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Order (DONALD AND DONNA GOLDSTEIN)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
MAR 13 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

DONALD AND DONNA GOLDSTEIN, Derivatively on behalf of Nominal Defendant WELLS REAL ESTATE INVESTMENT TRUST, INC.,	)	
Plaintiffs,	)	
v.	)	**Civil Action File No. 2007-CV-139004**
LEO F. WELLS, III, et al.	)	
Defendants,	)	
-and-	)	
WELLS REAL ESTATE INVESTMENT TRUST, INC.,	)	

ORDER

Counsel appeared before the Court on February 22, 2008, to present oral argument on Defendants' Motion to Dismiss. After reviewing the record of the case, the briefs submitted by the parties on this issue, and the arguments presented by counsel, this Court finds as follows:

I. Facts

Wells Real Estate Investment Trust, Inc. ("Wells REIT"), a Maryland corporation with its principal place of business in Georgia, was a limited term real estate trust that, per its Articles of Incorporation, must liquidate or list itself on a stock exchange by January 30, 2008. Wells REIT's Board of Directors decided to acquire two of its three primary advisors, Wells Real Estate Advisory Services ("WREAS") and Wells Government Services Inc. ("WGS"), (hereinafter, the "Internalization") prior to the 2008 deadline. After the Internalization, Wells REIT amended its Articles of Incorporation and

extended the liquidation deadline. Both the Internalization and the deadline extension were ratified by separate shareholders' votes.

This case is a derivative action brought by certain complaining shareholders on behalf of Wells REIT that challenges the terms of the Internalization and its related shareholder proxy statement, alleges that the Internalization delayed or hindered meeting the 2008 deadline, and challenges ongoing advisor services contracts with Wells Advisory Service I, LLC ("WASI").

The Internalization, which closed in April 2007, was investigated by a special committee (the "Internalization Committee"), approved by the Board of Directors, and ratified by the shareholders. On August 1, 2007, unidentified Wells REIT shareholders sent a demand letter to Wells REIT. On August 14, 2007, counsel for the complaining shareholders, counsel for Wells REIT, and counsel for the independent directors met to discuss the demand letter. After the meeting, counsel for Wells REIT responded to shareholders' counsel with a formal request for additional information and to identify the complaining shareholders. On August, 24, 2007, this suit was filed, and shortly thereafter Wells REIT's Board of Directors formed a demand review committee (the "DRC") to investigate the demand letter. In October, the DRC issued a report recommending that the demand letter be rejected. Thereafter, the Board of Directors rejected the demand and filed the motion to dismiss[1] addressed in this Order.

II. Standards

A party seeking a motion to dismiss brought under OCGA § 9-11-12(b)(6) for failure to state a claim upon which relief can be granted must demonstrate that plaintiff's

[1] The individual director Defendants moved on October 31, 2007, to join in Wells REIT's Motion to Dismiss.

allegations in the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof. Common Cause/Georgia v. City of Atlanta, 279 Ga. 480, 481 (2005).

Defendants seek a dismissal based upon the determination of the DRC to reject the demand letter pursuant to O.C.G.A. § 14-2-744. See also, MD CODE ANN., Corp. & Assoc. §§ 3-203, 2-401 (West 2007). The DRC report, as well as other documents such as minutes from the Board of Directors, have been attached as exhibits to the various briefs on this issue. In Thompson v. Scientific Atlanta, Incorporated, 275 Ga. App. 680, the Georgia Court of Appeals reviewed a trial court's order dismissing a derivative suit pursuant to O.C.G.A. § 14-2-744, where a special litigation committee had rejected a shareholder's demand letter. The Court of Appeals acknowledged that a motion to dismiss, "under these circumstances is perhaps best considered as a hybrid summary judgment motion for dismissal... " Id. at 683 (quoting Zapata Corp. v. Lamdonado, 430 A.2d 779 (Del. 1981)). Thus, the DRC report and other documents related to the DRC's review are properly before the Court on this motion. In light of the DRC report, Plaintiffs bear the burden of coming "forward with evidence to support [their] claim of lack of independence." Id.

The internal affairs of a corporation, such as actions involving officers and directors, are regulated by the law of the state of incorporation. Diedrich v. Miller & Meier & Assoc., Architects & Planners, Inc., 254 Ga. 734, 735 (1985). Whether or not the director defendants breached their fiduciary duties to Plaintiffs and the other Wells REIT shareholders is determined in accordance with Maryland law under the internal affairs doctrine.

III. Adequacy of Shareholders' Demand

Defendants petition the Court to grant its motion to dismiss on the grounds that the shareholders' demand letter was inadequate as a matter of law. Defendants argue that the demand letter failed to identify the complaining shareholders and provided insufficient factual information regarding their complaints and requested actions.

Citing Smalcho v. Virkelo, 576 F. Supp 1439 (Del. Dist. 1983), Defendants argue that Plaintiffs' failure to respond to their August 8th and 22nd requests to supplement the demand letter (identify the shareholders and provide additional factual information) before filing suit rendered the demand inadequate. "[T]he identity of the shareholder requesting board action is equally important information for the board and the Court cannot expect a board of directors to act upon a shareholder's request without such information." Id. at 1445 (upholding a trial court's dismissal of a shareholder derivative action where the shareholders failed to supplement their demand letter by identifying the complaining shareholders before filing suit).

Plaintiffs in this action, however, filed a verified Complaint on August 24, 2007, and in the Complaint (Paragraph 82) stated that Plaintiffs, Mr. and Mrs. Goldstein, served a demand letter on Wells REIT's Board of Directors.[2] Cf., Smalcho, 576 F. Supp. 1439 (plaintiff's complaint in that case was not verified). In addition, counsel for the independent directors represented to the Court that the DRC investigation focused on both the demand letter and the Complaint. With the combined information, the Court finds Defendants had information necessary to confirm the identity of the complaining shareholders for purposes of the DRC investigation.

[2] On February 21, 2008, Mr. Goldstein filled an affidavit with the Court to dispel any confusion regarding whether he and his wife were the unidentified shareholders in the August 1, 2007 demand letter.

Second, Defendants argue that the demand letter contained insufficient factual information for the Board to investigate and act upon. The purpose of a demand letter is "to give directors a fair opportunity to initiate the action requested by appellants." Bender v. Schwartz, 917 A.2d 142, 154 (Md. App., 2007).

The demand letter in this case identifies the Internalization and challenges it on the grounds that Wells REIT overcompensated the advisors, granted excessive employment agreements to certain executives, and continued an advisory relationship with WASI. In addition, the demand letter alleges that the Board failed to disclose a contemporaneous Lex-Winn offer to the shareholders or to negotiate in good faith with Lex-Winn, whom the complaining shareholders allege offered a higher per-share price and discouraged the Internalization. Plaintiffs additionally accuse interested directors of breaching their fiduciary duties and engaging in self-dealing transactions. The Court finds that all of these factors, combined with the August 14th meeting, provided the Board with sufficient information to proceed with its investigation.

IV. Reasonableness of DRC Review

Upon receiving a shareholder demand letter, a Maryland corporation's board of directors "must conduct an investigation into the allegations in the demand" and determine whether to pursue a lawsuit. Bender v. Schwartz, 917 A.2d 142,152 (Court of Special Appeals 2007). If the board of directors refuses a demand, then the complaining shareholder may bring a "demand refused" action.[3] Id.

[3] The timing of this lawsuit departs from that of a traditional derivative suit. Here, Plaintiffs presented their demand letter and then filed the Complaint three weeks later before the Board of Directors had completed their investigation or made a recommendation. Because, however, Plaintiffs' demand was ultimately denied, for purposes of this section, the Court will evaluate this case as a classic demand refused action.

A board of directors' investigation and refusal of a demand is evaluated by courts under the business judgment rule because a board's decision whether to pursue litigation is treated with substantial deference. A shareholder's suit may proceed, however, if the shareholder can demonstrate that either (i) "the board or committee's investigation or decision was not conducted independently and in good faith," or (ii) "the decision was not within the realm of sound business judgment." Id. (citing Levine v. Smith, 591 A.2d 194, 212 (Del. 1991); Scalasi v. Grills, 501 F.Supp.2d 356, 362-362 (E.D.N.Y. 2007). After making a demand upon a board of directors, the shareholder waives claims that the "board *cannot independently act* on the demand", but, instead, must allege that the board "*in fact* did not act independently... ." Bender v. Schwartz, 917 A.2d at 152 (emphasis in original).

A. Independence

Plaintiffs allege that the following facts demonstrate that the Board did not act independently in refusing their demand: (i) the overlap between the Board members on the Internalization Special Committee and the DRC, (ii) the Board of Directors' refusal of demand in another "factually similar" derivative suit challenging the internalization, and/or (iii) the representation of the DRC by the same independent counsel who represented the disinterested directors on the Internalization. Plaintiffs argue that the Board of Directors was essentially allowed to grade its own homework by allowing the same individuals (Directors and independent counsel) who recommended and approved the Internalization to review its propriety in the context of the demand letter.

Three of the Directors on the Internalization Committee also served on the four-member DRC. Plaintiffs complain that Mr. Cantrell, a newly elected Director, was not

put on the DRC. On any board of directors, overlapping committee membership is a practical reality. Without more, this alone is insufficient to challenge the independence of the DRC's review. See, e.g., Scalisi v. Grills, 501 F.Supp.2d 356, 362-362 (upholding a committee's independence for purposes of applying the business judgment rule to a demand refusal); Webowsky v. Collumb, 362 Md. 581, 618 (Md. 2001) (board members' participation in underlying transactions did not demonstrate lack of independence sufficient for excuse of demand). Similarly, refusing a factually-related demand and/or participating in a defense of a factually-related suit is insufficient to establish lack of independence. Scalisi, 501 F.Supp.2d at 362-363.

Plaintiffs' third challenge to the DRC's independence relates to its legal representation by Rogers & Hardin, LLP ("R&H"). R&H acted as special outside counsel to the Internalization Committee and to the DRC. See, In Re Consumers Power Co. Derivative Litigation, 132 F.R.D. 455, 474 (E.D. Mich. 1990) ("the integrity of a special litigation committee can be undermined if the attorneys represented and advising it have a sufficient conflict of interest to taint the committee's investigation and decision-making."). Plaintiffs challenge R&H's dual representation of the Internalization and DRC Committees as an opportunity for R&H to review its own performance and advice. Plaintiffs argue that for R&H to advise the DRC to take action on the demand would have been a criticism of the Internalization Committee's work, which was done under the guidance of R&H.

Retaining the same special counsel to advise the Internalization Committee and the DRC, however, does not "taint" the independence of the DRC and remove it from the protection of the business judgment rule. See, e.g., In Re Boston Scientific Corp.

Shareholders' Litigation, 2007 WL 1696995 (S.D.N.Y 2007) (upholding the application of the business judgment rule to a demand committee's investigation where the committee retained the same counsel to advise it as advised the transaction being challenged in the demand); Madvig v. Gaither, 461 F. Supp. 2d 398, 408 (W.D.N.C., 2006) (finding no conflict to retain the same counsel to advise the audit committee and who handled the SEC allegations). Practical considerations such as the time and money required to bring in new counsel, catch them up to speed, and perform the investigation support the conclusion that outside counsel who advised a company on an underlying transaction are not necessarily conflicted out of advising a demand committee investigating that transaction.

Plaintiffs also challenge R&H's impact on the DRC's independence because it represents the individual shareholders in this litigation. In Re Consumers Power Co. Derivative Litigation, 132 F.R.D. 455, 474 (E.D. Mich. 1990). In In Re Consumer Power, the Court analyzed the existing attorney relationships and found a potential for a law firm's involvement to negate the independence of the special investigation committee where the law firm represented the interested directors on issues raised in the demand. Defendants, however, argue that in this case R&H has been aligned only with the independent directors in their capacity as both Board of Director committee members (Internalization and DRC) and now as defendants in this case. Defendants argue that the conflict opined upon in In Re Consumer Power would be analogous to R&H representing the interested directors and the corporation, which is not the factual situation before the Court. Without more, the Court declines to find that R&H's

involvement in the events giving rise to the law suit and in this litigation negate the DRC's independence.[4]

B. DRC Investigation, Review, and Report

Plaintiffs also challenge the sufficiency of the DRC investigation, review and report arguing that it was neither reasonable nor based in sound business judgment. The reasonableness of a committee review is evaluated by factors such as (1) retention of independent counsel, (2) production of a report, including its length, procedures, reasoning and supporting documentation, (3) proper identification of the issues, investigation/interviewing of officers, directors and/or employees, (4) review of relevant documents, and (5) demand committee meetings. Bender v. Schwartz, 917 A.2d 142, 156. Plaintiffs specifically challenge the DRC review on the grounds that the DRC performed insufficient interviews (i.e., did not interview the interested directors), reviewed an insufficient number of documents related to the Internalization, and failed to adequately meet and/or deliberate regarding the demand.

On August 22, 2007, the Wells REIT Board of Directors formed the DRC, which was comprised of four independent Directors represented by R&H as outside counsel. The DRC held a telephonic meeting on September 7, 2007, and in-person meetings on September 12th and the 20th, which included presentations from Wells REIT's financial advisors. In addition, Defendants state that the DRC reviewed nine binders of documents relating to the Internalization including advisor reports and Board meeting minutes. Defendants also argue that the DRC's investigation was reasonable because it relied, in part, on its familiarity with and investigations regarding the Internalization,

[4] The issues raised by Plaintiffs' counsel in this regard speak more to potential conflicts between multiple clients and potential disqualification issues. In light of the facts of this case, however, these concerns alone are not sufficient to negate the DRC's independence.

including prior investigations in factually similar law suits. See Frank v. LoVetere, 363 F.Supp.2d 327, 337 ("Plaintiff points to no authority or policy reason why it would be unreasonable as a matter of law for the [demand committee] to rely on a knowledgeable corporate official's expertise derived from his own involvement with the transaction when it occurred."). On September 24, 2007, the DRC presented its conclusions to the Board and followed up with a 57-page report plus numerous exhibits on October 4, 2007.[5]

In its Report, the DRC concluded that there were inadequate facts to support a claim of breach of fiduciary duty, waste of corporate assets, unjust enrichment, or usurpation of corporate opportunity. Finally, the DRC concluded that pursuing this litigation was not in the best interest of the company because of the expense, disruption to business operations, distraction of management, and harm/difficulty in undoing the Internalization.

Based upon the foregoing analysis, the Court finds that Plaintiffs have failed to raise facts sufficient to call into question the reasonableness of the DRC review. In light of the Bender factors, this Court holds that the DRC investigation, review, and report were reasonable and grounded in sound business judgment.

[5] Plaintiffs concede that the DRC correctly identified and investigated the relevant issues, which were laid out in the demand letter and discussed between counsel during their various meetings.

V. Conclusion

For the above stated reasons, Defendants' Motion to Dismiss is hereby **GRANTED**.

SO ORDERED, this 13 day of March, 2008.

Alice D. Bonner

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

Copies to:

Counsel for Plaintiffs
Corey D. Holzer, Esq.
Michael I. Fistel, Jr., Esq.
Marshall P. Dees, Esq.
H OLZER HOLZER & FISTEL LLC
1117 Perimeter Center West, Suite E-107
Atlanta, Georgia 30338
(770) 392-0090
(770) 392-0029 fax

Counsel for Plaintiffs
John C. Herman, Esq.
Ryan K. Walsh, Esq.
COUGHLIN STOIA GELLER RUDMAN & ROBBINS
3424 Peachtree ST., Suite 1650
Atlanta, GA 30326

Counsel for Nominal Defendant Wells Real Estate Investment Trust, Inc.
J. Kirk Quillian, Esq.
J. Timothy Mast, Esq.
Jamie Theriot, Esq.
TROUTMAN SANDERS LLP
Bank of America Plaza, Suite 5200
600 Peachtree Street
Atlanta, GA 30308
(404) 885-3000
(404) 885-3900 fax

Counsel for Leo F. Wells, III, Douglas P. Williams, Randall D. Fretz, Donald A. Miller, Robert E. Bowers, and Wells Capital, Inc.
Michael R. Smith, Esq.
Dan S. McDevitt, Esq.
Michael J. Cates, Esq.
Bethany M. Rezek, Esq.
KING & SPALDING, LLP
1180 Peachtree St.
Atlanta, GA 30309
404 572 4600
404 572-5100 fax

Counsel for Michael R. Buchanan, Richard W. Carpenter, Bud Carter, William H. Keogler, Jr., Donald S. Moss, Neil H. Strickland, and W. Wayne Woody
Tony Powers, Esq.
Kimberly Myers, Esq.
ROGERS & HARDIN LLP
229 Peachtree Street NE
2700 International Tower
Atlanta, GA 30303
404 522.4700

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