SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY **PART** IAS MOTION 48EFM

Justice

----------X

RICHARD GAMMEL, HOWARD LASKER, MICHAEL BERNSTEIN IRA,

Plaintiff,

- v -

JEFFREY IMMELT, SEBASTIEN BAZIN, W BEATTIE, JOHN BRENNAN, FRANCISCO DSOUZA, MARIJN DEKKERS, JOHN FLANNERY, EDWARD GARDEN, PETER HENRY, SUSAN HOCKFIELD, ANDREA JUNG, RISA LAVIZZO-MOUREY, ROCHELLE LAZARUS, STEVEN MOLLENKOPF, JAMES MULVA, JAMES ROHR, MARY SCHAPIRO, JAMES TISCH, LOWELL MCADAM, GENERAL ELECTRIC COMPANY,

Defendant.

----------X

INDEX NO. 650780/2018

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

were read on this motion to/for DISMISS.

In this shareholder derivative action, defendants move, pursuant to CPLR 3211 (a) (3) and (a) (7) and Business Corporation Law §§ 402 (b) and 626 (c), for an order dismissing the complaint. For the reasons set forth below, the motion is granted.

Background

The following facts are alleged in the complaint, unless otherwise noted, and for the purposes of this motion to dismiss are accepted as true.

Plaintiffs Richard Gammel, Howard Lasker, and Michael A. Bernstein IRA are shareholders in nominal defendant General Electric Company (GE) (NYSCEF Doc. No. (NYSCEF) 23, affirmation of defendants' counsel, exhibit A [amended complaint], ¶¶ 17-19).

GE is a New York corporation based in Boston, Massachusetts (*id.*, ¶ 20). Defendants Jeffrey R. Immelt, Sébastien N. Bazin, W. Geoffrey Beattie, John J. Brennan, Francisco D'Souza, Marijn E. Dekkers, John L. Flannery, Edward P. Garden, Peter B. Henry, Susan J. Hockfield, Andrea Jung, Risa Lavizza-Mourey, Rochelle B. Lazarus, Steven M. Mollenkopf, James J. Mulva, James E. Rohr, Mary L. Schapiro, James S. Tisch, and Lowell C. McAdam (collectively, the Director Defendants) are either current or former members of GE's board of directors (the Board) and the committees, including the Audit Committee, the GE Capital Committee, the Compensation Committee, and the Risk Committee, charged with overseeing GE's business operations (*id.*, ¶¶ 21-39). Apart from Immelt and Flannery, both of whom served as chief executive officers for GE, none of the other Director Defendants have been GE employees (NYSCEF 24, affirmation of defendants' counsel, exhibit B at 2-9; NYSCEF 25, affirmation of defendants' counsel, exhibit C at 2-8).

GE is a global company engaged in a variety of different industries, such as insurance, through GE Capital, and energy, through GE Power. In 2004, GE spun off its long-term care insurance (LTC) business into Genworth, Inc. (Genworth), although GE retained significant exposure as a reinsurer for Genworth's LTC policies (amended complaint, ¶¶ 10 and 79). A portion of GE Power's business involves the service and maintenance of energy equipment for third parties pursuant to contracts known as Long Term Services Agreements (LTSAs) (*id.*, ¶ 5).

Plaintiffs allege that "[a] majority of GE's Directors failed to properly inform themselves" of significant negative trends in the LTC industry over the course of several years (*id.*, ¶¶ 6 and 81). For instance, other LTC insurance carriers noted that

policyholders were living longer, thereby exposing the insurers to elevated claims for higher medical costs than had been projected originally (*id.*, ¶ 77). These factors led these LTC insurers to impose double-digit premium increases (*id.*, ¶ 84), increase their LTC reserves (*id.*, ¶ 83), exit the LTC business (*id.*, ¶ 82), or liquidate altogether (*id.*, ¶ 77). Genworth was one company that shored up its LTC business by adding hundreds of millions of dollars to its reserves (*id.*, ¶¶ 85-87). Plaintiffs allege that the Director Defendants should have been aware of Genworth's public disclosures about the status of its reserves, made in public filings with the Securities and Exchange Commission (SEC), especially when GE reinsured many of Genworth's policies (*id.*, ¶ 88). Nevertheless, plaintiffs claim that GE waited until October 2017 to reassess its original assumptions for its LTC business, when it announced a $6.2 billion charge to its 2017 fourth quarter earnings (*id.*, ¶¶ 7, 10 and 91). In 2018, GE announced that a $15 billion contribution in capital was necessary to bolster its LTC insurance reserves (*id.*, ¶¶ 10 and 104).

