

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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CHANCELLOR

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GEORGETOWN, DELAWARE 19947

Submitted: December 7, 2005

Decided: December 14, 2005

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Re: *Alan Laties v. William Wise, et al.*
Civil Action No. 1280-N

Dear Counsel:

After carefully examining the arguments presented by respective counsel, I hereby grant defendants' motions to dismiss for the reasons set forth below.

In 2001 William Wise received bonuses and other compensation near \$9 million as El Paso Corporation's CEO, due in some part to the profits reported that year. Three years later, after Wise's 2003 departure, El Paso restated its 2001 performance from a profit of \$93 million to a loss of \$447 million. Many, including the New York Times,¹ wondered why Wise and other executives similarly situated during this era of restatements continued to keep such seemingly

¹ Jonathan D. Glater, *Sorry, I'm Keeping the Bonus Anyway*, N.Y. Times, March 13, 2005, Section 3, at 1.

ill-gotten gains, and why the respective corporations failed to bring suit seeking restitution. Plaintiff Laties brought a derivative claim on behalf of the corporation against Wise for unjust enrichment, and against the present directors of El Paso accusing them of waste for not pursuing the valuable claim against Wise. Defendants move for dismissal for failure to comply with Court of Chancery Rule 23.1.²

Court of Chancery Rule 23.1 requires that a stockholder seeking to assert a derivative claim on behalf of a Delaware corporation must first exhaust all intracorporate remedies by making a demand on the board of directors to obtain the action desired, or by pleading with particularity why demand should be excused.³ Because a derivative claim belongs to the corporation, “it is the corporation, acting through its board of directors, which must make the decision whether or not to assert the claim.”⁴ A plaintiff’s pleading burden under Rule 23.1 is “more onerous than required to withstand a Rule 12(b)(6) motion to dismiss” and requires the plaintiff to allege with particularity why demand would be futile.⁵ Under the Rule 23.1 standard “only well-pleaded allegations of fact must be accepted as true; conclusory allegations of fact or law not supported by allegations of specific fact may not be taken as true.”⁶

Where a derivative action challenges the board’s failure to take action, Delaware applies the *Rales* test to evaluate the plaintiff’s futility allegations.⁷ There, the Supreme Court reasoned that:

a court must determine whether or not the particularized factual allegations of a derivative shareholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand.⁸

² Defendant Wise joined the director defendants in their motion to dismiss for failure to make a demand. Because this tack is successful, I do not address Wise’s challenge to personal jurisdiction.

³ See Ch. Ct. R. 23.1; *Rales v. Blasland*, 634 A.2d 927, 932 (Del. 1993).

⁴ *Grimes v. Donald*, 673 A.2d 1207, 1215 (Del. 1996), *overruled in part on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

⁵ *Levine v. Smith*, 591 A.2d 194, 207 (Del. 1991).

⁶ *Grobow v. Perot*, 539 A.2d 180, 186 (Del. 1988), *overruled in part on other grounds by Brehm*, 746 A.2d 244.

⁷ See *Rales*, 634 A.2d 927, 933-34.

⁸ *Id.* at 934.

Since a plaintiff must plead with particularity reasons why demand should be excused, when a reason presented is that directors are disabled by the risk of personal liability from a certain claim against those directors, such claim must also be pled with particularity.⁹ Further, a plaintiff must show that the personal liability is a substantial likelihood, and not just a mere threat.¹⁰

The complaint in this case contains no particularized factual allegations that impugn the independence of the board and its ability to evaluate a demand in respect to either claim. Plaintiff argues that the board was interested because it might be liable for not pursuing the Wise Claim. This wasteful inaction is allegedly unprotected by El Paso's certificate of incorporation provision under Section 102(b)(7) of the DGCL.

Without examining whether or not the elements of plaintiff's waste claim are met, it is evident that the waste claim is deficient on ripeness grounds. Because the waste claim serves as the basis for the alleged futility of demand, facts supporting it must be pled with particularity.¹¹ There are no allegations (let alone particularized factual allegations) that the directors made a definitive decision not to seek restitution from Wise, that the remedies are time-barred or otherwise in imminent danger of becoming unavailable.¹² The complaint contains a quote from the New York Times, which recounts a statement by an El Paso spokesperson that the company had not yet made any effort to recover bonuses paid to Wise.¹³ Such a statement hardly reaches the level of a definitive decision by the board required to make such a waste claim ripe.

Additionally, plaintiff's contention that the directors face a substantial likelihood of liability is contradicted by the Section 102(b)(7) provision in the El Paso certificate of incorporation. Plaintiff must satisfy the Court that personal liability is a substantial likelihood; yet the complaint does not assert bad faith, intentional misconduct, knowing violation of law, or any other conduct for which

⁹ See *In re Baxter International, Inc. Shareholders Litigation*, 654 A.2d 1268, 1270 (Del. Ch. 1995).

¹⁰ *Rales*, 634 A.2d at 936.

¹¹ See *In re Baxter*, 654 A.2d at 1270.

¹² See *Saito v. McCall*, 2004 WL 3029876, at *5 (Del. Ch. 2004) (finding claim of failure to pursue claims deficient on grounds of ripeness because plaintiffs failed to allege that director defendants made a definitive decision whether to pursue claims and that the claims were time barred and that the remedies were therefore lost).

¹³ Derivative Complaint ¶ 16.

the directors may be liable.¹⁴ Without such particularized pleading, the directors' ability to exercise business judgment in respect to a demand remains intact.

For these reasons, I hereby grant defendants' motions to dismiss.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name.

William B. Chandler III

WBCIII:bsr

¹⁴ See *In re Baxter*, 654 A.2d at 1270.