EXHIBIT 28

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE HEWLETT-PACKARD COMPANY SHAREHOLDER DERIVATIVE LITIGATION	MASTER DOCKET NO. C-12-6003 CRB (EDL)
THIS DOCUMENT RELATES TO: ALL ACTIONS	**[PROPOSED] SUR-REPLY OBJECTION OF HARRIET STEINBERG TO THE PROPOSED SETTLEMENT** **[PUBLIC VERSION]**

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

Hewlett-Packard Company ("HP" or the "Company") does not dispute the principle that proponents of a proposed settlement "who improperly negotiate a settlement should bear the heavier burden of establishing fairness by clear and convincing evidence." *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1126 n.30 (7th Cir. 1979). Instead, HP argues that *General Motors* is limited to cases where unauthorized negotiations took place in violation of a court order. HP Memo. (Dkt. No. 399) at 5.

Although the precise impropriety in *General Motors* involved an unauthorized settlement negotiation, the holding is not limited to that precise factual setting but, instead, extends to *any* case in which a settlement has been improperly negotiated. Here, the Proposed Settlement was initially structured with two elements this Court found to be improper: (1) the retention of Settling Plaintiffs' counsel as additional counsel to assist in the prosecution of claims against Lynch and Hussain;[1] and (2) an agreed upon minimum payment of $18 million in attorneys' fees for those services potentially rising to $48 based upon any recovery achieved from Lynch and Hussain. *See* Stipulation of Settlement (Dkt. No. 149-2) at 33-35 and Exhibit A thereto.

HP contends that attorneys' fees were only negotiated after the other terms of the Proposed Settlement had already been agreed upon. HP Memo. at 57-58. However, the Company and the Settling Plaintiffs have both have improperly choked off discovery into the bulk of the relevant settlement discussions making it impossible to verify the accuracy of that contention. *See* Joint Letter Brief (Dkt. No. 350) at 3-6. In any event, even assuming *arguendo* that were the case, HP's argument ignores that the proposed settlement provided for an ongoing retention of Settling Plaintiffs' counsel was also held to be improper. *See* Aug. 25, 2015 Tr. (Dkt. No. 199) at 18:15-18.

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[1] The original term sheet negotiated by the Settling parties contemplated the realignment of the parties in *Noel v. Whitman, et al.*, Case No. 1:13-cv-251346 (Cal. Super. Ct. Santa Clara Cty.) to substitute HP as plaintiff. *See* Exhibit 30 (at §I.C) to the declaration of Caroline A. Olsen (the "Olsen Decl.") in response to the objections (Dkt. No. 399-31).

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II. THE COMPANY HAS FAILED TO DEMONSTRATE THAT STEINBERG'S CLAIMS ARE SUBJECT TO DISMISSAL

The Company asserts that any claims which Steinberg could assert are subject to dismissal on a pleading motion based upon the results of the Committee's investigation. HP Memo. (Dkt. No. 399) §III.B (pp. 9 - 47). The Outside Directors contend that the claims themselves lack merit. See Directors' Memo. (Dkt. No. 402) at Point III (pp. 2-8). The Company and the Outside Directors are both in error.

A. Steinberg Will be Able to Properly Allege Wrongful Demand Refusal

The wrongful refusal of a demand is properly alleged where there is "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). The business judgment rule does not apply if directors did "[1] not act in good faith, . . . *or* [2] reach[ed] their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available." *Brehm v. Eisner*, 746 A.2d 244, 264, n. 66 (Del. 2000) (emphasis added). Therefore, to survive a motion to dismiss under Rule 23.1 where demand has been made and refused, a plaintiff must allege particularized facts that raise a reasonable doubt that (1) the board's decision to deny the demand was consistent with its duty of care to act on an informed basis, that is, was not grossly negligent; *or* (2) the board acted in good faith, consistent with its duty of loyalty. *See Ironworkers Dist. Council v. Andreotti*, C.A. No. 9714-VCG, 2015 Del. Ch. LEXIS 135, at *83 (Del. Ch. May 8, 2015).

1. The Board Insulating its Analysis of the Claims From Scrutiny Raises a Reasonable Doubt With Respect to the Reasonableness and Good Faith of the Investigation

In an argument confined to a footnote, HP contends that the Company did not insulate its analysis from scrutiny because it provided an "in-person presentation from DRC's counsel which laid out the entirety of the DRC's conclusions." HP Memo. at 11 n.6. HP's contention is a gross perversion of the actual events.

