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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

FRANK J. FOSBRE, JR., derivatively)
on behalf of INTERNATIONAL GAME)
TECHNOLOGY,)
Plaintiff,)

3:09-CV-0467-ECR-RAM (Base)
Case))
Member Cases: 3:09-CV-0489,)
3:09-CV-0536, and)
3:09-CV-0542)

vs.)

ORDER

THOMAS J. MATTHEWS, et al.,)
Defendants,)

and)

INTERNATIONAL GAME TECHNOLOGY,)
Nominal Defendant.)

JEANNE M. CALAMORE, derivatively)
on behalf of INTERNATIONAL GAME)
TECHNOLOGY,)
Plaintiff,)

3:09-CV-0489-ECR-VPC)

vs.)

THOMAS J. MATTHEWS, et al.,)
Defendants,)

and)

INTERNATIONAL GAME TECHNOLOGY,)
Nominal Defendant.)

SANJAY ISRANI, derivatively)
on behalf of INTERNATIONAL GAME)
TECHNOLOGY,)
Plaintiff,)

3:09-CV-0536-ECR-RAM)

1 vs.)
)
 2 ROBERT A. BITTMAN, et al.,)
)
 3 Defendants,)
)
 4 and)
)
 5 INTERNATIONAL GAME TECHNOLOGY,)
)
 6 Nominal Defendant.)
)
 7 IRINA ARONSON, derivatively)
 on behalf of INTERNATIONAL GAME)
 8 TECHNOLOGY,)
)
 9 Plaintiff,)
)
 10 vs.)
)
 11 THOMAS J. MATTHEWS, et al.,)
)
 12 Defendants,)
)
 13 and)
)
 14 INTERNATIONAL GAME TECHNOLOGY,)
)
 15 Nominal Defendant.)
)

3:09-CV-0542-ECR-VPC

17 This diversity case consists of four consolidated derivative
 18 actions brought by shareholders of Nominal Defendant International
 19 Game Technology ("IGT").¹ Now pending are two motions to dismiss

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 23 ¹ A note regarding the caption of this action. The parties,
 24 pursuant to the stipulation approved by Judge Jones consolidating the
 25 actions (#37), have been using "In re International Game Technology
 26 Derivative Litigation" as the name of this case. This is not our
 27 usual practice, which uses the original captions of the separate
 actions as the caption of the consolidated action, and uses the
 terminology "base case" and "member cases" to refer to them. Though
 this is a matter of style, rather than substance, we prefer to follow
 our usual practice. The parties should adopt our practice in future
 filings, to avoid any confusion that might otherwise arise.

1 (## 54, 56), the first filed by IGT, the other by the officers and
2 directors of IGT named as Defendants ("Individual Defendants").²

3 The motions are ripe, and we now rule on them.

4
5 **I. Factual and Procedural Background**

6 IGT is a Nevada corporation that specializes in the design,
7 manufacture and marketing of computerized gaming equipment.
8 Plaintiffs are individual shareholders of IGT. This case consists
9 of four initially separate, but substantially similar actions, which
10 the Court consolidated on October 26, 2009. On December 11, 2009,
11 Plaintiffs filed the operative "Verified Consolidated Shareholder
12 Derivative Complaint" ("Complaint") (#46). The Complaint asserts
13 nine "counts," which describe various ways that IGT officers and
14 directors allegedly breached their fiduciary duties and were
15 unjustly enriched during the period from November 2007 to the
16 present.³ At the heart of Plaintiffs' Complaint is the allegation

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18 ² The Individual Defendants include Robert A. Bittman, Richard
19 R. Burt, Patrick W. Cavanaugh, Anthony Ciorciari, Patti S. Hart,
20 Robert A. Mathewson, Thomas J. Matthews, Robert Miller, Stephen Morro,
21 Richard Pennington, Frederick B. Rentschler, David E. Roberson, Philip
22 G. Satre, and Daniel R. Siciliano. David Johnson was named as a
defendant in one of the member cases, Case No. 3:09-CV-542, but is not
named in the text of the operative Complaint (#46). As such, it
appears that any claims previously asserted against David Johnson have
been withdrawn. (See Compl. ¶¶ 33-50 (#46) (listing defendants, not
including David Johnson); P.s' Opp. at 1 n. 3 (#72) (same).)

