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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

R. ANDRE KLEIN, on behalf of himself and all other stockholders of APPLE INC.,

Plaintiff,

vs.

TIMOTHY D. COOK, WILLIAM V. CAMPBELL, MILLARD ("MICKEY") DREXLER, ARTHUR D. LEVINSON, ROBERT A. IGER, ANDREA JUNG, FRED D. ANDERSON, ESTATE OF STEVEN P. JOBS, deceased, and DOES 1-30, inclusive,

Defendants,

-and-

APPLE INC., a California corporation,

Nominal Defendant.

Case No. 5:14-cv-03634-EJD

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT

Date: May 14, 2015
Time: 9:00 a.m.
Courtroom: 4 - 5th Floor
Judge: Honorable Edward J. Davila

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INTRODUCTION

Unable to defend the specific pleading defects identified in Defendants' moving papers, Plaintiff simply doubles down and, contrary to well-established law, repeats the Complaint's deficient conclusory allegations and unsupported inferences—which are entitled to no deference.[1] Plaintiff *fails to point to a single specific allegation* showing that any Board member was aware of Apple's cold-calling practices. Instead, Plaintiff improperly attempts to impute the actions and knowledge of others—most specifically Steve Jobs—to the current directors. Plaintiff's argument boils down to an opinion that the current Board members must have known of Apple's cold-calling practices because they were Apple directors, and, for some, because of their alleged relationship with Jobs and their roles with other companies that purportedly engaged in the challenged conduct. When these conclusions and inferences are removed from the Complaint, it becomes clear that there are no specific factual allegations asserted against the Individual Defendants. Plaintiff simply has not shown that demand on the members of Apple's Board would have been futile.

Plaintiff also fails to state a cause of action against the Individual Defendants or that the action complies with the limitations period. Plaintiff's Complaint should be dismissed for failure to satisfy the demand futility requirement and for failure to state a claim.

ARGUMENT

I. PLAINTIFF ALLEGES NO SPECIFIC FACTS SHOWING DEMAND FUTILITY.

A. The Complaint Must Demonstrate, With Factual Particularity As To Each Director, Why A Majority Of The Board Cannot Objectively Evaluate A Demand.

In an unavailing effort to establish demand futility, the Opposition asserts, in various

[1] Plaintiff purports to sue the Estate of Steven P. Jobs pursuant to California Probate Code sections 550 and 552 to recover against insurance policies that may have covered Jobs. The primary directors' and officers' liability insurance company, Zurich American Insurance Company, has authorized this filing on behalf of the Estate. O'Melveny & Myers represents the Estate and does not represent the insurance companies. The filing of this reply brief on behalf of the Estate is not intended to, and does not, waive any terms or conditions in the policies, or any challenges any insurance company may have to the sufficiency of the service of process, personal jurisdiction or any other FRCP 12(b) or other defense to any insurance company's liability for the asserted claims. It is the Estate's understanding that the insurers have reserved all rights and coverage defenses.

forms, that Apple's Board "caused Apple to engage in anti-poaching practices or failed to stop them despite a known duty to act." (*See, e.g.*, Opp'n at 4.) Plaintiff asserts the Complaint alleges that Apple entered into dozens of anti-solicitation agreements with other companies. (*See id.* at 3.) But even if true, Plaintiff is unable to point to any specific allegation supporting an inference that *any* of Apple's Board members in office at the time of the filing of the Complaint knew about or permitted the allegedly improper agreements or were otherwise unable to properly consider a demand from Plaintiff. Instead, Plaintiff relies almost exclusively on the positions held by certain Apple directors and the alleged friendship between certain directors and the late Steve Jobs. This is simply not enough. Courts have soundly rejected attempts to impute directors with knowledge of alleged corporate activity solely on the basis of their status as directors or their service in various capacities. *See Rattner v. Bidzos*, No. Civ. A. 19700, 2003 WL 22284323, at *11 (Del. Ch. Oct. 7, 2003); *Desimone v. Barrows*, 924 A.2d 908, 943 (Del. Ch. 2007) (finding "the wholesale imputation of one director's knowledge to every other for demand excusal purposes" impermissible). Allegations that inside directors "operate the company collectively" and "consult extensively with each other" are insufficient to impute the alleged knowledge of one director to the other. *In re Google, Inc. S'holder Derivative Litig.*, No. C 11–4248 PJH, 2013 WL 5402220, at *6 (N.D. Cal. Sept. 26, 2013) (rejecting efforts to impute alleged knowledge of Google's former CEO to two other inside directors).

