Matter of MetLife, Inc.
2014 NY Slip Op 30204(U)
January 22, 2014
Sup Ct, New York County
Docket Number: 100955/12
Judge: Barbara R. Kapnick

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK Justice PART 39

Index Number : 100955/2012
IN RE: METLIFE, INC.
vs.
X
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/22/14

_____, J.S.C.
BARBARA R. KAPNICK
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: IA PART 39

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DECISION/ORDER
Index No. 100955/12
Motion Seq. No. 002

IN RE METLIFE, INC. SHAREHOLDER LITIGATION

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BARBARA R. KAPNICK, J.:

Plaintiffs Jack Fishbaum ("Fishbaum") and Lee Batchelder ("Batchelder") are shareholders of MetLife, Inc. ("MetLife" or the "Company"), which is a nominal defendant.[1] The individual defendants are current or past members of MetLife's Board of Directors (the "Board"). Specifically, they are: Steven A. Kandarian ("Kandarian"), Sylvia Mathews Burwell ("Burwell"), Eduardo Castro-Wright ("Castro-Wright"), Cheryl W. Grisé ("Grisé"), C. Robert Henrikson ("Henrikson"),[2] R. Glenn Hubbard ("Hubbard"), John M. Keane ("Keane"), Alfred F. Kelly, Jr. ("Kelly"), James M. Kilts ("Kilts"), Catherine R. Kinney ("Kinney"), Hugh B. Price ("Price"), David Satcher ("Satcher"), Kenton J. Sicchitano ("Sicchitano"), and Lulu C. Wang ("Wang").

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[1] The instant defendants previously moved, under motion sequence no. 001, for consolidation of this action, brought by Fishbaum under a different caption, with a separate action brought by Batchelder under Index No. 650683/2012. That motion was granted by Order of this Court dated July 27, 2012 in accordance with the terms of the Stipulation and Order of the parties, also signed on July 27, 2012, and the two cases were consolidated under the instant caption.

[2] Henrikson was not a member of the Board when the original Complaint was filed.

This action arises out of MetLife's allegedly illegal and improper use of the U.S. Social Security Administration's ("SSA") Death Master File ("DMF"), a government-maintained database of all deaths recorded in the United States for individuals enrolled in the U.S. Social Security program since 1936. (First Amended Shareholder Derivative Complaint ["Amended Complaint" or "Am. Compl."] ¶ 1.) Plaintiff asserts that a substantial part of MetLife's business depends on whether, and when, individual policyholders or annuity holders have passed away, and that in contravention of various states' insurance and unclaimed property laws - including rules and regulations established by the New York Department of Financial Services ("NYDFS") - MetLife has selectively used the DMF for its own benefit. (Am. Compl. ¶ 2.)

Specifically, plaintiffs allege that MetLife has diligently consulted the SSA's DMF for clients with annuities to enable it to stop making annuity payments upon the death of those annuitants. For regular life insurance policies, however, MetLife allegedly ignores the DMF so that the Company can avoid paying death benefits. Moreover, plaintiffs assert that even when the Company learned of the death of a policyholder and confirmed the death through either the DMF or its in-house records, MetLife would not immediately recognize the death as a liability. Plaintiffs further allege that beyond violating insurance and unclaimed property laws,

rules and regulations, MetLife's conduct is inherently deceptive given that the Company expressly markets and sells life insurance policies on the premise that beneficiaries will receive benefits upon the death of the insured. (*Id.* ¶ 3.)

In or about December 2010, plaintiffs claim that MetLife adopted and began to implement internal policies that would include the utilization of the DMF in all business units on a regular basis, at least annually. (*Id.* ¶ 97.) Thus, it would seem that from this date on, MetLife began to search the DMF in order to identify its liabilities under insurance policies.

