EXHIBIT 1

Ian D. Berg (Bar No. 263586)
ABRAHAM FRUCHTER,
& TWERSKY, LLP
11622 El Camino Real, Suite 100
San Diego, California 92130
Tel: (858) 764-2580
Fax: (858) 764-2582
iberg@aftlaw.com

Counsel for Harriet Steinberg

[Additional counsel listed on signature page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE HEWLETT-PACKARD COMPANY SHAREHOLDER DERIVATIVE LITIGATION	MASTER DOCKET NO. C-12-6003 CRB (EDL) **HARRIET STEINBERG'S OBJECTION TO THE PROPOSED SETTLEMENT** **[PUBLIC VERSION]**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES xi

INTRODUCTION 1

SUMMARY OF FACTS 2

Hewlett Packard 2

Autonomy 3

HP Becomes Interested in Acquiring Autonomy Despite Having Rejected the Idea Only Months Earlier 3

"Red Flags" Cast Doubt on Autonomy's Reported Growth and Profitability 4

HP Fails to Properly Conduct Financial Due Diligence Prior to the Acquisition and Ignores Specific Warnings Made by KPMG 6

HP Also Fails to Properly Perform Operational Due Diligence Prior to the Acquisition 8

HP Makes A Premium Offer for Autonomy Notwithstanding the Lack of Due Diligence 8

The Board Proceeds With the Acquisition Over the CFO's Opposition and After "New News" is Brought to The Board's Attention 8

Investors Are Horrified When the Acquisition is Announced 9

HP Terminates Apotheker and Robison After Learning of Key Due Diligence Failures and Publicly Blames Them for the Acquisition 10

HP Institutes the M&A Reforms 11

The Board Members Share Responsibility for HP's Due Diligence Failures 11

Autonomy's Post-Acquisition Results Fall Far Behind Projections 12

HP Restates Autonomy's Financials for GAAP Recognizing a Related $5 Billion Charge 13

The Board Forms the Committee Which Exonerates Everyone at HP of Liability by Accusing Lynch, Hussain and Deloitte UK of Fraud in Connection With the Acquisition 14

HP Adopts the Governance Revisions Some of Which Were "Informed" by the Settling Plaintiffs Recommendations 14

HP Sues Lynch and Hussain – But Not Deloitte UK -- Alleging Accounting Fraud Based Upon the Very Transactions Addressed in Deloitte UK's Audit Committee Memos 15

No Criminal Charges Have Ever Been Filed 16

Steinberg's Demand Refused Claims 16

ARGUMENT 17

I. THE SETTLING PARTIES BEAR THE BURDEN OF DEMONSTRATING BY CLEAR AND CONVINCING EVIDENCE THAT THE PROPOSED SETTLEMENT IS FAIR AND REASONABLE 17

II. THE SETTLING PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE CLAIMS THEY ARE SEEKING TO RELEASE ARE WEAK 18

A. The Settling Plaintiffs Have Failed to Demonstrate That the Claims They Are Seeking to Release Lack Merit 18

i. Claims Against Apotheker and Robison 19

ii. Claims Against HP's Directors 20

iii. Claims Against HP Directors Serving on the FIC 22

iv. Claims Against Directors Serving on the Technology Committee 23

v. Claims Against Barclay's and Perella Weinberg 24

B. The Settling Plaintiffs Have Failed to Demonstrate That Steinberg's Complaint is Subject to Dismissal 24

i. The Complaint Filed by Steinberg is Not Subject to Dismissal Because the Board Insulated its Analysis of the Claims From Scrutiny 25

ii. A Reasonable Doubt Exists Whether the Committee was Properly Informed or Reached Conclusions Which Could Not Have Been the Product of Good Faith in Refusing the Demand 26

a. Claims Against Apotheker and Robison 27

b. Claims Against the Board 28

c. Claims Against the FIC....29

d. Claims Against the Technology Committee....29

e. Claims Against Barclays and Perella Weinberg....30

III. THE SETTLING PARTIES HAVE FAILED TO DEMONSTRATE THAT HP IS OBTAINING A SUBSTANTIAL BENEFIT FROM THE PROPOSED SETTLEMENT....30

A. The Settling Plaintiffs Have Failed to Demonstrate That the Governance Revisions Would Have Prevented the Losses HP Suffered in the Acquisition....30

B. The Settling Parties Have Failed to Demonstrate That the Settling Plaintiffs' Input was a Substantial Factor in Formulating the Governance Reforms....32

C. No Consideration Supports the Proposed Release of Claims Provided to HP'S Former Officers and Directors as Well as the Professional Advisers....33

IV. THE EARLY STAGE OF THE PROCEEDINGS ALSO COUNSELS AGAINST APPROVING THE PROPOSED SETTLEMENT....34

A. The Discovery Taken by the Settling Plaintiffs Has Been Extremely Limited....34

B. The Continued Pendency of the Action Against Lynch And Hussain Also Counsels Against Approving the Proposed Settlement....35

CONCLUSION....35

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases **Page(s)**

Ash v. McCall,
C.A. No. 17132-CC, 2000 Del. Ch. LEXIS 144 (Del. Ch. Sept. 15, 2000) 19

Barkan v. Amsted Indus., Inc.,
567 A.2d 1279 (Del. 1989) 17

Barovic v. Ballmer,
2014 U.S. Dist. LEXIS 175599 (W.D. Wash. Dec. 10, 2014)....................25

Brehm v. Eisner (In re Walt Disney Co. Deriv. Litig.),
906 A.2d 27 (Del. 2006) 19, 23, 24

Carroll ex. Rel. Citibank, Inc. v. Weill,
Index No. 600645/06 (N.Y. Sup. Ct. May 14, 2007)....................33

City of Orlando Police Pension Fund v. Page,
970 F. Supp. 2d 1022 (N.D. Cal. 2013) 25

Gantler v. Stephens,
965 A.2d 695 (Del. 2009) 27

Grimes v. DCS Communications Corp.,
724 A.2d 561 (Del. Ch. 1998)....................25

Grimes v. Donald,
673 A.2d 1207 (Del. 1996) 24

In re Del Monte Foods Co. S'holders Litig.,
25 A.3d 813 (Del. Ch. 2011)....................22

In re General Motors Corp. Engine Interchange Litigation,
594 F.2d 1106 (7th Cir. 1979) 17

In re Oracle Corp. Deriv. Litig.,
824 A.2d 917 (Del. Ch. 2003)....................25

In re Oracle Sec. Litig.,
852 F. Supp. 1437 (N.D. Cal. 1994) 32

In re Primedia Inc.,
67 A.3d 455 (Del. Ch. 2013)....................24

In re Rambus Inc. Deriv. Litig.,
No. c-06-3515-JF, 2009 WL 166689 (N.D. Cal. Jan. 20, 2009)....................17

In re Toys "R" Us, Inc., S'holder Litig.,
877 A.2d 975 (Del. Ch. 2005)....................22

Kaplan v. Rand,
192 F.3d 60 (2d Cir. 1999)....................30, 31

Karpus v. Borelli (In re Interpublic Sec. Litig.),
2004 U.S. Dist. LEXIS 21429 33

La. Municipal Ret. Sys. v. Morgan Stanley & Co.,
2011 Del. Ch. LEXIS 42 (Del. Ch. Mar. 4, 2011) 25

Linney v. Cellular Alaska P'ship,
151 F.3d 1234 (9th Cir. 1998) 30

McCall v. Scott,
239 F.3d 808 (6th Cir. 2001) 21

MCG Capital Corp. v. Maginn,
C.A. No. 4521-CC, 2010 Del. Ch. LEXIS 87 (Del. Ch. May 5, 2010) 19

Mills Acquisition Co. v. Macmillan, Inc.,
559 A.2d 1261 (Del. 1989) 20, 21

Mills v. Electric Auto-Lite Co.,
396 U.S. 375 (1970) 30

Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.,
660 F.2d 9 (2d Cir. 1981) 34

Resnick v. Frank (In re Online DVD-Rental Antitrust Litig.),
779 F.3d 934 (9th Cir. 2015) 34

Rosenbloom v. Pyott,
765 F.3d 1137 (9th Cir. 2014) 20, 23

Scattered Corp. v. Chicago Stock Exch.,
701 A.2d 70 (Del. 1997) 24

Schechtman v. Wolfson,
244 F.2d 537 (2d Cir. 1957) 33

Steiner v. Williams,
2001 U.S. Dist. LEXIS 7097 (S.D.N.Y. May 31, 2001) 33

Stepak v. Addison,
20 F.3d 398 (11th Cir. 1994) 24

Stone v. Ritter,
911 A.2d 362 (Del. 2006) 20

Winkelman v. General Motors Corp.,
48 F. Supp. 490 (S.D.N.Y. 1942) 33-34

Statutes and Rules

8 Del. C. §102(b)(7) 20, 21, 23, 27

Fed. R. Civ. P. 23.1(c) 17

Treatises

R. Franklin Balotti & Jesse A Finkelstein, DELAWARE LAW OF ORGANIZATION & BUSINESS CORPORATIONS, §4.16[B] 20

Manual for Complex Litigation Fourth §21.61 33

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATEMENT OF ISSUES

1. Whether the proposed settlement (the "Proposed Settlement") of shareholder derivative claims is fair and reasonable to Hewlett-Packard Company ("HP" or the "Company")?

2. What evidentiary burden must do Plaintiff Stanley Morrical and other HP shareholders advocating the Proposed Settlement (the "Settling Plaintiffs") satisfy to demonstrate that the Proposed Settlement is fair and reasonable?

3. Whether the Settling Plaintiffs have demonstrated that the claims asserted lack merit?

4. Whether the Settling Plaintiffs have demonstrated that the demand refused claims asserted by Steinberg are subject to dismissal?

5. Whether the board of directors (the "Board") of HP has improperly insulated its analysis of the derivative claims from scrutiny?

6. Whether a reasonable doubt exists with respect to the demand review committee ("DRC" or the "Committee") having been properly informed or reaching conclusions which were the product of an absence of good faith?

7. Whether the Settling Parties have demonstrated that any the Governance Reforms constitute a substantial benefit to HP?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

This case is highly unusual in that the Company and its DRC both concede, indeed *insist*, that: some materially wrongful and actionable conduct occurred in connection with the Company's acquisition (the "Acquisition") of Autonomy Plc ("Autonomy"); the wrongful conduct caused the Company substantial injury, measured in the billions of dollars; and that those at fault should pay for the harm caused. However the Proposed Settlement here is not fair or reasonable because it seeks to bargain away valuable and meritorious claims which could be asserted against HP's senior executives, members of the Company's Board at the time of the Acquisition and their investment bankers for settlement consideration which ranges somewhere between illusory and non-existent. As a result, the Settling Plaintiffs have failed to carry their burden of demonstrating that the Proposed Settlement is fair and reasonable.

