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Re: e4e, Inc. v. Sircar
C.A. No. 20366-NC
Submitted: September 24, 2003

Dear Counsel:

Plaintiff e4e, Inc. ("e4e") is a shareholder of Nominal Defendant iSeva, Inc. ("iSeva"). Defendant Deepak Sircar ("Sircar") is iSeva's chief executive officer and president and one of its four directors. e4e brings this

derivative action seeking Sircar's removal as an officer of iSeva. Sircar has moved, under Court of Chancery Rule 12(c), for judgment on the pleadings.

BACKGROUND

iSeva, a Delaware corporation, provides information technology customer support through a call center in India. Sircar's employment as an iSeva officer is governed by his employment agreement which allows iSeva's Board to terminate him "at-will" and for "cause" which is defined to include, upon "a finding by the Board," disloyalty, inappropriate disclosure of confidential information, breach of any written noncompetition agreement, and engaging "in such other behavior detrimental to the interests of [iSeva] as the Board determines."* e4e holds most of iSeva's Series B Preferred Stock.

In its Complaint, e4e alleges that Sircar has attempted to sell iSeva under terms adverse to e4e's interests. Furthermore, after e4e thwarted those efforts, Sircar then attempted to induce key customers and key executives of

[1] Compl. ¶¶ 4-5.

iSeva to follow him to a competitor of iSeva. Despite these allegations, Sircar remains as iSeva's chief executive officer and president.

Arun Santhebennur ("Santhebennur") is iSeva's chief financial officer and another of its directors.* In May 2003, he traveled with Sircar to India to meet with the managers of iSeva's operations there. e4e now contends that Santhebennur participated with Sircar in his efforts to persuade iSeva's leadership in India to abandon iSeva and to participate in the competing venture.

CONTENTIONS

Sircar has moved for judgment on the pleadings. He notes that e4e did not offer iSeva's board of directors the opportunity to decide first how to deal with Sircar's alleged misconduct. He then argues that this derivative action must be dismissed under Court of Chancery Rule 23.1 because e4e has not alleged sufficient grounds to excuse its failure to demand that the

[2] Santhebennur is not a party to this proceeding.

board first take action. Next, Sircar argues that the relief which e4e seeks – his removal as corporate officer – is relief which this Court simply does not have the power to grant.

e4e claims that any demand on its part would have been futile because two of iSeva's four directors – Sircar and Santhebennur – are actively engaged in the effort to divert both key management personnel and important customers to a competitive venture. In addition, while concurring that it is aware of no precedent in which this Court has removed a duly designated corporate officer (at least in the absence of fraud,' which it concedes that it has not pleaded), it argues that, under the unique circumstances of this case, the unusual remedy of Sircar's removal is necessary to preserve and protect the interests of iSeva's shareholders.[3]

[3] Derivative actions routinely involve efforts by shareholders to pursue litigation on behalf of the corporation. Here, e4e asks the Court to exercise business judgment and terminate the employment contract between Sircar and iSeva.

ANALYSIS

1. The Applicable Standard

In evaluating a motion for judgment on the pleadings under Court of Chancery Rule 12(c), the Court must accept the well-pleaded factual allegations in the Complaint as true and give the plaintiff all reasonable inferences which may be drawn from the Complaint.[4] "A complaint should not be dismissed upon such a motion unless it appears a certainty that under no set of facts which could be proved to support the claim would the plaintiff be entitled to relief? Because the question of whether e4e was excused from making a demand on the iSeva board is governed by Court of Chancery Rule 23.1, the allegations relating to demand excusal must be pleaded with particularity.[6]

[4] *Wallace v. Wood,* 752 A.2d 1175, 1179 (Del. Ch. 1999); *Weiss v. Samsonite Corp.,* 741 A.2d 366, 371 (Del. Ch. 1999).
[5] *Delaware State Troopers Lodge No. 1 v. O'Rourke,* 403 A.2d 1109, 1110 (Del. Ch. 1979).
[6] *See, e.g., Rales v. Blasband,* 634 A.2d 927 (Del. 1993).

