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Re: ***Daniel and Raizel Taubenfeld v. Marriott Int 'l, Inc., et al.***
Civil Action No. 20122-NC

Dear Counsel:

Plaintiffs Daniel and Raizel Taubenfeld filed this derivative action alleging that the individual defendants in this case withheld money that should have been paid to hotel owners and acted in such a way as to injure the reputation and profitability of nominal defendant Marriott International, Inc. ("Marriott").

Pending before the Court is plaintiffs' voluntary motion to dismiss their complaint pursuant to Chancery Rule 41 (a). The Rule 41 (a) motion, however, raises a subsidiary issue: What effect does Chancery Rule 15(aaa)

have on a plaintiffs' ability to dismiss their complaint ***with prejudice*** in conformity with Rule 4 1 (a)? For the reasons set forth below, I conclude that a plaintiffs ability to dismiss a complaint ***with prejudice*** pursuant to Rule 41(a) is unaffected by Rule 15(aaa). It is first necessary to set forth the procedural history of this case in some detail.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background and Filing of the Complaint

Plaintiffs Daniel and Raizel Taubenfeld own Marriott common stock. They initiated this derivative action against Marriott (as nominal defendant), Avendra, LLC,[1] and eleven individual defendants, all current or former board members of Marriott. Plaintiffs contend that due to defendants' actions, Marriott had to renegotiate several management agreements that it had with hotel owners, making those agreements less profitable, and thereby damaging Marriott's reputation.

Plaintiffs filed their complaint in this Court on January 16, 2003. Less than one month later, two motions to dismiss were filed: one on behalf of Avendra and one on behalf of Marriott and the individual defendants. Avendra moved to dismiss under Rule 12(b)(6) because the complaint failed

[1] Avendra is a procurement services company for the hospitality industry that is partly owned by Marriott. It is designed to allow its owners to receive rebates and volume discounts from suppliers. Compl. ¶¶ 8, 11. Marriott's use of Avendra, and its handling of the savings received from its ownership of Avendra, is central to plaintiffs' complaint.

to state a claim upon which relief could be granted. Marriott and the individual defendants moved to dismiss the complaint both for failing to state a claim and for failing (under Rule 23.1) to establish either that demand was wrongly rejected or that demand was futile.[2]

B. Defendants' Attempts to Proceed on a Motion to Dismiss

Defendants[3] then requested a briefing schedule on their motions to, dismiss. In response to defendants' inquiry, counsel for plaintiffs stated that plaintiffs were in the process of preparing an amended complaint! Several months passed and defendants' counsel again inquired as to whether plaintiffs intended to submit an amended complaint or were prepared to enter into a briefing schedule. In response to this inquiry, plaintiffs' counsel informed defendants that plaintiffs were preparing a demand for books and records of Marriott pursuant to 8 *Del.* C. § 220 in order to facilitate preparation of plaintiffs' amended complaint.[4] Defendants, in a letter to plaintiffs' counsel, requested a copy of plaintiffs' § 220 demand by July 1. Plaintiffs' counsel responded, via voice mail, that he would deliver the § 220

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[2] Specifically, Rule 23.1 requires that "[t]he 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 plaintiffs failure to obtain the action or for not making the effort." **DEL. CH. CT. R. 23.1;** *Lewis v. Aronson, 466* A.2d *375* (Del. Ch. 1983).

[3] Unless otherwise noted, by referring to defendants, I refer to Marriott and individual defendants only; I do not refer to Avendra.

[4] Section 220 provides shareholders the right, in certain circumstances, to inspect the books and records of a corporation in which they hold an equitable stake.

demand by July 3. On July 2, Marriott received the demand.[5] That same day, defendants' counsel wrote to this Court seeking the imposition of a briefing schedule on the motions to dismiss. On July 14, two briefs were submitted to this Court in support of the defendants' motions to dismiss.

