . . has not yet been amended to try to attack the wisdom, prudence or process by which that decision came out [and] says nothing which would in any way, shape or form speak to the quality or adequacy of the decision communicated on May 19. [¶] . . . [¶]

"But, in any case, now we know that there was a conscious decision communicated. That much I think I can take judicial notice of."

Addressing Birch's counsel, the trial court observed: "I have to now look at the fully informed record, even though it obviously forces an effective mutation of your own pleading

without your voluntary consent. . . . Through judicial notice, you are now stuck with explaining why the [board's] response is not adequate when you had — when you filed the complaint . . . . [¶] . . . [¶] . . . [A]t this point you probably have to answer what [the board] really did and say why that's so bad."

The trial court offered Birch an opportunity to amend the complaint, but her attorney replied, "[W]e made a tactical decision not to amend, and I am willing to stand by that."

By order dated February 17, 2011, the trial court granted the motion for judgment on the pleadings and dismissed the action with prejudice. Birch appealed.

II

DISCUSSION

"We review de novo a trial court's judgment on an order granting a motion for judgment on the pleadings." (*Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 321.)

"'The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer, that is, under the state of the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law.' . . . 'Matters which are subject to mandatory judicial notice may be treated as part of the complaint and may be considered without notice to the parties. . . . Matters which are subject to permissive judicial notice must be specified in the notice of motion, the supporting points and authorities, or as the court otherwise permits.' . . . 'Judgment on the pleadings does not depend upon a resolution of questions of witness credibility or evidentiary conflicts. In fact, judgment on the pleadings must be denied where there are material factual issues that require evidentiary resolution. . . . In determining whether the pleadings, together with matters that may be judicially noticed, entitle a party to judgment, a reviewing court can itself conduct the appropriate analysis and need not defer to the trial court.'" (*Bezirdjian v. O'Reilly*, *supra*, 183 Cal.App.4th at pp. 321–322, citations omitted.) "'In an appeal from a motion granting judgment on the pleadings, we accept as true the facts alleged in the complaint . . . .'" (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1361.)

As a preliminary matter, "we review some basic principles regarding shareholder derivative actions. [Amgen] is incorporated in the State of Delaware, and [all] parties agree that Delaware law applies in this lawsuit. 'A basic principle of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation. . . . "The exercise of this managerial power is tempered by fundamental fiduciary obligations owed by the directors to the corporation and its shareholders." . . . The decision to bring a law suit or to refrain from litigating a claim on behalf of a corporation is a decision concerning the management of the corporation. . . . Consequently, such decisions are part of the responsibility of the board of directors.' . . .

"'"Because the shareholders' ability to institute an action on behalf of the corporation inherently impinges upon the directors' power to manage the affairs of the corporation the law imposes certain prerequisites on a stockholder's right to sue derivatively." . . . [Delaware law] requires that shareholders seeking to assert a claim on behalf of the corporation must first exhaust intracorporate remedies by making a demand on the directors to obtain the action desired, or to plead with particularity why demand is excused. . . . [¶] The purpose of pre-suit demand is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur.' . . .

"Courts generally accord some deference to a corporation's decision to refuse a shareholder's demand: 'Since a conscious decision by a board of directors to refrain from acting may be a valid exercise of business judgment, "where demand on a board has been made and refused, [courts] apply the business judgment rule in reviewing the board's refusal to act pursuant to a stockholder's demand" to file a lawsuit. . . . The business judgment rule is a presumption that in making a business decision, not involving self-interest, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. . . . "The burden is on the party challenging the decision to establish facts rebutting th[is] presumption." . . . Thus, the

business judgment rule operates as a judicial acknowledgement of a board of directors' managerial prerogatives.' . . .