Plaintiffs also allege that flawed revenue projections from GE Power's LTSAs have negatively impacted GE's earnings. Despite negative trends in the power industry, GE Power continued to increase revenue estimates from the LTSAs until 2017, when GE Power announced an $850 million charge to earnings to account for project cost overruns (*id.*, ¶¶ 100-101). GE allegedly engaged in complex, aggressive accounting practices to conceal the extent of the problems with GE Power while simultaneously releasing false or misleading statements praising GE Power's financial health (*id.*, ¶¶ 103-104 and 111). Plaintiffs allege that the SEC had charged GE with accounting fraud

once before in relation to these improper accounting practices, which GE had also used to increase its reported earnings (*id.*, ¶ 63).

These actions ultimately led GE to suspend issuing annual dividends to its shareholders (*id.*, ¶ 9), caused a drastic decline in GE's share price from $23.58 per share on October 19, 2017 to $12.73 per share on March 26, 2018 (*id.*, ¶ 116), and caused a marked decrease in GE's quarterly earnings (*id.*, ¶ 112). GE is now the subject of a shareholders' class action pending in federal court for violations of the federal securities laws (*id.*, ¶ 15 and NYSCEF 46), and the subject of an SEC investigation into GE's LTC business and its revenue accounting practices related to GE Power (*id.*, ¶¶ 104 and 106).

Plaintiffs also take issue with the corporate waste related to a "chase plane," or a second corporate jet that trailed Immelt when he traveled for business (*id.*, ¶ 124). Although the practice of using a chase plane was first discovered in 2014, GE did not terminate the practice until 2017 (*id.*, ¶¶ 124-126). Additionally, plaintiffs allege that certain GE executives used corporate aircraft for personal travel (*id.*, ¶ 134).

Plaintiffs commenced this action seeking damages for breach of fiduciary duty, unjust enrichment, waste of corporate assets, abuse of control, and gross mismanagement. Defendants now move pre-answer for dismissal of the complaint.

The Parties' Contentions

On this motion, defendants argue that the complaint should be dismissed for plaintiffs' failure to plead demand futility with particularity. They contend that the Board and its committees met frequently each year, as evidenced in the proxy statements dated March 8, 2017 and March 12, 2018 (NYSCEF 24, affirmation of defendants'

counsel, exhibit B at 2; NYSCEF 25, affirmation of defendants' counsel, exhibit C at 6-7), and that the Board was entitled to rely upon the audits of GE's financial statements performed by KPMG LLP (KPMG), an independent accounting firm. Defendants also argue that the Director Defendants are shielded from liability pursuant to exculpatory language in GE's certificate of incorporation.

Plaintiffs admit that they did not make a pre-litigation demand upon the Board, and principally assert that such a demand would have been futile. Plaintiffs argue that a majority of the Director Defendants are interested directors incapable of arriving at an independent decision. They claim that the Director Defendants ignored the "red flags" described in numerous published reports and articles, excerpts of which are contained in the complaint, warning of the downward trends in the LTC and energy industries yet chose to rubber-stamp the decisions of GE's executives whose actions they were supposed to monitor. As for the language in GE's certificate of incorporation, plaintiffs submit that the Director Defendants acted in bad faith and intentionally breached their fiduciary duties by repeatedly ignoring the red flags concerning the true state of GE's business.

Discussion

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord [the plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Allegations that are ambiguous must be resolved in plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). A motion to

dismiss the complaint will be denied "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [citations omitted]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

A. Demand Futility under Business Corporation Law § 626 (c)

Business Corporation Law § 626 sets forth specific procedures that must be followed in shareholder derivative actions. Importantly, Business Corporation Law § 626 (c) provides that the complaint in any shareholder derivative action "shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." The requirement of a pre-litigation demand "relieves courts of unduly intruding into matters of corporate governance by first allowing the directors themselves to address the alleged abuses" (*Bansbach v Zinn*, 1 NY3d 1, 9 [2003], *rearg denied* 1 NY3d 593 [2004]).

