Liss v Read
2014 NY Slip Op 33988(U)
October 30, 2014
Supreme Court, New York County
Docket Number: 650642/2013
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA **PART** 39

Justice

LISS, EDITH

INDEX NO. 650642/2013

MOTION DATE

- V -

READ, IAN C.

MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ..... No(s) _____

Answering Affidavits - Exhibits ..... No(s) _____

Replying Affidavits ..... No(s) _____

Cross Motion ..... No

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 10/30/14 which disposes of motion sequences 005 and 006.

DATED: 10/30/2014

SALIANN SCARPULLA , J.S.C.

1. CHECK ONE : [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE : MOTION IS : [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

3. CHECK IF APPROPRIATE : [ ] SETTLE ORDER [ ] SUBMIT ORDER

[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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EDITH LISS, Derivatively on Behalf of
Pfizer Inc.

Plaintiff,

Index No. 650642/2013

-against-

DECISION AND ORDER

IAN C. READ, GEORGE A. LORCH, M. ANTHONY BURNS, CONSTANCE J. HORNER, W. DON CORNWELL, WILLIAM H. GRAY, III, DENNIS A. AUSIELLO, SUZANNE NORA JOHNSON, JAMES M. KILTS, FRANCES D. FERGUSSON, JOHN P. MASCOTTE, STEPHEN W. SANGER, HELEN H. HOBBS, MARC TESSIER-LAVIGNE, JEFFREY B. KINDLER, HENRY A. MCKINNELL, WILLIAM C. STEERE, JR., JOHN F. NIBLACK, MICHAEL S. BROWN, ROBERT N. BURT, DANA G. MEAD, WILLIAM R. HOWELL, RUTH J. SIMMONS, STANLEY O. IKENBERRY, JEAN-PAUL VALLES, FRANKLIN D. RAINES, HARRY P. KAMEN, ALEX J. MANDL, MICHAEL I. SOVERN, GEORGE B. HARVEY, and FELIX G. ROHATYN,

Defendants,

-and-

PFIZER INC., a Delaware corporation,

Nominal Defendant.

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HON. SALIANN SCARPULLA, J.:

In this shareholder derivative action, plaintiff Edith Liss ("Liss") asserts claims on behalf of Pfizer, Inc. ("Pfizer") against current and former officers and members of Pfizer's board of directors (the "board") arising out of Pfizer's settlements with

government authorities concerning alleged violations of the Foreign Corrupt Practices Act ("FCPA"). Nominal defendant Pfizer and defendant Ian C. Read ("Read") move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (3) and (7) (motion sequence no. 005), and the individual defendants move to dismiss the complaint, pursuant to CPLR 3211 (a) (7), and on other grounds (motion sequence no. 006). These motions are herein consolidated for consideration.

Background

As alleged in the complaint, Pfizer is a Delaware corporation with principal offices in New York. It is a leading research-based, global pharmaceutical company which operates in various countries in the Middle East, Europe, Africa, Asia, and Latin America. Due to its global presence, Pfizer must comply with the FCPA. Under the FCPA, it is "unlawful for U.S. companies to bribe any foreign official in order to obtain or retain business." *Midwestern Teamsters Pension Trust Fund v Baker Hughes Inc.*, 2009 WL 6799492, *1, 2009 US Dist LEXIS 50521 (SD Tex 2009).

Liss was a shareholder of Pfizer at all times relevant to the allegations in the complaint, and is currently a shareholder. Liss alleges in the complaint that the individual defendants knew that Pfizer's internal controls did not comply with the FCPA, and that

they failed to promptly and sufficiently remedy those controls. The individual defendants are current or past members of Pfizer's board.[1]

As alleged in the complaint, from 2001 to 2007, "defendants allowed Pfizer and its subsidiaries to engage in a continuous international scheme to make illicit payments to foreign officials, including foreign doctors and hospital administrators, in order to secure lucrative contracts and induce them to use and prescribe Pfizer products."

