

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID V. MYERS and SHIVA Y.
STEIN, derivatively on behalf of
STARBUCKS CORPORATION,

Plaintiffs,

v.

TROY ALSTEAD, MARY N. DILLON,
ROBERT M. GATES, MELLODY
HOBSON, KEVIN R. JOHNSON,
SCOTT MAW, JOSHUA COOPER
RAMO, HOWARD SCHULTZ, JAMES
G. SHENNAN, JR., CLARA SHIH,
JAVIER G. TERUEL, MYRON E.
ULLMAN, III, CRAIG E.
WEATHERUP,

Defendants,

and

STARBUCKS CORPORATION,

Nominal Defendant.

CASE NO. C16-1580 RAJ

ORDER

1 **I. INTRODUCTION**

2 This matter comes before the Court on Nominal Defendant Starbucks
3 Corporation’s (“Starbucks”) and the Individual Defendants’ Motion to Dismiss
4 Complaint for Breach of Fiduciary Duties and Unjust Enrichment. Dkt. ## 15, 16.
5 The Court is also in receipt of Defendants’ unopposed Request for Judicial Notice.
6 Dkt. # 18. Having reviewed the briefs submitted by the parties¹ and the relevant
7 portions of the record, the Court finds oral argument unnecessary. For the reasons that
8 follow, the Court **GRANTS** Starbucks’ Motion and the Request for Judicial Notice,
9 and terminates the Individual Defendants’ motion as **MOOT**.

10 **II. BACKGROUND**

11 Plaintiffs are shareholders of Starbucks. Based on media reports, Plaintiffs
12 allege that Starbucks underpaid its taxes in the European Union (EU) between 1998
13 and 2012. Dkt. 4-3 (Complaint) at ¶ 52. The United Kingdom’s Parliament inquired
14 into Starbucks’ EU tax structure “to understand why [Starbucks doesn’t] pay the
15 corporate tax that it appears, on the facts, is due.” *Id.* at ¶ 54. On December 6, 2012,
16 Starbucks announced to the London Chamber of Commerce that it would resolve the
17 issue by paying ten million pounds each year for 2013 and 2014. *Id.* at ¶ 60.

18 Separately, Starbucks had entered into an advanced pricing agreement (“APA”)
19 with the Netherlands. *Id.* at ¶ 62. The APA established how Starbucks was to
20 calculate its taxes due to the Netherlands over the course of ten years. In July 2013,
21 the European Commission (“Commission”) began an investigation into the APA on

22
23 ¹ The Court strongly disfavors footnoted legal citations. Footnoted citations serve as an
24 end-run around page limits and formatting requirements dictated by the Local Rules. *See* Local
25 Rules W.D. Wash. LCR 7(e). Moreover, several courts have observed that “citations are highly
26 relevant in a legal brief” and including them in footnotes “makes brief-reading difficult.”
27 *Wichansky v. Zowine*, No. CV-13-01208-PHX-DGC, 2014 WL 289924, at *1 (D. Ariz. Jan. 24,
2014). The Court strongly discourages the parties from footnoting their legal citations in any
future submissions. *See Kano v. Nat’l Consumer Co-op Bank*, 22 F.3d 899-900 (9th Cir. 1994).

1 suspicion that the agreement was in violation of anti-competition prohibitions. *Id.* at ¶
2 62. The investigation became public on June 11, 2014 when the Commission
3 confirmed that “it had opened a formal, in-depth investigation into the corporate
4 structure of Starbucks in the Netherlands[.]” *Id.* at ¶ 63.

5 On October 21, 2015, the Commission “issued a decision finding that
6 Starbucks’ APA with the Dutch tax authorities artificially lowered tax[es] paid by its
7 subsidiary” *Id.* at ¶ 66. The Commission considered the APA to be in violation
8 of Article 107(1) of the Treaty of Functioning of the European Union, which prevents
9 member states, such as the Netherlands, from giving corporations unfair competitive
10 advantages. *Id.* As a result, the Commission ordered the Netherlands to collect thirty
11 (30) million euros from Starbucks. *Id.* at ¶ 67. The Netherlands appealed the decision.
12 *Id.* at ¶ 68.

