David Shaev Profit Sharing Account v Riggio
2014 NY Slip Op 31776(U)
July 3, 2014
Sup Ct, NY County
Docket Number: 654339/2013
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

DAVID SHAEV PROFIT SHARING ACCOUNT, f/b/o DAVID SHAEV, Derivatively on Behalf of Nominal Defendant BARNES & NOBLE, INC.,	
Plaintiff,	Index No. 654339/2013
-against-	DECISION AND ORDER
LEONARD RIGGIO, GEORGE CAMPBELL, JR., MARK D. CARLETON, WILLIAM DILLARD, II, DAVID G. GOLDEN, PATRICIA L. HIGGINS, GREGORY B. MAFFEI and DAVID A. WILSON,	Motion Sequence No. 002
Defendants,	
and	
BARNES & NOBLE, INC.,	
Nominal Defendant.	

MELVIN L. SCHWEITZER, J.:

David Shaev is the settlor and primary beneficiary of the David Shaev Profit Sharing Account f/b/o David Shaev (Plaintiff). Plaintiff has initiated this putative shareholder derivative suit on behalf of Barnes & Noble, Inc., alleging breach of fiduciary duties and abuse of control on the part of Nominal Defendant Barnes & Noble, Inc. (Company or Barnes & Noble) and Defendants Leonard Riggio, George Campbell, Jr., Mark D. Carleton, William Dillard, II, David G. Golden, Patricia L. Higgins, Gregory B. Maffei, and David A. Wilson (collectively, the Individual Defendants, and with Barnes & Noble, the defendants). Plaintiff claims that the Individual Defendants violated their fiduciary duties to Barnes & Noble by failing to ensure the Company operated with appropriate internal control mechanisms. Defendants seek dismissal of

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the derivative suit on the grounds of lack of standing pursuant to CPLR 3211 (a) (3) and Delaware Chancery Court Rule 23.1. They also contend that Plaintiff's claims should be dismissed with prejudice. In light of the state of law on shareholder derivative suits, and more specifically the conditions under which demand is properly excused, the court grants defendants' motion to dismiss Plaintiff's amended complaint with prejudice.

Background

Barnes & Noble, a Delaware corporation, is the nation's leading provider of reading material, digital media, and educational products, operating over 1,300 bookstores and employing 45,000 workers. As of June 2014, the Company's three operating segments include B&N Retail, B&N College, and NOOK. B&N Retail comprises the Company's 700 traditional bookstores, nondigitial products, and Sterling Publishing Co., Inc. B&N College consists of 600 stores targeted for college students, selling items such as textbooks and college apparel. NOOK is composed of Barnes & Noble's digital content and NOOK devices and accessories. Together, B&N College and NOOK form NOOK Media LLC.

Individual Defendants Leonard Riggio, the founder of Barnes & Noble and Chairman of the Board of Directors, George Campbell, Jr., William Dillard, II, David G. Golden, Patricia L. Higgins, Gregory B. Maffei, and David A. Wilson, as well as newly appointed Chief Executive Officer Michael Huseby, composed the Company's nine-member Board when Plaintiff filed its amended complaint on March 14, 2014. Barnes & Noble's Board has three standing committees: the Audit Committee, the Compensation Committee, and the Corporate Governance and Nominating Committee. Wilson, Golden, and Higgins are members of the Audit Committee. Campbell, Dillard, and Golden are members of the Compensation Committee.

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Dillard, Higgins, and Carleton are members of the Corporate Governance and Nominating Committee.

On June 25, 2013, Barnes & Noble announced it was in the process of assessing previous years reported financial results in past Securities & Exchange Commission (SEC) 10-K filings. On July 29, 2013, Barnes & Noble filed its 2013 10-K, concluding that there was a material weakness in its internal controls over the reporting and review of the reconciliation of its Distribution Center accruals. Certain accruals for the periods prior to April 27, 2013 had been overstated, resulting in misstatements in annual and quarterly financial statements. As a result, Barnes & Noble restated previously reported financial statements for the years ended April 28, 2012, and April 30, 2011. The Company formed internal teams and hired outside advisors to remedy the internal control deficiencies and began plans to rectify the situation. In the Company's 10-Q for the first fiscal quarter of fiscal year 2014 (the period ended July 27, 2013), Barnes & Noble reaffirmed its efforts to address the issues that resulted in the restatement of results and expressed its belief that the current course of action would be effective in eliminating the material weaknesses in its internal controls by the end of the 2014 fiscal year.