Liss alleges that "the members of Pfizer's audit committee were aware of the Company's FCPA compliance failures since at least February 18, 2004, when they received a memorandum from Douglas M. Lankler." Douglas M. Lankler ("Lankler") was, at the time, Pfizer's deputy compliance officer on FCPA issues occurring in India, Pakistan, Italy and Turkey. According to the Liss complaint, that memorandum was

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[1]Those members who were on the board at the time of the filing of Liss's complaint are: defendant Read, Pfizer's Chief Executive Officer ("CEO"), and a director, since December 2010; defendant George A. Lorch ("Lorch"), a director since 2000; defendant M. Anthony Burns ("Burns"), a director since 1988; defendant Constance J. Horner ("Horner"), a director at Pfizer since 1973; W. Don Cornwell ("Cornwell"), a Pfizer director since 1997; defendant William H. Gray III ("Gray"), a Pfizer director since 2000; defendant Dennis A. Ausiello ("Ausiello"), a Pfizer director since 2006; defendant Suzanne Nora Johnson ("Johnson"), a Pfizer director since 2007; defendant James M. Kilts ("Kilts"), a Pfizer director since 2007; defendant Frances D. Fergusson ("Fergusson"), a Pfizer director since 2009; defendant John P. Mascotte ("Mascotte"), a Pfizer director since 2009; defendant Stephen W. Sanger ("Sanger"), a Pfizer director since 2009; defendant Helen H. Hobbs ("Hobbs"), a Pfizer director since December 2011; and defendant Marc Tessier-Lavigne ("Tessier-Lavigne"), a Pfizer director since December 2011 (collectively, the "individual defendants").

followed up by a presentation to audit committee members on February 26, 2004 alerting them to FCPA violations in several countries, including Italy.

Defendant Jeffrey B. Kindler ("Kindler") was Pfizer's CEO, and a Pfizer director, from July 2006 to December 2010. Kindler was Chairman of the Board from December 2006 to December 2010, and a Director from July 2006 to December 2010. Prior to that, Kindler was Pfizer's Vice Chairman and General Counsel from 2005 to 2006, Executive Vice President and General Counsel from 2004 to 2005, and Senior Vice President and General Counsel from 2002 to 2004. A report from Kindler, dated April 15, 2004, alerted the board to compliance issues in, among other countries, Croatia. Additional reports from Kindler in May, September and October of 2004, continued to provide the board with ongoing compliance problems in these countries, such as India, Italy, Saudi Arabia, Croatia, and Belgium. Yet, according to the complaint, the board failed to take prompt action to correct these issues, allowing subsidiary Pfizer HCP Croatia to continue making improper payments until "sometime in 2005."

Liss alleges that "[r]epeated warnings of the Company's non-compliance with the FCPA continued," and that throughout 2005, the board and audit committee continued to receive information about FCPA compliance issues in Croatia, Italy, and Saudi Arabia. A May 18, 2005 memorandum from Hugh Donnelly ("Donnelly"), vice president of corporate internal audit, detailed numerous holes in Pfizer's compliance with the FCPA.

In 2006, Kindler, Lankler, and Donnelly continued to provide the board and audit committee with information that Pfizer's "compliance with the FCPA in foreign countries was non-existent." According to the Liss complaint, "[a] memorandum from Lankler, dated June 15, 2006, notified the Audit Committee that in addition to the continuing investigations in Italy and Saudi Arabia, FCPA investigations had begun in Russia and Kuwait."

Liss alleges that, although the board was aware of the ongoing FCPA violations, even by 2006, its response was inadequate. Liss alleges that:

> [T]he Board knew of the government investigations and FCPA issues in Kazakhstan. . . . [T]he 2007 and 2008 Pfizer HCP Kazakhstan audits identified control flaws and lack of FCPA Procedure implementation, as well as violations of local and corporate travel and entertainment policies. In fact, by the end of 2006, the Company only expected to review 60% of its small markets with risks for FCPA violations. Thus, despite the glaring weaknesses in the Company's FCPA compliance, the Board did not even order a review in 40% of the Company's small markets.

Liss further alleges that the

> 2007 audit of Pfizer HCP Kazakhstan . . . also rated Pfizer HCP Kazakhstan's controls over healthcare professional consultant payments 'unsatisfactory.' The June 2008 audit of Pfizer HCP Kazakhstan similarly identified . . . lack of FCPA Procedure implementation for charitable contributions . . . [Pfizer] did not even expect that full remediation of these controls would occur until December 2008.