B. The Complaint Fails To Specifically Allege Facts Showing That Apple Had Anti-Solicitation Agreements With All Of The Companies Associated With Board Members.

Plaintiff's argument that demand would have been futile starts with a faulty premise—that Plaintiff alleges with particularity that Apple had anti-solicitation agreements with dozens of other companies. In paragraphs 59 through 95 of the Complaint, Plaintiff alleges specific communications, on specific dates with specific individuals, purporting to show anti-solicitation agreements between Apple and a few other companies (including Pixar, Google, and Adobe).[2] Plaintiff also relies on the DOJ action against Apple, which alleged the existence of three

[2] Defendants contest the accuracy of many of the allegations and inferences asserted by Plaintiff in these paragraphs.

agreements involving Apple and Adobe, Google, and Pixar. (*See* Declaration of Vivi Lee ("Lee Decl."), Ex. A.; Compl. ¶¶ 4-6.) For every other alleged agreement—including those with Genentech, J. Crew, Nike, and Intuit (all companies associated with an Apple director)—Plaintiff relies solely on a list of companies whose employees Apple's recruiters would not cold call. (*See* Opp'n at 3, 5-6, 12-16 (referencing Compl. ¶ 64).)

That list, however, cannot support an inference that anti-solicitation agreements existed with those companies. The DOJ and case law confirm that unilateral decisions not to cold call employees of other companies are entirely legal and appropriate and, under certain circumstances, bilateral no-cold-calling agreements are also legal. *See, e.g.*, *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1336 (Fed. Cir. 2010); Lee Decl., Ex. C at V. The reason for the list is obvious: to avoid creating the potential for an apparent conflict of interest that the directors were assisting Apple recruiters in hiring employees away from their own companies. Moreover, two of the companies on the list are clothing retail companies (Nike and J. Crew) that would not present attractive recruiting opportunities for a high-tech company like Apple. (*See* Compl. ¶ 151 ("Nike is a retail company and would not likely do a lot of recruiting at Apple for technical positions").) It would be unreasonable to infer that the inclusion of Nike and J. Crew was anything but Apple's unilateral decision to place companies associated with Apple directors on the list.

Plaintiff also attempts to reinforce his argument regarding the list of companies by a demonstrably false allegation: that Jobs placed an Apple director on the boards of each of the companies that "was actively involved or participated" in the challenged conduct. (Opp'n at 6.) Yet Plaintiff points to no Apple director who sat on the board of Adobe, Intel, Palm, ILM, or Dreamworks, even though Plaintiff alleges that Apple had an anti-solicitation agreement with those companies. (*See* Compl. ¶¶ 78-95.) There is simply no correlation between the challenged conduct and the directorships that Apple directors held at other companies. The Court should disregard the general summary allegation because it is contradicted by the more specific allegations regarding the work history of Apple's directors. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("The court need not … accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. … Nor is the court

required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.").

C. Plaintiff Fails To Allege That Any Apple Director Had Knowledge Of The Anti-Solicitation Agreements.

Even if Apple had entered into dozens of anti-solicitation agreements, which it did not, the Complaint still fails to allege particular facts to show demand futility. Specifically, Plaintiff fails to allege facts showing any involvement in or any knowledge of the alleged anti-solicitation agreements by any of the eight Apple Board members at the time of the Complaint's filing.

1. The Complaint Does Not Allege That Demand Was Futile With Respect To Gore, Sugar, And Wagner.

Plaintiff concedes that demand would not have been futile with respect to Gore, Sugar, and Wagner, who are not alleged to have been involved in any purported agreements and are not named as defendants.

2. The Conclusory Allegations Against Levinson Do Not Establish That Demand Would Have Been Futile.

The allegations that demand would have been futile as to Levinson rely on the inclusion of Genentech on Apple's do-not-call list and Plaintiff's bald assertion that the alleged anti-solicitation agreements "were brokered and implemented at the highest levels of" the companies.[3] (Opp'n at 8.) Plaintiff's theory relies on a factual and a legal fallacy. Plaintiff does not provide any factual allegation that Levinson had anything to do with the alleged agreements. In fact, the Complaint identifies only five persons who are arguably at the "highest levels" of three different companies and Apple: Steve Jobs, William Campbell (Google's Senior Advisor), Eric Schmidt (Google's CEO), Ed Colligan (Palm's CEO), and Bruce Chizen (Adobe's CEO). (Compl. at ¶¶ 59 – 95.) None of these individuals was a Board member of Apple when Plaintiff filed his Complaint.