Instead, as a condition to participating in a meeting with the DRC's counsel, Steinberg's counsel was required to sign a highly restrictive confidentiality agreement prohibiting Steinberg

from revealing any of the contents or discussions at that meeting. *See* Dkt. No. 218-3. No documents were provided to Steinberg's counsel, who instead, received an oral presentation from the DRC counsel which appears to have based upon the slide decks in the Presentation. *See* Sur-Reply Declaration of Jeffrey S. Abraham ("Abraham Sur-Reply Decl.") at ¶2. At the end of the presentation, Steinberg did not know with certainty the precise actions HP would be taking, an issue which was articulated in a letter to Ralph Ferrara requesting a definitive response. *See* Dkt. No. 218 ¶7. Also, the presentation was of limited use in that it did not provide the DRC Resolution or other material underlying the DRC's and Board's ultimate decisions. Accordingly, Steinberg was forced to make a books and records demand for that information. Since that time, HP has continued to stonewall and insulate the DRC's analysis from any serious scrutiny, most recently cloaking huge sections of the Presentation under the attorney-client privilege or work-product doctrine.[2] *See* Dkt. No. 390-5.

Judge Hamilton's considered opinion in *City of Orlando Police Pension Fund v. Page*, 970 F. Supp. 2d 1022 (N.D. Cal. 2013) is on point. The Company's effort to distinguish *City of Orlando* because it involved an admitted wrongdoing is nowhere indicated in the decision and lacks any merit. The *Page* decision did not turn on there being an "admitted wrongdoing," despite a $500 million government disgorgement. More importantly, in this case there is an admitted wrongdoing resulting in a ***multi-billion dollar*** loss to the Company that dwarfs the loss to the company in the *Page* case. Here, as in *Page,* the core issue is whether the parties' conduct is sufficiently culpable to give rise to a claim for liability.

[2] HP's objection to the use of documents produced in response to books and records requests to support the objection (*see* Dkt. No. 403 at 3) is without merit as "[b]asic notions of accountability require that stockholders be able to use Section 220 to evaluate whether the demand-refusal decision was made in good faith, after a reasonable investigation, or whether the Board had some different, ulterior motivation." *La. Mun. Police Emples. Ret. Sys. v. Morgan Stanley & Co.*, C.A. No. 5682-VCL, 2011 Del. Ch. LEXIS 42, *19 (Del. Ch. Mar. 4, 2011) (quotes and citation omitted)

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2. The Failure to Insure an Independent Investigation of the Claims Raises a Reasonable Doubt With Respect to the Reasonableness and Good Faith of the Investigation

The Company asserts that "[t]he independence of the DRC is beyond dispute" contending that mere service on the Board at the time of the Acquisition is an insufficient basis upon which to raise a reasonable doubt with respect to independence. HP Memo. at 12-13. However, this is not a case of "mere service" on the Board but, instead, evaluating whether the members of the Board had potential liability. This is particularly true with respect to Thompson, who had been a member of the Board's Finance and Investment Committee ("FIC") and Reiner, who was a member of the Board's Technology Committee. Those committees' roles in the Acquisition were specifically discussed and analyzed by the Committee. *See* DRC Resolution at 34-35; §XV.C.5 and 6 (Dkt. No. 211-1).

Kaplan v. Wyatt, 499 A.2d 1184 (Del. 1985), the only case relied upon by HP in making this argument, is not on point. In *Kaplan*, the director "abstained from voting" on the transaction in question. *Id. at* 1189. Here, in contrast, Thompson and Reiner both voted to approve the Acquisition and their involvement ran deeper than that based upon their respective membership on the FIC and the Technology Committee. *See, e.g.*, *Booth Family Trust v. Jeffries*, 640 F.3d 134,146 (6th Cir. 2011) (a director's status as a defendant and participation on a committee charged with oversight of alleged wrongdoing "cast some doubt on [their] ability to independently consider the Shareholders' claims . . . .")