However, a plaintiff's failure to serve a pre-litigation demand upon the corporation may be excused if making such a demand would be futile (*see Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 139 AD3d 621, 621-622 [1st Dept 2016]). The demand requirement is excused where a plaintiff pleads "with particularity that (1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction" (*Marx v Akers*, 88 NY2d 189, 198 [1996]). If any one of these tests is met, the failure to file a pre-

litigation demand is excused (*id.* at 200-201). Excusing a pre-litigation demand is an exception, and the Court of Appeals has indicated that "the exception should not be permitted to swallow the rule" that a pre-litigation demand is required (*Matter of Omnicom Group Inc. Shareholder Derivative Litig.*, 43 AD3d 766, 768 [1st Dept 2007], citing *Marx*, 88 NY2d at 200). Therefore, conclusory allegations of wrongdoing are insufficient (*see Glatzer v Grossman*, 47 AD3d 676, 677 [2d Dept 2008] [stating that "it is not sufficient to name a majority of the directors as defendants with conclusory allegations of wrongdoing or control by wrongdoers"]). If a plaintiff fails to plead with particularity that service of a pre-litigation demand should be excused, the complaint must be dismissed (*see Retirement Plan for Gen. Empls. of the City of N. Miami Beach v McGraw*, 158 AD3d 494, 495 [1st Dept 2018]).

"[A] director may be interested under either of two scenarios: self-interest in a transaction or loss of independence due to the control of an interested director" (*Matter of Comverse Tech., Inc. Derivative Litig.*, 56 AD3d 49, 54 [1st Dept 2008]). Here, the complaint fails to plead any particularized facts that the Director Defendants were interested parties for purposes of satisfying the first test in *Marx*, e.g. that they received a personal financial benefit from the transactions at issue (*see Marx*, 88 NY2d at 202; *Walsh v Wwebnet, Inc.*, 116 AD3d 845, 848 [2d Dept 2014]), or that any one of them controlled or dominated the other directors (*see Voluto Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 46 AD3d 354, 356 [1st Dept 2007]). Plaintiff's allegation that the Director Defendants would have declined to initiate the litigation because they would have been subject to personal liability is insufficient (*see Wandel v Eisenberg*, 60 AD3d 77, 80 [1st Dept 2009] [stating that "[t]he bare claim that the directors who served

on the stock option and compensation committees should be viewed as interested because they are 'substantially likely to be held liable' for their actions is not enough"]). Likewise, the assertion that certain directors controlled the amount of compensation other directors would have received is inadequate, especially in the absence of an allegation that the compensation the Director Defendants received was excessive (*see Walsh*, 116 AD3d at 848). Simply naming each current or former director "in a lawsuit, without more, is insufficient to establish that they are conflicted and demand is futile" (*Lerner v Immelt*, 523 Fed Appx 824, 827 [2d Cir 2013] [citations omitted]; *accord Bildstein v Atwater*, 222 AD2d 545, 546 [2d Dept 1995]).

Moreover, as 17 of the Director Defendants were independent, outside directors elected by GE's shareholders to their positions, plaintiffs could not have reasonably concluded that the Board would have rejected a pre-litigation demand (*see Wietschner v Dimon*, 139 AD3d 461, 462 [1st Dept 2016], *lv denied* 28 NY3d 901 [2016]; *Lewis v Akers*, 227 AD2d 595, 596 [2d Dept 1996], *lv denied* 88 NY2d 813 [1996]; *Lewis v Welch*, 126 AD2d 519, 521 [2d Dept 1987]). Plaintiffs' contention that the Director Defendants "had an interest in seeing . . . a soft landing for G.E. as the business continues to deteriorate" (NYSCEF 58, oral argument tr at 22:17-19), is wholly conclusory and inadequate to show that the Director Defendants were "interested" for purposes of demand futility, especially in the absence of a personal benefit to any of them.

Regarding the second test enunciated in *Marx*, a pre-litigation demand is excused where the "board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances"

(*Marx*, 88 NY2d at 200, citing *Barr v Wackman*, 36 NY2d 371, 380 [1975]). A close reading of the complaint reveals that plaintiffs fail to plead with particularity facts showing that the Director Defendants failed to self-inform (*see City of Tallahassee Retirement System v Akerson*, 2009 WL 6019489 [Sup Ct, NY County, Oct. 16, 2009, Bransten, J., Index No. 601535/2008]).

