UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EUGENE F. TOWERS,

Plaintiff,

v.

ROBERT A. IGER, et al.,

Defendants.

Case No. 15-cv-04609-BLF

ORDER GRANTING MOTION TO DISMISS WITHOUT LEAVE TO AMEND

[Re: ECF 57]

Plaintiff Eugene Towers brings this stockholder derivative action on behalf of nominal defendant The Walt Disney Company ("Disney" or the "Company"), against current and former directors, executive officers and other individuals for alleged breaches of fiduciary duty and unjust enrichment as a result of their purported knowledge of anticompetitive labor agreements between Disney and other animation studios. First. Am. Compl. ("FAC"), ECF 49. Towers alleges that these illegal actions caused Disney to become the subject of various costly legal actions.

Presently before the Court is Defendants[1] motion to dismiss Plaintiff's amended complaint for failure to plead demand futility and failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *See generally* Mot., ECF 57. The Court heard argument on this motion on February 2, 2017. For the reasons stated herein, the Court GRANTS Defendants' motion WITHOUT LEAVE TO AMEND. Defendants have also filed a request for judicial notice, which the Court GRANTS. Req. Judicial Notice ("RJN"), ECF 58.

[1] "Defendants" refers to Robert A. Iger, Alan Bergman, Edwin Catmull, James A. Rasulo, Thomas O. Staggs, Susan E. Arnold, John S. Chen, Jack Dorsey, Fred H. Langhammer, Aylwin B. Lewis, Monica Lozano, Robert W. Matschullat, Sheryl Sandberg, Orin C. Smith, and Richard W. Cook. *See generally* FAC.

I. BACKGROUND

A. Factual Background

Plaintiff alleges that commencing in the mid-1980s, employees of certain companies in the animation industry, including Pixar Animation Studios ("Pixar") and Lucasfilm Ltd. LLC ("Lucasfilm"), attempted to reduce labor competition and depress employee compensation by entering into "gentleman's agreements" not to recruit each other's employees by "cold calling"[2] them and to share employee compensation information (the "alleged conspiracy"), all in violation of federal law. FAC ¶¶ 2, 4, 6, 11. Towers also alleges that the recruiting practices used in the conspiracy were "meant to be kept secret and [were] made over a handshake rather than a formal document," and "kept to a low profile to ensure they were not known about by anyone other than those necessary to fulfill the agreements." *Id.* ¶¶ 159, 165.

According to the FAC, the alleged conspiracy began when George Lucas, the former Chairman and Chief Executive Officer ("CEO") of Lucasfilm, sold Lucasfilm's computer division, then a "tech, research and development company," to Steve Jobs who had recently left his employment at Apple Inc. ("Apple"). *Id.* ¶ 4. Jobs named his new company Pixar. *Id.* Towers alleges that Defendant Edwin Catmull—Lucas' and Jobs' deputy and president of Pixar—along with other senior executives, reached an agreement to restrain competition for the skilled labor that worked for the two companies. *Id.* ¶ 5. Towers further alleges that under Catmull's leadership, other companies later joined the conspiracy. *Id.* ¶ 6 (listing, among others, DreamWorks, ImageMovers, Sony, and Blue Sky).

In 2009, the U.S. Department of Justice ("DOJ") began investigating the hiring practices of the companies involved in the alleged conspiracy. *Id.* ¶ 12. After about a year of investigating, on September 24, 2010, the DOJ filed a complaint against Pixar, Adobe Systems Incorporated ("Adobe"), Apple, Google Inc. ("Google"), Intel Corporation ("Intel"), and Intuit Inc. ("Intuit"). *Id.* Three months later, the DOJ filed a similar suit against Lucasfilm. *Id.* The DOJ alleged that these companies employed anti-poaching agreements, which amounted to restraints of trade that

[2] "Cold calling" occurs where "employers call employees working for another company seeking to recruit or 'poach' them." FAC ¶ 2. Plaintiff alleges that "cold calling" is a vital tool for acquiring skilled labor, particularly in competitive fields. *Id.*

were per se unlawful under antitrust laws. *Id.* ¶ 13. The accused companies settled these actions with the DOJ in 2010. *Id.* Nevertheless, the allegations led to a number of derivative and class action lawsuits being filed against the named companies. Mot. 5.

B. Disney's Involvement

Although Plaintiff concedes that Disney was not involved in the origination of the alleged conspiracy and did not engage in any aspect of the conspiracy for several decades thereafter, he alleges that Disney began to participate in the alleged conspiracy as early as September 2005 and that its participation deepened in 2006 when Disney purchased Pixar and appointed Catmull to run Walt Disney Animation Studios. FAC ¶¶ 4, 6–8. He further avers that Defendant Richard W. Cook, the then-Chairman of the Walt Disney Studios of Disney ("Disney Studios"), "explicitly approved Pixar's and Disney's participation in the anti-solicitation scheme when informed of it." *Id.* ¶¶ 10, 43. Plaintiff alleges that the public did not learn about Disney's involvement until March 2014, when the court unsealed several documents from *In re: High-Tech Employee Antitrust Litigation*, No. 11-cv-2509 (N.D. Cal. filed May 23, 2011). FAC ¶ 15.