"The presumption created by the business judgment rule is not absolute. However, to rebut the presumption, a plaintiff must plead with particularity facts that create a reasonable doubt as to the good faith or reasonableness of a board's investigation. . . . Mere conclusory allegations are insufficient. . . . 'If there is reason to doubt that the board acted independently or with due care in responding to the demand, the stockholder may have the basis *ex post* to claim wrongful refusal. The stockholder then has the right to bring the underlying action with the same standing which the stockholder would have had, *ex ante,* if demand had been excused as futile.'" (*Bezirdjian v. O'Reilly*, *supra*, 183 Cal.App.4th at pp. 322–323, citations & fns. omitted.) "'The complaint shall . . . allege with particularity the efforts, if any, . . . 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.'" (*Id.* at p. 322, fn. 4.)

"Upon receipt of a demand, the Board of Directors must investigate and evaluate the charges in order to discharge its duty to the shareholders and manage corporate affairs responsibly." (*Allison on Behalf of G.M.C. v. General Motors Corp*. (D.Del. 1985) 604 F.Supp. 1106, 1117.) "'The plaintiff[s] in this case made a demand upon the board that was refused. In those circumstances, for this lawsuit to go forward *the plaintiffs must allege with particularity facts that create a reasonable doubt that the corporation's board of directors wrongfully refused the demand*. . . . In determining whether a demand was wrongly refused, this Court reviews the board's decision under traditional business judgment rule standards, which are the board's disinterest and independence and the good faith and reasonableness of its investigation. . . . By making a demand, a shareholder-plaintiff tacitly concedes the disinterest and independence of the board. . . . Therefore, in that particular context *the only issues to be decided are the good faith and reasonableness of the board's investigation of the claims articulated in the demand*.'" (*Scattered Corp. v. Chicago Stock Exch.* (Del. 1997) 701 A.2d 70, 73, italics added, overruled on another point in *Brehm v. Eisner* (Del. 2000) 746 A.2d 244, 253 & fn. 13.) In short, "the trial court reviews the board's decision only for compliance with the traditional business judgment rule. The only

relevant question is whether the directors acted *in an informed manner and with due care, in a good faith belief* that their action was in the best interest of the corporation." (*Levine v. Smith* (Del. 1991) 591 A.2d 194, 198, italics added, overruled on another point in *Brehm v. Eisner*, *supra*, 746 A.2d at p. 253 & fn. 13.)

This appeal presents a classic example of how attorneys on opposite sides of a dispute can examine the same allegations and come to completely opposite conclusions. The question on appeal is straightforward: Did Birch allege facts with sufficient particularity to defeat the business judgment rule at the pleading stage? The answer is yes.

At the risk of being repetitious, the complaint alleged: "On October 29, 2009, [I] made a demand (the 'Litigation Demand') on the Board. . . . [¶] . . . The Board has acknowledged receipt of the Litigation Demand, but, [u]pon information and belief, has not conducted any investigation of the Litigation Demand, has not retained any independent counsel or other advisors in connection with the Litigation Demand, has not formed a committee to consider or investigate the Litigation Demand, and has not in fact done anything to consider or respond to the Litigation Demand. Despite being well aware of the Litigation Demand's allegations as a result of the governmental investigations and litigations described in the Litigation Demand and in this Complaint, the Board, as it has done consistently, has abdicated its responsibility to take action when put on notice of serious problems with the Company's business, operations, and legal compliance. Once again, the Board has failed to act in good faith."

The foregoing language alleged with particularity that defendants did not investigate the matters raised in Birch's litigation demand in good faith or in a reasonable way, nor did defendants respond to the demand with due care or on an informed basis. The business judgment rule requires a shareholder to prove a negative, namely, the board *failed* to take appropriate action. Birch alleged specific ways in which defendants *could* have investigated the accusations in her litigation demand, but she also alleged defendants did not pursue any of them. Although the last sentence of the quoted paragraph — alleging the board's lack of good faith — is a conclusion, the preceding factual allegations support it. We accept the

factual allegations in the complaint as true. (See *Klein v. Chevron U.S.A., Inc.*, *supra*, 202 Cal.App.4th at p. 1361.)

