

Levine v Damico

2016 NY Slip Op 30784(U)

April 26, 2016

Supreme Court, New York County

Docket Number: 651772/2015

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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LARRY LEVINE, derivatively on behalf of
INTRALINKS HOLDINGS, INC.,

Plaintiff,

-against-

J. ANDREW DAMICO, ANTHONY PLESNER,
PATRICK J. WACK, BRIAN J. CONWAY,
PETER GYENES, THOMAS HALE, HABIB
KAIROUZ, ROBERT C. MCBRIDE, J. CHRIS
SCALET, RONALD W. HOVSEPIAN, FRANK
BRUNETTI and HARRY TAYLOR,

Defendants,

AND

INTRALINKS HOLDINGS, INC.,

Nominal Defendants.

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JEFFREY K. OING, J.:

Mtn seq. nos. 002, 003 and 004 are consolidated for
disposition.

Defendants, J. Andrew Damico, Anthony Plesner, Patrick J.
Wack, Brian J. Conway, Peter Gyenes, Thomas Hale, Habib Kairouz,
Robert C. McBride, J. Chris Scalet, Ronald W. Hovsepian, Frank
Brunetti and Harry Taylor (collectively, the "Individual
Defendants"), and Intralinks Holdings, Inc. ("Intralinks" and,
collectively with the Individual Defendants, "defendants") move
for an order, pursuant to CPLR 3211, dismissing the complaint in
its entirety.

Index No.: 651772/2015

**Mtn Seq. Nos. 002, 003 &
004**

DECISION AND ORDER

Background

Intralinks provides software-as-a-service ("SaaS") solutions for securely managing content, exchanging critical business information, and collaborating within and among organizations worldwide (Compl. ¶ 2). Plaintiff Larry Levine ("plaintiff" or "Levine") is an Intralinks shareholder (Compl., ¶ 21). The Individual Defendants served as directors and officers of Intralinks during the relevant time period (Compl., ¶¶ 23-36). One of Intralinks' customers was the FDIC, who was a subscriber since October 9, 2000 (Compl., ¶ 65). Beginning in 2007, the FDIC provided a large percentage of Intralinks' revenue (Compl., ¶¶ 67-68). On November 18, 2010, Intralinks signed a contract extension with the FDIC which, inter alia, extended the contract's "final expiration date through June 9, 2011" (Compl., ¶ 73). Plaintiff alleges that this provision in the contract extension served to notify Intralinks that its relationship with the FDIC would terminate on that date, but that defendants did not reveal this fact in subsequent public filings with the Securities and Exchange Commission and sold Intralinks stock before the public was informed that FDIC would be terminating its contract, thereby reaping an illicit profit (Compl., ¶¶ 73, 86-94, 164).

On December 5, 2011, a securities class action was filed in the U.S. District Court for the Southern District of New York against Intralinks and certain other of the defendants herein, captioned William D. Wallace et al. v. IntraLinks et al., 11-cv-8861-TPG (SDNY) (the "Securities Action") (Compl., ¶ 10). The defendants in the Securities Action moved to dismiss the complaint and, on May 8, 2013, the Honorable Thomas P. Griesa issued a decision in which he, inter alia, sustained certain claims "based on the allegation that defendants made false and misleading statements related to the strength of Intralinks' business and customer satisfaction, without disclosing the impending loss of its largest customer (Compl., ¶ 12).

On May 16, 2013, Levine issued a demand upon the Intralinks board of directors (the "Board") to commence an action against certain current and/or former directors and executive officers of Intralinks (the "Demand Letter") (Demand Letter, Compl., Ex. A). In the Demand Letter, plaintiff alleged, inter alia, that based on the November 18, 2010 contract extension, defendants knew or should have known that the FDIC's relationship with Intralinks would terminate on June 9, 2011 yet failed to disclose this fact (Demand Letter at p. 4, Compl., Ex. A). The Demand Letter also discussed Judge Griesa's decision to sustain certain claims

related to defendants' alleged concealment of the impending loss of Intralinks' key client (Demand Letter at p. 6, Compl., Ex. A).

On June 26, 2013, the Board formed a Special Committee to investigate Levine's allegations (Compl., ¶ 18; Demand Refusal, Compl., Ex. E). It reviewed over 65,000 documents, including prior interviews with company employees, and gathered information from various departments of the company including finance, billing and sales (Demand Refusal, Compl., Ex. E). On March 27, 2014, WilmerHale, counsel for the Board, sent plaintiff a letter detailing these efforts and refusing the demand (the "Demand Refusal"), stating, in part, that the Special Committee's investigation revealed that plaintiff's allegations concerning Intralinks' management's advance knowledge of the impending loss of the FDIC as a customer were incorrect (Demand Refusal, Compl., Ex. E).

Before the Demand Refusal was issued, Levine filed a derivative action in this Court on December 13, 2013, captioned Levine v Damico, et al., Index No. 654308/2013 ("Levine I"). On February 4, 2015, this Court dismissed the complaint in the Levine I action without prejudice on the ground that plaintiff failed to plead sufficiently that Intralinks' demand refusal was wrongful (Clancy Aff., Ex. 4 at 11:25-12:1; 17:4-11).

Undeterred, plaintiff commenced this action on May 20, 2015, naming the same defendants and propounding the same causes of action (See Clancy Aff., Ex. 1). Defendants once again move to dismiss plaintiff's complaint arguing that the Board's refusal of plaintiff's demand was reasonable, and plaintiff is therefore barred from bringing this action.