On or about April 25, 2011, the California Insurance Commissioner announced that it had issued a subpoena to MetLife pertaining to a 2008 audit (the "California Audit") of its practices of withholding death benefits after MetLife had learned of an insured's death. During California's investigative hearing held on May 23, 2011, Robert E. Sollmann, Jr., MetLife's Executive Vice President of Retirement Products, confirmed that until late 2010 or early 2011, MetLife did not have a formal system in place to determine whether life annuitants that were known to be deceased also had a life insurance policy. (*Id.* ¶¶ 107-108.)

On or about July 5, 2011, Reuters reported that the New York

Attorney General had issued subpoenas to nine life insurance companies, including MetLife, specifically demanding information regarding their procedures for identifying beneficiaries of life insurance policies and paying out policies for deceased customers. (*Id.* ¶ 109.)

Also on July 5, 2011, the NYDFS issued a letter to insurers pursuant to NY Insurance Law 308 (the "DFS Letter"). The DFS Letter required life insurance companies and fraternal benefit societies doing business in New York to conduct a cross check of their entire block of business against the SSA's DMF, or another comparable database, using "exact" match criteria. Every life insurance policy and annuity contract, and retained asset account issued by a New York domestic insurer or delivered or issued for delivery in New York by an authorized foreign insurer since 1986 was subject to the requirement, with certain exceptions. Insurers were required to pay any unpaid death benefit payments that may have been due under the policies and accounts and to submit monthly reports to the NYDFS on their progress in bucketing, paying and/or escheating amounts due and payable with regard to valid matches against the DMF. (*Id.* ¶¶ 4, 110.)

Thereafter, on our about August 5, 2011, MetLife filed a Form 10-Q for the quarter ending June 30, 2011 which stated as follows:

> Unclaimed Property Inquiries. More than 30 U.S. jurisdictions are auditing MetLife, Inc. and certain of its affiliates for compliance with unclaimed property laws. Additionally, MLIC and certain of its affiliates have received subpoenas and other regulatory inquiries from certain regulators and other officials relating to claims-payment practices and compliance with unclaimed property laws. On July 5, 2011, the New York Insurance Department issued a letter requiring life insurers doing business in New York to use data available on the U.S. Social Security Administration's Death Master File or a similar database to identify instances where death benefits under life insurance policies, annuities, and retained asset accounts are payable, to locate and pay beneficiaries under such contracts, and to report the results of the use of the data. It is possible that other jurisdictions may pursue similar investigations or inquiries, or issue directives similar to the New York Insurance Department's letter. It is possible that the audits and related activity may result in additional payments to beneficiaries, additional escheatment of funds deemed abandoned under state laws, administrative penalties, and changes to the Company's procedures for the identification and escheatment of abandoned property. The Company is not currently able to estimate the reasonably possible amount of any such additional payments or the reasonably possible cost of any such changes in procedures, but it is possible that such costs may be substantial.

(*Id.* ¶ 111.)

Effective June 14, 2012, the NYDFS enacted Insurance Regulation 200 as an emergency measure to require life insurance companies to adopt and implement procedures to investigate claims and locate beneficiaries with respect to death benefits under life insurance policies, annuity contracts, and accounts. These processes and procedures had the effect of maintaining monies and accounts that should have been paid to beneficiaries of the

Company's policyholders, or instead escheated to the relevant state authorities after the "dormancy period" expired. (*Id.* ¶¶ 5-6.)

Plaintiffs allege that from at least February 2010 to October 2011 (the "Relevant Period"), the individual defendants caused the Company to issue materially false and misleading statements concerning the Company's current and future financial condition and its potential liability to policyholders, their beneficiaries, and relevant state authorities for tens of millions of dollars in benefits that should have been paid out to policyholders or escheated to the states long ago, and the Company's exposure to claims of state and federal law violations. (*Id.* ¶ 6.)