C. Procedural History

Sometime in late 2014 or early 2015, Plaintiff made a demand on Disney for certain internal books and records of the Company pursuant to 8 Del. C. § 220 for the period of January 1, 2004 to the date of the demand concerning, among other things "the policies in place at Disney that relate to employee recruitment or hiring from companies other than Disney, including, . . . policies regarding cold-calling and other contact with prospective employees," and "all books and records regarding the Company's compliance with antitrust laws in relation to hiring, compensation, or retaining employees." *Id.* ¶¶ 17, 145. The Company responded to the demand, and Plaintiff subsequently filed his original complaint for breach of fiduciary duty and unjust enrichment against current and former directors, executive officers, and other individuals, because of their purported knowledge of the scheme. *See generally* Compl., ECF 6. Defendants moved to dismiss the complaint for failure to plead demand futility under Rule 23.1 and failure to state a claim under Rule 12(b)(6). *See generally* ECF 23. The Court granted Defendants' motion, finding that Plaintiff "failed to plead sufficient facts regarding the Board's knowledge of the

purported conspiracy." Order Granting Mot. to Dismiss 2 ("First Dismissal Order"), ECF 40. Specifically, the Court found that Plaintiff pled no more than that a majority of the Board members at the time the complaint was filed had served on the Board when Disney's alleged "participation in the conspiracy was in full effect." *Id.* Moreover, the Court determined that the facts as pled did not lead to a plausible inference that because one Defendant allegedly discussed the conspiracy with other companies, other members of the board shared his knowledge. *Id.* The Court also determined that Plaintiff's allegation that the board members must have learned of the purported conspiracy through the due diligence conducted for the acquisition of Pixar was insufficient under Delaware law. *Id.* Finally, the Court held that allegations that a defendant should have known of certain misconduct does not constitute particularized facts of actual knowledge. *Id.*

Following the dismissal, Plaintiff made another demand on Disney pursuant to 8 Del. C. § 220, seeking to uncover additional documents relating to the alleged wrongdoing. FAC ¶ 17. On October 21, 2016, Plaintiff filed the operative complaint. *See generally id.*

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 23.1

Federal Rule of Civil Procedure 23.1 governs derivative actions, *see Rosenbloom v. Pyott*, 765 F.3d 1137, 1148 (9th Cir. 2014), and requires a plaintiff to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors . . . and the reasons for the plaintiff's failure to obtain the action or for not making the effort." Fed. R. Civ. P. 23.1(b)(3). Rule 23.1, however, involves the adequacy of a plaintiff's pleadings; "[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 (internal citation omitted).

Disney is a Delaware corporation and Delaware law therefore controls. *See Kamen v. Kemper Fin. Serv., Inc.*, 500 U.S. 90, 108–09 (1991) ("[A] court that is entertaining a derivative action...must apply the demand futility exception as defined by the State of incorporation.").

In the context of a pre-suit demand, directors are entitled to a presumption that they

fulfilled their fiduciary duties, and "the burden is upon the plaintiff in the derivative action to overcome that presumption" with particularized factual allegations. *Beam v. Stewart*, 845 A.2d 1040, 1048–49 (Del. 2004); *see also Weiss v. Swanson*, 948 A.2d 433, 441 (Del. Ch. 2008) ("The requirement of particularized facts means a plaintiff's pleading burden in the demand [futility] context is more onerous than that required to withstand a Rule 12(b)(6) motion." (citation and internal quotation marks omitted)).

B. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. Dismissal may be based on "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). For purposes of evaluating a motion to dismiss, a court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 697 (2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

III. JUDICIAL NOTICE

Before addressing Defendants' motion, the Court considers Defendants' request for judicial notice. While the scope of review on a motion to dismiss is generally limited to the contents of the complaint, under Fed. R. Evid. 201(b), courts may take judicial notice of facts that are "not subject to reasonable dispute." Courts have previously taken judicial notice of documents on which complaints necessarily rely, *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001), court filings and other matters of public record, *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*,

442 F.3d 741, 746 n.6 (9th Cir. 2006), press releases issued by a federal agency, *States v. 14.02 Acres of Land More or Less in Fresno Ct.*, 547 F.3d 943, 955 (9th Cir. 2008), and a company's certificate of incorporation, *In re Polycom, Inc. Derivative Litig.*, 78 F. Supp. 3d 1006, 1013 n.4 (N.D. Cal. 2015).