The Company also never directly confronts Bennett's inability to act independently because of his relationship with Perella Weinberg. As Steinberg has previously explained, Perella Weinberg's potential liability is inherently intertwined with that of HP's officers and directors. Supp. Obj. (Docket No. 391) at 3. That is a conflict which, therefore, cannot be wished away by abstaining from voting or evaluating potential claims against Perella Weinberg. DRC Resolution at 22; §XII.A.2. *See also Booth Family Trust*, 640 F.3d at 144 (special committee member's recusal was an effective admission on that he lacked independence).

The same is true of Proskauer. Their ongoing relationship with Barclays and Perella Weinberg placed them in a situation of conflict because their potential liability was inherently

intertwined with that of HP's officers and directors. DRC Resolution at 54; §XIX.C.1.j. It is also a conflict which cannot be wished away from recusing oneself from only opining on the liability of officers and directors.

3. Steinberg Can Allege Particularized Facts Raising a Reasonable Doubt as to Whether the DRC's Decision Was Reached by a Grossly Negligent Process

The Company also contends that "[t]he thoroughness of the DRC is beyond dispute." HP Memo. at 14. The entire focus of that argument, however, is on the number of hours and the amount of effort expended by counsel on the investigation as well as the twelve meetings the DRC had concerning the status of the investigation. *Id.* at 14-15.

The problem, however, is not with the volume of material gathered or the number of hours expended in the process. Instead, the gross negligence primarily manifests itself through the improper compartmentalization of key facts or controlling principles of law in analyzing potential liability. *See, e.g., Snyder v. Barnhart*, No. C 04-03844 CRB, 2005 U.S. Dist. LEXIS 13274, at *34 (N.D. Cal. June 30, 2005) (criticizing analysis of Administrative Law Judge for improperly compartmentalizing relevant facts).

This improper compartmentalization of facts can most clearly be seen in the Committee's evaluation of whether there existed "red flags" with respect to Autonomy's financial reports. DRC Resolution at 35. The Presentation includes information demonstrating that those concerns were widespread as reflected in the analysis preformed only months earlier at HP in Project Aggie and in Barclays' presentation concerning Autonomy. *See* Abraham Decl. Ex. 1 at HP_DER3_00012728 and 00013517.

However, those facts are contained within separate portions of the Presentation respectively concerning "Results of Factual investigation: Strategic Considerations 2010" and "Consideration of Professional Advisors". *See* Abraham Sur-Reply Decl. Ex. 58. However, those documents are not found in the section of the Presentation addressing the issue of "red flags" related to Autonomy's financial reports and, indeed, are not even mentioned in the DRC's conclusions with respect to that issue. DRC Resolution at 35; §XV.C.7.a.

1 The Company contends that it is "[n]ot true" that the Committee confined itself to the
2 analyst reports questioning Autonomy, as cited in the complaints, and instead, considered many
3 more positive analyst reports not cited in the complaints. HP Memo. at 35 n. 32. Aside from
4 ignoring Project Aggie and Barclays observations about Autonomy's financials lacking
5 transparency and improperly reporting organic growth, HP's analysis ignores that the negative
6 analyst reports continued to be extant and those analysts had not withdrawn their opinions. Also,
7 even a cursory review of those reports demonstrates that they lack the breadth of analysis of
8 underlying issues contained in the negative analyst reports. *Compare* Abraham Decl. Exs. 27,
9 32-34 and 37-39 (Dkt. Nos. 385-3, 385-8-10 and 385-13-15) *with* Olsen Decl. Exs. 8-16 (Dkt.
10 Nos. 399-9-17).

11 The Committee's analysis of the "red flag" issue also ignores that such red flags are not a
12 necessary element for a breach of the duty of due care claim which could be asserted against HP
13 ***officers*** Apotheker and Robison.[3] Instead, red flags are an issue for evaluating the culpability of
14 corporate ***directors*** who are insulated from claims based upon breach of the duty of care by 8
15 Del. C. §102(b)(7). *See, e.g.*, *La. Mun. Police Emples. Ret. Sys. v. Pyott*, 46 A.3d 313, 340-44
16 (Del. Ch. 2012), *rev'd on other grounds*, 74 A.3d 612 (Del. 2013).

17 The same applies to Apotheker and Robison not having reviewed the KPMG Report.
18 Steinberg Obj. at 27 (citing Ex. 1). The Company discusses at length the reasons why the failure
19 to review the KPMG Report does not necessarily lead to liability on the part of Apotheker,
20 Robison or any of the Directors. HP Memo. at Point III.B.2.(d)(ii) (pp. 32-35). However, the
21 Company is unable to demonstrate that the Committee -- rather than a belated *post hoc*
22 rationalization by HP -- incorporated this fact into evaluating the potential liability of Apotheker
23 and Robison.

24 The Company also attempts to suggest that Apotheker and Robison are not culpable
25 because their conduct was not "so grossly off the mark so as to amount to a gross abuse of
26 discretion." HP Memo. at 24 (quoting *Metro Life Ins. Co. v. Tremont Grp. Holdings, Inc.*, C.A.

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28 [3] The same is true of defendant Lesajk who as HP's CFO also does not enjoy the benefits of the exculpation for breaches of the duty of care provided to directors by 8 *Del. C.* §102(b)(7).

1 No. 7092-VCP, 2012 BL 334610 (Del. Ch. Dec. 20, 2012)). As an initial matter, *Metro Life Ins.*
2 is not directly on point because it involved interpretation of the exculpation provision of a
3 general partnership agreement. *Id.* at *8. Even if *Metro Life Ins.* was on point, however, it
4 supports Steinberg's analysis of Delaware law.

5 In *Metro Life Ins.*, the Delaware Chancery Court held that the failure to supervise,
6 monitor and manage investments while blindly resting on the statements of Bernard Madoff
7 without sufficient written confirmation was grossly negligent conduct. *Id.* Here, although no
8 analogy is perfect, Apotheker and Robison failed to review the KPMG Report while blindly
9 relying on an oral report from Deloitte UK (HP_DER3_00012877, Abraham Decl. Ex. 1) and,
10 according to HP's latest submissions, Hussain's oral representations without obtaining the
11 documents necessary to confirm those statements. HP Memo. at 38 (complaining that Hussain
12 "was lying."). Delaware law, however, holds that the failure to "ask[] for any of the underlying
13 material" constitutes gross negligence. *Metro Life Ins.* at *9 (quoting *Forsythe v. ESC Fund*
14 *Management Co. (US)*, 2007 BL 187403, 2007 WL 2982247, at *8 (Del. Ch. Oct. 9, 2007)).[4]

15 Similarly, the Committee completely dropped the ball in analyzing potential claims
16 against members of the FIC. Steinberg Obj. at 29. Although the Company now offers a spirited
17 defense of the FIC, it cannot cover up the fact that the DRC failed to consider those facts in
18 reaching its conclusions at the time; or, that the Committee simply made no conclusions with
19 respect to the potential liability of the FIC members.[5]

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21 [4] The other cases cited by HP are distinguishable. *Adams v. Cavlerse Farms Maint. Corp.*, 2010 WL 3944961 (Del. Ch. Sept. 17, 2010), was a *pro se* action brought against a homeowner's association involving different concerns than the need to be properly informed of relevant facts prior to making a corporate decision. *Midland Grange No. 27 Patrons of Husbandry v. Walls,* 2008 WL 616239 (Del. Ch. Feb. 28, 2008), involved a sale of real estate by a fraternal organization in which following trial the Chancery Court held that the failure to comply with the procedures set forth in the by-laws was not motivated by a desire to override the rights of members.
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25 [5] Steinberg also contended that the Committee was not fully informed of the context in which Meg Whitman blamed Apotheker and Robison for the Acquisition. Steinberg Obj. at 27 (citing Exs. 42 and 48). In a footnote, HP defends the reasonableness of the conclusion without even attempting to demonstrate that the Committee was aware of the relevant facts identified by Steinberg, which is the relevant test in analyzing this prong of wrongful demand refusal. HP Memo. at 43 n.42. Whitman's apologia is, in any event almost laughable in light of investor's
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4. Steinberg Will Also be Able to Allege a Reasonable Doubt About the Committee's Conclusions With Respect to Liability

Another alternative basis for Steinberg being able to survive a motion to dismiss would be alleging facts supporting a reasonable basis that the Committee's conclusions were unreasonable. *See, e.g., Ironworkers Dist. Council,* 2015 Del. Ch. LEXIS 135, at 82-83. Although Steinberg need not allege this prong of the wrongful demand refusal test to survive a motion to dismisss, it is apparent that she would be able to do so here.[6]

HP's officers are liable for breaches of the duty of due care if they fail to act in a fully informed manner. *See*, *e.g.*, *Smith v. Van Gorkom*, 488 A.2d 858, 875-876 (Del. 1985). Here, in contrast, no such conclusion is possible with respect to HP management as Apotheker and Robison, among other things, failed to review the KPMG Report and failed to learn of the widespread concerns about the integrity of Autonomy's financial reporting.