Plaintiffs further contend that MetLife's alleged practice of selectively using the DMF violates various states' insurance laws and unclaimed property laws, rules, and regulations, and MetLife's issuance of materially false and misleading public filings violates the federal securities laws. Consequently, MetLife allegedly has been subjected to numerous investigations by state regulators as well as securities fraud litigation that plaintiff asserts will cost the Company hundreds of millions, if not billions of dollars in government-imposed fines and penalties, lawsuit-related compensatory and punitive damages, the resurrection of outstanding claims to insurance policy beneficiaries, and impairment of

goodwill and reputational capital. Indeed, plaintiffs assert that MetLife has already entered into a settlement agreement that requires the Company to pay nearly $500 million to settle a multistate investigation into unpaid claims for deceased policy holders (the "Multistate Settlement"). (*Id.* ¶ 7.) Defendants, however, contend that $438 million of the Multistate Settlement related to the redemption of older, so-called "industrial" life insurance policies, for which MetLife was already "properly reserved." The remaining amount purportedly consists of a $40 million payment to cover the state agencies' cost of investigation. Moreover, defendants explain that under the Multistate Settlement, MetLife agreed that, going forward, it would periodically cross-check its insurance policies against the DMF. (Memo in Support, p. 6.)

Plaintiffs further allege that the individual defendants knew that MetLife was ignoring the death of its policyholders since, for instance, the Insurance Commissioner of California made findings resulting from the California Audit that for two decades, MetLife failed to pay life insurance policy benefits to named beneficiaries, or to the State of California, even after learning that an insurer had died. The California Audit further concluded that MetLife did not take steps to determine whether policy owners of dormant accounts are still alive and, if not, pay the

beneficiaries or California if they could not be located. (Am. Compl. ¶ 7.)

In addition, plaintiffs allege that because of their responsibilities as members of the Company's Board and its various committees, the director defendants knew, or were reckless in not knowing, that the Company was wrongfully and unfairly using the DMF to determine whether its annuity policyholders had died so that MetLife could stop making payments, but ignored the SSA's DMF to determine whether death benefit payments were due under life insurance policies. In fact, a significant amount of the Company's operating income and investment income is intertwined with procedures and policies used by MetLife in the investigation and paying of claims so, plaintiff alleges, it would have been unreasonable for the Board members not to have known about the Company's policies concerning the DMF. (*Id.* ¶ 8.)

Plaintiffs filed the original Complaints on January 26, 2012 and March 6, 2012, followed by the First Amended Shareholder Derivative Complaint dated August 22, 2012, asserting against the individual defendants a cause of action for breach of fiduciary duty and one for unjust enrichment.

Defendants Metlife, Burwell, Castro-Wright, Grisé, Henrikson,

Hubbard, Kandarian, Keane, Kelly, Kilts, Kinney, Price, Satcher, Sicchitano and Wang now move this Court to dismiss the Amended Complaint pursuant to CPLR 3211(a)(3) and (a)(7), and Del. Ch. Ct. R. 23.1, based on (i) plaintiffs' failure to make a pre-litigation demand on MetLife's Board as required by applicable Delaware law, and (ii) plaintiffs' failure to state a cause of action.

Plaintiffs' Failure to Make a Pre-Suit Demand

Defendants contend that plaintiffs' failure to make a demand on MetLife's Board of Directors prior to commencing this action is grounds for dismissing the Complaint. Plaintiffs, on the other hand, argue that such demand would have been futile and, therefore, was excused.

Since MetLife is incorporated in Delaware, Delaware law is controlling. *See, e.g., Security Police & Fire Professionals of Am. Retirement Fund v Mack,* 93 AD3d 562 (1st Dept 2012); *Wilson v Tully,* 243 AD2d 229, 232 (1st Dept 1998). Under well-settled Delaware law, a shareholder may not commence a derivative action on behalf of a corporation unless the shareholder (1) first makes a pre-suit demand on the Board to commence an action on behalf of the company, and the Board wrongfully refuses to do so; or (2) pleads particularized factual allegations demonstrating that a demand would be "futile" because a majority of the Board is incapable of

making a disinterested and independent judgment as to whether the corporation should pursue the claims. *See Simon v Becherer,* 7 AD3d 66, 71-72 (1st Dept 2004); *Rales v Blasband*, 634 A2d 927, 932-934 (Del. 1993); Del. Ch. Ct. R. 23.1.

