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SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-2200-16

JOHN NEFF, DERIVATIVELY AND
BEHALF OF IMMUNOMEDICS, INC.,

Plaintiff,

v.

DAVID M. GOLDENBERG, CYNTHIA L.
SULLIVAN, ARTHUR S. KIRSCH,
BRIAN A. MARKISON, MARY E.
PAETZOLD, DON C. STARK, and
PETER P. PFREUNDSCHUH,

Defendants,

And

IMMUNOMEDICS, INC.,

Nominal Defendant.

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Decided: March 29, 2018

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FRANK J. DEANGELIS, J.S.C.

The current matter comes before Court by way of a motion to dismiss a shareholder derivative action for breaches of various directors' of Immunomedics, Inc. fiduciary duties, abuse of control, and gross mismanagement. John Neff ("Plaintiff"), derivatively and on behalf of Immunomedics, Inc. ("Immunomedics") alleges that David M. Goldenberg, Cynthia L. Sullivan, Arthur S. Kirsch, Brian A. Markison, Mary E. Paetzold, Don C. Stark, and Peter P. Pfreundschuh (collectively, "Defendants") failed to correct or caused Immunomedics to fail to correct certain false and misleading statements, rendering Defendants personally liable to Immunomedics for breaching their fiduciary duties.

Immunomedics is a clinical-stage biopharmaceutical company that focuses on the development of monoclonal antibody-based products for the targeted treatment of cancer, autoimmune and other diseases. Am. Compl. ¶ 2. Immunomedics developed an advanced antibody-drug conjugate (ADC) called IMMU-132 for the treatment of patients with many diverse solid cancers, but most notably metastatic triple-negative breast cancer. Id. at ¶¶ 1-2. The American Society of Clinical Oncology ("ASCO") is an organization dedicated to cancer research. Id. at ¶ 4. In particular, ASCO

prohibits public releases of the information from any abstract or study data scheduled to be released at an ASCO meeting. Id.

On April 19, 2016, Immunomedics announced that the company would present updated results for IMMU-132 at ASCO's annual meeting in June 2016. Id. at ¶ 6. On May 2, 2016, Immunomedics issued a press release announcing that the company was accepted to make a presentation as part of the Best of ASCO program. Id. at ¶ 7. According to the Amended Complaint, announced presentations at the ASCO meeting routinely increase share prices for the companies set to present at ASCO. Id. at 5. On May 14, 2016, Immunomedics announced that the updated phase 2 results of IMMU-132 will be presented at the ASCO annual meeting. Id. at ¶ 93. Following this announcement, Immunomedics' stock price increased $0.05. Id. at ¶ 94. On May 4, 2016, Immunomedics filed a Form 10-Q with SEC, signed by defendants Cynthia L. Sullivan and Peter P. Pfreundschuh, reporting a net loss of $14 million in 3Q 2016 and providing updates on IMMU-132. Id. at ¶¶ 121-122. Moreover, on May 5, 2016, Immunomedics hosted a conference call to discuss the company's financial results for the third quarter, in which defendant Sullivan stated that IMMU-132 abstract was to be included in and presented at the ASCO meeting and Best of ASCO conference. Id. at ¶ 124.

On June 2, 2016, media outlets reported that ASCO had removed a scheduled presentation by Immunomedics on the IMMU-132 breast

cancer drug. Id. at ¶ 127. Specifically, ASCO's reason for removing Immunomedics' presentation was that Immunomedics submitted old and previously observed IMMU-132 data. Id. The next day, TheStreet.com published an article on Immunomedics' violation of the ASCO conference policy. Id. at ¶ 130. Specifically, TheStreet.com stated that defendant Goldenberg had already presented the same IMMU-132 trial results at an industry networking meeting in April, and the company issued a press release when the IMMU-132 data was presented in April. Id. at 131.

