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Kenney v Immelt
2013 NY Slip Op 51831(U)
Decided on November 7, 2013
Supreme Court, New York County
Bransten, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
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Decided on November 7, 2013

Supreme Court, New York County

James Kenney and DAVID RAUL, Plaintiffs,

against

Jeffrey R. Immelt, KEITH S. SHERIN, JOHN G. RICE, BRACKETT B. DENNISTON III, JOHN KRENICKI JR., PAMELA DALEY, JOHN F. LYNCH, KATHRYN A. CASSIDY, RALPH S. LARSEN, DOUGLAS A. WARNER III, ROGER S. PENSKE, JAMES I. CASH JR., SAMUEL NUNN, ANDREA JUNG, ANN M. FUDGE, ROCHELLE B. LAZARUS, ALAN G. LAFLEY, ROBERT J. SWIERINGA, ROBERT W. LANE, SUSAN HOCKFIELD, JAMES J. MULVA, W. GEOFFREY BEATTIE and JAMES S. TISCH, Defendants, -and- GENERAL ELECTRIC COMPANY, a New York corporation, Nominal Defendant.

650542/2012

The attorneys for Defendants/Movants in this matter were Greg A. Danilow, Stephen A. Radin, and Evert J. Christensen, Jr., of Weil, Gotshal & Manges LLP. The attorneys for

Plaintiffs/Respondents were Brian J. Robbins, Felipe J. Arroyo, Julia M. Williams, and Gina Stassi, of Robbins Arroyo LLP, Thomas G. Amon, of the Law Offices of Thomas G. Amon, and Nicholas I. Porritt, of Levi & Korinsky LLP.

Eileen Bransten, J.

This matter comes before the Court on Defendants Jeffrey R. Immelt, Keith S. Sherin, John G. Rice, Brackett B. Denniston III, John Krenicki Jr., Pamela Daley, John F. Lynch, Kathryn A. Cassidy, Ralph S. Larsen, Douglas A. Warner III, Roger S. Penske, James I. Cash Jr., Samuel Nunn, Andrea Jung, Ann M. Fudge, Rochelle B. Lazarus, Alan G. Lafley, Robert J. Swieringa, Robert W. Lane, Susan Hockfield, James J. Mulva, W. Geoffrey Beattie, and James S. Tisch's (collectively "Defendants") motion to dismiss Plaintiffs James Kenney and David Raul's (collectively "Plaintiffs") shareholder derivative claims brought on behalf of Nominal Defendant General Electric Company ("GE"). Plaintiffs oppose. For the reasons that follow, Defendants' motion to dismiss is granted with respect to CPLR 3211(a)(7) and (a)(3), and is otherwise denied.[FN1]

BACKGROUND

GE is a New York corporation with its "principal executive offices" located in Connecticut. (Consolidated Complaint ("Compl.") ¶ 15.)

Plaintiff James Kenney ("Plaintiff Kenney") is a GE shareholder who purchased his stock on August 6, 2004, and has continuously been a shareholder since that time. (Compl. ¶ 13.) Plaintiff David Raul ("Plaintiff Raul") is a GE shareholder who purchased his stock on January 20, 2009, and has continuously been a shareholder since that time. (Compl. ¶ 14.)

In early 2008, GE Capital, a subsidiary of GE that accounts for approximately 50% of GE's earnings, experienced a decline in business as a result of adverse market and economic conditions. (Compl. ¶¶ 57-58.) As a result of this decline, on September 25, 2008, GE issued a press release announcing certain earnings revisions, and that GE's Board (the "Board") had approved a plan to maintain a $0.31 per share quarterly dividend throughout 2009. (Compl. ¶¶ 58-59.) That press release also stated "that GE would continue to pay its historical dividend." (Compl. ¶ 60.)

Around the same time, during a conference call with investors, Immelt stated that GE would "maintain[] [its] dividend commitment" and that "the GE dividend is secure for investors." (Compl. ¶¶ 60-61.) Keith S. Sherin, GE's Vice Chairman, Senior Vice President and CFO, made similar statements regarding the security of the dividend, and also discussed GE Capital's real estate portfolio, characterizing it as "high quality." (Compl. ¶¶ 17, 61-62.) Sherin [*2]denied that GE was having difficulty funding itself and Immelt denied that GE was planning any equity offerings. (Compl. ¶¶ 63-64.)

On October 1, 2008, GE announced that it would offer $12.2 billion of common stock in a public offering, and that it would sell an additional $3 billion of perpetual preferred stock to Berkshire Hathaway in a private offering. (Compl. ¶ 66.) The public offering was completed on October 7, 2008, and the private offering closed on October 16, 2008. (Compl. ¶¶ 66-67.)

On October 10, 2008, GE held a conference call at which Jeffrey R. Immelt, GE's Chairman and CEO, and Sherin stated that the public offering was a "proactive measure" related to "potential issues" in the commercial paper market, but that GE was not having problems issuing commercial paper. (Compl. ¶¶ 68-69, 71.) Sherin further denied that GE was having funding issues and made positive statements regarding GE Capital's financial health, noting that GE Capital would not participate in the Federal Reserve's Commercial Paper Funding Facility program. (Compl. ¶¶ 70, 70 n.1.) During that conference call, and at a subsequent meeting held on December 2, 2008, Immelt and Sherin confirmed that GE would maintain its $0.31 quarterly dividend. (Compl. ¶¶ 73-74.) Also around this time, GE posted statements on its website confirming that the dividend would be maintained. (Compl. ¶ 75.)

Contrary to the statements above, on February 27, 2009, GE announced that it would cut its dividend from $0.31 per share to $0.10 per share. (Compl. ¶ 78.) Also, at a meeting in March 2009, GE Capital revealed that its loan portfolios contained significant quantities of "consumer loans . . . to non-prime borrowers," as well as loans and leases with borrowers that were "below investment grade or junk' grade." (Compl. ¶¶ 81-82.)

Also, two weeks before the announcement that GE would cut its dividend from $0.31 per share to $0.10 per share, Kathryn A. Cassidy, Pamela Daley, Brackett B. Denniston III, Immelt, John Krenicki Jr., John F. Lynch, and John G. Rice [FN2] sold shares of GE stock totaling nearly $5 million in value. (Compl. ¶¶ 90-92.)

On March 3, 2009, a class action lawsuit was commenced in federal court. That action is

currently pending in the U.S. District Court for the Southern District of New York, and is captioned *In re General Electric Co. Securities Litigation*, 09 Civ. 1951 (DLC).

On April 8, 2010, Plaintiff Kenney sent a letter to the Board, demanding that they investigate and take legal action against certain officers and directors on behalf of GE. (Compl. ¶ 100.) On February 8, 2012, Plaintiff Raul made a similar demand upon the Board. (Compl. ¶ 123.) Plaintiffs' demands upon the Board and the subsequent refusals of those demands are discussed in greater detail below.

On February 27, 2012, Plaintiff Kenney commenced a derivative action on behalf of GE, bearing index number 650542/2012. On March 2, 2012, Plaintiff Raul commenced a separate but related derivative action, bearing index number 650651/2012. By order dated June 28, 2012, [*3]the Court consolidated Plaintiffs' actions, and on November 13, 2012, Plaintiffs filed the Consolidated Complaint, alleging breach of fiduciary duties, waste of corporate assets, unjust enrichment, and seeking indemnification and contribution from Defendants as to any claims asserted against GE. Defendants seek dismissal of the Consolidated Complaint pursuant to sections 3211(a)(1), (a)(3), and (a)(7) of the New York Civil Practice Law and Rules ("CPLR") arguing that Plaintiffs' allegations do not satisfy the demand requirement of section 626(c) of the New York Business Corporation Law ("BCL"), that Plaintiffs are not entitled to discovery prior to this motion to dismiss being decided, and that under BCL 626(b), Plaintiff Raul lacks standing with respect to conduct that occurred prior to his becoming a GE shareholder. Each argument will be considered in turn under New York law.[FN3]

ANALYSISOn a motion to dismiss for failure to state a cause of action (CPLR 3211(a)(7)), the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977); *see* CPLR 3211(a)(7). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). A motion to dismiss must be denied if the factual allegations contained within "the pleadings' four corners . . . manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-52 (2002) (internal quotation marks and citations omitted).

While factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v. Sud*, 211 AD2d 423, 424 (1st Dep't 1995).

Where the motion to dismiss is based on documentary evidence (CPLR 3211(a)(1)), the claim will be dismissed "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 NY2d at 88; *see 150 Broadway NY Assoc., L.P. v. Bodner*, 14 AD3d 1, 5 (1st Dep't 2004). Where the defendants have presented documentary evidence, the court is required to determine "whether the proponent of the pleading has a cause of action, not whether he has stated one." *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 AD2d 143, 150 (1st Dep't 2001) (internal quotation mark and citation omitted).