"Upon reviewing a motion to dismiss for failure to demonstrate demand futility pursuant to Rule 23.1, the Court must accept the well-pled factual allegations of the derivative complaint as true and draw all reasonable inferences in favor of plaintiffs. Conclusory allegations, however, are not accepted as true." *In re Dow Chem. Co. Derivative Litig.,* 2010 WL 66769, at *6 (Del. Ch. Jan 11, 2010)(internal quotation marks omitted); *see also Wilson v Tully,* 243 AD2d at 234. Plaintiff need not demonstrate a reasonable probability of success on the merits to establish demand futility. *Rales,* 634 A2d at 934. Instead, a plaintiff need only "make a threshold showing, through the allegation of particularized facts, that their claims have some merit." *Id.*

Moreover, "[d]emand is deemed futile, and therefore excused, only if a majority of the directors have such a personal stake in the matter at issue or the proposed litigation that they would not be able to make a proper business judgment in response to a demand." *In re Dow Chem. Co. Derivative Litig.,* 2010 WL 66769, at *6. Thus, the instant plaintiffs must meet the applicable pleading

standard as to at least seven of the thirteen directors who were on MetLife's Board at the time this suit was filed.

The Delaware Supreme Court has articulated two tests to determine demand futility. The *Aronson* test, established by *Aronson v Lewis*, 473 A2d 805 (Del. 1984), *overruled on other grounds, Brehm v Eisner*, 746 A2d 244 (Del. 2000), applies where the plaintiff alleges that the Board as a whole has made a conscious business decision in violation of its fiduciary duties. By contrast, the *Rales* test, established under *Rales v Blasband, supra*, applies where the plaintiff challenges a Board's failure to discharge its oversight duties. *See Wood v Baum*, 953 A2d 136, 140 (Del. 2008)(discussing the *Aronson* and *Rales* tests).

> [C]onsistent with the context and rationale of *Aronson*, a court should not apply the *Aronson* test for demand futility where the board that would be considering the demand did not make the business decision that is being challenged. Thus, where inaction, rather than action, by a board is charged and "directors are sued derivatively because they have failed to do something (such as a failure to oversee subordinates), demand should not be excused automatically in the absence of allegations demonstrating why the board is incapable of considering a demand. Indeed, requiring demand in such circumstances is consistent with the board's managerial prerogatives because it permits the board to have the opportunity to take action where it has not previously considered doing so."

Wilson v Tully, 243 AD2d at 233, *quoting Rales v Blasband*, 634 A2d at 933-934.

In considering demand futility under *Rales,* "a court must determine whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." *Rales, supra* at 934. Since here, plaintiff does not allege a decision taken by the Board, but rather cites MetLife's alleged practice of not searching the DMF so as to avoid paying death benefits, the Court will apply the *Rales* test. *See Seminaris v Landa,* 662 A2d 1350, 1354 (Del. Ch. 1995)(applying Rales test where plaintiff did not challenge any specific board action that approved or ratified the alleged wrongdoings).

In order to determine whether MetLife's Board could have been impartial in considering a demand at the time the Complaint was filed, the Court must look to the nature of the decision confronting the Board. *See Rales,* 634 A2d at 935. The Court in *Rales* articulated a two-step process that a board of directors must employ in considering a shareholder demand for litigation. First, "the directors must determine the best method to inform themselves of the facts relating to the alleged wrongdoing and the consideration, both legal and financial, bearing on a response to the demand," and second, "the board must weigh the alternatives

available to it, including the advisability of implementing internal corrective action and commencing legal proceedings..." *Id.* "In carrying out these tasks, the board must be able to act free of personal financial interest and improper extraneous influences." *Id.*

Director Interest

"Directorial interest...exists where a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders." *Rales, supra* at 936.

