

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: BRANSTEN, EILEEN Justice

PART 3

KUMARI, MINAKSHI

INDEX NO. 653016/2015

MOTION DATE 03/29/2016

- v -

OCH, DANIEL

MOTION SEQ. NO. 001

Table with 2 columns: Description of papers and No(s). Rows include: The following papers, numbered 1 to 3, were read on this application to/for dismiss; Notice of Motion/ Petition/ OSC - Affidavits - Exhibits (1); Answering Affidavits - Exhibits (2); Replying (3).

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

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

DATE: 9/ 20 /2016

Signature of Eileen Branstetter and text: BRANSTEN, EILEEN, JSC

- 1. CHECK ONE : [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. APPLICATION : [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE : [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE
[ ] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

-----X  
MINAKSHI KUMARI, Individually and on Behalf of  
All Others Similarly Situated and Derivatively on  
Behalf of OCH-ZIFF CAPITAL MANAGEMENT  
GROUP LLC,

Plaintiff,

-against-

Index No. 653016/2015  
Motion Date: 3/29/2016  
Motion Seq. No. 001

DANIEL OCH, DAVID WINDREICH, JOEL  
FRANK, ALLEN BUFFERD, J. BARRY  
GRISWELL, JEROME KENNEY, and  
GEORGANNE PROCTOR,

Defendants,

-and-

OCH-ZIFF CAPITAL MANAGEMENT GROUP LLC,

Nominal Defendant.

-----X  
**BRANSTEN, J.**

This matter comes before the court upon the motion of Defendants Daniel Och, David Windreich, Joel Frank, Allen Bufferd, J. Barry Griswell, Jerome Kenney, and Georganne Proctor (collectively, "Defendants") to dismiss Plaintiff's complaint pursuant CPLR 3211(a)(1), CPLR 3211(a)(7), Delaware Court of Chancery Rule 23.1, and 6 Delaware Code § 18-1003. Defendants are current officers on the Board of Directors of Och-Ziff Capital Management Group LLC ("OZM" or the "Company"). Plaintiff's

complaint asserts five derivative causes of action on behalf of the Company, including breaches of fiduciary duty and other misconduct based on Defendants' alleged violations of anti-bribery laws and disclosure laws that led to a Federal investigation of the Company.

For the reasons that follow, Defendants' motion to dismiss the Complaint will be granted.

**I. Background<sup>1</sup>**

a. The Company

Founded by Defendant Daniel S. Och in 1994, the Company is a publicly owned investment manager that provides advisory services and invests in equity and real estate markets. (Compl. ¶ 20.) Och serves as OZM's Chief Executive Officer and has a controlling interest in the Company. (Compl. ¶ 13.) Defendant David Windreich is Head of U.S. and European Investing for OZM and a member of OZM's Board of Directors and Partner Management Committee. The remaining individual Defendants are also on the Company's Board. (Compl. ¶¶ 11-19.)

According to Plaintiff, Och is significantly involved in almost all of the Company's business and has the ability both to elect all other members of the Company's Board and to determine the outcome of all matters requiring shareholder approval. (Compl. ¶ 23.)

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<sup>1</sup> Unless otherwise noted, the facts described herein are taken from Plaintiff's Complaint.

b. The Regulatory and Criminal Investigations

According to Plaintiff, between 2007 and 2011, the Company's Board caused the Company to engage in bribery, illegal kickbacks, and other criminal activities in several African countries. (Compl. ¶¶ 52-100.) Unbeknownst to the Company's shareholders, beginning in 2011, the Company received several subpoenas from the SEC and requests for information from the Department of Justice ("DOJ") regarding the Company's activities in Africa. (Compl. ¶¶ 33-42.) Moreover, throughout 2012 and 2013, Defendants caused the Company to issue regulatory disclosures and press releases that materially misrepresented or omitted the fact that the Company had repeatedly violated anti-bribery laws and that the Company was being investigated by the DOJ and SEC. (Compl. ¶ 32.)

On February 2, 2014, the Wall Street Journal ("WSJ") reported that the DOJ had started a criminal investigation of certain private equity firms, including the Company, regarding possible violations of anti-bribery laws, and specifically detailed suspicious transactions. (Compl. ¶¶ 33-36.) Following this news, the Company's stock fell 6.7%. (Compl. ¶ 37.) Thereafter, on March 18, 2014, OZM filed its annual Form 10-K report with the SEC, which reiterated the Company's previously stated quarterly and year-end financial results, and also confirmed that the Company had been under investigation by the SEC and the DOJ since 2011 for, among other things, violations of the Foreign Corrupt Practices Act ("FCPA"). (Compl. ¶¶ 41-42.) By April 2014, after a series of news articles were published about the investigations, which specifically related to OZM investments in

the Democratic Republic of the Congo, Libya and Zimbabwe, OZM stock had fallen 10%. (Compl. ¶¶ 43-47.)

c. The Stokes Derivative Action

In May 2014, a putative shareholder derivative action was filed, asserting that the Company's directors breached their fiduciary duties in connection with previously explained bribery allegations. *See Stokes v. Och, et al.*, Index No. 651663/2014. The *Stokes* plaintiff claimed that demand on the Board would have been "futile" as the Board was "incapable of making an independent and disinterested decision to institute and vigorously prosecute the action." *See* Affirmation of Robert Serio ("Serio Affirm.") Ex. I. On July 27, 2015, the Honorable Lawrence K. Marks dismissed the complaint, concluding that "plaintiff has not met his burden of establishing that a demand to the board would be futile either because of a lack of control of the board over the CEO or because of potential individual liability of [certain directors]." (Serio Affirm Ex. J.)

d. The Jha Derivative Action

In August 2014, a putative shareholder derivative action was filed in the Southern District of New York. *See Jha v. Och, et al.*, No 14-CV-6332 (S.D.N.Y.). The plaintiff in that case similarly asserted demand "futility" based on the directors' "engage[ment] in the alleged wrongdoing." *Id.* Following the filing of the defendants' motion to dismiss in September 2014, the plaintiff voluntarily discontinued the action.

e. The Instant Action Shareholder Demand

On October 29, 2014, Plaintiff Minakshi Kumari issued a demand to OZM's Board, based on the individual Defendants' knowledge of and participation in the aforementioned reckless and illegal conduct. (Compl. ¶¶ 136-39.) On behalf of OZM's shareholders, Plaintiff specifically requested damages sustained by the Company because of Defendants' breaches of their fiduciary duties, including bonuses Defendants received that are recoverable under Sarbanes-Oxley and/or New York law. (Compl. ¶ 139.)

On November 6, 2014, independent counsel informed Plaintiff that the Board created a Demand Review Committee to review Plaintiff's claims. (Compl. ¶ 140.) After further inquiry by Plaintiff as to the status of the demand, counsel for the Board stated, via letter dated May 12, 2015, that the Board unanimously voted not to pursue the demand because it "could compromise the Company's position in the government investigations." (Compl. ¶ 142.)

In September 2015, following the Board's refusal, Plaintiff commenced this action, alleging the following: (1) breach of fiduciary duty and waste of corporate assets; (2) aiding and abetting the Board's breaches of fiduciary duty; (3) unjust enrichment; (4) contribution and indemnification; and (5) gross mismanagement.

**II. Discussion**

In moving to dismiss, Defendants first argue that the Board's refusal of the demand was protected by the business judgment rule under applicable Delaware law.

Defendants further argue that by making a pre-suit demand on the Board, Plaintiff concedes the independence of the Board and is otherwise collaterally estopped from challenging the independence of the Board. In addition, Defendants maintain that Plaintiff has not pleaded the particularized facts necessary to overcome the business judgment rule. In opposition, Plaintiff argues that she has adequately pleaded that the Board wrongfully refused her demand, rendering the protections of the business judgment rule unavailing.

a. Applicable Delaware Law

Under New York choice-of-law principles, “substantive issues such as issues of corporate governance, including threshold demand issue, are governed by the law of the state in which the corporation is chartered...” *Lerner v. Prince*, 119 A.D.3d 122, 127-28 (1st Dep’t 2014). Since OZM is a Delaware corporation, this Court must apply Delaware law.

In Delaware, if a shareholder demand is rejected by the board, “the board decision is entitled to the presumption of the business judgment rule and the burden is on the shareholder to allege facts with *particularity* which create reasonable doubt that the directors’ action was entitled to the [presumption].” *Lerner v. Prince*, 36 Misc.3d 297, 306 (Sup. Ct. N.Y. Cnty. May 15, 2012) (emphasis added), *aff’d*, 119 A.D.3d 122 (1st Dep’t 2014) (applying Delaware law); *see also Spiegel v. Buntrock*, 571 A.2d 767, 774 (Del. 1990) (explaining that the board’s decision is presumed to be made “on an informed

basis, in good faith, and in the honest belief that the action taken was in the best interests of the company”). A plaintiff must show that the board’s decision not to sue was made in bad faith or based on an unreasonable investigation of the claims. *See In re Merrill Lynch & Co., Inc., Sec. Derivative & ERISA Litig*, 773 F.Supp.2d 330, 345 (S.D.N.Y. 2011) (applying Delaware law), *aff’d sub nom Lambrecht v. O’Neal*, 504 F. App’x 23 (2d Cir. 2012).

b. Analysis

Plaintiff alleges that she made demand on the Board to take action against certain OZM executives on October 29, 2014. (Compl. ¶ 139.) Specifically, Plaintiff demanded “(i) the amount of damages sustained by the Company as a result of [the executives’] breaches of fiduciary duties alleged and (ii) all bonuses, restricted stock, stock options...recoverable...” *Id.* On November 6, 2014, Plaintiff received a letter from counsel on behalf of the Demand Review Committee, stating that it was hired to assist the committee in reviewing the demand. (Compl. ¶ 140.) On April 13, 2015, after receiving no further correspondence on the issue, Plaintiff contacted counsel regarding her demand. (Compl. ¶ 141.) Subsequently, on May 12, 2015, counsel for the committee sent a letter to Plaintiff, explaining that based on the committee’s recommendation, the Board unanimously rejected the demand because a suit “could compromise the Company’s position in the government investigations.” (Compl. ¶¶ 142-43.)