"Pursuant to CPLR § 3211 (a)(3) a cause of action may be dismissed where a party lacks legal capacity or standing to sue." *Raske v. Next Mgt., LLC*, 2013 WL 5033149, at *5 (Sup. Ct. NY Cnty. Sept. 12, 2013); *see* CPLR 3211(a)(3). "The critical issue in determining whether a party has standing to sue is whether the party has suffered an injury in fact, which is an actual [*4]legal stake in the matter being adjudicated and ensures that the party seeking review has some concrete interest in prosecuting the action.'" *Raske*, 2013 WL 5033149, at *5 (quoting *Society of Plastics Indus. v. Cnty. of Suffolk*, 77 NY2d 761, 772 (1991)).

I.*CPLR 3211(a)(7) — Failure to State a Cause of Action*

A.*Derivative Claims and the Business Judgment Rule*

"Derivative claims against corporate directors belong to the corporation itself. . . . [T]he decision whether and to what extent to explore and prosecute such claims lies within the judgment and control of the corporation's board of directors." *Auerbach v. Bennett*, 47 NY2d 619, 631 (1979). "This is the essence of the responsibility and role of the board of directors, and courts may not intrude to interfere." *Auerbach*, 47 NY2d at 631.

As a general proposition, the business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Auerbach*, 47 NY2d at 629. That is, "by definition the responsibility for business judgments must rest with the corporate directors . . . . [and] absent evidence of bad faith or fraud . . . the courts must and properly should respect their determinations." *Auerbach*, 47 NY2d at 630-31.

In the context of a board's refusal to bring a suit demanded by a shareholder, the Court of Appeals explained:

While the substantive aspects of a decision to terminate a shareholders' derivative action against defendant corporate directors made by a committee of disinterested directors appointed by the corporation's board of directors are beyond judicial inquiry under the business judgment doctrine, the court may inquire as to the disinterested independence of the members of that committee and as to the appropriateness and sufficiency of the investigative procedures chosen and pursued by the committee.

Auerbach, 47 NY2d at 623-24. The Court went on to explain that "[t]he business judgment rule does not foreclose inquiry by the courts into the disinterested independence of those members of the board chosen by it to make the corporate decision on its behalf." *Auerbach*, 47 NY2d at 631. "Indeed the rule shields the deliberations and conclusions of the chosen representatives of the board *only* if they possess a disinterested independence and do not stand in a dual relation which prevents an unprejudicial exercise of judgment." *Auerbach*, 47 NY2d at 631 (emphasis added) (citation omitted). Furthermore, "[w]hile the court may properly inquire as to the adequacy and appropriateness of the committee's investigative procedures and methodologies, it may not under the guise of consideration of such factors trespass in the domain of business judgment." *Auerbach*, 47 NY2d at 635.

B.*The Demand Requirement Under New York Law*

BCL 626(c) provides that in a shareholder derivative action, "the complaint 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." BCL 626(c) (emphasis added). That is, BCL 626(c) "requires that a shareholder bringing a derivative action seeking to vindicate the rights of the corporation allege, with particularity, either that an attempt was first made to get the board of [*5]directors to initiate such an action or that any such effort would be futile." *Wandel v. Eisenberg*, 60 AD3d 77, 79 (1st Dep't 2009).

Here, Defendants argue that Plaintiffs did not satisfy the particularized pleading requirement of BCL 626(c). Specifically, Defendants argue that "Plaintiffs' contention that they need only plead particularized facts showing that they made a demand, without particularized facts showing that their demand was wrongfully refused, is wrong." (Defendants' Memorandum of Law in Reply ("Defs.' Reply Mem.") at 2.) Rather, Defendants assert that "New York law, just like Delaware law, requires a shareholder who

makes a demand, as plaintiffs have done here, to plead particularized facts explaining the reasons why his demand was wrongfully refused and why a court should displace the business judgment of the directors charged with managing the business and affairs of the corporation," in addition to the fact that such a demand was made and refused. (Defs.' Reply Mem. at 2-3.)

In response, Plaintiffs argue that Defendants have misstated the applicable particularized pleading requirement by relying on New York cases interpreting Delaware law, instead of those interpreting New York law. (Plaintiffs' Memorandum of Law in Opposition ("Pls.' Opp. Mem.") at 7-8.) Moreover, Plaintiffs argue that the Court of Appeals has "expressly declined to adopt Delaware's approach to the demand requirement." (Pls.' Opp. Mem. at 8 n.9 (citing *Marx v. Akers*, 88 NY2d 189, 198 (1996).) Plaintiffs contend that the Consolidated Complaint contains sufficiently particularized allegations with respect to the demand made upon GE's board, such that BCL 626(c)'s requirement of particularized pleading is satisfied. (Pls.' Opp. Mem. at 11.)

As a threshold matter, the Court finds that Plaintiffs' argument that the Court of Appeals has "expressly declined to adopt Delaware's approach to the demand requirement" is unavailing. In *Marx*, the Court of Appeals declined to adopt Delaware's approach with respect to pleading solely in the context of demand futility. *Marx,* 88 NY2d at 198 (holding that "neither the universal demand requirement nor the Delaware approach to demand futility is adopted here"). Notably, while the demand futility standard adopted in *Marx* and the Delaware standard rejected by that court each require that a plaintiff plead different allegations, both standards require that such pleadings be particularized. *Marx*, 88 NY2d at 195, 198. Nevertheless, the rejection of the Delaware standard in *Marx* concerns demand futility, while the issue here is whether New York law requires that a plaintiff plead with particularity that his or her demand was wrongfully refused. Thus, the holding in *Marx* does not provide a basis for denying Defendants' motion.

Under Delaware law, the demand requirement is set forth in Delaware Court of Chancery Rule 23.1(a), which provides that "[t]he complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." Del. Ch. R. 23.1(a). Similarly, Federal Rule of Civil Procedure 23.1(b)(3) provides that the complaint in a derivative action must "state with

particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or not making the effort." Fed. R. Civ. P. 23.1(b)(3).

While the language of these two rules is similar to that of BCL 626(c), the New York rule notably omits an explicit requirement that the complaint allege with particularity the reasons why the sought after action was not obtained. *See* BCL 626(c). Instead, BCL 626(c) requires [*6]particularized pleading as to either "the efforts of the plaintiff to secure the initiation of such action by the board" or " the reasons for not making such effort." BCL 626(c). That omitted language is interpreted under Delaware law to mean that "when a shareholder makes a demand upon a corporation's board of directors to initiate litigation and that demand is refused, the shareholder may only initiate a derivative action if he or she can allege particularized facts demonstrating that the demand was wrongfully refused." *Carroll v. McKinnell*, 19 Misc 3d 1106(A), 1106(A) (Sup. Ct. NY Cnty. 2008) (citations omitted) (interpreting Delaware law). Also, "because Delaware's pleading standard for derivative actions is either identical to or consistent with the principles behind Fed. R. Civ. P. 23.1,' federal courts freely adopt Delaware

state law jurisprudence when applying the federal pleading standard for derivative actions." *Halpert Enters. v. Harrison*, 2007 WL 486561, at *4 n.3 (S.D.NY Feb. 14, 2007) (citation omitted).

However, because of the difference in language between the Delaware and federal rules, and BLC 626(c), it is less clear whether, under New York law, the particularized pleading requirement extends to allegations of wrongful demand refusal. Nevertheless, the First Department decision, *Tomczak v. Trepel*, 283 AD2d 229 (1st Dep't 2001), is instructive on this issue. There, the First Department applied Section 623(c) of the New York Not-for-Profit Corporation Law ("N-PCL") and held that a "derivative action . . . was properly dismissed since the allegations in plaintiffs' amended verified complaint failed to set forth with particularity the efforts of . . . plaintiffs to secure the initiation of such action by the board [or] the reason for not making such effort.'" *Tomczak*, 283 AD2d at 229-30 (quoting N-PCL 623(c)). The First Department went on to explain that "[w]hile plaintiffs allege that unsuccessful demands were made on the [board] . . . to initiate legal action, the complaint provides no indication as to who made the demands, when they were made, which Board

members they were made to, the content of the demands or *why the Board refused to take action*." *Tomczak*, 283 AD2d at 230 (emphasis added).

N-PCL 623(c) and BCL 626(c) are almost identical in terms of their language, except for the addition "or plaintiffs" in the former, and the use of "reasons" instead of "reason" in the latter. *Compare* BCL 626(c) *with* N-PCL 623(c). The Court of Appeals has observed that although "[t]he Legislature . . . frequently employs the same words in different statutes with different meaning and effect," *Sentry Ins. Co. v. Amsel*, 36 NY2d 291, 294-95 (1975), "[w]here the same word or group of words is used in . . . different statutes, if the acts are similar in intent and character the same meaning may be attached to them." *People v. Duggins*, 3 NY3d 522, 528 (2004) (citation omitted). Moreover, "[w]e should not ascribe different meanings to the same word, as used in different statutes, unless compelling reasons so dictate." *In re Wilson Sullivan Co.*, 289 NY 110, 117 (1942) (Desmond, J., dissenting).