Barnes & Noble indicated in its 10-Q for the second fiscal quarter of fiscal year 2014 (the period ended October 26, 2013) that the SEC's New York Regional Office had begun an investigation into the Company's restatement of earnings and a separate matter related to a whistleblower's allegation that the Company improperly allocated costs between NOOK and B&N Retail.

Plaintiff filed its initial complaint on December 17, 2013, asserting that the Board breached its fiduciary duties of loyalty, good faith, and candor to the Company by facilitating the continuance of inadequate internal controls and issuing allegedly misleading statements related to such controls. Following defendants' motion to dismiss the initial complaint, Plaintiff amended its complaint pursuant to CPLR 3025 (a).

Discussion

Initially, the court has determined that the claims cited in Plaintiff's amended complaint are derivative in nature. *Kramer v W. Pac. Indus., Inc.*, 546 A2d 348, 353 (Del 1988). Barnes & Noble purportedly suffered the harm alleged here and would receive the benefit of any potential recovery. *Bader v Goldman Sachs Group, Inc.*, No. 08-CV-255(SLT)(JMA), 2010 WL 3938410, at *5 (EDNY Sept. 30, 2010) (citing *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004).

In order for a derivative suit to go forward, a shareholder must either make pre-suit demand on the corporation or seek to be excused from making a demand on grounds of demand futility. *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A2d 106, 120 (Del Ch 2009). Pre-suit demand on the corporation is "a basic principle of corporate governance and is a matter of substantive law." *Grimes v Donald*, 673 A2d 1027, 1216 (Del 1996), *overruled in part on other grounds by Brehm v Eisner*, 746 A2d 244, 253 (Del 2000). As Plaintiff has admittedly not made demand on the Board, the only manner in which this claim can proceed is for the court to find that a demand would be futile under the circumstances.

Next, choice of law. New York courts follow the "internal affairs doctrine" to decide which state's substantive law governs matters of director liability. *See e.g. Zion v Kurtz*, 50 NY2d 92, 100 (1980); *see also Globalvest Mgmt. Co. L.P. v Citibank, N.A.*, No. 603386/04, 2005 WL 1148687, at *8 (Sup Ct NY Co May 12, 2005). "Under New York's choice of law rules, the substantive law of the state of incorporation governs compliance with the demand requirement." *Lerner v Prince*, 36 Misc 3d 297, 205 (Sup Ct 2012); *see also David Shaev Profit*

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Sharing Account v Cayne, 24 AD3d 154, 154 (1st Dept 2005). As Barnes & Noble is incorporated in Delaware, Plaintiff's claims will be analyzed under Delaware substantive law and, most importantly, Delaware Chancery Court Rule 23.1. *Potter v Arrington*, 11 Misc 3d 297, 305 (Sup Ct 2012) (applying Delaware substantive law to a Delaware corporation in a derivative suit).

Delaware requires a "threshold question of standing, focused on whether the shareholder has exhausted intracorporate remedies, namely whether the shareholder has made a demand on the board of directors." *In re Morgan Stanley Derivative Litig.*, 542 F Supp 2d 317, 321 [SDNY 2008]. In the event that pre-suit demand would be futile, a plaintiff must plead with particularity why the shareholder was justified in having demand excused. *Rales v Blasband*, 634 A2d 927, 934 (Del 1993).

Demand futility is examined with respect to the membership of the Board of Directors at the time the amended complaint was filed unless the asserted claims were "validly in litigation" at the time of the original complaint. *Braddock v Zimmerman*, 906 A2d 776, 779 [Del 2006]. A complaint that did not "satisfy the legal test for demand excusal" when originally filed is not "validly in litigation." *In re Affiliated Comp. Servs., Inc. S'holder Litig.*, C.A. No. 2821-VCL, 2009 WL 296078, at *7 (Del. Ch. Feb. 6, 2009). Plaintiff's original complaint suffered from several pleading defects, prompting defendants' motion to dismiss and Plaintiff's decision to file an amended complaint. Therefore, the original complaint was not validly in litigation when it was filed. *Id.* While there were eight members on Barnes & Noble's Board at the time of the original complaint, a ninth member, Michael Huseby, was added by the time of the amended complaint. As such, Plaintiff needs to show demand is excused for five of the nine Board members in order to reach the necessary majority figure.