> Under *Rales,* defendant directors who face a "substantial likelihood of personal liability" are deemed interested in the transaction and thus cannot make an impartial decision. But "[d]emand is not excused solely because the directors would be deciding to sue themselves." Rather, "demand will be excused based on a possibility of personal director liability only in the rare case when a plaintiff is able to show director conduct that is 'so egregious on its face that...a substantial likelihood of director liability therefore exists.'"

In re Dow Chem. Co. Derivative Litig., 2010 WL 66769, at *12. "A simple allegation of potential directorial liability is insufficient to excuse demand, else the demand requirement itself would be rendered toothless, and directorial control over corporate litigation would be lost." *In re Goldman Sachs Group, Inc. Shareholder Litig.,* 2011 WL 4826104, at *18 (Del. Ch. Oct 12, 2011).

Plaintiffs allege that the director defendants face a significant likelihood of personal liability for breach of their fiduciary duties to MetLife for their participation or acquiescence in the wrongdoing alleged in the Amended Complaint and their complete failure to perform their oversight duties to MetLife, including their failure to ensure MetLife's compliance with unclaimed property laws, failure to ensure that MetLife implemented appropriate claims-payment practices and procedures, and failure to ensure that MetLife had an adequate financial reporting system. (Am. Compl. ¶ 131.)

In addition, plaintiffs allege that the director defendants failed to act in good faith as demonstrated by their violation of "various states' insurance laws and unclaimed property laws - including rules and regulations established by the New York State Department of Financial Services," and MetLife's internal "Code of Business Conduct and Ethics" and certain charters enacted by its Board's various Committees. (Am. Compl. ¶¶ 2, 39-48, 54.) In addition to alleging that the defendants' actions or omissions were illegal, plaintiffs allege that "MetLife's conduct is inherently deceptive" and points to the July 5, 2011 DFS Letter which it claims "demonstrat[es] the improper nature of MetLife's practices." (*Id.*, ¶¶ 3-4.) Further, plaintiffs allege that the director defendants knew or should have known that MetLife was maintaining

monies that should have been paid to beneficiaries of its policyholders and, as a result, MetLife's financial statements issued between February 2010 to October 2011 were materially false and misleading in that MetLife failed to reserve for losses that it knew it had already incurred. (*Id.*, ¶¶ 6, 57-59, 62-68, 70-73, 76-81, 83-96, 102-103, 105.) Finally, plaintiffs allege that as a result of issuing materially false and misleading financial statements, the director defendants violated federal securities laws. (*Id.*, ¶¶ 7, 133, 135.)

Plaintiffs point to the $500 million Multistate Settlement as an example of the liability to which defendants allegedly have exposed MetLife. Plaintiffs also point to the California Audit which purportedly indicated that "for two decades, MetLife failed to pay life insurance policy benefits to named beneficiaries, or to California, even after learning than an insured had died." (*Id.*, ¶ 7.) Plaintiffs further allege that the director defendants, in breaching their fiduciary duties to MetLife, have subjected MetLife to, *inter alia,* hundreds of millions of dollars in charges, a substantial drop in the value of the Company's stock, adverse publicity, lawsuits, potential fines and investigation costs. (*Id.*, ¶ 8.)

Underpinning all of the foregoing arguments is plaintiffs'

allegation that the defendants breached their fiduciary duties by acting or failing to act in violation of applicable laws, rules or regulations. Defendants, by contrast, argue that plaintiffs identify no rule, regulation or insurance policy term in place during the Relevant Period that required life insurers to search the DMF or otherwise pay death benefits without first having received a claim under a life insurance policy.