Legally, Plaintiff's efforts to impute knowledge of others at Apple, Genentech, or Google to Levinson because of his role at those companies must also fail. *See Rattner*, 2003 WL

[3] Plaintiff also discusses a 2009 FTC investigation into whether Levinson's and Eric Schmidt's inclusion on the boards of both Apple and Google violated antitrust laws. (Opp'n at 7-8.) Plaintiff provides no explanation of how this alleged investigation has anything to do with the alleged anti-solicitation agreements.

22284323, at *11 (rejecting conclusory allegations of knowledge based on service in various capacities); *Desimone*, 924 A.2d at 943 (finding "the wholesale imputation of one director's knowledge to every other for demand excusal purposes" impermissible). Corporate officials are not presumed to know everything their subordinates know. *See Marvin H. Maurras Revocable Trust v. Bronfman*, Nos. 12 C 3395, 12 C 6019, 2013 WL 5348357, at *5 (N.D. Ill. Sept. 24, 2013). Demand is not excused as to Levinson.

3. The Conclusory Allegations Against Iger Do Not Establish That Demand Would Have Been Futile.

There are no factual allegations supporting a reasonable inference that Iger ever discussed or had any knowledge of the alleged conduct. Plaintiff's attempt to rely on Iger's role at Disney and Apple and his friendship with Jobs is unavailing. Iger joined Apple's Board well after the DOJ settlement and could not have been involved in Apple's prior recruiting practices. (Compl. ¶¶ 5, 36.) The Complaint contains no factual allegations indicating Iger was ever informed of any recruiting agreements involving Apple. He cannot be presumed to share his subordinates' knowledge or be charged with knowledge of alleged corporate activity based solely on his roles as a Disney director and CEO. See *Maurras Revocable Trust*, 2013 WL 5348357, at *5. It is also unreasonable to impute Jobs's knowledge to Iger simply because they discussed Disney movies and served together on Disney's board. "[M]ere allegations that directors move in the same social circles, or a characterization that they are friends, is not sufficient to negate a director's independence for demand excusal purposes." *In re Verisign, Inc., Derivative Litig.*, 531 F. Supp. 2d 1173, 1197 (N.D. Cal. 2007). Demand is not excused as to Iger.

4. The Conclusory Allegations Against Drexler Do Not Establish That Demand Would Have Been Futile.

As with Levinson and Iger, Plaintiff relies on Drexler's role at Apple and a second company—J. Crew, a retail clothing company—and on Drexler's friendship with Jobs to establish demand futility. As with Levinson and Iger, Plaintiff provides no factual allegation that Drexler had anything to do with, or had any knowledge of, the alleged agreements. Drexler cannot be presumed to have knowledge of any purported anti-solicitation agreement simply because he served as a director at Apple and J. Crew or because he knew Jobs. *See Desimone*, 924 A.2d at

943; *Guttmann v. Jen-Hsun Huang*, 823 A.2d 492, 499 (Del. Ch. 2003); *In re Google, Inc.*, 2013 WL 5402220, at *6. Demand is not excused as to Drexler.

5. The Conclusory Allegations Against Cook Do Not Establish That Demand Would Have Been Futile.

As with other directors, Plaintiff weakly attempts to connect Cook to the alleged conduct based on his friendship with Jobs and his role at Apple and another company—Nike—which Plaintiff asserts had an anti-solicitation agreement with Apple. (Opp'n at 6-7.) As noted above, Plaintiff's allegations do not support the assertion that any such agreement existed. Moreover, as with the other directors, Plaintiff's allegations cannot reasonably support an inference that Cook had any knowledge of the alleged non-solicitation agreements. The factual allegations do not support a finding that Cook faces a substantial likelihood of personal liability. Finally, Plaintiff alleges that Cook indirectly earned higher compensation as a result of the alleged conduct. (*Id*. at 7.) However, the purported indirect impact of the alleged conduct does little to establish that Cook had any knowledge of that alleged conduct. There is no reason to doubt Cook's ability to independently and disinterestedly consider a demand. Demand is not excused as to Cook.