Leo Apotheker ("Apotheker") and Shane Robison ("Robison"), respectively the Company's CEO and Chief Strategist, as the "Sponsors" of the Acquisition were charged with the responsibility for insuring that due diligence had been properly completed before HP spent more than ***$11 billion*** to acquire Autonomy. Apotheker and Robison failed in their task by, among other things, either ignoring or not knowing of the crucial, pre-acquisition KPMG Report which warned that financial due diligence had not been properly completed and, as a result, the key financial assumptions supporting the Acquisition could not be confirmed.

Although the case for liability against Apotheker and Robison is the strongest, Board members are also at a substantial risk of liability because they ignored a key, *flashing* red flag from HP's CFO warning them that the Acquisition was overpriced and achieving the synergies which lay at the heart of the transaction would be difficult and other red flags concerning the lack of organic growth at Autonomy. The Board's Finance and Investment Committee ("FIC") appears to have done nothing material before its foolhardy recommendation of the Acquisition to the Board. Similarly, the Board's Technology Committee utterly abdicated its responsibility in failing to follow through on its mandate to insure that the technology owned by Autonomy was fully up to date. There are other potentially meritorious claims against Barclays (which HP

Board members knew was subject to a direct conflict of interest) and Perella Weinberg, but HP has blocked any effort to analyze those claims by redacting most of the analysis performed by counsel for the DRC with respect to those claims.

In contrast to the strength of the claims against those being fully released the Proposed Settlement consideration consists of a series of Governance Revisions which the Settling Plaintiffs have failed to demonstrate would have prevented the losses suffered by HP in the Acquisition. In addition, the Settling Plaintiffs have failed to demonstrate being materially responsible for the Governance Revisions or that many of the Defendants being released from liability have any connection to the adoption or implementation of the Governance Revisions.

Finally, the limited record developed by the Settling Plaintiffs further counsels against approval of the Proposed Settlement. This is particularly true given that HP has sued Messrs. Lynch and Hussain, the former CEO and CFO of Autonomy, alleging they defrauded HP in the Acquisition. If, however, Lynch and Hussain are ultimately found to be not liable or only liable for a limited percentage of the damages suffered by HP, that will inevitably strengthen any potential claim which could be asserted against the Defendants which the Settling Plaintiffs seek to release for the anemic and illusory relief obtained in the Proposed Settlement.

Therefore, and for the reasons set forth below in greater detail and in Steinberg's prior submissions (Docket Nos. 217, 256, 296), the Court should decline to grant final approval to the Proposed Settlement.

SUMMARY OF FACTS

Hewlett Packard

HP is a leading global provider of products, technologies, software, solutions and services to individual consumers, small- and medium-sized businesses and large enterprises, including customers in the government, health and education sectors. HP had over the years attempted to acquire different businesses in order to expand into higher margin software offerings including 3Com Corporation, Palm, Inc., 3Par Inc. and ArcSight, Inc. *See* HP_DER3_00012685-12706 (Ex. 1). Those acquisitions, however, had uniformly proven

1 unsuccessful causing HP to take substantial related charges against the Company's earnings
2 including $885 million for Palm. *See* Nov. 21, 2011 HP press release (Ex. 28). HP's most
3 recent acquisition of EDS, an information and technology equipment services company, also did
4 not work out well, ultimately resulting in an $8 billion write down. *See* DRC Resolution (Dkt.
5 No. 211-1) at 2.

6 **Autonomy**

7 Autonomy was headquartered in England and was the second largest software company
8 in Europe. Autonomy's leading software product was known as Intelligent Data Operating
9 Layer ("IDOL"). UK Complaint (Ex. 29) ¶30.1. Autonomy had also been an active acquirer of
10 other software companies including Verity, an enterprise search and business management
11 software company, acquired in December 2005 for approximately $500 million, Zantaz, an email
12 archiving and litigation support company, acquired in June 2007 for $375 million, Interwoven, a
13 niche provider of enterprise management software in January 2009 for $775 million, and Iron
14 Mountain Digital, a pioneer in E-discovery and online backup solutions provider, in May 2011
15 for $380 million. *See* HP_DER3_00002403 (Ex. 2).

16 Autonomy presented itself as a company whose revenues were derived from the sale of
17 its IDOL software and related services. UK Complaint ¶53. Software sales were reported to
18 have generated high gross margins of 88.1% in 2009 and 87.3% in 2010 (UK Complaint ¶¶70.1
19 and 70.2) with operating margins of 36.8% in 2009 and 36.4% in 2010. DRC Resolution at 24;
20 §XIV.C.1.b. Autonomy also reported that it was generating high levels of "organic growth"
21 (defined as increases in revenue excluding the effects of acquisitions and foreign exchange) and
22 "organic IDOL growth" (defined as increases in revenues excluding the effect of acquisitions,
23 foreign exchange, service revenues and deferred release revenues). UK Complaint ¶61.4.

24 **HP Becomes Interested in Acquiring Autonomy**
25 **Despite Having Rejected the Idea Only Months Earlier**

26 HP had previously identified Autonomy as a potential acquisition candidate. However,
27 as late as August 2010, HP declined to proceed with any acquisition because it feared that it
28 would be "[o]verpaying for business which may stagnate." HP_DER3_00012728 (Ex. 1). In

1 addition, HP observed that it would "[l]ikely be difficult to integrate" Autonomy because of,
2 among other things, "Company culture mismatch" and "HP lacks service skills/capacity to scale
3 breadth of portfolio . . . ." *Id.*
4 Nonetheless, in November 2010 Apotheker became HP's CEO and informed the Board
5 of his belief that HP had to expand "into new technologies that may . . . be outside of HP's core
6 competencies." DRC Resolution at 29; §XV.C.3.b.i. Apotheker perceived Autonomy to be an
7 appealing acquisition target because it had a superior software product, *i.e.*, IDOL, selling at high
8 margins and experiencing rapid growth in sales. *See, e.g.,* UK Complaint ¶¶171-172.
9 **"Red Flags" Cast Doubt on Autonomy's Reported Growth and Profitability**
10 Autonomy, as an English company, reported its financial results under IFRS which
11 differs substantially from GAAP standards governing financial reporting by U.S. companies.
12 Those reporting differences are particularly pronounced with respect to reporting revenues from
13 software sales. *See, e.g.,* PriceWaterhouseCoopers LLP, IFRS AND US GAAP: SIMILARITIES AND
14 DIFFERENCES, October 2014 at 16 ("potential for significant differences" between GAAP and
15 IFRS with respect to software revenue recognition) (Ex. 31).
16 Autonomy's reported financial results were viewed skeptically by the investment
17 community. For example, concerns existed about "the unusual inclusion of hardware" sales in
18 operating results. July 26, 2010 RBC Capital Markets Report (Ex. 32) at 1. *See also* July 22,
19 2010 Piper Jaffray Report (Ex. 31) at 1 (noting "a mix shift towards appliance (*i.e.*, hardware)
20 revenue in the quarter."). Indeed, on February 1, 2011, Numis Securities Ltd. issued a report on
21 Autonomy titled "Slow Dark Clouds . . . ." warning that reported revenues were "potentially
22 flattered by . . . hardware sales . . . ." Ex. 34 at 1.
23 In addition, Autonomy's publicly reported organic growth numbers had been the subject
24 of widespread skepticism by investors. *See, e.g.*, Paul Morland, *Autonomy Must Stand Up and*
25 *Be Recounted Over Growth Rates*, TELEGRAPH (Nov. 25, 2012) (Ex. 35). Thus, on June 25,
26 2010, J.P. Morgan Cazenove ("JP Morgan") issued a report giving Autonomy an underweight
27 (*i.e.*, a sell) recommendation stating that:
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

> ***We continue to rate the stock Underweight as we believe the underlying growth in the business is at best single digit and the underlying margins are significantly lower than those reported in the P&L.*** Our thesis remains unchanged: ***poor cash conversion resulting from a growing working capital requirement can only be masked by regular acquisitions*** that exhibit strong cash generation and negative working capital. . .
>
> ***When analysed historically, Autonomy shows little or no organic growth in deferred revenue.*** [Emphasis added.]

Ex. 36 at 1. On July 22, 2010, JP Morgan issued a report concluding that after taking hardware sales and recent acquisitions "***the underlying business declined in the quarter***." Ex. 37 at 1 (emphasis added). An October 25, 2010, report from JP Morgan stated that: "***[w]e have consistently argued that growth at Autonomy has been fuelled by acquisitions and not organic growth***." Ex. 38 at 1 (emphasis added).

On October 22, 2010, KBC Peel Hunt issued a particularly prescient analyst report questioning Autonomy's organic growth and stating that:

> **What is the correct definition of organic growth?**
>
> The calculation of organic growth for an acquisitive company is very important. ***Underlying license growth is probably the single most important driver of the rating for a software company.*** It gives a valuable insight into the competitiveness of the product, the growth rate of the market for the product, visibility of future maintenance streams and the sustainability of long term earnings growth. In Q3 2008 Autonomy claimed that it had grown IDOL (product/license) organically at 50%. In Q3 2010, we estimate that this growth rate had fallen to 3% (10% according to Autonomy) and without 30% growth from the OEM business, core license sales would have gone into reverse. ***The implied rating differential between a company growing at 50% and one doing just 3% is cavernous.***
>
> **Autonomy's note on itself confirms our worst fears**
>
> If we look at page three of Autonomy's note on itself, published on the company's website, we can see exactly how it defines organic growth. Our table below suggests that not only is this ***growth exaggerated***, but it is inconsistent with calculations made by the company in 2009.
>
> * * *
>
> **Autonomy's definition of organic growth is misleading**
>
> The reason all of this is important is because, as we said above, organic license growth is the single most important determinant of the multiple commanded by a software stock. ***Autonomy would presumably argue that by acquiring a company with products that do not use IDOL and then adding IDOL to the offering, all subsequent sales become organic growth. While the logic of this cannot be denied, it does result in what we believe to be a misleading***

> ***interpretation of organic growth. This is because it is one-off in nature and gives no indication of the longer term potential for growth.***

Ex. 39 at 2-3 (emphasis added). HP's prior due diligence with respect to Autonomy had also concluded that to "fuel standalone future growth requires [Autonomy's] continuation of acquisition strategy." HP_DER3_00012728 (Ex. 1).

Indeed, Barclays, HP's primary investment bank advising the Company on the Acquisition, stated in its presentation materials with respect to Autonomy that there were "[c]oncerns over organic growth and debate about whether or not recent growth trends are indicative of structural inadequacies have resulted in stock price losing luster over the past 12 months." HP_DER3_00013516 (Ex. 1). In addition, Barclays observed that there existed:

- Challenges to accounting approach have led to investor concern
- Disclosure not perceived as transparent

HP_DER3_00013517 (Ex. 1).