23 ³ The nine "counts" include the following: (1) "Against All
24 Defendants for Breach of Fiduciary Duty for Disseminating False and
25 Misleading Information"; (2) "Against All Defendants for Breach of
26 Fiduciary Duties For Failing to Maintain Internal Controls"; (3)
27 Against All Defendants for Breach of Fiduciary Duties for Failing to
28 Properly Oversee and Manage the Company"; (4) "Against All Defendants
for Unjust Enrichment"; (5) "Against All Defendants for Abuse of
Control"; (6) "Against All Defendants for Gross Mismanagement"; (7)
"Against All Defendants for Waste of Corporate Assets"; (8) Against

1 that certain IGT senior officers made intentionally misleading
2 public statements about the bright financial prospects of IGT, and
3 that at least some of them benefitted from selling their own stock
4 in IGT at inflated prices. In fact, Plaintiffs allege, the officers
5 were mismanaging the company, so that the prospects for the future
6 were not bright at all. The IGT Board of Directors, meanwhile,
7 allegedly failed to oversee adequately the work of the officers and
8 the performance of the company, failed to take action to terminate
9 the officers for cause, and even rewarded one of them in particular,
10 the former CEO, with a revised employment contract providing a large
11 salary and bonus.

12 The motion to dismiss (#54), filed by IGT, asserts that the
13 Complaint should be dismissed because Plaintiffs failed to make a
14 pre-suit demand on IGT's board of directors and Plaintiffs have not
15 alleged sufficient particularized facts to support application of
16 the doctrine of demand futility. Plaintiffs have opposed (#72) the
17 motion (#54), and IGT has replied (#76).

18 The second pending motion to dismiss (#56) is filed by the
19 Individual Defendants, who argue that each of the "counts" asserted
20 against them fail to state a claim upon which relief can be granted.
21 Plaintiffs have opposed (#71) the motion (#56), and the Individual
22 Defendants have replied (#78).

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24 Defendants Bittman, Burt, Hart, Mathewson, Miller, Rentschler,
25 Roberson, and Satre for Breach of Fiduciary Duties of Loyalty and Good
26 Faith in Connection with Matthew's 'Resignation'; and (9) "Against
27 the Insider Selling Defendants for Breach of Fiduciary Duties for
28 Insider Selling and Misappropriation of Information." Of these nine
"counts," all except for count 4, for unjust enrichment, are variants
on the breach of fiduciary duty theme.

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1 **II. Motion to Dismiss Standard**

2 A motion to dismiss under Federal Rule of Civil Procedure
3 12(b)(6) will only be granted if the complaint fails to "state a
4 claim to relief that is plausible on its face." Bell Atl. Corp. v.
5 Twombly, 550 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 129
6 S. Ct. 1937, 1953 (2009) (clarifying that Twombly applies to
7 pleadings in "all civil actions"). On a motion to dismiss, except
8 where a heightened pleading standard applies, "we presum[e] that
9 general allegations embrace those specific facts that are necessary
10 to support the claim." Lujan v. Defenders of Wildlife, 504 U.S.
11 555, 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S.
12 871, 889 (1990)) (alteration in original); see also Erickson v.
13 Pardus, 551 U.S. 89, 93 (2007) (noting that "[s]pecific facts are
14 not necessary; the statement need only give the defendant fair
15 notice of what the . . . claim is and the grounds upon which it
16 rests.") (internal quotation marks omitted). Moreover, "[a]ll
17 allegations of material fact in the complaint are taken as true and
18 construed in the light most favorable to the non-moving party." In
19 re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996)
20 (citation omitted).

21 Although courts generally assume the facts alleged are true,
22 courts do not "assume the truth of legal conclusions merely because
23 they are cast in the form of factual allegations." W. Mining
24 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,
25 "[c]onclusory allegations and unwarranted inferences are
26 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89
27 F.3d at 1403 (citation omitted).