First, plaintiffs have not refuted that the Board, and its committees, met regularly (*see Lockridge v Krasnoff*, 2008 NY Slip Op 31338[U], *5 [Sup Ct, Nassau County 2008] [stating that an audit committee met 49 times between 1999 and 2006]; *Fink v Komansky*, 2004 WL 2813166, *5, 2004 US Dist LEXIS 24660, *13 [SD NY, Dec. 8, 2004, No. 03-CV-0388 (GBD)] [concluding that regular meetings are examples of directors exercising their fiduciary obligations]). While plaintiffs acknowledge that meetings took place, the complaint is "devoid of specific facts that the subject matter of these meetings were the transactions at issue" (*Fink*, 2004 WL 2813166, *5, 2004 US Dist LEXIS 24660, *13). "[G]eneralized allegations of committee membership, without more, are not sufficiently particularized to form a basis upon which to excuse the demand requirement" (*City of Tallahassee Retirement System*, 2009 WL 6019489). The complaint herein simply describes the duties of each committee without causally relating those duties to the purported acts, or omissions, at issue to each of the Director Defendants.

Second, the complaint does not allege that the Board had been presented with red flags warning of the general health of the LTC and energy industries, or the specific health of GE Capital and GE Power, and that the Director Defendants consciously chose to overlook or ignore them (*see Retirement Plan for Gen. Empls. of the City of N.*

Miami Beach v McGraw, 2016 NY Slip Op 32654[U], *9 [Sup Ct, NY County 2016], *affd* 158 AD3d 494 [1st Dept 2018] [concluding that "generalized warnings about the subprime sector are insufficient to alert corporate directors to internal wrongdoing"]; *Matter of Falconstor Software Inc.*, 39 Misc 3d 916, 934 [Sup Ct, Suffolk County 2013], *appeal dismissed Walter v FalconStor Software, Inc.*, 126 AD3d 885 [2d Dept 2015] [stating that the complaint lacked "particularized facts that the FalconStor directors knew of the violations, or that they were provided with any red flags to support an assertion that they consistently refused to exercise proper oversight"]; *Brewster v Lacy*, 2004 WL 5487868 [Sup Ct, NY County, June 21, 2014, Moskowitz, J., index No. 603873/2002], *affd* 24 AD3d 136 [1st Dept 2005] [finding that the plaintiff failed to plead specific facts that the director defendants acted wrongfully or recklessly or willfully ignored red flag warnings]; *cf. Matter of Bank of New York Derivative Litig.*, 2000 WL 1708173, *2, 2000 US Dist LEXIS 16502, *5 [SD NY, Nov. 14, 2000, No. 99-CV-9977 (DC)] [finding that the complaint included "numerous specific examples of publicly available and other information that plaintiffs contend should have put the individual defendants on notice . . . that the Bank was being exposed to unacceptable risks"]).

Plaintiffs do not allege that Genworth's filings with the SEC had been presented to the Board, nor does it allege that it was GE's policy to raise and discuss Genworth's public disclosures at Board or committee meetings (*see Mason-Mahon v Flint*, 166 AD3d 754, 758 [2d Dept 2018] [stating that company policy required the corporate defendant's "board of directors be notified regarding any litigation and compliance issues resulting in fines or penalties of more than $1,500; and that based upon such regular reporting, the board had specific information or reason to inform itself regarding

HSBC Bank's payments of alleged penalties in excess of that amount"]). Notably, the complaint refers to three Genworth filings with the SEC on November 5, 2014, March 2, 2015 and November 8, 2016 (NYSCEF 23, ¶¶ 85-87). These three filings hardly constitute a sustained pattern of red flags or warnings that should have caught the attention of the Director Defendants (*see Miller v Schreyer*, 257 AD2d 358, 362 [1st Dept 1999] [finding that the corporate defendant's board of directors should have been aware of a series of suspect transactions, which served no legitimate purpose, that had taken place over a period of five years]).

In addition, there is no allegation that "any member of the Board actually read or learned the contents of" the published news articles, from 2017 and 2018, identified in the complaint (*Matter of SAIC Derivative Litig.*, 948 F Supp 2d 366, 385 [SD NY 2013], *affd sub nom. Welch v Havenstein*, 553 Fed Appx 54 [2d Cir 2014]). The complaint does not identify what actions the Director Defendants should have taken had they been aware of the red flags (*see Lockridge v Krasnoff*, 2008 NY Slip Op 31338[U], *5 [Sup Ct, Nassau County 2008]). The complaint also does not adequately plead with specificity the culpability of the following Director Defendants, Edward P. Garden, Peter B. Henry, Risa Lavizzo-Mourey, Steven M. Mollenkopf, or Lowell C. McAdam, each of whom were elected to GE's Board in 2016 or later (NYSCEF 23, ¶¶ 28, 29, 32, 34, and 39) and when most of the warnings took place before their tenure. Hence, merely identifying news articles discussing general, downward trends in the LTC and energy industries is "insufficient to alert [the] corporate directors to internal wrongdoing" (*see Retirement Plan for Gen. Empls. of the City of N. Miami Beach*, 2016 NY Slip Op 32654[U], *9 [citations omitted]). As for the use of a chase plane, the complaint alleges that the

Board was not aware of the contested practice, and the practice has since been terminated (amended complaint, ¶¶ 124-126).