HP Fails to Properly Conduct Financial Due Diligence Prior to the Acquisition <u>and Ignores Specific Warnings Made by KPMG</u>

HP's stated policy had long been that:

> Before we decide to sign a definitive acquisition agreement, we have to obtain and review material information (including non-public information) to verify our initial interest and evaluate the acquisition's risks and liabilities. This process is called ***due diligence***.

HP's 2007 Integration Playbook (HP_DER3_00012649) (Ex. 1) (emphasis added). Indeed, HP had a relatively elaborate series of procedures in place designed to implement the core purpose of due diligence of properly evaluating the assets being purchased. *See* HP_DER2_00000045-53 (Ex. 3); HP_DER3_00012639-12641 (Ex. 1).

A key area of risk of the Acquisition related to the lack of transparency in Autonomy's reported financial results. As discussed above, several highly regarded securities analysts openly questioned the veracity of the assumptions lying at the heart of HP's valuation of Autonomy, *i.e.*, revenue generated by software sales, Autonomy's operating margins and organic growth rate. *See* pp. 4-6, *supra.*

KPMG, which had been rationed to perform due diligence with respect to Autonomy's financial statements, explicitly reported to HP that it was unable to obtain ***more than half*** the materials they believed they needed to effectively perform such due diligence and informed HP of that fact. *See* HP_DER3_00004569-4573 (Ex. 4); HP_DER3_00012926 (Ex. 1). This included the "auditor work papers and internal audit reports" also information to "validate organic vs. acquisition growth rates . . . ." HP_DER3_00000870 (Ex. 5). Those Deloitte UK work papers were one of the "must haves" of financial due diligence. DRC Resolution at 32; §XV.C.3.d.iii.(c). As a result, KPMG informed HP that it had been unable to confirm the accuracy of Autonomy's publicly reported organic growth numbers, organic growth being an essential component of what HP was purchasing (or at least thought it was purchasing). *See* HP_DER3_00004516 (Ex. 4).

Instead of obtaining Deloitte UK's workpapers to directly verify information, HP confined itself to a telephone conference call with Deloitte UK taking place on August 17, 2011, the day before HP agreed to the Acquisition (DRC Resolution at 32; §XV.C.3.d.iii.(c)) but well after the Board had authorized the Acquisition and Apotheker had negotiated its terms. *Id.* at 32; §XV.C.3.d. Deloitte UK purportedly confirmed that it had no disagreements with Autonomy management (DRC Resolution, *supra*), something which was not surprising, given the relatively lax standards for financial reporting under IFRS.

HP also did not make use of all the resources at its disposal for performing due diligence. Perella Weinberg which had been retained to provide strategic advice to HP in connection with the Acquisition (DRC Resolution at 31;§XV.C.3.d.ii.(d)), had been effectively frozen out of the due diligence process causing one of its investment bankers to write to Robison on July 31, 2011, complaining of the situation and stating graphically "given . . . the concerns about a thorough diligence process we don't feel we can meet our obligations with this construct" and "at the moment we have limited visibility into the diligence process." *See* HP_DER3_00013715 (Ex. 1). On August 8, 2011, another Perella Weinberg banker wrote to Robison complaining about the level of due diligence stating that there is a "fundamental disconnect between the diligence

1 ask from our end and what Tesla [*i.e.*, Autonomy] believes a buyer needs to accomplish."
2 HP_DER3_00012860 (Ex. 1).

3 **<u>HP Also Fails to Properly Perform Operational Due Diligence Prior to the Acquisition</u>**

4 Another risk of the Acquisition involved the extent to which IDOL, Autonomy's primary
5 software product, was becoming outdated or uncompetitive. Yet HP Failed to engage in a hands-
6 on review of Autonomy's software by as software engineer and ,instead, had a product manager
7 review a demo model. *See* HP_DER3_00012760 and 12858 (Ex. 1). Very shortly after the
8 Acquisition, HP discovered that, indeed, IDOL was desperately in need of updating to remain
9 competitive. *See* HP_DER3_00013545 (Ex. 1).

10 **<u>HP Makes A Premium Offer for Autonomy Notwithstanding the Lack of Due Diligence</u>**

11 At a July 19-21, 2011, Board meeting, Apotheker was granted authority to negotiate a
12 transaction with Autonomy with the prospect of announcing an acquisition by Q3 2011. DRC
13 Resolution at 30 & 31; §§XV.C.3.d. and XV.C.3.d.ii.(c). On July 28, 2011, Apotheker and
14 Lynch narrowed the price range for Autonomy from £24.94 to £26.94. *Id.* at 33; §XV.C.4.b.i.
15 On August 5, 2011, the Board agreed to a maximum price range of £24.94 to £26.94 which
16 because of a market drop was subsequently narrowed to £25.00 to £25.50. *Id.* at 33;
17 §XV.C.4.b.ii. On August 14, 2011, Apotheker, subject to Board approval agreed to a price of
18 £25.50. *Id.* at 34; §XV.C.4.b.iii.

19 This proposed price represented a total acquisition price of $11.1 billion which was a
20 more than 60% premium to the trading price of Autonomy stock. *See* HP AU-N 000492 (Ex. 7).
21 The $11.1 billion price, according to HP's internal valuation model reflected a $1.6 billion
22 premium over Autonomy's stand-alone value of $9.5 billion. DRC Resolution at 33;
23 §XV.C.4.iii.

24 **The Board Proceeds With the Acquisition Over the**
25 **<u>CFO's Opposition and After "New News" is Brought to The Board's Attention</u>**

26 At an August 16, 2011 Board meeting, Cathy Lesjak ("Lesjak"), HP's CFO, opposed
27 proceeding with the Acquisition because: (i) the 60% premium agreed upon was too high; (ii) the
28 Acquisition would negatively impact HP's stock price and be received negatively by HP's

1 shareholders; and (iii) HP had a history of not achieving anticipated growth or synergies in
2 previous transactions. DRC Resolution at 34; §XV.C.5.b. The Committee does not identify the
3 basis for Lesjak's analysis. However, given that only a year earlier, immediately prior to
4 Apotheker assuming the role of HP's CEO, it would appear that Lesjak based her opinion on the
5 prior due diligence undertaken by HP in Project Aggie when it decided *not* to pursue an
6 acquisition of Autonomy. *See, e.g.,* HP_DER3_00012728 (Ex. 1).

7 On August 17, 2011, Lane, the Chairman of HP's Board, convened an executive session
8 of the non-management directors because of "new news" he had learned and was "still trying to
9 digest." HP_DER3_00012932-12933 (Ex. 1). The precise "new news" or even the events or
10 matters discussed at that Executive Session are unknown because the minutes from that meeting,
11 if they ever existed, cannot be found. *Id.* The Committee asserts, however, that the Board then
12 re-visited the issue of the Acquisition with Apotheker who "upon reflection and consideration of
13 management's due diligence and the advice of HP's professional advisors, recommended that the
14 Acquisition proceed." DRC Resolution at 34;§XV.C.5c.i. No mention is made of any
15 documents relating to due diligence which were reviewed at that time by the Board or the nature
16 of the information Apotheker provided to the Board, if any, which gave them sufficient comfort
17 to proceed with the Acquisition in light of Lesajk's concerns and the "new news" which had
18 been so difficult to "digest." *Id.* Instead, the Board seemingly abdicated to Apotheker's
19 judgment without reviewing any documents. *See* HP_DER3_00012933 (Ex. 1).

20 **Investors Are Horrified When the Acquisition is Announced**

21 On August 18, 2011, the Board approved proceeding with the Acquisition and HP
22 publicly announced its agreement to acquire Autonomy through a tender offer for a price of
23 £25.50 (or $42.11) per share for a total price of £6.7 billion (or $11.1 billion). DRC Resolution
24 at 1 and 35;§XV.C.6. Investor reaction was swift and punishing, driving down HP's stock price
25 by 20% in a single day. *See* HP_DER3_00012946 (Ex. 1). HP's large institutional investors
26 vocally protested the sheer stupidity of the Acquisition based upon the knowledge common to all
27 investors -- except for apparently HP -- that Autonomy was a roll-up with weak organic growth
28

and questionable accounting for gross margins. One large mutual fund opined that it would be better to pay a large breakup fee than proceed with the Acquisition. *See* HP_DER3_0012948 (Ex. 1). That, however, was not an option because there was no provision for terminating the Acquisition in exchange for a breakup fee. *See* HP_DER3_00012951 (Ex. 1).

An anonymous blogger going by the name of Joe Bloggs then appeared questioning the key assumptions upon which the Acquisition had been premised, *i.e.,* the actual amount of pure software sales and Autonomy's true rate of organic growth. *See* HP_DER3_0000166-169 (Ex. 7). Larry Ellison, the CEO of Oracle, also openly mocked HP for paying an exorbitant price to acquire Autonomy. *See* Oracle Press Release, *Another Whopper From Autonomy CEO Mike Lynch* (Sept. 28, 2011) (Ex. 40).

HP Terminates Apotheker and Robison After Learning of Key Due Diligence Failures and Publicly Blames Them for the Acquisition

Numerous press reports and, in particular, a September 1, 2011, article questioning the integrity of Autonomy's revenues and reported growth rates piqued the interest of Lesjak, who e-mailed the article to Apotheker and Robison with a note stating: "I am assuming that the due diligence that your team did with KPMG would have picked up any of these types of issues. Do you have any concerns such that we should get E&Y or Jim's folks to double?" *See* HP_DER3_00000164 (Ex. 7). In a September 4, 2011 e-mail, Lane declaring himself "haunted" by the Acquisition requested back-up materials concerning the assumptions HP had made about Autonomy's organic growth. *See* HP_DER3_00001896 (Ex. 8). Apotheker, rather than produce supporting material, shamelessly provided talking points forwarded to him by Lynch rather than any back-up material. *Id.* In other words, no such back-up materials existed.

Apotheker and Robison had been the "Sponsors" of the Acquisition and, in that capacity, responsible for "ensuring that the due diligence process is followed and completed." DRC Resolution at 28; §XV.C.2.c. Accordingly, it was not a surprise when on September 22, 2011, Apotheker "stepped down" from his positions at the Company. *See* Press Release, *HP Names Meg Whitman President and Chief Executive Officer* (Sept. 22, 2011) (Ex. 41). Shortly thereafter, Robison also "retired" from HP. *See* Press Release, *Shane Robison to Retire From*

HP (Oct. 20, 2011) (Ex. 41). On November 20, 2012, Meg Whitman, the new CEO of HP, in a conference call with securities' analysts, publicly blamed Apotheker and Robison for the acquisition stating "really the two people that should have been held responsible are gone." Ex. 42 at 9.

