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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
LEAD CIVIL ACTION
NO. 07-0629 BLS1

IN RE SAPIENT CORPORATION
DERIVATIVE LITIGATION[1]

MEMORANDUM AND ORDER
ON MOTIONS TO DISMISS

This matter is before the Court on three motions pursuant to Mass. R. Civ. P. Rule 12(b)(6) and Rule 23.1 to dismiss this consolidated action. The motions are: Defendants' [except Jerry A. Greenberg] Motion to Dismiss the Consolidated Derivative Complaint, Paper #15; Defendant Jerry A. Greenberg's Motion to Dismiss the Consolidated Derivative Complaint, Paper #16; and Defendant Susan D. Cooke's Motion to Dismiss, Paper #25. The grounds for the motions are, among others, that the now-consolidated complaint, (the "Complaint"),[2] does not comply with Rule 23.1 because the plaintiffs failed to make pre-suit demands upon the Sapient Board of Directors and because the plaintiffs have failed to allege with particularity sufficient grounds to excuse their failure to make such demands. Additionally, the various defendants move for dismissal on grounds that the complaint fails to state a claim.

BACKGROUND

Sapient Corporation ("Sapient") is a Delaware corporation, said to be headquartered in

[1] See Papers #5, filed in Middlesex County, consolidating cases captioned Federoff v. Greenberg, Middlesex No. 06-2939 and Hamilton v. Greenberg, No. 06-3131, and re-defining the caption of the consolidated action as "In re Sapient Corporation Derivative Litigation," and thereafter transferring the consolidated case to this Court. See also Papers ##7, 9 and 11 regarding transfer to the Business Litigation Session.

[2] The Complaint is Paper #30, was docketed on May 25, 2007, in lieu of the missing original.

Cambridge, Massachusetts. Sapient is a consulting company that provides business, marketing, and technology services.

The plaintiffs purport to be Sapient shareholders and have brought their consolidated derivative suit against six members of Sapient's eight-person Board of Directors and certain of its executive officers. The essence of the Complaint is that Sapient's Board of Directors, (the "Board"), and certain of its executive officers, despite their responsibility for maintaining and establishing internal controls and ensuring that Sapient's financial statements were based on accurate financial information, permitted Sapient to cause or facilitate certain back-dating of stock options, which now has resulted in the anticipated restating of certain historical financial statements.

On August 8, 2006, Sapient publicly announced that it was conducting an internal review of its stock-based compensation practices. The plaintiff Alex Federoff filed the first of these derivative actions shortly thereafter on August 17, 2006, and plaintiff Jerry W. Hamilton filed his complaint shortly thereafter. Neither of the consolidated suits were preceded by any demand, written or oral, that the Board take any particular action with respect to the plaintiffs' allegations. Instead, the plaintiffs assert that any demand upon the members of the Board should be excused because certain of the directors "are incapable of independently and disinterestedly considering a demand to commence and vigorously prosecute this action." Complaint para. 68.

Only six of the eight directors of Sapient at the time of the filing of either of the initial complaints, or at the time of filing of the consolidated Complaint, have been named as defendants. The remaining two of the eight directors, Jeffrey Cunningham ("Cunningham") and Hermann Buerger ("Buerger"), have not been named as defendants.

The Complaint identifies three groups of defendants: the Director Defendants, made up of Jerry A. Greenebrg ("Greenberg"), J. Stuart Moore ("Moore"), Darius W. Gaskins, Jr. ("Gaskins"), Bruce D. Parker ("Parker"), Dennis H. Chookaszian ("Chookaszian") and Gary S. McKissock ("McKissock"); the Option Recipient Defendants, made up of 17 Sapient present or former officers, including Gaskins and Parker; and the Individual Defendants, made up of the combination of the Director Defendants and the Option Recipient Defendants.

The Complaint, in para. 68, states the reasons why the plaintiffs have not made any demand on the Sapient Board. That paragraph reads as follows:

> 68. At the time this action was commenced, the Board consisted of eight directors: defendants Greenberg, Moore, Gaskins, Jr., Parker, Chookaszian and McKissock and directors Jeffrey M. Cunnigham and Hermann Buerger. The following directors are incapable of independently and disinterestedly considering a demand to commence and vigorously prosecute this action:
>
> a. Gaskins and Parker, because they are directly interested as recipients of the improperly backdated stock option grants complained of herein. Accordingly, Gaskins and Parker are incapable of independently and disinterestedly considering a demand to commence and vigorously prosecute this action against the Individual defendants;
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> b. Gaskins and Parker, because as members of the Compensation Committee during the relevant period, they directly participated in and approved the misconduct alleged herein, and are substantially likely to be held liable for breaching their fiduciary duties, as alleged herein. Moreover, by colluding with the other Option Recipient Defendants, as alleged herein, Gaskins and Parker have demonstrated that they are unable or unwilling to act independently of the other Individual Defendants;
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> c. Greenberg and Moore, because as Co-Chief Executive Officers during the relevant period, they directly participated in and approved the misconduct alleged herein, and are substantially likely to be held liable for breaching their fiduciary duties, as alleged herein. Moreover, by colluding with the other Option Recipient Defendants, as alleged herein, Greenberg and Moore have demonstrated that they are unable or unwilling to act independently of the other Individual Defendants;

d. Gaskins, Parker and Chookaszian, because as members of the Audit Committee during the relevant period, they directly participated in and approved the misconduct alleged herein, and are substantially likely to be held liable for breaching their fiduciary duties, as alleged herein. Moreover, by colluding with the other Option Recipient Defendants, as alleged herein, Gaskins, Parker and Chookaszian have demonstrated that they are unable or unwilling to act independently of the other Individual Defendants;

e. Greenberg, Moore, Gaskins, Parker, Chookaszian and McKissock, because as directors of the Company, they participated in and approved the Company's filing of false financial statements and other false SEC filings, as alleged herein, and therefore are substantially likely to be held liable for breaching their fiduciary duties. Moreover, by colluding with the other Option Recipient Defendants, as alleged herein, Greenberg, Moore, Gaskins, Parker, Chookaszian and McKissock have demonstrated that they are unable or unwilling to act independently of the other Individual Defendants; and

f. Greenberg and Moore, because their principal professional occupations are their positions as the Company's Co-chief Executive Officers, thus they stand to earn hundreds of thousands of dollars, in annual salary, bonuses, and other compensation. Accordingly, Greenberg and Moore are incapable of independently and disinterestedly considering a demand to commence and vigorously prosecute this action against the Individual defendants, particularly McKissock, who is currently a member of the Compensation Committee.

DISCUSSION

Given Sapient's status as a Delaware corporation, much of the argument for and against the motions to dismiss cites to Delaware law. The law of a corporation's state of incorporation provides the circumstances under which a pre-suit demand would be futile. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95-96 (1991); Harhen v. Brown, 431 Mass. 838, 844 (2000); Bartlett v. New York, N.H., & H. R.R. Co., 221 Mass. 530, 538 (1915). Thus, this Court will begin by reciting some general principles of Delaware law that apply here.

The focus, principally, is on the issue of the absence and alleged futility of making a pre-

suit demand on the Sapient board of directors. This is a requirement that must be assayed by an examination of the Complaint's allegations as to why there was no demand made.

> A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation. . . . The existence and exercise of this power carries with it certain fundamental fiduciary obligations to the corporation and its shareholders. . . . Moreover, a stockholder is not powerless to challenge director action which results in harm to the corporation. The machinery of corporate democracy and the derivative suit are potent tools to redress the conduct of a torpid or unfaithful management. The derivative action developed in equity to enable shareholders to sue in the corporation's name where those in control of the company refused to assert a claim belonging to it. The nature of the action is two-fold. First, it is the equivalent of a suit by the shareholders to compel the corporation to sue. Second, it is a suit by the corporation, asserted by the shareholders on its behalf, against those liable to it.
>
> By its very nature the derivative action impinges on the managerial freedom of directors. Hence, the demand requirement of Chancery Rule 23.1 exists at the threshold, first to insure that a stockholder exhausts his intracorporate remedies, and then to provide a safeguard against strike suits. Thus, by promoting this form of alternate dispute resolution, rather than immediate recourse to litigation, the demand requirement is a recognition of the fundamental precept that directors manage the business and affairs of corporations.

Aronson v. Lewis, 473 A.2d 805, 811-812 (Del. Supr. 1984). See Brehm v. Eisner, 746 A.2d 244, 253 (Del. Supr. 2000).

Whatever the underlying allegations of misconduct, if a derivative plaintiff fails to carry the burden of demonstrating that demand should be excused, the complaint must be dismissed. Kaufman v. Belmont, 479 A.2d 282, 286 (Del. Ch. 1984).

If a plaintiff does not actually make demand prior to filing suit, he or she "must set forth . . . particularized factual statements that are essential to the claim." Brehm, 746 A.2d at 254. The pleading requirements of Rule 23.1 are "an exception to the general notice pleading standard" and "more onerous than that required to withstand a Rule 12(b)(6) motion to dismiss."

Levine v. Smith, 591 A.2d 194, 207, 210 (Del. Supr. 1991).

The plaintiff is required to plead with particularity that "reasonable doubt" exists either that: (1) a majority of the board is disinterested and independent; or (2) that the challenged transaction was a valid exercise of business judgment. Aronson, 473 A.2d at 814; Rales v. Blasband, 634 A.2d 927, 933 (Del. Supr. 1993). Thus, in determining demand futility, the Court "must make two inquiries, one into the independence and disinterestedness of the directors and the other into the substantive nature of the challenged transaction and the board's approval thereof." Id.

> To satisfy [the] requirement [of alleging with particularity the reasons for the plaintiff's failure to demand action from the board], the "stockholder plaintiffs must overcome the powerful presumptions of the business judgment rule" by alleging sufficient particularized facts to support an inference that demand is excused because the board is "incapable of exercising its power and authority to pursue the derivative claims directly." In Aronson v. Lewis, we held that a demand on the board is excused only if the complaint contains particularized factual allegations raising a reasonable doubt that either: (1) "the directors are disinterested and independent" or "(2) the challenged transaction was otherwise the product of a valid exercise of business judgment."

White v. Panic, 783 A.2d 543, 551 (Del. Supr. 2001).

> However, the mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge either the independence or disinterestedness of directors, although in rare cases a transaction may be so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists.

Aronson, 473 A.2d at 815.

"The question of independence flows from an analysis of the factual allegations pertaining to the influences upon the directors' performance of their duties generally, and more specifically in respect to the challenged transaction[s]." Pogostin v. Rice, 480 A.2d 619, 624

(Del. Supr. 1984).

This year the Delaware Chancery Court has issued three decisions dealing with the law applicable here. First, in Ryan v. Gifford, 918 A.2d 341 (Del. Ch. 2007), the Court ruled that the shareholder in that derivative action provided sufficient particularity in his pleading to survive a motion to dismiss for failure to make a demand on the directors under Del. Ch. Ct. R. 23.1. The Ryan Court found that there were sufficient allegations to raise a reason to doubt the disinterestedness of the board.

Next, in Desimone v. Barrows, 924 A. 2d 908 (Del. Ch. 2007), noting that the Court "do[es] not accept cursory contentions of wrongdoing as a substitute for the pleading of particularized facts" and that "[m]ere notice pleading is insufficient to meet the plaintiff's burden to show demand excusal in a derivative case," found the plaintiff's pleadings insufficient.

In the third, and most recent Delaware Chancery Court case, Conrad v. Blank, C.A. No. 2611-VCL (Del. Ch. Sept. 7, 2007), on the facts there alleged, the Court concluded that the complaint adequately alleges demand futility. Citing to Ryan and Disimone, the Conrad court observed that directors who allegedly received backdated options "are clearly not disinterested under Rales." Further in Conrad, the Court concluded that the three members of the compensation committee were shown to be sufficiently involved in the stock option backdating to conclude that five of the ten member board there lacked disinterestedness.