Plaintiffs also allege that the Board should have implemented simpler accounting processes to avoid issuing false or misleading statements about GE Power's estimated revenues. However, plaintiffs ignore Business Corporation Law § 717 (a) (2), which expressly permits a director "to rely on information, opinions, reports or statements including financial statements and other financial data, in each case prepared or presented by . . . public accountants or other persons as to matters which the director believes to be within such person's professional or expert competence."

In this instance, KPMG audited the "statement[s] of financial position" for GE and its affiliates in 2016 and 2017, and concluded that "the consolidated financial statements . . . present fairly, in all material respects, the financial position of General Electric Company and consolidated affiliates" (NYSCEF 26, affirmation of defendants' counsel, exhibit D at 2; NYSCEF 27, affirmation of defendants' counsel, exhibit E at 2). Significantly, KPMG's audit opinions explicitly referred to GE's internal controls (*id.*)., directly contradicting plaintiffs' assertion that GE lacked any form of internal controls[1] (amended complaint, ¶ 101).

The complaint also does not include a particularized statement explaining why this practice of relying on an outside accounting firm was unreasonable (*see DSW Lenox, LLC v Rosetree on Lenox Ave., LLC*, 2014 NY Slip Op 31311[U], *18 [Sup Ct, NY County 2014] [concluding that the plaintiff had failed to allege that the defendant

[1] The quote attributed to GE Power's CEO, Russell Stokes, in the complaint refers to the "level of attention that we should have had on that portion of the business" (NYSCEF 23, ¶ 101), not the wholesale absence of internal controls.

Board members' reliance on outside counsel was unreasonable or that they deferred to outside counsel without reviewing all pertinent facts]), or that it was an improper exercise of the Director Defendants' business judgment. The fact that the SEC had previously investigated GE's accounting practices, which resulted in a charge of accounting fraud, is insufficient to alert the Director Defendants to questionable current accounting practices related to GE Power. A press release dated August 4, 2009 from the SEC indicates that GE had settled the accounting fraud claim that arose of out violations related to GE's commercial paper funding program, interest-rate swaps, locomotives sales, and commercial aircraft engine parts sales that occurred in 2002 and 2003 (NYSCEF 38, affirmation of defendants' counsel, exhibit I at 1). No mention is made of GE Power in the SEC release.

The third test described in *Marx* requires a plaintiff to plead particularized facts showing that "the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors" (*Matter of Omnicom Group Inc. Shareholder Derivative Litig.*, 43 AD3d 766, 768 [1st Dept 2007], quoting *Marx*, 88 NY3d at 200-201). "The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings" (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 153 [2003] [citation omitted]), but the rule will not protect directors who "passively rubber-stamp[ ] the acts of active corporate managers" (*Matter of Comverse Tech, Inc.*, 56 AD3d at 56, citing *Barr v Wackman*, 36 NY2d 371, 381 [1975]). The complaint must "allege facts, such as self-dealing, fraud or bad faith" to show that the subject transaction "could not have been the product of sound business judgment" (*see*

Goldstein v Bass, 138 AD3d 556, 557 [1st Dept 2016]; *Lewis*, 227 AD2d at 596]; *see generally Auerbach v Bennett*, 47 NY2d 619, 631 [1979]). Thus, "[s]o long as the corporation's directors have not breached their fiduciary obligation to the corporation, 'the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient'" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990] [internal quotation marks and citation omitted]). Nevertheless, "it is the 'rare case[ ] [in which] a transaction may be so egregious on its face that board approval cannot meet the test of business judgment'" (*Stein v Immelt*, 472 Fed Appx 64, 66 [2d Cir 2012], quoting *Wandel*, 60 AD3d at 82]).