1 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
2 normally limited to the complaint itself. See Lee v. City of L.A.,
3 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on
4 materials outside the pleadings in making its ruling, it must treat
5 the motion to dismiss as one for summary judgment and give the non-
6 moving party an opportunity to respond. FED. R. CIV. P. 12(d);
7 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A
8 court may, however, consider certain materials – documents attached
9 to the complaint, documents incorporated by reference in the
10 complaint, or matters of judicial notice – without converting the
11 motion to dismiss into a motion for summary judgment." Ritchie, 342
12 F.3d at 908.

13 If documents are physically attached to the complaint, then a
14 court may consider them if their "authenticity is not contested" and
15 "the plaintiff's complaint necessarily relies on them." Lee, 250
16 F.3d at 688 (citation, internal quotations, and ellipsis omitted).
17 A court may also treat certain documents as incorporated by
18 reference into the plaintiff's complaint if the complaint "refers
19 extensively to the document or the document forms the basis of the
20 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
21 adjudicative facts or matters of public record meet the requirements
22 of Fed. R. Evid. 201, a court may judicially notice them in deciding
23 a motion to dismiss. Id. at 909; see FED. R. EVID. 201(b) ("A
24 judicially noticed fact must be one not subject to reasonable
25 dispute in that it is either (1) generally known within the
26 territorial jurisdiction of the trial court or (2) capable of

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1 accurate and ready determination by resort to sources whose accuracy
2 cannot reasonably be questioned.”).

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III. IGT's Motion to Dismiss (#54)

5 IGT argues that Plaintiffs' Complaint (#46) must be dismissed
6 because Plaintiffs failed to adequately plead demand futility
7 pursuant to Federal Rule of Civil Procedure 23.1 and Nevada law.
8 Under Rule 23.1, a shareholder seeking to vindicate the interests of
9 a corporation through a derivative suit must first demand action
10 from the corporation's directors or plead with particularity the
11 reasons why such a demand would have been futile. FED. R. CIV. P.
12 23.1(b)(3). All of Plaintiffs' claims in this lawsuit are
13 derivative, requiring a demand on IGT's board or a particularized
14 showing of demand futility. It is undisputed that Plaintiffs made
15 no demand on IGT's board, so we need only consider whether
16 Plaintiffs adequately pleaded demand futility.

17 Rule 23.1 does not establish the circumstances under which
18 demand would be futile; rather, the law of IGT's incorporating
19 state, Nevada, sets that standard. In re Silicon Graphics, Inc.
20 Secs. Litig., 183 F.3d 970, 989-90 (9th Cir. 1999), abrogated on
21 other grounds as recognized in S. Ferry LP, # 2 v. Killinger, 542
22 F.3d 776, 784 (9th Cir. 2008). Relatively recently, the Nevada
23 Supreme Court clarified Nevada law regarding demand futility,
24 adopting the approach developed by the Delaware Supreme Court. See
25 Shoen v. SAC Holding Corp., 137 P.3d 1171, 1184 (Nev. 2006)
26 (following Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984),
27 overruled in part on other grounds by Brehm v. Eisner, 746 A.2d 244,

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1 254 (Del. 2000), and Rales v. Blasband, 634 A.2d 927, 933 (Del.
2 1993)). The test adopted in Shoen requires us to “examine whether
3 particularized facts demonstrate: (1) in those cases in which the
4 directors approved the challenged transactions, a reasonable doubt
5 that the directors were disinterested or that the business judgment
6 rule otherwise protects the challenged decisions; or (2) in those
7 cases in which the challenged transactions did not involve board
8 action or the board of directors has changed since the transactions,
9 a reasonable doubt that the board can impartially consider a
10 demand.” Shoen, 137 P.3d at 1184. In practice, the two prongs of
11 this test “often amount to the same analysis, i.e., whether
12 directorial interest in the challenged act or the outcome of any
13 related litigation negates impartiality to consider a demand.” Id.
14 at 1184 n.62.

15 Demand futility analysis is normally conducted on a claim-by
16 claim basis. See In re Countrywide Fin. Corp. Deriv. Litig., 554 F.
17 Supp. 2d 1044, 1080 (C.D. Cal. 2008) (citing Beam ex rel. Martha
18 Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961, 977 (Del.
19 Ch. 2003)). Here, however, the parties have not so organized their
20 arguments, perhaps because the factual allegations and claims
21 asserted by Plaintiffs in the Complaint (#46) overlap with one
22 another to a significant extent. We will proceed with our
23 discussion of the issues as the parties have framed them – albeit
24 not in the same order – while mindful of the requirement that demand
25 be excused for each claim individually. The IGT Board consisted, as
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1 of the time this lawsuit was filed, of nine directors.⁴ Thus, to
2 establish demand futility, Plaintiffs must plead facts raising a
3 reasonable doubt regarding the capability of at least five of those
4 directors to consider impartially a demand with regard to each
5 claim. See Shoen, 137 P.3d at 1184 n.62.

6 **A. Approval of Mr. Matthews' Revised Employment Agreement**

7 Plaintiffs assert in the Complaint (#46) that demand was not
8 required on the IGT board because of the Board's actions relating to
9 Mr. Matthews' employment. In March 2009, Mr. Matthews resigned as
10 IGT's CEO, but retained his position as Chairman of the IGT's Board.
11 (Compl. ¶¶ 16 n.3, 135 (#46).) IGT and Mr. Matthews subsequently
12 entered into a revised employment agreement, pursuant to which Mr.
13 Matthews continued to receive his previous base salary of \$840,000
14 through December 1, 2009, and was eligible for an annual bonus.
15 (Id. ¶¶ 16 n.3, 135.) Effective December 1, 2009, Mr. Matthews also
16 resigned as Chairman of the Board, and was replaced by Mr. Satre.
17 (Id. ¶ 18.) Plaintiffs argue that the members of the IGT Board who
18 accepted Mr. Matthews resignation as CEO, rather than terminating
19 him for cause, and who approved the renegotiated employment
20 agreement breached their fiduciary duties by wasting corporate
21 assets, "essentially bestowing a gift on [Mr. Matthews]." (Id. ¶
22 135.)

23 Here, the contested corporate transaction is the result of
24 director action, namely, the Board's acceptance of Mr. Matthews'

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26 ⁴ The members of the IGT Board at the time this lawsuit was
27 filed, and who therefore would have been charged with considering a
28 demand by Plaintiffs, had it been made, were defendants Bittman, Burt,
Hart, Mathewson, Matthews, Miller, Rentschler, Roberson, and Satre.

1 resignation as CEO and approval of his revised employment agreement.
2 Thus, in order to establish demand futility, Plaintiffs "must plead,
3 with sufficient particularity, that a reasonable doubt exists that
4 the directors are independent and disinterested or entitled to the
5 protections of the business judgment rule." Shoen, 137 P.3d at
6 1187. They have not done so. Plaintiffs do not argue that any of
7 the directors were not independent and disinterested with regard to
8 these decisions. Plaintiffs allege generally that the Board's
9 decisions relating to Mr. Matthews' employment were not protected
10 business judgments. (See Compl. ¶ 135 (#46).) Nevertheless, they
11 allege no particularized facts and present no argument in support of
12 that bald assertion. See White v. Panic, 783 A.2d 543, 549 (Del.
13 2001) (stating that at the motion to dismiss stage, plaintiffs in a
14 derivative suit "are entitled to all reasonable factual inferences
15 that logically flow from the particularized facts alleged, but
16 conclusory allegations are not considered as expressly pleaded facts
17 or factual inferences").