The Company seeks to excuse this grossly negligent conduct by claiming that Apotheker was told following the August 17th conference call that no material issues remained and Robison received a similar report. HP Memo. at 33-34. However, in making this argument, the Company still fails to confront that Apotheker and Robison as the "Sponsors" of the Acquisition were personally charged with the responsibility for insuring that all necessary due diligence had been properly performed. DRC Resolution at 28; §XV.C.2.c.

Indeed, even without their status as "Sponsors," Apotheker and Robison still had a duty to be fully informed of all relevant facts and not just to rely on their underlings. Section 141(e) of Delaware General Corporation Law only provides a safe harbor to directors who rely on the

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widespread criticism of HP's due diligence process which almost resulted in both defendants Lane and Thompson not being re-elected to the Board. *See* Abraham Sur-Reply Decl. Ex. 59.

[6] *Ironworkers Dist. Council,* upon which the Company now relies, held that the plaintiffs in that action had failed to properly allege a reasonable doubt that demand had been wrongfully refused. However, the case is not on point because key to the Chancery Court's determination were the findings that that the company's legal analysis was thoughtful thorough and had a good faith basis. *Id.* at *62 & n.167, *63 & n.172. Here, in contrast, there is no way to determine the precise legal analysis of the Committee (or its counsel) or whether it had a good faith basis. Instead, HP has drawn a shroud of secrecy over the analysis through an aggressive assertion of privilege. *See* Steinberg Obj. at 62. *See also* Point II.A.1, *supra.*

1 reports of others; ***officers do <u>not</u> enjoy any such safe harbor***. *See, e.g.*, 8 *Del.C.* §141(e).[7] This
2 is particularly appropriate where, as here, an HP officer warned Robison that the Company was
3 not obtaining sufficient due diligence. *See* HP_DER3_0012860 (Ex. 1).[8]
4 The Company now seeks to claim that the warnings contained in the KPMG Report did
5 not constitute red flags because that report mainly said good things about Autonomy. HP Memo.
6 at 32-33. This contention is utter nonsense because KPMG specifically warned that a review of
7 Deloitte UK's work papers was necessary to properly complete financial due diligence and that it
8 had been unable to confirm the veracity of, among other things, Autonomy's reported organic
9 growth figures. *See* Steinberg Obj. at 7 (citing Exs. 1 and 4-5). In other words, KPMG's
10 concerns about the lack of documentation clearly overshadowed any other positive statements
11 that may have been made in in their draft report.
12 Also, HP offers no compelling reason why Apotheker and Robison ignored the public
13 concerns with respect to the integrity of Autonomy's financial reports. The Company posits this
14 issue as one in which the duty to be informed is dependent upon the existence of "red flags." HP
15 Memo. at 35. However, ***corporate officers*** such as Apotheker and Robison (and Lesjak) had a
16 duty to be fully informed of relevant facts regardless of whether red flags are present. It is only
17 in analyzing the potential bad faith conduct of directors that there is a need to evaluate whether
18 any red flags were present. *See, e.g., Pyott*, 46 A.3d at 340-44. A "name brand" accounting
19 firm opining favorably on Autonomy's annual financial statements (*e.g.,* HP Memo. at 43 n.42)
20 could not reasonably provide any comfort where, as here, IFRS accounting standards with
21 respect to software revenue recognition differs so dramatically from U.S. Generally Accepted
22 Accounting Principles (GAAP). *See* Steinberg Obj. at 4.
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24 [7] *In re Accuray, Inc. S'holder Deriv. Litig.,* 757 F. Supp. 2d 919 (N.D. Cal. 2010), *In re REMEC Inc. Sec. Litig.,* 702 F. Supp.2d 1202 (S.D. Cal. 2010); and *Howard v. SEC,* 376 F.3d
25 1136 (D.C. Cir. 2004), upon which the Company relies (HP Memo. at 34) are all not on point because they involve claims arising the federal securities law under which there is a need to
26 plead a strong inference of scienter. *See, e.g., Tellabs Inc. v. Makor Issues & Rights*, 551 U.S. 308, 313 (2007).
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28 [8] Steinberg previously identified the writer of the e-mail as a Perella Weinberg banker. HP has pointed out that the author was, in fact, an HP employee. *See* HP Memo. at 39, n. 36.