On October 3, 2016, Seymour Rosenfeld, who at the time was an Immunomedics shareholder, filed the present suit. The initial Complaint alleged that all of the announcements, press releases and the press conference call made by Defendants since April 19, 2016 were materially false. Specifically, that Defendants failed to disclose that (1) the abstract for IMMU-132 that Immunomedics submitted to ASCO for the presentation at the 2016 ASCO Annual Meeting contained previously disclosed results from a mid-stage study; (2) Immunomedics had misrepresented to ASCO that its abstract for IMMU-132 contained only updated and previously undisclosed data; (3) the forgoing misrepresentation was a violation of ASCO policy and caused Immunomedics' IMMU-132 presentation to be removed from the 2016 ASCO Annual Meeting; and (4) the company's statements about Immunomedics' business, operations and prospects lacked a reasonable basis throughout the

Relevant Period. Defendants moved to dismiss the Complaint. Thereafter, it was discovered that Mr. Rosenfeld sold his shares of Immunomedics at some point after the Complaint was filed. The parties consented to Plaintiff's filing of an amended Complaint and Defendants withdrew the motion to dismiss. On March 3, 2017, the shareholders of Immunomedics elected the venBio Slate that included four new directors. Therefore, the new board consisted of a newly-elected majority – Bezhad Aghazadeh, Scott Canute, Peter Barton Hutt, and Khalid Islam and the three members from the old board – David Goldenberg, Cynthia Sullivan, and Brian Markison. On October 16, 2017, Plaintiff filed an Amended Complaint against the old board substituting the plaintiff and adding facts to bolster the original Complaint's futility allegations. On December 4, 2017, Defendants filed a Motion to Dismiss the Amended Complaint for failure to plead demand futility as to the Board of Directors at the time of the Amended Complaint and, in alternative, failure to plead demand futility as to the original Complaint.

## I. STANDARD OF REVIEW

R. 4:6-2 provides, in relevant part, that the defendant may raise, by motion with accompanying brief, the failure of the plaintiff's pleading to state a claim upon which relief can be granted as a defense to the plaintiff's claim for relief. Such motions should be granted "in only the rarest of instances." Printing Mart v. Sharp Elect. Corp., 116 N.J. 739, 772 (1989). In

approaching a motion to dismiss for failure to state a claim upon which relief can be granted, the Court's inquiry is limited to "examining the legal sufficiency of the facts alleged on the face of the complaint." Id. at 746. The court is permitted to consider additional documents, aside from the complaint, when those documents form the basis of plaintiff's claims. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005). The Court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim . . . ." Id. For purposes of analysis, the plaintiff is entitled to "every reasonable inference of fact . . . [and the examination] should be one that is at once painstaking and undertaken with a generous and hospitable approach." Id.

In reviewing the motion, the Court is not concerned with the "ability of plaintiffs to prove the allegations contained in the complaint." Id. The complaint need only allege sufficient facts as to give rise to a cause of action or prima facie case. Dismissal of the plaintiff's complaint is only appropriate after the complaint has been "accorded . . . [a] meticulous and indulgent examination. . . ." Printing Mart, 116 N.J. at 772. If dismissal of the plaintiff's complaint is appropriate, the dismissal "should be without prejudice to a plaintiff's filing of an amended complaint." Id. In circumstances where the plaintiff's pleading is inadequate in part, the Court has the discretion to dismiss only

certain counts from the complaint. See, e.g., Jenkins v. Region Nine Housing Corp., 306 N.J. Super. 258 (App. Div. 1997).

**II. ANALYSIS**

Defendants first assert that Plaintiff was required to demand that the board take up litigation itself or plead demand futility. Defendants assert that Plaintiff was required to demonstrate demand futility as to the new board and had not done so and additionally, failed to plead with particularity facts creating a reasonable doubt that a majority of the old board could have exercised their independent and disinterested business judgment in responding to a demand.

As a general principle, the board of directors, not the shareholders, manages the business and affairs of a Delaware corporation. 8 Del. C. § 141(a). [1] Shareholders, however, can seek redress in derivative actions for torpid or unfaithful management. Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984). Because a derivative action, by its very nature, impinges on the managerial freedom of directors, Chancery Rule 23.1 operates as a threshold to insure that plaintiffs exhaust intra-corporate remedies and protect against strike suits. Id.

[1] Immunomedics, Inc. is a Delaware corporation and the parties do not dispute that Delaware law governs here. Furthermore, New Jersey follows the same law as Delaware in shareholder derivative claims, and thus there is no conflict of law. Johnson v. Glassman, 401 N.J. Super. 222, 228 n. 2 (App. Div. 2008).

"To preserve the board's authority over ordinary business decisions, a plaintiff who initiates a derivative action must before the commencement of the action either demand that the corporate board take up the litigation itself, or, in the alternative, demonstrate in a complaint why such a demand would be futile." In re infoUSA, Inc. S'holders Litig., 953 A.2d 963, 974 (Del. Ch. 2007). Successful derivative plaintiffs "must focus intensely upon individual director's conflicts of interest or particular transactions that are beyond the bounds of business judgment. The appropriate analysis focuses upon each particular action, or failure to act, challenged by a plaintiff." Id. Delaware law recognizes a simple, fundamental truth of institutional competency: "the value of assets bought and sold in the marketplace . . . is a matter best determined by the good faith business judgments of disinterested and independent directors, men and women with business acumen appointed by the shareholders precisely for their skill at making such evaluations." Id. The Delaware courts generally will not substitute the judgment of a judge for that of the board. Rather, a judge ensures that the board made the business judgment with a disinterested and independent mindset. Therefore, the courts avoid questioning the merits of a director's decision, but examine, instead, allegations questioning the motivations fueling the decision. Id.

A plaintiff who asserts demand futility must meet the requirement under Rule 23.1 of pleading with factual particularity, which substantially differs from the New Jersey notice pleading under standard.[2] Vague or conclusory allegations do not suffice, rather the pleader must set forth particularized factual statements that are essential to the claim. Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000).

Because Plaintiff did not make a demand on Immunomedics' board of directors at any point before or during the pendency of this suit, Plaintiff must demonstrate that demand is excused to maintain his derivative claims in the face of Defendants' motion to dismiss. Therefore, the Court must determine whether the Amended Complaint alleges, with particularity, sufficient facts to support a conclusion that demand was futile.

In evaluating whether a demand on the Board of Directors would be futile, the trial court must decide "whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." Aronson, 473 A.2d at 814. Notably, despite the use of "and" in Aronson, the Delaware Supreme

[2] Notably, the New Jersey Supreme Court adopted the two-part test in Aronson v. Lewis, 473 A.2d 805 (Del. 1984) to evaluate demand futility under R. 4:32-3 (also requiring a demand prior to filing a shareholder derivative action under New Jersey law) and have also recognized the need to plead demand futility with particularity. In re PSE & G Shareholder Litigation, 173 N.J. 258, 282 (2002).

Court held that the two prongs are disjunctive. Brehm v. Eisner, 746 A.2d at 256. That is, demand is excused if either of the Aronson prongs is met. Id. Importantly, a shareholder plaintiff has the burden of proving demand-futility. Id. at 266.

Furthermore, Defendants argue that demand futility must be assessed at the time of the Amended Complaint, not the original Complaint.[3] The parties agree that the relevant question under Delaware law determining the timing of the assessment of futility rests on whether the original complaint was validly in litigation, but disagree as to the answer to that question. The test under Delaware law to determine whether a demand must be made when a derivative complaint is amended is found in Braddock v. Zimmerman, 906 A.2d 776 (Del. 2006). The Delaware Supreme Court, approving the reasoning of Harris v. Carter, 582 A.2d 222 (Del. Ch. 1990), held that "for purposes of determining whether demand is required before filing an amended derivative complaint, the term 'validly in litigation' means a proceeding that can or has survived a motion to dismiss." Braddock, 906 A.2d at 779. In Harris, the court held that the key question in determining the appropriate time to test demand futility is whether the amended claims were "validly in

[3] Although Immunomedics' board members changed in March 2017 and the Amended Complaint was not filed until October 2017, Plaintiff has not substituted any of the Defendants in its Complaint and thus has not joined the new board members in this actions or pled demand futility against the new board. Instead, Plaintiff's allegations on the issue of futility are asserted against Defendants Goldenberg, Sullivan and Markison.

litigation" prior to the amendment. Harris, 582 A.2d at 230. For the purposes of that analysis, "claim" refers not "simply to legal theories of liability but refers broadly to the acts and transactions alleged in the original complaint. Thus, an amendment or supplement to a complaint that elaborates upon facts relating to acts or transactions alleged in the original pleading . . . would not . . . constitute a matter that would require a derivative plaintiff to bring any part of an amended or supplemental complaint to the board prior to filing." Id. at 231. Expanding on this, the Braddock Court explained the three circumstances that must exist to excuse a plaintiff from showing demand futility as of the time of filing the amended complaint: (1) "the original complaint was well pleaded as a derivative action;" (2) "the original complaint satisfied the legal test for demand excusal;" and (3) "the act or transaction complained of is essentially the same as the act or transaction challenged in the original complaint." Braddock, 906 A.2d at 786.

