SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN J.S.C. PART 3
Justice

Index Number : 651087/2012
IN RE AVON PRODUCTS
vs.
X
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. 651087/2012
MOTION DATE 9/5/12
MOTION SEQ. NO. 003

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1
Answering Affidavits — Exhibits ____ | No(s). 2
Replying Affidavits ____ | No(s). 3

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3-5-13

Eileen Branston J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE
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In re AVON PRODUCTS, INC. SHAREHOLDERS LITIGATION

Index No. 651087/2012
Motion Date: 9/5/2012
Motion Seq. No.: 003

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BRANSTEN, J.

This matter comes before the Court on Defendants Andrea Jung, Fred Hassan, Ann S. Moore, Paula Stern, Lawrence A. Weinbach, Maria Elena Lagomasino, W. Don Cornwell, Gary M. Rodkin, V. Ann Hailey, Paul S. Pressler, Douglas R. Conant and Sherilyn McCoy's (collectively "Defendants") motion to dismiss Plaintiffs' shareholder derivative and putative class action claims. Plaintiffs oppose. For the reasons that follow, Defendants' motion to dismiss is granted.

I. Background[1]

Nominal Defendant Avon Products, Inc. ("Avon" or the "Company") is "a global manufacturer and marketer of beauty products," incorporated in New York. (Amended Consolidated Complaint ("Compl.") ¶ 36; Defendants' Memorandum in Support of

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[1] This statement of facts is taken from the Complaint and from other publicly-available documents, including Securities and Exchange Commission filings and press releases, which the Court may consider for the purpose of this motion. *See Etzion v. Etzion*, 62 A.D.3d 646, 650 (2d Dep't 2009) (considering press releases and newspaper articles submitted by defendant in opposition to motion to dismiss); *Gomez-Jimenez v. New York Law School*, 943 N.Y.S.2d 834, 844 (Sup. Ct. N.Y. Cty. 2012) (taking judicial notice of *U.S. News* article in considering motion to dismiss); *Levin v. Kozlowski*, 13 Misc.3d 1236(A), at *2 n.1 (Sup. Ct. N.Y. Cty. 2006) (considering publicly available documents, including SEC filings).

Motion to Dismiss the Amended Consolidated Complaint ("Defs' Moving Br.") at 3.) Defendants are current and former members of the Avon Board of Directors ("Board"). (Compl. ¶¶ 20-31.)

Plaintiffs are five purported Avon shareholders, *see id.* ¶¶ 14-18, who bring this action challenging the Board's decision as to whether to engage in negotiations with Coty, Inc. ("Coty") regarding the potential sale of Avon.

Coty approached Avon in late 2011, interested in exploring a potential transaction. (Compl. ¶¶ 41-42.) In three letters sent during March 2012, Coty presented "compelling proposals" to the Board and requested that the parties open discussions about a potential transaction. *Id.* ¶ 42. Coty then publicly disclosed its proposals to purchase Avon in an April 2, 2012 press release, which contained an open letter to the Board and then CEO, Defendant Andrea Jung. *Id.* Coty's proposal offered a $23.25 per share purchase price. *Id.* ¶ 43.

Shortly thereafter, Avon released its own press release, explaining its rejection of Coty's proposal. *Id.* ¶¶ 3, 43. In its press release, Avon offered reasons for its rejection of Coty's overtures, including: (1) the Board's confidence in Avon's stand-alone prospects; (2) the Board's belief that "Coty's indication of interest substantially undervalues Avon"; (3) the hiring of a new Avon CEO and the "greater opportunity to improve shareholder value in excess of" Coty's offer; and, (4) the non-binding nature of Coty's offer and its

reservation of the ability to raise or lower the purchase price. (Affirmation of Jasand Mock in Support of Defendants' Motion to Dismiss ("Mock Affirm."), Ex. 6) (April 2, 2012 Avon press release).

Following the issuance of Avon's press release, Coty continued pursuing the Company during April and May. On May 9, 2012, Coty submitted another proposal to Avon, this time raising its price to $24.75 per share. *Id.* ¶ 44. Plaintiffs represent that this offer constituted a premium of nearly 40% over the trading price of Avon, as of May 17, 2012. *Id.* ¶¶ 7, 47. In its May 9, 2012 letter, Coty stated that its offer would expire on May 14, 2012. *Id.* ¶ 44. Before the deadline, Avon emailed Coty to request an additional week to consider the offer. *Id.* ¶ 45. After receiving Avon's email, Coty withdrew its offer on May 14, 2012, its original deadline. *Id.* ¶ 46.