1 Thus, the Company's assertion in a footnote that that the Delaware Supreme Court's
2 decisions in *Brehm v. Eisner (In re Walt Disney Co. Deriv. Litig.)*, 906 A.2d 27 (Del. 2006) and
3 *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) have no bearing on this case because they
4 involve duty of care cases (HP Memo. at 34-35 n. 34), entirely misses the mark as it relates to
5 Apotheker and Robison (and Lesjak). Instead, their liability as officers of HP is assessed under a
6 duty of care standard because, as officers of HP, they may not rely on the exculpatory provision
7 of 8 *Del. C.* §102(b)(7). *See, e.g., Gantler v. Stephens*, 965 A.2d 695, 709, n.37 (Del. 2009).
8 The case for liability under the duty of care standard against HP's officers is the strongest
9 because proving gross negligence is substantially easier than proving a breach of the duty of
10 loyalty or the absence of good faith as required under 8 *Del. C.* §102(b)(7). *See, e.g., Brehm v.*
11 *Eisner*, 906 A.2d at 64-66. However, there being a higher threshold for establishing liability
12 does not mean that HP's non-executive directors will be able to escape liability in this action.
13 HP's non-executive directors ignored "red flags" relating to the reliability of Autonomy's
14 financial statements. *See* p. II.A.3, *supra*. In addition, Lesajk's "new news" likely informed the
15 Board of the precise issues which later proved so problematic. Given the existence of Project
16 Aggie it is reasonable to allege that the "new news" related specifically to the organic growth
17 issue and the likelihood that HP would not be able to successfully integrate Autonomy. *See*
18 HP_DER3_00012728 (Ex. 1).
19 The contention that Lesjak's primary concern was the stock market's expected reaction to
20 acquiring Autonomy for $11 billion (*see* HP Memo. at 42) makes no sense. The expected stock
21 market reaction would not have required Apotheker referencing the purported strength of the
22 Company's due diligence as a basis for proceeding with the Acquisition. *See* DRC Resolution at
23 34; §XV.C.5.c.i. It is inconceivable that the Company's due diligence (as meager as its
24 substance was) could in any way meaningfully address how investors were expected to react.
25 Also, this reference to the Company's due diligence is a new contention that is
26 unsupported by any document. The relevant slide from the Presentation contains *no mention* of
27 due diligence and, instead, only reflects the Board's choosing to go along with Apotheker
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1 overriding Lesajk's concerns. *See* HP_DER3_00012933 (Abraham Decl. Ex. 1). To the extent
2 the Committee added a reference to Apotheker's due diligence, it reflects a guilty heart that there
3 should have been a review of the due diligence at that time.

4 Similarly unavailing is the Board's reliance on presentations at the August 18, 2011
5 meeting because by that time they had already decided to proceed with the Acquisition. The
6 primary presentations at the August 18th meeting were made by Barclays and Perella Weinberg
7 both of which disclaimed liability for their content and relied on the input provided by HP
8 management seemingly gained through the "due diligence" process. *See*, *e.g.*, Abraham Decl.
9 Ex. 6 at 1.

10 Moreover, the Company's entire analysis glosses over the directors obligation to institute
11 a system of internal controls. *See, e.g.¸ In re Caremark Int'l Deriv. Litig.*, 698 A.2d 959, 971
12 (Del. Ch. 1996). Here, HP has failed to produce any documents evidencing the system of
13 internal controls designed to insure the full reporting of relevant information in the context of
14 corporate acquisitions. The Government Revisions seemed to be aimed at correcting internal
15 control concerns; yet, however, the failure to have internal controls in place or to properly follow
16 through on the internal controls that were in place at the time of the Acquisition, represents a
17 failure of the Board to properly discharge its duties in accordance with Delaware law. *See, e.g.,*
18 *Pyott*, 46 A.3d at 340-342.

19 The case against settlement approval gets even stronger with the FIC. The Committee
20 failed to perform any analysis of the FIC's potential liability. Instead, the only evaluation of any
21 claims against the Board's committees took place with respect to the Technology Committee and
22 the Audit Committee. Steinberg Obj. at 22-23.