The words used in N-PCL 623(c) and BCL 626(c) are almost identical. Given the subject matter of each statute, these words are similar in intent and character, and there is no compelling reason to interpret them differently. Further, in *Adams v. Banc of America Securities LLC*, 7 Misc 3d 1023(A) (Sup. Ct. NY Cnty. 2005), Justice Fried, addressing a motion to dismiss a derivative suit brought on behalf of a Delaware corporation, found that the particularized pleading standard had not been met such that dismissal was appropriate, stating that "[t]he allegations that the board wrongfully refused the demands are not adequately pled, in that they [*7]are largely conclusory." *Adams*, 7 Misc 3d at 1023(A). Notably, Justice Fried also found that "[e]ven under New York law, the complaint is properly dismissed" where the complaint "provide[d] no indication as to who made the demand, when it was made, to which board members it was made, and the content of the demand, or why the board refused to take action." *Adams*, 7 Misc 3d at 1023(A) (citing *Tomczak*, 283 AD2d at 229-30).

Based on the First Department's analysis in *Tomczak*, and in the absence of a compelling reason to the contrary, the Court finds that the particularized pleading requirement of BCL 626(c) should include not only allegations that "demands were made on the [board] . . . to initiate legal action," but also "who made the demands, when they were made, which Board members they were made to, the content of the demands [and] *why the Board refused to take action*." *Tomczak*, 283 AD2d at 230 (emphasis added).

The emphasized language from *Tomczak* , "why the Board refused to take action," is the rationale for the Board's decision to refuse the demand and would underlie whether such refusal was wrongful. For example, applying the standards in *Auerbach v. Bennett*, 47 NY2d 619 (1979), the reason for the refusal could be that the Board was interested or lacked independence, that it acted in bad faith, or that it employed inadequate or inappropriate procedures in reaching its decision to refuse the demand. *Auerbach*, 47 NY2d at 623-24, 630-31. Accordingly, the Court finds that a plaintiff must plead with particularity not only that a demand was made, but also that the refusal of the demand was wrongful.

As a policy matter, this conclusion is consistent with well-settled New York law that "[t]he demand requirement rests on basic principles of corporate control — that the management of the corporation is entrusted to its board of directors, who have primary responsibility for acting in the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts.'" *Bansbach v. Zinn*, 1 NY3d 1, 8-9 (2003), *rearg. denied*, 1 NY3d 593 (2004) (quoting *Barr v. Wackman*, 36 NY2d 371, 378 (1975)); *Wandel*, 60 AD3d at 79-80. The Court of Appeals explained that "[t]he purposes of the demand requirement are to (1) relieve courts from deciding matters of internal corporate governance by providing corporate directors with opportunities to correct alleged abuses, (2) provide corporate boards with reasonable protection from harassment by litigation on matters clearly within the discretion of directors, and (3) discourage strike suits' commenced by shareholders for personal gain rather than for the benefit of the corporation." *Marx v. Akers*, 88 NY2d 189, 194 (1996) (citing *Barr*, 36 NY2d at 378). "[T]he demand is generally designed to weed out unnecessary or illegitimate shareholder derivative suits." *Marx*, 88 NY2d at 194 (citing *Barr*, 36 NY2d at 378). These purposes would be unfulfilled by a mere rote recitation of the contents of a demand and statements that such demand was made.

This conclusion is also consistent with the deferential standard applied when reviewing board decisions under the business judgment rule. *Auerbach v. Bennett*, 47 NY2d 619, 630-31 (1979). As one court explained, "conclusory allegations of discrimination, self-dealing, fraud and bad faith are insufficient to overcome the presumption of regularity created by the business judgment rule." *Cannings v. East Midtown Plaza Hous. Co.*, 33 Misc 3d 1216(A), 1216(A) (Sup. Ct. NY Cnty. 2011), *aff'd*, 104 AD3d 443 (1st Dep't 2013) (citations omitted) (Madden, J.); *see Arvonio v. Arvonio*, 31 Misc 2d 5, 6 (Sup. Ct. NY Cnty. 1961) (finding that dismissal was appropriate where allegations implicating the business judgment rule were "general in nature and [*8]wholly conclusory and insufficient"). The Court of Appeals

likewise observed that "a rational explanation for the board's decision . . . should not end all inquiry, foreclosing review of *nonconclusory* assertions of malevolent conduct; under the business judgment test, it would not." *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 NY2d 530, 542 (1990) (emphasis added).

Finally, this conclusion is consistent with the pleading standard that applies in the context of demand futility, as opposed to demand refusal. The Court of Appeals has explained that a demand on the board is excused as futile "when a complaint alleges with particularity that [1] a majority of the board of directors is interested in the challenged transaction," "[2] the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances," or "[3] the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors." *Marx*, 88 NY2d at 200-01 (citations omitted). The three factors identified in *Marx* are sufficiently similar to those at issue in the context of demand refusal — bad faith, interestedness or lack of independence, and adequacy or appropriateness of investigative procedures — that the applicability of the particularized pleading standard is appropriate in both contexts.

For all of the reasons stated above, the Court finds that in the context of demand refusal, to satisfy the demand requirement under BCL 626(c) a plaintiff must plead with particularity not only that a demand was made, but also that the refusal of the demand was wrongful.

C.*Whether Plaintiffs Plead with Sufficient Particularity that a Demand Was Made*

In the context of a derivative suit, the First Department has held that a "[d]emand to sue need not assume a particular form nor need it be made in any special language." *Ripley v. Int'l Rys. of Cent. Am.*, 8 AD2d 310, 317 (1st Dep't 1959). As noted above, BCL 626(c) provides that "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board." BCL 626(c). The complaint should include allegations about "who made the demands, when they were made, which Board members they were made to, [and] the content of the demands." *Tomczak v. Trepel*, 283 AD2d 229, 230 (1st Dep't 2001). *See* 4B *Commercial Litigation in New York State Courts* § 82:10 (Robert L. Haig ed., 3rd ed. 2010) (describing the information that should be included in a demand letter).

Plaintiffs allege that they made a total of three demands upon the Board. First, Plaintiffs

allege that on April 8, 2010, Plaintiff Kenney, by counsel, mailed "a ten-page, single-spaced litigation demand" (the "Kenney Demand Letter") "to GE's Board, care of Chairman and CEO Immelt." (Compl. ¶ 100.) Plaintiffs further allege that the letter demanded that the Board initiate an investigation and legal proceedings against certain proposed defendants, and included legal theories and supporting facts, damages, and remedies. (Compl. ¶ 100; Compl. Ex. A at 1-10.)[FN4] [*9]

Second, Plaintiffs allege that on February 8, 2012, Plaintiff Raul, by counsel, sent "a thirteen-page, single-spaced litigation demand" (the "Raul Demand Letter") to the Board. (Compl. ¶ 123.) The Raul Demand Letter is generally addressed to the Board. (Compl. Ex. S at 1.) Plaintiffs further allege that the letter demanded that the board initiate an investigation and legal proceedings against certain proposed defendants, and included legal theories and supporting facts, damages, and remedies. (Compl. ¶ 123; Compl. Ex. S at 1-12.)

Accordingly, the Court finds that Plaintiffs have pled with sufficient particularity that the demands set forth in the Kenney Demand Letter and the Raul Demand Letter (collectively the "Demand Letters") were made upon the Board.

Plaintiffs also allege that on October 30, 2012, subsequent to this action being commenced, Plaintiff Kenney, by counsel, sent a letter (the "Confirmatory Demand Letter") to Rachel Skaistis ("Counselor Skaistis"), of Cravath, Swaine & Moore LLP, whose law firm was retained as independent counsel to assist with the investigations related to the Demand Letters. (Compl. ¶ 126; Compl. Ex. U at 1-2.) That letter references the Kenney Demand Letter, the Board's refusal to act thereon, and Plaintiff Kenney's subsequently commenced derivative suit. (Compl. ¶ 126; Compl. Ex. U at 1.) The Confirmatory Demand Letter also identifies the Raul Demand Letter, the Board's refusal to act thereon, and Plaintiff Raul's subsequently commenced derivative suit. (Compl. ¶ 126; Compl. Ex. U at 1.) The letter goes on to state that Plaintiff Kenney "joins in and demands that the Board take each and every action based on each and every fact and on each and every legal theory raised by Mr. Raul in the Raul Demand" and incorporates a copy of the Raul Demand Letter by reference. (Compl. ¶ 126; Compl. Ex. U at 2.)

Unlike the Kenney Demand Letter and the Raul Demand Letter, the Confirmatory Demand Letter fails to satisfy the applicable legal standard. Under New York law, "[a] complaining stockholder must go to [the] board for relief before he can bring" a derivative

suit. *Barr v. Wackman*, 43 AD2d 689, 690 (1st Dep't 1973), *aff'd*, 36 NY2d 371 (1975) (quoting *Continental Sec. Co. v. Belmont*, 206 NY 7, 19 (1912)). However, the Confirmatory Demand Letter was addressed to Counselor Skaistis and includes a notation indicating that it was carbon copied to Greg A. Danilow and Brackett B. Denniston III, who are respectively outside counsel to GE, and Senior Vice President and General Counsel to GE. (Compl. ¶¶ 19, 101, 106; Compl. Ex. U at 1-2.) Here, the demand was not made upon the Board or an individual director. Moreover, Plaintiffs do not allege that such demand upon the Board would have been futile, such that demand would be excused. *See* BCL 626(c). Under *Tomczak*, a plaintiff must plead with particularity, among other things, to "which Board members [demands] were made." *Tomczak*, 283 AD2d at 230. As one treatise notes, "[d]emand can be made only upon the board of directors. Communications to other parties, e.g., corporate officers, shareholders, or attorneys, will not be considered effective." 4B *Commercial Litigation in New York State Courts* § 82:10 (footnotes omitted).

Accordingly, the Court finds that Plaintiffs have not pled with sufficient particularity that the demand set forth in the Confirmatory Demand Letter was made upon the Board, such that the Consolidated Complaint is dismissed to the extent it relies upon the Confirmatory Demand Letter.

D.*Whether Plaintiffs Plead with Sufficient Particularity that Refusal Was Wrongful*

[*10]

"The business judgment rule prevents courts from inquiring into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'" *Lemle v. Lemle*, 92 AD3d 494, 497 (1st Dep't 2012) (quoting *Auerbach v. Bennett*, 47 NY2d 619, 629 (1979)). "[A]bsent evidence of bad faith or fraud . . . courts must and properly should respect [a board's] determinations." *Auerbach*, 47 NY2d at 631. "The business judgment rule does not foreclose inquiry by the courts into the disinterested independence of those members of the board chosen by it to make the corporate decision on its behalf." *Auerbach*, 47 NY2d at 631. Moreover, "the court may properly inquire as to the adequacy and appropriateness of the committee's investigative procedures and methodologies." *Auerbach*, 47 NY2d at 634.

Here, Plaintiffs do not assert a cause of action for fraud. Plaintiffs argue that the Board

acted in bad faith because, among other things, it was not disinterested and independent, and it employed inadequate and inappropriate investigative procedures. Thus, although the existence of bad faith precludes the application of the business judgment doctrine, the Court shall first consider the Board's disinterestedness and independence and the adequacy and appropriateness of its investigative procedures, as those latter issues underlie Plaintiffs' argument that the Board acted in bad faith when it refused Plaintiffs' demands.

1.*Disinterestedness and Independence of the Audit Committee*

The Court of Appeals has observed that "[d]irector interest may either be self-interest in the transaction at issue, or a loss of independence because a director with no direct interest in a transaction is controlled' by a self-interested director." *Bansbach v. Zinn*, 1 NY3d 1, 9 (2003) (quoting *Marx v. Akers*, 88 NY2d 189, 200-01 (1996)) (addressing the issue of director interestedness in the context of demand futility).

However, "[a] charge of interest must be made with particularity. Simply naming a majority of the board as defendants with conclusory allegations of wrongdoing or control is insufficient to circumvent the requirement of demand." *Bansbach*, 1 NY3d at 11 (citing *Barr v. Wackman*, 36 NY2d 371, 379 (1975)); *see Wandel v. Eisenberg*, 2007 WL 6822868, at *1 (Sup. Ct. NY Cnty. 2007), *aff'd*, 60 AD3d 77 (1st Dep't 2009) (quoting *Marx*, 88 NY2d at 199-200). As one court explained, "conclusory allegations as to director control or wrongdoing [are] insufficient to satisfy BCL § 626 particularity requirement. The mere presence of directors on committees is not particular as to their individual participation or alleged collusion with interested directors in the backdating of stock options." *Wandel*, 2007 WL 6822868, at *1.

The Board referred the demands made in the Kenney Demand Letter and the Raul Demand Letter to GE's audit committee (the "Audit Committee") "for consideration and a recommendation to the board." (Defendants' Memorandum of Law in Support ("Defs.' Supp. Mem.") at 7, 9.)

[The Audit Committee] consists of six outside, non-employee GE directors: Mr. Warner (the audit committee's chair and the former Chairman of the Board of JPMorgan Chase & Co.), Mr. Beattie (the President and Chief Executive Officer of The Woodbridge Company Limited), Dr. Cash (Emeritus James E. Robinson Professor of Business Administration at

Harvard Business School), Mr. Lane (the Chairman of the Board and former Chief Executive Officer of Deere & Company), Mr. Mulva (the Chairman and Chief Executive Officer of ConocoPhillips), and Dr. [*11]Swieringa (Professor of Accounting and former Anne and Elmer Lindseth Dean at the S.C. Johnson Graduate School of Management at Cornell University).

(Defs.' Mem. Supp. at 5-6; Compl. Ex. M at 2-3; Compl. Ex. T at 2.)

Plaintiffs argue that the Audit Committee was interested because four out of six of its members were named as wrongdoers in the demand letters. (Pls.' Opp. Mem. at 15.) Specifically, Plaintiffs allege that Audit Committee members Warner, Cash, Lane, and Swieringa breached their respective fiduciary duties to GE. (Pls.' Opp. Mem. at 15.) In support of this contention, Plaintiffs allege that they Warner, Cash, Lane, and Swieringa breached their duty of loyalty "by approving statements . . . which they knew or were reckless in not knowing contained improper statements or omissions." (Compl. ¶ 134; *see* Compl. ¶¶ 25, 27, 33-34.) Warner, Cash, Lane, and Swieringa also allegedly "failed in their duty of oversight . . . and in their duty to appropriately review statements made during Company conference calls and in press releases, as required by the Audit Committee Charter in effect at the time." (Compl. ¶ 134; *see* Compl. ¶¶ 25, 27, 33-34.) The demand letters include similar allegations that Warner, Cash, Lane, and Swieringa breached their respective fiduciary duties because they failed to correct press releases that contained incorrect statements. (Compl. Ex. A at 5-6; Compl. Ex. S at 9-10.)

The Raul Demand Letter also identifies Audit Committee members Warner, Cash, Lane, and Swieringa, and alleges that those individuals "breached their fiduciary duties of due care, loyalty, and good faith because the Audit Committee participated in the preparation of improper statements and earnings press releases that failed to disclose the precarious financial situation surrounding GE." (Compl. Ex. S at 9-10.) That letter contains further allegations that Warner, Cash, Lane, and Swieringa "reviewed and failed to correct GE's improper press releases and dividend guidance . . . . [and] failed to ensure that the Company had in place the requisite internal controls over its financial reporting and earnings guidance public statements . . . . [d]espite having held 17 meetings in 2008." (Compl. Ex. S at 10.)

BCL 717(a) provides that, among other things, "[a] director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may

serve, in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances." BCL 717(a). Good faith requires that directors "not assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation." *Foley v. D'Agostino*, 21 AD2d 60, 66 (1st Dep't 1964) (citation omitted). "Moreover, it is well established that, as fiduciaries, board members bear a duty of loyalty to the corporation and may not profit improperly at the expense of their corporation.'" *S.H. Helen R. Scheuer Family Found., Inc. v. 61 Assoc.*, 179 AD2d 65, 70 (1st Dep't 1992).

Defendants argue, among other things, that the Court should follow the reasoning of the federal court in *Lerner v. Immelt*, and adopt the standard under Delaware law which provides that " in making a demand [a plaintiff] . . . waive[s] her right to argue that the board was lacking independence based on the facts that were existent at the time of her demand.'" (Def's Supp. Mem. at 17 (quoting *Lerner v. Immelt*, 10 CV 1807, Tr. at 41-42 (S.D.NY Sept. 12, 2011), *aff'd*, 523 F. App'x 824 (2d Cir. 2013)).) There, the court explained that "[a]lthough there is no case [*12]law on point, the Court believes that if the New York Court of Appeals were to consider this question it would adopt what has become the dominant rule in Delaware and hold that in making a demand Lerner has waived her right to argue that the board was lacking independence based on the facts that were existent at the time of her demand." (Defendants' Motion to Dismiss ("Defs.' Mot. Dismiss"), Ex. A at 41-42.) Despite that court's holding, for the reasons that follow, the Court declines to adopt that standard.

First, although "derivative actions are not favored in the law because they ask courts to second-guess the business judgment of the individuals charged with managing the company. . . . [, they] serve the important purpose of protecting corporations and minority shareholders against officers and directors who, in discharging their official responsibilities, place other interests ahead of those of the corporation." *Bansbach*, 1 NY3d at 8. That purpose would be ill-served by limiting a shareholder's ability to sue derivatively on behalf of a corporation, particularly in light of the already-demanding particularized pleading standards discussed above.

Second, it is well-settled that "[t]he demand requirement rests on basic principles of corporate control — that the management of the corporation is entrusted to its board of directors, who have primary responsibility for acting in the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts.'" *Bansbach*, 1

NY3d at 8-9 (citation omitted). Applying the Delaware rule as urged by Defendants would disincentivize shareholders from making demands upon the board before bringing derivative suits and would, therefore, be inapposite to the principle that the board has the "primary responsibility for acting in the name of the corporation." *Bansbach*, 1 NY3d at 9.

Third, in *Auerbach*, the Court of Appeals stated unambiguously that "[t]he business judgment rule does not foreclose inquiry by the courts into the disinterested independence of those members of the board chosen by it to make the corporate decision on its behalf." *Auerbach*, 47 NY2d at 631. Unlike the federal court in *Lerner v. Immelt*, this Court is "duty bound to adhere to the determinations by the highest court of this State until overruled by that court." *People v. Askew*, 66 AD2d 710, 713 (1st Dep't 1978). As such, this Court will not create an exception to the Court of Appeal's holding where none exists.

Accordingly, the Court declines to adopt the rule, as urged by Defendants, that a shareholder who makes a demand on the board waives his or her right to argue that the board lacked independence based on the facts that were existent at the time of her demand.

Nevertheless, the Court finds that Plaintiffs' allegations on the issue of the Audit Committee's interestedness and lack of independence are insufficiently particularized. First, the allegations do not contain particularized statements of fact supporting the conclusion that Warner, Cash, Lane, and Swieringa "assume[d] and engage[d] in the promotion of personal interests which are incompatible with the superior interests of their corporation." *Foley*, 21 AD2d at 66. Second, the allegations do not contain particularized statements of fact supporting the conclusion that Warner, Cash, Lane, and Swieringa failed to perform their duties as directors and Audit Committee members "with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances." BCL 717 (a). Third, the allegations do not contain particularized statements of fact supporting the conclusion that Warner, Cash, Lane, and Swieringa breached their duty of loyalty by "profit [ting] improperly at the expense of their corporation.'" *S.H. Helen R. Scheuer Family Foundation, Inc.*, 179 AD2d at 70. Also, Plaintiffs [*13]do not argue that Warner, Cash, Lane, and Swieringa were controlled by any other officers or directors, nor do they allege particularized statements of fact supporting such a conclusion.

Plaintiffs do not allege that Warner, Cash, Lane, and Swieringa promoted their personal interests or profited at GE's expense. The allegations that Warner, Cash, Lane, and Swieringa

failed to correct certain statements do not, without more, lead the Court to conclude that they violated their duty of care by not exercising the appropriate degree of care. Moreover, the allegations regarding Warner, Cash, Lane, and Swieringa's mental state are conclusory and are not supported by particularized statements of fact. Also, even if the Confirmatory Demand Letter had been sent to the Board, it too would contain insufficiently particularized allegations regarding the Audit Committee because it simply adopts and reasserts the allegations and demands contained in the Raul Demand Letter. (Compl. ¶ 126; Compl. Ex. U at 1-2.)

Accordingly, the Court finds that Plaintiffs have not pled with sufficient particularity that Warner, Cash, Lane, and Swieringa were interested or lacked independence.

2.*The Disinterestedness and Independence of the GE Board*

Even if Plaintiffs' allegations regarding Audit Committee members Warner, Cash, Lane, and Swieringa had been sufficiently particularized, it was not the Audit Committee that ultimately decided to refuse Plaintiffs' demands. Under *Auerbach*, the proper "inquiry by the courts [is] into the disinterested independence of *those members of the board chosen by it to make the corporate decision on its behalf*." *Auerbach*, 47 NY2d at 631 (emphasis added). The decision to refuse Plaintiffs' demands was made by a larger group of non-management board members.

In the response to Plaintiff Kenney's demand, on December 10, 2010, there was a meeting of non-management directors including Warner, Beattie, Cash, Lane, Mulva, Swieringa, Castell, Hockfield, Jung, Lafley, Larsen, Lazarus, Nunn, Fudge, and Tisch. (Compl. Ex. M at 6.) Penske and Immelt were not present. (Compl. Ex. M at 6.) Following a presentation by Warner and the Audit Committee's independent counsel, discussion ensued and those directors present voted unanimously to refuse the Plaintiff Kenney's demand. (Compl. Ex. M at 6.) Thus, the decision to refuse Plaintiff Kenney's demand was made by eleven non-management directors, in addition to Warner, Cash, Lane, and Swieringa.

In response to Plaintiff Raul's demand, on April 24, 2012, there was a meeting of non-management directors including Warner, Beattie, Cash, Mulva, Swieringa, Hockfield, Jung, Lafley, Larsen, Lazarus, Nunn, Fudge, and Tisch. (Compl. Ex. T at 3-4.) Lane, Penske, and Immelt were not present, although Lane attended the Audit Committee's meeting the day before. (Compl. Ex. T at 3-4.) Following a presentation of the Audit Committee and its

independent counsel's findings and recommendations, the directors present voted unanimously to refuse Plaintiff Raul's demand. (Compl. Ex. T at 4.) Thus, the decision to refuse Plaintiff Raul's demand was made by eleven non-management directors, in addition to Warner, Cash, and Swieringa.

The Kenney Demand Letter notes that the December 5, 2005 Registration Statement was signed by Immelt, Sherin, Cash, Castell, Fudge, Gonzalez, Jung, Lafley, Lane, Larsen, Lazarus, Nunn, Penske, Swieringa, and Warner, includes that registration statement in a collective definition called "Offering Materials," and states that the "Offering Materials contained a series [*14]of materially false and misleading statements and omissions regarding" GE. (Compl. Ex. A at 3, 3 n.1.)

The Raul Demand Letter states that "the entire Board failed, as directors, to assure that a reliable system of financial controls were in place and functioning effectively." (Compl. Ex. S at 10.) Furthermore, "[t]he Board either knew or should have known management's and their public statements in press releases and SEC filings were materially false and misleading . . . ; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents." (Compl. Ex. S at 10.) Moreover, "[t]hese directors either knew, should have known, or could have known, that violations of law were occurring and took no steps in a good faith effort to prevent or remedy that situation . . . . even to this day, the Board has failed to take action to remedy the breaches of fiduciary duties that occurred between at least September 25, 2008 and March 19, 2009, meaning that their breaches of fiduciary duty continue to the present." (Compl. Ex. S at 10.)

Applying the standards discussed above, the Court finds that the allegations in the demand letters regarding the entire board are insufficiently particularized to call into question the disinterestedness or independence of the directors who were present in addition to Warner, Cash, Lane, and Swieringa at the December 10, 2010 meeting and in addition to Warner, Cash, and Swieringa at the April 24, 2012 meeting. The 2005 registration statement identified in the Kenney Demand Letter predates the period of alleged wrongdoing by approximately three years, and, thus, does not support a conclusion that the board was interested or lacked independence. Also, allegations regarding the Board in the Raul Demand Letter are insufficiently particularized, because they do not include statements of fact upon which legal conclusions can be based. Rather, they assert legal conclusions that the Board

committed certain wrongful acts and did so with certain mental states. Likewise, even if the Confirmatory Demand Letter had been sent to the Board, it too would contain insufficiently particularized allegations regarding the Board because it simply adopts and reasserts the allegations and demands contained in the Raul Demand Letter. (Compl. ¶ 126; Compl. Ex. U at 1-2.)

For the same reasons, the allegations in the Consolidated Complaint which identify directors Beattie, Mulva, Hockfield, Jung, Lafley, Larsen, Lazarus, Nunn, Fudge, and Tisch (Compl. ¶¶ 24, 28-29, 30-32, 35-38, 136), as well as those which identify the collective group known as the "Individual Defendants" are also insufficiently particularized. "It is not sufficient . . . merely to name a majority of the directors as parties defendant with conclusory allegations of wrongdoing or control by wrongdoers." *Barr v. Wackman*, 36 NY2d 371, 379 (1975) (addressing the issue of particularized pleading in the context of demand futility).

Accordingly, the Court finds that Plaintiffs have not pled with sufficient particularity that the Board was interested or lacked independence.

3.*The Adequacy and Appropriateness of the Investigative Procedures*

Plaintiffs argue that the Board did not use adequate or appropriate procedures when it voted to refuse the demands solely on the basis of the Audit Committee's recommendation. (Pls.' Opp. Mem. at 15.) Specifically, the "remaining Board members did not employ any other investigative procedure, but instead based their decision to refuse Plaintiffs' demands on the [*15]investigation and recommendation of the conflicted Audit Committee members." (Pls.' Opp. Mem. at 15.)

Under *Auerbach*, "the court may properly inquire as to the adequacy and appropriateness of the committee's investigative procedures and methodologies." *Auerbach v. Bennett*, 47 NY2d 619, 634 (1979). As one court explained, the question of "whether the special litigation committee employed proper procedures before rejecting [the] demand — requires courts to inquire into whether the procedures employed were so inadequate as to suggest fraud or bad faith, because the business judgment doctrine does not protect a disinterested board which acts fraudulently or in bad faith." *Stoner v. Walsh*, 772 F. Supp. 790, 799 (S.D.NY 1991) (citing *Auerbach*, 47 NY2d at 634-35).