C. The July 29 Letter Opinion Addressing Rule 15(aaa)

1. Rule 15(aaa)

Court of Chancery Rule 15 governs the procedure for amending pleadings. Subsection (a) provides a liberal standard for proposed amendments. It allows each party to amend their pleadings once as a matter of right, and directs the Court to grant leave to amend freely "when justice so requires." In an acknowledgement of, and attempt to reduce, the burden on the parties and this Court that motions to re-plead present, this Court adopted subsection (aaa) to Rule 15.[6] That subsection states:

> (aaa) Notwithstanding subsection (a) of this Rule, a party that wishes to respond to a motion to dismiss under Rules 12(b)(6), 12(c) or 23.1 by amending its pleading must file an

[5] Although not affecting the issue currently before the Court, I note that Marriott denied plaintiffs' § 220 demand on the basis that the demand did not establish a proper purpose to permit inspection of the records and documents plaintiffs had requested. See 8 *Del. C.* § 220(b) (requiring a proper purpose for shareholder inspection); Security *First* v. U.S. *Die Casting & Dev. Co.*, 687 A.2d 563, 566-67 (Del. 1997) ("Section 220 of the Delaware General Corporation Law permits a stockholder, who shows a specific proper purpose and who complies with the procedural requirements of the statute, to inspect specific books and records of a corporation.").

[6] *See Stern v. LF Capital Partners, LLC, 820* A.2d 1143, 1146 (Del. Ch. 2003) ("The self-evident purpose of this rule is to reduce the burden on both the courts and the parties encountered when a successful motion to dismiss is met by a motion to re-plead.").

> amended complaint or a motion to amend in conformity with this rule no later than the time such party's answering brief in response to the Rule 12(b), 12(c) or 23.1 motion is due to be filed. In the event a party fails to comply with the requirement and the Court concludes that the pleading should be dismissed under Rule 12(b)(6), 12(c) or 23.1, the dismissal shall be with prejudice unless the Court for good cause shown shall find that dismissal with prejudice would not be just under all the circumstances.

Thus, Rule 15(aaa), read in conjunction with Rule 15(a), presents three separate standards for allowing the amendment of a complaint. Plaintiffs may amend once as a matter of course either before a responsive pleading is served, or if no responsive pleading is permitted and no trial date set, twenty days after the complaint is served. If a defendant moves to dismiss pursuant to Rules 12(b)(6), 12(c), or 23.1, plaintiffs may amend their complaint so long as the Court decides that "justice so requires."[7] If the time for plaintiffs' response to a motion to dismiss has passed, and the Court decides dismissal is appropriate, plaintiffs may only submit an amended complaint if they show that "dismissal with prejudice would not be just under all the circumstances."[8]

2. Plaintiffs' Counsel's July 9 and July 21 Correspondence

In response to defense counsel's request that I enter a briefing schedule, plaintiffs' counsel wrote to the Court on July 9, alleging that

[7] **DEL. CH. CT. R. 15(a).**
[8] **DEL. CH. CT. R.** 15(aaa).

defendants were merely "seeking to force plaintiffs to make the Rule 15(aaa) election between filing a responsive brief or an amended complaint before the § 220 demand is resolved or documents produced." Plaintiffs attempted to couch the issue as one concerning the interplay between § 220 and Rule 15(aaa). Plaintiffs expanded on this argument in a July 21 letter, which asked the Court to stay proceedings in this case so that plaintiffs could pursue their § 220 action before they filed their amended complaint pursuant to Rule 15(aaa). The July 21 letter, which cites Vice Chancellor Lamb's decision *in Stern v. L.F. Capital Partners, LLC*,[9] argues that the only policy embodied in Rule 15(aaa) is to prevent the unnecessary expenditure of judicial resources. Plaintiffs argued that no judicial resources would be expended pending the outcome of the § 220 request, and that a rule preventing the use of § 220 to amend a shareholder derivative complaint would be "draconian."