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In pleading demand futility, Plaintiff is tasked with satisfying Delaware Chancery Court Rule 23.1 and must "comply with stringent requirements of factual particularity that differ substantially from the permissive notice pleadings governed solely by Chancery Rule 8(a)" that simply requires a "short and plain statement showing the pleader is entitled to relief." *Brehm*, 746 A2d at 254 & n21; *Sec. Police & Fire Prof'ls. of Am. Ret. Fund v Mack*, 30 Misc 3d 663, 670 (Sup Ct 2010) (applying heightened Delaware pleading standard pursuant to Rule 23.1); *see also In re Am. Int'l Group, Inc. Derivative Litig.*, 700 F Supp 2d 419, 430 (SDNY 2010) (Rule 23.1 "imposes a pleading standard higher than the normal standard applicable to the analysis of a pleading challenged under Rule 12(b)(6)"). Directors are presumed to be disinterested and independent when performing their fiduciary obligations. *Beam v Stewart*, 845 A2d 1040, 1048-49 (Del 2004). The particularized allegations must be pleaded in a "director-by-director" fashion and conclusory statements are disfavored and rejected. *Khanna v McMinn*, No. 20545-NC, 2006 WL 1388744, at *12, 14 (Del Ch May 9, 2006); *Levine v Smith*, 591 A2d 194, 207 (Del. 1991); *see also Scattered Corp. v Chi. Stock Exch., Inc.*, 701 A2d 70, 75 (Del 1997) ("plaintiff's 'facts' creating a reasonable doubt about the disinterestedness and independence of the . . . Committee are not facts at all. Rather they are conclusory and speculative statements, suffering fatally from a paucity of particularization."). Should a plaintiff fail to meet this heavy burden, dismissal of the suit would be warranted. *Brehm*, 746 A2d at 267. The court finds that Plaintiff has not adequately pled the reasons why demand should be excused. Plaintiff's inferences and allegations are entirely conclusory in nature and lack the specificity and particularized facts demanded by Delaware law.

Two Delaware tests on the sufficiency of demand futility allegations are relevant for evaluating Plaintiff's claims: the *Aronson* test and the *Rales* test. The *Aronson* test applies when

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a particular business decision is called into question, and requires the Plaintiff to plead particularized facts spawning a reasonable doubt that either "(1) the directors are disinterested and independent" or "(2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson v Lewis*, 473 A2d 805, 814 (Del 1984). *Aronson* is properly reserved for conscious business decisions or self-dealing situations in which one must inquire as to whether a director personally benefitted from a transaction. *E.g. Coates v Netro Corp.*, 28 Del J Corp L 241, at *6 (Del Ch 2002). The *Rales* test governs when "the subject of a derivative suit is not a business decision of the Board but rather a violation of the Board's oversight duties." *Wood v Baum*, 953 A2d 136, 140 (Del 2008); *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, MDL No. 12-2389, 2013 WL 6798160, at *17 (SDNY 2013).

Under *Rales*, "a court must determine whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. If the derivative plaintiff satisfies this burden, then demand will be excused as futile." *Rales*, 634 A2d at 933-34. A plaintiff "must adequately plead that a majority of the company's board of directors were incapable of objectively responding to a demand because they either (1) 'face a sufficiently substantial threat of personal liability,' and are thus themselves interested, or (2) 'are compromised in their ability to act independently of the interested directors.'" *Facebook*, 2013 WL 6798160, at *17 (quoting *Desimone v Barrows*, 924 A2d 908, 928 (Del. Ch. 2007)). Despite Plaintiff's assertions to the contrary, interestedness under *Rales* solely focuses on whether a director confronts a substantial likelihood of liability for Plaintiff's proffered claims. *Guttman v Huang*, 823 A2d 492, 502 (Del Ch 2003].