HP Institutes the M&A Reforms

In the November 20, 2012 conference call, Whitman also announced material changes to the Company's mergers & acquisition procedures (the "M&A Reforms"). Thus, HP's merger due diligence function, which had previously reported to Strategy was, instead, required to report to the CFO. Dkt. No. 218-1 at 9. A Risk Management Committee ("RMC") was also "formed to expand the internal oversight of HP's existing Transaction Approval Process and was made responsible for assessing the risks associated with due diligence conducted in proposed acquisitions." HP's Response to Steinberg's Interrogatories (Ex. 9) at No. 5.

Similarly, HP implemented enhanced internal procedures through Midaxo, a computer-based project knowledge management tool, to be used to streamline information for buy-side mergers and acquisitions. *See* HP_DER2_00000028-40 (Ex. 10) (identifying M&A Reforms initiated prior to the Proposed Settlement). HP also instituted numerous "M&A process enhancements" which included the creation of transaction management process such as: (i) an M&A Master Process; (ii) Intelligent Due Diligence frameworks ("IDD"); and (iii) systemic pre-transaction public review. HP_DER3_00000033 (Ex. 10).

The Board Members Share Responsibility for HP's Due Diligence Failures

Although Whitman correctly blamed Apotheker and Robison for HP's due diligence failures and the losses occurring as a result of those failures, it is apparent that it is inappropriate to limit blame to just those two senior executives. The Board had responsibilities for competently overseeing the process and had committees in place which were responsible for overseeing and providing additional advice with the Acquisition.

The entire Board was the recipient of a giant "red flag" which blanketed over the entirety of the Acquisition in the form of Lesjak's pronounced opposition to the Acquisition and the

"new news" that was difficult to "digest." Nonetheless, the Committee claims that the Board relied entirely on Apotheker's vacuous statement that HP's due diligence gave him comfort to proceed with the Acquisition, without actually reviewing any of the underlying due diligence to determine how it comported with or otherwise refuted the "new news."

The FIC had been responsible for providing oversight to the finance and investment functions of HP. *See* HP_DER3_0012598 (Ex. 1). In that capacity, the FIC recommended approval of the Acquisition to the Board. DRC Resolution at 35; §XV.C.6.a. Yet, it appears that the members of the FIC received the same presentations as were made to the Board (*id.* at 30; XV.C.3.c.v) and never bothered to review or consider the KPMG Report notwithstanding the numerous "red flags" with respect to Autonomy's reported financial results.

Similarly, the Board's Technology Committee was required to review and make a recommendation with respect to the technology aspects of such transactions. *See* HP_DER2_00000047 (Ex. 3). The only Technology Committee meeting minutes relating to the Acquisition was a May 25, 2011 presentation regarding the technology aspects of Autonomy's software products. *See* HP_DER3_00008979 (Ex. 11). That, however, only involved a "preliminary business case." DRC Resolution at 30; §XV.C.3.c.v. Additional due diligence took place (*id.* at §XV.C.3.c.vi.), yet the Technology Committee never seems to have moved beyond its preliminary assessment of Autonomy's technology or to have learned that there had been noon ads-on testing of Autonomy's software with the testing of the demo version performed by a marketing executive rather than a software engineer. *See* HP_DER3_00012760 and 12858 (Ex. 1)[1]

<u>Autonomy's Post-Acquisition Results Fall Far Behind Projections</u>

On or about April 29, 2012, Lynch warned Whitman and Lesjak that Autonomy was expecting a sizeable revenue miss for HP's second fiscal quarter ending April 30, 2012. *See* HP_DER3_00007397 (Ex. 14). Autonomy missed its second quarter revenue target of $350 million by more than 30%, recording actual revenue of approximately $106 million. *See*

[1] The Technology Committee's March 23, 2011 minutes and presentation which are heavily redacted and contain no analysis concerning IDOL. *See* Ex. 12.

HP_DER3_00008898 (Ex. 14). Most of that miss ($85 million) was attributed to deal slippage caused by Autonomy operating under HP's newly imposed bureaucracy, while a smaller portion ($13 million) was attributed to revenue recognition issues caused by the differences between IFRS and GAAP. *See* HP_DER3_00004249 (Ex. 13); HP_DER3_00008901 (Ex. 14); HP_DER3_00008972 (Ex. 15). By August 2012, Autonomy continued to significantly trail HP's expectations with projected 2012 revenues of $692 million falling 44% short of plan. *See* HP_DER3_00007016 (Ex. 15-1).

HP Restates Autonomy's Financials for GAAP Recognizing a Related $5 Billion Charge

In June 2012 -- or 10 months after announcing the Acquisition -- HP conducted a "forensic review" of AU's revenue-recognition practices. DRC Resolution at 2; §§I.A.3-5. That review determined that after adjusting Autonomy's financial statements for GAAP, as compared to IFRS under which it had previously reported, that:

(1) Autonomy's revenues, excluding hardware sales, were consistently more than 20% lower than that which Autonomy publicly reported. *Id* at 24; §XIV.C. 1.a;

(2) Autonomy reported revenue growth of 17.1% in 2010 reflected actual organic growth of ***negative*** 7.1% and for the first half of 2011 Autonomy's reported growth rate of 9.4% only included a 4.4% organic growth rate with the rest of the reported growth coming from hardware sales and acquisitions. *Id.*; §§XIV.C. 1.c.-d.; and

(3) Operating margins previously reported as being 36.8% for 2009, 36.4% for 2010 and 35.2% in the first half of 2011 were, once hardware sales were stripped out, 33.9% for 2009, 26.7% for 2010, and 26.2% for the first half of 2011, reflecting a significant and previously unknown adverse trend. *Id.* at 24, §XIV.C. 1.b.

1 (approximately $5 billion). UK Complaint ¶199. In addition, HP has suffered damages based
2 upon reductions in expected synergies. DRC Resolution at 25; §XIV.C.5.a.

3 **The Board Forms the Committee Which Exonerates Everyone at HP of Liability by**
4 **Accusing Lynch, Hussain and Deloitte UK of Fraud in Connection With the Acquisition**

5 On January 17, 2013, the Board established the DRC to consider and evaluate the
6 allegations in various shareholder derivative actions which had been filed and shareholder
7 demand letters which had been received by the Board. DRC Resolution at 9, §II.A.1. The
8 Committee, rather than retaining its own counsel, relied on counsel retained by the Company to
9 advise it and help conduct the investigation. *Id.* at 13;§IV.A.1.

10 On January 10, 2014, approximately one year later, the Committee concluded that "HP's
11 present and former directors and officers . . . engaged in a reasonable process for acquiring
12 Autonomy and . . . that they reasonably relied on all reasonably available material information
13 before making decisions (including . . . (with respect to directors) representations of
14 management). . . ." DRC Resolution at 51; §XVIII.B. The Committee also concluded that
15 Barclays and Perella Weinberg, the Company's financial advisors in connection with the
16 Acquisition, had no potential liability. DRC Resolution at 53-55. Instead, the Committee cast
17 the entire blame for HP's $5 billion loss on Lynch, Hussain and Deloitte UK recommending that
18 actions be filed against them in England. DRC Resolution at 63 and 67; §§XX.E.1 and XXI.E.1.

19 **HP Adopts the Governance Revisions Some of Which Were**
20 **"Informed" by the Settling Plaintiffs' Recommendations**

21 One of the DRC's tasks was "recommending to the Board whether any new or modified
22 corporate policies or procedures or other internal corrective measures should be adopted."
23 Ashton Decl. (Dkt. No. 233-1) at ¶4. These modified corporate procedures eventually became
24 the Governance Revisions. *See* Declaration of Ann M. Ashton (Dkt. No. 233-1) ¶8.

25 The sum total of the Settling Plaintiffs involvement in the Governance Revisions is that
26 the proposals they made on December 16, 2013, "***informed*** the recommendations made to the
27
28

DRC." *Id.* at ¶10 (emphasis added). In other words the Settling Plaintiffs did not originate the proposals at issue but only "shaped, amplified, [and] expanded" the Governance Revisions. Sept. 26, 2014 Tr. (Dkt. No. 238) at 7:16." The number of Governance Revisions which the Settling Plaintiffs "informed" is also very limited and was described as follows:

> Robbins Geller's suggestion that committees responsible for M&A transactions have more members with M&A experience ***informed*** the recommendation that a director's M&A experience be considered when assignments are made to the Finance and Investment Committee . . . Robbins Geller's proposal that the M&A committee meet in executive session without management ***informed*** a recommendation that the FIC meet in executive session without management to consider potential acquisitions before a vote on approval to sign. Other proposals . . . ***informed*** recommendations related to the reporting line for the approval to sign, the formalizing of Executive Committee review of each business unit's criteria for evaluating potential targets, and the development of a buy-side fairness policy.

Ashton Decl. ¶10 (emphasis added).

<u>HP Sues Lynch and Hussain -- But Not Deloitte UK -- Alleging Accounting Fraud Based Upon the Very Transactions Addressed in Deloitte UK's Audit Committee Memos</u>

On or about April 17, 2015 -- or 15 months after the DRC Resolution -- HP finally filed the UK Complaint against Lynch and Hussain in England. Deloitte UK, however, was not sued by HP. The accounting violations alleged in the UK Complaint, however, are discussed at length in Deloitte UK's memos to Autonomy's audit committee (the "Audit Committee") which were part of Deloitte's work papers. *Compare* UK Complaint *e.g.* ¶¶53-58, 74-79, 82-83 *with* HP_DER3_0003187-3224 (Ex. 17); HP_DER3_0003225-3244 (Ex. 18); HP_DER3_0003155-3180 (Ex. 19); HP_DER3_0007745-7775 (Ex. 16) (Deloitte UK memos). *See also* Ex. 24 (comparing UK Complaint allegations to Deloitte UK memos). These are the same workpapers which KPMG identified as "***must have***" for the financial due diligence process (*see*, HP_DER3_00012838 (Ex. 1), prior to being told by HP that their services were no longer needed. HP_DER3_00013629 (Ex. 1).

If Robison or Apotheker had bothered to read the KPMG Report they would have known these facts. In addition, many of the accounting entries relating to VARs (Value Added Resellers) appear to have been vetted by the UK Financial Reporting Review Panel ("FRRP"),

1 the regulatory body in England responsible for regulating accounts and accountants, which
2 declined to pursue any action. *See* May 5, 2015 letter from Clifford Chance US LLP, counsel for
3 Lynch, to Marc Wolinsky, counsel to HP (Ex. 43) at 2, 23-24 and 40.

4 **No Criminal Charges Have Ever Been Filed**

5 HP also announced that because it had been defrauded, the Company was referring the
6 matter to the appropriate authorities in the U.S. and the U.K. for potential criminal prosecutions.
7 *See* Nov. 20, 2012 HP press release (Ex. 30). UK's Serious Fraud Office ("SFO") expressly
8 declined to bring criminal charges against Lynch, Hussain and Deloitte UK. *See, e.g.*, SFO press
9 release dated Jan. 19, 2015 (Ex. 44). Since that time, it appears that no criminal charges have
10 ever been filed with respect to the Acquisition.