13 Based on the tax schemes that led to Starbucks’ payouts to the EU and the
14 Netherlands, Plaintiffs issued demand letters (the “Demands”) to the Starbucks’ Board
15 of Directors (“Board”) “to investigate and commence an action against certain current
16 and/or former directors and executive officers of the Company.” *Id.* at ¶ 79. The
17 Board considered the letters and relevant documents, and discussed the Demands at
18 two Board meetings and an executive session. *Id.* at ¶ 80, Ex. C. On May 24, 2016,
19 the Board refused the Demands. *Id.*

20 Plaintiffs were unsatisfied with the Board’s investigation and subsequent
21 refusal and brought this action on behalf of Starbucks, alleging that the Board
22 breached their fiduciary duties and were unjustly enriched as a result. *Id.* at ¶¶ 88-104.
23 Defendants now move the Court to dismiss the lawsuit.

24 **III. LEGAL STANDARD**

25 Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a complaint for failure to
26 state a claim. The rule requires the court to assume the truth of the complaint’s factual
27 allegations and credit all reasonable inferences arising from those allegations. *Sanders*

1 | *v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). A court “need not accept as true
2 | conclusory allegations that are contradicted by documents referred to in the
3 | complaint.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th
4 | Cir. 2008). The plaintiff must point to factual allegations that “state a claim to relief
5 | that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). If
6 | the plaintiff succeeds, the complaint avoids dismissal if there is “any set of facts
7 | consistent with the allegations in the complaint” that would entitle the plaintiff to
8 | relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

9 | A court typically cannot consider evidence beyond the four corners of the
10 | complaint, although it may rely on a document to which the complaint refers if the
11 | document is central to the party’s claims and its authenticity is not in question.
12 | *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A court may also consider
13 | evidence subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th
14 | Cir. 2003).

15 | **IV. DISCUSSION**

16 | A. Standing Under Federal Rule of Civil Procedure 23.1

17 | To maintain a shareholder derivative lawsuit, a plaintiff must allege that she
18 | “was a shareholder or member at the time of the transaction complained of, or that the
19 | plaintiff’s share or membership later devolved on [her] by operation of law[.]” Fed. R.
20 | Civ. P. 23.1(b)(1). This is known as the contemporaneous ownership rule and is aimed
21 | at preventing “prospective plaintiffs from purchasing shares in a corporation with an
22 | eye to filing a derivative suit.” *In re Zoran Corp. Derivative Litig.*, 511 F. Supp. 2d
23 | 986, 1009 (N.D. Cal. 2007) (citing *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532
24 | n.6 (1984)).

1 Some courts recognize a narrow exception² to the contemporaneous ownership
2 rule that affords a shareholder standing in “unusual situations, such as where a plaintiff
3 acquires his stock after a particular transaction has begun but before it is completed[.]”
4 *In re CytRx Corp. Stockholder Derivative Litig. II*, 2017 Del. Ch. LEXIS 27, *9 (Del.
5 Ch. Feb. 22, 2017); *see also Conrad v. Blank*, 940 A.2d 28, 41 (Del. Ch. 2007)
6 (finding that Delaware courts “strictly interpret” the contemporaneous ownership rule
7 but recognize exceptions “so as not to prevent reasonable opportunities to rectify
8 corporate aberrations.”) (internal quotations and citations omitted). However, the
9 exception—referred to as the continuing wrong doctrine—“does not bestow standing
10 upon a stockholder to challenge transactions occurring before he bought his stock
11 simply because they are similar or related to transactions or other conduct that
12 occurred later.” *Desimone v. Barrows*, 924 A.2d 908, 925 (Del. Ch. 2007).