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As Plaintiff's claims amount to issues of oversight, management, and the issuance of alleged misstatements, they ultimately do not challenge specific business decisions and, thus, the *Rales* test is the proper standard with which to engage in a demand futility analysis. *Spear v Conway*, No. 401919/03, 6 Misc 3d 1023, 2003 NY Slip Op 51749(U), 2003 WL 24012118, at *5 [Sup Ct NY Co Oct. 17, 2003] (applying *Rales* in a matter alleging failure to monitor); *Guttman*, 823 A2d at 499 (applying *Rales* in a case claiming improper financial control systems); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v Lundgren*, 579 F Supp 2d 520, 528 (SDNY 2008) (utilizing *Rales* to analyze a case alleging misleading public statements).

A director is interested for the purposes of demand futility if he faces a substantial likelihood of liability for Plaintiff's claims. *Facebook*, 2013 WL 6798160, at *17. Under Delaware law, directors owe their corporation and shareholders a duty of care and loyalty. *Cede & Co. v Technicolor, Inc.*, 634 A2d 345, 367 (Del 1993). The duty of care necessitates that directors make a "good faith effort to be informed and exercise judgment" in the execution of their duties. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A2d 959, 968 (Del Ch 1996); *see also Aronson*, 473 A2d at 812 (directors must "inform themselves, prior to making a business decision, of all material information reasonably available to them" and "act with requisite care in the discharge of their duties"). "[T]he duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Cede & Co.*, 634 A2d at 361. Barnes & Noble includes an exculpatory clause in its Certificate of Incorporation, fashioned off of Delaware General Corporation Law § 102 (b) (7), that voids potential liability for duty of care claims. Thus, Plaintiff must plead a substantial likelihood of personal liability for a duty of loyalty breach or good faith violation, which is subsumed within

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the duty of loyalty. In order for a breach of good faith to be found, a director must have engaged in a conscious disregard for his responsibilities or displayed an intentional dereliction of his duties.

Plaintiff has failed to plead facts with the specificity required by Delaware law to suggest that the directors face a substantial likelihood of liability. The oversight claims Plaintiff levies in its amended complaint are *Caremark* claims, which are recognized by Delaware courts as "possibly the most difficult theory in corporate law upon which a plaintiff might hope to win judgment." *Caremark*, 698 A2d at 967; *see also Desimone*, 924 A2d at 940 (Delaware courts "routinely reject" lack of oversight demand futility allegations). "*Caremark* articulates the necessary conditions predicate for director oversight liability." *Stone v Ritter*, 911 A2d 362, 365 (Del 2006). In *Guttman*, the Delaware Court of Chancery applied *Caremark* and dismissed an action that alleged director liability for an oversight failure that precipitated an SEC investigation and restatement of financial results for multiple fiscal periods. 923 A2d at 495-96, 508. Thus, Delaware law is unquestionably clear that *Caremark* is the accepted standard under which Plaintiff's monitoring claims should be assessed.

Under *Caremark*, a plaintiff must plead with particularity that "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, [they] consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone*, 911 A2d at 370. The following factors are exigent to a finding of *Caremark* liability: the dearth of an audit committee or the existence of an audit committee that meets only sparingly, *Guttman*, 823 A2d at 507; a knowing failure to "implement any reporting or information systems or controls," *Stone*, 911 A2d at 370; a willful failure to monitor existing controls, *Guttman*, 823

A2d at 506; an audit committee possessing knowledge of "red flags" and deciding to ignore them or nourish their perpetuation, *id.* at 507 (no substantial risk of *Caremark* liability when plaintiffs were unable to "plead a single fact suggesting specific red – or even yellow – flags were waved at the outside directors"); *Rattner v Bidzos*, No. Civ. A. 19700, 2003 WL 22284323, at *12 [Del. Ch. Oct. 7, 2003] ("[C]laimed red flags are only useful when they are either waived [*sic*] in one's face or displayed so that they are visible to the careful observer"). The existence of a restatement or SEC investigation, a situation essentially identical to the facts underlying Plaintiff's amended complaint, does not suggest bad faith or a conscious disregard of "red flags" in satisfaction of Rule 23.1. *See In re Intel Corp. Derivative Litig.*, 621 F Supp 2d 165, 175 [Del 2009]. There is a stark difference between the occurrence of a suboptimal outcome and the creation of grossly negligent internal controls; to find *Caremark* liability, a plaintiff needs to show a director exhibited a "conscious disregard for his duties." *Guttman*, 823 A2d at 506 (*Caremark* "premises liability on a showing that the directors were conscious of the fact that they were not doing their jobs").

