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W.D. Ark.: Adios to Wal-Mart director breach-of-duty claims re: Mexican
bribes, \(Apr. 1, 2015\)](#)

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Securities & Corporate > Content > News & Blogs > Securities Regulation Daily > 2015 > April 2015 > April 1, 2015 > CORPORATE GOVERNANCE—W.D. Ark.: Adios to Wal-Mart director breach-of-duty claims re: Mexican bribes, (Apr. 1, 2015)

By Amy Leisinger, J.D.

The Western District of Arkansas has dismissed a consolidated shareholder action against current and former directors of Wal-Mart Stores, Inc. alleging that they violated their fiduciary duties in acquiescing in alleged bribery of Mexican officials. According to the court, the plaintiffs failed to sufficiently plead that a majority of Wal-Mart's board knew about or consciously ignored the alleged wrongful conduct and did not show that a majority of the director defendants faced a substantial likelihood of personal liability for the purposes of establishing demand futility (*In re Wal-Mart Stores, Inc. Shareholder Derivative Litigation*, March 31, 2015, Hickey, S.).

Background. When information about irregularities authorized by individuals at Wal-Mart de Mexico (Walmex) came to light, Wal-Mart conducted an investigation into whether the officials paid bribes to ensure quick approval of building permits and plans for new stores. The original investigation purportedly found “reasonable suspicion” that Mexico and U.S. laws were violated with “no defensible explanation” for millions of dollars in payments and related concealment. However, a later report stated that there was “no evidence or clear indication” of bribes. These issues were thereafter widely publicized in a *New York Times* article.

The plaintiffs filed a complaint alleging that the individual defendants breached their fiduciary duties of loyalty and good faith by permitting violations of foreign and federal laws by obstructing investigations and covering up violations. The plaintiffs also contended that the individual defendants violated the Exchange Act by causing Wal-Mart to make false or misleading statements in its proxy materials. The defendants moved to dismiss, arguing that the plaintiffs failed to adequately allege demand futility.

Demand futility. Under Delaware law, to demonstrate demand futility when alleging that directors made a conscious business decision in breach of their duties, a plaintiff must allege specific facts creating doubt that the directors are disinterested and independent or that the challenged transaction was the product of a valid exercise of business judgment. The plaintiffs alleged that the board made conscious decisions to condone and cover up criminal activity and that the individual defendants can be subject to personal liability for losses sustained as a result of their breaches of duty. The court, however, rejected the plaintiffs' contention that the defendants should have known about the alleged misconduct by virtue of their positions, noting that the complaint does not provide particularized facts from which to infer that a majority of the board had actual or constructive knowledge of the alleged misconduct. “Plaintiffs' allegations do not provide the particulars for what each Director Defendant knew, how he or she learned of the information, or when he or she learned of the information,” and “courts may not impute knowledge of wrongdoing to directors simply because they serve on the board or because the corporate governance structure requires that notice of the wrongdoing reach the board,” the court stated.

Because the plaintiffs failed to plead with particularity that a majority of the director defendants faced a substantial likelihood of personal liability compromising their ability to impartially consider a demand, the action was dismissed for failure to plead demand futility.

The case is [No. 4:12-cv-4041](#).

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Companies: Louisiana Municipal Police Employees' Retirement System; Wal-Mart Stores, Inc.

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