SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: RAMOS **PART** 53

Justice

BEATRICE CORWIN LIVING IRREVOCABLE TRUST, ROBERT A. CORWIN AND MARILYN A. CORWIN AS TRUSTEES OF THE BEATRICE CORWIN LIVING IRREVOCABLE TRUST,

INDEX NO. 653989/2014

MOTION DATE

- V -

GENERAL ELECTRIC COMPANY

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ..... No(s) _____

Answering Affidavits - Exhibits ..... No(s) _____

Replying Affidavits ..... No(s) _____

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with accompanying Memorandum Decision.

DATED: 9/16/15

HON. CHARLES E. RAMOS J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE :
2. CHECK AS APPROPRIATE :
3. CHECK IF APPROPRIATE :

☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

----------X

BEATRICE CORWIN LIVING IRREVOCABLE TRUST, ROBERT A. CORWIN AND MARILYN A. CORWIN AS TRUSTEES OF THE BEATRICE CORWIN LIVING IRREVOCABLE TRUST,

Index No. 653989/2014

Plaintiffs,

-against-

GENERAL ELECTRIC COMPANY,

Defendant.

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Hon. Charles E. Ramos, J.S.C.:

In motion sequence 001, defendant General Electric Company (GE) moves pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action.

Background[1]

Plaintiffs Beatrice Corwin Living Irrevocable Trust (the Trust) and its trustees Robert A. Corwin (Mr. Corwin) and Marilyn A. Corwin (Mrs. Corwin) (collectively, plaintiffs) bring this action to inspect GE's books and records in connection with possible breaches of fiduciary duty by GE for failing to disclose the amount of taxes it would owe if it repatriated its overseas earnings to the US (Repatriation Tax) (Complaint at ¶¶ 1-2).

GE is one of the largest and most diversified infrastructure and financial services corporations in the world, with products and services ranging from aircraft engines, power generation, oil

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[1]The facts herein are taken from the pleadings and submissions.

and gas production equipment, and household appliances to medical imaging, business and consumer financing and industrial products (*id.* at ¶¶ 6-7, 19). It reported revenues of over $146 billion in 2013 and it is ranked seventh on Forbes' list of World's Most Valuable Brands (*id.* at ¶ 19). The Trust owns 100 shares of common stock of GE (*id.* at ¶1)

According to plaintiffs, the Financial Accounting Standards Board (FASB) requires disclosure of the Repatriation Tax unless the determination of the Repatriation Tax is "not practicable" (*id.*). Specifically, FASB Accounting Standards Codification (ASC) 740-30-50-2 requires disclosure of "[t]he amount of the unrecognized deferred tax liability for temporary differences related to investments in foreign subsidiaries and foreign corporate joint ventures that are essentially permanent in duration or a statement that determination is not practicable" (*id.* at ¶ 13).

GE has stated in public filings that calculating the Repatriation Tax is impracticable "[b]ecause of the availability of U.S. foreign tax credits, it is not practicable to determine the U.S. federal income tax liability that would be payable if such earnings were not reinvested indefinitely" (February 27, 2014 GE Form 10-K, at 77, 158).

Plaintiffs contend that GE's disclosure statement is untrue, and allege that GE has reported many more complex tax

calculations and point out that many other multinational companies routinely disclose the Repatriation Tax in their 10-Ks (Complaint at ¶ 20-21). Plaintiffs allege that GE can calculate the Repatriation Tax and has already estimated it internally (*id.* at ¶ 22).

On September 29, 2014, the Trust sent GE and its Board a demand letter to inspect certain books and records under New York Business Corporation Law (BCL) § 624 and New York common law (the Demand Letter) (*id.* at ¶ 26). The Trust requested documents related to GE's non-disclosure of the Repatriation Tax, stating that their purposes were (I) ascertaining the financial condition of GE, (ii) investigating management's conduct, and (iii) obtaining information in aid of potential litigation (*See* Demand Letter, Exhibit 1 of Complaint). On October 28, 2014, GE denied the demand, contending that the Trust lacked a valid purpose and that the Trust's final request is overly broad (*See* Exhibit 2 of Complaint).