Plaintiff has not pled any of the critical facts outlined above. Barnes & Noble convenes an Audit Committee that meets regularly and devotes sufficient time to its work. Plaintiff concedes the Committee met twenty-seven times during fiscal years 2012 and 2013, a figure contradicting any bad faith allegations. Despite Plaintiff's identification of a confidential whistleblower who potentially was aware of control issues endemic to the Company, Plaintiff is unable to allege particularized facts clearly demonstrating that any individual member of the Board actively knew of these purported deficiencies, consciously failed to put forth any control systems, or knowingly refused to monitor those systems already in existence. Likewise, Plaintiff has neglected to point to any glaring "red flags" to which the Board knowingly remained

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indifferent. *Caremark* liability is not found in the event that the Board is aware of the settlement of previous suits alleging internal control problems. *See Citigroup*, 946 A2d at 129 (finding no "red flag" when past involvement in Enron scandal was not linked to case at issue). Moreover, Plaintiff's only allegation of bad faith, in which Plaintiff contends defendants Wilson, Higgins, and Golden approved the Company's misleading statements, is entirely conclusory and circumstantial.

Plaintiff's allegations, in fact, speak to the presence of adequate monitoring systems and a lack of bad faith. The fact that Barnes & Noble itself identified the internal control issues is "evidence of directorial supervision, rather than evidence of failure to supervise." *See In re Sonus Networks, Inc. S'holder Derivative Litig.*, 499 F3d 47, 70 (1st Cir 2007). The actual behavior of the Audit Committee reveals that it was active and responsive; Plaintiff's perfunctory claims that the Board refused to institute satisfactory internal controls do not meet the pleading standards contemplated by Delaware law.

Further, membership on the Audit and Corporate Governance and Nominating Committees does not preclude the directors from being classified as disinterested for purposes of demand excusal under *Rales*. "[C]ourts regularly reject committee membership as a basis to excuse demand, absent detailed pleading of specific knowledge by the committee members and specific failures to meet the duties imposed on committee members." *Bohigian v Pearson*, No. 650149/10, NYLJ 1202743923395, at *16 (Sup Ct NY Co Oct. 15, 2010]. Despite Plaintiff's citation to extensive public disclosures, the substance of its complaint suffers from a paucity of particularized detail. "Plaintiff's lengthy recitation of the duties and responsibilities enumerated in those committees' charters does not supply the requisite particularity." *La. Mun. Police Emps. Ret. Sys. v Pandit*, No. 08 Civ. 7389(LTS)(RLE), 2009 WL 2902587, at *10

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(SDNY Sept 10, 2009]. In sum, Plaintiff is unsuccessful in alleging any facts, let alone particularized facts, sufficient to compel the court to conclude that any director, and certainly not a majority of the directors, is substantially likely to face personal liability. "As numerous Delaware decisions make clear, an allegation that the underlying cause of a corporate trauma falls within the delegated authority of a board committee does not support an inference that the directors on that committee knew of and consciously disregarded the problem for purposes of Rule 23.1." *South v Baker*, 62 A3d 1, 17 & n6 [Del Ch 2012]. Therefore, the directors are not considered interested for the purposes of considering demand for Plaintiff's *Caremark* oversight claims.

Allegations that directors failed to halt the issuance of false or misleading statements have been analyzed under *Caremark* as failure of oversight cases. *See e.g. Rattner v Bidzos*, C.A No. 19700, 2003 WL 22284323, at *12-13 (Del Ch Oct 7, 2003); *Loveman v Lauder*, 484 F Supp 2d 259, 266, 270 (SDNY 2007). To adequately plead a breach of fiduciary duty on alleged misstatements, a plaintiff must plead particularized facts demonstrating the directors "deliberately misinform[ed] shareholders." *Malone v Brincat*, 722 A2d 5, 14 (Del 1998). Falsity or knowledge of untruth cannot be "infer[red]" to meet Rule 23.1 requirements. *Id.* Directors must have made such statements "knowingly or in bad faith," which "requires allegations regarding what the directors knew and when." *Citigroup, Inc.*, 964 A2d at 134. Under Delaware General Corporation Law § 141 (e), directors may rely in good faith on a company's records and the representations of its officers and employees. "Without more, . . . the signing of financial reports is insufficient to create an inference that the directors had actual or constructive notice of any illegality for purposes of the demand excused analysis." *Rahbari v Oros*, 732 F Supp 2d 367, 380 (SDNY 2010).