Committees investigating shareholder demands routinely retain independent counsel to

assist them with their investigation, and such retention has been found to be an adequate and appropriate procedure. *See, e.g., Auerbach*, 47 NY2d at 635 (finding that the "committee promptly engaged eminent special counsel to guide its deliberations and to advise it"); *Bansbach*, 1 NY3d at 7; *Ungerleider v. One Fifth Ave. Apartment Corp.*, 164 Misc 2d 118, 121 (Sup. Ct. NY Cnty. 1995) (holding that a board's procedure was "appropriate" where a committee retained independent counsel to advise it); *Stoner*, 772 F. Supp. at 793 (noting that "the Committee had retained the law firm of White & Case as independent counsel to the Committee and the entire Board with respect to the matters referred to in the demand").

Moreover, the use of an evaluative committee, that is, one that recommends a course of action to a board, as opposed to an empowered committee, such as the one in *Auerbach*, that makes a final decision on behalf of a corporation, has been upheld as procedurally sound. *See, e.g.*, *Stoner*, 772 F. Supp. at 800-01 (applying New York law, distinguishing the role of the committee in *Auerbach*, and concluding that the plaintiff had failed to allege facts supporting the conclusion that the board employed inadequate procedures in rejecting the demand); *In re Boston Sci. Corp. S'holders Litig.*, 2007 WL 1696995, at *1 (S.D.NY June 13, 2007) (applying Delaware law). *See also* 4B *Commercial Litigation in New York State Courts* § 82:23 (footnotes omitted) (explaining that "[i]f the committee is evaluative rather than empowered, ... [t]he board should consider the committee's report and vote on whether or not to proceed").

At the outset, because Plaintiffs failed to plead with the requisite particularity that the Board, including the Audit Committee, was interested and lacked independence, the Board's alleged reliance on the "conflicted Audit Committee members" is insufficient to establish the lack of adequate and appropriate procedures.

The steps taken by the Audit Committee and its independent counsel in investigating and evaluating Plaintiffs' demands are set forth in detail in the correspondence from Counselor Skaistis. Examples include reviewing thousands of documents, and conducting multiple interviews of current and former employees, officers, directors, GE's independent auditor and that auditor's outside counsel. (Compl. Ex. M at 3.)

In the context of Plaintiff Kenney's demand, Counselor Skaistis also notes the investigative steps taken with respect to Olga Lerner's demand,[FN5] to the extent that the allegations [*16]raised in those demands overlapped. (Compl. Ex. M at 3.) In response to

Plaintiff Raul's demand, Counselor Skaistis states that "every issue presented in your letter has been thoroughly reviewed in the past," and goes on to briefly summarize the investigations that took place in response to the demands by Olga Lerner and Plaintiff Kenney. (Compl. Ex. T at 2.)

As to the Confirmatory Demand Letter, which adopts and reasserts the allegations and demands contained in the Raul Demand Letter, (Compl. ¶ 126, Ex. U at 1-2), Plaintiffs do not cite, nor is the Court aware of, any precedent which supports the conclusion that a board must take action when a shareholder asserts a demand letter that is identical to one that has already been investigated and refused by the board. Such a requirement would place boards in an untenable position vis-a-vis their corporation's shareholders, if a board had to fully reinvestigate demands that had been previously investigated and refused.

The correspondence from Counselor Skaistis shows that the Audit Committee's recommendations to refuse Plaintiffs' demands were reported to a larger group of non-management directors, and were subsequently adopted by unanimous vote. (Compl. Ex. M at 6; Compl. Ex. T at 4.) In each case, Warner and the Audit Committee's independent counsel presented their findings and recommendations, which formed the basis for the Board's decision to refuse Plaintiffs' demands. (Compl. Ex. M at 6; Compl. Ex. T at 4.)

Accordingly, the Court finds that Plaintiffs have not pled with sufficient particularity that the Board failed to employ adequate and appropriate investigative procedures and methodologies.

4.*Bad Faith*

Plaintiffs argue that they "adequately allege facts that reasonably suggest that the Board's refusal of their demands was in bad faith, and, thus, not a valid exercise of business judgment." (Pls.' Opp. Mem. at 14.) Specifically, Plaintiffs argue that bad faith is demonstrated because the "Board failed to employ appropriate and sufficient investigative procedures in connection with the demands because they delegated responsibility for the investigation to Audit Committee members Warner, Cash, Lane, and Swieringa, who were not disinterested." (Pls.' Opp. Mem. at 14.)

BCL 717(a) provides in pertinent part that "[a] director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may

serve, in good faith." BCL 717(a). That is, directors "may not assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation." *Foley v. D'Agostino*, 21 AD2d 60, 66 (1st Dep't 1964) (citation omitted). The [*17]issue is whether Plaintiffs have alleged with sufficient particularity that in this case, the "actions of corporate directors [were not] taken in good faith." *Auerbach v. Bennett*, 47 NY2d 619, 629 (1979).

Here, Plaintiffs assert that the basis for their allegations regarding bad faith are the Board's failure to employ adequate procedures and the Board's lack of independence. However, the Court held above that Plaintiffs have failed to plead with sufficient particularity that the Audit Committee and Board were interested or lacked independence, or that they failed to employ adequate and appropriates investigative procedures and methodologies. Plaintiffs also do not separately allege with sufficient particularity that the non-management directors acted in bad faith, that is, that they "assume[d] and engage[d] in the promotion of personal interests which are incompatible with the superior interests of their corporation." *Foley*, 21 AD2d at 66.

In addition, Plaintiffs separately argue that the Board's decisions (a) to refuse Plaintiff Kenney's demand prior to the issuance of a ruling on the motion to dismiss filed pending in the related securities class action case, and (b) not to enter into tolling agreements with the alleged wrongdoers, "are not consistent with a Board that acted independently and in good faith." (Pls.' Opp. Mem. at 14.) Moreover, Plaintiffs argue that the board did not appropriately respond to the Confirmatory Demand Letter, but stated only that they would not "re-investigate" any allegations, such that the board "wrongfully refused and/or ignored" the Confirmatory Demand Letter. (Compl. ¶¶ 127-28.) These arguments fail for several reasons.

The correspondence from Counselor Skaistis shows that the decisions to reject Plaintiffs' demands were based on, among other things, the Board's determination that "any litigation would have very little likelihood of success." (Compl. Ex. M at 5; Compl. Ex. T at 3.) As one court applying New York law explained, "the ultimate substantive decision whether to litigate . . . falls squarely within the embrace of the business judgment doctrine.'" *Abramowitz v. Posner*, 513 F. Supp. 120, 131 (S.D.NY 1981) (quoting *Auerbach*, 47 NY2d at 633)). The decisions to refuse Plaintiff Kenney's demand prior to the decision on related motion to dismiss and not to enter into tolling agreements with the alleged wrongdoers represent

extensions of the decision not to litigate based on the determination that such litigation would have very little likelihood of success. These decisions were not "so egregious on [their] face that [they] could not have been the product of sound business judgment of the directors" who made them. *Marx v. Akers*, 88 NY2d 189, 200-01 (1996). Moreover, the allegations regarding these decisions do not otherwise support the conclusion that they were made in order to "assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation." *Foley*, 21 AD2d at 66.

Finally, having found that Plaintiffs do not otherwise allege with requisite particularity that the Board acted in bad faith, was interested or lacked independence, or employed inadequate or inappropriate investigative procedures, these decisions are entitled to the protection of the business judgment rule, and, thus, may not be second-guessed by this Court.

Accordingly, the Court finds that Plaintiffs have not pled with sufficient particularity that the Board acted in bad faith, either with respect to its refusals of Plaintiffs' demands, or its decisions regarding the tolling agreements and the pending motion to dismiss.

E.*Whether Plaintiffs Are Entitled to Discovery* [*18]

Plaintiffs argue that they "should be allowed to conduct limited discovery into the facts relating to the investigation and refusal of their demands before the Court addresses whether the Board's refusal of Plaintiffs' demands was wrongful." (Pls.' Opp. Mem. at 20.) As to each of their arguments regarding why the Board's decisions in this case are not protected by the business judgment rule, Plaintiffs contend that they have pled sufficient facts to create a "reasonable doubt" about whether the refusals were wrongful, and, thus, are entitled to limited discovery prior to this Court ruling on this motion. (Pls.' Opp. Mem. at 14-15, 17, 19-20.)

Defendants argue that Plaintiffs have not adequately pled facts that would entitle Plaintiffs to discovery prior to deciding a motion to dismiss. (Defs.' Reply Mem. at 13.) Defendants further argue that the cases cited by Plaintiffs which allowed discovery are factually distinguishable from the instant case in that they involve, among other things, motions for summary judgment, as opposed to a motion to dismiss. (Defs.' Reply Mem. at 12.) Defendants also argue that allowing such discovery would be contrary to the applicable standard on a motion to dismiss, which considers only the pleadings. (Defs.' Reply Mem. at 12.) Finally, Defendants argue that under Delaware law, plaintiffs in a derivative suit are not

entitled to discovery to assist their compliance with the particularized pleading requirement in a case of demand refusal. (Defs.' Reply Mem. at 12.)