Plaintiffs then brought this action, seeking a judgment compelling GE to permit immediate inspection and copying of the books and records as specified in the Demand Letter.

Pleading Standard

Pursuant to CPLR § 3211 (a)(7), a complaint will be dismissed if "the pleading fails to state a cause of action" (CPLR 3211 [a] [7]). On a 3211 (a) (7) motion, "the complaint

must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172 [1st Dept 2004]). However, vague and conclusory allegations are not sufficient to sustain a cause of action (*Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 [1st Dept 2003]).

Under New York law, shareholders are entitled to inspect books and records "so long as the shareholders seek the inspection in good faith and for a valid purpose" (*Retirement Plan for Gen. Employees of City of N. Miami Beach v McGraw-Hill Companies, Inc.*, 120 AD3d 1052, 1055 [1st Dept 2014]) (Internal citation omitted). This Court has stated that "proper purposes" must be "reasonably related to the shareholder's interest in the corporation, and may include efforts to investigate management's conduct and to obtain information in aid of legitimate litigation" (*Bed Bath & Beyond Inc. v Hill*, 2008 WL 6487330 [Sup Ct, NY County, Ramos, J.].

However, courts can deny this right if the shareholder's asserted purposes are speculative, vague, and conclusory, and thus insufficient to establish a proper purpose for the inspection (*JAS Family Trust v Oceana Holding Corp.*, 109 AD3d 639, 643 [2d Dept 2013]). New York courts have recognized some improper purposes, including "those which are inimical to the corporation, for example, to discover business secrets to aid a

competitor of the corporation, to secure prospects for personal business, to find technical defects in corporate transactions to institute 'strike suits', and to locate information to pursue one's own social or political goals" (*Tatko v Tatko Bros. Slate Co., Inc.*, 173 AD2d 917, 917-18 [3d Dept 1991]).

Discussion

Plaintiffs' first stated purpose for examining GE's books and records is to ascertain the financial condition of GE.

GE points out that ascertaining the financial condition of a corporation has only been found to be a proper purpose within the context of small, closely held, private corporations where a shareholder is evaluating an offer or selling shares or where questions are raised casting doubt with respect to the financial well-being of the closely held corporation (*see e.g. Herencia v Centercut Rest. Corp.*, 92 AD3d 485, 486 [1st Dept 2012]; *Dyer v Indium Corp. of Am.*, 2 AD3d 1195 [3d Dept 2003]; *Waldman v Eldorado Towers, Ltd.*, 25 AD2d 836 [1st Dept 1966] affirmed 19 NY2d 843 [1967]).

GE contends that, like all large publicly traded companies, it has filed thousands of pages of financial information with the SEC, numerous publicly accessible investor presentations and conference transcripts and webcasts, including question and answer sessions with scores of highly sophisticated stock analysts who closely monitor the financial conditions of the

companies (GE's Memorandum of Law in Support of Motion to Dismiss at 10). GE states that plaintiffs can use this information to ascertain the financial condition of GE without the need to examine the books and records with respect to the Repatriation Tax.

In rebuttal, plaintiffs rely on the First Department's decision in *McGraw-Hill* (120 AD3d 1052) which permitted inspection of the books and records of a large public company, where the demand was made in good faith and for proper purposes. However, at issue there were allegations of specific wrongdoing by the defendants:

> "Petitioners allege that under the direction of respondent's chairman and chief executive, S&P undertook a strategy of fraudulently issuing positive ratings on complex financial products such as residential mortgage-backed securities (RMBS), collateralized debt obligations (CDOs), and other similarly packaged mortgage-related products. According to petitioners, this strategy redounded to McGraw-Hill and S&P's benefit because in many instances, debt issuers whose securities S&P rated were also clients of S&P's services. Therefore, petitioners allege, as the complex mortgage-backed securities industry grew, McGraw-Hill's management directed S&P to further provide optimistic credit ratings in an effort to attract more business from the issuers and gain more revenue from those issuers' complex securities. According to petitioners, the mortgage-related securities at the heart of the meltdown would not have been marketed and sold without S&P's high ratings, none of which accurately reflected the securities' actual risk. Petitioners assert that the rosy credit ratings, which S&P knew to be false, encouraged investment in toxic securities, thus helping to trigger the financial crisis of 2008" (*id.* at 1052-1053).
>
> Plaintiffs have not alleged anything close to the types of

allegations that support a good faith and valid purpose to inspect books and records by a shareholder with a real interest in the matter. The decision in *McGraw-Hill*, the principal case relied on by Plaintiffs, highlights plaintiff's lack of a proper purpose here (*id.*). The stockholders in *McGraw-Hill* made detailed allegations, supported by SEC and United States Senate Subcommittee on Investigations reports, concerning knowingly false "rosy credit ratings" made by S&P, a wholly-owned subsidiary of McGraw-Hill, which "encouraged investment in toxic securities, thus helping to trigger the financial crisis of 2008" (*id.*). The alleged wrongdoing in McGraw-Hill "exposed [the company] to substantial potential liability in multiple civil actions and investigations" (*id.* at 1056). Plaintiffs here do not allege any wrongdoing comparable to the facts in McGraw-Hill, and fail to explain how the speculated noncompliance, if turns out to be true, could "subject GE to multiple civil and regulatory actions that could affect the financial condition of the company." Unlike *McGraw Hill*, plaintiffs fail to allege specific facts of wrongdoing by GE and how a failure to disclose GE's unrecognized deferred tax liabilities on its overseas profits could damage plaintiffs.

Plaintiffs' second and third purposes for inspecting GE's books and records are to "investigate management's conduct" and "to obtain information in aid of potential litigation" as they

allege potential wrongdoings and breaches of fiduciary duty by GE and its Board. New York case law in interpreting Delaware Law has established that "[a]n asserted purpose of investigating in order to uncover possible misconduct is insufficient; the applicant must present some credible basis from which the court can infer that waste or mismanagement may have occurred" (*Lambrecht v Bank of Am. Corp.*, 85 AD3d 576, 576 [1st Dept 2011], citing *Thomas & Betts Corp. v Leviton Mfg. Co., Inc.*, 681 A2d 1026, 1031 [Del 1996]; *Security First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 571 [Del 1997]).

Plaintiffs do not allege that GE's disclosure of its deferred tax liability in fact violates FASB ASC 740-30-50-2. Plaintiffs simply speculate that "it appears" to Plaintiffs that GE has violated ASC 740-30-50-2 by falsely disclosing that the calculation of Repatriation Tax is impracticable. There is no indication that GE is not in compliance with the FASB through its statement that its Repatriation Tax is "impracticable."

Plaintiffs contend that a GE spokesperson claimed in a media report that the reason GE did not disclose the Repatriation Tax was because GE did not believe it would be useful to shareholders. However, this does not imply any wrongdoing since the statement does not contradict GE's disclosure that determination of the Repatriation Tax is impracticable. It is possible that disclosure of Repatriation Tax is both

impracticable and of little use to investors. This comment alone does not suggest that GE made false statement in its 10K regarding the Repatriation Tax. Moreover, this Court cannot reasonably infer any wrongdoing from such a statement made in a media report.

Plaintiffs also allege that GE is capable of calculating and might have already calculated its Repatriation Tax internally. Plaintiffs claim that GE does periodically estimate the Repatriation Tax because GE reviews its tax positions quarterly and adjusts the balances as new information becomes available and as part of this regular review, GE would need to periodically estimate the Repatriation Tax. Plaintiffs offer no support for this claim other than a quotation from GE that it reviews its "tax positions quarterly and adjust[s] the balances [reported in its financial statements] as new information becomes available" (Feb. 27, 2014 Form 10-K, at 73). However, in the same form, GE specifically states that "[b]ecause of the availability of U.S. foreign tax credits, it is not practicable to determine the U.S. federal income tax liability that would be payable if [indefinitely reinvested foreign] earnings were not reinvested" (*id.* at 77, 158).