13 While some courts recognize this exception, others have rejected it as an
14 impermissibly expansive reading of the term “transaction” as it appears in Rule 23.1.
15 *See In re Bank of New York Derivative Litig.*, 320 F.3d 291, 298 (2d Cir. 2003)
16 (rejecting the expansive interpretation of “transaction” inherent in the continuing
17 wrong doctrine and finding that “a plaintiff must have owned stock in the corporation
18 *throughout* the course of the activities that constitute the *primary basis* of the
19 complaint.”). These courts read Rule 23.1’s standing requirement to mean that “a
20 proper plaintiff must have acquired his or her stock in the corporation before the core
21 of the allegedly wrongful conduct transpired.” *Id.* at 298. This strict interpretative
22 approach prevents a plaintiff from buying into a corporation with knowledge of

24 ² Plaintiffs’ argument in favor of this exception is relegated to a footnote in their
25 Opposition. Dkt. # 20 at 26. When parties leave arguments in footnotes, it suggests to the Court
26 that the arguments do not hold much weight. Moreover, by including such an important analysis
27 in a footnote, the Plaintiffs have essentially flouted this Court’s page requirement. In the future,
the Court may exercise its discretion to ignore any arguments that are flippantly included in
footnotes rather than in the body of the brief.

1 potential wrongdoing so that she may maintain a lawsuit. *See id.* at 298
2 (“Accordingly, in determining whether to grant derivative standing to a proposed
3 plaintiff who acquired stock in the midst of the alleged wrongdoing, courts have often
4 considered the policies underlying the contemporaneous ownership doctrine and have
5 been particularly influenced by whether the proposed plaintiff knew of the wrongful
6 conduct before purchasing his or her shares.”); *Bateson v. Magna Oil Corp.*, 414 F.2d
7 128, 131 (5th Cir. 1969) (“[A] stranger to the corporation who buys stock with
8 knowledge of the alleged wrongs may not maintain a derivative action even if the
9 wrongs complained of are continuing wrongs”); *Brambles USA, Inc. v. Blocker*,
10 731 F. Supp. 643, 652 (D. Del. 1990) (“As a matter of policy, one who buys shares
11 with knowledge of a purported wrongdoing should not be permitted to bring suit to
12 challenge that wrongdoing.”).

13 In their Complaint, Plaintiffs allege two distinct sets of wrongdoing. The first
14 set alleges Starbucks underpaid taxes in the EU between 2008 and 2012. Dkt. # 4-3
15 (Complaint) at ¶ 52. Plaintiffs state that the United Kingdom’s Parliament conducted
16 an inquiry into Starbucks’ taxes that resulted in Starbucks agreeing to pay ten million
17 pounds each year for 2013 and 2014. *Id.* at ¶¶ 54, 60. Starbucks announced this
18 agreement on December 6, 2012. *Id.* at ¶ 60. According to Plaintiffs’ Complaint, any
19 wrongdoing associated with underpaid taxes in the EU ended in 2012. Moreover, the
20 settlement and payment schedule was well-known to the public by the end of 2012.
21 Plaintiffs concede that they did not own stock in Starbucks until October 2013 and
22 June 2014, respectively. *Id.* at ¶¶ 25, 26. As such, Plaintiffs did not hold stock in
23 Starbucks during the relevant period and therefore fail to satisfy their standing burden
24 under Rule 23.1 with regard to these allegations. The Court dismisses with prejudice
25 any claims based on this set of allegations.

26 Plaintiff’s second set of allegations is related to Starbucks’ 2007 APA with the
27 Netherlands. Dkt. # 4-3 (Complaint) at ¶ 62. The APA was a tax ruling that defined

1 | how Starbucks would calculate its taxes due to the Dutch government over the course
2 | of ten years. *Id.*; *see also* Dkt. # 15 (Motion) at 8. In July 2013, the Commission
3 | began investigating the APA due to suspicions that it might be in violation of Article
4 | 107(1) of the Treaty on the Functioning of the European Union, which prevents states
5 | from acting to distort or threaten to distort competition. Dkt. # 4-3 (Complaint) at ¶
6 | 62. On June 11, 2014, the Commission made a public announcement confirming its
7 | formal, in-depth investigation into the corporate tax structure of Starbucks in the
8 | Netherlands. *Id.* at ¶ 63. On October 21, 2015, the Commission issued a decision
9 | finding the APA artificially lowered taxes and was aimed at giving Starbucks an unfair
10 | competitive advantage. *Id.* at ¶ 66. As a result, the Commission ordered the Dutch
11 | government to collect additional taxes from Starbucks amounting to 30 million euros.
12 | *Id.* at ¶ 67. The Netherlands appealed this decision to the General Court of the
13 | European Union; the appeal is pending. *Id.* at ¶ 68.