Furthermore, Liss alleges that, in August 2006, Pfizer engaged KPMG LLC (KPMG) to provide the company with information concerning violations in Italy and

Russia. Pfizer engaged PricewaterhouseCooper in 2007 in connection with an FCPA investigation in Thailand and Vietnam. According to Liss,

> by December 7, 2007, the list of countries with known FCPA issues skyrocketed and the Audit Committee was informed through a memorandum it received from Lankler and another Pfizer attorney that FCPA investigations were ongoing in at least thirty countries, including: Argentina, Austria, Belgium, Brazil, Bulgaria, China, Croatia, Czech Republic, Denmark, Ecuador, India, Italy, Japan, Kazakhstan, Kuwait, Mexico, Moldova, Nigeria, Pakistan, Romania, Russia, Saudi Arabia, Serbia, Slovakia, Sweden, Taiwan, Turkey, Thailand, Ukraine, and Vietnam.

Liss alleges that the board failed promptly and sufficiently to correct Pfizer's deficient FCPA compliance, noting: (1) February 2004 through December 2004 memos and presentations from Pfizer employees notifying Pfizer board members of FCPA violations in countries including India, Italy, Pakistan, Croatia, Saudi Arabia; (2) that FCPA issues persisted into 2005 in Croatia, in Italy until December 2006, and until at least December 2007 in India, Belgium, Pakistan, Turkey and Saudi Arabia; and (3) October 2005 through December 2006 memos and presentations from Pfizer employees to the Pfizer board members concerning ongoing FCPA violations, government investigations, and corporate governance issues in these same countries, and advising that FCPA violations had arisen in Russia and Kuwait.

Liss alleges that this conduct led to an enforcement action against Pfizer by the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ"),

and, according to Liss, the result of these actions is that Pfizer was charged with violations of the FCPA.

Liss avers that "Pfizer had a blatantly inadequate system of internal controls that failed to ensure compliance with the provisions of the FCPA for its Bulgaria, China, Croatia, Czech Republic, Italy, Kazakhstan, Russia and Serbia operations."[2]

On January 25, 2009, Pfizer announced the acquisition of Wyeth, Inc. ("Wyeth") for $68 billion. With respect to Pfizer's due diligence in this acquisition, plaintiff alleges that it "failed to reveal that Wyeth had numerous FCPA issues. Wyeth had been paying similar bribes to state-owned individuals and entities like Pfizer had done since the late 1990's."[3]

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[2]According to the complaint, and the SEC complaint, Pfizer's subsidiaries engaged in conduct which violated the terms of the FCPA including, but not limited to: paying for travel and equipment to Bulgarian government-employed doctors; and making payments and providing gifts to doctors employed by China and Croatia; provided support for international travel and recreational opportunities to doctors employed by the Czech government; provided cash payments and gifts to doctors employed by Italian government healthcare institutions all with the intent to influence these government officials to prescribe Pfizer products.

[3] At oral argument, Liss's attorney argued:

> So then the deal closes. This is now October 2009 and when you look at what the SEC's complaint against Wyeth which is now Pfizer's subsidiary, Pfizer's board who had a duty to their own shareholders all along to not expose the company to liability for violations, has now gone and acquired a subsidiary that . . . is violating the Antibribery provision of the FCPA. And after they acquire it, is continuing to violate it even though supposedly their controls are fine at this period. They acquired Wyeth, and the violations of the Antibribery Provision continue at Wyeth through

The August 7, 2012 SEC complaint against Pfizer, in *SEC v Pfizer, Inc.*, 1:12-cv-01303-ESH (US DC 2012), alleges, that the employees in each of the relevant Pfizer subsidiaries attempted to hide the illicit nature of the transactions by improperly recording them as legitimate expenses on the books and records of the respective subsidiaries. Further, according to the SEC complaint, as a result of this conduct, Pfizer violated Section 13 (b)(2)(A) of the Securities Exchange Act of 1934 ("Exchange Act") by failing to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and disposition of assets of the issuer, and by failing to ensure that it maintained adequate internal controls to detect and prevent FCPA violations, Pfizer violated Section 13 (b) (2) (B) of the Exchange Act.