6. The Conclusory Allegations Against Jung Do Not Establish That Demand Would Have Been Futile.

Plaintiff's allegations regarding Jung are not only insufficient but perplexing. Plaintiff suggests that Jung would have known about the alleged anti-solicitation agreements because of her knowledge of an unrelated government investigation at Avon when she was CEO and because she was an Apple director at the time of the DOJ investigation. Plaintiff provides no explanation for how an unrelated investigation at a separate company would reveal the existence of anti-solicitation agreements. The Complaint contains no facts suggesting Jung had any awareness of the challenged conduct prior to the DOJ's investigation and no facts suggesting that she became aware of and approved or acquiesced in any challenged conduct during the DOJ investigation. Rote allegations of participation in the challenged conduct are not sufficient to excuse demand. *See Shields v. Singleton*, 15 Cal. App. 4th 1611, 1621 (1993) (rejecting conclusory allegations that directors "participated in, conspired in, or aided and abetted the criminal and fraudulent activities at issue"); *Laborers' Local v. Intersil*, 868 F. Supp. 2d 838, 845-46 (N.D. Cal. 2012)

(noting that demand is not excused by merely pleading that the directors participated in the challenged conduct). Demand is not excused as to Jung.

7. The Complaint Fails To Identify Any Report To Or Communication With The Apple Board Regarding The Challenged Conduct.

Rosenbloom v. Pyott, 765 F.3d 1137 (9th Cir. 2014), cited by Plaintiff, demonstrates the significant deficiencies in Plaintiff's allegations. In *Rosenbloom*, the court found that the allegations pled specific facts showing that a majority of the Allergan board was involved in or was aware of all or nearly all of the allegedly illegal conduct related to the off-label marketing practices for Botox. *Id*. at 1144-47, 1154. The *Rosenbloom* plaintiffs alleged that (1) the Allergan executives made presentations and reports to the Board regarding the specific off-label marketing programs and promotional materials at issue in the litigation, *id.* at 1142-43; (2) the Board "discussed and approved a number of 'strategic plans' that expressly depended on" the illegal conduct, *id.* at 1144-45; (3) "the Board closely and continuously monitored Botox sales for on- and off-labels indications" and identified specific Board meetings where the topic was discussed, *id.* at 1145; and (4) the Board was alerted to the illegality of the conduct at issue by a series of FDA letters, an internal "investigation in which several board members were involved" prompted by one of those FDA letters, and Board discussion of an "ethics complaint by an employee who stated she was resigning after only six weeks at Allergan due to concerns about its off-label marketing program," *id.* at 1146-47.

In contrast to the detailed allegations in *Rosenbloom*, Plaintiff here can point to no allegations that any Apple Board member—let alone the Board—received any report or presentation about, conducted any monitoring of, or was alerted to any illegality related to the challenged conduct. Indeed, Plaintiff points to not a single discussion with any Board member—or at a Board meeting—regarding the challenged conduct.

D. No Current Director Faces A Substantial Likelihood Of Personal Liability For The Challenged Conduct.

Plaintiff's complete failure to allege any director's knowledge of or participation in the challenged conduct means Plaintiff cannot show that any of the directors face a substantial risk of personal liability, as required to excuse demand. *Seminaris v. Landa*, 662 A.2d 1350, 1355 (Del.

Ch. 1995) (rejecting "discredited refrain" that directors would not "'sue themselves'"). As discussed in the moving papers, Apple's Articles of Incorporation bar director liability for anything short of intentional misconduct, bad faith, self-dealing, or deliberate abdication of duties. *See* Lee Decl., Ex. H, Article IV Sect. 1 (eliminating director liability "to the fullest extent permissible under California law"); Cal. Corp. Code § 204(a)(10) (permitting corporations to "eliminat[e] or limit[] the personal liability of a director for monetary damages in an action brought by or in the right of the corporation for breach of a director's duties to the corporation and its shareholders" except in cases of intentional misconduct, bad faith, self-dealing, or deliberate abdication of duties).

Plaintiff asserts that the Court cannot consider California's exculpatory provision on a motion to dismiss because it is in the form of an affirmative defense. (Opp'n at 18-19.) Plaintiff is wrong. "[T]he assertion of an affirmative defense may be considered properly on a motion to dismiss where the 'allegations in the complaint suffice to establish' the defense." *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013) (quoting *Jones v. Bock*, 549 U.S. 199, 215 (2007)). The Court can properly consider the exculpation clause in considering whether demand futility is excused. *In re Abbott Labs. Derivative S'holder Litig.*, 126 F. Supp. 2d 535, 537 (N.D. Ill. 2000) (dismissing claims where all claims for unintentional wrongs were barred by exculpatory clause).