3. The Court's July 29, 2003 Letter Opinion

In their letter to the Court, plaintiffs argued that Rule 15(aaa)'s policy of conserving litigant and judicial resources would not be offended by issuing a stay in these circumstances. Plaintiffs, however, failed to consider

[9] 820 A.2d 1143 (Del. Ch. 2003).

another policy that Rule 15(aaa) embodied, one noted by Vice Chancellor Lamb in ***Stern*** and one the Court cited in its July 29 Letter Opinion:

> Rule 15(aaa) "embodies a legislative-type finding that, by the time the responsive brief is due to be filed in opposition to a motion to dismiss of the type described in the rule, the party-plaintiff will have enough information from which to decide whether to stand on the complaint as alleged or, instead, to re-plead.""

In again recognizing that policy, the Court noted that Rule 15(aaa) was in no way affecting the plaintiffs' rights, as shareholders, to demand inspection. It was noted, however, that Rule 15(aaa) "control[s] how litigation will proceed after a complaint is filed or appropriate motions to dismiss are filed."" In this case, plaintiffs filed their complaint in January 2003. That filing was a certification under Rule 11 that the plaintiffs had enough information to support their allegations.[12] Plaintiffs chose to file a complaint before pursuing their § 220 rights. Although that decision did not affect plaintiffs' § 220 rights, it did effect the benefit such rights could afford the plaintiffs.

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[10] *Taubenfeld JT v. J. W. Marriott, Jr.*, C.A. No. 20122 (Letter Opinion July 29, 2003) (quoting *Stern v. LF Capital Partners, LLC*, *820* A.2d 1143, 1146 (Del. Ch. 2003)).

[11] *Id.*

[12] Del. Ch. Ct. R. 11 provides that: "[b]y presenting to the Court . . . a pleading . . . an attorney is certifying that . . , the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . ."

The July 29 Letter Opinion directed plaintiffs to file their answering brief, or their motion to amend their complaint, by August 11.

D. The Current Procedural Posture

Following the July 29 decision, plaintiffs' counsel advised the Court that plaintiffs were willing to have the case dismissed with prejudice as to them only. No other correspondence was received by the Court until September 5, when the Court received a letter from plaintiffs' counsel, which included a proposed order dismissing the action with prejudice as to plaintiffs only. The September 5 letter cited to Vice Chancellor Lamb's holding in *Stern* that, given Rule 15(aaa), party-plaintiffs will not be permitted to file a "without prejudice" dismissal of their action under Rule 41(a).[13] Plaintiffs' counsel distinguished *Stern* on the ground that plaintiffs in this case were stipulating to a dismissal under Rule 41 (a) *with* prejudice (albeit to them only).

Defendants responded first that the plaintiffs' request for dismissal is inconsistent with the Court's July 29 order since the plaintiffs did not file a supporting brief or seek leave to amend. Thus, according to the defendants, the Court should consider the motions to dismiss based simply on the plaintiffs' complaint. Second, defendants argue that even if plaintiffs'

[13] 820 A.2d at 1147.

voluntary dismissal with prejudice may be appropriate, plaintiffs do not meet the requirements for dismissal under Rule 41(a). Finally, defendants insist that any dismissal should be "with prejudice as to all shareholders." They argue that without the benefit of a "with prejudice" dismissal as to all shareholders, defendants will be unfairly exposed to subsequent litigation at considerable expense.

III. LEGAL ANALYSIS

A. The Effect of the July 29 Letter Opinion on Plaintiffs' Ability to Seek Dismissal

The Court's July 29 Letter Opinion ordered plaintiffs to either file an answering brief or seek leave to amend their complaint by August 11, 2003. Defendants argue that because plaintiffs followed neither directive, they waived their right to file an answering brief and the Court should simply rule on the pending motion to dismiss. This argument misconstrues the scope of the Court's July 29 decision. Nothing in the Court's July 29 decision foreclosed plaintiffs from proposing other relief available to them under the rules of this Court. Nor did the Court's July 29 decision bar plaintiffs from seeking a dismissal according to the procedures set out in Rule 41(a). Accordingly, I now turn to whether Rule 15(aaa) precludes plaintiffs' ability to dismiss their complaint with prejudice.