Defendants request judicial notice of the following documents: (1) a copy of the civil antitrust complaint filed by the U.S. Department of Justice ("DOJ") in *United States v. Adobe Systems, Inc.*, No. 10-cv-1629 (D.D.C. filed Sept. 24, 2010); (2) a copy of the stipulation, proposed final judgment, and final judgment filed in *United States v. Adobe Systems, Inc.*; (3) a copy of the September 24, 2010 DOJ press release announcing the settlement in *United States v. Adobe Systems, Inc.*; (4) a copy of the competitive impact statement filed by the DOJ in *United States v. Adobe Systems, Inc.*; (5) a copy of the December 21, 2010 DOJ press release announcing settlement of *United States v. Lucasfilm Ltd.*, No. 10-cv-2220 (D.D.C. filed Dec. 21, 2010); (6) a copy of the civil antitrust complaint filed by the DOJ in *United States v. Lucasfilm Ltd.*; (7) a copy of the competitive impact statement filed by the DOJ in *United States v. Lucasfilm Ltd.*; (8) a copy of the stipulation, proposed final judgment, and final judgment in *United States v. Lucasfilm Ltd.*; (9) a copy of the Second Consolidated Amended Class Action Complaint in *In re Animation Workers Antitrust Litigation*, No. 14-cv-4062 (N.D. Cal. filed Mar. 15, 2015); and (10) a copy of the Restated Certificate of Incorporation of the Walt Disney Company, filed with the Delaware Secretary of State on or about March 18, 2014. *See* RJN 1–2. Plaintiff does not object to the Court taking judicial notice of these documents. Accordingly, Defendants' request is GRANTED.

IV. DISCUSSION

A. Demand Futility[3]

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

[3] Although Defendants construe some of Plaintiff's allegations as attempting to make out a failure of oversight claim, Plaintiff contends that he is not asserting such a claim. *See* Mot. 14; Opp'n 13. Instead, Plaintiff states he is "alleging an active choice to 'affirmatively adopt[ ], implement[ ], and/or condon[e]' the Illegal Anticompetitive Agreements." Opp'n 13–14. Accordingly the Court does not address Defendants' arguments related to the standard under *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). *See* Mot. 14.

why such demand would have been futile." *Rosenbloom*, 765 F.3d at 1147 (quoting *In re Silicon Graphics*, 183 F.3d 970, 989 (9th Cir. 1999)); *see* Fed. R. Civ. P. 23.1. Towers did not make a demand on the Disney Board. Instead, he alleges that demand was excused because it would have been futile. *See* FAC ¶ 22; Opp'n 13–21, ECF 64. Because "[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," Delaware law applies here. *Scalisi v. Fund Asset Mgmt., L.P.*, 380 F.3d 133, 138 (2d Cir. 2004) (cited with approval in *Rosenbloom*, 765 F.3d at 1148).

The Delaware Supreme Court has articulated two tests for determining whether a complaint sufficiently pleads demand futility: the *Aronson* test and the *Rales* test. *See Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) ("the *Aronson* test"); *Rales v. Blasband*, 634 A.2d 927 (Del. 1993) ("the *Rales* test"). Delaware courts apply the *Aronson* test if the derivative action challenges a particular decision or transaction of the corporation's board of directors. *See Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008). Under *Aronson*, the plaintiff must plead particularized facts that create a reasonable doubt that either (1) the directors were disinterested or independent, or (2) the challenged transaction was the product of a valid exercise of business judgment. *See* 473 A.2d at 812.

On the other hand, Delaware courts apply *Rales* if the subject of the derivative suit is not a business decision of the board but rather a violation of the board's oversight duties. *See Wood*, 953 A.2d at 140; *see also Guttman v. Huang*, 823 A.2d 492, 499–500 (Del. 2003) (applying *Rales* where the plaintiffs alleged that director defendants individually breached their fiduciary duties to the corporation and failed "to ensure that [the corporation] had in place the financial control systems necessary to ensure compliance with applicable accounting standards"). The *Rales* test simply requires the plaintiff to offer particularized allegations to create a reasonable doubt as to the first prong of the *Aronson* test:

> Thus, a court must determine whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. If the

> derivative plaintiff satisfies this burden, then demand will be excused as futile.

Rales, 634 A.2d at 934; *see also In re Bidz.com, Inc. Derivative Litig.*, 773 F. Supp. 2d 844, 855 (C.D. Cal. 2011).

The Ninth Circuit has held that the difference between the *Aronson* and *Rales* tests is blurred in cases where a derivative claim alleges wrongdoing by a majority of the board but does not challenge a specific board decision. *Rosenbloom*, 765 F.3d at 1150 (collecting cases). For such hybrid claims, courts excuse demand if "Plaintiffs' particularized allegations create a reasonable doubt as to whether a majority of the board . . . faces a substantial likelihood of personal liability." *Id.* Because Disney's certificate of incorporation exculpates members of its Board from personal liability, plaintiff can establish the substantial likelihood of liability necessary to excuse demand only by pleading "bad faith by alleging with particularity that a director *knowingly* violated a fiduciary duty or failed to act in violation of a *known* duty to act, demonstrating a *conscious* disregard for her duties." *In re Gen. Motors Co. Derivative Litig.*, C.A. No. 9627, 2015 WL 3958724, at *12 (Del. Ch. June 26, 2015) (emphasis in original) (citation omitted), *aff'd,* 133 A.3d 971 (Del. 2016) (TABLE); *see also In re Yahoo! Inc. S'holder Derivative Litig.*, 153 F. Supp. 3d 1107, 1120 (N.D. Cal. 2015) (finding pre-suit demand not excused because plaintiffs failed to establish that the directors acted in "bad faith"). An allegation that a defendant should have known of misconduct does not constitute particularized facts of actual knowledge. *See In re CNET Networks, Inc.*, 483 F. Supp. 2d 947, 964 (N.D. Cal. 2007).