Discussion

As Levine's demand was refused by the board, he may only proceed with this derivative action if he can allege with sufficient particularity that the Board's refusal of the demand was wrongful (Mount Moriah Cemetery on Behalf of Dun & Bradstreet Corp. v Moritz, 1991 WL 50149, at *3 [Del Ch Apr. 4, 1991] aff'd, 599 A2d 413 [Del 1991]). Such a pleading must include facts supporting a plausible inference that the Special Committee's investigation and the Board's subsequent decision to refuse the demand were a result of gross negligence, i.e., "conduct that constitutes reckless indifference or actions that are without the bounds of reason" (Espinoza ex rel. JPMorgan Chase & Co. v Dimon, 807 F3d 502, 506 [2d Cir 2015] citing McPadden v Sidhu, 964 A2d 1262, 1274 [Del Ch 2008]).

Plaintiff asserts that the investigation by the Special Committee was deficient and unreasonable because the Special Committee failed to: (1) interview anyone from the FDIC as to

when Intralinks' directors were aware that Intralinks' contract with the FDIC was ending; or (2) "reconcile" or otherwise address Judge Griesa's decision sustaining certain causes of action in defendants' motion to dismiss the Securities Action (Compl., ¶¶ 18-20, 174). These arguments are unavailing.

I. Failure to Interview FDIC Representatives

In an investigation in response to a shareholder demand, a special committee's selection of individuals to interview is generally entitled to deference (Gatz v Ponsoldt, 2004 WL 3029868, at *5 [Del Ch Nov. 5, 2004] [fact that independent committed interviewed only two defendants involved in the transaction forming the basis of the plaintiff's claim was not grossly negligent]; Mount Moriah Cemetery on Behalf of Dun & Bradstreet Corp. v Moritz, 1991 WL 50149, at *4 [Del Ch Apr. 4, 1991] aff'd, 599 A2d 413 [Del 1991] [investigation was not grossly negligent where Special Committee interviewed only senior officers accused of wrongdoing and their immediate subordinates without contacting a single customer, regional manager, salesperson or "whistle blower"]).

Plaintiff, nevertheless, argues that the Special Committee's failure to interview any FDIC employees was grossly negligent because these employees were "likely" to corroborate plaintiff's allegations of wrongdoing. Plaintiff relies heavily on two cases

in support of this claim, City of Orlando Police Pension Fund v Page, 970 F Supp 2d 1022 (ND Cal 201) and Barovic v Ballmer, 72 F Supp 3d 1210 (WD Wash 2014). This reliance is misplaced because they are neither binding nor relevant.

The Ballmer court held that the failure of Microsoft's demand review committee to interview certain European Union officials who "could reasonably have been expected to hold highly material information" -- including information that Microsoft did not have -- regarding Microsoft's violation of a 2009 settlement agreement with the European Union, such as the "the EU's expectations of Microsoft's internal compliance methodology," called into question the reasonableness of the committee's investigation into these violations (Barovic v Ballmer, 72 F Supp 3d 1210, 1215 [WD Wash 2014]). Similarly, in Page the court held that Google's investigation into alleged wrongdoing set forth in plaintiff's shareholder demand was unreasonable, in part, because it did not interview the Department of Justice investigator who had led an independent investigation of the conduct at issue in the demand which found that Google had acted wrongfully (City of Orlando Police Pension Fund v Page, 970 F Supp 2d 1022, 1032 [ND Cal 2013]).

Here, by contrast, all of the information relevant to defendants' alleged failure to reveal that the FDIC would no

longer be an Intralinks customer (i.e., the date at which defendants were informed that this relationship would be terminated and their actions thereafter) was necessarily within the possession of Intralinks. Plaintiff fails to allege with particularity what information the FDIC could have provided to the Special Committee that Intralinks did not already possess. Accordingly, the fact that the Special Committee did not interview FDIC employees does not demonstrate that the investigation was unreasonable, let alone grossly negligent (Ironworkers Dist. Council of Phila. & Vic. Retirement & Pension Plan v Andreotti, CV 9714-VCG, 2015 WL 2270673, at *26 [Del Ch May 8, 2015] aff'd sub nom. Ironworkers Dist. Council of Phila. v Andreotti, 2016 WL 341201 [Del Jan. 28, 2016] [plaintiff's conclusory claim that committee's failure to interview current and former DuPont CEOs was grossly negligent was inadequate where plaintiff did not disclose how information unique to these individuals would have changed Board's determination to refuse the demand]).

II. Failure to Address Judge Griesa's Ruling

Notably, plaintiff's argument that the Special Committee's findings were flawed because the Special Committee did not address or reconcile Judge Griesa's decision in the Securities Action was already rejected in Levine I (See Levine I, Opp. at p.

14). Delaware law does not require the Special Committee to address, let alone "reconcile," this decision in its refusal (Baron v Siff, 15152, 1997 WL 666973, at *3 [Del Ch Oct. 17, 1997] [refusal letter's failure to contain a point-by-point response to all allegations in the demand letter does not stand for the proposition that the Board did not consider the demand before refusing it]). Moreover, as Judge Griesa's decision was a determination of the adequacy of plaintiffs' pleadings rather than the ultimate merits of their claims, it was not relevant to the Special Committee's investigation.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint with prejudice is granted, and it is hereby dismissed with prejudice.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/26/16



HON. JEFFREY K. OING, J.S.C.