18 From the particularized facts pleaded, it appears that Mr.
19 Matthews was not given a "gift," but rather he was paid for his
20 continued service as Chairman of the Board. A board's decisions
21 relating to executive compensation are "the essence of business
22 judgment" Brehm, 746 A.2d at 263. Plaintiffs have pleaded
23 no particularized facts that raise a reasonable doubt that the
24 Board's challenged decisions relating to Mr. Matthews fall within
25 the Board's broad discretion in such matters. Cf. In re. Walt
26 Disney Co. Deriv. Litig., 825 A.2d 275, 289 (Del. Ch. 2003)
27 (excusing demand because particularized facts pleaded, if taken as
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1 true, demonstrated defendant directors consciously and intentionally
2 disregarded their responsibilities relating to employment of
3 corporate officer). As such, Plaintiffs' allegations relating to
4 Mr. Matthews' resignation as CEO and revised employment agreement do
5 not establish demand futility with regard to any of Plaintiffs'
6 claims.

7 **B. Director Compensation**

8 Plaintiffs argue that Defendants Burt, Mathewson, Miller, and
9 Rentschler receive such high compensation for their service as IGT
10 directors that their ability to impartially consider a demand
11 relating to Plaintiffs' claims is compromised. Plaintiffs allege
12 that in fiscal year 2008 Mr. Burt received \$404,998 for his services
13 as director, Mr. Mathewson received \$384,498, Mr. Miller received
14 \$413,498, and Mr. Rentschler received \$419,498.⁵ (Compl. ¶ 133(c)-
15 (f) (#46).) Plaintiffs assert that these amounts equal or exceed
16 the salaries of many senior IGT officers, and equal or exceed the
17 compensation received by the directors of many much larger U.S.
18 companies. The conclusion Plaintiffs suggest should be drawn is
19 that such high directors' fees "clearly give a reasonable IGT
20 stockholder reason to doubt that they could independently consider a
21 demand." (P.s' Opp. at 16 (#72).)

22 Plaintiffs' conclusion, however, does not follow from their
23 premises. As Plaintiffs concede, allegations "that directors are

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25 ⁵ We acknowledge that IGT questions whether fiscal year 2008 was
26 the relevant year, given that the lawsuits that were consolidated here
27 were all filed in 2009. Director compensation in 2009 was apparently
28 lower, because of the decline in value of stock-based compensation.
(See IGT's Reply at 5 (#76).) Our analysis here does not change,
however, no matter which fiscal year's compensation figures are used.

1 paid for their services as directors . . . without more, do not
2 establish" a disabling interest or lack of independence on the part
3 of the director. Grobow v. Perot, 539 A.2d 180, 188 (Del. 1988),
4 overruled in part on other grounds by Brehm, 746 A.2d 244 (Del.
5 2000). Several courts have suggested in dictum that if the
6 directors' fees are shown to "exceed materially what is commonly
7 understood and accepted to be a usual and customary director's fee,"
8 this might constitute the necessary something "more." E.g. Orman v.
9 Cullman, 794 A.2d 5, 29 n.62 (Del. Ch. 2002). Nevertheless,
10 Plaintiffs have not cited, and we have not discovered, any case in
11 which a court has found a director's fee to be something other than
12 "usual and customary" based solely on the size of the fee. C.f. In
13 re Countrywide Fin. Corp. Deriv. Litig., 554 F. Supp. 2d 1044, 1078
14 (C.D. Cal. 2008) (applying Delaware law, finding director
15 compensation ranging from \$358,966 to \$538,824 to be "substantial,"
16 but not so "astronomical" as to support, without more, a finding of
17 demand futility).

18 Rather, in cases where demand is excused, there is always some
19 circumstance in addition to the size of the fee that casts doubt on
20 the directors' independence. For example, in In re National Auto
21 Credit, Inc. Shareholders Litigation, No. 19028, 2003 WL 139768
22 (Del. Ch. Jan. 10, 2003), an unpublished opinion cited by
23 Plaintiffs, there were allegations of "massive increases" in
24 director's fees, from which a "causal link" between the directors'
25 compensation and the challenged resolutions adopted by the Board
26 could be reasonably inferred. Id. at *11. Here, Plaintiffs have
27 made no such allegations of a quid pro quo, or indeed any causal