In its complaint, the SEC sought to (1) permanently enjoin Pfizer from violating, or aiding and abetting violations of these two sections; (2) disgorge all ill-gotten gains wrongfully obtained as a result of the illegal conduct; and (3) make periodic reports to the Commission on the status of Pfizer's remediation and implementation of compliance measures.

2010.

So, now we're up here and eventually we see that the Board Pfizer, agrees to settle not just the wrongdoing at Pfizer HCP, but –and I'm sorry, there's a typo here. It was almost $20 million –not almost $30 million – of profits and interest that they disgorged related to the Wyeth violations.

In August 2012, the SEC and DOJ announced a settlement of the FCPA actions against Pfizer and Pfizer HCP. According to the Liss complaint, pursuant to the settlement agreement:

> [Pfizer] agreed to pay approximately $41.2 million, including [a] $15 million fine for two criminal counts against a Pfizer subsidiary, $16 million in restitution from profits that it earned from the bribery, and $10.3 million in interest, in addition to entering into a deferred prosecution agreement with the DOJ, which entailed substantial additional costs to [Pfizer]. Also as part of the settlement, Pfizer agreed to pay approximately $20 million for FCPA violations at Wyeth LLC ("Wyeth"), a company that Pfizer acquired in 2009, for a total payment of $60.2 million.

In the "Deferred Prosecution Agreement," dated August 3, 2012, which the DOJ entered into with Pfizer HCP, a subsidiary of Pfizer ("DPA"), the DOJ calculated the $15,000,000 penalty for the two criminal counts, which are described as an "offense [that] involved more than one bribe," by including a downward departure in the $28,500,000 base fine. The downward departure was based upon "the nature and extent of Pfizer's voluntary, prompt and thorough disclosure of the misconduct at issue, the nature and extent of Pfizer's extensive cooperation in this matter, Pfizer's cooperation, pursuant to USSG § 8C4.1, in the Department's investigation into other misconduct in the industry, and Pfizer's extraordinary and ongoing remediation." Thus, Pfizer HCP was ordered to pay $15,000,000.

Likewise, the SEC complaint describes Pfizer's cooperation, investigative and remedial measures as follows:

> Pfizer made an initial voluntary disclosure of certain of these issues to the Commission and Department of Justice in October 2004, and thereafter diligently and thoroughly undertook a global internal investigation of its operations in no less than 19 countries, which identified additional potential violations, and regularly reported the results of these investigations and fully cooperated with the staff of the Commission. Pfizer also undertook a comprehensive compliance review of its operations, enhanced its internal controls and compliance functions . . . .

According to the papers submitted in *SEC v Pfizer Inc.*, Pfizer agreed to pay $16,032,676.00 as a disgorgement of the profits gained as a result of the underlying violations, as well as $10,307,268.84 in prejudgment interest. Further, based upon Pfizer's cooperation in the SEC investigation, the government did not seek a civil penalty against Pfizer, nor did the district court order one.

The complaint alleges that the individual defendants were alerted to the FCPA compliance failures to the extent defendants knew that: (1) Pfizer failed to have adequate internal controls to prevent FCPA violations; (2) after FCPA violations were uncovered, the risks were not prevented or remedied, and (3) that the Pfizer's books and records did not reflect the numerous FCPA violations that occurred and were continually occurring. On these grounds, Liss alleges three causes of action against the individual defendants: (1) breach of fiduciary duty; (2) waste of corporate assets; and (3) unjust enrichment.

For the breach of fiduciary duty claim, Liss alleges that the individual defendants breached their duty of loyalty by "allowing the company to violate the FCPA by failing to implement and maintain an adequate system of internal controls to detect and prevent the illicit payments . . . ." With respect to the second cause of action for waste of corporate

assets, Liss alleges "[u]nder the Individual Defendants purview, Pfizer violated the FCPA's anti-bribery provision and the Books and Records Provision by bribing foreign officials . . . [a]s a result, the Company must, among other things, pay $60.2 million to resolve the FCPA violations." Finally, on the third cause of action for unjust enrichment, Liss alleges that the individual defendants "received incentive compensation and fees from Pfizer that were not justified nor in the best interest of Pfizer."