Plaintiff has not established that, at the time the action was filed, any Apple Board member—let alone a majority of Apple's Board—was incapable of impartially considering a litigation demand. In the absence of actual particularized facts, Plaintiff instead relies on attenuated inferences and conclusory allegations in a failed attempt to implicate the directors' disinterestedness and independence.[4] Because such allegations carry no weight, Defendants' motion to dismiss must be granted. *See Shields*, 15 Cal. App. 4th at 1622 (rejecting general allegations indiscriminately leveled against all directors); *In re Silicon Graphics Inc. Sec. Litig.*,

[4] Plaintiff also argues the tone and substance of Apple's motion to dismiss demonstrate hostility suggesting demand would be futile. Courts have found such arguments to be without merit. *Kaufman v. Kansas Gas and Elec. Co.*, 634 F. Supp. 1573, 1581 (D. Kan. 1986) (finding that filing motion to dismiss shareholder derivative complaint does not evidence hostility); Aronson *v. Lewis*, 473 A.2d 805, 810 (Del.1984) ("[F]utility is gauged by the circumstances existing at the commencement of a derivative suit ... [, which] dispose[s] of plaintiff's argument that defendants' motion to dismiss established board hostility and the futility of demand").

183 F.3d 970, 990 (9th Cir. 1999) (same).

II. PLAINTIFF FAILS TO STATE ANY CLAIM.

Plaintiff's claims sound in fraud but fail to meet the heightened pleading standards that are required of fraud claims under Rule 9(b) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4. When judging the sufficiency of Plaintiff's allegations, the Court must ignore conclusory allegations that do not have the support of sufficient factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). And the Court should draw inferences from Plaintiff's allegations only to the degree they are plausible. *Iqbal*, 556 U.S. at 670. Considering these standards, the Complaint falls well short of the mark.

A. Plaintiff Fails To State A Claim Under § 14(a) Of The Exchange Act.

In his first Count, Plaintiff claims that Defendants issued material misstatements or omissions in Apple's proxy statements, a claim that sounds in fraud. Contrary to Plaintiff's position (Opp'n at 20), binding precedent holds that where a plaintiff asserts a fraud claim under § 14(a) of the Exchange Act, "Federal Rule of Civil Procedure 9(b) and the PSLRA require [a plaintiff] to plead her case with a high degree of meticulousness." *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022 (9th Cir. 2000); *see also Calamore v. Juniper Networks, Inc.*, No. C 07-01772 JW, 2008 WL 6971767, at *2 (N.D. Cal. Aug. 13, 2008) (holding that § 14(a) claims must satisfy Rule 9(b) pleading requirements when alleging fraud).

Rule 9(b) requires that a complaint allege "with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Plaintiff's allegations that the director Defendants "continuously caused Apple to violate antitrust laws" are conclusory. (Compl. ¶¶ 101, 106, 111.) As discussed above, Plaintiff has provided no particularized allegations showing that the Board members were even aware of the alleged practices, much less their cause. *See supra* § I.C. Moreover, the alleged omissions regarding the DOJ's investigation—which had concluded years earlier—and the possibility of criminal or civil liability, (Compl. ¶ 166), are immaterial as a matter of law because, "while pending litigation may be material under certain circumstances, the mere possibility of litigation is not." *Gen. Elec. Co. v. Cathcart*, 980 F.2d 927,

935 (3d Cir. 1992). Because Plaintiff fails to satisfy the pleading requirement as to his § 14(a) claim, and for the other reasons articulated in Defendants' moving papers, the Court should dismiss that claim.

B. Plaintiff Fails To State A Claim For Counts II Through V

Because Plaintiff's claims sound in fraud, he must plead the circumstances with specificity. Fed. R. Civ. P. 9(b). Plaintiff disagrees, claiming he merely alleges claims for breach of fiduciary duty. (Opp'n at 22.) That, however, is not the law. Where a "claim is said to be 'grounded in fraud' or to 'sound in fraud,'" the pleading "as a whole must satisfy the particularity requirement of Rule 9(b)." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (quoting *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir.2003); *see also Borsellino v. Goldman Sachs Grp., Inc.*, 477 F.3d 502, 507 (7th Cir. 2007) ("Although claims of interference with economic advantage, interference with fiduciary relationship, and civil conspiracy are not by definition fraudulent torts, Rule 9(b) applies to 'averments of fraud,' not claims of fraud, so whether the rule applies will depend on the plaintiffs' factual allegations.")