Demand futility can be established without "a smoking gun of Board knowledge," by "alleging particular facts that support an inference of conscious inaction." *Rosenbloom*, 765 F.3d at 1156 (citation and emphasis omitted). However, it is "a rare case where the circumstances are so egregious that there is a substantial likelihood of liability." *In re Baxter Int'l, Inc. S'holder Litig.*, 654 A.2d 1268, 1271 (Del. Ch. 1995) (citing *Aronson*, 473 A.2d at 815).

In this case, Plaintiff's main argument is that demand is excused because a majority of the Board caused or knowingly allowed the Company to engage in illegal hiring practices. *See* Opp'n 13–21. In response, Defendants argue that Plaintiff has not sufficiently pled particularized facts demonstrating that a majority of the members of the Board knew of or participated in the

purported conspiracy. Mot. 1, 9.

i. Composition of the Board

Demand futility is analyzed based on the composition of the board at the time the lawsuit is initiated, as that is the board upon which demand would have been made. *See Harris v. Carter*, 582 A.2d 222, 228 (Del. Ch. 1990); *see also Braddock v. Zimmerman*, 906 A.2d 776, 786 (Del. 2006). Disney's Board of Directors is currently comprised of eleven directors: Susan Arnold, John Chen, Jack Dorsey, Robert Iger, Fred Langhammer, Aylwin Lewis, Robert Matschullat, Sheryl Sandberg, Orin Smith, Maria Elena Lagomasino, and Mark Parker. FAC ¶ 122 & n.11. Only Mr. Iger is also an officer. *Id.* ¶¶ 29, 34–38, 40–42. Four of the eleven members of the Board—Jack Dorsey, Sheryl Sandberg, Maria Elena Lagomasino, and Mark Parker—became directors after the complained-of conduct would have ceased. *Id.* ¶¶ 36, 41, 122 & n.11. Six of the eleven members of the Board—John Chen, Robert Iger, Fred Langhammer, Aylwin Lewis, Robert Matschullat, and Orin Smith—were directors at the time the Company acquired Pixar in 2006. *Id.* ¶¶ 29, 35, 37–38, 40, 42, 123 & n.12. Susan Arnold became a director in May 2007. *Id.* ¶ 34.

Plaintiff contends that the Court should consider Defendant Lozano, who resigned from the Board effective March 2016, as a member of the Board for demand purposes instead of Parker, who joined the Board in January 2016. FAC at 40 n.11, 41 n.12. Defendants disagree, relying on *Braddock v. Zimmerman*, and contend that when a complaint is dismissed pursuant to Rule 23.1 and then amended, "plaintiff must make a demand on the board of directors in place at that time the amended complaint is filed or demonstrate that demand is legally excused as to that board." Mot. 3 n.2 (citing and quoting *Braddock*, 906 A.2d at 786). Although the Ninth Circuit has not directly addressed this issue, courts in this district have cited the rule set forth in *Braddock* with approval. *See, e.g.*, *UFCW Local 1500 Pension Fund v. Mayer*, No. 16-478, 2016 WL 6122458, at *3 n.2 (N.D. Cal. Oct. 19, 2016); *Zoumboulakis v. McGinn*, 148 F. Supp. 3d 920, 926 (N.D. Cal. 2015); *In re CNET Networks, Inc. S'holder Derivative Litig.*, No. C 06-03817, 2008 WL 2445200, at *5 (N.D. Cal. June 16, 2008). Agreeing with the reasoning in these decisions, the Court will consider demand futility with respect to the Board in place at the time Plaintiff filed the

amended complaint.

ii. Allegations of Knowledge

In the FAC, Plaintiff continues to allege, at most, that a few high-level employees and officers knew of and participated in the alleged conspiracy. Taken as a whole, these allegations are not sufficient to satisfy Delaware law with respect to demand futility, as they do not show that at least six members of the current board face a substantial likelihood of personal liability for violating their fiduciary duties. Mot. 6–7; *Rosenbloom*, 765 F.3d at 1150 ("[D]emand is excused if Plaintiffs' particularized allegations create a reasonable doubt as to whether a *majority* of the board . . . face a substantial likelihood of personal liability[.]").

Plaintiff's new allegations are based on minutes from four Board meetings that occurred between November 30, 2005 and January 23, 2006, when the Board was considering the Pixar acquisition. FAC ¶¶ 125–40. [redacted] *Id.* ¶¶ 126–40. Present at these meetings were current board members Chen, Iger, Langhammer, Lewis, Matschullat, and Smith. *Id.* ¶¶ 127, 129, 135, 139.