14 | Plaintiffs became shareholders in the midst of the Commission’s investigation
15 | into Starbucks’ APA with the Netherlands. *Id.* at ¶¶ 25, 26. The Court is inclined to
16 | apply the continuing wrong doctrine to the APA and its post-2007 effects, but is
17 | suspicious of Plaintiffs’ timing in buying into Starbucks—both plaintiffs became
18 | shareholders after the investigation into the APA had already begun and was known to
19 | the public. This is a close case. Nonetheless, the Court finds that Plaintiffs have
20 | standing to bring this derivative lawsuit based on the allegations related to the APA.³

21 | **B. Business Judgment Rule**

22 | After the Commission handed down its decision with regard to the APA,
23 | Plaintiffs made pre-suit Demands on the Board of Starbucks to “investigate and
24 | commence an action against certain current and/or former directors and executive

26 | ³ Though the Court concludes that Plaintiffs have standing to pursue these allegations, the
27 | Court makes no comment on whether Starbucks has engaged in any “corporate aberrations.” *See*
Conrad, 940 A.2d at 42.

1 officers of’ Starbucks. Dkt. # 4-3 (Complaint) at ¶ 79. The Board refused the
2 Demands. *Id.* at ¶ 80.

3 The Court reviews the Board’s decision to refuse the Demands under the
4 business judgment rule. The business judgment rule is a rebuttable “presumption that
5 in making a business decision the directors of a corporation acted on an informed
6 basis, in good faith and in the honest belief that the action taken was in the best
7 interests of the company.” *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) *overruled*
8 *on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (citations omitted).⁴
9 “Absent an abuse of discretion, that judgment will be respected by the courts.” *Id.*; *see*
10 *also Zapata Corp. v. Maldonado*, 430 A.2d 779, 787 (Del. 1981) (“If a ‘committee,
11 composed of independent and disinterested directors, conducted a proper review of the
12 matters before it, considered a variety of factors and reached, in good faith, a business
13 judgment that (the) action was not in the best interest of (the corporation)’, the action
14 must be dismissed.”) (citations omitted); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717,
15 720 (Del. 1971) (“A board of directors enjoys a presumption of sound business
16 judgment, and its decisions will not be disturbed if they can be attributed to any
17 rational business purpose. A court under such circumstances will not substitute its own
18 notions of what is or is not sound business judgment.”). The party challenging the
19 Board’s decision has the burden to establish facts that rebut this presumption.
20 *Aronson*, 473 A.2d at 812.

21 When reviewing the Board’s decision, the Court inquires “into the procedures
22 employed by the board in making its determination.” *Barovic v. Ballmer*, 72 F. Supp.
23 3d 1210, 1215 (W.D. Wash. 2014) (quoting *In re PSE & G Shareholder Litigation*,

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25 ⁴ In a shareholder derivative action brought in federal court based on diversity
26 jurisdiction, the Court applies the substantive law of the state of incorporation. Starbucks is
27 incorporated in Washington. Washington courts often look to Delaware courts for guidance on
issues that arise in shareholder derivative suits.

1 173 N.J. 258, 291 (2002)). There is “no prescribed procedure that a board must
2 follow.” *Levine v. Smith*, 591 A.2d 194, 214 (Del. 1991) *overruled on other grounds*
3 *by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Generally, however, the Court will
4 analyze whether the Board fulfilled their “duty to inform themselves of all material
5 information reasonably available to them.” *Barovic*, 72 F. Supp. 3d at 1215 (citing *Mt.*
6 *Moriah Cemetery on Behalf of Dun & Bradstreet Corp. v. Moritz*, 1991 WL 50149, at
7 *4 (Del.Ch., Apr. 4, 1991)); *see also Zapata Corp.*, 430 A.2d at 797 (“The issues
8 become solely independence, good faith, and reasonable investigation.”).

