IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR THE COUNTY OF NEW CASTLE

WILLIAM D. WAGNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 16740
	)	
IRWIN SELINGER, DAVID P. DELANEY, RODNEY F. PRICE, STEVEN D. LEVKOFF, and LOUIS A. LUBRANO,	)	
	)	
and	)	
	)	
GRAHAM FIELD HEALTH PRODUCTS INC.,	)	
	)	
Nominal Defendant.	)	

Submitted: October 5, 1999
Decided: January 18, 2000

MEMORANDUM OPINION

Norman M. Monhait of Rosenthal Monhait Gross & Goddess, Wilmington, Delaware; OF COUNSEL: Glen DeValerio and Michael G. Lange of Berman, Devalerio & Pease of Boston, Massachusetts; Frederic S. Fox, Laurence D. King and Janine R. Azriliant of Kaplan, Kilsheimer & Fox of New York, New York. Attorneys for Plaintiff.

Alan J. Stone and Christopher F. Carlton of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; OF COUNSEL: Scott A. Edelman, Andrew E. Tomback and Mitchell Epner of Milbank, Tweed, Hadley & McCloy, New York, New York. Attorneys for Defendants.

Andre G. Bouchard of Bouchard, Friedlander & MaloneyHuss, Wilmington, Delaware. Attorney for Nominal Defendant.

STEELE, V.C.

A shareholder plaintiff alleges that defendant Board of Directors wasted corporate assets, and breached fiduciary duties of loyalty and care by approving a new separation agreement for the corporation's CEO. The CEO received more severance benefits than originally contemplated under a previous employment agreement. Plaintiff objects to the Board's decision to enter into the separation agreement because additional benefits were conferred which were allegedly not supported by actual additional consideration to the corporation.

Defendants move to dismiss this action arguing that 1) the complaint fails to state a waste claim for which relief can be granted, 2) an exculpatory clause in the corporate charter shields the Board from liability and, 3) the plaintiff failed to either make a pre-suit demand on the Board or plead demand futility.

Because plaintiff has not pleaded facts sufficient to support his waste claim, I defer to the Board's business judgment to enter into the new agreement. Accordingly, Defendants' motion to dismiss is granted. I reach this result without needing to examine the affect of an exculpatory provision in the corporate charter purportedly shielding the Board from liability.

I. Parties

The plaintiff, William **ID.** Wagner, is a shareholder of Graham Field Health Products, Inc. ("GFI"), a Delaware corporation that manufactures, markets, and distributes medical, surgical and other healthcare products. The defendants are GFI's former CEO Irwin Selinger, the directors of GFI,[1] and GFI as nominal defendant.

II. Background & Factual Contentions

Defendant Irwin Selinger served as GFI's Chief Executive Officer, Chairman of the Board of Directors, and member of the Board's Executive Committee from 1981 until his departure in mid-1998. Selinger's employment with GFI was subject to an Employment Agreement* set to expire on July 8, 2001. Selinger and GFI signed the Employment Agreement in 199 1.

Under the Employment Agreement, Selinger would receive nothing if GFI terminated him for dishonesty. If he was terminated for any other reasons (except disability), he would receive only (1) continued payment of his base salary, and (2) payments due him as a result of his past participation in an employee benefits plan. The Employment Agreement imposed non-

[1] David P. Delaney, Rodney F. Price, Steven D. Levkoff, and Louis A. Lubrano.
[2] Compl., Ex. B.

competition and confidentiality obligations on Selinger, both of which were set to expire one year after termination of employment. Selinger further agreed to a non-solicitation clause designed to prevent him from wooing away GFI employees.

III. Class Actions Filed by GFI Shareholders

GFI has made numerous acquisitions by exchanging GFI's stock for the target company's stock. Since March 1998, GFI shareholders have tiled a dozen class action lawsuits in the United States District Court for the Eastern District of New York against GFI and Selinger personally, alleging federal securities law violations. The class action complaints state that Selinger and other senior GFI officers developed a scheme to inflate artificially the price of GFI common stock so that GFI could complete its acquisitions by issuing fewer shares. Selinger also allegedly personally prospered from the sale of some of his GFI stock at artificially inflated prices while in possession of material, nonpublic adverse information about GFI's business and prospects. Plaintiff implies that these allegations led, at least in part, to the departure of several key GFI officers, including Selinger.