Additionally, Courts have found that for a complaint to be validly in litigation, Plaintiff has to have standing throughout the pendency of the suit. See Harris v. Carter, 582 A.2d 222 (Del. Ch. 1990); Korsinsky v. Wikelreid, 38 N.Y.S.3d 190 (1st Dep't 2016); In re Nyfix, Inc. Derivative Litig., 567 F. Supp. 2d 306 (D. Conn. 2008); see also Lambrecht v. O'Neal, 3 A.3d 277, 284 (Del. 2010) (quoting Lewis v. Anderson, 477 A.2d 1040, 1046 (Del. 1984) (for

a shareholder "to have standing to maintain a derivative action, the plaintiff 'must not only be a stockholder at the time of the alleged wrong and at the time of commencement of suit but . . . must also maintain shareholder status throughout the litigation.'"). Here, Plaintiff Rosenfeld sold his shares and therefore lost standing to maintain a derivative claim. Moreover, Plaintiff Neff has not served a demand on the new board and has not pled any factual allegations demonstrating demand futility as against the new board, since Plaintiff had never substituted the new board as defendants. Only the minority of defendants remain on the new board after the venBio Slate was elected to the board, thus there can be no demand futility shown as to them as a matter of law.

Plaintiff maintains that demand futility is assessed only as of the time of the filing of the original Complaint and that he was not required to make a demand on the new board. The leading Delaware case on this subject, Harris v. Carter, 582 A.2d 222 (Del. Ch. 1990) does not support plaintiffs' position that claims against new parties can be treated as "validly in litigation." In Harris, no new defendants were brought into the case, but the Court suggested that claims against new defendants should not be treated as "validly in litigation" when it stated that the "power to amend or supplement a well-instituted derivative suit without recourse to Rule 23.1, does not acknowledge a shareholder right to

institute new corporate 'claims' against an existing defendant . . . after a disinterested board takes control of the corporation." Id. at 231. Implicit in the Court's conclusion is the assumption that claims against new defendants will require a new demand with respect to the new defendants.

The rationale employed by Harris supports this conclusion. In Harris, the Court used a definition of "claims" from the Restatement (Second) of Judgments when describing the contours of the "validly in litigation" standard. Id. The Court described a claim under Rule 23.1 as any legal theory grounded upon "the acts and transactions alleged in the original complaint." Id. The Restatement (Second) of Judgments does not consider causes of action against different defendants as a single claim, even though such defendants may be sued to recover for a single injury. Restatement (Second) of Judgments § 49. The commentary to Restatement (Second) of Judgments § 49 provides that a "claim against others who are liable for the same harm is regarded as separate." Id. at cmt. a. The reasoning of Harris thus demonstrates that substituting an old board with the new board of directors, as the defendants, results in new claims. A new board of directors should be presented with the opportunity to manage litigation that seeks to redress harm inflicted upon the corporation. The identity of the defendants influences a board's decision as to whether to initiate litigation and, consequently, the demand futility

analysis. Therefore, a demand should have been made on the new board.

Nonetheless, for purposes of thoroughness and completion, the Court will not end its analysis here, but determine whether Plaintiff's claims would survive had Plaintiff preserved standing. If Plaintiff would retain standing, the allegations in the original Complaint would nonetheless have to meet the Braddock test to demonstrate that demand is excused. The Court begins its application of the Braddock test by assessing whether the original Complaint meets the first prong of Aronson v. Lewis.[4] Among the seven named defendants, Kirsh, Stark, Markison and Paetzold were non-management directors at the time when the original complaint was filed. Goldenberg was the chairman of the board; Sullivan was the president, CEO and a director; and Pfreundschuh was the CFO, but not a director. A shareholder plaintiff must show a lack of a majority of independent directors to satisfy the demand futility requirement. Beam v. Stewart, 845 A.2d 1040, 1046 n. 8 (Del. 2004) (holding that "[i]f three directors of a six person board are not independent and three directors are independent, there is not a majority of independent directors and demand would be futile.").

[4] As the Court discussed earlier, Aronson v. Lewis, 473 A.2d 805 (Del. 1984) is the seminal case that sets out the requirements for evaluating demand futility, see supra at 6, thus, as a threshold issue, Plaintiff's original complaint must meet one of the Aronson prongs to demonstrate that the original complaint was well pleaded as a derivative action.

Plaintiff must allege with particularity that three of the directors were not independent and disinterested. Plaintiff has failed to plead with particular facts that three of the directors were not independent. Instead, Plaintiff makes conclusory allegations about the directors based on their personal relationships to each other. Plaintiff claims that Goldenberg and Sullivan are married and lack independence due to their spousal relationship. Plaintiff also asserts that Sullivan and Goldenberg receive substantial monetary compensation and other benefits from Immunomedics. Moreover, Plaintiff alleges that the six directors - Sullivan, Goldenberg, Kirsh, Stark, Markison and Paetzold (collectively, the "Directors") – have longstanding business and personal relationships with each other that preclude them from acting independently. Plaintiff also claims that the Directors control Immunomedics and are beholden to each other.

However, friendship on its own is insufficient to cast doubt in a director's independence and disinterest. Beam, 845 A.2d at 1050. "Even if a personal or business relationship were demonstrated, for such a relationship to be significant, it must be of a "bias-producing nature." Beam, 845 A.2d at 1050). While marriage warrants an inference that the joined individuals are partial to each other and may be dependent and interested as to each other, Plaintiff has not alleged any facts demonstrating Goldenberg's and Sullivan's inability to remain independent and disinterred as

directors on behalf of Immunomedics vis-à-vis their spousal relationship. Nor has Plaintiff cited any authority to support the proposition that the mere existence of a spousal relationship between directors of a company renders them per se interested and dependent with respect to the claims asserted in the Complaint. Even assuming that Sullivan and Goldenberg are not independent because of their marriage and their executive positions with Immunomedics, Plaintiff still has to demonstrate lack of independence among at least one of the other Directors. Plaintiff has made no showing of particularity to overcome the presumption of independence other than conclusory allegations. Nothing in the pleadings indicates that Kirsh, Stark, Markison and Paetzold have anything stronger than a mere business relationship or friendship. To excuse demand, a shareholder plaintiff must show a much stronger relationship to defeat the presumption of independence. Beam, 845 A.2d at 1052. Mere statements that the Directors cannot be independent or disinterested due to their personal friendships lacks the specifics to show that the Directors have developed any personal or business relationship of a "bias-producing" nature.

Moreover, the mere fact that a director receives compensation from the company is similarly insufficient to overcome the presumption of independence. A shareholder plaintiff must show a director's dependence on the board's stipends or demonstrate such compensation to be of "such subjective material importance that

its threatened loss might create a reason to question" the director's independence. Telxon Corp. v. Meyerson, 802 A.2d 257, 264 (Del. 2002). While Plaintiff provides some details of the Directors' compensation, nothing in the pleadings indicates that the Immunomedics compensation that Kirsh, Stark, Markison and Paetzold receive is of such material importance that the threat of losing the compensation would cast doubt on their independence.

According to the Complaint, in addition to the director position at Immunomedics, Kirsh served as a senior advisor to GCA Savvian, LLC, an investment bank, since 2005. Compl. ¶ 19. Markison served as a healthcare industry executive at Avista Capital Partners since September 2012 and was previously the president and CEO of Fougera Pharmaceuticals. Id. at ¶ 20. Paetzold is also the CFO of SMG Indium Resources Ltd. Id. at ¶ 21. Stark is the president and CEO of Whistler Associates, Inc. Id. at ¶ 22. The Court finds Plaintiff's compensation structure insufficient to create a presumption of Kirsh's, Stark's, Markison's or Paetzold's lack of independence.

In addition, the "mere threat" of personal liability is insufficient to overcome either the independence or disinterestedness of directors. Aronson, 473 A.2d at 815. Therefore, Plaintiff's allegations that Kirsh, Stark, Markison and Paetzold are not disinterested because they face a substantial likelihood of liability is conclusory and insufficient to overcome

the presumption of independence. Thus, Plaintiff's Complaint does not contain particularized facts that can demonstrate that there is a reasonable doubt that the majority of the directors are disinterested and independent.

As discussed above, the second prong of the Aronson test analyzes whether particularized facts alleged create a reasonable doubt that the challenged transaction was otherwise the product of a valid exercise of business judgment. Aronson, 473 A.2d at 813; Rales v. Blasband, 634 A.2d 927, 933-34 (1993). Courts have cautioned, however, that cases where a plaintiff is able to show that director conduct is so egregious on its face that board approval cannot meet the test of business judgment are very rare. In re Citigroup, Inc. S'holder Derivative Litig., 964 A2d 106, 121 (Del. Ch. 2009). With respect to the allegations of Defendants' willfulness or recklessness in causing the company to make false and/or misleading statements, Plaintiff fails to plead particularized facts to create a reasonable doubt that the challenged transactions were not the products of reasonable business judgment.