11 **Steinberg's Demand Refused Claims**

12 On December 4, 2012, Steinberg made a Demand on the Board. DRC Resolution at 7,
13 §I.B.3.c. On January 17, 2013, the Board established the Committee which was charged with
14 reviewing the relevant facts and allegations relating to the Acquisition and reporting back to the
15 Board with its recommendations. DRC Resolution at 9, §II.A.1. On January 10, 2014, the
16 Committee adopted the DRC Resolution. On January 16, 2014, the Board adopted a resolution
17 resolving, among other things, that HP should not proceed with claims against anyone aside from
18 Lynch, Hussain and Deloitte UK. *See* HP Board of Directors' Resolution Regarding Shareholder
19 Claims and Demands (Wolinsky Decl. (Dkt. No. 211-3) Ex. 3) at 12 ¶16.

20 On March 26, 2014, Steinberg through her counsel, wrote to Ralph Ferrara, the primary
21 counsel for the Committee, asking that he reveal or confirm the Board's decision in response to
22 the Demand. *See* Sep. 17, 2014 Declaration of Jeffrey S. Abraham ("2014 Abraham Decl.")
23 (Dkt. No. 218) ¶7. Mr. Ferrara declined to state what actions had been taken and, instead,
24 offered to provide copies of the DRC Resolution and the Board Minutes pursuant to the terms of
25 a highly restrictive Settlement Confidentiality Agreement. *See* 2014 Abraham Decl. ¶8. On
26 April 24, 2014, through her counsel, Steinberg wrote to Mr. Ferrara accepting HP's offer to
27 produce the DRC Resolution and the Board Minutes. *See* 2014 Abraham Decl. ¶10. On May 16,
28

1 2014, after waiting more than three weeks for a response -- and four months from the time the
2 Board had acted -- Steinberg filed her Complaint alleging wrongful demand refusal.

3 **ARGUMENT**

4 **I. THE SETTLING PARTIES BEAR THE BURDEN OF DEMONSTRATING BY**
5 **CLEAR AND CONVINCING EVIDENCE THAT THE PROPOSED SETTLEMENT IS FAIR AND REASONABLE**

6 Derivative suits are fiduciary in nature, and the Court must approve the settlement of
7 such cases to ensure that the interest of the absent shareholders has been fairly represented. Fed.
8 R. Civ. P. 23.1(c); *see also Barkan v. Amsted Indus., Inc.,* 567 A.2d 1279, 1283 (Del. 1989). The
9 Court must determine, using its business judgment, whether the settlement is "fundamentally
10 fair, adequate and reasonable." Order Denying Motion for Approval of Second Amended
11 Settlement (Docket No. 265) at 5 (quoting *In re Rambus Inc. Deriv. Litig.,* No. c-06-3515-JF,
12 2009 WL 166689, at *3 (N.D. Cal. Jan. 20, 2009)).

13 The proponents of settling a shareholder derivative lawsuit, the Settling Parties here, bear
14 the burden of demonstrating that the Proposed Settlement is fair and reasonable. *Barkan,* 567
15 A.2d at 1283. However, "proponents who improperly negotiate a settlement should bear the
16 heavier burden of establishing fairness by clear and convincing evidence." *In re General Motors*
17 *Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1126 n.30 (7th Cir. 1979).

18 Here, the core terms of the Proposed Settlement were negotiated in connection with an
19 agreement to pay a minimum of $18 million for the Settling Plaintiffs' purported role in the
20 Governance Revisions. An additional fee of up to $30 million was to be paid with respect to any
21 result achieved in the litigation contemplated against Lynch, Hussain and Deloitte UK. This
22 Court quickly jettisoned the potential $30 million second leg of the fee request. Dkt. No. 199 at
23 18:15-18. The $18 million fee request was subsequently reduced through a private arbitration
24 conducted before Judge Walker to $8.7 million in attorneys' fees. *See* Arbitration Decision at 3-
25 4 (Dkt. No. 233-1).

26 Nonetheless, the fact remains that the terms of the Proposed Settlement were negotiated
27 against the backdrop of excessive attorneys' fees being offered and agreed to by HP. *See, e.g.*,
28

1 Aug. 25, 2014 Tr. at 18:15-18 (Dkt. No. 199). Steinberg, pursuant to this Court's March 13,
2 2015, Order [Dkt No. 319], sought to obtain discovery relating to settlement communications
3 among the Settling Parties. *See* HP's document objections at 12 (No. 14) (Ex. 45). The Settling
4 Parties refused to produce documents almost all those documents claiming – incorrectly – that
5 they were privileged from discovery. *See* Settling Plaintiffs' document objections at 5 (No. 4)
6 (Ex. 46). The failure to provide discovery further demonstrates a reason for concern about the
7 process through which the Proposed Settlement was negotiated.

8 **II. THE SETTLING PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT**
9 **THE CLAIMS THEY ARE SEEKING TO RELEASE ARE WEAK**

The Settling Plaintiffs assert that the key risks they encountered are that of: (a) potentially
10 meritorious defense based upon either a lack of gross negligence on the part of HP's officers or a
11 lack of a conscious disregard of known facts by the other members of the Board; (b) the barriers
12 to recovery posed by the Board's decisions as reflected in the DRC Resolution; and (c) potential
13 dismissal for failing to properly allege demand futility. Settling Plaintiffs' Memo. at 12.
14 However, none of these matters is, in fact, a material barrier to recovery in this action.[2]

15
16 **A. The Settling Plaintiffs Have Failed to Demonstrate That the Claims They Are Seeking to Release Lack Merit**

17 The Proposed Settlement seeks to release all claims related to the Acquisition against
18 everybody aside from Lynch, Hussain and Deloitte UK. However, the Settling Plaintiffs have
19 failed to demonstrate (or discuss in any meaningful way) that the asserted defenses pose a
20 material risk. Instead, it appears even based upon the relatively limited factual record provided
21 to date that those claims have substantial merit or, at the very least, without additional inquiry
22 into their merits cannot be discounted at this preliminary stage of the litigation.

23
24 [2] The Ninth Circuit observed 20 years ago that shareholder "derivative actions are rarely successful." *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 377-78 (9th Cir. 1995) (quoted at
25 March 13, 2015 Order (Docket No. 319) at 9. However, since that time, there have been some spectacularly successful results in shareholder derivative actions. *See, e.g.*, *Ams. Mining Corp. v.*
26 *Theriault*, 51 A.3d 1213 (Del. 2012) (affirming judgment of $1.347 **billion** plus pre-judgment interest); Kevin LaCroix, *UnitedHealth Derivative Settlement "Largest Ever"*(Dec. 6, 2007)
27 ($900 million settlement) (Ex. 48); Kevin LaCroix, *Largest Derivative Lawsuit Settlements* (Dec. 5, 2014) (listing six additional settlements worth more than $100 million) (Ex. 49).
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

i. Claims Against Apotheker and Robison

Apotheker and Robison as the Sponsors of the Acquisition were "accountable for the acquisition and . . . involved at every stage . . . including ensuring that the due-diligence process is followed and completed . . . ." DRC Resolution at 28;§XIV.C.2.c.(*i*). Financial due diligence was particularly critical for the Acquisition because of the widespread skepticism concerning Autonomy's published financial results. *See, e.g.,* pp. 4-7, *supra.*

Nonetheless, HP failed to properly perform its financial due diligence. KPMG, which was retained to assist in the process, specifically warned that it had been unable to obtain access to more than half the material necessary to properly perform financial due diligence. *See* HP_DER3_00004569-4573 (Ex. 4); HP_DER3_00012926 (Ex. 1). The material which KPMG (and HP) were unable to review included Deloitte UK's workpapers which were one of the "must haves" of the due diligence process. *See* DRC Resolution at 32; HP_DER3_00012838 (Ex. 1). As a result, KPMG specifically informed HP that it was unable to confirm the accuracy of Autonomy's reported organic growth rate and other key assumptions underlying the Acquisition. *See, e.g.,* KPMG Report, HP_DER3_00004516 (Ex. 4).

Apotheker, and Robison, failed to review the KPMG Report. *See* HP_DER3_00012877 (Ex. 1). Failing to review the KPMG Report when charged with the responsibility for ensuring that the due diligence process was "followed and completed" (DRC Resolution at 28) means that Apotheker and Robison were, at the very least, grossly negligent in failing to perform their designated tasks. *See, e.g.*, *Brehm v. Eisner (In re Walt Disney Co. Deriv. Litig.)*, 906 A.2d 27, 64-65 (Del. 2006) (gross negligence includes "a failure to inform one's self of available material facts."); *MCG Capital Corp. v. Maginn*, C.A. No. 4521-CC, 2010 Del. Ch. LEXIS 87, at *79 n.129 (Del. Ch. May 5, 2010) (failure to be "adequately informed" constitutes gross negligence). *Compare with Ash v. McCall*, C.A. No. 17132-CC, 2000 Del. Ch. LEXIS 144 at *29 (Del. Ch. Sept. 15, 2000) (finding a failure to plead demand futility where advisers performed due diligence and "waived 'green flags' to the . . . board.")

In addition to the financial due diligence failures, HP was damaged by a "Failure to Identify Autonomy Software/Technology as 'Outdated' or Insufficient." HP_DER3_00013545 Ex.1). The Committee (or its counsel) identified this issue as having been HP's responsibility. *Id*. Since Apotheker and Robison as the "Sponsors" of the Acquisition were charged with the responsibility of properly completing due diligence (DRC Resolution at 28, §XV.C.2.c.) that would also place the blame for this due diligence failure on them as well. In particular, Apotheker and Robison failed to arrange for hands-on testing of Autonomy's software by a software engineer. Instead, they allowed a relatively limited amount of "testing" to take place on a demo version supervised by a product manager. *See* HP_DER3_00012760 and 12858 (Ex. 1).

ii. Claims Against HP's Directors

Section 102(b)(7) of the Delaware General Corporation Law upon which the Settling Plaintiffs rely (Settling Pl. Memo. (Dkt. No. 365) at 13) is a barrier to recovery, but not an absolute bar. Instead, the statute allows for recovery against directors where there is either a lack of good faith or a breach of the fiduciary duty of loyalty. *See* 8 *Del. C.* §102(b)(7). "A failure to act in good faith may be shown . . . where the fiduciary . . . intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." *Brehm,* 907 A.2d at 755. *See also Rosenbloom v. Pyott,* 765 F.3d 1137, 1150 (9th Cir. 2014).