In addition, Plaintiff asserts that the Board's refusal is "not surprising" because the directors "engaged in the alleged wrongdoing and therefore have interests averse to performing a fair, unbiased investigation." (Compl. ¶¶ 143.) Plaintiff further alleges that the individual Defendants have no "willingness to bring their conduct to light" and their "outright refusal" to investigate said misconduct shows their inability to "exercise independent, objective judgment" in deciding whether to pursue the claims. *Id.*

As explained above, "when a board refuses a demand, the only issues to be examined are the good faith and reasonableness of its [post-demand] investigation." *See Levine v. Smith*, 591 A.2d 194, 212 (Del. 1991) (quoting *Spiegel v. Buntrock*, 571 A.2d 767, 777 (Del. 1990)). To survive a motion to dismiss based on a board's protection under the business judgment rule, a shareholder must plead the Board's lack of good faith and reasonableness with particularity. *See Lerner*, 36 Misc.3d at 306. Plaintiff, however, has failed to do so.

First, Plaintiff fails to allege any actions taken by the Board, post-demand, that suggest bad faith or unreasonableness. Instead, Plaintiff re-alleges pre-demand wrongful conduct against certain OZM executives, namely, Daniel Och, founder and CEO of OZM. Further still, Plaintiff does not dispute that the Board formed the Demand Review Committee with two outside directors, which hired independent counsel to assist in reviewing Plaintiff's demand. *See Serio Affirm. Ex. P.* Thus, Plaintiff's allegations lack the particularity required to create a "reasonable doubt" as to the Board's good faith and

reasonableness in considering her demand. *Lerner v. Prince*, 36 Misc.3d 297, 306 (Sup. Ct. N.Y. Cnty. May 15, 2012).

In opposition, Plaintiff nonetheless maintains that she could not plead wrongful refusal with particularity because the Demand Review Committee did not provide a “detailed description of [its] investigatory efforts.” (Mem. in Opp. at 1.) However, “under Delaware law, the board was not required to send [] a detailed letter explaining its refusal with a point-by-point response to each [of the claims].” *Espinoza v. Dimon*, 807 F.3d 502, 506 (2d Cir. 2015) (explaining that such a requirement would incentivize shareholder plaintiffs to bring a litany of claims against the board of directors). Further still, “[w]hile a board of directors has a duty to act on an informed basis in responding to a demand ..., there is obviously no prescribed procedure that a board must follow.” *Levine v. Smith*, 591 A.2d 194, 214 (Del. 1991).

Here, the demand refusal letter indicates that the Demand Review Committee convened four times to discuss Plaintiff’s demand from December 2014 through April 2015 and held a telephone conference on the issue on April 24, 2015. *See Serio Affirm.*

Ex. P. The letter further provides that the committee:

discussed several factors in considering [the Demand], including the likelihood of success of [Plaintiff’s claims] ...potential defenses to the claims, the cost of undertaking an investigation and pursuing the claims...and the potential impact on the ongoing government investigations...

*Id.* Counsel further explained that the committee determined that many of Plaintiff’s claims were indemnification-based claims that were dependent on the outcome of the

government investigations, but, because of that fact, Plaintiff's claims could be revisited upon resolution of those investigations. *Id.* The above indicates that the Demand Review Committee considered Plaintiff's demand and the nature of her claims over the course of a few months, and thus, this Court concludes that the "only reasonable inference" to be drawn from the letter is that the Board acted in good faith and reasonably with respect to Plaintiff's demand. *Espinoza v. Dimon*, 807 F.3d 502, 507 (2d Cir. 2015) (citing *Levine v. Smith*, 591 A.2d 194, 214 (Del. 1991)).

Since Plaintiff has failed to plead the particularized allegations necessary to rebut the presumption that the Board acted "on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company," Defendants motion to dismiss must be granted. *Spiegel v. Buntrock*, 571 A.2d 767, 774 (Del. 1990). In light of the conclusion, Defendants' remaining argument that Plaintiff is collaterally estopped from bringing this action need not be considered.

*(Order follows on next page.)*

**III. Conclusion**

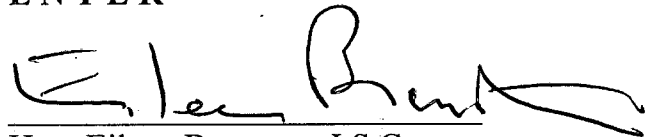
For the foregoing reasons, it is

ORDERED that Defendants' motion to dismiss is granted; and the complaint is dismissed with costs and disbursements to Defendant as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York  
September 20, 2016

**ENTER**



Hon. Eileen Bransten, J.S.C.