Although Plaintiff asks the Court to infer that the illegal scheme was discussed openly at the meetings from these minutes, *see* Opp'n 19–20 (arguing that in these meetings, the Board discussed all of the reasons justifying the alleged conspiracy), the Board's minutes are rather unremarkable. *See* Reply ISO Mot. 1, ECF 66; *see In re Wal-Mart Stores, Inc. S'holder Derivative Litig.*, No. 12-cv-4041, 2015 WL 1470184, at *6–7 (W.D. Ark. Mar. 31, 2015) (dismissing claims because the complaint did not allege directors were "'directly informed' of any wrongdoing" (citation omitted)). Indeed, it would be remarkable if the Board had not discussed these topics before deciding to acquire Pixar, particularly because these types of discussions are an anticipated aspect of due diligence into any acquisition and because the industry relies so heavily

on its creative talent. *See* FAC ¶ 125; Mot. 7. The only inference that Plaintiff's allegations plausibly support is that the Board discussed entirely appropriate and lawful means to retain and attract creative talent in relation to an acquisition. Reply ISO Mot. 3.

Plaintiff highlights particular instances that he contends allows the Court to infer that a majority of the Board at the time the FAC was filed was aware of the alleged conspiracy, if not actively participating in it. Opp'n 15. All of these allegations rely on the assumption that because some of the alleged co-conspirators were in meetings with the Board members where employment issues were discussed, the alleged co-conspirators must have shared details of the scheme with the Board. *See id.* First, Plaintiff refers to various conversations between former members of the Board—Cook, Catmull, and Disney Studio's President Alan Bergman—regarding the alleged conspiracy. FAC ¶¶ 65–66, 72–73; Opp'n 16. Towers argues that these conversations, which demonstrate that Cook and Catmull were "freely" discussing the alleged conspiracy, support the inference that they shared this information with the other members of Disney's Board. Opp'n 17. The Court already found these allegations, which were pled in the prior complaint, insufficient because "under Delaware law, one director's knowledge does not impute to any other for demand futility purposes." First Dismissal Order 2 (citing *In re Yahoo!*, 153 F. Supp. 3d at 1123). Moreover, Plaintiff's own allegations belie the contention that the parties to the alleged conspiracy "freely" discussed it. FAC ¶ 165 (alleging that the conspiracy was "kept to a low profile to ensure [it was] not known about by anyone other than those necessary to fulfill the agreements.").

Second, Plaintiff alleges that "Steve Jobs himself presented to Disney's Board in connection with Disney's acquisition of Pixar." *Id.* ¶ 126; *see also id.* ¶¶136, 138. Towers contends that Jobs' presentation, along with the fact that the Board repeatedly discussed employment concerns and "key aspects of the deal" with architects of the alleged conspiracy, constitutes particularized allegations demonstrating that the Board discussed and sanctioned the alleged conspiracy. Opp'n 17–18. The mere fact that Steve Jobs, the "architect of the Anticompetitive Agreements," presented on various issues [redacted] is insufficient. *Id.* ¶ 136. Plaintiff would have this Court interpret [redacted] as code for the anti-poaching practices. Such an inference, without any facts showing that the Board

members understood discussions about Pixar's [redacted] to mean anti-poaching practices, is implausible. Plaintiff alleges no particularized facts demonstrating that Jobs or anyone else revealed any recruiting practices, let alone any unlawful conspiracy, to the members of the Board. *See* Mot. 10. Indeed, any blind inference that Jobs or anyone else conveyed these alleged illegal practices to the Board is impermissible under Delaware law. *See* Reply ISO Mot. 2; *In re Google, Inc. S'holder Derivative Litig.*, No. 11-4248, 2012 WL 1611064, at *7 (N.D. Cal. May 8, 2012)); *cf. Cottrell v. Duke*, 829 F.3d 983, 995 (9th Cir. 2016) (rejecting the assumption that the company's board members knew of the allegations of misconduct because "the shareholders did not plead any facts supporting the inference that the officers actually shared their knowledge"); *Desimone v. Barrows*, 924 A.2d 908, 943 (Del. Ch. 2007) ("Delaware law does not permit the wholesale imputation of one director's knowledge to every other for demand excusal purposes. Rather, a derivative complaint must plead facts *specific to each director* . . . ."); *Rattner v. Bidzos*, No. Civ. A. 19700, 2003 WL 22284323, at *11 (Del. Ch. 2003) (holding that directors cannot be charged with knowledge of information merely because they served on a board with a director who may have known such information)).

Finally, Plaintiff alleges that the Board was informed of [redacted] during these meetings. FAC ¶ 126, 133; Opp'n 19. [redacted] FAC ¶¶ 126, 139. [redacted] *Id.* ¶¶ 133, 139. Defendants argue, and the Court agrees, that neither [redacted] plausibly supports Plaintiff's claims because neither is alleged to be part of the conspiracy nor to violate the law. Mot. 8, 10, 13–14; Reply ISO Mot. 5; *In re Goldman Sachs Grp., Inc. S'holder Litig.*, No. Civ. A. 5215, 2011 WL 4826104, at *20–21 (noting "*legal* business decisions . . . are within management's discretion to pursue [and] are not 'red flags' that would put a board on notice of unlawful conduct" (emphasis in original)).