Also, although "a board of directors may rely in good faith upon information, opinions, reports or statements presented by corporate officers, employees and experts . . . it may not avoid its ***active and direct duty of oversight*** in a [significant] matter . . . ." *Mills Acquisition Co. v. Macmillan*, 559 A.2d 1261, 1268 (Del. 1989) (quotations and citations omitted) (emphasis added). A failure to properly perform the duty of oversight implicates a breach of the directors' duty of loyalty. *See, e.g., Stone v. Ritter,* 911 A.2d 362, 370 (Del. 2006). Thus, it is hornbook law that "if a complaint makes out a claim based on a breach of directors' duty of oversight . . . the claim will fall outside any exculpatory charter provision under 8 *Del. C.* §102(b)(7)." R. Franklin Balotti & Jesse A Finkelstein, DELAWARE LAW OF ORGANIZATION & BUSINESS CORPORATIONS, §4.16[B] p. 4-138 & n.755. The intentional or reckless disregard of "red flags"

warning of fraudulent practices can result in directors not being protected from liability by Section 102(b)(7) "for acts or omissions not in good faith." *McCall v. Scott*, 239 F.3d 808, 818-19 (6th Cir. 2001).

Here, one such red flag existed in the form of Lesjak actively questioning the wisdom of proceeding with the Acquisition. DRC Resolution at p. 34; §XV.C.5.c & c(i) and p. 35; §XV.C.7.a. This consisted of or was followed by "new news" which was difficult to "digest" causing Lane to call an executive session of the Board. HP_DER3_00012932-12933 (Ex. 1). Although the Committee does not identify the contents of the "new news" it would appear to have been the results of the due diligence for "Project Aggie" undertaken in August 2010. *See* HP_DER3_00012718 (Ex. 1). Project Aggie identified concrete reasons for not acquiring Autonomy including a lack of organic growth, competitive pressures and a likely inability to successfully integrate Autonomy into HP's corporate structure. *Id.* According to the Committee, all of the Board's concerns raised by this red flag were purportedly ameliorated by Apotheker, who had been CEO for about one year, orally assuring Lane that the Company's due diligence was sufficient to allay those concerns. *See* DRC Resolution at 34; §XV.C.5.c.i.

However, at that time it was not sufficient to simply rely on Apotheker's opinion with respect to due diligence because although "a board of directors may rely in good faith upon information, opinions, reports or statements presented by corporate officers, employees and experts . . . it may not avoid its ***active and direct duty of oversight*** in a [significant] matter . . . ." *Mills Acquisition Co. v. Macmillan*, 559 A.2d 1261, 1268 (Del. 1989) (quotations and citations omitted) (emphasis added). Such an "active and direct duty of oversight" after Lesajk direct warning would have included reviewing the relevant due diligence upon which Apotheker was relying. However, the Board failed to do so and, instead, rubber-stamped Apotheker's decision.

Other "red flags" surrounded Autonomy's financial reports in the form of adverse analyst reports and Barclays warning about the lack of transparency in Autonomy's published financial statements. *See* pp. 4-8, *supra*. This was potentially ameliorated by the involvement of the FIC as a board committee charged with specific responsibility for such matters. *See* Point II.A.iii,

infra. To the extent that was not a responsibility of the FIC, the entire Board would have been responsible to exercise its "active and direct duty of oversight." There is, however, no evidence that they did so and the Committee does not suggest otherwise.

In addition, the Board consciously disregarded its duties in retaining Barclays as HP's primary financial adviser. This retention was made in spite of conflicting interests Barclays had in acting as financial advisor (to opine on the adequacy and fairness of the Acquisition price) and on the other hand collecting fees for underwriting the Acquisition and arranging financing for HP in the event the Acquisition was completed. *See, e.g.,* HP_DER3_00013546-13547 (Ex. 1). A prudent board of directors would not allow for the retention and paying of such a conflicted investment advisor. *See, e.g., In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 833 (Del. Ch. 2011) ("If the directors had known at the outset of Barclays' intentions and activities, the Board likely would have hired a different banker.") *See also In re Toys "R" Us, Inc., S'holder Litig.*, 877 A.2d 975, 1005 (Del. Ch. 2005) (the sell-side investment banker, First Boston, asked about possibly providing buy-side financing for purchasers of a subsidiary but "[t]he board promptly nixed that idea.") Yet, HP's Board allowed itself to be guided by Barclays despite the existence of a well-established conflict.

iii. Claims Against HP Directors Serving on the FIC

The FIC was a Board committee tasked with the responsibility of evaluating acquisition candidates such as Autonomy. DRC Resolution at 28; §XV.C.2.c. The FIC appears to have held two meetings prior to recommending the relating to the Acquisition to the Board on August 18, 2011: one on March 23, 2011 and one on May 25, 2011. DRC Resolution at 30 and 35; §§XV.C.3.c.v. and XV.C.6.b. The presentations received by the FIC appear to have been identical to those provided to the Board. *Id.* at 30 (referring to "virtually identical presentations"). On that basis, the FIC recommended that HP proceed with the Acquisition. DRC Resolution at 35; §XV.C.6.a.

In doing so, the FIC ignored the "red flags" surrounding Autonomy's financial reports in the form of adverse analyst reports and Barclays warning about the lack of transparency in

Autonomy's published financial statements. *See* pp. 4-8, *supra*. Notwithstanding these red flags, the members of the FIC failed to review the KPMG Report addressing the scope and reliability of financial due diligence. Instead, the FIC appears to have done nothing at all or at least nothing different from the other members of the Board to insure that financial due diligence had been correctly completed. In other words, they remained "consciously inactive" thereby subjecting themselves to liability. *Rosenbloom*, 765 F.3d at 1156; *see also Brehm, supra* (the failure of a director to become aware of facts when charged with the responsibility for doing so constitutes a conscious disregard for their duties taking the conduct outside 8 *Del. C.* §102(b)(7))

Indeed, the DRC Resolution does not even attempt to address or exonerate the FIC from liability. This stands in sharp contrast to the Committee's conclusion with respect to HP's Audit committee that it "was not tasked in its charter with the responsibility of evaluating any acquisitions . . . ." DRC Resolution at 35; §XV.C.6.c. The FIC, however, as tasked with that responsibility which they clearly failed to perform.

iv. Claims Against Directors Serving on the Technology Committee

The Technology Committee which was "chartered to provide strategic oversight and guidance on technology issues." DRC Resolution at 28; §XV.C.2.c. In that capacity, the Technology Committee recommended that the Board approve the Acquisition. DRC Resolution at 35; §XV.C.6.a. However, the Technology Committee completely failed in its mission by only conducting a preliminary review of Autonomy's technology on May 25, 2011. *Id.* at (referring to a "preliminary business case").

The Technology Committee does not appear to have had any additional substantive meetings. As a result, it appears that the Technology Committee failed to learn that HP had not conducted hands-on testing of Autonomy's software and that only product marketing personnel rather than a software engineer had performed that testing. *See* HP_DER3_00012760 and 12858 (Ex. 1). Nonetheless, being "consciously inactive," the Technology Committee on August 18, 2011 recommended that the Board approve the Acquisition. DRC Resolution at 35;§XV.C.6.a.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

v. Claims Against Barclay's and Perella Weinberg

HP's investment bankers presented Autonomy as a compelling case for enabling the Company to transform its business. DRC Resolution at 30; §XV.C.3.d.i. It is unclear whether this advice emanated from Barclays or Perella Weinberg. Either way it was dead wrong and directly contradicted HP's own internal analysis from Project Aggie only months earlier not to proceed with an acquisition of Autonomy. *See* HP_DER3_00012728 (Ex. 1).

The record with respect to the potential liability of Barclays and Perella Weinberg is otherwise completely shrouded in mystery. The slide presentation prepared for the Committee on those issues is heavily redacted based on an assertion of either the attorney-client privilege or the work-product doctrine including: the section dealing with Barclay's potential liability contains 60 completely redacted pages (HP_DER3_00013530-44; 13548-96) (Ex. 1); and the section discussing Perella Weinberg's potential liability totals 9 pages (HP_DER3_00012808-12816) (Ex. 1) of which 7 pages, or almost 90% is redacted.

B. The Settling Plaintiffs Have Failed to Demonstrate That Steinberg's Complaint is Subject to Dismissal

Steinberg made a demand on the Board. Therefore, it is axiomatic that Steinberg's complaint and any subsequent amendment of that pleading *cannot* be subject to dismissal for failure to make a demand on the Board. The relevant issue, instead, will be whether Steinberg adequately alleged wrongful demand refusal, which exists when there are facts alleged with particularity creating "a reason to doubt" that the board's decision is entitled to the protection of the business judgment rule. *Grimes v. Donald*, 673 A.2d 1207, 1217, 1219 (Del. 1996) (overruled on other grounds); *Stepak v. Addison*, 20 F.3d 398, 403 (11th Cir. 1994).

The business judgment rule does not apply if HP's directors did "not act in good faith, . . . or reach[ed] their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available." *Brehm*, 746 A.2d at 264. Allegations that the Board "was biased, lacked independence, or ***failed to conduct a reasonable investigation***" can demonstrate "a reasonable doubt that demand was properly refused." *Scattered Corp. v. Chicago Stock Exch.*, 701 A.2d 70, 75 (Del. 1997) (emphasis added); *see also In re Primedia Inc.*, 67 A.3d 455,

472 (Del. Ch. 2013) ("had I understood that full disgorgement was possible, I would have denied the SLC's motion . . . ."). Similarly, allegations raising a reasonable doubt that the Board's decision making process was not undertaken in good faith also can demonstrate that demand was not properly refused. *See, e.g., Barovic v. Ballmer*, 2014 U.S. Dist. LEXIS 175599, 8-9 (W.D. Wash. Dec. 10, 2014); *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 925 and 928 (Del. Ch. 2003) (litigation committee's findings were held to not be reasonable notwithstanding an "extremely lengthy Report totaling 1,110 pages . . . .")

Here, the complaint filed by Steinberg is not subject to dismissal on a pleading motion because: (i) HP has insulated its analysis of the claims from scrutiny by denying Steinberg access to the analysis supporting the Board's conclusions; and (ii) the DRC Resolution reflects a failure to be informed of key facts or failing to undertake the decision making process in good faith with respect to the potential liability of the Defendants being released in the Proposed Settlement.

i. The Complaint Filed by Steinberg is Not Subject to Dismissal Because the Board Insulated its Analysis of the Claims From Scrutiny

Demand is deemed wrongfully refused where "defendants have effectively insulated its investigation from scrutiny." *City of Orlando Police Pension Fund v. Page*, 970 F. Supp. 2d 1022, 1030 (N.D. Cal. 2013). Here, HP's failure to provide Steinberg with a copy of the DRC Resolution for four months after the Board had taken action and after many requests by her counsel for that document completely insulated the Board's investigation from any scrutiny supplying the facts necessary to support Steinberg's allegations of wrongful demand refusal.

After Steinberg had filed her complaint, HP belatedly provided Steinberg with a copy of the DRC Resolution. HP's belated production of the DRC Resolution, however, continued to shield the vast bulk of the analysis from scrutiny. Indeed, the working assumption of the Delaware Chancery Court is that any board resolution will be accompanied by a report of counsel which assisted the board or any of its committees in the investigation. *See, e.g., La. Mun. Ret. Sys. v. Morgan Stanley & Co.,* 2011 Del. Ch. LEXIS 42, at *22-23 (Del. Ch. Mar. 4, 2011) (citing *Grimes v. DCS Communications Corp.*, 724 A.2d 561, 567 (Del. Ch. 1998)).