1 link, between the challenged actions and omissions of the IGT Board
2 and the directors' compensation. Demand also would also be excused
3 if the IGT directors would jeopardize their positions on the Board,
4 and hence the continued receipt of their substantial director's
5 fees, if they were to accede to a shareholder demand. Cf. Mizel v.
6 Connelly, No. 16638, 1999 WL 550369 (Del. Ch. July 22, 1999) (CEO
7 whose actions were challenged in the lawsuit was also the company's
8 largest shareholder, the management superior of two director-
9 officers and the grandfather of one of them, and owner of a 100%
10 interest in the company that was the primary employer of an outside
11 director) (cited in P.s' Opp. at 11 (#72)). Nothing in the
12 particularized allegations of the Complaint (#46), however, supports
13 this theory of demand futility, either. Thus, Plaintiffs' have not
14 raised a reasonable doubt that any of the IGT directors would have
15 been incapable of impartially considering a demand relating to any
16 of Plaintiffs' claims.

17 **C. Committee Membership**

18 Plaintiffs argue that a number of the IGT directors are
19 interested in the outcome of this litigation, and thus incapable of
20 impartially considering a demand, because of their membership on
21 various committees of the IGT Board. Specifically, Plaintiffs cite
22 the participation of defendants Burt, Hart, Mathewson, Rentschler
23 and Roberson on the Audit Committee, and defendants Burt, Miller,
24 Rentschler and Satre on the Nominating and Corporate Governance
25 Committee ("Governance Committee"). (Compl. ¶¶ 134(d), (e) (#46).)
26 Plaintiffs argue that each of these directors face a substantial
27 likelihood of liability for breaches of their fiduciary duties

1 relating to their work on these committees. The members of the
2 Audit Committee allegedly "caused the Company to issue repeated
3 false and misleading statements" and "failed to ensure the existence
4 of adequate internal controls at IGT over insider stock sales."
5 (P.s' Opp. at 26.) The members of the Governance Committee
6 allegedly failed in "reviewing compliance by senior officers and
7 directors with IGT's Code of Business Conduct . . . and implementing
8 remedial measures." (Id. at 27.)

9 Demand futility with respect to a given director is not
10 necessarily established just because the director is named as a
11 defendant in the derivative suit. Rather, to establish demand
12 futility based on an interest in the outcome of the suit, a
13 plaintiff must allege particularized facts showing that "a
14 substantial likelihood of director liability exists." Shoen, 137
15 P.3d at 1184 (quoting Seminaris v. Landa, 662 A.2d 1350, 1354 (Del.
16 Ch. 1995)). Under Nevada law, this is a "difficult threshold to
17 meet." Id. Nevada law statutorily exculpates directors and
18 officers from personal liability for breach of fiduciary duty unless
19 the act or failure to act constituting the breach "involved
20 intentional misconduct, fraud or a knowing violation of the law,"
21 with exceptions not applicable here. NEV. REV. STAT. § 78.138(7).
22 Thus, to demonstrate demand futility through a showing of a
23 substantial likelihood of director liability, Plaintiffs must plead
24 particularized facts showing that the acts or omissions of the
25 defendant directors involved intentional misconduct, fraud or a

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1 knowing violation of the law.⁶ In other words, Plaintiffs are
2 required to plead particularized facts supporting the notion that
3 "the directors were conscious of the fact that they were not doing
4 their jobs." In re Coca-Cola Enters., Inc. Deriv. Litig., 478 F.
5 Supp. 2d 1369, 1377 (N.D. Ga. 2007) (applying Delaware law).

6 Plaintiffs have failed to plead particularized facts showing
7 the members of the Audit Committee or the Governance Committee acted
8 or failed to act with requisite level of scienter. The Complaint
9 (#46) does not, for the most part, include any particularized facts
10 demonstrating director involvement in the alleged breaches of
11 fiduciary duty falling under the respective committees' area of
12 responsibility.⁷ It also lacks any particularized facts as to what
13 information the respective committees saw and upon which they failed
14 to act. See In re Coca-Cola, 478 F. Supp. 2d at 1378-79 (applying
15 Delaware law, finding allegations to be insufficient to excuse
16 demand on defendant Audit Committee members because plaintiff
17 "failed to point to any specific facts indicating the existence of
18 'red flags' which would have suggested to the members of the