Liss seeks damages based upon the "severe" damage to Pfizer's "business, goodwill and reputation . . . by the continuous and extensive bribery scheme" and Pfizer's failure to implement a system of internal controls to detect and prevent it. Additionally, Liss's alleged damages include the investigative and defense costs spent by Pfizer to institute internal controls and defend the government investigations, as well as the $60.2 million that Liss alleges Pfizer paid to resolve the FCPA enforcement actions.

In their motion papers, Pfizer and Read move to dismiss the complaint (motion sequence no. 005) as against them on the grounds that: (1) under Delaware law,[4] because plaintiff is a shareholder, who did not make a presuit demand on the board to initiate or pursue litigation, she failed to allege, with sufficiently particular facts, that such a demand would have been futile; (2) the so-called *Rales* test for the demand futility analysis applies because the subject of this derivative suit is not a "business decision" of the board, but instead "a violation of the board's oversight duties," and plaintiff cannot satisfy this test;

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[4] The parties agree that Delaware law applies.

and (3) plaintiff fails to state a cause of action, pursuant to CPLR 3211 (a) (1) and (7), against Read.

Finally, defendants argue that Liss does not allege facts with sufficient specificity that Pfizer did not remedy the violations quickly enough.

The remaining defendants,[5] move to dismiss the complaint (motion sequence no. 006) on the grounds that: (1) a presuit demand on the Pfizer board is required under Delaware law; (2) the complaint fails to state a claim upon which relief can be granted, as the allegations are conclusory; and (3) the claims are barred by the applicable statute of limitations.

Discussion

Under Delaware Law, pleadings in derivative suits are governed by Chancery Rule 23.1. *Brehm v Eisner*, 746 A2d 244, 254 (Del Supr 2000). "Rule 23.1 is not satisfied by conclusory statements or mere notice pleading. . . . What the pleader must set forth are particularized factual statements that are essential to the claim." *Id.* at 254 (citations omitted).

Rule 23.1 further requires, in part, that "a plaintiff shareholder . . . make a demand upon the corporation's current board to pursue derivative claims owned by the corporation before a shareholder is permitted to pursue legal action on the corporation's

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[5] On May 15, 2013, plaintiff voluntarily discontinued this lawsuit against defendants Michael I. Sovern, George B. Harvey, and Felix G. Rohatyn.

behalf," *In re Goldman Sachs Group, Inc. Shareholder Litig.*, 2011 WL 4826104, *6, (Del Ch 2011) (internal citations and quotations omitted), and must set forth particularized facts describing "the reasons for not obtaining the action or not making the effort." Fed R Civ P 23.1 (b) (3). Such a demand upon the board "is required because '[t]he decision whether to initiate or pursue a lawsuit on behalf of the corporation is generally within the power and responsibility of the board of directors.'" *In re Goldman Sachs Group, Inc.*, 2011 WL 4826104 at *6. "This allows the directors to exercise their business judgment and determine whether litigation is in the best interest of the corporation." *Abbott Laboratories Derivative Shareholders Litig.*, 325 F3d 795, 803 (7th Cir 2003).

"To preserve the board's authority over ordinary business decisions, a plaintiff who initiates a derivative action must either demand that the corporate board take up the litigation itself or, demonstrate, in the alternative, in a complaint why such a demand would be futile." *In re INFOUSA, Inc. Shareholders Litigation*, 953 A2d 963, 984-985 (Del Ch 2007).

Here, Liss concedes that no presuit demand was made on the board, and argues that such a demand should be excused as futile. Under any test for futility, the court, in evaluating a motion to dismiss for failure to make a demand, is required to accept the truth of all facts pleaded in the complaint, and "plaintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged.'" *In re Pfizer*

Inc. Shareholder Derivative Litigation, 722 F Supp 2d 453, 458 (S.D.N.Y. 2010) (internal citations omitted). Although Delaware law provides alternative tests for determining whether a demand would have been futile, the parties here agree that the test as set forth by the court in *Rales v. Blasband*, 634 A.2d 927 (Del. 1993) is applicable.