Here, almost all the work investigating the potential claims was done by Committee

counsel who spent more than 34,000 hours on the project and other experts and consultants performed an additional 16,000 hours of work. DRC Resolution at 16; §IV.E.5.b. However, no report of counsel has been made available and it appears that no such report exists.

Instead, HP has recently produced in response to Court ordered discovery a presentation (the "Presentation") made to the Committee consisting of approximately 1,300 pages of slides. However, even the Presentation as produced is insufficient to reflect the full scope of the analysis conducted in response to the Demand particularly with respect to the analysis of Committee counsel because it is rife with redactions based upon the assertion of the attorney-client privilege and work product doctrine. *See* Abraham Decl. ¶2.

Accordingly, the Committee -- at least in the documents provided -- either makes no effort to analyze the relevant facts in light of controlling principles of law or insulates its analysis of potential liability from any critical analysis. That these are traditionally difficult standards under which to impose liability does not answer the question of whether the facts applied to controlling principles of law would result in liability in this particular case.

Thus, *first*, HP refused to produce the DRC Resolution; *next*, HP refused to produce the Presentation which purportedly supports the DRC Resolution; and, *finally*, HP failed to produce the portions of the Presentation reflecting counsel's analysis of the underlying claims. The net effect, however, is that HP's refusal to provide the analysis supporting the decision to refuse the Demand will inevitably allow Steinberg to successfully plead wrongful demand refusal.

ii. A Reasonable Doubt Exists Whether the Committee was Properly Informed or Reached Conclusions Which Could Not Have Been the Product of Good Faith in Refusing the Demand

Even given the limited record HP has provided concerning the Board's consideration of potential claims, it is apparent that Plaintiff would be able to allege facts sufficient to raise a reasonable doubt as to whether the Committee in investigating potential claims was properly informed of relevant facts or made decisions which were the product of good faith. These failures infect the Committee's analysis of claims against: (a) Apotheker and Robison; (b) the Board; (c) the FIC; (d) the Technology Committee; and (e) Barclays and Peralla Weinberg.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

a. Claims Against Apotheker and Robison

The Committee failed to be informed or otherwise ignored that Apotheker and Robison never reviewed the KPMG Report. *See* HP_DER3_00012877 (Ex. 1). Instead, the Committee obscures this fact by globally referencing "HP management" in relation to the KPMG Report. DRC Resolution at 34; §XV.C.5.b ("KPMG's report had advised HP management . . . .").

Similarly, the Committee also was not fully informed of the facts or made a bad faith conclusion in explaining away Meg Whitman's statement that Apotheker and Robison "owned" the Acquisition as not reflecting any assignment of fault to Apotheker and Robison. DRC Resolution at 72, §XXII.D.2.e. The actual context of Whitman's statement demonstrates that she did, in fact, assign blame to Apotheker and Robison. Thus the question presented in the conference call was "who is responsible internally for the acquisition." Ex. 42 at 8. Whitman answered as follows: "really the two people that should have been held responsible are gone." *Id.* at 9. Indeed, Whitman's statement was widely interpreted as casting blame on Apotheker and Robison. *See*, *e.g.*, J. Bort, *Meg Whitman Blamed a Well Respected HP Tech Executive for the Autonomy Disaster – And is Ruffling Feathers*, Business Insider (Nov. 28, 2012) (Ex. 47).

Finally, the Committee in analyzing the potential liability of Apotheker and Robison for "Pre-Acquisition Claims," (DRC Resolution at 26;§XV) appears to have applied a single standard based upon the exculpation provisions of Delaware law, *i.e.,* 8 *Del. C.* §102(b)(7). *Id.* at 27; §XV.C.1. This is evident in their focus on "red flags" as being critical to whether liability should be imposed. *Id.* at 35; §XV.C.7a. However, executives such as Apotheker and Robison are liable for gross negligence which results from a failure to be properly informed of relevant facts. Red flags are only relevant to an analysis of whether a director is liable for conscious disregard of known facts. *See, e.g.*, *Gantler v. Stephens*, 965 A.2d 695, 709, n.37 (Del. 2009) (Delaware's exculpatory provision is available only to directors not officers).

b. Claims Against the Board

The Committee was not fully informed with respect to the existence of "red flags" relating to Autonomy's financial reports. Instead, the Committee confined its analysis to reports "cited in the Complaint." DRC Resolution at 35, §XIV.C.7.a. However, this ignores that Barclay's, one of HP's investment bankers, specifically warned about the lack of transparency and investor concern about Autonomy's financial reports. *See* HP_DER3_00013517 (Ex. 1). It also ignores that HP knew from prior research in August 2010 in connection with Project Aggie that Autonomy's growth rather than being organic was dependent on its continued acquisition of other companies. *See* HP_DER3_00012728 (Ex. 1)

In addition, the Committee's conclusion that any "red flags" raised by securities analysts publicly questioning Autonomy's reported results were diminished by the many positive analyst reports "dating back to 2005" (DRC Resolution at 35, §XIV.C.7.a) reflects a failure to be informed that the concerns about Autonomy's financial reports materialized much later than 2005. Therefore, the October 2010 analyst reports came only months before HP embarked on the Acquisition and were significantly more relevant than analyst reports going back to 2005, which are so far removed from events occurring in 2010 and 2011 that they could not negate the significance of the red flags raised by Autonomy's recent financial reports.

The Committee's conclusion that management's due diligence "was viewed as the ultimate test to determine whether 'red flags' actually existed" (i*d.*) ignores that, as the Committee discusses elsewhere, due diligence having been constrained. *Id.* at 56; §XIX.C.3.e. Also, the Committee ignored how there could have been any "strength" to the due diligence process where Deloitte UK's work papers, which were one of the "must haves" of financial due diligence, had not been obtained. *Id.*at 32; §XV.C.3.d.iii.(c).

The Committee also places great stock in HP purportedly receiving advice concerning the limited scope of due diligence which was appropriate for UK listed companies from HP's investment bankers. DRC Resolution at 34; §XV.C.5.b. However, the Committee was not informed or failed to take into account that Perella Weinberg, one of HP's investment bankers

clearly complained that the lack of due diligence constituted a problem for HP proceeding with the Acquisition. *See* HP_DER3_00012860 and 13715 (Ex. 1).

The Committee also ignored the key conclusions HP reached from the August 2010 consideration of acquiring, *i.e.*, that Autonomy's growth was not organic and that Autonomy would be difficult to integrate with HP. *See* HP_DER3_00012728 (Ex. 1). The Committee does not appear informed of the extent of the HP directors' knowledge of that relatively recent analysis or why the due diligence for the Acquisition failed to uncover these key very same facts.

c. Claims Against the FIC

The Committee failed to inform itself of the merits of potential claims against the FIC. This failure to become informed is glaring as the Committee states that "[t]he Technology Committee ***and the FIC*** recommended the Acquisition to the Board at the August 18 meeting." DRC Resolution at 35; §XV.C.6.a (emphasis added). However, the Committee then drops the ball by analyzing the potential liability of the Technology Committee and the Audit Committee while failing to perform any analysis for the FIC. *Id.* §XV.C.6.b-c.

d. Claims Against the Technology Committee

The Committee fails to consider or ignores that the Technology Committee only conducted a preliminary analysis of Autonomy's software which was conducted on May 25, 2011. DRC Resolution at 35; §XV.C.6.b. However, the DRC ignores that the Technology Committee never moved beyond that early preliminary assessment and never learned (or otherwise ignored) that the Technology Committee failed to become informed that there had been no hands-on testing of Autonomy's software by a software engineer with the testing limited to that performed by a marketing executive on demo software. *See* HP_DER3_00012760 and 12858 (Ex. 1).

Seemingly recognizing the infirmities in the Technology Committee's actions, the Committee pulls back its analysis to events which took place in 2007-2008. DRC Resolution at 35; §XV.C.6.b. However, this too reflects a failure to be informed or is completely unreasonable in light of changes in the technology and competitive landscape in the ensuing four years. *See,*

1 *e.g., See* HP_DER3_00012728 (Ex. 1).

2 **e. Claims Against Barclays and Perella Weinberg**

3 The Committee's analysis of the liability of Barclays and Perella Weinberg both assume
4 incorrectly that none of HP's officers and directors breached their fiduciary duties. DRC
5 Resolution at 53 and 55; §§XIX.C.1.e and XIX.C.2.j. As a result, the Committee was not
6 informed of the potential liability of Barclays and Perella Weinberg for aiding and abetting a
7 breach of fiduciary duties. *Id.*

8 **III. THE SETTLING PARTIES HAVE FAILED TO DEMONSTRATE THAT HP IS**
9 **OBTAINING A SUBSTANTIAL BENEFIT FROM THE PROPOSED**
10 **SETTLEMENT**

In order to be fair and reasonable, a settlement's value must fall within the range of
11 reasonableness meaning the amount or the value of the recovery must be measured against the
12 potential amount of a favorable judgment discounted the risks of obtaining a judgment. *See, e.g.*,
13 *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998)). The Governance
14 Revisions are the sole compensation purportedly being provided to HP in connection with the
15 Proposed Settlement. However, the Governance Revisions cannot support the fairness of the
16 Proposed Settlement because: (a) the Settling Plaintiffs have failed to demonstrate that the
17 Governance Revisions -- or those portions of the Governance Revisions for which they are
18 responsible -- would have prevented the damages HP suffered in connection with the
19 Acquisition; (b) the Settling Plaintiffs have failed to demonstrate that they made any meaningful
20 contribution to the formation of the Governance Revisions; and (c) several of the Defendants the
21 Settling Parties seek to release have no plausible connection to the Governance Revisions.

22 **A. The Settling Plaintiffs Have Failed to Demonstrate That the Governance Revisions**
23 **Would Have Prevented the Losses HP Suffered in the Acquisition**

24 The Governance Revisions can only support approval of the Proposed Settlement if they
25 confer a "substantial benefit" on HP which means it must be "something more than technical in
26 its consequence and . . . accomplishes a result which corrects or prevents an abuse which would
27 be prejudicial to the rights and interests of the corporation . . . ." *Mills v. Electric Auto-Lite Co.*,
28

1 396 U.S. 375, 392 (1970) (quoted in *Kaplan v. Rand*, 192 F.3d 60, 69 (2d Cir. 1999)). *See also*
2 Ashton Decl. ¶6 (rejecting the Settling Plaintiffs' initial corporate governance proposals as being
3 too generalized and not sufficiently related to the harm suffered in the Acquisition). Here, the
4 Settling Plaintiffs have failed to demonstrate any such substantial benefit.

