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VICE CHANCELLOR

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

COURT OF CHANCERY COURTHOUSE
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Re: *Gentili v. L.O.M. Med. Int'l, Inc*.
Civil Action No. 7600-VCG

Dear Counsel:

This matter involves a request under Section 225 of the Delaware General Corporation Law ("DGCL")[1] to determine the composition of the Board of Directors of L.O.M. Medical International, Inc. ("L.O.M." or the "Company"). The dispute centers on whether certain Defendants were validly elected as directors (the "Challenged Directors") at a meeting of the stockholders held on April 17, 2012. The Plaintiffs allege that the stockholder meeting was adjourned before a vote for the offices of the Directors could be taken. The Defendants have moved to dismiss under Rule 12(b)(6). The Defendants argue that even if the meeting was adjourned, stockholders representing the majority of the shares of the Company ratified the

[1] 8 *Del. C.* § 225.

vote, electing the Challenged Directors, by written consent (the "Consents"). For the reasons detailed below, I deny the motion.

A. Background[2]

A L.O.M. stockholders' meeting was held on April 17, 2012. At the meeting, stockholders raised concerns about the sufficiency of notice, the accuracy of the proxy materials, and the lack of current financial information.[3] The President of L.O.M., pursuant to Article II, § 9(a) of the company's bylaws, may adjourn a stockholder meeting at "his or her sole discretion."[4] In response to a stockholder's request, the President of L.O.M., Mr. Lionel Matthews, adjourned the stockholders' meeting.[5] Matthews and "numerous stockholders" departed the meeting.[6] L.O.M.'s counsel then announced that the meeting had not adjourned and that a recess was being taken.[7] Defendant Woloschuk, a Company director,[8] then "purported to preside over a resumed meeting."[9] At the resumed meeting, the Challenged Directors were allegedly elected.[10] The Challenged Directors then took

[2] The facts below are taken from the Complaint.
[3] Compl. ¶¶ 62-64.
[4] *Id.* ¶ 66.
[5] *Id.* ¶¶ 65, 67.
[6] *Id.* ¶ 69.
[7] *Id.*
[8] *Id.* ¶ 32.
[9] *Id.* ¶ 69.
[10] *Id.*

a number of actions, including approving L.O.M.'s 2012 stock option plan and firing Matthews as L.O.M.'s president.[11]

The Defendants assert that after the meeting resumed, the stockholder votes were counted, and that the Challenged Directors were elected at the April 17, 2012, meeting by approximately 56% of the Company's issued and outstanding shares.[12] The Defendants contend that after the meeting, on April 18, 2012, the Challenged Directors sent the stockholders a letter that informed the stockholders of the meeting's results.[13] At some point and in some manner, some entity solicited the Consents from the stockholders; the record is silent in regard to this issue. The Defendants assert that 53.36% of the stockholders ratified the actions taken at the April 17, 2012, meeting via the Consents.[14]

The Consents asked the stockholders to directly ratify the election of the Challenged Directors.[15] The third "Whereas" clause of the Consents states that "the Shareholder is delivering this written consent to (a) confirm and ratify the election of [the Challenged Directors] and (b) ratify the Corporation's 2012 Stock Option Plan."[16] The first "Resolved" clause of the Consents states that "the Shareholder hereby approves and authorizes the election of [the Challenged Directors] as

[11] *Id*. ¶¶ 69, 70.
[12] *See* Defs.' Opening Br. Supp. Mot. Dismiss Verified Compl. at 3, 10, 11.
[13] *Id*. at 10, 11.
[14] *Id*. at 12.
[15] *See* Affidavit of Ralph Woloschuk Supp. Defs.' Mot. Dismiss Verified Compl. Ex. D.
[16] *Id*.

directors of the Corporation and ratifies the Corporation's 2012 Stock Option Plan."[17]

B. Rule 12(b)(6) Standard

"[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[18] "Under this minimal standard, when considering a motion to dismiss, the trial court must accept even vague allegations in the Complaint as well-pleaded if they provide the defendant notice of the claim" and accept well-pleaded factual allegations as true.[19] Moreover, all reasonable inferences are drawn in the plaintiff's favor.[20] "Matters extrinsic to a complaint generally may not be considered in a ruling on a motion to dismiss . . . [D]ocuments outside the pleadings may be considered only in particular instances and for carefully limited purposes."[21] Material that can be considered includes: "documents attached to or incorporated by reference in the complaint, matters 'integral' to the complaint, and facts of which a court may take judicial notice (*e.g.*, a certificate of incorporation)."[22]