Plaintiff further alleges that Iger lacks independence, and is therefore incapable of impartially considering a demand. FAC ¶ 148. Although this may be adequately pled as to Iger, the FAC remains insufficient because Plaintiff does not allege that an additional five directors lack independence or face a substantial likelihood of personal liability. *See In re Verifone Holdings, Inc. S'holder Derivative Litig.*, Nos. C 07-6347, C 07-6140, 2010 WL 3385055, at *10 (N.D. Cal. Aug. 26, 2010).[4]

Considering the complaint as a whole, at most, Towers has particularly alleged that Jobs, Catmull, Cook, and Bergman knew about the alleged conspiracy and discussed issues that tangentially relate to the unlawful conduct with a majority of the current board, and that Iger is not independent. However, there are no particularized allegations that a majority of the current Board members knew about the alleged conspiracy or were complicit in it—*i.e.*, Plaintiff fails to establish that the Directors acted in "bad faith." *See In re Yahoo!*, 153 F. Supp. 3d at 1120 (citations omitted). Accordingly, the Court cannot plausibly infer that a majority of the current members of the board face a substantial likelihood of personal liability for breaching their fiduciary duties. Thus, Plaintiff has failed to establish demand futility.

The Court also agrees with Defendants that amendment would be futile. At the hearing on Defendants' motion to dismiss Plaintiff's initial complaint, Plaintiff indicated that he would conduct another inspection demand to augment the complaint. Thus, the Court allowed Plaintiff leave to amend. However, at the hearing on the instant motion, Plaintiff did not indicate what he would be able to do to supplement his current allegations, and the Court is unaware of any facts that Plaintiff could add to support demand futility. Given that amendment would likely be futile, and the fact that this is Plaintiff's second attempt to state a claim, the Court finds that leave to amend is not appropriate. *See Foman v. Davis*, 371 U.S. 178 (1962); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2009); *In re Verifone*, 2010 WL 3385055, at *10 (dismissing

[4] The Court recognizes that Plaintiff might be able to cure deficiencies regarding Robert Iger's knowledge of the conspiracy by alleging facts similar to those facts presented in Santa Clara County Superior Court case *In re Apple, Inc. Derivative Litigation*, No. 14-cv-262174 (Cal. Super. Ct. Oct. 5, 2016). However, that alone would be insufficient; particular allegations as to one Board member would not support an inference regarding the majority of the Board that is required to allege demand futility.

with prejudice where plaintiff inspected company's books and records before filing amended complaint). Therefore, the Court GRANTS Defendants' motion to dismiss for failure to plead demand futility WITHOUT LEAVE TO AMEND.

iii. Statute of Limitations

In the alternative, Defendants argue that Plaintiff cannot establish that a majority of the Board faces a substantial likelihood of personal liability because Plaintiff's claims are time barred. Mot. 18 (citing *In re VeriSign, Inc. Derivative Litig.*, 531 F. Supp. 2d 1173, 1192 (N.D. Cal. 2007) (holding that when a cause of action is time barred, plaintiffs cannot use those causes of action as a basis for alleging demand futility)). While a statute-of-limitations assertion is an affirmative defense, a defendant may still raise a motion to dismiss based on the defense if the running of the limitations period is apparent on the face of the complaint. *See Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (stating that, "[i]f the running of the statute is apparent on the face of the complaint, the defense may be raised by a motion to dismiss").

The parties appear to agree that a three-year statute of limitations applies to claims for breach of fiduciary duty under Delaware law. Mot. 19; Opp'n 29; 10 Del. C. § 8106(a); *In re VeriSign*, 531 F. Supp. 2d at 1215 (three-year limitations period applies to claims for breach of fiduciary duty and equitable claims, such as unjust enrichment). Under § 8106, claims accrue at the time of the wrongful act, "even if the plaintiff is ignorant of the cause of action." *SmithKline Beecham Pharms. Co. v. Merck & Co., Inc.*, 766 A.2d 442, 450 (Del. Supr. 2000) (quoting *In re Dean Witter P'ship Litig.*, No. Civ. A 14816, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998)).

In the FAC, Towers alleges that the conspiracy dates back to the mid-1980s, and began at companies other than Disney. FAC ¶ 4, 60. He further alleges that Disney began to participate in the alleged conspiracy as early as September 2005. *Id.* ¶¶ 6–8. Thus, his claim accrued at that time. Towers argues, however, that due to either equitable tolling or equitable estoppel, the cause of action did not accrue until he first became aware that Disney was involved in the alleged conspiracy in 2014. *Id.* ¶¶ 151–173; Opp'n 25–30. Although the three-year limitations period may be subject to exception under the doctrines of equitable tolling or fraudulent concealment, *Krahmer v. Christie's Inc.*, 903 A.2d 773, 778 (Del. Ch. 2006), the Court concludes that neither

applies, and thus, Towers' claims are time barred.