First, to the extent that plaintiffs allege that the defendants violated their obligations under the DFS Letter, their allegation fails. Plaintiffs assert in the Amended Complaint that the DFS Letter was issued approximately seven months after MetLife voluntarily implemented internal policies and practices in order to identify liabilities under their insurance policies. Thus, based on plaintiffs' own assertions, MetLife voluntarily began checking the DMF before it ever had a duty to do so under the DFS Letter. Moreover, nothing in the results of the California Audit, as alleged by plaintiffs, indicates that MetLife violated any law. Similarly, defendants point out that no finding of wrongdoing was made in the Multistate Settlement. Neither is the fact that MetLife has been the subject of numerous audits and litigation proof that the defendants caused MetLife to violate any applicable laws, rules or regulations.

In fact, plaintiffs discuss in the Amended Complaint an August 12, 2012 *Wall Street Journal* article which describes the various state investigations and settlements as a sea change in the insurance industry that "upend[s] more than a century of practice in how life-insurance benefits get paid." (Am. Compl. ¶ 126.) That article further acknowledges that "[s]tandard language in life-insurance policies makes clear it is up to beneficiaries to notify the insurer when an insured person had died." It does, however, acknowledge that "[u]nder many state laws, insurers can keep unclaimed policies on their books until the insured person would be at least 95 years old, after which time the policies - and death benefits due on them - are handed over to state unclaimed-property departments." Yet, plaintiffs offer no particularized facts to show that the individual defendants faced a substantial likelihood of liability for violation of such unclaimed property laws.

Further, plaintiffs have not alleged any particularized facts indicating that the individual defendants faced a substantial likelihood of liability by being presented with and ignoring "red flags" indicating illegal conduct, thereby "consciously permitting the corporation to violate positive law." *South v Baker*, 2012 WL 4372538, at *1 (Del. Ch. Sept. 25, 2012).

In addition, because plaintiffs' allegations of director liability based on the filing of materially false or misleading financial statements are premised on the underlying assertion that the individual directors knew or should have known that MetLife was violating the law, these allegations also fall short. Indeed, the DFS Letter seems to be the first legal obligation imposed on MetLife which plaintiffs allege in any detail and MetLife disclosed its potential liability in the first Form 10-Q it filed after that Letter was issued.

Plaintiffs further emphasize that certain securities fraud claims arising out of the same facts, asserted by a different plaintiff against the instant defendants in a related action filed in the Southern District of New York, survived a motion to dismiss. While the Hon. Lewis A. Kaplan dismissed some of that plaintiff's claims in *City of Westland Police & Fire Retirement System v MetLife, Inc.*, 928 FSupp2d 705 (SDNY 2013), he found that plaintiff had sufficiently alleged claims pursuant to Section 11 of the Securities Act of 1933. The instant plaintiffs argue that Judge Kaplan's decision in the *Westland* case supports their contention here that the individual defendants faced a substantial likelihood of liability for their breaches of their fiduciary duties, thereby excusing demand. (Notice of Supp. Authority in Support, pp. 2-5.) Defendants, on the other hand, argue that *Westland* does not help

plaintiffs for primarily two reasons. First, Judge Kaplan dismissed all of the fraud-based claims brought under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 in that case and, second, the surviving Section 11 claims were subject to a notice pleading standard, which is less onerous than the standard for pleading fraud. (Response to Plaintiffs' Notice of Supp. Authority, pp. 3-4, *citing Levine v Smith,* 591 A2d 194, 207 [Del. 1991], *overruled on other grounds, Brehm v Eisner,* 746 A2d 244 [Del. 2000].)