The court in *Rales* stated that the previously relied-upon test for demand futility, the *Aronson*[6] test, does not apply:

> (1) where a business decision was made by the board of a company, but a majority of the directors making the decision have been replaced; (2) where the subject of the derivative suit is not a business decision of the board; and (3) where [] the decision being challenged was made by the board of a different corporation.

Rales, 634 A2d at 934 (citations omitted). Under such circumstances, the demand is not excused by the court unless 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." *Id.* at 934.

The *Rales* court then defined director "interest" and "independence." "A director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders. Directorial interest also exists where a corporate decision will have a materially detrimental impact on a director, but not

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[6] *Aronson v Lewis*, 473 A2d 805 (Del 1984), *overruled* by *Brehm v Eisner*, 746 A2d 244 (Del 2000).

on the corporation and the stockholders." *Id.* at 936 (citations omitted). With respect to independence, the *Rales* court says that "'[i]ndependence means that a director's decision is based on the corporate merits of the subject before the board rather than the extraneous considerations or influences." *Id.* (citation and internal quotations omitted).

Director Interest

Liss argues that the members of the board at the time she filed her complaint were not disinterested because the facts alleged here expose each member to liability for a breach of their fiduciary duty. In order to satisfy the *Rales* test for disinterest on this basis, the complaint's particularized allegations must raise a 'substantial likelihood' of personal liability by a majority of the board. *Midwestern Teamsters Pension Trust Fund v Baker Hughes Inc.*, 2009 WL 6799492 at *6, 2009 US Dist LEXIS 129701. Liss must meet the applicable pleading standard as to at least eight of the fourteen directors who were on Pfizer's board at the time this suit was filed. *Stone v Ritter*, 911 A2d 362, 367 (Del 2006).

To establish a "substantial likelihood" of personal liability with respect to the individual defendants, a plaintiff shareholders must allege "particularized facts which demonstrate that the directors 'knew that they were not discharging their fiduciary obligations' and that they failed to act 'in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities.'" *Midwestern Teamsters Pension Trust Fund*, 2009 WL 6799492 at *6 (quoting *Stone v Ritter*, 911 A2d at 370).

Further, to establish director oversight liability, a plaintiff shareholder must show that either "'(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.'" *Midwestern Teamsters Pension Trust Fund*, 2009 WL 6799492 at *6. Alternatively, the plaintiff must show that the board "'*consciously* disregarded red flags signaling that the company's employees were taking facially improper, and not just ex-post ill-advised or even bone-headed, business risks.'" *Security Police & Fire Professionals of Am. Retirement Fund v Mack*, 93 AD3d 562, 564 (1st Dept 2012) (quoting *In re Goldman Sachs Group, Inc. Shareholder Litigation*, 2011 WL 4826104, *22 n 217, [Del Ch 2011]).

To meet this standard, it is not enough to allege that violations occurred, or that there were failures of reporting within the company, or even that illegal conduct took place; instead, plaintiff must allege in detail that the directors possessed a culpable state of mind, in that they were knowingly not acting to further the interests of the company. *Desimone v Barrows*, 924 A2d 908, 940 (Del Ch 2007); *Midwestern Teamsters Pension Trust Fund*, 2006 WL 6799492 at *6, *Stone*, 911 A2d at 370.

Here, the likelihood of individual director liability for breach of fiduciary duty is decreased substantially, because the certificate of incorporation provides that directors are exculpated from liability to the extent authorized by the Delaware General Corporation

Law. The Delaware Code Annotated, title 8, section 102 (b) (7), *i.e.*, mandates that directors are exculpated from liability for breaches of due care; however, this limitation on liability does not reach as far as claims based on fraudulent, illegal or bad faith conduct. *Security Police & Fire Professionals of Am. Retirement Fund*, 93 AD3d at 565 (1st Dept 2012). Therefore, the complaint must allege with particularity that the directors acted with scienter, *i.e.*, that they had "actual or constructive knowledge that their conduct was legally improper." *Id.* at 562; *Wood v Baum*, 953 A2d 136, 141 (Del Supr 2008).