9 Plaintiffs allege that the Board failed to undertake any investigation into the
10 Demands. Dkt. # 4-3 (Complaint) at ¶ 82.⁵ This conclusion is belied by the refusal
11 letter attached to the Complaint. Dkt. # 4-3 at 58-61. The refusal letter explains that
12 the Board at least reviewed

13 Copies of both demand letters, the materials attached to those
14 demand letters, copies of prior board and audit committee
15 minutes and presentations concerning the Company’s
16 European Union corporate structure and corporate tax strategy,
17 news reports and press releases, a transcript of certain
18 testimony before the House of Commons Committee of Public
19 Accounts, the decision by the European Commission, and the
20 subsequent appeal by The Netherlands.

21 *Id.* at 59. The Board discussed the Demands at two separate Board meetings
22 and an executive session. *Id.* at 59-60. During the first meeting, the Board questioned
23 Starbucks’ CFO, corporate counsel, senior vice present of Global Responsibility &

25 ⁵ The Court notes that Plaintiffs argue in their Complaint that the Defendants did not
26 undertake an investigation. However, the Plaintiffs essentially concede throughout their
27 Opposition that Defendants *did* conduct an investigation, albeit an “unreasonable” one. *See, e.g.*,
Dkt. # 20 at 10.

1 Public Policy, vice president of Tax & Customs, and Starbucks' outside counsel. *Id.* at
2 59. Having carefully considered the evidence before it, the Board found that "it would
3 not be in the best interests of the Company for it to institute litigation or bring claims
4 against any persons for the matters raised in the two Demand letters." *Id.* at 61. Based
5 on these facts, the Court finds that the Board undertook a good faith effort to inform
6 themselves of the issues presented by Plaintiffs and conducted a good faith and
7 reasonable investigation into Plaintiffs' Demands. *See City of Orlando Police Pension*
8 *Fund v. Page*, 970 F. Supp. 2d 1022, 1028 (N.D. Cal. 2013) (in analyzing a board's
9 refusal, the court found that the "only issues to be decided are the good faith and
10 reasonableness of the board's investigation of the claims articulated in the demand.").

11 Plaintiffs cite *Barovik v. Ballmer* and *City of Orlando Police Pension Fund v.*
12 *Page* to emphasize how unreasonable Starbucks' investigation was in this case. But
13 the facts of those cases are immediately distinguishable from the instant matter. In
14 *Barovik*, Microsoft violated a settlement agreement and was fined by the EU as a
15 result. *Barovik*, 72 F. Supp. 3d at 1213. In *Page*, Google admitted to hosting
16 advertisements for controlled substances in violation of US law and was fined by the
17 Government. *Page*, 970 F. Supp. 2d at 1025. Here, Starbucks is not accused of any
18 illegal activity or wrongdoing. The Commissioner's decision targeted the
19 Netherlands' actions in entering into the APA with Starbucks, and the resolution was
20 focused on how the Netherlands could amend the wrongdoing by collecting the
21 underpaid taxes. Dkt. # 17-2 at 103. Therefore, the Court does not find *Barovik* or
22 *Page* instructive here.

23 Plaintiffs have not met their burden to rebut the business judgment rule's
24 presumption. Accordingly, the Court GRANTS Starbucks' motion and dismisses
25 Plaintiffs' allegations related to the Netherlands' APA without prejudice. The Court
26 GRANTS Plaintiffs leave to amend their Complaint in accordance with this Order.
27 Because the Court concludes that the business judgment rule applies to the Board's

1 refusal of Plaintiffs' Demands, the Court further finds the Individual Defendants'
2 pending motion MOOT.

3 **V. CONCLUSION**

4 For the foregoing reasons, the Court **GRANTS** Starbucks' Motion to Dismiss.
5 Dkt. # 15. The Court **GRANTS** Defendants' unopposed Request for Judicial Notice.
6 Dkt. # 18. The Court directs the Clerk to terminate the Individual Defendants'
7 pending Motion to Dismiss as **MOOT**. Dkt. # 16.

8 The Court **GRANTS** Plaintiffs leave to amend their Complaint in accordance
9 with this Order. Plaintiffs have twenty-one (21) days from the date of this Order to
10 amend their Complaint.

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12 Dated this 5th day of September, 2017.

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16 The Honorable Richard A. Jones
17 United States District Judge
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