

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

STEPHEN P. LAMB
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: June 30, 2004
Decided: September 16, 2004

Mr. Alfred Ronsdorf
aronsdorf@yahoo.com

R. Bruce McNew, Esquire
Taylor & McNew
3711 Kennett Pike, Suite 210
Greenville, DE 19807

RE: Alfred Ronsdorf v. Randall Jacobson, et al.
C.A. No. 20614

Dear Mr. Ronsdorf and Mr. McNew:

Randall Jacobson, the defendant in this purported derivative action, moves to dismiss the first amended complaint¹ on the grounds that it fails to state a claim and that the plaintiff, Alfred Ronsdorf,² lacks standing to bring the action. The court heard argument on June 30, 2004. For the reasons set forth herein, the court

¹ Ronsdorf filed his initial complaint on October 31, 2003. Jacobson filed a motion to dismiss on November 26, 2003 as well as a motion to stay discovery. The court granted the motion to stay discovery on December 31, 2003. The first amended complaint was filed on January 9, 2004, and on January 26, 2004, Jacobson filed a motion to dismiss the amended complaint.

² The plaintiff's name was Paul Jacobson, and he later changed it to Alfred Ronsdorf. Ronsdorf and Randall Jacobson are brothers.

grants the motion in part, and reserves the question of standing to be resolved in connection with the related countersuit filed by Jacobson.³

Ronsdorf's amended complaint alleges breach of fiduciary duties and wrongful self-dealing by Jacobson in connection with his management of Technology Development Corporation (USA) ("TDC").⁴ TDC, a Delaware corporation, is named as a nominal defendant. TDC is a small, family-operated business that provides computer services to various government agencies and departments. Randall Jacobson and his father, Arvid Jacobson, started TDC in April 1984. The amended complaint alleges that Ronsdorf and Jacobson are the owners of 35% and 45% of the TDC common shares and that Jacobson has been the sole director and president of TDC from 1995 to the present.

The amended complaint alleges that for the period 1995-2002 TDC had revenues of \$14,410,379.68 and incurred an overall loss of \$46,483.74.

The mismanagement claimed is Jacobson's alleged failure to bid a profit on any of TDC's contracts with the government from 1995 onward. This omission

³ Jacobson filed a complaint (Civil Action No. 518-N) on June 21, 2004 seeking: a temporary restraining order, a permanent and preliminary injunction, and a declaration that Ronsdorf is no longer a corporate officer of TDC; specific performance of a 1987 agreement, thereby canceling Ronsdorf's shares of TDC; and damages.

⁴ The claims asserted by the plaintiff are derivative as they relate to the alleged mismanagement of TDC. The defendants have not moved to dismiss pursuant to Rule 23.1.

allegedly cost TDC more than \$2 million between 1995 and 2002.⁵ The amended complaint claims that the regulations governing the sort of government contracts involved allow the contractor to bid a profit up to 15%. Thus, Jacobson's alleged failure to bid the 15% profit is claimed to amount to a breach of fiduciary duties.⁶

The amended complaint also alleges wrongful self-dealing by Jacobson because Jacobson hired his wife as TDC's bookkeeper and Jacobson allegedly received two unauthorized loans in 1990 and 2002 that have not yet been repaid.

Jacobson moves to dismiss the amended complaint on the basis that Ronsdorf has failed to state a claim, and lacks standing to bring this derivative action.⁷ Jacobson asserts that Ronsdorf has failed to allege sufficient facts to support his claims for breach of fiduciary duties and wrongful self-dealing and, moreover, that Ronsdorf does not have standing to bring this action as he fails the continuous ownership requirement and is not an adequate derivative representative.

⁵ The complaint alleges that there are two types of government contracts between contractors like TDC and the government: firm-fixed-price and cost-plus-fee contracts. The complaint alleges that all of TDC's contracts with the government are of the cost-plus-fee variety. Am. Compl. ¶ 13.

⁶ The amended complaint states that the Federal Acquisition Regulation is the governing law of TDC's government contracts. Am. Compl. ¶ 12.

⁷ Jacobson moves to dismiss the amended complaint pursuant to Court of Chancery Rule 12(b)(6), and further asserts that the amended complaint should be dismissed pursuant to Court of Chancery Rule 11(c)(2).

On a motion to dismiss, the court is to assume the truthfulness of all well pleaded allegations of fact in the complaint.⁸ Although “all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true . . . neither inferences nor conclusions of fact unsupported by allegations of specific facts . . . are accepted as true.”⁹ That is, “[a] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in [the nonmoving party’s] favor unless they are reasonable inferences.”¹⁰ On a motion to dismiss, the court may consider for certain limited purposes the contents of documents that are referred to in the complaint.¹¹

Under Delaware law, the business judgment rule acts as a substantive rule of law providing that directors are not liable to the corporation for any injury or loss arising from action taken by them in good faith and with appropriate care. Moreover, the business judgment rule creates a presumption that the acts of independent directors are taken in good faith and with due care.¹² The allegations

⁸ *Grobow v. Perot*, 539 A.2d 180, 187 & n.6 (Del. 1988).

⁹ *Id.*

¹⁰ *Id.*

¹¹ A court may consider, for limited purposes, documents that are “integral to or incorporated by reference in the complaint.” *In re Lukens Inc. S’holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999), *aff’d sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (citing *In re Santa Fe Pac. Corp. S’holders Litig.*, 669 A.2d 59, 69-70 (Del. 1995)).

¹² RODMAN WARD, JR., EDWARD P. WELCH & ANDREW J. TUREZYN, *FOLK ON THE DELAWARE GENERAL CORPORATION LAW*, § 141.2.2.2, GCL-IV-33 (4TH ED. 2004).

of the amended complaint relating to the claimed failure to “bid a profit” on any of the corporation’s contracts over a period of nine years obviously relate directly to the management of the business and affairs of TDC. Yet those allegations (despite their sweeping nature) fail to provide a basis for this court to second-guess the basis on which TDC managed its contractual relations with the government. This is true for two reasons. First, Jacobson, the sole director and president, is not alleged to have any interest in the bidding of contracts that is not congruent with the interests of TDC. On the contrary, he is alleged to be the owner of 45% of TDC’s common shares. Second, the amended complaint is lacking in any factual detail about how contracts were bid or how the alleged failure to “bid a profit” actually affected the corporation’s success either in obtaining contracts or in earning money on them. For these reasons, the allegations in the amended complaint relating to the bidding of contracts fail to allege any basis on which the business judgment rule could be overcome.

The amended complaint also alleges that Jacobson breached his fiduciary duties by taking unauthorized, interest-free loans from TDC in 1990 and 2002.¹³

¹³ The amended complaint further alleges that Jacobson breached his fiduciary duties by hiring his wife as the company’s accountant, claiming that Jacobson’s wife has no professional experience and has done “a poor job.” The only particulars alleged are that Mrs. Jacobson failed to pay bills from vendors and failed to file 2002 tax returns. For the reasons discussed, *infra*, Ronsdorf’s standing to raise this issue is unclear. Thus, the court will defer consideration of the motion to dismiss this claim.

Ronsdorf claims that these loans were obtained improperly and that Jacobson has not yet repaid the loans or the interest on them. Jacobson argues that this claim should be dismissed because Delaware law allows companies to provide their officers or employees with interest-free loans.¹⁴

Jacobson is correct that interest-free loans to corporate officers or directors are statutorily permitted. Nevertheless, the amended complaint alleges that the loans were unauthorized and that Jacobson stood on both sides of the transactions. If Ronsdorf is able to prove these allegations, Jacobson will either be obliged to repay the loans or will bear the burden of proving the entire fairness of those transactions.¹⁵ Jacobson is a 45% stockholder and has been the president, treasurer, secretary, and sole director of TDC since 1992.¹⁶ Since Jacobson is both a controlling stockholder and an interested director, the entire fairness standard is

¹⁴ See 8 *Del. C.* § 143.

¹⁵ See *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (“As a general matter, the business judgment rule presumption that a board acted loyally can be rebutted by alleging facts which, if accepted as true, establish that the board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders.”).

¹⁶ At oral argument, Ronsdorf stated that he and Jacobson were the sole directors in 1990 and that he only learned of the 1990 loan in 2001. Ronsdorf stated that, even though he was a director, he was unaware of the 1990 loan and that he could not recall what the company’s revenues were in 1990.

appropriate in determining the propriety of these alleged loans.¹⁷ Thus, the court will not dismiss the claims related to the two loans at this time.

Ronsdorf's Standing To Sue Derivatively

In order for Ronsdorf to maintain an action derivatively on behalf of the company, he must have continuously held common stock in TDC from the time of the alleged injury on the corporation to the filing of the complaint and, thereafter, during the pendency of this action.¹⁸ The record, however, is quite unclear as to whether Ronsdorf is now a stockholder of TDC and whether he has had continuous stock ownership at all relevant times. In this connection, Jacobson has filed a separate action (Civil Action No. 518-N) seeking a declaration that Ronsdorf is not a stockholder of TDC and an order specifically enforcing an alleged contract between Ronsdorf and Jacobson relating to the ownership of TDC stock. Obviously, the issues raised in that action are intimately related to the question of standing raised here.

The court concludes that the best course is to stay the remaining issues in this action while proceeding in Civil Action No. 518-N to determine the nature and extent of Ronsdorf's alleged ownership of common stock of TDC. The parties are

¹⁷ See *Orman*, 794 A.2d at 20 n.36.

¹⁸ See *Lewis v. Anderson*, 477 A.2d 1040, 1046 n.7 (Del. 1983) (discussing the requirement of 8 *Del. C.* § 327 and Court of Chancery Rule 23.1 that the plaintiff to a derivative suit be a stockholder of the company on whose behalf the suit is brought at the time of the transaction of which such stockholder complains).

Alfred Ronsdorf v. Randall Jacobson, et al.

C.A. No. 20614

September 17, 2004

Page 8

directed to conduct any necessary discovery on these issues within the next 90 days. The court will then schedule trial in Civil Action No. 518-N during the month of January 2005 on a date convenient to the court, the parties and their counsel.

For the foregoing reasons, the court has this date entered the attached order.

/s/ Stephen P. Lamb
Vice Chancellor

Attachment