Plaintiffs then filed this action, alleging that the Avon Board's refusal to enter into discussions with Coty constituted a breach of its fiduciary duties. Plaintiffs' Complaint asserts both derivative and direct breach of fiduciary duty claims against the twelve Defendant-members of the Avon Board. In their Complaint, Plaintiffs plead that demand on the Avon Board was not made because it would have been futile.

II. Analysis

Defendants seek dismissal of both the derivative and direct breach of fiduciary duty claims brought against them in the Complaint. Each claim will be considered in turn under New York law.[2]

A. *Count One – Derivative Claim for Breach of Fiduciary Duty*

Section 626(c) of the New York Business Corporation Law ("BCL") "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 directors to initiate such an action or that any such effort would be futile." *Wandel v. Eisenberg*, 60 A.D.3d 77, 79 (1st Dep't 2009); *see* BCL § 626(c). Therefore, the threshold issue with regard to Plaintiffs' derivative claim is whether their failure to make a demand on Avon's Board is excused.

"The 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

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[2] Since Avon is incorporated in New York, the law of New York is properly applied in this dispute to vet the propriety of Plaintiffs' shareholder claims. *Hart v. General Motors Corp.*, 129 A.D.2d 179, 183-84 (1st Dep't 1987) (citing "internal affairs doctrine" and applying law of the state of incorporation in shareholder derivative action against corporation and directors challenging board authorization of stock purchase).

correct alleged abuses without resort to the courts.'" *Bansbach v. Zinn*, 1 N.Y.3d 1, 8-9 (2003), *rearg. denied* 1 N.Y.3d 593 (2004) (quoting *Barr v. Wackman*, 36 N.Y.2d 371, 378 (1975)); *Wandel v. Eisenberg*, 60 A.D.3d at 79-80. The requirement relieves "courts from deciding matters of internal corporate governance by providing corporate directors with opportunities to correct alleged abuses, ... provide[s] corporate boards with reasonable protection from harassment by litigation on matters clearly within the discretion of directors, and ... discourage[s] 'strike suits' commenced by shareholders for personal gain rather than for the benefit of the corporation." *Marx v. Akers*, 88 N.Y.2d 189, 194 (1996).

Whether the Section 626(c) demand requirement has been met is a matter within the discretion of the court. *Lewis v. Akers*, 227 A.D.2d 595, 596 (2d Dep't 1996), *lv denied* 88 N.Y.2d 813 (1996). The court has excused demand as futile "only when the complaint's specific allegations support the conclusion that '(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction.'" *Wandel*, 60 A.D.3d at 80 (quoting *Marx*, 88 N.Y.2d at 198).

Plaintiffs concede that they have not made a demand upon the board; instead, they contend that demand should be excused as futile. In their papers, Plaintiffs make no

argument that a majority of the directors is interested. Plaintiffs focus instead on the second and third *Marx* bases, contending that the Avon directors failed to inform themselves about the Coty offer and failed to exercise their business judgment in refusing to engage Coty. After review of the Plaintiffs' pleading in the Complaint, the Court finds that Plaintiffs have failed to allege with the requisite particularity facts supporting either of these *Marx* grounds for excusing demand.

1. Failure to Inform

To excuse demand on the basis that directors were uninformed, Plaintiffs must "allege[] with particularity that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances." *Marx*, 88 N.Y.2d at 200. As the Court of Appeals explained in *Marx*, a director "does not exempt himself from liability by failing to do more than passively rubber-stamp the decisions of the active managers." *Id.*

In an attempt to demonstrate that Defendants did not fully inform themselves about Coty's proposals, Plaintiffs offer only bare allegations that the Board "flatly rejected each of [Coty's] proposals, without adequate consideration" and "unreasonably failed and/or refused to" engage with Coty. (Compl. ¶¶ 42, 47.) Such sparse pleading is not sufficiently particularized to justify excusal of the demand requirement.