a. Equitable Tolling

Under Delaware law, a plaintiff may toll the limitations period by specifically alleging that the facts were "so hidden that a reasonable plaintiff could not have made timely discovery of an injury necessary to file a complaint." *Smith v. McGee*, No. Civ. A. 2101, 2006 WL 3000363, at *3 (Del. Ch. Oct. 16, 2006); *see also Ryan v. Gifford*, 918 A.2d 341, 359 (Del. Ch. 2007). If the plaintiff sufficiently meets his burden of showing that the statute was tolled, relief extends only until plaintiff is on inquiry notice. *Ryan*, 918 A.2d at 359. Tolling ends when plaintiff discovers, or in the exercise of reasonable diligence should have discovered, his injury. *Id.*

Plaintiff alleges that equitable tolling applies to the limitations period because "there was nothing to arouse a reasonable Disney shareholder's suspicions that there were potential derivative claims against the Individual Defendants based on the DOJ Investigation of other companies." Opp'n 26 (citing FAC ¶ 152). Defendants, however, argue that Plaintiff concedes that his claims arise out of the same conduct investigated by the DOJ and that gave rise to the September 24, 2010 final judgment. Mot. 20. Accordingly, they contend that Plaintiff, a purported Disney stockholder at the time of the September 24, 2010 final judgment, was on notice of the Pixar-related conduct alleged in the FAC, and had all of the information necessary to trigger inquiry notice of the alleged oversight claims against the Disney Board, as soon as the DOJ publicly disclosed the alleged recruiting practices at Pixar in late-2010. *Id.*

Plaintiff emphasizes that although the conduct at issue is the same type of conduct that the DOJ investigated, Disney's conduct was not revealed by the DOJ Investigation. Opp'n 27. The Court finds this argument unpersuasive. For the same reasons the state court held that the plaintiffs in *In re Google Inc. S'holder Derivative Litig.*, No. 14-cv-261485, 2015 WL 9942165 (Cal. Super. Ct. Nov. 24, 2015), should have been aware of Google's alleged unlawful conduct, Towers should have been aware of the Pixar-related conduct here. Indeed, reasonable due diligence would have led him to discover any wrongdoing on the part of Disney. *See* Mot. 20–21; Opp'n 28.

In *In re Google Inc.*, plaintiffs brought a shareholder derivative action on behalf of

themselves and all other shareholders of nominal defendant Google against Google and various officers and directors of Google based upon the same allegations at issue in this action against Disney—*i.e.*, that Google entered into an unlawful conspiracy to eliminate hiring competition and drive down employee wages. 2015 WL 9942165, at *1. The state court found that plaintiffs' claims were "based on the anticompetitive agreements uncovered by the DOJ investigation and publicly revealed by the DOJ in Sept. 2010," and thus, unless equitable tolling applied, the action—which was originally filed on February 28, 2014—was time barred. *Id.* at *4. Because Google was named in the September 2010 DOJ complaint, the state court found that equitable tolling did not apply, and thus, the action was barred by the statute of limitations. *Id.* at *5.

Although Disney was not named in any of the DOJ complaints, Towers does not contest that he was on notice of the Pixar-related conduct as a result of the 2010 public disclosures (though he argues that he was not aware of Disney's conduct, which is at issue in the case). Notice of the alleged conduct at Pixar, a Disney subsidiary, which was disclosed by the DOJ in late 2010, gave Plaintiff all the information necessary to trigger inquiry notice of the alleged claims against the Disney Board. Mot. 10.

Benfield v. Mocatta Metals Corporation, on which Plaintiff partially relies, supports the Court's conclusion that public notice of the Pixar-related conduct put Towers on inquiry notice of the alleged Disney-related conduct. 26 F. 3d 19 (2d Cir. 1994). In *Benfield*, the Second Circuit affirmed the dismissal of plaintiff's claims as time barred because "long before" the limitations period expired, "plaintiffs had at least constructive knowledge of [a third party's] fraudulent conduct and the close relationship between [the third party] and [defendant]," such that "a duty of inquiry arose." *Id.* at 22. Similarly, the claims here are identical to the ones asserted by the DOJ against Pixar, are against the same board members, and arise out of the same alleged practices. *See id.*; Opp'n 27. The DOJ allegations against Pixar should have put Towers on notice of the potential scope of the wrongs, *i.e.*, that the alleged unlawful conduct extended to Disney, or a subsidiary or division of Disney other than Pixar (and Lucasfilm). *See Graulich v. Dell*, No. C.A. 5846, 2011 WL 1843813, at *6 (Del. Ch. May 16, 2011) (rejecting argument that limitations period was tolled because "disclosures in public filings and news comments . . . did not reveal the

extent of the misconduct and whether it was systemic").

For the foregoing reasons, the Court concludes that equitable tolling does not apply to toll the statute of limitations. Plaintiff accordingly had until September 23, 2013 to file his suit for it to be timely; however, Towers filed this lawsuit on September 29, 2015—two years past the expiration of the limitations period.

b. Fraudulent Concealment

Plaintiff alternatively asserts that the doctrine of fraudulent concealment tolls the statute of limitations in this case. Opp'n 29–30. Fraudulent concealment "requires an affirmative act of concealment by a defendant—an 'actual artifice' that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry." *Ryan*, 918 A.2d at 360 (citing and quoting *In re Dean Witter*, 1998 WL 442456, at *5–6) (internal quotation marks omitted). Like with equitable tolling, the plaintiff bears the burden of showing that fraudulent concealment applies, and relief from the limitations period extends only until the plaintiff is put on inquiry notice or would have been had he conducted reasonable diligence. *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007).

