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Order on Plaintiffs' Motion to Add S. Laird Ellis, III and Francoise Ellis as Plaintiffs (ALAN B. THOMAS, JR.)

Alice D. Bonner
Superior Court of Fulton County

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Background

This motion to add plaintiffs arises out of a pending settlement through which Plaintiffs, Alan B. Thomas, Jr. and Heather McFarland would settle their direct claims with Defendants. The settlement calls for Plaintiffs Thomas and McFarland to transfer their Lecstar Corporation (“Lecstar” or “the Corporation”) shares to certain Defendants. Any such settlement would mean that these Plaintiffs would no longer be shareholders of Lecstar and, therefore, would lose standing to pursue derivative claims on behalf of the Corporation. To avoid harm to Lecstar and its other shareholders, before approving any such settlement, the Court permitted Plaintiffs Thomas and McFarland to file a motion to add plaintiffs, and on September 11, 2009, they filed a motion pursuant to O.C.G.A. 9-11-21 to add two new Plaintiffs, S. Laird Ellis, III and Francoise Ellis (the “Ellises”).

In opposition to Plaintiffs’ motion to add the Ellises, the Southridge Defendants argue that these potential plaintiffs should not be added because they do not have standing to sue. These Defendants contend that the Ellises lack standing because (1) they cannot fairly and adequately represent the interests of the Corporation, (2) they “failed to comply with the statutory demand requirements for bringing derivative claims,” and (3) their claims are barred by the applicable statute of limitations.

Standard

Under Georgia law, “[P]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.” O.C.G.A. § 9-11-21. “The determination of whether a

party should be added to a lawsuit lies within the discretion of the trial court, and that determination will not be disturbed on appeal absent a showing of abuse.”

Ellison v. Hill, 288 Ga. App. 415, 418 (2007).

Substantive Law

The Parties do not dispute that Texas substantive law controls this case. Texas law provides that “[A] shareholder may not commence or maintain a derivative proceeding unless the shareholder: (1) was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder by operation of law from a person that was a shareholder at that time; and (2) fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.” V.A.T.S. Bus. Corp. Act, Art. 5.14 (b).

Fair and Adequate Representation of Corporate Interests

As the Court noted in its January 16, 2009, Order on Defendants’ Motion for Summary Judgment, a trial court must decide whether a shareholder adequately represents the interests of the corporation, and that decision will not be disturbed absent abuse of discretion. Zeidman v. J. Ray McDermott & Co., Inc., 651 F.2d 1030, 1040 (5th Cir. 1981). A plaintiff in a shareholder derivative action must not have ulterior motives and must not be pursuing an external personal agenda. Smith v. Ayres, 977 F.2d 946, 949 (5th Cir. 1992). The Southridge Defendants argue that the Ellises’ earlier attempt to settle the derivative suit demonstrates a “conflict of interest” rendering them unable to adequately represent the interests of the Corporation. However, the Court finds that the Ellises have attempted to settle the derivative claims, not merely for

themselves, but for all of the remaining Lecstar shareholders who are not affiliated with the Defendants. The Court finds that this does not evidence a conflict of interest. In addition, the Court finds that there is no evidence that the Ellises “interests are antagonistic to those [they are] seeking to represent.” Williams v. Service Corp. International, 218 Ga.App. 10, 11, 459 S.E.2d 621, 622 (Ga. App. 1995). Nor is there any evidence that their attempt to settle did not have the best interest of the other shareholders in mind.

The Southridge Defendants point to Hornreich v. Plant Industries, Inc., 535 F.2d 550 (9th Cir. 1976), as authority for the proposition that attempts to settle a derivative claim render a shareholder inadequate to represent their corporation. In that case, the potential plaintiff had been fired as a result of a dispute with the very same entity that he sought to represent and had also used the threat of suit as leverage to settle his other claims. Id. at 551. Thus, Hornreich is distinguishable from the facts in this case.