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20 ⁶ Plaintiffs' argument that they "cannot be dismissed at the
21 pleading stage" based on such an exculpatory provision in IGT's bylaws
22 misses the mark. (P.s' Opp. at 28 (#72).) It is not IGT's bylaws,
23 but rather a Nevada statute, that contains the exculpatory provision
24 at issue. Moreover, Nevada case law demonstrates that the statutory
25 exculpatory provision can and should be considered at the pleading
26 stage. See Shoen, 137 P.3d at 1184 and n.60 (describing Nev. Rev.
27 Stat. § 78.138(7) as part of demand futility analysis properly applied
28 to a motion to dismiss).

29 ⁷ The one possible exception here is the allegation that Mr. Burt
30 directly participated in the alleged insider trading of IGT stock, as
31 well as serving as a member of the Governance Committee. There are
32 no particularized facts pleaded showing director involvement, however,
33 with respect to the other committee members.

1 committee that there were problems . . . or of any conscious
2 decision not to take action despite any such red flags”) (internal
3 quotation marks omitted). The Complaint’s general allegations that
4 committee members “permitted” various breaches of fiduciary duties
5 are insufficient to show intentional misconduct, fraud or a knowing
6 violation of the law by those directors. (See Compl. ¶ 134(d),(e).)
7 As such, Plaintiffs have failed to demonstrate demand futility with
8 regard to any of their claims based on IGT directors’ committee
9 membership.

10 **D. Directors’ Principal Employment With IGT**

11 Plaintiffs argue that two of the IGT directors were incapable
12 of considering a demand because their “principal professional
13 occupations were their respective positions with IGT” when this
14 lawsuit was initiated. (P.s’ Opp. at 14 (#72).) Specifically, Ms.
15 Hart was IGT’s CEO and President, having taken over from Mr.
16 Matthews after his resignation in April 2009, and Mr. Matthews was
17 employed as the Chairman of the IGT Board of Directors. Plaintiffs’
18 assert that Ms. Hart’s and Mr. Matthews’ substantial financial
19 interest in maintaining their respective positions gives rise to a
20 reasonable doubt that they are able to impartially consider a
21 demand, “independent of directors who are their employers and/or
22 management superiors.” (Id. at 12.) Plaintiffs’ theory here is
23 apparently that the Compensation Committee of the Board of Directors
24 constitutes an employer, for purposes of this analysis; as of the
25 time of lawsuit, Ms. Hart, as CEO of IGT, had no management
26 superiors, and Mr. Matthews, as Chairman of the Board, held no
27 position in the IGT management at all.

1 Demonstrating that a director is principally employed by a
2 corporation, however, is not enough to establish that director is
3 incapable of impartially considering a demand on that corporation.
4 See In re NutriSystem, Inc. Deriv. Litig., 666 F. Supp. 2d 501, 515
5 (E.D. Pa. 2009) (“Under Delaware law, merely being employed by a
6 corporation is not, by itself, sufficient to create a reasonable
7 doubt as to the independence of a director.”) (citing In re Walt
8 Disney Co. Deriv. Litig., 731 A.2d 342, 356 (Del. Ch. 1998), aff’d
9 in pertinent part, 746 A.2d 244 (Del. 2000)); In re Sagent Tech.,
10 Inc., Deriv. Litig., 278 F. Supp. 2d 1079, 1089 (N.D. Cal. 2003)
11 (noting that if allegations that directors acted or would act to
12 preserve their positions were sufficient to show lack of
13 independence, every inside director would be disabled from
14 considering a pre-suit demand). Further, the existence of a
15 compensation committee, “absent more particularized factual
16 allegations of undue influence, is not enough by itself” to create a
17 reasonable doubt about a director’s independence. In re
18 NutriSystem, 666 F. Supp. at 515-16. Here, Plaintiff has made no
19 particularized allegations of any undue influence the compensation
20 committee might have over Ms. Hart or Mr. Matthews.