First, the Delaware General Corporation Law does not require directors to provide shareholders with information concerning the finances or affairs of the corporation without a request for shareholder action. Malone v. Brincat, 722 A.2d 5, 11 (Del. 1998). Defendants argue that immediately after Immunomedics was informed

that the ASCO presentation was cancelled, Immunomedics issued another disclosure explaining its efforts to reverse ASCO's decision. Specifically, Sullivan explained that the presenter and she believed that the results disclosed prior to the scheduled ASCO presentation were different from those in the ASCO abstract submitted. Id.

For shareholders who receive false communications from directors without a request for shareholder action to receive protection under Delaware Law, shareholder plaintiffs must show that the directors are deliberately misinforming shareholders directly or by a public statement about the business of the corporation. Malone, 722 A.2d at 14. Importantly, Kirsh, Stark, Markison and Paetzold did not sign the April 19 press release, the May 2 press release, the May 4 press release, the 2016 Q3 Form 10-K or the June 3 press release. Plaintiff does not point to any specific facts that are allegedly false or misleading in the April 19 press release in which Immunomedics announced that the company would present updated results for its product IMMU-132 at ASCO's annual meeting in June 2016. Nor does the Plaintiff demonstrate that any specific facts were false or misleading in the May 2 press release in which Immunomedics announced that the company was accepted to make a presentation as part of the Best of ASCO program. Again, Plaintiff did not allege that any specific facts were misleading or false in the May 4 press release in which Immunomedics announced

the updated phase 2 results of IMMU-132 in patients with metastatic triple-negative breast cancer will be presented at ASCO annual meeting. With respect to the filing of the Form 10-Q, Sullivan and Pfreundschuh signed the Form 10-Q, not Kirsh, Stark, Markison or Paetzold. Compl. ¶ 55. After searching the Complaint in depth, the Court cannot find sufficient factual allegations to support deliberate misinformation by Kirsh, Stark, Markison or Paetzold. Moreover, the Court does not find facts that cast reasonable doubt that issuing any of the above press releases or the Form 10-Q was not the product of reasonable business judgment by Kirsh, Stark, Markison or Paetzold.

With respect to the first count of breach of fiduciary duty, as discussed above, there are no alleged facts that indicate deliberate misinformation to support the allegations of false or misleading statements. Thus, the breach of duty of loyalty fails. Moreover, with respect to the allegations that the Directors breached the duty of care, Immunomedics' Certificate of Incorporation exculpates directors for violations of the duties of care consistent with Del. Code § 102(b)(7).

Claims of waste are derivative claims. Shearin v. E. F. Hutton Group, Inc., 652 A.2d 578, 591 (Del.Ch.1994) ("A claim for corporate waste is classically derivative."). Claims of breach of fiduciary duty on the part of directors will also regarded as derivative claims unless the injury to shares is distinct. See

Small v. Goldman, 637 F. Supp. 1030 (D.N.J.1986) (holding plaintiff had individual cause of action arising out of conspiracy by directors to compel sale of plaintiff's shares below value); see also Strasenburgh v. Straubmuller, 146 N.J. 527, 552-553 (1996). There are no allegations here that indicate that the injury to the shares is distinct.

Furthermore, Plaintiff's unjust enrichment claim is duplicative of the breach of fiduciary duty claim. Plaintiff asserts the same factual allegations to support both claims. Plaintiff's unjust enrichment claim is premised on economic gain purportedly realized by the directors as a result of their wrongful acts and false and misleading statements. See Calma ex rel. Citrix Sys., Inc. v. Templeton, 114 A.3d 563, 592 (Del. Ch. 2015)(instructing that where an unjust enrichment claim is duplicative of the breach of fiduciary duty claim and fiduciary claims fails as a matter of law, an unjust enrichment claim must also fail on a motion to dismiss.) Here, factual allegations set forth by Plaintiff do not support a claim of breach of a fiduciary duty, therefore the unjust enrichment claim similarly fails as a matter of law.

Plaintiff's original Complaint fails the Aronson test and would not survive a motion to dismiss, thus failing the Braddock test. Plaintiff was required to make a demand or plead demand futility as to the new board. Plaintiff, however, did not serve a demand on the new board and did not plead any factual allegations

demonstrating demand futility as against the new board. Accordingly, Plaintiff's Complaint is dismissed without prejudice.

## III. CONCLUSION

Plaintiff failed to plead demand futility as to the new board, therefore Defendants' motion to dismiss is GRANTED.