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Order on Motion to Dismiss (Benfield v. Wells et al.)

John J. Goger
Fulton County Superior Court

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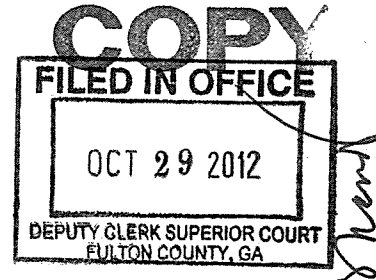
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



SHARON BENFIELD, derivatively on behalf,)
of SUNTRUST BANKS, INC.,)

Plaintiff,)

v.)

Civil Action File No.
2011CV205554

JAMES M. WELLS, III, ROBERT M.)
BEALL, II, ALSTON D. CORRELL,)
JEFFREY C. CROWE, BLAKE P.)
GARRETT, JR., L. PHILLIP HUMANN,)
DAVID H. HUGHES, M. DOUGLES)
IVESTER, J. HICKS LANIER, G. GILMER)
MINOR, III, LARRY L. PRINCE, FRANK S.)
ROYAL, KAREN HASTIE WILLIAMS,)
PHAIL WYNN, JR., THOMAS M. GARROTT,)
FRANCES L. BREEDEN, MARK A.)
CHANCY, DAVID F. DIERKER, THOMAS E.)
FREEMAN, RAYMOND D. FORTIN, C.T.)
HILL, THOMAS G. KUNTZ, THOMAS E.)
PANTHER, WILLIAM R. REED, JR.,)
WILLIAM H. ROGERS, JR., TIMOTHY E.)
SULLIVAN, and E. JENNER WOOD, III,)

Defendants.)

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

On October 9, 2012, counsel appeared before the Court to present oral argument on Defendants' Motion to Dismiss and Defendants Correll's, Hughes' and Minor's Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted, and Joinder in, and Adoption of Motions to Dismiss of Co-Defendants Pursuant to OCGA §§ 14-2-744 and 9-11-12(b)(6). Upon consideration of the arguments of counsel, the briefs and materials submitted on the motion, and the record of the case, the Court hereby finds as follows.

I. Factual Background

a. Plaintiff's Allegations

On September 9, 2011, Plaintiff sued certain current and former members of SunTrust Bank, Inc.'s ("SunTrust") Board of Directors and its executive officers (collectively, the "Defendants"), alleging that Defendants caused SunTrust to make misleading public statements regarding the impact on SunTrust of the subprime mortgage lending crisis and the imploding housing market collapse, which left SunTrust in the imperiled position of requiring a \$4.9 billion government bailout. Plaintiff contends that Defendants shifted SunTrust from its historically conservative lending practices into riskier lending practices that left it exposed to significant losses, which it sustained when the real estate market collapsed in 2008 and 2009.

Due to its losses in 2008 and 2009, Plaintiff alleges that SunTrust's stock dropped to \$36/share from an all-time high of \$90/share in mid-2007. During this plunge in stock prices, Plaintiff contends that the Board publically downplayed the financial uncertainty of SunTrust. Plaintiff also contends that three Defendants sold shares of SunTrust stock prior to the plunge in price at inflated prices and that Defendants caused SunTrust to repurchase shares of common stock at inflated prices when public information about the company was not current or accurate.

Plaintiff additionally alleges that Defendants were unjustly enriched by being over-compensated during this period. According to Plaintiff, SunTrust's inflated public filings led to unwarranted bonuses to the Defendants—even after the government bailout of \$4.9 million in 2008. Finally, Plaintiff alleges that the mismanagement of SunTrust assets has subjected SunTrust to potential liability in several pending lawsuits.

b. Claims at Issue

Plaintiff asserts the following claims against Defendants: Count 1 – Against all Defendants for Breach of Fiduciary Duty for Disseminating False and Misleading Information; Count 2 – Against all Defendants for Breach of Fiduciary Duty for Failing to Maintain Internal Controls; Count 3 – Against all Defendants for Breach of Fiduciary Duties for Failing to Properly Oversee and Manage the Company; Count 4 – Against all Defendants for Unjust Enrichment; Count 5 – Against all Defendants for Abuse of Control; Count 6 – Against all Defendants for Gross Mismanagement; Count 7 – Against all Defendants for Waste of Corporate Assets; Count 8 – Against Wells, Garrott, and Reed for Breach of Fiduciary Duties for Insider Selling and Misappropriation of Information; and Count 9 – Against all Defendants for Breach of Fiduciary Duties for Causing SunTrust to Materially Expend Assets in Connection with the Stock Buyback.

c. Demand Process

On February 3, 2011, Plaintiff Sharon Benfield's counsel sent a shareholder demand letter (the "Demand") to Defendant James M. Wells, III, who at that time was the Chairman of SunTrust's Board and SunTrust's Chief Executive Officer. SunTrust responded on March 25, 2011, stating that it believed the Plaintiff's Demand was premised on numerous errors of fact and mistaken assumptions and requested that Plaintiff clarify her position and advise SunTrust if she intended to continue with her Demand.

Without responding to SunTrust's letter, on September 9, 2011, Plaintiff filed this action for the benefit of SunTrust against Defendants.

In October 2011, the first Demand Review Committee (the “DRC”) was authorized to investigate, review, and analyze the facts and circumstances surrounding the claims and allegations made in the Complaint and to determine whether it was in the best interest of SunTrust to pursue or to maintain an action on behalf of SunTrust. At that time, the first DRC members were Alston D. Correll, David H. Hughes, and G. Gilmer Minor, III (all named Defendants in this action). The first DRC was initially formed in 2008 to investigate similar claims to the ones at issue here.

In February 2012, the Board voted to appoint new members to the DRC—Kyle Prechtl Legg (“Legg”), William A. Linnenbringer (“Linnenbringer”), and David M. Ratcliffe (“Ratcliffe”). Each new member of the DRC joined the Board in 2010 or 2011, and is not named as a defendant in this, or any other, litigation referenced in the Complaint.

d. DRC Review

After a review that included SunTrust’s SEC filings, materials submitted to bank regulators, and all minutes of the Board and of its Audit Committee, Risk Committee, and Compensation Committee from 2004-2011, as well as 24 interviews of SunTrust personnel and its auditors (Pricewaterhouse Coopers, LLP (“PwC”) and Ernst & Young, LLP) and special counsel to the Audit Committee, the DRC directed SunTrust to seek dismissal of the Complaint, finding that Defendants acted in good faith and in accordance with the duties of due care and loyalty to which they are subject and that there was no credible evidence of any breach of fiduciary duty, corporate waste, mismanagement or other violations of law alleged by the Plaintiff.

Additionally, the DRC also considered the exculpatory clause contained in the Articles of Incorporation, which protects a director from personal liability for money damages for a breach of the duty of care or other duty, subject to exceptions if the director violated a business opportunity, engaged in acts involving intentional misconduct or knowing violations of law or participated in a conflicted interest transaction. The DRC did not believe that the facts here would give rise to an exception to the exculpation provision; therefore, the recovery of monetary damages would be unlikely.

II. Defendants' Motions to Dismiss

Defendants have moved to dismiss the Complaint for two reasons. First, they contend that under O.C.G.A. § 14-2-744, the action cannot proceed in light of the review and conclusions reached by the DRC. Cases construing O.C.G.A. § 14-2-744 instruct the Court to apply a “hybrid” summary judgment standard and consider whether the DRC has demonstrated that no material fact issue exists as to its independence, good faith and investigative reasonableness. See Thompson v. Scientific Atlanta, 275 Ga. App. 680 (2005). As such, it is appropriate to consider the DRC Report and related materials submitted by Plaintiff in the Court’s consideration of this issue.

Second, they seek dismissal for failure to state a claim under O.C.G.A. § 9-11-12(b)(6). Because the Court **GRANTS** Defendants’ motions pursuant to O.C.G.A. § 14-2-744 for the reasons stated below, the Court declines to address this basis for dismissal.

a. Defendants’ Motion to Dismiss Based on the DRC’s Conclusions

OCGA § 14-2-744(a) provides that a court “may dismiss a derivative action if, on motion by the corporation, the court finds that...[a majority of a committee consisting of two or more

independent directors] has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation shall have the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation.”

In Thompson v. Scientific Atlanta, Inc., 275 Ga. App. 680 (2005), the Georgia Court of Appeals found that a corporation was able to meet its burden of proof upon filing a motion to dismiss supported by the “voluminous and detailed” independent committee’s report. There, the Court held that upon the corporation’s coming forward with an “over 900-page report” that reflected a “detailed and documented investigation, including the backgrounds and qualifications of its members,” it was “incumbent upon [the plaintiff] to come forward with evidence to support his claim of lack of independence of the [DRC members].” Id. at 683; see also Booth Family Trust v. Jeffries, 640 F.3d 134 (6th Cir. 2011) (Griffin, dissenting) (“While it is the [independent committee’s] ultimate burden of persuasion to establish its independence, it is the plaintiff who must demonstrate how the facts presented rise to the level necessary to demonstrate a lack of independence.”).

Here, Defendants insist that they have satisfied the requisite showing by submitting the DRC report, which they contend establishes that the members of the DRC are independent and that their conclusions were reached in good faith after conducting a reasonable investigation.

Specifically, the DRC report shows that each DRC member has a distinguished professional background unrelated to SunTrust. Legg has been a member of the Board since 2011. She is the former CEO of Legg Mason Capital Management and has more than 30 years

of professional experience in the investment industry. Legg is also a director of the Eastman Kodak Company.

Linnenbringer has been a director since 2010. Prior to his retirement in 2002, he served as Managing Partner for the U.S. banking and financial-services industry practice at PwC, as well as Chairman of the global financial services industry practice during his 32 year career with PwC. He also serves as a director of TeleTech Holdings, Inc.

Ratcliffe has been a director since 2011. He retired in December 2010, as Chairman, President and CEO of Southern Company. From 1999-2004 he was President and CEO of Georgia Power. He also serves as a member of the boards of CSX, and various other organizations, including GRA Venture Fund, LLC, the Georgia Research Alliance, Urjanet, Children's Healthcare of Atlanta, and the Centers for Disease Control Foundation.

The DRC report also describes the independence review process that the DRC members conducted with their counsel, Jones Walker. The members completed a questionnaire that addressed certain factors that might impair his or her independence, and upon evaluation, it was determined that the members could sufficiently exercise independent business judgment when conducting the investigation. Furthermore, the DRC members did not serve on SunTrust's Board during 2006-2009, the time period most closely scrutinized in Plaintiff's Complaint.

The DRC was assisted by Jones, Walker, Waechter, Poitevant, Carrère & Denègre LLP ("Jones Walker"), a law firm that had previously assisted another independent review committee in the investigation of prior claims asserted against SunTrust and certain Board members. Jones Walker has never represented SunTrust on a regular or continuing basis, and fees from any representation of SunTrust have never amounted to as much as one percent of the firm's annual

fee income, with the exception of the Jones Walker's predecessor's fee in connection with its 2008 representation of the independent review committee. The Jones Walker team offered appropriate and relevant expertise, with backgrounds that included the former Regional and District Counsel to the Atlanta Office of the Comptroller of Currency, the former First Assistant U.S. Attorney and Chief of Criminal Division for the Eastern Dist. of Louisiana, and the former chief of the Criminal Division of the US Attorney's Office for the Southern Dist. of Alabama.

As to the reasonableness and good faith of the investigation, Defendants point the Court to the fact that the DRC met eight times (four in person), conducted 24 witness interviews and participated in all but six (for which they got a detailed summary by counsel), and reviewed SEC filings and a variety of other documents and materials submitted to bank regulators and all minutes of the Board, the Audit Committee, the Risk Committee and the Compensation Committee from 2004-2011.

Upon a review of the DRC report and other materials detailing the efforts and process of the DRC committee, the Court finds that Defendants carried their initial burden to show the "independence and good faith of the group making the determination and the reasonableness of the investigation." OCGA § 14-2-744. While the Court disagrees with an interpretation of Thompson that would suggest that the mere filing of a report, in and of itself, is enough to automatically tilt the burden of proof to the plaintiff, 275 Ga. App. at 683, the Court is satisfied here that Defendants' materials would warrant dismissal of Plaintiff's case under O.C.G.A. § 14-2-744, unless Plaintiff can affirmatively point to material issues of fact regarding the independence and good faith of the DRC and the reasonableness of its investigation. See Thompson, 275 Ga. App. at 683; Kaplan v. Wyatt, 499 A.2d 1184 (Del. 1985) (holding that a

plaintiff had the burden to show how certain business connections impair a member of an independent review committee's ability to make decisions on the corporate merits of an issue).

b. Plaintiff's Opposition to Defendants' Motion

For her part, Plaintiff contends that the DRC lacks independence due to Ratcliffe's connections with certain Defendants and failed to perform an adequate investigation.

Specifically, Plaintiff raises the following challenges:

1. Ratcliffe, who was President, Chairman and CEO of Southern Company, knows Defendant Alston D. Correll, who served on Southern's Board of Directors from 1994-2000 and its Compensation Committee from 1995-2000. Correll approved executive compensation awarded to Ratcliffe during some or all of that time period, and was Chairman of the Committee for some of that period.
2. Ratcliffe and Defendant E. Jenner Wood served together on Georgia Power's Executive Committee, and SunTrust furnished banking services to Georgia Power when Defendant Wood served as Chairman, President and CEO of SunTrust Bank.
3. Ratcliffe has served along with Defendants, Correll, Wood, James Wells and Phillip Humann in various charity organizations and solicited funds from members during fundraisers.
4. Defendant Ray Fortin, SunTrust's General Counsel, has been intimately involved with the DRC's investigation and played a substantive role in determining who would be interviewed.
5. The DRC declined to interview Fortin, notwithstanding the fact that allegations have been made regarding his alleged efforts to threaten a SunTrust employee who was asked to talk to plaintiff's counsel in another case (this case has subsequently been dismissed against SunTrust), a finding in another lawsuit that Fortin turned a blind eye to falsified e-mails in order to protect SunTrust's insurance coverage for loan losses, and an allegation from Defendant Thomas M. Garrott that Fortin manipulated minutes of Board meetings by skewing them in Management's favor.
6. A fact issues exists regarding whether the second DRC conducted an independence determination of Jones Walker, the law firm that represented the DRC in its review.
7. DRC members were not present at the interviews of 6 witnesses.

8. Linnenbringer claimed to be unaware of allegations made against Fortin in a prior action (which has subsequently been dismissed with prejudice) regarding the threatening of a witness, Scott Trapani, who had previously served in SunTrust's risk management division. Additionally, Linnenbringer confirmed that the DRC was unaware that Fortin was found to be willfully blind to falsified emails by an employee because "alerting and/or firing the author of those emails may have impacted the company's insurance coverage for loan losses."
9. Defendant Garrott was interviewed by the first DRC and not re-interviewed by the second DRC, despite his testimony that he agrees with the Plaintiff because he feels that the board was negligent and could have done a better job managing the economic fall-out.

The Court will first address the allegations surrounding Ratcliffe's independence (items one through 3 above). The decisions that have examined the qualifications of members of special litigation committees have required that they be both "disinterested" in the sense of not having a personal interest in the transaction being challenged (other than a benefit on the corporation or all shareholders generally), and "independent" in the sense of not being influenced in favor of the defendants by reason of personal or other relationships. O.C.G.A. § 14-2-744, Code Revision Commission Comments (*quoting* Aronson v. Lewis, 473 A.2d 805, 812-16 (Del 1984)).

Here, Plaintiff does not assert that Ratcliffe, who joined SunTrust's Board after the time period primarily at issue in the Complaint, had a personal interest in a transaction or other challenged action. Rather, Plaintiff questions Ratcliffe's relationships with certain Defendants, which Plaintiff contends renders him unable to maintain independence. Under Millsap v. Am. Family Corp., 208 Ga. App. 230 (1993), the Court of Appeals explained that a committee member is independent if he or she "is in a position to base his decision on the merits of the issue rather than being governed by extraneous considerations or influences." Millsap, 208 Ga. App. at 232.

The most serious allegation leveled against Ratcliffe involves his connection with Defendant Correll, who served on the Board of Southern Company (and at one time chaired its Compensation Committee) from 1994-2001, while Ratcliffe ascended the ranks, ultimately to become President, Chairman, and CEO of Southern Company in 2004. Plaintiff attempts to credit Ratcliffe's three promotions between 1995-1999, from President and CEO of Mississippi Power to President and CEO of Georgia Power, and Ratcliffe's associated increases in salary, to Correll's influence as a member of Southern Company's Compensation Committee.

However, upon further examination, the record reflects that Ratcliffe's career trajectory with the Southern Company and its various subsidiaries had a wide arc, spanning nearly 40 years, while Correll's path dovetailed with Ratcliffe's over 10 years ago for only 7 years, a brief portion of the overall timeline. Ratcliffe and Correll do not have a personal relationship, just a business connection, which the Court finds immaterial to Ratcliffe's overall professional success at Southern in view of Ratcliffe's deep history with the company. Given the totality of the circumstances, the Court finds that the relationship is not enough to render Ratcliffe unable to "base his decision on the merits of the issue rather than being governed by extraneous considerations or influences." Millsap, 208 Ga. App. at 232. See In re Oracle Sec. Litig., 852 F. Supp. 1437, 1442 (N.D. Ca. 1994) ("Business dealings seldom take place between complete strangers and it would be a strained and artificial rule which required a director to be unacquainted or uninvolved with fellow directors in order to be regarded as independent.").

It is incumbent on Plaintiff to show how these connections impair Ratcliffe's ability to make an independent decision. See Kaplan, 499 A.2d at 1189 ("Allegations of natural bias not supported by tangible evidence of an interest on the part of [the review committee] in the

outcome of the litigation do not demonstrate a lack of independence.”). And the Court finds that Plaintiff failed to sufficiently connect the dots between a connection and an inability to exercise business judgment.

For the same reason as set forth above, the Court finds that Ratcliffe’s connections with Defendants Wood, Wells and Humann from their shared memberships on boards of various charitable organizations, as well as Wood’s and Ratcliffe’s membership on Georgia Power’s Executive Committee, are not enough to create a material fact issue regarding Ratcliffe’s independence.

Plaintiff raises no allegations of a lack of independence as to Legg or Linnenbringer. Rather, citing Booth, 640 F.3d at 145, Plaintiff asserts that a conflict of one member of the DRC can disqualify the entire committee when the committee’s independent members are less than the number authorized by the corporate resolution. In Booth, the Court found that the two-member demand review committee was tainted by the recusal of one of its members, who had a personal relationship with a key defendant. Id. Even though the other committee member may have been independent, the Court found that the recusal of the conflicted member “materially altered the special litigation committee as an entity” and deviated from the corporate resolution, which specifically created a two-member committee. Id. Additionally, the Court questioned whether the committee was even authorized to act with only one member, noting that the resolution was silent on that point. Id.

Plaintiff urges the Court to apply the same rationale to this case and find the entire DRC conflicted due to Ratcliffe’s connections with several Defendants. Although, as stated above, the Court finds that Ratcliffe’s relationships were insufficient to cast doubt about his independence,

nevertheless, the Court is not persuaded that the rationale in Booth would necessitate the disqualification of the entire DRC. Although the SunTrust resolution authorizes a three-member DRC, it permits the DRC to act with only a majority vote. As a result, the DRC was authorized to act with less than three members, so its conduct would still have effect if one member was rendered conflicted (so long as the conflicted member is not accused of influencing the acts of the other members). In contrast, the corporate resolution at issue in Booth was silent as to whether the committee could operate with only one member. Id. at 145 (“it is not clear from the record that the special litigation committee was even authorized to operate with only one member. The Board’s resolution forming the special litigation committee is silent on that point.”).

Next, turning to Plaintiff’s challenges to the DRC’s review process based on the influence of Defendant Fortin, Plaintiff relies on various email communications between members of SunTrust’s legal team, including Fortin, and either a member of the DRC or its counsel, Jones Walker. Plaintiff also identifies communications between Fortin and SunTrust’s counsel, but incorrectly identifies the attorney as a member of the Jones Walker team.

The Court has reviewed the emails on which Plaintiff relies and declines to construe the communications as evidence that the DRC or its counsel was taking instructions from Fortin. The emails reflect SunTrust’s progress in responding to document requests generated by the DRC, the administrative efforts made to coordinate interviews of SunTrust employees and to ensure that individuals with relevant information are included in the DRC’s efforts, the degree to which the DRC’s work would be included in the agenda of Board meetings, and general considerations regarding the choice to reconstitute the DRC. In one email, Fortin asks why

Defendant Garrott is included in an interview list given the fact that he stepped down from SunTrust's board in 2007. However, the DRC subsequently interviewed Garrott, so any insinuation that Fortin intended to dictate the individuals selected for interviews is of no effect.

Simply put, the Court is not going to engage in an editorial review to come up with the constructions advanced by Plaintiff. It is just as reasonable and more likely that the communications were intended to be informative and even cooperative (such as the progress report on SunTrust's efforts to comply with the DRC's document requests), rather than soliciting or responding to inappropriate substantive advice proffered by Fortin or SunTrust's legal team. In any event, Plaintiff was required to "present evidence showing that the presence of the corporate officers influenced those being interviewed, altered the outcome of the investigation, or impaired the independence of the Committee in making its report." Kaplan, 499 A.2d at 1190. And the Court finds that Plaintiff failed to make this showing.

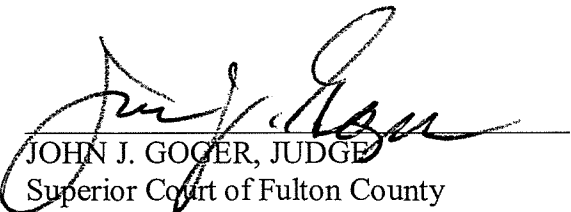
Plaintiff also attacks the fact that the DRC failed to interview Fortin despite allegations made about him in other lawsuits and an allegation from Defendant Garrott that Fortin manipulated minutes. As to the allegations against Fortin made in other lawsuits, some of which have now been dismissed, the relevant case law directs that the appropriate scope of the DRC's investigation is the claims at issue here, not the basis of claims in other litigation. See Kaplan v. Wyatt, 499 A.2d 1184, 1191 (Del. 1985) (SLC "was not required to investigate" matters that "contain[ed] nothing of consequence relating to the specific allegations set forth in [the] complaint").

With regard to the alleged failure of the DRC to re-interview Defendant Garrott, who was interviewed in this investigation by the first DRC, the DRC points out that they interviewed

Defendant Phail Wynn, Jr., who was on the board of an organization acquired by SunTrust along with Garrott, and he refuted Garrott's criticism of the Board meetings and minutes and provided further context in which to view Garrott's criticism of the SunTrust Board. The Court is not called on to determine whether the DRC did a perfect job, but whether it conducted a "reasonable investigation." And there is no evidence that an interview of Fortin or an additional interview of Garrott "would have provided new information that would have changed the reasonableness of the [DRC]'s decision." Frank v. LoVetere, 363 F. Supp. 2d 327, 335 (D. Conn. 2005).

As for the rest of Plaintiff's complaints with the DRC's process, the Court finds that they have no merit. Accordingly, the Court will honor the recommendation of the DRC, which the Court finds has made a determination in good faith after conducting a reasonable investigation that the maintenance of the derivative suit is not in the best interest of SunTrust. Plaintiff's claims are hereby **DISMISSED**.

SO ORDERED this 29 day of October, 2012.


JOHN J. GOGER, JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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