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Docket: CIVIL ACTION NO. 16-3422-BLS1

Date: September 14, 2017

Parties: JENNIFER BRINING, individually and as Trustee of the Jennifer Brining Living Trust and for the Benefit of SENDLATER, INC., in a Derivative Capacity VS. JOHN J. DONAVAN, SENDLATER, INC., SENDLATER II HOLDINGS, LLC AND SIL ENTERPRISES, LLC

Judge: Mitchell H. Kaplan, Justice of the Superior Court

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This case is before the Court on the nominal defendant Sendlater, Inc.'s (Sendlater) motion to dismiss. The exact nature of the motion to dismiss is complicated by the unusual procedural history of this case which informs the basis for the motion that Sendlater has filed.

The plaintiff, Jennifer Brining, is a shareholder in Sendlater, a corporation established under the laws of Vermont in 2014. Although she is by far the largest investor in Sendlater, having invested approximately \$1.3 million of the approximately \$2.5 million invested in the company, she is a minority shareholder owning only just over 11% of the company, as of May, 2017. [1] She originally filed her complaint asserting only direct claims against the defendants who are John J. Donovan and two companies that he or his wife control (collectively, for simplicity,

[1] The court has not been provided with a capitalization chart. While the company's value, if any, may have deteriorated since Brining made her investment, the court has seen no evidence that any valuation of the company was ever undertaken, although the value assigned a share varied dramatically over the past three years.

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Donovan). In general, Brining alleged that nearly all of the money invested in Sendlater was taken by Donovan, then a Director and effectively the manager of Sendlater, and used for his personal affairs, not for the benefit of Sendlater. She asserted various causes of action based on that conduct. At a hearing on requests for preliminary relief convened in November, 2016, the court (Liebensparger, J.) commented that the claims asserted by Brining appeared to be claims for corporate waste, which were claims that belonged to Sendlater and not to an individual investor. Apparently prompted by this remark, on November 30, 2016, Brining's attorney sent counsel for Sendlater a Mass.R.Civ.P. 23.1 demand letter demanding that Sendlater's board of directors (the Board) cause the company to bring suit against Donovan. On December 13, 2016, Brining amended her complaint to allege that a demand had been sent, but the Board had not responded. [2]

During additional hearings held in early 2017 to address discovery disputes and requests for protective orders, the court ruled that while the form of the demand sent to the Board was unusual, it was adequate to inform the Board of the allegedly wrongful actions undertaken by Donovan and to request action to redress this conduct. Moreover, Sendlater, through counsel, advised the court that Donovan had been removed from the Board, no longer had any control over Sendlater's funds, and the Board had retained AlixPartners LLP to conduct an independent investigation of the transactions between Donovan and Sendlater. Therefore, it appears that the Board treated Brining's attorney's demand as a formal demand requiring investigation and response.

The Vermont statute authorizing derivative proceedings (11A V.S.A. § 7.40) provides

[2] On December 13, 2016, based on preliminary findings concerning transactions between Sendlater and Donovan contained in a report by the forensic accounting firm, AlixPartners, LLP, the court concluded that Sendlater had a reasonable likelihood of recovering from Donovan and issued an order on trustee process attaching funds allegedly due Donovan by certain trusts.

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little guidance concerning how much time a board of directors may have to respond to a shareholder demand, nor does there exist and case law interpreting it. Nonetheless, the court concluded that under Vermont law a board must be given adequate time to investigate such a demand. See § 7.40(b) ("Whether or not a demand for action was made, if the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed.") Further, as noted above, the Board had already retained a well-known forensic accounting firm to investigate, and it required adequate time to complete its work.

In the interim, the court decided motions to dismiss the Amended Complaint. It held that all of Brining's direct claims against Donovan had to be dismissed for failure to state a claim on which relief could be granted, as well as certain of the derivative claims. [3] In consequence, by the end of April, 2017, the only claims still pending in this action were derivative claims in the name of the nominal defendant Sendlater against Donovan for fraud, breach of fiduciary duty, and unjust enrichment.