Further, Plaintiffs' allegations that Defendants rejected Coty's proposals without adequate consideration are belied by both Plaintiffs' assertions in their Complaint, as well as the documents referenced therein. For example, Plaintiffs highlight that Coty's final proposal imposed a May 14, 2012 deadline on the Avon Board for its response. (Compl. ¶ 45.) As the Complaint notes, Avon responded to Coty in advance of the deadline, seeking another week to vet Coty's proposal. *Id.*; *see also* Mock Affirm. Ex. 14 (Avon May 13, 2012 press release stating that "Avon Products, Inc. today advised Coty Inc. that Avon's Board of Directors, in conjunction with management and the company's financial and legal advisors, will consider Coty's letter dated May 9, 2012. Avon's Board expects to respond within a week."). Coty then unilaterally decided to withdraw its offer the next day. *Id.* ¶ 46. Plaintiff characterizes Avon's request for additional time as demonstrative of the Board's purported knee-jerk refusals of Coty's offers. However, Avon's response demonstrates the opposite – that the Board sought time to vet Coty's request with the aid of its financial and legal advisors.

Further, Avon's response to Coty's April 2, 2012 offer undercuts Plaintiffs' allegation that the Board refused to consider Coty's proposals. Plaintiffs quote from Coty's April 2nd letter in their Complaint, which notes that Coty initially made an offer of $22.25 per share on March 7, 2012 but increased that proposal to $23.25 per share in its subsequent March 19 and March 30, 2012 letters. (Compl. ¶ 42.) As Avon's April 2,

2012 press release indicates, Avon considered the $23.25 offer and rejected it for the several reasons, including: (1) the Board's confidence in Avon's stand-alone prospects; (2) the Board's belief that "Coty's indication of interest substantially undervalues Avon"; (3) the hiring of a new Avon CEO and the Board's view that it presents "greater opportunity to improve shareholder value in excess of" Coty's offer; and, (4) the Board's belief that Coty's overtures were not a "real offer" because they were non-binding and reserved the ability to raise or lower the purchase price. (Mock Affirm. Ex. 6.) While Plaintiffs may not agree with these reasons, they contradict Plaintiffs' assertion that the Board reflexively refused to entertain any of Coty's offers.

Accordingly, based on the facts as pleaded, giving all appropriate inferences to Plaintiffs on this motion to dismiss, the Court finds that Plaintiffs have failed to plead with particularity that the Defendants did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances. Therefore, demand is not excused under the second prong of *Marx*.

2. Failure to Exercise Business Judgment

Under the third prong of *Marx*, Plaintiffs must plead with particularity that the Board's action was "so egregious on its face that it could not have been the product of sound business judgment." *Marx*, 88 N.Y.2d at 200-01. However, only in "rare cases"

will board action be found "so egregious" as to satisfy this *Marx* criterion. *Wandel*, 60 A.D.3d at 82.

Plaintiffs' allegations in the instant Complaint fall far short of this elevated standard. While Plaintiffs acknowledge in their papers that "a board is not required to negotiate with an offeror" (Pls.' Br. at 24), at bottom, this action is premised on Plaintiffs' assertion to the contrary – that the Board was obligated to enter into formal merger negotiations with Coty lest it be in "egregious" dereliction of its duties to Avon. Plaintiffs seek to substitute their judgment for that of the Board in this instance, and through this action, invite the Court to do the same. However, after viewing the facts as pleaded, the Court declines, since Plaintiffs have failed to allege that the Board's action here "could not have been the product of business judgment."

As discussed above with respect to the failure to inform prong, the Avon Board issued two press releases in response to Coty's proposals. Both the April 2, 2012 and May 13, 2012 press releases demonstrate the Board's consideration and vetting of Coty's offer. Even construing these press releases in the light most favorable to Plaintiffs, it appears that the Complaint fails to "rule out all possibility" that the Board failed to exercise its business judgment. *See In re Omnicom S'holder Derivative Litig.*, 43 A.D.3d 766, 769 (1st Dep't 2007).

In *Omnicom*, the First Department examined whether the defendant-board of directors' decision to transfer certain investments to a subsidiary could have been the product of sound business judgment under the third prong of *Marx*. The court examined statements made by Omnicom's CEO to the Wall Street Journal, which offered reasons for the transfer, and found that these statements were sufficient to show that "its directors could have been making a business judgment." *Id.* The First Department did not pass on the wisdom of the Board's action; instead, it cabined its analysis under the third prong of *Marx* to whether the facts as pleaded ruled out all possibility that the board exercised the requisite judgment.