B. Rule 15(aaa)'s Effect on Rule 41 (a)

In *Stern,* plaintiffs filed their complaint on October 26, 2001 and defendants filed a motion to dismiss on January 4, 2002. Plaintiffs filed an answering brief to the motion to dismiss on February 5, 2002, and the Court heard argument on the motion on March 26, 2002.[14] Approximately one week after the Court heard oral argument, plaintiffs filed a notice of dismissal pursuant to Rule 41 (a)(1).[15] This raised the issue whether Rule 15(aaa) limits a plaintiffs' ability to resort to Rule 41(a).

As mentioned above, Rule 15(aaa) is designed to limit a plaintiffs ability to re-plead once the time to file a responsive brief has passed. The policy embodied in this Rule is to conserve both judicial and litigant resources, and reflects the policy judgment that "by the time the responsive brief is due . . . the party-plaintiff will have enough information from which to decide whether to stand on the complaint as alleged or, instead, to re-plead."[16] As Vice Chancellor Lamb noted in *Stern,* neither Rule 15(aaa) nor Rule 41 (a) refers to the other. Nevertheless, "there is substantial interplay

[14] *Stern, 820* A.2d at 1144.
[15] Id. at 1145.
[16] *Id.* at 1146.

between Rule 15(aaa) and Rule 41(a), and those rules should be construed, to the extent possible, to give effect to both.“”

In *Stern*, the plaintiffs admittedly were using Rule 4 1 (a) to subvert the policy of Rule 15(aaa); they sought to use Rule 41(a) to file a new complaint when the text of Rule 15(aaa) would not allow them to do so. In holding that Rule 15(aaa) should be read to bar plaintiffs from dismissing under Rule 41(a) in order to file a new action alleging amended claims, Vice Chancellor Lamb wrote that “mere willingness to pay the expense of a new lawsuit should not entitle a litigant to avoid the salutary operation of Rule 15(aaa).”[18]

In this case, however, plaintiffs seek to dismiss their complaint *with prejudice*. This is different than *Stern*, where plaintiffs acknowledged that, by resorting to Rule 41(a), they were simply seeking to do what Rule 15(aaa) would not allow. Furthermore, a dismissal *with prejudice* pursuant to Rule 41(a) does no harm to Rule 15(aaa)’s salutary purpose. Rule 15(aaa) was designed to prevent plaintiffs from re-pleading allegations after a certain stage is reached in the litigation. A dismissal with prejudice accomplishes this purpose. For these reasons, I conclude that a dismissal with prejudice,

[17] ***Id.*** at 1147.
[18] ***Id.***

pursuant to Rule 41(a), fully comports with *Stern*, and the policy of Rule 1 5(aaa), and is permissible.

C. The Requirements of Rule 41 (a)

In their opposition to a voluntary dismissal with prejudice, defendants argue that "a voluntary dismissal under Rule 41 is not a matter of right, but rather is within the discretion of the trial court." Defendants rely heavily upon *ASX Investment Corp.* v. *Newton"* and *Draper v. Paul N. Gardner Defined Plan Trust.*[20] Both of these cases, however, are concerned with dismissal under Rule 41 (a)(2), which governs dismissals by order of Court.[21] Rule 4 1 (a)(2) begins, "[e]xcept as provided in paragraph (1) of this subdivision of this Rule." Here, paragraph (1) of Rule 41 plainly applies.

Rule 41 (a)(1) allows for voluntary dismissal by plaintiffs. It provides that: "Subject to payment of costs and the provisions of Rule 23(e) and Rule 2 1.3 an action may be dismissed by the plaintiff without order of the court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment."

[19] 1994 Del. LEXIS 66 (Del. Ch.).
[20] 625 A.2d 859, 863 (Del. 1993).
[21] Although Rule 23.1 requires court approval for dismissal of derivative actions, defendants have not argued that such approval would not be appropriate here.