At a hearing convened on April 26, 2017, Sendlater's counsel reported that AlixPartners had completed its report on April 18, 2017 and the Board had met to consider Brining's demand on April 20, 2017. The Board then consisted of three members, none of whom appeared to have been Board members at the time that the demand was sent: John Rose, Nadir-Yohan Zohar (who became president of Sendlater effective February 1, 2017), and Bhaskar Panigrahi. The court was presented with minutes of the Board's meeting which reflected that the Board received a

[3] The court initially allowed one direct claim against Donovan to proceed: a claim in which Brining alleged that Donovan fraudulently induced her to lend Sendlater \$200,000 by telling her that it would be repaid within a month or two. However, the note that was given her by Sendlater had a one year maturity date. When Sendlater paid the note, with accrued interest, just prior to the due date, the court dismissed that claim as well. It appears that Donovan provided Sendlater the funds with which to pay the note.

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presentation from AlixPartners, discussed the law suit, and then voted as follows: "Regarding the allegations in the Demand and the Plaintiff's Amended Complaint that pertain to Professor John Donovan, the Board resolves that it is not in the best interests of Sendlater to pursue legal action against Professor Donovan at any point now or in the future, or to permit claims to be pursued on its behalf." Counsel explained that based upon the Board's vote, Sendlater would be filing a motion to dismiss the remaining derivative claims. A schedule for service of the motion and an opposition

was adopted. Oral argument on the motion was held on August 8, 2017.

ADDITIONAL FACTS

A few additional facts help to place the pending motion in context. Sendlater is an internet based company still very much in the development phase. A detailed understanding of its proposed business operation is unnecessary for the resolution of this case. In brief, it appears that in 2013, Romano and Nancy Formichella conceived of an internet based enterprise that would arrange for cards, gifts and other items to be delivered over extended periods, presumably to family and friends, even after the sender had died. To generate income, partnerships could be developed with retailers, florists, greeting card companies and other relevant businesses. The Formichellas lived in Vermont and sought counsel from a Vermont lawyer who introduced them to Donovan. [4] The lawyer incorporated Sendlater in Vermont, although its physical location became Donovan's residence in Hamilton, Massachusetts. Donovan also became a director and the president of Sendlater. The Formichellas sought investments in Sendlater from their friends, one of whom was Brining who invested through a trust that she controlled. As noted above, it is

[4] At the time, the Formichellas were unaware of Donovan's somewhat checkered past. See, e.g., *Father of Trump Deputy Treasury Pick at Center of Family Dispute*, Boston Globe, May 16, 2017; and *Separate and Final Judgment Confirming the Arbitrator's October 26, 2016 Orders (November 1, 2016) Rebecca M Brown et al. v. John J. Donovan et al.* Suffolk Superior Court CA No. 03-4247.

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alleged that nearly all of the funds raised for the benefit of Sendlater passed to accounts in the name of Donovan or businesses controlled by him or his wife. This led Brining to file her original complaint.

THE ALIXPARTNERS REPORT

AlixPartners is a nationally recognized forensic accounting firm. It was first retained by Sendlater in connection with Brining's motions for preliminary relief filed in November, 2016. While Donovan used AlixPartner's preliminary analysis of his transactions with Sendlater to oppose Brining's motions, the court (Liebensparger, J.) found that it actually supported Brining's contentions that Donovan had misused corporate assets: "I point specifically to the report of [AlixPartners] in which it . . . found that the Donovans expended nearly \$580,000 for non-business reasons out of the corporation. He balanced that off with what he said may be, but he hasn't been able to determine or hasn't been able to confirm that the Donovans contributed more than the \$580,000 back to the corporation." After the Brining demand was made, AlixPartners was retained to undertake a more thorough analysis of these transactions. As noted above, its conclusions were set out in an April 18, 2017 report to the Board (the Report).