23 The Committee's analysis of the Technology Committee members' potential liability
24 fares no better. The Technology Committee failed to meet for months in order obtain an update
25 on due diligence. Steinberg Obj. at 23. The Company's *post-hoc* rationalization that the failure
26 to meet and perform its duties is irrelevant because there were no concerns with Autonomy's
27 software (HP Memo. at 40) flies in the face of the Presentation stating that "Failure to Identify
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1 Autonomy Software/Technology as "Outdated' or Insufficient". *See* Ex. 1 (at
2 HP_DER3_00013545).

3 **B. The Record Does Not Show, and HP and the Outside Directors Have Failed to**
4 **Demonstrate, That Defendants Have no Potential Liability**

The documents provided to Steinberg , as well as the documents which the Settling
5 Plaintiffs obtained through their discovery, are only a fraction of the documents relevant to
6 assessing potential liability. *See* Steinberg Obj. at 34. In addition, there has not been a single
7 deposition taken in this litigation. The Settling Plaintiffs have purportedly interviewed
8 Apotheker and Robison but have failed to share the notes or results of those interviews with the
9 Court or with Steinberg. *See* Abraham Sur-Reply Decl. ¶3. Similarly, although the DRC has
10 purportedly interviewed dozens of witnesses, there appear to be no transcripts of those interviews
11 and the notes of those interviews have not been produced. Bennett Tr. at 19:13-20:14; Abraham
12 Sur-Reply Decl. ¶3.

13 Therefore, the Company's effort to obtain approval of the Proposed Settlement is very
14 much akin to an attempt to obtain summary judgment without providing relevant discovery: it is
15 not allowed. *See, e.g.*¸ Fed. R. Civ. P. 56(d). However, even on the limited and self-selected
16 record provided by the Company, it is apparent that the claims which are the subject of being
17 released through the Proposed Settlement do, in fact, have merit. *See* Point II.A.4, *supra*.

18 In seeking to bolster their arguments, HP's outside directors (the "Directors") contend
19 that Steinberg would have two options in alleging claims against HP's directors: either they acted
20 in their own self-interest in approving the acquisition of Autonomy (Outside Dir. Memo. at Point
21 III.A.) or that the Directors acted in bad faith. *Id.* at Point III.B. That, however, does not
22 represent an accurate portrayal of the claims which could be asserted against the Directors.

23 Instead, Steinberg claims against the Directors primarily center on the breach of the duty
24 of oversight which 'implicates a breach of the directors' *duty of loyalty*." R. Franklin Balotti &
25 Jesse A Finkelstein, DELAWARE LAW OF ORGANIZATION & BUSINESS CORPORATIONS, §4.16[B]
26 at p. 4-138. *See also* Steinberg Obj. at 20 (citing *Stone v. Ritter,* 911 A.2d 362, 370 (Del. 2006)).
27 Thus, contrary to the Director's contention there is no requirement that Steinberg allege (or
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demonstrate) the Directors' self-interest in the Company's acquisition of Autonomy. The claim is not that the Directors knowingly acquired Autonomy for an excessive price but rather that they breached their duty of loyalty by ignoring multiple red flags and failing to properly oversee the process through which HP willingly chose to spend over $11 billion on Autonomy ultimately resulting in an $8.8 billion loss to the Company.

Similarly, although many of the cases discuss the breach of duty of loyalty as an act of bad faith, there is still no requirement to allege (or prove) that the Directors "acted with scienter, *i.e.,* that they had actual or constructive knowledge that their conduct was legally improper." Directors' Memo. at 3 (quoting *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008)). *Wood* is not on point because as a court in this District has previously explained that:

> In *Wood v. Baum* . . ., the court held that allegations of scienter were required where an exculpatory provision in an LLC's operating agreement exempted directors from all liability except in cases of "fraudulent or illegal conduct." The Delaware statute that allowed such exculpatory clauses – the Limited Liability Company Act ("LLCA") – permits LLCs to eliminate director liability for *all* fiduciary duties, excepting only those that constitute a bad faith violation of the implied covenant of good faith and fair dealing. *Id.*; 6 Del. C. §18-1101. . . [However,] *Wood* does not stand for the proposition that the mere presence of an exculpatory provision requires allegations of scienter even for a duty of loyalty claim. Indeed, the clause in *Wood* exculpated such claims, which is not an option here given that Delaware law does not permit a corporation . . . to exculpate duty of loyalty claims. To the extent courts have relied on *Wood* to require allegations of scienter for duty of loyalty claims where such claims are non-exculpable, those courts have not explained why such an extension is appropriate and they are therefore unpersuasive.