2. Demand Futility

In light of the statutory duty of the directors of a Delaware corporation to "manage the business and affairs of the corporation,"[7] it is presumed "that in making a business decision the directors of a Delaware corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.':' This presumption may be overcome by an appropriate showing of interest or lack of independence on the part of a majority of the directors who would be charged with evaluating a shareholder demand for board action.[9]

e4e seeks Sircar's removal based on his alleged misconduct. That the conduct of a director is questioned does not necessarily preclude the exercise of his disinterested business judgment." The Court, instead, must consider

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[7] 8 *Del.* C. § 141(a).
[8] *Aronson v. Lewis, 473* A.2d 805,812 (Del. 1984).
[9] *See Orman v. Cullman, 794* A.2d *5, 25* n.50 (Del. Ch. *2002); Beam v. Stewart, 2003* WL 2271421, at *9-*10 (Del. Ch. Sept. 30, 2003).
[10] *See, e.g., Guttman v. Huang, 823* A.2d 492, 500 (Del. Ch. 2003). It is significant to note that e4e is not challenging any specific exercise of business judgment by iSeva's directors. It does not even expressly challenge the failure of the Board to take action in response to allegations of Sircar's misconduct. Instead, e4e contends that, the Board

both the likelihood of an adverse determination as to wrongful conduct and the potential consequences that might flow from such a determination.'[11] The Complaint alleges serious misconduct on the part of Sircar – a chief executive officer and president subverting corporate interest by seeking to induce key personnel and critical customers to depart for a competitive venture. These allegations, if true, would sustain a conclusion of wrongdoing on the part of Sircar and could justify serious sanctions. Accordingly, Sircar must be deemed interested with respect to any demand that might have been made by e4e regarding his continued employment as iSeva's chief executive officer and president.[12]

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cannot, in an independent and disinterested fashion, evaluate whether to terminate Sircar's employment. Because the Board consists of four directors, e4e can demonstrate that the Board is incapable of independently and disinterestedly exercising business judgment through allegations of particularized facts evidencing that two of the four directors are either interested or not independent. ***See, e.g., In re The Limited S'holders Litig.,*** 2002 WL 537692, at *7 (Del. Ch. Mar. 27, 2002). e4e does not challenge either the independence or the interestedness of the other two iSeva directors who serve on the Board as designees of the holders of the Series B Preferred Stock.

[11] ***See, e.g., Guttman, 823*** A.2d at 501; ***Rattner v. Bidzos, 2003 WL 2284323,*** at *9 (Del. Ch. Sept. 30, 2003).

[12] I do not understand Sircar to dispute that he should be considered interested for demand excusal purposes.

Thus, I turn to e4e's contentions regarding Santhebennur's ability to evaluate objectively a demand upon the iSeva board that Sircar be removed from his position of corporate officer. e4e argues that Santhebennur is an active participant with Sircar in his efforts to divert personnel and customers from iSeva. That alignment of interests, e4e argues, raises reasonable doubts about whether his judgment has been tainted by self-interest and whether he could objectively assess Sircar's continued employment with iSeva.[13] The Complaint's express allegations about Santhebennur are sparse. Santhebennur accompanied Sircar to India and "participated in at least some of the wrongful conduct described [elsewhere in the Complaint]" and "he did so in concert with Sircar."[14] These "facts," certainly not pleaded with particularity, alone are not sufficient to raise a reasonable doubt about

[13] e4e also argues that "Santhebennur is a pawn of Sircar." Pl.'s Br. in Opp. at 17. Although the Complaint alleges Santhebermur's place in iSeva's management hierarchy and his participation with Sircar, e4e has failed to provide a sufficient basis for inferring that Sircar dominated and controlled Santhebennur.
[14] Compl. ¶ 29.

Santhebennur's ability to exercise his business judgment in determining whether to take the action of terminating Sircar.

The Complaint, however, refers to a May 27, 2003, letter written by iSeva executives in India (the "May 27 letter") to iSeva's Board as the result of Sircar's visit. That letter contains the following assertions about Santhebennur:

> 1. Santhebennur participated in discussions advising the iSeva executives in India to "be willing to leave iSeva to start a new call center for [a competitor]."
>
> 2. Santhebennur asked those executives "to sign a letter to be given to" [the potential acquirer/competitor] to show their support for it.

The allegations of the May 27 letter, which are made with particularity, if properly considered, show that Santhebennur was actively involved with Sircar in his efforts to do grievous harm to iSeva by siphoning off important employees and customers.

Thus, I must determine if it is proper to consider the May 27 letter.