The Report notes that until December, 2016, Sendlater had essentially no internal controls. Not only did it not prepare financial statements, it did not even record transactions. It did not have any procedures for approving expenses or determining that related party transactions were for fair value.

Through the end of February, 2017, a group of companies that the Report identifies as the "Sendlater Entities" had received funds of \$2,995,706 and distributed \$2,846,276. However, the

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Report (I) defines the Sendlater Entities as including SecureNet and SIL Holdings; and (ii) states that SecureNet is owned by Donovan's wife and SIL Holdings is owned by Donovan and both those entities engage in some transactions unrelated to the business of Sendlater. In consequence, identifying the gross funds in and out of the "Sendlater Entities" during the period in question is of limited utility in determining financial improprieties related to the misuse of funds intended to further Sendlater's business plan.

In any event, of the incoming funds, \$2,521,801 were invested in Sendlater in return for Sendlater stock. Neither Donovan, his wife, nor any of their entities invested any cash in Sendlater.

The Report concludes that Donovan loaned "Sendlater Entities" \$202,074; however, those loans were documented by notes apparently generated and signed by Zohar on March 30, 2017, although the money was lent on earlier dates. There is no explanation as to why Zohar would sign loan documents for loans made before he was President and what he reviewed to confirm the amounts, sources, and uses of the funds. Donovan also claimed to have made direct payment of Sendlater's legal expenses of nearly \$40,000 in November, 2016, but that appears to be related to the claims asserted against him in this case. The cash and expenses paid to or on behalf of Sendlater by Donovan appear to have come from loans to Donovan from two individuals: Will Graylin and Bill Wheaton. However, these loans have a very peculiar feature. They appear to be convertible into Sendlater stock at the option of the lenders. It is unclear how Sendlater would account for a loan to Donovan that Graylin and/or Wheaton could convert into stock to be issued by Sendlater?

The Report states that another entity controlled by Donovan leased three properties or parts of properties located in Vermont, Massachusetts, and South Carolina to Sendlater. The

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Report does not explain why all three locations were necessary for Sendlater's operations. The total lease obligations to the Donovan related entity were, in the aggregate, \$363,970, but, according to the Report, "the estimated value of the lease agreements" to Sendlater was only \$192,206. The court has been unable to determine if all, or part, of these lease obligations were paid, although the Report refers to some payments to the Donovan entity.

Another unusual transaction described in the Report was Donovan's loan of Sendlater shares owned or controlled by him to Sendlater on February 1, 2017. These shares were valued at 28 cents a share, based on the amount paid to Sendlater for the shares by two individual investors on January 31, 2017. There is no indication that this share price was the result of arm's length negotiation or any formal appraisal of the value of Sendlater. The Report does not explain why it was a prudent business decision for Sendlater to borrow shares from Donovan for these transactions instead of simply issuing shares to these new investors.

The Report concludes that of the \$2,846,276 disbursed by Donovan on behalf of the Sendlater Entities: (I) \$1,274,506 "appear to be related to the business activities of Sendlater"; (ii) \$800,018 are not related to any Sendlater business activity; and (iii) \$771,552 of disbursements "cannot be determined based on the scope of work performed." Moreover, of the \$1,274,506 described as apparently related to business activities, \$601,063 was paid to a company called Savior Labs for website development and other related services. However, Savior Labs is owned by Paul Parisi who was also an employee of one or more Sendlater Entities. Savior Labs also provided services for Donovan personally. The Report explains that: "Based on the nature (services) and lack of documentation for the work performed by Savior Labs, I was unable to assess the value of services provided to [Sendlater]."

The Report concluded with the following "general observations regarding the documents

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provided to [AlixPartners] and relied upon for purposes of this investigation:"

Documents regularly included handwritten modifications of dates, interest rates, and loan amounts;

Metadata indicated that documents were created or modified days, months and years after the date on the face of the document;

Documents (primarily invoices) appear to be computer generated and do not contain any authentication (such as logos or seals);

Multiple versions of documents contained materially different terms and varying dates;

Signatures on documents appear to be typed or computer generated;

Signatures on documents were undated; and

Dating and amounts on the documents are inconsistent within the document.