5 Indeed, HP has taken the position that "in light of the nature of the massive fraud
6 perpetrated at Autonomy and Deloitte UK's failures, different M&A procedures would not have
7 prevented the losses suffered by HP in connection with the Autonomy acquisition." HP's
8 Responses to Steinberg's Interrogatories (Ex. 9) at No. 7. *See also* Order Denying Motion for
9 Approval of Second Amended Settlement (Docket No. 265) at 9. Steinberg agrees that the
10 Governance Revisions would not have had any influence on the outcome of the Acquisition but
11 for the opposite reason that the fraud was so easily discoverable through ordinary financial due
12 diligence with the issues flagged in the KPMG Report. However, regardless of the reason, if the
13 Governance Revisions could not have prevented HP from losing $5 billion in the Acquisition
14 then they fail to correct or prevent the abuse which is the subject of this action and do not confer
15 a substantial benefit in connection with this litigation. *See, e.g., Mills, supra; Kaplan, supra.*

16 Judge Walker's finding in a private arbitration conducted for the benefit of the Settling
17 Parties that the Governance Revisions were directly tailored to preventing breaches of fiduciary
18 duty does not cause them -- or their sub-parts which were "informed" by the Settling Plaintiffs
19 recommendations -- to have any substantial benefit for HP. The fact remains that the Settling
20 Plaintiffs fail to connect the individual elements of the Governance Revisions with failings in the
21 due diligence process during the Acquisition. As a result, they have failed to demonstrate that
22 the Governance Revisions would have prevented the losses HP suffered in the Acquisition.

23 In addition, Judge Walker's findings were based upon a limited record in which the only
24 participants in those proceedings, *i.e.*, the Settling Parties, were united in their desire to ascribe
25 value to the Governance Revisions. Thus, for example, the submissions made to Judge Walker
26 fail to confront that the accounting irregularities HP claims caused its losses were easily
27 discoverable through a normal due diligence process. Judge Walker also did not make any
28

findings with respect to the due diligence procedures HP had in place during the Acquisition, whether HP's due diligence procedures were properly followed, how those procedures compare to the ones embodied in the Governance Revisions and, to the extent they are materially different, how those differences would have had any material impact on the Acquisition.

B. The Settling Parties Have Failed to Demonstrate That the Settling Plaintiffs' Input was a Substantial Factor in Formulating the Governance Reforms

In order for corporate governance reforms to serve as the basis for a proposed settlement, they must have been caused by the underlying shareholder derivative litigation. Causation may not be assumed where "[o]ther causative factors such as . . . public scrutiny . . . [was] considerably more compelling." *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1447 (N.D. Cal. 1994) (Walker, J.)

Here, public scrutiny clearly caused HP to adopt the M&A Reforms. *See* p. 11, *supra.* Those actions included establishing the RMC "to expand the internal oversight of HP's existing Transaction Approval Process [which] was made responsible for assessing the risks associated with due diligence conducted in proposed acquisitions." HP's Response to Steinberg Interrogatories (Ex. 9) No. 5. These and other substantial M&A Reforms were implemented by HP management without the involvement of the DRC or the Settling Plaintiffs. *See* Response to Steinberg Interrogatory No. 1; *see also* HP_DER2_00000028-40 (Ex. 10) (identifying M&A reforms initiated prior November 2013).

The only item within the M&A Reforms identified as being instituted based upon input from the Settling Plaintiffs is the charter of the RMC. *See* HP Response to Steinberg Interrogatory (Ex. 9) No. 5. The RMC, however, was created even before the DRC "***was actually formed***." Walker Tr. at 62:21-24 (emphasis added). The importance of the charter or how it materially changed the operations of the RMC is left unexplained. *Compare* HP_DER2_00000037 (duties and function of RMC as of Nov. 2013) (Ex. 10) *with* HP_DER2_00000041-44 (RMC charter dated Mar. 24, 2014) (Ex. 22). In other words, the Settling Plaintiffs have failed to demonstrate that the charter constitutes a substantial benefit.

The Settling Parties fare no better with respect to the Governance Revisions. They were developed by Proskauer with HP's management (*see* Ashton Decl. ¶8) and appear to have changed very little from the time they were shared with the Settling Plaintiffs at the outset of negotiations to the time they were ultimately adopted by the Board after having been vetted by HP management. *Compare* HP_DER2_00000021 *with* HP_DER2_00000013; Interrogatory Response No. 5. *See also* Ex. 24 (comparison of different iterations of Governance Revisions). Such minor modifications also cannot reasonably constitute a substantial benefit to HP. *See, e.g., Steiner v. Williams*, 2001 U.S. Dist. LEXIS 7097, at *15-17 (S.D.N.Y. May 31, 2001) (citing *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957)); *Karpus v. Borelli*, 2004 U.S. Dist. LEXIS 21429; Fed. Sec. L. Rep. (CCH) ¶93,029 (S.D.N.Y. Oct. 27, 2004).

In addition, despite Steinberg's request for a precise explanation of how the Governance Revisions are any different from the DRC's and management's proposals, no coherent response has been provided. *See* Interrogatory Resp. Nos. 3-6 (Ex. 9) Instead, "[t]he submissions appear to be deliberately vague on this issue. Various names have been given to describe plaintiff's role including 'among' and 'catalyst,' but . . . there is no way of determining which reforms were specifically instituted because of plaintiff's Action . . . ." *Carroll ex. Rel. Citibank, Inc. v. Weill*, Index No. 600645/06 at 27-28 (N.Y. Sup. Ct. May14, 2007) (rejecting proposed settlement of a shareholder derivative action because of a failure to demonstrate any value received by the company) (Ex. 26).

Finally, there is no evidence that the Governance Revisions would be abandoned by HP in the event the Proposed Settlement was not approved. Instead, there is every indication that they would remain in place to the extent they are viewed as adding a dose of prevention to a potential repetition of the errors made in the Acquisition.

C. No Consideration Supports the Proposed Release of Claims Provided to HP'S Former Officers and Directors as Well as the Professional Advisers

The Federal Judicial Center specifically counsels wariness with respect to "releasing claims against parties who did not contribute to the class settlement." Manual for Complex Litigation Fourth §21.61 & n.957 (citing cases). Similarly, in the context of shareholder

derivative actions, such as the case at Bar, it has long been the law that a party gaining a release must contribute to the proposed settlement. *Winkelman v. General Motors Corp.*, 48 F. Supp. 490, 496-97 and 499 (S.D.N.Y. 1942) (cited in *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 n.9 (2d Cir. 1981) (Friendly, J.)).

Here, the Proposed Settlement releases several parties without receiving any compensation (assuming *arguendo* that HP has satisfied its burden of demonstrating that the corporate governance revisions constitute proper consideration for the release of any claims). Primary among those being given a release without any countervailing consideration are Defendants Apotheker who left HP's employ in September 2011 and Robison who left in or about November 2011. *See* Ex. 41. There is no evidence that either Apotheker or Robison were responsible for recommending or implementing the corporate governance reforms or that their future conduct will be impacted by the corporate governance reforms because they are no longer at HP. The same problem exists with respect to Barclays and Perella Weinberg: they have not even contributed a peppercorn of value to the Proposed Settlement.

IV. THE EARLY STAGE OF THE PROCEEDINGS ALSO COUNSELS AGAINST APPROVING THE PROPOSED SETTLEMENT

One factor taken into account in analyzing the fairness of a proposed settlement in a representative action is "the extent of discovery completed and the stage of the proceedings." *Resnick v. Frank (In re Online DVD-Rental Antitrust Litig.)*, 779 F.3d 934, 944 (9th Cir. 2015). Here, this case has not even progressed to the motion to dismiss stage. Here, both the extent of discovery and the stage of the proceedings counsel against approval of the Proposed Settlement.

A. The Discovery Taken by the Settling Plaintiffs Has Been Extremely Limited

Discovery has also not progressed very far. The Settling Plaintiffs claim to have reviewed 35,000 documents. *See* Aug. 25, 2014 Tr. (Dkt. No. 190) at 34:6-9. However, aside from those documents, there is a database of Board minutes and related materials which includes 100,501 documents and 240,000 relevant documents obtained directly from HP and its professional advisors. DRC Resolution at 16; §IV.E.2. There also appears to be another 2.8 million files collected from 41 HP custodians and millions of files including e-mails hosted on

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

electronic databases. *Id.* Thus, the Settling Plaintiffs' document discovery pales in comparison to that which was reviewed by Committee Counsel and would be available during ordinary pre-trial discovery and counsels against approval of the Proposed Settlement.

B. The Continued Pendency of the Action Against Lynch And Hussain Also Counsels Against Approving the Proposed Settlement

The Proposed Settlement was reached before the filing of the UK Complaint or any material litigation in that action. The filing of the UK Complaint has already revealed one important piece of information in the form of the allegations of accounting fraud being largely based on information easily available from Deloitte UK's Audit Committee memos. It is impossible to know at this time what the testimony and evidence will be in that action and how it will, in turn, impact the potential liability of Defendants being released from liability in this action. If Lynch and Hussain are ultimately found to be not liable or liable for only a small percentage of the damages suffered by HP, then it will inevitably point the finger at others as being responsible for the at least $5 billion of damages suffered by HP.

CONCLUSION

For all the reasons set forth above and in Steinberg's prior submissions (Dkt. Nos. 217, 256 and 296), it is respectfully submitted that the Court should not approve the Proposed Settlement or, in the alternative, the Court should confine its release of claims to the demand futility claims asserted by the Settling Plaintiffs and allow Steinberg to proceed with litigating the demand refused claims.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

Dated: July 6, 2015

ABRAHAM, FRUCHTER & TWERSKY, LLP
Ian D. Berg (Bar No. 263586)
11622 El Camino Real, Suite 100
San Diego, CA 92130
Tel: (858) 764-2580
Fax: (858) 764-2582
iberg@aftlaw.com

ABRAHAM, FRUCHTER & TWERSKY, LLP

/s/ Jeffrey S. Abraham
Jeffrey S. Abraham, *pro hac vice*
Lawrence D. Levit
Philip T. Taylor
One Penn Plaza; Suite 2805
New York, New York 10119
Tel: (212) 279-5050
Fax: (212) 279-3655
jabraham@aftlaw.com
llevit@aftlaw.com
ptaylor@aftlaw.com

KANTROWITZ, GOLDHAMER & GRAIFMAN, P.C.
Gary S. Graifman, *pro hac vice*
Michael L. Braunstein
210 Summit Avenue
Montvale, New Jersey 07645
Tel: (201) 391-7000
Fax: (201) 307-1088
ggraifman@kgglaw.com

GREEN & ASSOCIATES, LLC
Michael S. Green
522 Route 18, Suite 5
East Brunswick, New Jersey 08816
Tel: (732) 390-5900

Counsel for Harriet Steinberg