In contrast, we do *not* accept as true any of the statements in the letters that were attached to the answer and of which the trial court took judicial notice. "A court can properly take judicial notice of the *existence* of a document, but can take judicial notice only of the truth of the *contents* of documents such as findings of fact, conclusions of law, orders, and judgments. . . . It is immaterial that if the extrinsic matter is true it would defeat the cause of action, because a [motion for judgment on the pleadings] is not concerned with a party's ability to *prove* the allegations of the pleading. . . . [¶] In ruling on a [motion for judgment on the pleadings], it is thus error to take judicial notice of the terms of an ordinary document submitted in support *or* interpret the terms; 'a court cannot by means of judicial notice convert a [motion for judgment on the pleadings] into an incomplete evidentiary hearing in which the [moving] party can present documentary evidence and the opposing party is bound by what that evidence appears to show.'" (*Jamulians Against the Casino v. Dougherty* (2012) 205 Cal.App.4th 632, 638, citations omitted.)

Here, Amgen's letters can be used to establish that defendants corresponded with Birch on four occasions in response to her litigation demand; the letters cannot be used for any other purpose. Birch's concession that the letters were received and are authentic is inconsistent with the allegation in the complaint that defendants did nothing in response to her litigation demand. But that minor inconsistency does not affect the legal sufficiency of the facts as a whole: Notwithstanding the admitted receipt of the letters, Birch alleged facts that create sufficient doubt as to whether defendants conducted a reasonable investigation in good faith and whether defendants rejected Birch's litigation demand on an informed basis. Those facts were adequately pleaded regardless of when the letters were received — before or after the complaint was filed — because the allegations were not expressly limited to a specific period of time. Simply put, the facts alleged in the original complaint were sufficient to negate the business judgment rule even after Birch received the May 19, 2010 rejection letter.

Further, assuming that the contents of the letters could be accepted for the truth — just as the facts in Birch's complaint are accepted as true — the parties would be at a stalemate. The complaint and the answer would contradict each other on the same issue: the application of the business judgment rule. Indeed, the contents of the letters are described in Amgen's answer, but defendants could not succeed in dismissing the complaint by arguing that the allegations of the answer are more credible than the conflicting allegations of the complaint. "'[J]udgment on the pleadings must be denied where there are material factual issues that require evidentiary resolution.'" (*Bezirdjian v. O'Reilly*, *supra*, 183 Cal.App.4th at p. 322.)

Amgen's reliance on the outcome in *Levine v. Smith*, *supra*, 591 A.2d 194, is misplaced. In that case, the board's letter rejecting the plaintiff's demand was *attached to the complaint*. For that reason, the court could accept the contents of the letter as true. The Delaware Supreme Court explained: "[Plaintiff's] allegation that the Board 'did nothing' is contradicted by the Board's letter of reply rejecting [plaintiff's] demand. The letter, attached to plaintiff's Amended Complaint, states, 'following review of the matters set forth in your December 11, 1986 [demand] letter, the Board . . . unanimously determined that an attempt to rescind, or litigat[e] . . . concerning [the repurchase agreement] is not in the best interests of the Corporation.' As the trial court points out, [the Board's] letter reply 'is inconsistent with, and thus diminishes the force of, plaintiff's allegation that the Board "did nothing."' Further, the Board's letter response refusing [plaintiff's] demand 'following review of the matters' which were the subject of [the] demand letter of December 11, 1986 reflects on its face the . . . Board's consideration of [plaintiff's] demand. The only reasonable inference to be drawn from this document is that the . . . Directors did act in an informed manner in addressing [plaintiff's] demand." (*Levine v. Smith*, at p. 214, fn. omitted.)

In contrast, Birch chose not to amend her complaint after receiving defendants' rejection letter. No rule of pleading required her to do otherwise. As was her right, Birch stood on the allegations of the original complaint, which were legally sufficient to defeat the business judgment rule at the pleading stage, notwithstanding her receipt of Amgen's letters.

III

DISPOSITION

The judgment is reversed and, on remand, the trial court shall enter a new order denying the motion for judgment on the pleadings. Plaintiff is entitled to costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.