

Chancery Court Dismisses Suit Over Former HP CEO's Severance Package

Jeff Mordock



The Delaware Court of Chancery has dismissed a derivative lawsuit against Hewlett-Packard Co. and its board of directors, alleging that the company wasted resources when it approved a \$40 million severance package to former CEO Mark Hurd. The lawsuit was dismissed because the plaintiff failed to justify his decision not to make a demand on the board prior to filing his claim.

Vice Chancellor Donald F. Parsons Jr. issued the opinion June 21 in *Zucker v. Andreessen*.

"There is no dispute that the plaintiff decided not to make a presuit demand," Parsons wrote. "Hence, the issue before the court is whether the amended verified shareholder derivative complaint alleges a basis to excuse presuit demand. For the reasons stated in this memorandum opinion, the complaint fails to do so."

HP shareholder Lawrence Zucker filed the lawsuit in November 2010 and amended it in February 2011, according to court documents. Zucker alleges that Hurd's severance package is corporate waste because he was fired for allegedly falsifying expense reports in order to cover up an alleged relationship with a contractor who eventually filed a sexual harassment lawsuit against the company. The complaint

also contends that the company's board breached its fiduciary duty of care by failing to implement a long-term succession plan before Hurd's unexpected termination.

"The board provided Hurd with a \$40 million gift for absolutely nothing in return," Zucker's attorneys wrote in the initial complaint.

All members of the company's board were named as defendants, including Marc L. Andreessen, Lawrence T. Babbio Jr., Joel Z. Hyatt and Rajiv L. Gupta. HP, which is headquartered in Palo Alto, Calif., and incorporated in Delaware, was named as a nominal defendant.

The defendants claim that demand is not excused in either count, and therefore, the complaint must be dismissed. In addition, the defendants contend that the plaintiff makes no allegations that the board was disinterested, uninformed or acted in bad faith when it approved the severance package. Furthermore, the severance agreement was not one-sided and could pass the business judgment test, the defendants said.

Zucker alleges that he was not required to make a demand on the board, because HP's board delegated authority to assess the merits of his lawsuit to a special litigation committee.

Parsons rejected his claim, holding that under *Spiegel v. Buntrock*, a 1990 Delaware Supreme Court decision, the appointment of a special litigation committee "is not, in all instances, an acknowledgement that demand was excused and ergo that a shareholder's lawsuit was properly initiated as a derivative action."

"Rather, as this court has held, 'to find that a board of directors conceded the futility of demand, a derivative plaintiff must allege particularized facts that support a factual finding that the board made the concession,'" Parsons wrote, citing the 1995 Delaware Chancery Court decision in *Seminaris v. Landa*.

In his amended complaint, Zucker also cited a two-paragraph letter decision issued by the Chancery Court in the 2008 case, *Sutherland v. Sutherland*. In *Sutherland*, former Vice Chancellor Stephen P. Lamb wrote that once a special litigation committee is established, "arguments in favor of dismissal ... for failure to make a demand are no longer justiciable."

However, Parsons denied Zucker's argument, holding that the *Sutherland* language was "out of context" because in that case the board of directors formed the litigation committee two years after its initial motion to dismiss was denied.

The plaintiff in *Sutherland* then filed an amended complaint after the litigation committee was formed.

“The procedural posture of this case bears no resemblance to that of *Sutherland*,” Parsons wrote. “Furthermore *Sutherland* does not stand for the proposition plaintiff claims.”

“Unlike plaintiff here, therefore, the plaintiff in *Sutherland* amended her complaint after the committee in question was formed,” Parsons wrote. “Thus noting in *Sutherland* undermines the holding of *Seminaris* that ‘to demonstrate that defendants conceded demand futility, a plaintiff must allege particularized facts to support a factual determination that the board intended to concede demand.’ Because Zucker’s complaint contains no such allegations, his waiver argument fails.”

Parsons also held that Zucker failed to allege particularized facts that raised a reasonable doubt that Hurd’s severance agreement violated the business judgment rule, noting that the plaintiff conceded that HP directors were disinterested and independent of Hurd.

The vice chancellor added that in reaching the decision to pay Hurd a \$40 million severance, the board found no violations of HP’s sexual harassment policy, only that he allegedly falsified expense reports, and an attractive severance package was necessary to attract replacement candidates.

“The company was terminating Hurd for expense report violations and mere allegations of a scandal at the same time that it was trying to put its best foot forward

to replacement candidates,” Parsons wrote. “Denying Hurd any severance despite the admittedly ‘considerable value that [he] has contributed to HP’ could have undermined its efforts to attract outside executive talent. The complaint offers no particularized allegations raising a reasonable doubt that the board could have considered such external factors in good faith in approving the severance agreement.”

Zucker’s claim that HP’s board breached its fiduciary duty of care by failing to adopt a succession plan was also dismissed by Parsons for failure to plead demand futility. The vice chancellor also noted that failure to implement a succession plan is not a breach of fiduciary duty under Delaware law.

“The complaint contains a handful of conclusory allegations that ‘the failure to have a succession plan also cannot be said to be sound business judgment’ and ‘amounts to a breach of the duty of good faith,’” Parsons wrote. “Yet, plaintiff’s brief does not cite, nor is the court aware of, any Delaware precedent that stands for the proposition that failure to adopt a long-term succession plan amounts to a breach of duty.”

“The circumstances of this case, however, do not justify departing from this court’s traditional reluctance to engage in establishing new standards of liability in corporate governance by judicial fiat.”

Zucker was represented by Michael W. McDermott and David B. Anthony of Berger Harris, a Wilmington firm; Eduard Korsinsky and Eric Andersen of Levi & Korsinsky of New York; and Gregory M. Nespole and Stacey T. Kelly of Wolf

Haldenstein Adler Freeman & Herz, also of New York.

HP’s board members were represented by Collins J. Seitz Jr. and Bradley R. Aronstam of Seitz Ross Aronstam & Moritz, a Delaware firm.

Peter J. Walsh and Stephen C. Norman were among the Potter Anderson & Corroon attorneys who represented HP. The company was also represented by Marc J. Sonnenfeld and Karen Pieslak Pohlmann of Morgan Lewis & Bockius’ Philadelphia office, and Steven M. Schatz, Boris Feldman, Katherine L. Henderson and Brian Danitz of Wilson Sonsini Goodrich & Rosati of Palo Alto, Calif.

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