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Plaintiff's amended complaint does not provide information on what each director definitively knew and when, thus failing to meet its designated burden. Rather, the complaint is framed on unavailing conclusory statements and imputes willful and malicious action simply on the basis of the Restatement, SEC Investigation, and similar actions taken against Barnes & Noble in the past. Plaintiff has not persuaded the court that the Individual Defendants relied on the Company's records or representations in bad faith or were aware of the inaccuracy of the alleged misstatements. Accordingly, Plaintiff has not evinced that any director confronts a substantial likelihood of liability sufficient to excuse demand. *Malone*, 722 A2d at 14; *Citigroup, Inc.*, 964 A2d at 133.

Alternative concepts of interestedness on the part of the directors are immaterial for the *Rales* test and thus do little to further Plaintiff's argument. Allegations juxtaposing Mr. Riggio's stock sale to his interest in Barnes & Noble's activity are legally insufficient to denote interestedness. *In re IAC/InterActiveCorp. Sec. Litig.*, 478 F Supp 2d 574, 603 (SDNY 2007) ("Cursory allegations that a director made sales of company stock in the market at a time when he possessed material, nonpublic information are not sufficient to find a director interested for demand-futility purposes."); *Ferre v McGrath*, No. 06 Civ. 1684 CM, 2007 WL 1180650, at *5 (SDNY Feb 16, 2007) ("[T]he mere sale of stock, accompanied by a conclusory allegation that a director 'knew or was in a position to know' inside information at the time of the sale, is insufficient to create a reasonable doubt as to the directors' lack of interest under *Rales*"). As such, Plaintiff has not made clear how Mr. Riggio's stock sale, reputational concerns, and dealings with Barnes & Noble render him categorically unfit to consider demand in this action.

Delaware case law undoubtedly holds that a demand cannot be excused solely because the Individual Directors ultimately would have to sue themselves. *Strugala v Riggio*, 817 F

Supp 2d 378, 386 [SDNY 2011]; *Guttman*, 823 A2d at 500 ("If the legal rule was that demand was excused whenever, by mere notice pleading, the plaintiffs could state a breach of fiduciary duty against a majority of the board, the demand requirement of the law would be weakened and the settlement value of so-called 'strike suits' would greatly increase, to the perceived detriment of the best interests of stockholders as investors").

Directors may also lack independence if they are beholden to interested directors as per the second prong of the *Rales* test. However, given that Plaintiff is unable to convey interestedness of any individual director, it follows that it cannot substantiate a lack of independence resulting from an interested director's influence on his colleagues. Inside directors, while not viewed as independent under NYSE or SEC rules, may still be independent when conducting a demand futility assessment under *Rales*. *In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*, 757 F Supp 2d 260, 335 [SDNY 2010] (asserting that lack of independence under NYSE Rules or the respective company's standards "does not mean these directors lack independence to disable them from fairly assessing" demand); *see e.g. In re First Bancorp Derivative Litig.*, 465 F Supp 2d 112, 123 (DPR 2006); *Caviness v Evans*, 229 FRD 354, 361 [D Mass 2005]; *Landy v D'Alessandro*, 316 F Supp 2d 49, 63 [D Mass 2004].

Plaintiff's claims of non-independence relating to Individual Defendants Carleton and Maffei are typified by their focus on SEC and NYSE rules, and are consequently ineffective. Plaintiff alleges Maffei and Carleton are interested because they were elected to Barnes & Noble's Board by Liberty and are conflicted between their duties to Liberty and Barnes & Noble's shareholders. These assertions are rooted in SEC/NYSE notions of independence and do not speak to whether any Individual Director faces a substantial likelihood of liability. *Rales*, 634 A2d at 934. Moreover, the amended complaint is bereft of any particularized facts and

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details on why Carleton and Maffei's allegiances to Liberty preclude them from acting in the best interest of Barnes & Noble as well. "Even though [p]laintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, . . . conclusory allegations are not considered as expressly pleaded facts or factual inferences." *Sec. Police*, 30 Misc 3d at 670. Plaintiff's superficial contentions are thus insufficient.