Liss's contention that a majority of the board lacks disinterestedness because they all face a substantial likelihood of liability for breach of fiduciary duty is unsupported by specific facts. Although Liss alleges that these defendants received numerous "red flag" warnings from multiple sources between 2004 and 2007, regarding the inadequacy of Pfizer's FCPA controls, and that they failed to remedy the FCPA controls, these allegations are not factually supported, and, in fact, are belied by the SEC and DOJ documents. Indeed, Liss acknowledges Pfizer's ongoing internal reporting with respect to the FCPA violations occurring in the numerous countries from 2004 to 2007, including the alleged reports and presentations from Lankler and Kindler.

Equally unavailing is Liss's argument that the individual directors' actions are significantly similar to those of the defendant directors in the cases of *In re Abbott Laboratories Derivative Shareholders Litig.*, 325 F3d 795 (7th Cir 2001), and *Westmoreland County Emp. Retirement Sys. v Parkinson,* 727 F3d 719 (7th Cir 2013),

two cases upon which Liss heavily relies to oppose defendants' motion. Both cases refer to the defendant directors' conscious decisions to take action that led to *increased* noncompliance with government action (emphasis added).

In *Abbott*, the shareholders filed suit against Abbott Labs' directors, alleging breach of fiduciary duty following a costly recall of adulterated diagnostic test kits manufactured by the company. According to the complaint, FDA officials conducted 13 inspections of the company's manufacturing facilities over a six-year period, during which Agency officials repeatedly identified "practice" and "quality" shortcomings. There, the appellate court found that

> Given the extensive paper trail in *Abbott* concerning the violations and the inferred awareness of the problems, the facts support a reasonable assumption that there was a "sustained and systematic failure of the board to exercise oversight," in this case intentional in that the directors knew of the violations of law, took no steps in an effort to prevent or remedy the situation, and that failure to take any action for such an inordinate amount of time resulted in substantial corporate losses, establishing a lack of good faith. We find that six years of noncompliance, inspections, 438s, Warning Letters, and notice in the press, all of which then resulted in the largest civil fine ever imposed by the FDA and the destruction and suspension of products which accounted for approximately $250 million in corporate assets, indicate that the directors' decision to not act was not made in good faith and was contrary to the best interests of the company.

Abbott, 725 A2d at 809.

Thus, based upon these allegations, the Seventh Circuit found that this conscious inaction supported plaintiffs' position with respect to demand futility.

Likewise, the Seventh Circuit found that the shareholders in *Westmoreland* were not

> challeng[ing] the directors' actions from 2006 to 2008, when Baxter *was* devoting considerable resources to fixing the Pumps. Rather, Westmoreland contends that the directors breached their duty of loyalty when they made a conscious decision to *halt* these efforts in late 2008, despite clear and specific guidance from the FDA that additional action from Baxter was needed to bring the company into compliance with FDA regulations and the terms of the Consent Decree.

Id. at 728.

Here, however, Liss provides no allegations of conscious decisions of inaction by the board, or decisions that slowed or impeded the investigations or remedial actions taken by Pfizer. Other than her descriptions of Pfizer's ongoing internal memoranda and presentations to keep itself fully apprised of the FCPA violations in numerous countries, Liss has not alleged any specific conduct of the individual directors that manifests Board Members' "conscious decision" to assist or encourage the FCPA violations. She does not allege any decision-making on the part of the board that led to government warnings or fines. There are no allegations that the timing of Pfizer's remedial action breached any internal, or governmental, requirements.

Liss alleges that, because it took years to remedy the violations, and because those violations at Pfizer's subsidiaries increased to multiple countries, the board's remedial actions were insufficient. However, she has not alleged that the directors had knowledge of inadequate internal controls and "chose to do nothing," as the court described in *Desimone v Barrows*, 924 A2d 908, nor does she allege that the directors of Pfizer failed

to cooperate with the government, as the courts found in *Abbott* (325 F3d 795) and *Westmoreland* (727 F3d 719).

Liss's allegations linking Pfizer's damages to the board's conduct are likewise conclusory. Liss alleges "severe" damage to Pfizer's reputation, but does not allege any specific damage or any conduct by the defendants that would have led to such damage. Further, she alleges that because of the conduct of the board, Pfizer was ordered to pay $60.2 million to the SEC and DOJ. Yet, the government did not seek any civil penalties against Pfizer. Instead, the penalties paid by Pfizer for the relevant FCPA violations were made up of the $15,000,000 paid by the Pfizer subsidiary for the two criminal counts, $16,032.676.00 for the disgorgement of profits gained as a result of the criminal violations, and $10,307,268.84 in prejudgment interest. According to the documents from the SEC and the DOJ, it was because of Pfizer's ongoing remedial efforts and cooperation that the government not only did not levy a civil fine against Pfizer, but even reduced the amount of the criminal fine against the Pfizer subsidiary from $28,000,000.00 to $15,000,000.00.

Liss's allegations about Pfizer's lack of due diligence in purchasing Wyeth are also conclusory. Liss alleges that Pfizer did not engage in adequate due diligence in acquiring Wyeth in 2009, as Wyeth had its own FCPA violations, for which Pfizer paid a $20,000,000.00 fine. Yet, in the context of this $68 billion acquisition, Liss makes no specific allegation of Board inaction or conscious ignorance of Wyeth compliance issues.

Moreover, Liss does not adequately allege how the Wyeth purchase factors into a finding that the board was not acting in the corporate interest of Pfizer. Liss is not alleging that Pfizer should not have made this acquisition. Further, based upon Liss's representations to the court, it appears Pfizer acquired Wyeth and affirmatively settled the FCPA claims, which is not out of the ordinary for such a transaction.

At bottom, Liss's allegations fail to satisfy the demanding pleading requirements to show lack of board disinterestedness.

Director Independence

"To show a director's lack of independence, the complaint must create a reasonable doubt as to whether the outside director was beholden to an interested director or so much under the latter's influence that his or her discretion would be sterilized." *Security Police & Fire Professionals of Am. Retirement Fund*, 93 AD3d at 563 (citations and internal quotation marks omitted). Here, Liss does not allege any facts with respect to a lack of independence for any board member other than Read.

Liss alleges that Read lacks independence from the individual defendants, because during the relevant time, he was employed as Pfizer's CEO, for which he received substantial compensation of approximately $25,000,000 in 2011.

Under Delaware law, directors are "entitled to a *presumption* that they were faithful to their fiduciary duties." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v Stewart*, 845 A2d 1040, 1048 (Del 2004). The directors are expected to be independent,

and it is the plaintiff's burden to offer allegations that would overcome the presumption. *Id.* at 1049.

Liss has not alleged beyond speculation that any of the directors were not disinterested, therefore there can be no finding that Read lacked independence based exclusively on his compensation. *See Matter of Metlife, Inc.* 2014 WL 264464, *12 (Sup Ct, NY Co. January 22, 2014).

In sum, Liss has not established the requisite lack of disinterest and independence required to establish that any demand Liss made upon the board to engage in litigation would have been futile. Therefore, the demand in this case is not excused. The motions to dismiss the complaint (motion sequence nos. 005 and 006) are granted on the ground that Liss has failed to made a presuit demand on the Pfizer board.

Accordingly, it is hereby

ORDERED that the motion by defendant Ian C. Read and nominal defendant Pfizer Inc. to dismiss the complaint (motion sequence no. 005) is granted in its entirety, and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants Ian C. Read and Pfizer Inc. dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that the motion by individual defendants George A. Lorch, M. Anthony Burns, Constance J. Horner, W. Don Cornwell, William H. Gray, III, Dennis A.

Ausiello, Suzanne Nora Johnson, James M. Kilts, Frances D. Fergusson, John P. Mascotte, Stephen W. Sanger, Helen H. Hobbs, Marc Tessier-Lavigne, Jeffrey B. Kindler, Henry A. McKinnell, William C. Steere, Jr., John F. Niblack, Michael S. Brown, Robert N. Burt, Dana G. Mead, William R. Howell, Ruth J. Simmons, Stanley O. Ikenberry, Jean-Paul Valles, Franklin D. Raines, Harry P. Kamen, and Alex J. Mandl to dismiss the complaint (motion sequence no. 006) is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants, dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of an appropriate bill of costs; and it is further

ORDERED that plaintiff's request for leave to amend is denied as moot.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 30, 2014

ENTER:

Saliann Scarpulla, J.S.C.