Gulbrandsen ex rel. Wells Fargo & Co. v. Stumpf, Case No.: C-12-05968-JSC, 2013 BL 124199, at *4-5 (N.D. Cal. May 9, 2013).[9]

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[9] The other cases the Directors rely upon are not on point. *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235 (Del. 2009), was a case arising out of a transaction in which the directors did not conduct a market check but, instead, relied on their knowledge of the company's condition. There were no allegations, as is the case here, that the directors failed to perform their duty of oversight or their obligations as members of the FIC or the Technology Committee. *In re BioClinica S'holder Litig.*, No. 8372-VCG, 2013 WL 5631233 (Del. Ch. Oct. 16, 2013), was a case in which the plaintiffs alleged that the directors inflated capital expenditures in order to knowingly depress the company's implied valuation in a corporate transaction. *Dent v. Ramtron Int'l Corp.*, No. 7950-VCP, 2014 WL 2931180 (Del. Ch. June 30, 2014), involved allegations that deal protection devices in a transaction producing a 71% premium to the unaffected market price were so unreasonable as to constitute bad faith.

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III. RELEASING POTENTIAL DEFENDANTS HAVING NO INVOLVEMENT WITH THE GOVERNANCE REVISIONS IS INAPPROPRIATE

The Company contends that it "the law is clear" that defendants or other parties who have not paid any compensation may be released from liability notwithstanding their lack of involvement or contribution to the Proposed Settlement. HP Memo. at 54-55. In making this argument, HP ignores cases having a contrary holding, as previously cited by Steinberg, including *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 n.9 (2d Cir. 1981) (Friendly, J.) and *Winkelman v. General Motors Corp.*, 48 F. Supp. 490, 496-97 and 499 (S.D.N.Y. 1942). *See* Steinberg Obj. at 34.

Glicken v. Bradford, 35 F.R.D. 144 (S.D.N.Y. 1964), upon which HP relies, opined that no contribution from each defendant was necessary but, at the same time, stated that:

> In fact, as substantial shareholders of IDS, the Murchison brothers, Alleghany, and all other stockholders, automatically are contributing to the settlement by absorbing their share of its cost, and it is only equitable that the Corporation, IDS, the recipient of the allegedly excessive fees, should bear the burden of the settlement.

Id. at 152. In other words, although there was no direct contribution, there was an equitable contribution or diminution in wealth on the part of the additional defendants being released. The same is true of other cases cited by the Company. *See, e.g.*, *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 548 (D. Colo. 1989) ($100,000 contributed towards the settlement); *Duban v. Diversified Mortg. Inv.*, 87 F.R.D. 33, 41 (S.D.N.Y. 1980) (only claims being released were ones which had not yet been filed and were purely speculative).

Although *Masterson v. Pergament,* 203 F.2d 315, 330 (6th Cir. 1953) supports HP's contention, this one outlier case involving a divided panel of the Sixth Circuit from more than sixty years ago hardly makes for a clear, controlling rule of law. This is particularly true where that holding conflicts with Judge Friendly's decision in *National Super Spuds, supra.*

In any event, *Masterson* is distinguishable in that it involved the payment of a cash fund. The person paying a cash fund may legitimately demand the release of other defendants as a condition for paying over a sum of money. Here, in contrast, it is the Company itself which is contributing a non-cash benefit to the Proposed Settlement by the way of purported corporate

1 Governance Revisions of questionable value. The current directors of HP as the Company's
2 fiduciaries have no right to demand an over broad release in return for repairing HP's corporate
3 governance procedures because in doing so they are overstepping their bounds as corporate
4 fiduciaries to look after the Company's best interests rather than that of their fellow former
5 officers and directors.

6 **CONCLUSION**

7 Therefore, for the reasons set forth above and in the prior submissions made with this
8 Court by Ms. Steinberg, this Court should decline to approve the Proposed Settlement.

9 Dated: July 22, 2015

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