In a stock options backdating case from the Northern District of California, CNET Networks, Inc. Shareholder Derivative Litigation, 2007 WL 1089690 (N.D. Cal. April 11, 2007), Judge Alsup, at *11, said:

> In Ryan v. Gifford, – A.2d – , 2007 WL 1018208, *8-*9 (Del Ch. Feb. 6,

> 2007), a Delaware court held that knowing approval of backdated option grants, along with intentional failure to disclose them, would render demand futile. In pleading that demand was futile, the court held that plaintiffs had pleaded particularized facts that if true, could show the grants to be backdated. The Ryan plaintiffs relied heavily on a report prepared by Merrill Lynch that did an empirical analysis comparing annualized returns from the reported grant dates versus the annualized returns for the stock itself. The reported grant dates yielded a return higher than the stock's annualized return by a factor of ten. Additionally, the plaintiffs alleged that stock options were not granted pursuant to an overall plan; options were granted sporadically. Because such facts were pleaded with particularity, the Delaware court held that for purposes of demand futility, the options were backdated.

The CNET Court went on to observe another decision in its own district, In re Linear Tech. Corp. Deriv. Litig., 2006 WL 3533024 at *3 (N.D. Cal. Dec. 7, 2006), in which the Court held that merely alleging that options were granted at a periodic low in stock price that was followed by a sharp jump in price was not sufficient to plead a pattern of backdating. The CNET Court then observed that

> Much like the plaintiffs in Linear Tech., plaintiffs here rely on pointing out instances where options were granted at a periodic low point in stock price, followed by an increase. They do not plead any facts as to when any other options were granted, or under what circumstances they were granted. Nor do they plead any particularized facts regarding the board's role in granting the options.

Id. at *11.

Both the CNET Court and the Linear Tech. Court found the complaints wanting in their pleading regarding the basis for failure to make a pre-suit demand on the respective boards of directors. See also, In re Computer Sciences Corporation Derivative Litigation, 2007 U.S. Dist. LEXIS 25414 (C.D. Cal. Mar. 27, 2007).

> "[There] is a very large – though not insurmountable – burden on stockholders who believe they should pursue the remedy of a derivative suit instead of selling their stock or seeking to reform or oust these directors from office.

> Delaware has pleading rules and an extensive judicial gloss on those rules that must be met in order for a stockholder to pursue a derivative remedy. Sound policy supports these rules, as we have noted. This Complaint, which is a blunderbuss of a mostly conclusory pleading, does not meet that burden, and it was properly dismissed.

Brehm, 746 A.2d at 267.

From the foregoing, this Court concludes that each case must stand or fall on the particular facts as pled in the complaint.

The Court turns now to the issue of the disinterestedness and independence of the Sapient Board members. A presumption of propriety must be the starting point in the absence of clear allegations to the contrary. Aronson, 473 A.2d. at 812, 815. See also Grimes v. Donald, 673 A.2d 1207, 1216 (Del. 1996).

As noted above, the Sapient Board has eight members. Two of the directors, Cunningham and Buerger, have not been named as defendants. Consequently, they must be deemed disinterested without further discussion.

Further, directors McKissock and Chookaszian are only described and charged based upon their status as directors. But "[m]ere membership on a committee or board, without specific allegations as to defendants' roles and conduct, is insufficient to support a finding that directors were conflicted." In re CNET Networks, Inc. Deriv. Litig., 2007 WL 1089690 at *16. Consequently, there is insufficient specificity in the Complaint to avoid a demand on these particular directors.

The Court will, therefore, consider the allegations in the Complaint relating to the remaining four directors: Gaskins, Parker, Moore and Greenberg. If any one of them is shown to be disinterested and independent, then the Board as a whole remains disinterested and

independent enough for the purposes of the demand excusal pleading requirements. It is here that the burden is on the plaintiffs to allege with particularity enough to create in the mind of this Court reasonable doubt as to disinterestedness.