Plaintiff's grievances towards Mr. Dillard hinge on the latter's longstanding social and business relationship with Mr. Riggio. The only scenario in which Mr. Dillard's ties to Mr. Riggio matter for demand futility is if Plaintiff demonstrated Mr. Riggio was too conflicted to be able to consider a demand in this case. As explained previously, Plaintiff failed to manifest Mr. Riggio's lack of independence. Moreover, contrary to Plaintiff's conclusions, the Delaware Court of Chancery did not deduce that Mr. Dillard was beholden to Mr. Riggio. Transcript of Oral Argument, *In re Barnes & Noble Stockholder Derivative Litig.*, C.A. No. 4813-VCS [Del Ch Oct 21, 2010], at 9:19-10:5, 17:13-23, 156:10-158:15 (stating that Vice Chancellor Strine "[didn't] want this cited back to me that Strine held that you're necessarily not an independent director"). "Allegations that [the defendant] and the other directors moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as 'friends,' . . . are insufficient, without more, to rebut the presumption of independence." *Beam*, 845 A2d at 1051. "[Plaintiff's] allegations of mere friendship and shared work experience likely fall short of what is necessary to call into question the independence of [the director defendants]." *Zimmerman v Crothall*, C.A. No. 6001-VCP, 2012 WL 707238, at *13 (Del Ch Mar 5, 2012]. Simply put, "the naked assertion of a previous business relationship is not enough to overcome the presumption of a director's independence." *Orman v Cullman*, 794 A2d 5, 27 (Del Ch 2002).

Having decided that defendants' motion to dismiss should be granted, the court must now determine whether Plaintiff's amended complaint should be dismissed with prejudice. Because the amended complaint marks Plaintiff's second futile effort at pleading demand excusal with the requisite degree of factual particularity and Plaintiff failed to take advantage of a books and records request pursuant to Delaware General Corporation Law § 220, the court finds that the amended complaint should be dismissed with prejudice.

The fact that Plaintiff has once again failed to resolve the pleading deficiencies in its complaint offers ample support for the court's decision to dismiss with prejudice. Plaintiff had access to defendants' legal arguments on demand futility and despite its inclusion of additional verbiage and material from relevant news outlets commenting on Barnes & Noble, the complaint is still severely lacking. "The plaintiffs filed an amended complaint after the first motion to dismiss was filed. Because the plaintiffs have failed to state a claim after two opportunities to do so, the Complaint is dismissed with prejudice." *Tasini v AOL, Inc.*, 851 F Supp 2d, 734, 745 n5 (SDNY 2012).

Plaintiff did not request books and records to supplement its complaint and Delaware courts have "repeatedly . . . emphasized the importance of using Section 220 [books and records requests] to investigate and plead potential fiduciary duty claims." *Litterst v Zemph Sound Innovations, Inc.*, C.A. No. 7700-ML, 2013 WL 5651317, at *7 (Del Ch Oct 17, 2013). "In the event a party fails to timely file an amended complaint or motion to amend under this section (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12 (b) (6) or 23.1, such dismissal shall be with prejudice . . . unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances." Del Ch R. 15(aaa). This standard on dismissal with prejudice is particularly pertinent for *Caremark* claims such as those of the Plaintiff. *South*, 62 A3d at 6 (granting with prejudice defendants' motion to dismiss for failure to plead sufficiently demand excusal, and emphasizing that "[b]ecause a plaintiff asserting a *Caremark* claim must plead facts sufficient to establish board involvement in conscious wrongdoing, our Supreme Court has admonished stockholders repeatedly to use Section 220 of the General Corporation Law, 8 Del. C. § 220, to obtain books and records and investigate their claims before filing suit"). Claims of improper accounting and financial reporting "most cr[y] out for the pleading of real facts – e.g. about the board's knowledge of the accounting problems at the company or the company's audit committee process"). Plaintiff's failure to follow this widely accepted procedure and comply with Delaware's exacting pleading requirements is fundamentally fatal to its derivative claim.

Conclusion

For the foregoing reasons, the court grants defendants' motion to dismiss with prejudice.

Accordingly, it is

ORDERED that motion to dismiss for defendants is granted; and it is further

ORDERED that the motion is granted with prejudice.

Dated: July 3, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER