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

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

Alan Bodner, et al

-v-

Leonard Grimstein, et al

INDEX NO. 650791/10

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss the amended complaint is GRANTED per the attached Decision and Order.

Dated: July 5, 2011

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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ALLEN BODNER, individually, and derivatively on behalf of DMV FUNDING LLC, derivatively on behalf of ABE BRIARWOOD CORP., IHS LONG TERM CARE, INC., and IHS LONG TERM CARE HOLDINGS, INC.,

Plaintiffs,

-against-

LEONARD GRUNSTEIN, HARRY GRUNSTEIN, MURRAY FORMAN, LAWRENCE LEVINSON, TROUTMAN SANDERS LLP, FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC, THI OF BALTIMORE, INC., KENNETH TABLER, METCAP SECURITIES, LLC, METCAP HOLDING, LLC, METCAP ADVISORY SERVICES, LLC, JOHN DOES 1 thought 10, AND XYZ CORPS. 1 through 10,

Defendants.

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Index No. 650791/10

DECISION AND ORDER

Motion Seq. No. 005

MELVIN L. SCHWEITZER, J.:

The 17-count amended complaint seeks to hold defendants liable for an elaborate scheme of self-dealing and conflicts of interest, designed to defraud plaintiffs out of millions of dollars. Defendants now move to dismiss the amended complaint under CPLR 3013, 3014, and 3211(a)(1), (3), (5), (7) and (8). For the reasons discussed below, the motion is granted.

CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Under CPLR 3014, "[e]very pleading shall consist of plain and concise statements in consecutively numbered paragraphs," and "[e]ach paragraph shall contain, as far as practicable, a single allegation."

> The court should not be compelled to wade through a mass of verbiage and superfluous matter in order to pick out an allegation here and there, which, pieced together with other statements taken from another part of the complaint, will state a cause of action. The time of the court should not be taken in a prolonged study of a long, tiresome, tedious, prolix, involved and loosely drawn complaint in an effort to save it.

Barsella v New York, 82 AD2d 747, 748 (1st Dept 1981) (internal quotation marks and citation omitted).

Here, the 61-page, 317-paragraph amended complaint contains numerous cross-references and various facts, conclusions, and commentaries whose relevance to the 17 causes of action are oftentimes difficult to ascertain. Many of the allegations are "prolix, confusing, and difficult to answer," and, therefore, subject to dismissal. *Rapaport v Diamond Dealers Club, Inc.*, 95 AD2d 743, 744 (1st Dept 1983) (dismissing amended complaint where its "168 paragraphs contain[ed] a confusing succession of discrete facts, conclusions, comments on hearings and transcripts and considerable other subsidiary evidentiary matter whose relevance to a particular cause of action [was] frequently obscure"). In addition, many of plaintiffs' nebulous allegations appear to have little probative value. Accordingly, the amended complaint is dismissed under CPLR 3013 and 3014. *Id.*; *see also Weissglass v Weissglass*, 52 AD2d 582, 582 (2d Dept 1976) (permitted the plaintiff to "serve an amended complaint concisely setting forth only allegations of serious misconduct by defendant, omitting the myriad of trivia which burdens the instant complaint and renders it practically impossible for defendant to interpose a responsive pleading").

Even assuming for the moment that the amended complaint survived under CPLR 3013 and 3014, each cause of action in the amended complaint is dismissed for one or more additional reasons, including the conflation of individual and derivative claims, failure to allege demand

futility, improperly asserting duplicative claims, and failure to state a cause of action. With respect to the conflation of derivative claims, "[f]or a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation." *Abrams v Donati*, 66 NY2d 951, 953 (1985). An exception exists "when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged." *Id.* However, "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." *Id.* Therefore, courts dismiss complaints where the allegations "confuse a shareholder's derivative and individual rights." *Id.*

Here, plaintiffs' second, third, fourth, fifth, sixth, ninth, tenth, eleventh, twelfth, and sixteenth causes of action all purport to assert claims both individually by plaintiff Allen Bodner (Bodner) and derivatively on behalf of the corporate plaintiffs. Plaintiffs fail to allege the breach of any duty owed to Bodner, or to any of the corporate plaintiffs, that was independent of duties owed to the corporations allegedly wronged. In essence, plaintiffs allege individual and derivative harm interchangeably and without distinction. As a result, these claims are "a confusing hodge-podge of plaintiff's personal claims" and "claims derivative in nature," and, therefore, these claims are dismissed. *Barbour v Knecht*, 296 AD2d 218, 228 (1st Dept 2002) ("[t]he mingling of derivative claims and individual claims requires dismissal of the causes of action so affected"). Nor do the seventh and eighth causes of action, which purport to assert Bodner's direct claims, clearly allege a wrong to Bodner that was not suffered by the corporate plaintiffs, thereby requiring dismissal of these individual claims. *Abrams*, 66 NY2d at 953.

Plaintiffs also fail to allege demand futility. The derivative claims are asserted by Bodner on behalf of plaintiff DMV Funding LLC (DMV), of which Bodner is allegedly a 50% owner, and derivatively on behalf of plaintiffs ABE Briarwood Corp. (ABE), IHS Long Term Care, Inc. (IHSLTC), and IHS Long Term Care Holdings, Inc. (IHSLHI), which are entities allegedly owned directly and indirectly by DMV. According to the amended complaint, defendant Harry Grunstein (H. Grunstein) "has been a fellow 50% owner and co-managing member of DMV and co-manager/director" of the other corporate plaintiffs, thereby sharing equal control over these entities with Bodner. Amended Complaint, ¶ 208. The pleading alleges demand futility based upon H. Grunstein being an "'interested' manager/director" of all of the corporate plaintiffs. *Id.*, ¶ 209. H. Grunstein allegedly "participated in or played the willing tool in Defendants' improper actions" and, therefore, "never would have consented to having [the corporate plaintiffs] sue him or the other Defendants – including his brother – each of whom he assisted in committing the acts alleged herein." *Id.*, ¶ 208. Plaintiffs' derivative claims are asserted in the second, third, fourth, fifth, sixth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth causes of action of the amended complaint.

According to the amended complaint, DMV, the ultimate parent company asserting the purported derivative claims, is a Delaware limited liability company (and IHSLTC and IHSLHI are both allegedly Delaware corporations). "One of the abiding principles of the law of corporations is that the issue of corporate governance, including the threshold demand issue, is governed by the law of the State in which the corporation is chartered, in this case, Delaware." *Hart v General Motors Corp.*, 129 AD2d 179, 182 (1st Dept 1987). Under Delaware Chancery Court Rule 23.1(a), a derivative "complaint shall ... allege with particularity the efforts, if any,

made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." *See also* 6 Del C § 18-1001 (permitting limited liability company member to bring an action in the right of the company "if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed").

In order to plead demand futility, the pleading must allege that "'under the particularized facts alleged, a reasonable doubt is created that . . . the directors are disinterested and independent,'" or that a "a reasonable doubt" exists as to whether "'the challenged transaction was otherwise the product of a valid exercise of business judgment.'" *Brehm v Eisner*, 746 A2d 244, 256 (Del 2000) (internal citations omitted).

> A director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders. Directorial interest also exists where a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders. In such circumstances, a director cannot be expected to exercise his or her independent business judgment without being influenced by the adverse personal consequences resulting from the decision.

Simon v Becherer, 7 AD3d 66, 72 (1st Dept 2004) (applying Delaware law) (citation and quotation marks omitted).

Here, the amended complaint fails to allege H. Grunstein's personal financial interest in the purported schemes against DMV. The amended complaint also fails to allege that H. Grunstein was "interested" as a result of being "'materially affected, either to his benefit or his detriment, by a decision of the board,' in a manner not shared by the company or its members."

Spellman v Katz 2009 WL 418302, *5, 2009 Del Ch LEXIS 18, *20 (Del Ch 2009). To the contrary, as an alleged equal co-owner of DMV, H. Grunstein would have suffered the same financial loss as Bodner. *See e.g. Brehm*, 746 A2d at 257 (Delaware Supreme Court rejected, as conclusory, plaintiff's attempt to excuse demand based upon allegations that the defendant endorsed corporate action in order to gain increased compensation, reasoning that these allegations were "illogical and counterintuitive," because the defendant's financial gain was tied to the success of the company). Nor is demand futility satisfied by plaintiffs' allegation that H. Grunstein would not have sued himself. *See MCG Capital Corp. v Maginn*, 2010 WL 1782271, *18, 2010 Del Ch LEXIS 87, *67 (Del Ch 2010) ("the 'mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge ... the disinterestedness of directors....' Demand is not excused simply by naming the directors as defendants in the suit or alleging that they participated in the challenged transaction'").

Plaintiffs claim to have sufficiently alleged that H. Grunstein is beholden to, dominated, or controlled by his familial and financial ties to his brother, defendant Leonard Grunstein (L. Grunstein), the alleged mastermind of defendants' scheme, although L. Grunstein was not alleged to be a manager or director of any of the corporate plaintiffs. Plaintiffs cite various allegations in the amended complaint and Bodner's affidavit in support of their assertions that H. Grunstein received improper employment benefits; that he was beholden to L. Grunstein for his employment and compensation, and "likely would lose his $200,000 stipend" if he did not "follow orders"; that he divested the corporate plaintiffs of leasehold interests; and that defendants purported to terminate Bodner's rights under the terms of DMV's Operating Agreement. *See* Mandelker Aff., ¶ 39; *see also* Amended Complaint, ¶¶ 4-7, 14, 56-58, 64-65,

70-78, 190-93, 195, 205-209, 238-39; Bodner Aff., ¶¶ 12, 14. However, an officer's alleged receipt of compensation as a result of the wrongful conduct is insufficient to excuse demand. *In re Baxter Intl., Inc. Shareholders Litig.*, 654 A2d 1268, 1269 (Del Ch 1995). Moreover, while "familial interest" and "domination and control" are grounds for doubting the board's capability "of making an independent decision to assert a claim if demand were made" (*Grimes v Donald*, 673 A2d 1207, 1216 [Del 1996]), plaintiffs fail to allege with any "factual particularity" how H. Grunstein was dominated or controlled, or his lack of independence, as a result of his sibling relationship with L. Grunstein. *Brehm*, 746 A2d at 254.

The amended complaint repeatedly alleges that Bodner and H. Grunstein were the only board members of the corporate plaintiffs, and that, pursuant to DMV's Operating Agreement, neither could be "removed ... without their individual consent and agreement." Amended Complaint, ¶ 207; *see also id.*, ¶¶ 73-78, 190-93, 200. The pleading does not allege that Bodner was actually terminated, but rather, only that H. Grunstein "purport[ed]" to terminate Bodner's interests. *Id.*, ¶ 238. Thus, it is not clear to the court whether the alleged removal did, or even could, occur. Moreover, the cases cited by plaintiffs involved the issue of independence between directors on the same board (*See Rales v Blasband*, 634 A2d 927 [Del 1993]; *Mizel v Connelly*, 1999 WL 550369, 1999 Del Ch LEXIS 157 [Del Ch 1999]; *Harbor Fin. Partners v Huizenga*, 751 A2d 879 [Del Ch 1999]; *Chaffin v GNI Group, Inc.*, 1999 WL 721569, 1999 Del Ch LEXIS 182 [Del Ch 1999]), not a purported inside director, such as H. Grunstein, and a complete outsider, such as L. Grunstein. Therefore, these cases are distinguishable on their facts.

Nor have plaintiffs alleged that the challenged transaction was not the product of a valid exercise of business judgment. Under Delaware law, "[i]t is a presumption that in making a

business decision the directors ... 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." *Aronson v Lewis*, 473 A2d 805, 812 (Del 1984). "The burden is on the party challenging the decision to establish facts rebutting the presumption." *Id.* Here, the amended complaint relies upon the conclusory allegation that defendants' "egregious misconduct ... could not have been the product of sound business judgment" (*id.*, ¶ 208), which is "insufficient to overcome the strong presumption of propriety afforded by the business judgment rule." *Emerald Partners v Berlin*, 1993 WL 545409, *5, 1993 Del Ch LEXIS 273, *14 (Del Ch 1993). In short, plaintiffs' allegations of demand futility are packed into their "prolix complaint larded with conclusory language," which fails to "comply with the[] fundamental pleading mandates" for demand futility in derivative suits under Delaware law. *Brehm*, 746 A2d at 254. Accordingly, plaintiffs' derivative claims are dismissed.

In addition, several of plaintiffs' claims are duplicative of their cause of action for legal malpractice. As stated by the First Department in *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*:

> Because the attorney-client relationship is both contractual and inherently fiduciary, a complaint seeking damages alleged to have been sustained by a plaintiff in the course of such a relationship will often advance one or more causes of action based upon the attorney's breach of some contractual or fiduciary duty owed to the client. *The courts normally treat the action as one for legal malpractice only.*

56 AD3d 1, 8-9 (1st Dept 2008) (emphasis added).

Here, the eleventh cause of action for legal malpractice is asserted against defendants L. Grunstein, Lawrence Levinson (Levinson), and Troutman Sanders LLP (Troutman). This claim

is based upon these defendants' purported violations of "various New York[] canons of legal ethics by acting, on the one hand, as Bodner's, IHSLTC's, IHSLHI's, ABE's and DMV's legal counsel, and on the other hand, owning or permitting conflicting ownership by Levinson and [L.] Grustein of" defendant Fundamental Long Term Care Holdings, LLC (Fundamental) "and by causing IHSLTC to assign its leases, its Right of First Offer and/or its right to be paid base rent and additional rent in accordance with the Agreement to Lease to Fundamental and its subsidiaries." Amended Complaint, ¶ 280. Similarly, the second cause of action for breach of fiduciary duty is premised upon plaintiffs' relationships with L. Grunstein, Levinson, and Troutman, "as their legal counsel," and these lawyers allegedly acting "in furtherance of their own pecuniary interests and in violation of plaintiffs' rights" by improperly causing IHSLTC to assign certain rights, thereby adversely affecting the interests of Bodner and the corporate plaintiffs. *Id.*, ¶¶ 231, 232-233. Accordingly, plaintiffs' second cause of action for breach of fiduciary duty is dismissed as redundant of the legal malpractice cause of action. *Waggoner v Caruso*, 68 AD3d 1, 6 (1st Dept 2009).

For the same reason, plaintiffs' causes of action for aiding and abetting breach of fiduciary duty (count 4), aiding and abetting breach of contract (count 6), fraud (count 7), aiding and abetting fraud (count 8), and fraudulent conveyance (count 13) – all of which are based upon the same alleged misconduct – are dismissed as duplicative of the legal malpractice cause of action. *Id.*; *see also Weissman v Kessler*, 78 AD3d 465, 466 (1st Dept 2010) ("breach of contract claims were properly dismissed as duplicative of the legal malpractice claims"); *Carl v Cohen*, 55 AD3d 478, 478-79 (1st Dept 2008) ("fraud claim was duplicative of the legal malpractice claim since it was 'not based on an allegation of independent, intentionally tortious' conduct and

failed to allege 'separate and distinct' damages [internal citations omitted]"). Accordingly, the second, fourth, sixth, seventh, eighth, and thirteenth causes of action are dismissed as duplicative of the eleventh cause of action for legal malpractice.

The first cause of action seeks a declaration of Bodner's ownership interests in, and his entitlement to serve as officers and directors of, the corporate plaintiffs. However, the declaratory relief sought by plaintiffs is based upon the same transactions and occurrences raised in plaintiffs' fifth and fourteenth causes of action for breach of contract, thereby rendering the first cause of action subject to dismissal as a matter of law. *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 (1st Dept 1988) ("[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract"). In any event, it is not clear to the court that a dispute exists over Bodner's ownership and management interests in the corporate plaintiffs, or that a dispute exists concerning the nature of these entities' affiliation with each other. Therefore, the first cause of action is dismissed for the additional reason that plaintiffs fail to allege a justiciable controversy. *Walker v Pataki*, 266 AD2d 40, 41 (1st Dept 1999) ("the absence of a dispute ... makes declaratory relief unavailable").

The seventeenth cause of action seeks an injunction and requests, among other things, that defendants be "preliminarily and permanently enjoined" from assigning IHSLTC's rights and divesting its leasehold interests, and from terminating Bodner's right to be paid consulting fees and his interests in ABE and DMV. Amended Complaint, ¶ 314. "'A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction,'" and injunctions are not granted when "an award of

damages would adequately compensate the [plaintiffs]." *Parry v Murphy*, 79 AD3d 713, 715-16 (2d Dept 2010). Here, plaintiffs have not moved for a preliminary injunction. Moreover, the allegations of the amended complaint fail to show irreparable harm or the inadequacy of an award of damages. Therefore, plaintiffs fail to state a cause of action for an injunction and the seventeenth cause of action is dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss the amended complaint is granted and the amended complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: July 5, 2011

ENTER:

J.S.C.