Here, looking at the facts as pleaded and the documents incorporated by the Complaint, the Court makes the same determination. The Board offered reasons for rejecting Coty's earlier offers and sought legal and financial advice to vet Coty's final proposal, demonstrating that the Board "could have been making a business judgment." Plaintiffs have failed to plead with particularity that Defendants failed to exercise their business judgment, as required to excuse demand futility under *Marx*.

B. *Count Two – Breach of Fiduciary Duty*

Count Two of the Complaint is styled as a direct claim for breach of fiduciary duty. Generally, a shareholder plaintiff "has no individual cause of action, though he loses

the value of his investment" and may only sue derivatively. *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985). While Plaintiffs are correct that such a claim can be sustained where "the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation," *id.*, Plaintiffs have not pleaded such a duty here.[3] In fact, the purported direct claim, as pleaded, arises from the same alleged conduct as the derivative claim and seeks the same damages. *Compare* Compl. ¶ 76 *with* ¶ 86; *compare id.* ¶¶ 83, 84 *with* ¶¶ 88, 89.

Plaintiffs maintain that the Board's actions have interfered with the shareholders' individual right to receive sales offers. *See* Pls.' Br. at 20. The essence of Plaintiffs' pleading is that shareholders were damaged by "the loss of an opportunity to receive the highest available value for their equity interest in Avon," resulting in a decline in Avon's stock price. (Compl. ¶¶ 1, 8.) Such a pleading demonstrates the derivative nature of Plaintiffs' claim. "Where shareholders suffer solely through depreciation in the value of their stock, the claim is derivative, even if the diminution in value derives from a breach of fiduciary duty." *Yudell v. Gilbert*, 99 A.D.3d 108, 113-14 (1st Dep't 2012).

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[3] Plaintiffs made no argument in their briefing that the other *Abrams* exception applies, i.e. that they have suffered an injury separate and distinct from that suffered by other shareholders. *Abrams*, 66 N.Y.2d at 953.

Accordingly, although styled as a direct claim, count two is, in fact, derivative. Having failed to plead that demand with particularity that demand should be excused for count two, Defendants' motion to dismiss is granted.

C. *Exculpatory Clause*

Notwithstanding the aforementioned bases for dismissing the Complaint, this action is also barred by the exculpatory clause set forth in the Avon Charter. Consistent with Section 402(b) of the Business Corporation Law, Avon's Charter provides in relevant part that:

> No person who is or was a director of the Corporation shall have personal liability to the Corporation or its shareholders for damages for any breach of duty in such capacity, provided that the foregoing shall not limit the liability of any such person (I) if a judgment or other final adjudication adverse to him establishes that his acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that he personally gained, in fact, a financial profit or other advantage to which he was not legally entitled . . .

(Mock Affirm. Ex. 3 at 8.) Exculpatory provisions drafted in accordance with Section 402(b) provide a proper basis for dismissal of derivative suits, where, as in the instant case, plaintiffs fail to plead that defendants' actions were taken in bad faith or involved either intentional misconduct or a knowing violation of the law. *See Teachers' Ret. Sys. of La. v. Welch*, 244 A.D.2d 231, 231-32 (1st Dep't 1997); *Glatzer v. Grossman*, 47

A.D.3d 676, 677 (2d Dep't 2008). Since Plaintiffs have failed to plead a claim outside the scope of the exculpatory provision, Defendants' motion to dismiss is granted.

III. Conclusion

For the foregoing reasons, Defendant's motion to dismiss counts one and two is granted. In their papers, Defendants seek dismissal with prejudice. (Defs.' Br. 25.) Plaintiffs raised no opposition to dismissal with prejudice in their briefing, nor did they seek leave to amend. Therefore, Defendants' motion is granted with prejudice.

ORDER

Accordingly, it is

ORDERED that Defendants' Andrea Jung, Fred Hassan, Ann S. Moore, Paula Stern, Lawrence A. Weinbach, Maria Elena Lagomasino, W. Don Cornwell, Gary M. Rodkin, V. Ann Hailey, Paul S. Pressler, Douglas R. Conant and Sherilyn McCoy's motion to dismiss (motion sequence no. 3) is granted with prejudice.

Dated: New York, New York
March 5, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.