Plaintiffs contends that GE, as a large and sophisticated firm, regularly conducts tax analyses more complex than the calculation of the Repatriation Tax and a firm like GE should

routinely calculate the Repatriation Tax. This argument is speculative. Plaintiffs also rely on information that many large companies, including Apple, Microsoft, and Citigroup, routinely disclose their Repatriation Tax, to speculate on GE's practicability to do such calculations. Plaintiffs ignore GE's response that there are also two-thirds of the Dow Jones Industrial Average firms which determine that the calculation of Repatriation Tax is impracticable. Plaintiffs' contention that because many large firms make the calculation and GE must be able to do it too is groundless and speculative.

Further, plaintiffs claim that GE's calculation of $1.5 billion, $1.3 billion and $2.5 billion tax benefits from lower-taxed global operations in 2011, 2012 and 2013 from lower-taxed indefinitely reinvested non-U.S. earnings undermines GE's statement that calculation of the Repatriation Tax is not practicable (Complaint, ¶ 21). GE counters stating that determining tax liabilities on these earnings were they to be liquidated and then repatriated obviously requires complex assumptions, including the manner and timing of the liquidation of these operations, the specific legal entities involved in the asset sale and payment of reported liabilities, the amounts left to be repatriated in specific legal entities, the timing of the repatriation, the countries in which overseas operations would be liquidated and then repatriated, the tax laws in each of those

countries and the resulting U.S. tax treatment of repatriations, including foreign tax credits that may or may not be available (GE Memorandum of Law, 15). The calculation of the tax benefits from not paying U.S. income taxes on overseas earnings in any particular year only helps to illustrate this point, since that calculation involves inputs GE knows, i.e., the amount of foreign taxes GE has accrued on its overseas earnings in the particular year and the amount of taxes GE would have accrued on those earnings had those earnings been subject to the full U.S. statutory tax rate.

It should be clear that the calculation of the Repatriation Tax is not as easy as plaintiffs suggest, because if that were the case, plaintiffs would have no need to inspect books and records and could easily calculate the number for themselves. The inherent complexity in determining the Repatriation Tax for a corporation like GE has been recognized by the regulators and a reason as to why ASC 740-30-50-2 allows companies like GE to make the disclosure that such a determination is "not practicable." Moreover, plaintiffs fail to bring forward any authority or precedent that permits shareholders to search books and records for failure to disclose the Repatriation Tax when that company has stated such disclosure is "not practicable."

Additionally, plaintiffs claim that they have grounds to believe that the Board and GE management have breached their

fiduciary duties by failing to exercise oversight of GE's compliance with applicable FASB standards. However, Plaintiffs do not explain how or why GE's board of management may have failed to exercise oversight of GE's financial disclosures. Plaintiffs do not allege that GE has violated ASC 740-30-50-2 but allege only that it appears to Plaintiffs that GE has violated the rule. The rule, however, requires either disclosure of the Repatriation Taxes that would be due if permanently reinvested overseas earnings were taxed at United States tax rates "or a statement that determination is not practicable." GE's disclosure in its Form 10-K that the determination is "not practicable" fully complies with the rule.

Plaintiffs' disagreement with the judgment and the interpretation of the rule made by GE and its accounting and tax advisors cannot serve as a valid basis to suspect that wrongdoing has occurred. In sum, Plaintiffs' first, second and third purported purposes are vague and speculative, and insufficient to constitute proper purposes for inspection of GE's books and records.

Accordingly, it is

ORDERED that Defendant's motion to dismiss Plaintiffs' books and record action is granted; and it is further

ORDERED that Plaintiffs are not entitled to inspect documents set forth in their demand dated September 29, 2014.

This constitutes the decision and order of this court.

Dated: September 16, 2015

ENTER:

J.S.C.

HON. CHARLES E. RAMOS