> As a general matter, the Court, in ruling on a motion to dismiss, will consider only those matters raised in the operative

> pleading, the complaint. The Court may, however, "consider for certain purposes, the content of documents that are integral to or are incorporated by reference into the complaint.""

The May 27 letter was not attached to the Complaint? The May 27 letter was not expressly incorporated into the Complaint by reference. Yet, the May 27 letter was referred to extensively and was given the status of a defined term by the drafters of the Complaint. Moreover, much of the wrongful conduct alleged to have been engaged in by Sircar was taken directly from the May 27 letter. Thus, I am satisfied that the May 27 letter was "integral" to the Complaint and can be considered in the context of evaluating whether or not there is reasonable doubt as to Santhebennur's ability to exercise independent or disinterested business judgment, free from the effects of "improper extraneous influence."[17]

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[15] *In re New Valley Corp.*, 2001 WL 50212, at *4 (Del. Ch. Jan. 11, 2001) (footnotes omitted) (citing *In re Sante Fe Pac. Corp. S'holders Litig.*, *669* A.2d 59, 68 (Del. 1999) and quoting *In re Lukens, Inc. S'holders Litig.*, *757* A.2d 720,727 (Del. Ch. 1999)).
[16] The May 27 letter was attached to e4e's Motion for a Temporary Restraining Order which was filed simultaneously with the Complaint.
[17] *Rales*, *634* A.2d at 935.

Accordingly, Santhebennur must, for these purposes, be viewed as interested because of his participation in Sircar's alleged scheme. The Complaint alleges that Sircar's scheme, if successfully implemented, would cause adverse consequences to iSeva that would call into question its viability as a going concern. Santhebennur's potential culpability and the potential consequences combine to raise reasonable doubts as to whether Santhebennur could fairly evaluate any demand that e4e might have made with respect to Sircar's continuing employment.

Thus, because the Complaint alleges with particularity that, when the Complaint was filed, both Santhebennur and Sircar suffered from a disabling interest, demand is excused.

3. The Remedy

The parties' principal debate has been over the scope of any remedy that the Court might impose. Although e4e initially sought interim injunctive relief that would have restricted Sircar from engaging in other efforts to sell iSeva or working for anyone other than iSeva, the only

permanent relief that it seeks is Sircar's removal as an iSeva's corporate officer.[18] Sircar argues that such relief cannot be obtained because the Court lacks the power to do so; accordingly, he contends that the action should be dismissed because the remedy which e4e has sought cannot be granted. e4e argues that no permanent injunctive relief, short of Sircar's termination, could be formulated to protect the interests of iSeva.

I decline the invitation to resolve whether this Court has the power, on the alleged facts, to order Sircar's removal as a corporate officer. I am not persuaded, based on the limited record before me, that, if e4e prevails after trial, permanent injunctive relief would be meaningless. Furthermore, given the equitable discretion afforded this Court in developing a wide range of possible remedies, I am not convinced that the Court may only consider termination as the exclusive remedy. In short, a motion under Rule 12(c)

[18] e4e did also pray for an order "granting such other relief as may be appropriate, including an award of reasonable attorneys' fees and expenses." e4e, however, has not sought damages and it has not asserted any claim against iSeva's Board for breach of fiduciary duty resulting from any failure to supervise Sircar or to take appropriate action when confronted with allegations of Sircar's misconduct. In addition, e4e has not asked for the appointment of a receiver.

should be granted only where under no circumstances, after the well-pleaded allegations have been accepted, could any relief be awarded to the plaintiff.[19] The potential for permanent injunctive relief alone precludes Sircar's efforts to satisfy the standard.[20]

CONCLUSION

For the foregoing reasons, Sircar's motion for judgment on the pleadings is denied.

IT IS SO ORDERED.

Very truly yours,

JWN/cap
oc: Register in Chancery-NC

[19] ***See Delaware State Troopers Lodge, 403*** A.2d at 1110.

[20] It is important to reiterate that no view is expressed as to whether or not Sircar's termination could be a remedy. More specifically, that the Court does not exclude the possibility of a termination remedy should not be interpreted in any way as suggesting that such a remedy might be available. Furthermore, I have not considered how the Court would, for example, address Sircar's employment agreement which allows the Board to terminate the employee for cause but does not mandate that it terminate the employee if cause exists.