IV. Selinger's Exit

Selinger's employment with GFI terminated as of July 29, 1998. Plaintiff does not allege that Selinger's termination involved any violation of

his Employment Agreement. Indisputably, Selinger left in accordance with the terms of a negotiated Separation Agreement. The Separation Agreement, not the original Employment Agreement, dictated the respective commitments of the parties.

Undeniably, the Separation Agreement conferred greater benefits upon Selinger than he stood to receive under the Employment Agreement. Under the Separation Agreement, Selinger received, *inter alia*, the continuation of his base salary of $550,000 through July 3 1, 1999, forgiveness of $2.2 million in past loans from GFI for which Selinger exchanged only a $500,000 unsecured note bearing no interest, a release from all potential claims against him held by GFI, payment of legal fees, the return of $3 million in his GFI stock pledged as security for the $2.2 million in loans, continued health benefits, and a leased auto paid for by GFI through July 3 1, 200 1 .[3] The later agreement also permitted Selinger to take his office rocking chair, to which he had presumably grown quite attached, but from which he would soon otherwise be detached. In return, Selinger did agreed to provide certain additional consideration. I will discuss the consideration passing to GFI in more detail below.

[3] The Separation Agreement also permitted Selinger "to continue to receive the same benefits currently provided under the Employment Agreements." See Separation Agreement, ¶ 2.

V. Analysis

A. Standard for a Motion to Dismiss

The standard for a motion to dismiss is well-settled under Delaware law: that under any possible set of facts consistent with the facts alleged in the complaint the plaintiff would still not be entitled to judgment.[4] I must accept all well-pleaded facts as true and construe any inferences from these facts in the light most favorable to the non-moving party.[5] Allegations which are merely conclusory and lacking factual basis in the complaint, however, will not survive a motion to dismiss.[6]

The gist of plaintiffs claim is that the board wasted GFI assets by approving the Separation Agreement with its enhanced benefits in place of Selinger's existing Employment Agreement. In deciding this motion to dismiss, I will focus on the factual allegations directly related to these two agreements.

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[4] Lewis v. ***Austen,*** Del. Ch., C.A. 'No. 12937, mem. op. at 4, Jacobs, V.C. (June 2, 1999) ("a plaintiff must allege facts that, taken as true, establish each and every element of a claim upon which relief could be granted.").

[5] ***O'Reilly v. Transworld Healthcare, Inc.,*** Del. Ch., C.A. No. 16507, mem. op. at 11, Steele, V.C. (August 20, 1999).

[6] ***In re The Walt Disney Company Shareholders' Litig.,*** Del. Ch., 731 A.2d 342, 353 (1998).

B. Demand Requirement

In this derivative action, plaintiff must allege with particularity either that he demanded that the Board pursue his claim or state facts indicating why this demand would be futile.[7] The plaintiff did not make demand on the Board. Plaintiff, thus, is required to plead particular facts showing demand to be futile and, therefore, excused.

A plaintiff may be excused from making a demand on a corporate board if he alleges facts which create a reasonable doubt that either 1) the board did not act with disinterest or independence, or 2) the board's acts were not the result of a valid exercise of business judgment.' Plaintiff fails to allege any facts indicating that the Board failed to act with disinterest or independence in approving the transaction. Instead, he argues the Board's approval of the Separation Agreement constituted corporate waste that can not be considered a valid exercise of business judgment, thereby demonstrating that a demand on the Board to act would have been futile."

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[7] See Court of Chancery Rule 23.1 (stating "the complaint shall also 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"); ***Grimes v. Donald,*** Del. Supr., 673 A.2d 1207, 1216 (1996).