Plaintiff's claims are grounded in fraud. Plaintiff seeks extraordinary damages because of Defendants' alleged fraud. Plaintiff alleges Defendants acted fraudulently "at all relevant times." (Compl. ¶¶ 45, 176, 180, 184.) Plaintiff cannot allege fraud without accepting the pleading standards that go with it. For the reasons articulated in Defendants' moving papers, Plaintiff fails to satisfy this pleading requirement. *See also supra* § I.C. (discussing Plaintiff's failure to allege, with specificity, that Board members participated in or were aware of the challenged conduct).

III. PLAINTIFF'S CLAIMS ARE TIME-BARRED

As Plaintiff acknowledges, the applicable statute of limitations for a claim is governed by "the gravamen of the complaint." *City of Vista v. Robert Thomas Sec., Inc.*, 84 Cal. App. 4th 882, 889 (2000) (holding that where the gravamen of the complaint is fraud, the three-year statute of limitations applies, even where plaintiff had asserted a cause of action for breach of fiduciary duty). Because they sound in fraud, *see supra* Part II.B., the relevant limitations period for Plaintiff's common law claims is three years. *See, e.g.*, *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1479 (2014).

The Complaint establishes that, at the latest, a reasonable plaintiff would have been put on inquiry notice by DOJ's September 24, 2010 press release announcing the alleged wrongdoing was at an end. (*See* Compl. ¶ 96; Lee Ex. B.) Plaintiff's state law claims should have been brought within three years of the press release. Plaintiff's § 14(a) claim should have been brought within one year of the press release. 15 U.S.C. § 77m. Plaintiff argues he could not have known that directors were involved, (Opp'n at 23-24), but his claim is belied by the press coverage and DOJ press release, which form the basis of Plaintiff's claims here. (*Compare, e.g.*, Lee Decl., Ex. A ¶¶ 17-26 (alleging Apple's senior executives entered into improper agreements with Google, Adobe, and Pixar not to cold call each other's employees) *with* Compl. ¶¶ 59-85 (same)).

Plaintiff presents a novel argument that he was not placed on inquiry notice until he knew a board demand would be futile. (*See* Opp'n at 23–24.) But demand futility has no impact on whether the elements of a cause of action are met. *Kaufman*, 634 F. Supp. 1573, 1581. Moreover, "futility is gauged by the circumstances existing at the commencement of a derivative suit." *Aronson*, 473 A.2d at 810. Under Plaintiff's theory, demand futility—which is determined when the complaint is filed—would always trump the statute of limitations. Such cannot be the law. When widespread coverage of the DOJ's settlement with Apple put Plaintiff on notice of the core facts on which he bases his Complaint, *(see* Lee Exs. B, L-U), Plaintiff had three years to investigate, draft, and file his Complaint. *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111 (1988) ("So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her"). The Court should not excuse three years of inaction just because Plaintiff alleges that demand would have been futile when he filed the Complaint.

Finally, Plaintiff argues that the limitations period for his common law claims should be tolled because of fraudulent concealment. (Opp'n at 25 n.23.) To meet that exception, though, Plaintiff should have "(1) plead[ed] with particularity the facts giving rise to the fraudulent concealment claim and (2) demonstrate[d] that he or she used due diligence in an attempt to uncover the facts." *Allen v. Similasan Corp.*, __ F. Supp. 3d __, No. 12–cv–376 BAS (JLB), 2015 WL 1533463, at *6 (S.D. Cal. Mar. 30, 2015). Plaintiff's allegations fall short on both counts—he is silent on how and when Apple's directors concealed any wrongdoing and he says

nothing about what steps he took to uncover that wrongdoing.

CONCLUSION

Because the Complaint lacks sufficient particularized factual allegations supporting a finding that a demand on Apple's Board would have been futile at the time Plaintiff filed the Complaint, the Court should grant Defendants' motion to dismiss. Defendants' motion to dismiss must also be granted because Plaintiff's claims are untimely and not sufficient to state a claim against any Defendant.

Dated: April 17, 2015

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