Defendants have not filed an answer or a motion for summary judgment; they have filed motions to dismiss. As such, Rule 4 l(a)(1) applies, and permits dismissal by the plaintiff. The complaint, therefore, as requested by plaintiffs, and in accordance with Rule 15(aaa) and *Stem*, is dismissed with prejudice.

D. Whether Prejudice Shall Be as to Plaintiffs Only or as to All Shareholders

Driving the current argument between plaintiffs and defendants is whether dismissal shall be with prejudice as to plaintiffs only, or as to all shareholders. Defendants argue that plaintiffs' actions have resulted in significant expense and diversion of defendants' resources. They allege that they will be injured by having to relitigate identical claims if a limited dismissal with prejudice is allowed. Defendants insist that "[i]t cannot be the policy of this Court to permit shareholders to file litigation, which is then actively engaged by Delaware corporations and their directors, and then allow shareholders to withdraw the litigation without consequence to themselves but leaving defendants subject to future litigation on the same

issues."[22] Defendants cite to Rule 15(aaa), and state that if a limited dismissal is granted, the purposes of Rule 15(aaa) will be frustrated.[23]

In the circumstances of this case, however, I believe the purpose of Rule 15(aaa) is fulfilled. Plaintiff shareholders filed a complaint, and voluntarily withdrew it *with consequence to themselves.* The Taubenfelds will not be permitted to bring another suit on the same issues. Defendants have pointed to no authority for the proposition that it is the policy of this state to preclude a suit by *other* shareholders on what may be worthy claims merely because two shareholders filed a complaint that they later have chosen not to defend.

It is true that defendants have expended resources defending this litigation. That alone is insufficient to dismiss a case with prejudice as to an entire class of shareholders. Addressing dismissal under the doctrine of another action pending, the Delaware Supreme Court noted almost half a

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[22] Mem. in Supp. of Defs.' Opp'n to Pls.' Req. for a Limited Dismissal 5-6 (Sept. 30, 2003). Defendants also make arguments for dismissal with prejudice to all shareholders based on *the* doctrine of *res judiciutu.* However, these arguments are premised on this Court dismissing the action based on the motion to dismiss or the defendants § 102(b)(7) provision. Since I am allowing plaintiffs dismissal of this case based on Rule 4 1 (a)(l), I do not address these arguments.

[23] I note that in *Stern,* Vice Chancellor Lamb's discussion of the policy behind this rule mentions that, "by the time the responsive brief is due . . . the party-plaintiff will have enough information from which to decide." *Stern,* 820 A.2d at 1146 (emphasis added). Vice Chancellor Lamb's decision contains no discussion of Rule 1 5(aaa)'s affect on those *not* a party to the action.

century ago, "[i]n cases of successive derivative suits by stockholders [the doctrine] should be applied with caution. Although the cause of action may be the same, as in this case, yet the suing plaintiffs are different. True, the suits are both in right of the corporation, but it is always possible that stockholders other than the one first suing may have a legitimate reason to 'file suit."[24] This same principle holds true today, almost fifty years later, when considering a Rule 4 1 (a)(1) voluntary dismissal.

Defendants also complain about how the Taubenfelds have continuously delayed in prosecuting this action. Although it is unfortunate that defendants have had to expend resources as a result of the Taubenfelds' delays, I do not find that to be reason to punish other shareholders who may have a legitimate reason to file suit.[25] Prejudice is applied to named plaintiffs only.

For the foregoing reasons, plaintiffs' motion for a dismissal with prejudice as to themselves only will be granted.

[24] *Auerbach v. Cities Serv. Co.,* 143 A.2d 904 (Del. 1958).

[25] I find it instructive that Rule 23.1 contemplates dismissal of derivative actions without prejudice or with prejudice as to plaintiff only. This rule implicitly recognizes that there may be cases where dismissals with prejudice to all shareholders would be inappropriate. A case where no substantive decision on the merits was ever reached is clearly a candidate for such a limited dismissal.

IT IS SO ORDERED.

Very truly yours,

S/William B. Chandler III

William B. Chandler III

WBCIII:meg

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