At the outset, the Court notes that Plaintiffs have not filed a motion or cross-motion to compel the discovery to which they assert an entitlement. Rather, they raise these arguments in their opposition to Defendants' motion to dismiss.

The First Department has held that " vague and conclusory allegations and expression[s] of hope that discovery, if and when conducted, might provide some factual support for [its] cause of action . . . provide an insufficient basis for failing to dismiss a patently defective cause of action.'" *HT Capital Advisors, L.L.C. v. Optical Res. Group, Inc.*, 276 AD2d 420, 420 (1st Dep't 2000) (citation omitted); *accord Ravenna v. Christie's Inc.*, 289 AD2d 15, 16 (1st Dep't 2001). In the context of a corporate governance dispute, one court explained that "[i]n the pre-discovery stage of litigation, it is inappropriate to dismiss a claim by invoking the business judgment rule,' given that plaintiffs have set forth more than conclusory allegations concerning defendants' fiduciary duties." *Cohen v. Seward Park Hous. Corp.*, 7 Misc 3d 1015(A), 1015(A) (Sup. Ct. NY Cnty. 2005) (citing *Ackerman v. 305 East 40th Owners Corp.*, 189 AD2d 665, 667 (1st Dep't 1993); *Bryan v. West 81 Street Owners Corp.*, 186 AD2d 514, 515 (1st Dep't 1992)).

In *Parkoff v. General Tel. & Electronics Corp.*, 53 NY2d 412 (1981), which is cited favorably by Plaintiffs, the Court of Appeals observed that:

"The business judgment doctrine should not be interpreted to stifle legitimate scrutiny by stockholders of decisions of management which, concededly, require investigation by outside directors and present ostensible situations of conflict of interest. Nor should the report of the outside directors be immune from scrutiny by an interpretation of the doctrine which compels the acceptance of the findings of the report on their face. In particular, summary judgment which ends a derivative action at the threshold, before the plaintiff has been afforded the opportunity of pretrial discovery and examination before trial, should not be the means of foreclosing a nonfrivolous action."

Parkoff, 53 NY2d at 417-18 (quoting *Auerbach v. Bennett*, 64 AD2d 98, 107-08 (2d Dep't 1978), *[*19]modified*, 47 NY2d 619 (1979)). That court concluded that "it was premature to have granted summary judgment to defendants for insufficiency of plaintiff's evidentiary

showing under the principles of *Auerbach*." *Parkoff*, 53 NY2d at 418.

The Court of Appeals further explained that:

To the assertion that recognition of a generalized demand for disclosure as sufficient to cause postponement of a motion for summary judgment might be thought to authorize and countenance fishing expeditions, it suffices to observe that in this type of case the plaintiff must necessarily be given more latitude to discover than in most and that the appropriate counterbalance lies in the vigilance of the court in its oversight of disclosure devices to issue appropriate protective

orders so as to forestall their employment as instruments of corporate harassment

without frustrating the legitimate interests of shareholder plaintiffs.

Parkoff, 53 NY2d at 418 n.2 (citing CPLR 3103).

Notwithstanding the Court of Appeals's statements in *Parkoff*, Plaintiffs have not established an entitlement to discovery such that this motion should be denied or postponed pending the completion of such discovery. The various holdings in *Parkoff* focus on a request for discovery in response to a motion for summary judgment, as opposed to a motion to dismiss under CPLR 3211. *See Parkoff*, 53 NY2d at 418. That court articulated the reason for such focus: "summary judgment . . . ends a derivative action at the threshold, before the plaintiff has been afforded the opportunity of pretrial discovery and examination before trial." *Parkoff*, 53 NY2d at 418. "[T]he granting of summary judgment dismissing the complaint . . . [is] an adjudication on the merits and therefore entitled to *res judicata* effect." *Murray v. Nat'l Broad. Co.*, 178 AD2d 157, 157 (1st Dep't 1991) (citation omitted).

Here, the Court previously determined that BCL 626(c) requires not only particularized pleadings that a demand was made, but also that refusal of such demand was wrongful. This Court also found that Plaintiffs have not pled with sufficient particularity that the Board acted in bad faith, that it was interested or lacked independence, or that it employed inadequate or inappropriate investigative procedures.

Accordingly, the Court finds that Plaintiffs have not established an entitlement to

discovery, such that Defendants' motion to dismiss should be denied or postponed.

II.*CPLR 3211(a)(3) — Lack of Legal Capacity to Sue*

CPLR 3211(a)(3) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the party asserting the cause of action has not legal capacity to sue." CPLR 3211(a)(3). As noted above, the issue in a motion under this section is "whether a party has standing to sue." *Raske v. Next Mgt., LLC*, 2013 WL 5033149, at *5 (Sup. Ct. NY Cnty. Sept. 12, 2013).

Defendants argue that Plaintiff Raul lacks standing under BCL 626(b) to assert claims that relate to conduct that took place prior to his becoming a GE shareholder on January 20, 2009. (Defs.' Reply Mem. at 13.) Defendants also argue that Plaintiff Raul cannot rely on the [*20]"continuing wrong doctrine" because Plaintiff Raul's stock was not acquired " before the core of the allegedly wrongful conduct transpired.'" (Defs.' Supp. Mem. at 23 (quoting *In re Bank of NY Derivative Litig.*, 320 F.3d 291, 298 (2d Cir. 2003)).)

Plaintiffs respond succinctly that although Defendants assert Plaintiff Raul lacks standing to assert claims related to conduct predating his stock ownership, "Defendants do not — because they cannot — argue that this supports dismissing the Complaint." (Pls.' Opp. Mem. at 13 n.12.) Also, on September 28, 2012, at the hearing to determine the issue of choosing a lead plaintiff, Plaintiff Raul, by counsel, argued that although Plaintiff Raul "bought in the middle of the lawsuit," the continuing wrong doctrine should apply such that he would nonetheless have standing to assert his claims. (Defs.' Mot. Dismiss, Ex. B, Sept. 28, 2012 Tr. at 24-25.)

BCL 626(b) "mandates that shareholders instituting a derivative action must demonstrate that they owned stock both when the lawsuit was brought and at the time of the transaction(s) of which they complain." *Pessin v. Chris-Craft Indus., Inc.*, 181 AD2d 66, 70 (1st Dep't 1992); *see* BCL 626(b). Where "Plaintiffs concede that they did not own stock . . . when the alleged misconduct took place and [because] the contemporaneous ownership rule is strictly enforced," "unless plaintiffs can show that their shares or interest . . . devolved upon them by operation of law, the limited exception authorized by Business Corporation Law § 626 (b), they are precluded from maintaining this action." *Pessin*, 181 AD2d at 70 (citing *Indep. Investor Protective League v. Time, Inc.*, 50 NY2d 259, 263 (1980)).

Courts in the First Department have recognized the continuing wrong doctrine as a limited exception to the contemporaneous ownership rule. *See, e.g.*, *Chaft v. Kass*, 19 AD2d 610, 610 (1st Dep't 1963); *Ripley v. Int'l Rys. of Cent. Am.*, 8 AD2d 310, 324 (1st Dep't 1959), *aff'd*, 8 NY2d 430 (1960); *Weinstein v. Behn*, 65 N.Y.S.2d 536, 540-41 (Sup. Ct. NY Cnty. 1946), *aff'd*, 272 A.D. 1045 (1st Dep't 1947). In *Ripley*, the court explained that the continuing nature of a wrong did not prevent shareholders from bringing a derivative action with respect to acts that occurred after they became shareholders. *Ripley*, 8 AD2d at 324.

Similarly, in *Weinstein*, the court held that the plaintiff had not satisfied the contemporaneous ownership requirement, noting that the "allegations refer[red] back to the alleged original wrongs specified in some detail under other paragraphs of the complaint, all of which occurred some time before plaintiff obtained her stock." *Weinstein*, 65 N.Y.S.2d at 540. "[Such] acts may not by the specious device of employment of appropriate language be transformed into recurring wrongs for the purpose of overriding" the contemporaneous ownership requirement, where "[t]hey are not distinguishable from the original wrongs." *Weinstein*, 65 N.Y.S.2d at 540 (citations omitted).

In *Chaft*, the court acknowledged the existence of the continuing wrong doctrine, but nevertheless concluded that the doctrine did not apply, noting that " [t]he device of employing language in the complaint to make out a continuing wrong does not permit a transferee stockholder to maintain a derivative action.'" *Chaft*, 19 AD2d at 610 (citation omitted).

In this case, several of the alleged wrongful acts took place after Plaintiff Raul became a shareholder of GE. For example, on January 23, 2009, three days after Plaintiff Raul became a shareholder, statements confirming that the $0.31 per share quarterly dividend would be maintained were made on GE's website and in a statement by Immelt issued in a press release. (Compl. ¶ 75.) Also, the stock sales by GE insiders were made in February 2009, two weeks [*21]before the announcement that GE would be reducing its dividend. (Compl. ¶¶ 90-92.)