To support his claim that fraudulent concealment applies to toll the limitations period, Plaintiff alleges that the nature of the "gentleman's agreements" themselves was secretive in that they were intended to be shared orally rather than written down. FAC ¶¶ 72, 67, 159. He also alleges that Disney continued to assert publicly that its compensation was the product of a free, competitive market, despite the fact that the alleged unlawful conspiracy ensured that those assertions were untrue. *Id.* ¶¶ 166–69. These allegations are insufficient. *See* Reply ISO Mot. 9; "[A] plaintiff must allege active, affirmative acts of fraudulent concealment that entail more than passive silence[.]" *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1198 (N.D. Cal. 2015). Towers, however, pleads only conclusory allegations with respect to the "secret conspiracy," which do not show active affirmative acts of concealment. *See id.* at 1199–1200.

Plaintiff's reliance on the court's decision in *In re Animation Workers* is misplaced. Opp'n 29–30. There, the court, applying the Ninth Circuit standard for fraudulent concealment, concluded that fraudulent concealment applied to toll the limitations period. *See* 123 F. Supp. 3d

at 1200–02. The court found that "[p]laintiffs sufficiently alleged that [the d]efendants both made misleading, pretextual statements and took affirmative steps to keep the alleged conspiracy a secret" by alleging that defendants "made general statements regarding the reasons for certain salary raises and raises that belied the true reason for compensation decisions, i.e., the alleged conspiracy, and that [d]efendants made specific misleading statements to individual putative class members." *Id.* at 1200. Plaintiff makes no similar allegations here. Accordingly, the Court concludes that the doctrine of fraudulent concealment does not apply.

Because neither equitable tolling nor fraudulent concealment operates to toll the limitations period, the Court concludes that Plaintiff's claims are time-barred, and thus GRANTS Defendants' motion to dismiss. In regard to fraudulent concealment, it seems possible that Plaintiff could allege additional facts regarding affirmative statements made by Defendants, however, because the Court has already found that amendment as to demand futility would be unavailing, the Court declines to allow amendment on fraudulent concealment as such amendment would not address other fatal deficiencies in the pleading.

B. Failure to State a Claim

i. Plaintiff's Claim for Breach of Fiduciary Duty

Plaintiff alleges that Defendants breached their fiduciary duty by causing or allowing the Company to be run in an illegal fashion and by causing or allowing the Company to disseminate to Disney stockholders materially misleading and inaccurate information. FAC ¶ 176; Opp'n 22. Both parties agree that Plaintiff's claim for breach of fiduciary duty rises and falls with his ability to allege demand futility. *See* Mot. 22–23 ("Because Plaintiff's insufficient demand futility allegations are duplicative of his underlying claims for breach of fiduciary duty, the Court should dismiss those claims pursuant to Rule 12(b)(6)[.]"); Opp'n 21 ("[B]ecause Plaintiff has shown a substantial likelihood of liability for a majority of the Board, he has also stated valid claims against those individuals."); *see also In re Yahoo! Inc.*, 153 F. Supp. 3d at 1126.

Accordingly, because the Court finds that Plaintiff failed to show that the Disney Directors' alleged breach of fiduciary duty—caused by their alleged participation in an illegal conspiracy—excused demand; the Court concludes that Plaintiff fails to state a claim that the

Directors breached their fiduciary duty. *See* Fed. R. Civ. P. 12(b)(6). The Court thus GRANTS Defendants' motion to dismiss Plaintiff's claim for breach of fiduciary duty WITHOUT LEAVE TO AMEND.

ii. Plaintiff's Claim for Unjust Enrichment

Plaintiff's unjust enrichment claim cannot succeed if a plaintiff's breach of fiduciary duty claim fails. *See Taylor v. Kissner*, 893 F. Supp. 2d 659, 674 (D. Del. 2012) (dismissing an unjust enrichment claim where the plaintiff had "not properly alleged any breach of fiduciary duty or any other theory providing a factual basis to conclude that the compensation received by each Defendant was paid without justification"); *Calma v. Templeton*, 114 A.3d 563, 591 (Del. Ch. 2015) ("At the pleadings stage, an unjust enrichment claim that is entirely duplicative of a breach of fiduciary duty claim—*i.e.*, where both claims are premised on the same purported breach of fiduciary duty—is frequently treated in the same manner when resolving a motion to dismiss." (citation and internal quotation marks omitted)). Because Plaintiff's breach of fiduciary duty claim should be dismissed, so too should this one.

V. ORDER

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss WITHOUT LEAVE TO AMEND. The Clerk is directed to close the file.

Dated: March 10, 2017

BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California