With respect to the pleading standard applicable to Section 11 claims, the Second Circuit has stated that "[i]ssuers are subject to 'virtually absolute' liability under section 11, while [certain other defendants] may be held liable for mere negligence." *In re Morgan Stanley Information Fund Securities Litig.,* 592 F3d 347, 359 (2d Cir 2010). "Moreover, unlike securities fraud claims pursuant to section 10(b) of the Securities Exchange Act of 1934...plaintiffs bringing claims under section[] 11...need not allege scienter, reliance, or loss causation." *Id.* Thus, this Court agrees that the survival of plaintiff's Section 11 claims under a notice pleading standard in *Westland* is not an indication that the individual defendants faced a substantial likelihood of liability under the breach of fiduciary duty claim asserted against them in this action.

[* 21]

Equally unavailing is plaintiffs' reliance on *Pfeiffer v Toll*, 989 A2d 683 (Del. Ch. 2010), in which the Delaware Chancery Court denied defendants' motion to dismiss based on plaintiff's failure to make a pre-litigation demand on the board, finding under *Rales* and other cases that demand was futile. As here, the defendants in *Pfeiffer* were the subject of, *inter alia*, a claim for breach of fiduciary duty and were named in a companion federal securities action. The claims asserted in both the Chancery Court and federal actions against the *Pfeiffer* defendants were based on their alleged insider trading activities. In its decision, the Chancery Court found particularly compelling the finding by the federal court that "the insider trading of the individual defendants...raised a 'powerful and cogent inference of *scienter*' and was 'unusual in scope and timing.'" *Id.* at 690. As discussed above, no such finding of *scienter* exists here, much less any particularized allegations that the individual defendants faced a substantial likelihood of liability for breach of their fiduciary duties.

As to the question of whether the individual defendants faced a substantial likelihood of personal liability for failing to perform their oversight duties to MetLife, the Delaware Chancery Court had held that director liability based on the duty of oversight is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *In re*

Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996). "[O]nly a sustained or systemic failure of the board to exercise oversight...will establish the lack of good faith that is a necessary condition to liability." *Id.* at 971. Further, the Delaware Supreme Court has held that liability for failure to adequately oversee the Company's affairs requires that the director defendants either (1) "utterly failed to implement any reporting or information systems or controls" or (2) "having implemented such a system or controls, consciously failed to monitor or oversee its operations" - i.e., "that the directors knew that they were not discharging their fiduciary obligations." *Stone ex rel. AmSouth Bancorporation v Ritter*, 911 A2d 362, 370 (Del. 2006).

Specifically, plaintiffs allege that the defendants served on MetLife's various committees and were charged with specific oversight responsibilities which they failed to exercise in good faith. (Am. Compl., ¶¶ 121, 133, 137-139, 148.) However, plaintiffs do not "point to any specific conduct of the individual directors or board resolution..., but rely upon conclusory allegations that the defendant directors 'knew or recklessly disregarded' or 'knew or were reckless in not knowing' of [defendants'] perilous course of conduct, thereby exposing the Company to numerous lawsuits and substantial damages." *Wilson v Tully,* 243 AD2d at 234 (affirming lower court's finding that

plaintiff's failure to make a pre-litigation demand was not futile and, thus, not excused). Accordingly, plaintiffs do not meet the stringent standard for oversight liability articulated in *In re Caremark* and cannot demonstrate a substantial likelihood of any director defendant's liability under that theory.

Also unavailing is plaintiffs' argument that demand was futile because the "magnitude and duration of the alleged wrongdoing was so great" that the defendants "must have known and/or had reason to suspect" that certain statements made in the past about the Company's financial condition were false and misleading. (Am. Compl. ¶ 140.) Courts have consistently recognized that demand futility allegations cannot be based on hindsight. "That, in hindsight, such action or inaction may turn out to be controversial, unpopular or even wrong is insufficient to excuse plaintiffs' failure to make a demand upon [defendant's] directors." *Wilson v Tully*, 243 AD2d at 238.