21 Furthermore, even if Ms. Hart and Mr. Matthews were in some way
22 beholden to the members of the compensation committee, that would
23 not be sufficient to establish an inability to impartially consider
24 a demand. As discussed above, Plaintiffs have failed to plead
25 particularized facts sufficient to raise a reasonable doubt that the
26 members of the compensation committee are disinterested and
27 impartial with respect to Plaintiffs’ claims. Where a dominating

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1 director is disinterested and impartial with respect to the demand,
2 the relationship between the beholden director and the dominating
3 director is not pertinent to the demand futility analysis. See In
4 re Dow Chem. Co. Deriv. Litig., no. 4349, 2010 WL 66769, at *8 (Del.
5 Ch. 2010) ("Plainly put, the beholdenness or dominance of any
6 director is irrelevant because there is no fear that the dominating
7 director, without a personal or adverse interest, will do anything
8 contrary to the best interest of the company and its stockholders.")
9 Plaintiffs have therefore failed to demonstrate demand futility for
10 any of their claims with respect to Ms. Hart or Mr. Matthews on the
11 basis of their respective principal professional occupations.

12 **E. Insider Trading**

13 Plaintiffs allege that defendants Burt, Bittman and Matthews
14 engaged in insider trading of IGT stock, and that therefore a demand
15 on them would have been futile. Nevertheless, we need not now
16 address whether the allegations in the Complaint (#46) are
17 sufficiently particularized to excuse demand for some or all of
18 Plaintiffs' claims. As noted above, to establish demand futility,
19 Plaintiffs must show that a majority of the IGT Board – that is, at
20 least five directors – would have unable to consider impartially a
21 demand with regard to each claim. Even assuming demand to be
22 excused with respect to these three defendants, Plaintiffs have not
23 cleared that bar.

24 In short, Plaintiffs have failed to demonstrate demand futility
25 with respect to any of their claims. As such, IGT's motion (#54) to
26 dismiss the Complaint (#46) for failure to comply with the pleading
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1 requirements of Rule 23.1(b) and Nevada law will be granted.

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3 **IV. Individual Defendants' Motion to Dismiss (#56)**

4 In light of our conclusion that IGT's motion to dismiss (#54)
5 should be granted, the Individual Defendants' motion to dismiss
6 (#56) is moot. We therefore will deny the motion on that basis, and
7 need not address the merits of the arguments therein.

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V. Leave to Amend

10 Under Rule 15(a) leave to amend is to be "freely given when
11 justice so requires." FED. R. CIV. P. 15(a). In general, amendment
12 should be allowed with "extreme liberality." Owens v. Kaiser Found.
13 Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (quoting
14 Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th
15 Cir. 1990)). If factors such as undue delay, bad faith, dilatory
16 motive, undue prejudice or futility of amendment are present, leave
17 to amend may properly be denied in the district court's discretion.
18 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th
19 Cir. 2003) (discussing Foman v. Davis, 371 U.S. 178, 182 (1962)).

20 Although Plaintiffs have failed to plead with particularity
21 facts that would establish demand futility, there is nothing in our
22 record that requires the conclusion that it would be impossible for
23 them to do so. As such, it would not be futile to permit Plaintiffs
24 to file an amended complaint. Nor do any of the other factors that
25 might weigh in favor of denying leave to amend apply here. Thus, we
26 will grant Plaintiffs leave to amend their complaint. If, however,

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1 the newly amended complaint is similarly deficient, we may be forced
2 to conclude that further leave to amend would be futile.

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VI. Conclusion

Plaintiffs failed to make any demand on the IGT Board and have not pleaded particularized facts sufficient to demonstrate demand futility with respect to their claims. As such, the Complaint (#46) must be dismissed. Nevertheless, Plaintiffs should be afforded an opportunity to file an amended complaint.

IT IS, THEREFORE, HEREBY ORDERED that IGT's motion to dismiss (#54) is **GRANTED**.

IT IS FURTHER ORDERED that the Individual Defendants' motion to dismiss (#56) is **DENIED** as moot.

IT IS FURTHER ORDERED that Plaintiffs shall have twenty one (21) days within which to file an amended complaint.

DATED: July 2, 2010.


UNITED STATES DISTRICT JUDGE