[8] ***Aronson*** v. ***Lewis,*** Del. Supr., 473 A.2d 805 (1984).

[9] *See* ***Sanders v. Wang,*** Del. Ch., C.A. No. 16640, slip op. at 11-13, Steele, V.C. (Nov. 8, 1999) (assessing whether the alleged facts surrounding the board's actions raise a reasonable doubt that the transaction alleged to constitute corporate waste resulted from a valid exercise of business judgment).

The survival of plaintiffs entire case depends upon the sufficiency of his stated waste claim. I find it to be inextricably intertwined with the required demand excused analysis. If his complaint fails to support this claim, plaintiff can not be excused from demand and his claim must be dismissed.

C. The Waste Claim

The standard for a waste claim is high and the test is "extreme.. .very rarely satisfied by a shareholder plaintiff.[10]" The transfer in question must either serve no corporate purpose or be so completely bereft of consideration that the "transfer is in effect a gift.[11]" To state a claim for waste a plaintiff must allege facts which if taken as true establish that the defendant directors "authorize[d] an exchange that [was] so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration."[12] Applying that rule in this case, I must find that the alleged facts, if taken as true, raise a reasonable doubt that any business person of ordinary, sound judgment would have concluded GFI received

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[10] ***Steiner*** v. ***Meyerson,*** Del. Ch., C.A. No. 13 139, mem. op. at 2, Allen, C. (July 19, 1995).

[11] ***Lewis v. Vogelstein,*** Del. Ch., 699 A.2d 327, 336 (1997).

[12] ***Glazer v. Zapata Corp.,*** Del. Ch., 658 A.2d 176, 183 (1993); see also ***Stein v. Orloff***, Del. Ch., C.A. No. 7276, 11 Del. J. Corp. L. 312,319, 1985 WL 11561, *3, Hartnett, V.C. (May 30, 1985) ("the test for finding a waste of corporate assets is whether the consideration received by the corporation was so inadequate that no person of ordinary, sound business judgment would deem it worth that which the corporation paid"), *appeal refused by* Del. Supr., ***504*** A.2d ***572*** (1986); ***Saxe v. Brady,*** Del. Ch., 184 A.2d 602 (1962).

meaningful consideration for what it exchanged in the Separation Agreement in order for plaintiff to successfully meet the challenge posed by defendants' motion to dismiss.

To overcome the presumption that a board's actions were the result of a valid exercise of business judgment, the plaintiff bears the burden of showing that the defendant directors failed to act (1) in good faith, (2) in the honest belief that the action taken was in the best interest of the company, or (3) on an informed basis.[13] In the present case, I find plaintiff fails to allege facts that create a reasonable doubt that the Board properly exercised its business judgment.

Plaintiff does no more than take issue with the adequacy of the consideration received by GFI in exchange for the additional benefits granted Selinger by the Separation Agreement.[14] Plaintiff does admit, however, that the Separation Agreement provided consideration to GFI that was not included in the Employment Agreement. Namely, the Separation Agreement (1) extends the respective duration of the non-competition clause and the confidentiality clause from one year to five years;[15] (2) includes a

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[13] ***Aronson***, 473 A.2d at 812.

[14] "The Separation Agreement conferred considerably greater benefits upon Defendant Selinger than he enjoyed under the Employment Agreement." Compl., at ¶ 65.

[15] Compl., at ¶ 73. Defendants state that the extended terms were actually only from one year to three years. Defendants also note that the non-solicitation clause was correspondingly extended to three years.

promise by Selinger to make himself available for the pending litigation;[16] and (3) obligates Selinger to provide limited consulting services if called at GFI's request.[17] Despite acknowledging these new obligations, plaintiff charges that GFI "will receive essentially nothing in return" because the consideration received by GFI secures commitments to which Selinger was already obligated under the Employment Agreement or constitutes "sham" consideration."

Under the legal standard for a claim of waste, I find that the plaintiffs allegations are conclusory and do not sufficiently state facts that if true would create reasonable doubt that, in approving the Separation Agreement, GFI's Board acted in a manner that no person of ordinary, sound business judgment would act. One can argue that the Board could have struck a better bargain than the terms included in the Separation Agreement. That argument, however, would be pointless in this context because plaintiff has failed to plead facts which create a reasonable doubt that the results of

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[16] Id., at ¶ 70. Plaintiff argues that this promise is illusory, and that Selinger would be obligated by law and motivated by self-interest to participate as a witness because he a co-defendant in the class actions lawsuits. Plaintiffs argument on this narrow issue is persuasive; if this "promise" constituted the sum of the alleged consideration for the additional benefits conferred, I may have ruled differently on this motion.

[17] ***Id*** at ¶ 75.

[18] ***Id*** at ¶ 70 and ¶ 75. Plaintiffs allegation that the consideration is a "sham" is particularly targeted at the consulting agreement. Plaintiff states that GFI would never consider using Selinger for consulting because Selinger's employment was terminated, in part, because he fundamentally disagreed with the current board of directors regarding

Board's bargain show bad faith, a lack of honest belief that the terms were in the best interest of the company, or that the Board did not fully inform itself before reaching its conclusions. Accordingly, I must presume that the Board 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."[19]

I find this case to be distinguishable from the Court's holding in ***Green v. Phillips*** [20] in which the plaintiff alleged that a board wasted assets by approving a new severance agreement with a departing executive. In that case the defendants simply cancelled the previous agreement with the former executive and executed a new one, in which "[c]ertain provisions.. .that confer benefits.. . [we]re not tied in any way to any consideration.. .that Mr. Phillips must provide in return." In contrast, I find that the nonconclusory, factual allegations here do not support the claim that the Separation Agreement fails to recite new consideration for GFI or that this consideration is a "sham." Addressing the facts of this case, plaintiff has failed to make allegations that if taken as true would show that GFI simply granted Selinger a more lucrative separation package for which GFI

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the future direction of GFI. Further, plaintiff alleges that the personal relationship between the current GFI President and Selinger is extremely acrimonious.

[19] ***Aronson, 473*** A.2d at 812.

[20] Del. Ch., C.A. No. 14436, Jacobs, V.C. (June 19, 1996).

extracted nothing additional.[21] This is especially true given the recitation in plaintiffs own complaint of the additional consideration afforded GFI by the Separation Agreement.

Plaintiff asks me to compare the terms of the Separation Agreement with the terms of the Employment Agreement in order to evaluate the sufficiency of the new consideration received by GFI. This analysis is simply not appropriate in either evaluating a waste claim for its sufficiency in a pleading or as a basis for concluding that demand can be excused. It is not a Vice Chancellor's business judgment, or lack thereof, that is at issue. I am not permitted to second-guess the Board's decision-making process or to appraise whether, in my personal opinion, the exchange of consideration was fair.

'VI. Conclusion

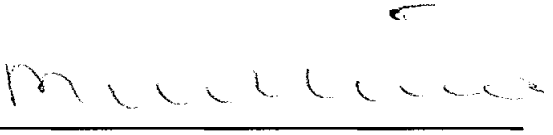
Since the complaint fails to plead facts which would deprive the Board of the benefit of the business judgment rule or facts that if true would create at least a reasonable doubt that any person of ordinary, sound business

[21] See ***Grobow*** v. ***Perot,*** Del. Supr., 539 A.2d 180, 185 n.4 (1988) (holding that complaint fails to raise a reasonable doubt that board's decision to accept CEO's promise "not to compete with EDS for three years or recruit EDS executives for eighteen months," *inter alia,* in exchange for a payment of a premium of approximately $371 million above the value of shares purchased was not the product of the valid exercise of business judgment; therefore, claim was properly dismissed.)

judgment acting on GFI's behalf would have entered into the Separation Agreement, I am not permitted to second-guess the Board's decision.

I grant defendants' motion to dismiss.

IT IS SO ORDERED.



Vice Chancellor