At oral argument, plaintiffs argued that GE's use of a chase plane constitutes egregious corporate waste, which falls under the third test in *Marx* (NYSCEF 58 at 24:4-5). As noted above, plaintiffs fail to plead specific facts adequately showing that the Director Defendants engaged in self-dealing, or that they were so conflicted as to rebut the business judgment rule (*see Goldstein*, 138 AD3d at 557). Indeed, it has not been alleged that the Director Defendants personally benefited from the practice. Similarly, the complaint is silent as to the specific, fraudulent conduct on the part of the Director Defendants regarding their actions related to the chase plane, or their alleged failure to act. Moreover, plaintiffs admit that GE's March 12, 2018 DEF 14A filing indicated that GE's executives repaid the corporation for their personal use of corporate aircraft (NYSCEF 23, ¶ 132). Further, plaintiffs have failed to allege any specific instances where the Director Defendants acted in bad faith or include an allegation that could plausibly be read to infer bad faith. There are no allegations of conduct by the Director

Defendants that they were acting for a purpose unaligned with the best interest of the corporation (*see Foley v D'Agostino*, 21 AD2d 60, 66 [1st Dept 1964] [holding that, to act in good faith, directors "may not assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation"]).

Accordingly, that part of the motion seeking dismissal based on demand futility is granted.

B. Business Corporation Law § 402 (b)

Business Corporation Law § 402 (b) provides:

> "(b) The certificate of incorporation may set forth a provision eliminating or limiting the personal liability of directors to the corporation or its shareholders for damages for any breach of duty in such capacity, provided that no such provision shall eliminate or limit:
> (1) the liability of any director if a judgment or other final adjudication adverse to him establishes that his acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled or that his acts violated section 719, or
> (2) the liability of any director for any act or omission prior to the adoption of a provision authorized by this paragraph."

The statute plainly allows a corporation to shield a director from liability provided that the director was not engaged in intentional misconduct, bad faith, or a knowing violation of the law.

As is relevant here, section 6 of GE's certificate of incorporation reads, in part:

> "A person who is or was a director of the corporation shall have no personal liability to the corporation or its shareholders for damages for any breach of duty in such capacity except that the foregoing shall not eliminate or limit liability where such liability is imposed under the Business Corporation law of the State of New York"

(NYSCEF 29 at 2). The exculpatory language in GE's certificate of incorporation above has been found to insulate its directors from liability (*see Teachers' Retirement Sys. of La. v Welch*, 244 AD2d 231, 231-232 [1st Dept 1997] *accord Bildstein*, 222 AD2d at 546).

At the outset, plaintiffs appear to equate the exculpatory clause in GE's certificate of incorporation to limitation of liability clauses contained in contracts, which are unenforceable as a matter of public policy if the clause insulates a party from gross negligence. However, an exculpatory clause in a corporation's charter is distinguishable because it is a statutory creation (*Teachers' Retirement Sys.*, 244 AD2d at 232.

Furthermore, while plaintiffs argue that the Director Defendants were grossly negligent, which has been defined as a "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993] [internal quotation marks and citation omitted]), Business Corporation Law § 402 (b) does not carve out an exception for gross negligence. The complaint does not plead specific, particularized facts sufficient to infer that the Director Defendants acted in bad faith or that they engaged in intentional misconduct or a knowing violation of the law (*see Teachers' Retirement Sys.*, 244 AD2d at 231-232). Consequently, that part of the motion seeking dismissal of the complaint against the Director Defendants is granted.

In view of the foregoing, the court need not assess whether the complaint should be dismissed for plaintiffs' failure to plead a breach of fiduciary duty cause of action with particularity as required under CPLR 3016 (b).

C. Leave to Replead

At oral argument, plaintiffs' counsel requested leave to replead to file a second amended complaint with more particularity (NYSCEF Doc. No 58, tr at 31:24-32:14). Plaintiffs' request for leave to replead is denied as procedurally improper. (See *Bd. of Mgrs. of the Vetro Condominium v 107/31 Dev. Corp.*, 2014 NY Slip Op 32748[U] [Sup Ct, NY County 2014]).

Accordingly, it is

ORDERED that the motion of nominal defendant General Electric Company and defendants Jeffrey R. Immelt, Sebastien N. Bazin, W. Geoffrey Beattie, John J. Brennan, Francisco D'Souza, Marijn E. Dekkers, John L. Flannery, Edward P. Garden, Peter B. Henry, Susan J. Hockfield, Andrea Jung, Risa Lavizza-Mourey, Rochelle B. Lazarus, Steven M. Mollenkopf, James J. Mulva, James E. Rohr, Mary L. Schapiro, James S. Tisch, and Lowell C. McAdam for dismissal of the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment of dismissal accordingly.

This memorandum opinion constitutes the decision and order of the Court.

6/28/19
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE