IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL A. VACEK, JR., Derivatively, on behalf of Walter Investment Management Corp.,	:	CIVIL ACTION
Plaintiff	:	NO. 17-CV-2820
vs.	:	
GEORGE M. AWAD, ET. AL.,	:	
Defendants	:	

ORDER

AND NOW, this 24th day of April, 2018, upon consideration of Defendants' Motion to Dismiss Amended Complaint (Doc. No. 30), Plaintiff's Response in Opposition thereto and the parties' respective sur-replies, it is hereby ORDERED that the Motion is DENIED.[1]

---

[1] In considering motions to dismiss under Rule 12(b)(6), the district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Krantz v. Prudential Investments Fund Management, 305 F.3d 140, 142 (3d Cir. 2002); Allah v. Seiverling, 229 F.3d 220, 224 (3d Cir. 2000). In so doing, the courts must consider whether the complaint has alleged enough facts to state a claim to relief that is plausible on its face. Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929, 949 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

This action is a purported stockholder derivative action and, as such, has additional pleading requirements under Fed. R. Civ. P. 23.1(b). Specifically, to plead such a cause of action, "[t]he complaint must be verified and must:

> (1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

> (2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and
>
> (3) state with particularity:
>
> > (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and
> >
> > (B) the reasons for not obtaining the action or not making the effort.

It has been said that "[t]he derivative form of action permits an individual shareholder to bring 'suit to enforce a *corporate* cause of action against officers, directors, and third parties.'" Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 95, 111 S. Ct. 1711, 1716, 114 L. Ed.2d 152 (1991)(quoting Ross v. Bernhard, 396 U.S. 531, 534, 90 S. Ct. 733, 736, 24 L. Ed.2d 729 (1970))(emphasis in original). It is in essence an equitable remedy devised to place "a means to protect the interests of a corporation from the misfeasance and malfeasance of faithless directors and managers" ... "in the hands of the individual shareholders." Id. "To prevent abuse of this remedy, however, equity courts established as a precondition 'for the suit' that the shareholder demonstrate 'that the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions.'" Id,(quoting Ross, supra). It is this precondition which is articulated in Rule 23.1. Id. However, given that corporations are creatures of state law, and it is state law which is the "font" of corporate directors' powers, as a Federal court which is entertaining a derivative action, we must look to and apply the law of Maryland as the state of Walter Investment's incorporation in determining the circumstances under which a shareholder demand may be excused as futile. Kamen, 500 U.S. at 98-99, 111 S. Ct. at 1717(quoting Burks v. Lasker, 441 U.S. 471, 478, 99 S. Ct. 1831, 1837, 60 L. Ed.2d 404 (1979)); Mona v. Mona Electric Group, Inc., 176 Md. App. 672, 934 A.2d 450, 463 (Md. App. 2007); Werbowski v. Collomb, 362 Md. 581, 766 A.2d 123, 134, n.3 (2001).

On this matter, Maryland law is clear - the futility exception is

> "a very limited exception, to be applied only when the allegations or evidence clearly demonstrate, in a very particular manner, either that (1) a demand, or a delay in awaiting a response to a demand, would cause irreparable harm to the corporation, or (2) a majority of the directors are so personally and directly conflicted or committed to the decision in dispute that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule."

Werbowski, 766 A.2d at 144. It has been observed that "the Werbowski standard is a matter of degree" and that "mere participation in or approval of the challenged transaction by directors does not excuse demand." Laidlaw v. Beneficial Bancorp, Inc., Case No. 24-C-17-1057, 2017 Md. Cir. Ct. LEXIS 11 at *9 (Aug. 8, 2017); Weinberg v. Gold, 838 F. Supp.2d 355, 360 (D. Md. 2012). Rather, "[t]he question is whether a majority of the Board has a personal interest in *not disturbing* the decision that is sufficiently significant to overwhelm their better judgment." Laidlaw at *11(emphasis in original). "Directors are considered to be interested if they either 'appear on both sides of a transaction' or 'expect to derive personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.'" Oliveira v. Sugarman, 451 Md.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.

208, 224, 152 A.3d 728, 737-738 (2016).

In application of the preceding legal precepts, we find that while this is a close call, the averments contained in paragraphs 104-106, 127-138, 148, 161, 166, 174 and 182-186 of the Amended Complaint when read together and in context with one another sufficiently allege that a majority of the director defendants were so involved in the operations of the corporation and/or in the managerial or decisions to approve managerial decisions and in the functions of the corporation and its various related operating entities, as to not be disinterested or independent and to not have acted in good faith or within the ambit of the business judgment rule. As a result, we conclude that it is very possible and perhaps even probable that a shareholder demand that defendants take the action sought would have been futile. In reaching this conclusion, we note that while "the issue of demand futility is often raised and decided in the context of a motion to dismiss based on the allegations of the complaint....(citation omitted), there is no requirement that the issue be resolved in that context." Werbowski, 766 A.2d at 145. Inasmuch as "[t]he futility issue may be resolved as a factual matter," we believe the prudent course to take here is to permit the parties to take discovery and, if appropriate, re-present the futility issue via motion for summary judgment. See, id. For these reasons, the motion to dismiss is denied.