Defendants argue that plaintiffs have also failed to allege particularized facts demonstrating a substantial likelihood of any defendant's liability for unjust enrichment. Plaintiffs' allegations seem to be based on the theory that the defendants abdicated their oversight responsibilities and therefore did not earn their compensation, and that defendant Henrikson sold MetLife

stock while in the possession of material, adverse, non-public information that, in being concealed, allowed the share price to remain artificially inflated. (Am. Compl. ¶¶ 154-155.) Plaintiffs' unjust enrichment allegations fall short as a basis to excuse a pre-suit demand on the Board for the same reasons plaintiffs' allegations regarding oversight liability do. In addition, plaintiffs' unjust enrichment claim relating to Henrikson's stock sales has no bearing on the demand issue because he admittedly was not on the Board at the time plaintiffs filed the Complaint.

Plaintiffs further allege that defendants "hurriedly" scheduled a March 4, 2011 public offering of stock in order to raise cash prior to internal and regulator findings being publicly disclosed. (Am. Compl. ¶¶ 98-99, 136.) Defendants dismiss this claim as nonsensical because they assert that they did not use this offering to raise cash, but to repurchase and cancel 6,857,000 shares of contingent convertible preferred stock owned by AIG. (Memo in Support, pp. 16-17.) In any event, plaintiffs do not meet their burden of showing that this offering was the basis for a substantial likelihood of personal liability of any of the individual defendants, or otherwise is a sufficient basis for excusing a pre-litigation demand on the Board.

For all of these reasons, plaintiffs have failed to establish director conduct that is "so egregious on its face that...a substantial likelihood of director liability...exist[ed]" for a majority of the thirteen defendants at the time plaintiffs commenced this suit. *In re Dow Chem. Co. Derivative Litig.*, 2010 WL 66769, at *12. Thus, the Court will next consider whether a majority of the Board members lacked independence.

Director Independence

Plaintiffs allege that demand also would have been futile because the Board members lacked independence since they were receiving compensation from MetLife and, therefore, were not independent from the Company, (Am. Compl. ¶¶ 141-142); "developed debilitating conflicts of interest" as a result of purported interrelated business, professional and personal relationships they had with the individual defendants, (Am. Compl. ¶ 143[a]); and would have been forced to sue themselves. (Am. Compl. ¶ 143[c].)

There is a presumption under Delaware law that directors are independent and faithful to their fiduciary duties. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v Stewart*, 845 A2d 1040, 1048 (Del. 2004). "In the context of presuit demand, the burden is upon the plaintiff in a derivative action to overcome that presumption." *Id.* at 1048-1049. In order to do so, a plaintiff must plead

particularized facts showing that the director was "beholden" to an interested director or officer or so "under [his] influence" that the director's "discretion would be sterilized." *Rales*, 634 A2d at 936; *see also Beam*, 845 A2d at 1052.

Here, plaintiffs fail to meet their burden of overcoming the presumption of independence. They advance mere conclusory allegations and do not establish that any particular Board member was beholden to, or under the influence of, an interested director. In fact, if receipt of compensation from the company, relationships with other directors or officers, or the prospect of suing one's self were sufficient to establish lack of director independence, then virtually every director of every corporation would fall into this category and the requirement for a pre-suit demand on the Board would be subsumed entirely.

The Court finds that plaintiffs' remaining arguments regarding the Board members' lack of independence are equally unavailing.

For all of the foregoing reasons, plaintiffs have failed to establish that a pre-suit demand on MetLife's Board would have been futile. Accordingly, defendants' motion to dismiss is granted and the Amended Complaint is dismissed with prejudice and without costs or disbursements. The Court thus need not reach defendants'

arguments for dismissal on the basis of failure to state a claim, *see Security Police & Fire Professionals of Am. Retirement Fund v Mack*, 93 AD3d at 565, *citing Jacobs v. Yang*, 2004 WL 1728521, *1 (Del. Ch. Aug. 2, 2004), *aff'd* 867 A2d 902 (Del. 2005).

This constitutes the decision and order of this Court.

Date: January 22, 2014

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK J.S.C.