The Southridge Defendants cite several factors that courts consider when determining whether a proposed derivative plaintiff can adequately and fairly represent a corporation. Citing Rothenberg v. Security Mgmt. Co., Inc., 667 F.2d 958, 961 (11th Cir. 1982), the factors the Southridge Defendants raise are: (1) indications that the plaintiff is not the true party in interest, (2) the degree of control exercised by the attorneys over the litigation, (3) the plaintiff’s unfamiliarity with the litigation and unwillingness to learn about the suit, (4) the lack of any personal commitment to the action on the part of the representative plaintiff, and (5) the degree of support received by the plaintiff from other

shareholders. The Southridge Defendants give great weight to the second factor and argue that the “degree of control exercise by the [Plaintiffs’] attorneys over the litigation is total.” The Court finds that Plaintiffs’ counsel’s involvement in and control over this case is no greater than that of other attorneys in similar cases. The Court also finds that three of the factors cited by the Southridge Defendants have been satisfied by Plaintiffs. Specifically, the Court finds that (1) there is no evidence that the Ellises are not the true parties in interest as they are Lecstar shareholders and were shareholders at the time the alleged wrongs in this case occurred, (2) the Ellises are generally familiar with this litigation and have demonstrated a willingness to learn more about the suit as evidenced by their preparation for and attendance at the hearing on this motion, and (3) the Ellises have shown personal commitment to this suit.

Demand Requirement

The Southridge Defendants argue that “the Ellises lack standing to bring a derivative claim because they failed to comply with the statutory demand requirement for bringing derivative claims.” Under the Texas Business Corporations Act a derivative proceeding cannot be commenced unless a shareholder files a written demand, and waits ninety days for the corporation to take suitable action or until the shareholder is notified that the demand has been rejected by the corporation, unless the corporation is suffering irreparable injury or such injury would result from waiting ninety days. V.A.T.S. Bus. Corp. Act. 5.14 (c). As this Court ruled in its January 16, 2009 Order, previous demands will “bind similarly situated shareholders making identical claims.” Pace v.

Jordan, 999 S.W.2d 615, 621 (Tex. App. 1999). “Judicial economy demands that identical claims, which in actuality belong to the corporation, be simultaneously disposed of by one demand.” Id. at 621. Here, the Ellises are in the same position as Plaintiffs Thomas and McFarland. They are all shareholders of Lecstar and are pursuing the same derivative claim on behalf of the Corporation.

Statute of Limitations

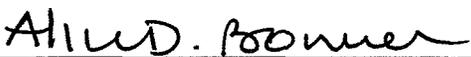
The Southridge Defendants argue that the Plaintiffs should not be allowed to add the Ellises as Plaintiffs because of a narrow exception under Georgia law that would require the Court to apply the Texas statute of limitations and render the Ellises’ claim time barred. The Southridge Defendants note that while the issue of relation back is generally a procedural issue governed by Georgia law, an exception to this rule exists when “the limitation is established as a condition precedent to the action by the statute which creates the cause of action.” Gray v. Armstrong, 222 Ga.App. 392, 474 S.E.2d 280 (1996); See also Griffen v. Hunt Refining Co., 292 Ga. App. 451 (2008). When the exception applies, the statute of limitations of the state where the tort was committed governs so that here, Texas law would control the procedural issue of relation back. The Southridge Defendants argue that the demand requirement is such a “condition precedent.” While the *demand* requirement may be a condition precedent to a shareholder derivative suit, it is not a *[statute of] limitation*. As it did in its January 16, 2009 Order, the Court finds that Georgia law prevails on the issue of relation back.

Pursuant to O.C.G.A. § 9-11-15(c), relation back is allowed whenever there is an identity of interests between the old and new parties so that it will not create prejudice to the opposing party. If leave is sought to change or add plaintiffs after the expiration of the statute of limitation, provided "the claim ... asserted in the amended [complaint] arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original [complaint], the amendment relates back to the date of the original [complaint]." Morris v. Chewning, 201 Ga. App. 658, 659, (1991) (citing OCGA § 9-11-15(c)). The Court finds that the Ellises share a unity of interest with Plaintiffs Thomas and McFarland such that Defendants are not prejudiced and that the Ellises would be asserting the same claims as originally asserted.

Conclusion

The Court finds that the Ellises were shareholders of Lecstar at the time the acts complained of in the Complaint were committed and that the Ellises can fairly and adequately represent the interests of Lecstar in a derivative suit. Accordingly, Plaintiffs' Motion to Add S. Laird Ellis, III and Francois Ellis as Plaintiffs is **GRANTED**.

SO ORDERED this 17 day of December, 2009.


ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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