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[17] *Id*.
[18] *Hamilton Partners, LP. v. Highland Capital Mgmt., L.P.*, 2012 WL 2053329, at *2 (Del. Ch. May 25, 2012).
[19] *In re Goldman Sachs S'holder Litig.*, 2011 WL 4826104, at *5 (Del. Ch. Oct. 12, 2011) (internal quotation marks removed).
[20] *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs, LLC*, 27 A.3d 531, 536 (Del. 2011).
[21] *Zucker v. Andreessen*, 2012 WL 2366448, at *2 (Del. Ch. June 21, 2012) (internal quotation marks removed).
[22] *Id*.

C. Documents Considered

Here, in addition to the Complaint, the Defendants ask me to consider the Consents together with an affidavit filed by Defendant Woloschuk. The Plaintiffs acknowledge that, in this peculiar situation, the Consents may be considered, but the Plaintiffs object to the consideration of Woloschuk's affidavit. The Plaintiffs contend that the motion before me is converted to one for summary judgment, rather than one to dismiss, upon consideration of the Woloschuk affidavit, and that, accordingly, they should be permitted to take discovery to respond if the affidavit is considered.

A Section 225 action is summary in nature;[23] however, I allowed the Defendants' Motion to Dismiss to go forward because it potentially presented an expedited resolution of this summary proceeding. While I permitted the Defendants to submit the Consents in interest of economy, and consider them in my decision here,[24] consideration of other matters pertaining to disputed facts, such as Woloschuk's affidavit, would indeed convert this Motion to Dismiss into a motion for summary judgment.[25] That conversion would require affording the Plaintiffs the opportunity to take discovery and submit evidence of their own concerning whether any factual matters are contested. Given the summary nature

[23] *See Box v. Box*, 697 A.2d 395, 399 (Del. 1997).
[24] *Zucker*, 2012 WL 2366448, at *2.
[25] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) ("When the trial court considers matters outside of the complaint, a motion to dismiss is usually converted into a motion for summary judgment and the parties are permitted to expand the record.").

of this Section 225 action, I find that litigants' economy is best served if I consider this matter as a motion to dismiss.[26] Accordingly, I limit my inquiry to the allegations of the Complaint and the Consents, and decline to consider Woloschuk's affidavit.

D. Ratification

The Defendants' Motion to Dismiss can only be granted if the Consents serve to ratify an action of the Board of Directors that, in turn, disposes of the Plaintiffs' contention that the votes were not validly taken in the April 17, 2012, stockholders' meeting.[27] The Consents themselves, based on these facts, clearly, may not count as "votes" for a slate of directors.[28] My focus must be, therefore, on what Board action the Consents purport to ratify.

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[26] For completeness, I have addressed the Defendants' motion broadly in this opinion. Even if my decision was different, however, and I was to consider the Defendants' extrinsic evidence beyond the Consents themselves, the record is inadequate to allow me to find the Consents valid. To cite one instance, the record is void of what information accompanied the transmittal of the ratification forms. Defense counsel informed me that these forms were provided by the Defendants to the stockholders, but the record is simply silent as to what information the stockholders actually received. While the Defendants point to the April 18, 2012, letter explaining what had happened at the stockholders' meeting, without examining *all* the documents that were submitted to the stockholders in soliciting these Consents, I cannot determine whether the Consents are valid. *See generally Lewis v. Vogelstein*, 699 A.2d 327, 334 (Del. Ch. 1997) ("[For ratification t]o be effective, of course, the agent must fully disclose all relevant circumstances with respect to the transaction to the principal prior to the ratification. Beyond that, since the relationship between a principal and agent is fiduciary in character, the agent in seeking ratification must act not only with candor, but with loyalty.").

[27] *See Gantler v. Stephens*, 965 A.2d 695, 713 (Del. 2009).

[28] The DGCL allows stockholders to elect directors by written consent, in lieu of an annual meeting, in certain circumstances. "Section 211(b) provides that stockholders can take action by written consent to elect directors in lieu of an annual meeting if (i) the action by consent is unanimous or (ii) 'all of the directorships to which directors could be elected at an annual meeting held at the effective time of such action are vacant and are filled by such action.'"

There is nothing in the Complaint indicating that an action of the Board, in fact, took place. The Complaint alleges only that Matthews, as L.O.M.'s President, had the discretion under the Company's bylaws to adjourn the meeting, and that he did so. Some stockholders left, others stayed. L.O.M's counsel, thereafter, purported to countermand that adjournment. After a brief recess, the vote was taken.

The vote itself, as described above, cannot be ratified. There was no Board action to ratify; therefore, the Consents themselves are insufficient to ratify the election of the Challenged Directors.[29] Based on the record before me, accepting as true all well-pleaded allegations of the Complaint, together with all reasonable inferences therefrom, I cannot find that the Consents are sufficient to ratify the election of the Challenged Directors.[30]

Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 401 (Del. 2010) (quoting 8 *Del. C.* § 211(b)). Before the disputed election, the Board of Directors comprised Matthews, Dean Lawrence, Defendant Woloschuk, and Defendant Mavety. *See* Compl. ¶ 45. Assuming, *arguendo*, that Matthews validly adjourned the meeting, the stockholders could not elect Challenged Directors through the Consents in lieu of an annual meeting because the Consents were not unanimous. *Crown EMAK*, 992 A.2d at 401 ("To operate in lieu of an annual meeting, a non-unanimous written consent thus must first remove all sitting directors and then fill the resulting vacancies. Stockholders cannot use a non-unanimous written consent to remove lawfully serving incumbent directors, and then elect successor directors, between annual meetings.").

[29] *See also Gantler*, 965 A.2d at 714 ("[T]he ratification doctrine does not apply to transactions where shareholder approval is statutorily required.").

[30] Even if I considered Woloschuk's affidavit, and accepted its averments as true, it would not save the Defendants' motion here. Though the affidavit suggests that Woloschuk, rather than L.O.M.'s counsel, continued the meeting, the affidavit is silent as to any decision that the *entire* Board of Directors took to overrule the adjournment of the meeting. A unilateral act by a single

The Defendants' real argument here, and one that I find sympathetic, is that in attempting to ratify the vote for the Challenged Directors, a majority of the shares outstanding have, in effect, been voted for the Challenged Directors. The Defendants argue that the adjournment of the meeting by Matthews was simply an attempt by the President of the Company to preserve himself in office, and that nothing prevents him from adjourning the next meeting, and the next, *ad infinitum*. It is, in the Defendants' view, elevating form over substance to require the stockholders, who have twice "voted" for the Challenged Directors, to go through this exercise yet again. The Defendants point out that this was the first stockholders' meeting in *eleven* years, and that the stockholders have clearly expressed their intent that fresh leadership take over the corporation.

The exercises of stockholder franchise are what legitimize corporate governance.[31] The DGCL both protects and facilitates the exercise of that franchise through its rules providing that, generally, "[d]irectors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors."[32] It appears to me that the Defendants have two courses of action open to them here: (1) they can answer the

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member accompanied by silence from the other members does not allow me to infer that the Board took action.

[31] *In re MONY Group, Inc. S'holder Litig.*, 853 A.2d 661, 673 (Del. Ch. 2004) ("In the election of directors context, it has been noted [that t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.") (internal quotation marks removed).

[32] *See* 8 *Del. C.* § 216.

Complaint and we can go forward, on a schedule appropriate to a summary proceeding, to a hearing on the validity of the adjournment, and the attempt to override that adjournment, of the meeting held on April 17, 2012; or (2) in the alternative, the Defendants can seek a new stockholders' meeting, done under the supervision of this Court, with appropriate safeguards in place to ensure that the meeting does not adjourn for improper reasons.[33]

For the foregoing reasons, the Defendants' Motion to Dismiss is denied.

IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

[33] *See id.* at § 225(a) ("Upon application of any stockholder or director, or any officer whose title to office is contested, the Court of Chancery may hear and determine the validity of any election, appointment, removal or resignation of any director or officer of any corporation. . . . In case it should be determined that no valid election has been held, the Court of Chancery may order an election to be held in accordance with § 211 or § 215 of this title.").