Because the alleged wrongful acts are sufficiently distinguishable from each other, they do not bar Plaintiff Raul from asserting claims for acts taking place after he became a shareholder of GE. The corollary of that conclusion, however, is that because the alleged acts are distinguishable from each another, Plaintiff Raul's standing is limited to the assertion of

claims related to acts that took place after he became a shareholder of GE on January 20, 2009.

Accordingly, the Consolidated Complaint is dismissed as to Plaintiff Raul, to the extent he asserts causes of action that relate to alleged acts that took place prior to January 20, 2009.

III.*CPLR 3211(a)(1) — Documentary Evidence*

Where the motion to dismiss is based on documentary evidence, the claim will be dismissed "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 NY2d 83, 88 (1994). "[D] ocumentary evidence" is not defined by statute, and will vary depending on the context. *Raske v. Next Mgt., LLC*, 2013 WL 5033149, at *5 (Sup. Ct. NY Cnty. Sept. 12, 2013) (citations omitted). Documentary evidence "must be unambiguous and of undisputed authenticity," and examples include "judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers." *Raske*, 2013 WL 5033149, at *5 (citations omitted).

The First Department has explained that "[o]n a motion to dismiss pursuant to CPLR 3211(a)(1), the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law." *Robinson v. Robinson*, 303 AD2d 234, 235 (1st Dep't 2003).

Although Defendants identify CPLR 3211(a)(1) as one of three bases for dismissal in their affirmations in support of this motion and in the order to show cause, they do not specify which, if any, of the documents attached to their motion papers establishes that one or more of Plaintiffs' "claims fail as a matter of law." *Robinson*, 303 AD2d at 235. Defendants' memorandum and reply memorandum in support of this motion are devoid of citations to CPLR 3211(a)(1).

Here, the Court finds that Defendants have not met their "burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law." *Leon v. Martinez*, 84 NY2d at 88; *Robinson*, 303 AD2d at 235. Accordingly, Defendants' motion to dismiss is denied to the extent it seeks dismissal of the Consolidated Complaint pursuant to CPLR 3211(a)(1).

IV.*Leave to Replead*

In their papers, Defendants seek dismissal with prejudice (Defs.' Supp. Mem. at 24; Defs.' Reply Mem. at 14.) Plaintiffs raised no opposition to dismissal with prejudice in their briefing, nor did they seek leave to amend. On the other hand, where a complaint is dismissed for failure to satisfy the particularized pleading requirement of BCL 626(c), the First Department has indicated that such dismissal should be "with leave to replead, in a detailed proposed amended pleading." *Health-Loom Corp. v. Soho Plaza Corp.*, 209 AD2d 197, 198 (1st Dep't 1994). [*22]CPLR 3025(b) provides that "[l]eave shall be freely given upon such terms as may be just." CPLR 3025(b); *Education Resources Inst., Inc. v. Concannon*, 69 AD3d 539, 540 (1st Dep't 2010). Moreover, "[t]he failure to request leave to replead in the opposition papers can be excused in the court's discretion." *PlasmaNet, Inc. v. Apax Partners, Inc.*, 6 Misc 3d 1011(A), 1011(A) (Sup. Ct. NY Cnty. 2004).

Based on the foregoing, and in light of Plaintiffs arguments with respect to the need for additional discovery, the Consolidated Complaint is dismissed pursuant to CPLR 3211(a)(7) with leave to replead.

With respect to Plaintiff Raul, there is no dispute that he first purchased his GE stock on January 20, 2009. Moreover, no facts have been alleged that would allow him to alter that date by repleading in the form of an amended complaint. Accordingly, the Consolidated Complaint is dismissed pursuant to CPLR 3211(a)(3) without leave to replead, solely as to Plaintiff Raul to the extent that he asserts causes of action that relate to alleged acts that took place prior to January 20, 2009.

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is granted with respect to CPLR 3211(a)(7) and (a)(3), and is otherwise denied. The Consolidated Complaint is dismissed in its entirety pursuant to CPLR 3211(a)(7) with leave to replead. The Consolidated Complaint is dismissed pursuant to CPLR 3211(a)(3) without leave to replead, solely as to Plaintiff Raul to the extent that he asserts causes of action that relate to alleged acts that took place prior to January 20, 2009.

ORDER

ACCORDINGLY, it is

ORDERED that Defendants Jeffrey R. Immelt, Keith S. Sherin, John G. Rice, Brackett B. Denniston III, John Krenicki Jr., Pamela Daley, John F. Lynch, Kathryn A. Cassidy, Ralph S. Larsen, Douglas A. Warner III, Roger S. Penske, James I. Cash Jr., Samuel Nunn, Andrea Jung, Ann M. Fudge, Rochelle B. Lazarus, Alan G. Lafley, Robert J. Swieringa, Robert W. Lane, Susan Hockfield, James J. Mulva, W. Geoffrey Beattie, and James S. Tisch's motion to dismiss is granted pursuant to CPLR 3211(a)(7) and (a)(3), and the motion is otherwise denied; and it is further

ORDERED that the Consolidated Complaint is dismissed in its entirety; and it is further

ORDERED that leave to replead is denied solely as to Plaintiff Raul to the extent that he asserts causes of action that relate to alleged acts that took place prior to January 20, 2009; and it is further

ORDERED that Plaintiffs are granted leave to serve an amended complaint so as to replead the demand requirement under BCL 626(c) within 20 days after service on Plaintiffs' attorneys of a copy of this order with notice of entry; and it is further

ORDERED, that, in the event that Plaintiffs fail to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by counsel for each Defendant attesting to such non-compliance, is directed to enter judgment dismissing the [*23]action, with prejudice, and with costs and disbursements to the Defendants as taxed by the Clerk.

Dated: New York, New York

November *7* , 2013

ENTER:

/s/ Eileen Bransten

Hon. Eileen Bransten, J.S.C.

Footnotes

Footnote 1: The Court is in receipt of the parties' letters dated May 10, May 14, October 25, and November 1, 2013 (NYSCEF Doc. Nos. 113-16), in which the parties brought two post-submission decisions to the Court's attention: *Lerner v. Immelt*, 523 F. App'x 824 (2d Cir. 2013) and *City of Orlando Police Pension Fund v. Page*, 2013 WL 5402087 (N.D. Cal. Sept. 26, 2013). Though instructive, the Court finds that these decisions do not alter the analysis or decision that follows. Moreover, the Court notes that Commercial Division Rule 18 (22 NYCRR 202.70(g)) provides that correspondence apprising the Court of post-submission decisions may not include any additional argument. 22 NYCRR 202.70(g). Accordingly, to the extent that the letters referenced above contained argument in addition to legal citations, such argument was neither read nor considered.

Footnote 2: Cassidy is GE's Senior Vice President and Treasurer. Daley is GE's Senior Vice President of Corporate Business Development. Denniston is GE's Senior Vice President and General Counsel. Krenicki is a GE Vice Chairman, as well as President and CEO of GE Energy Infrastructure. Lynch is GE's Senior Vice President of Corporate Human Resources. Rice is a GE Vice Chairman, as well as President and CEO of GE Global Growth and Operations. (Compl. ¶¶ 18-23.)

Footnote 3: Because GE is incorporated in New York, the Court will apply the law of New York in deciding whether to grant Defendants' motion to dismiss. *Hart v. General Motors Corp.*, 129 AD2d 179, 183-84 (1st Dep't 1987) (citing the "internal affairs doctrine" and applying law of the state of incorporation to decide a motion to dismiss in a shareholder derivative action); *Lerner v. Prince*, 36 Misc 3d 297, 305 (Sup. Ct. NY Cnty. 2012) (citations omitted) (explaining that "[u]nder New York's choice of law rules, the substantive law of the state of incorporation governs compliance with the demand requirement").

Footnote 4: CPLR 3014 provides in pertinent part that "[a] copy of any writing which is attached to a pleading is a part thereof for all purposes." CPLR 3014; *Certain Underwriters at Lloyd's, London v. William M. Mercer, Inc.*, 7 Misc 3d 1008(A), 1008(A) (Sup. Ct. NY Cnty. 2005). Accordingly, the exhibits referenced in and attached to the Consolidated Complaint "are properly considered on this motion." *Wilmington Trust Company v Metropolitan Life Insurance Company*, 2008 WL 3819698, at *1 (Sup. Ct. NY Cnty. Aug. 4, 2008) (citing CPLR 3014).

Footnote 5: On October 22, 2009, Olga Lerner, another GE shareholder, submitted a demand to the Board raising some of the same issues identified in Plaintiffs' demands. (Defs.' Supp. Mem. at 5.) On November 6, 2009, that demand was referred to the Audit Committee and its subsequently retained independent counsel "for an investigation and a recommendation to the board." (Defs.' Supp. Mem. at 5.) Following the refusal of her demand, Lerner commenced the derivative action referenced above, *Lerner v. Immelt*, in federal court. (Defs.' Supp. Mem. at 6.) Defendants' motion to dismiss was granted in that case, and the lower court's decision dismissing the action was recently affirmed by the U.S. Court of Appeals for the Second

Circuit. *See Lerner v. Immelt*, 523 F. App'x 824, 825 (2d Cir. 2013).

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