The Court examines first the allegations regarding Greenberg and Moore. It begins by noting that there are no allegations in the Complaint alleging that either Greenberg or Moore received any of the challenged options themselves or that they "approved" the granting of any backdated options to anyone else. Instead, the Complaint alleges that "from 1997 to 2003, the Compensation Committee, upon the recommendation of the Co-Chief Executive Officers, [Greenberg and Moore], granted the Option Recipient Defendants the following Sapient stock options: [there follows a listing of 21 different option grants]." (Emphasis added.) Complaint paras. 39 and 40. Nowhere, however, is it alleged that what was recommended by Greenberg and Moore included the backdating any of the options in issue, or even that they knew that any of those options were, or would be, backdated. There is nothing improper in recommending the granting of stock options.

Further, there are no allegations that Greenberg and Moore had any authority to "approve," as opposed to merely "recommend," the granting of stock options. There thus is no showing of how Greenberg's or Moore's recommendations could give rise to a substantial likelihood of liability. See, e.g., Ryan, 2007 Del. Ch. LEXIS 22, at **33-34. In short, there are no allegations that Greenberg or Moore "directly approved" any stock options. See, e.g., In re Computer Scis., 2007 U.S. Dist. LEXIS 25414, at *46.

The requisite particularized allegations of fact are absent as to Greenberg and Moore. The Complaint says nothing about (i) how many options were recommended for each recipient,

(ii) the vesting schedules therefor, (iii) the grant dates, or (iv) the exercise prices. Without some allegations of that nature, Greenberg and Moore cannot be considered "interested." See Guttman v. Huang, 823 A.2d 492, 503 (Del. Ch. 2003).

The demand cannot be excused on the ground that Greenberg or Moore are interested because of their recommendations. Consequently, six of an eight member Board are disinterested, at least on this issue. It, therefore, is unnecessary on this issue to examine the status of the disinterestedness or independence of Gaskins or Parker.

Additionally, as to all of the Sapient directors, there is an absence of specific or particularized allegations regarding how they would have been put on notice of any accounting problems or improprieties. Thus, again, this is no basis for excusing a demand. See, e.g, Guttman, 823 A.2d at 498.

The Court looks then at the question of whether a reasonable doubt is created that the challenged transactions were other than the product of valid exercises of business judgment.

What is challenged in the Complaint here are not specific actions by the Sapient Board, but rather generalized allegations reflecting poor supervision over financial statements, particularly with regard to the controls over how they were prepared and the publications thereof to the SEC and the investing public. Sloppy work is not tortious work, and falls within the concept of business judgment. There are no particularized allegations, however, as to any specific act by any particular Board member individually or by the Board as a whole. See Rales, 634 A.2d. at 933.

Thus, here, a reading of the Complaint cannot be said to provide to the Court – and it is the Court, not the plaintiffs, that must harbor this doubt – with a "reasonable doubt" that any

activities by at least four of the directors, as a group, were other than the product of valid exercises of business judgment.[3]

Demand has not been shown to be excused in these cases.

The Court does not assess in any way the other contentions by the defendants in support of their motions to dismiss.

As a result of the foregoing analysis of Delaware law and a review of the Complaint, this Court concludes that the Complaint must be dismissed. Further, the Court accepts the Delaware Supreme Court's reasoning that such dismissal ought to be without leave to further amend. See White, 783 A.2d at 555.

ORDER

For the foregoing reasons, Defendants' Motion to Dismiss the Consolidated Derivative Complaint, Paper #15; Defendant Jerry A. Greenberg's Motion to Dismiss the Consolidated Derivative Complaint, Paper #16; and Defendant Susan D. Cooke's Motion to Dismiss, Paper #25 are ALLOWED, without leave to amend. Final judgment shall enter accordingly, dismissing the case, with each party to bear his or its own costs.

Allan van Gestel
Justice of the Superior Court

DATED: October 29, 2007

[3] If the test was whether "there is a reasonable inference that the business judgment rule is not applicable," [emphasis added], as applied in Aronson, this Court might reach a different conclusion. But the Vice Chancellor was specifically overruled on that issue by the Delaware Supreme Court. See Aronson, 473 A.2d at 814.