The Report also noted that Sendlater has, since its inception, generated only \$11,131 of revenue.

THE BOARD'S DECISION

The Board's Resolution not to pursue or permit Brining to pursue claims against Donovan now or in the future states that the "Board's investigation has led it to conclude that [any judgment against Donovan] would not be of substantial value." However, the minutes do not explain what it learned through its investigation that led it to reach this conclusion. From the court's perspective, the Report certainly does not appear to support that conclusion.

The Resolution includes a number of bullet points that lay out the rationale for the Board's conclusion. They may be summarized as follows: the litigation would be expensive; litigation would distract employees and management; the litigation would negatively affect partnership and investment opportunities; the litigation would affect the company's public image and share price (although there appears to be no market for the companies' shares); and

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"Brining's method of prosecution, both through her lawsuit and through her correspondence with investors, employees, and Board members, have demonstrated that her values and motivations are not aligned with this Board and are not compatible with the success of the company." The court notes that the minutes do not explain who would have invested in or partnered with the company, if the lawsuit were not pending. Notably, the minutes do not state that Donovan is essential to the success of Sendlater because, for example, of his unique understanding of the technology or some other service that is available to the corporation only through him.

DISCUSSION

The Choice of Law and Legal Standard

Sendlater is incorporated under the laws of Vermont. Therefore, Vermont law must be applied in determining whether, under the circumstances presented by this case, the claims that Brining has asserted derivatively on behalf of Sendlater against Donovan can proceed for resolution on their merits or must be dismissed. See *Harrison v. NetCentric Corp.*, [433 Mass. 465](#), 471 (2001). Vermont has codified a shareholder's right to bring a derivative action in a statute (11A V.S.A. § 7.40). That statute, however, provides no guidance concerning the procedures that a board of directors should follow when a demand has been made by a shareholder that the corporation bring suit against a former officer/director who has allegedly injured it or when a court may conclude that such a case may proceed, notwithstanding the board's decision that it is not in the best interests of the corporation that the litigation continue. Compare Mass. G.L. c. 156D, §§ 7.40-7.47. There are also no reported Vermont cases that interpret the statute in this regard. The court concludes, however, that Sendlater's motion should be treated as a "demand rejected" derivative claim and the law to be applied in such situations is

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essentially uniform across most jurisdictions. See *Halebian v. Berv*, [457 Mass. 620](#), 625-626 (2010) and *Harlen v. Brown* [431 Mass. 838](#), 845 (2000) citing *Scattered Corp. v. Chicago Stock Exch., Inc.*, 701 A. 2d 70, 72-73 (Del. 1997).

Sendlater first argues that the claim should be dismissed because the Amended Complaint does "not properly plead the reasons for her failure to obtain the action she demanded." Under the circumstances presented by this case that is a make weight argument. In fact, the Amended Complaint alleges that a demand was sent and no response was received, which was the state of affairs at the time the Amended Complaint was filed. Thereafter, the court determined to stay the case while the Board investigated. When the Board reported that it had determined that it was in the best interest of Sendlater that the claims not ever be pursued, either by the corporation or Brining on its behalf, the parties addressed a briefing schedule for this anticipated motion to dismiss. There was no suggestion that Brining would first amend her complaint to take into account the Board action that had just occurred. Clearly, the parties anticipated that Brining would file pleadings in response to Sendlater's motion in which she would attempt to establish why the Board's action was insufficient to end the litigation, which is what she has done. [5]

Director Independence

Brining argues that the three member Board that rejected her demand was not independent of Donovan's influence. It does appear that each of these individuals had longstanding pre-existing relationships with Donovan and were asked by him to be Board members. Further, none of them appear to have made cash investments in Sendlater. While they may hold shares in Sendlater that could have value only if Sendlater succeeds, their interests may

[5] Compare G.L. c. 156D, § 7.44 (d): " the court shall dismiss the suit unless the plaintiff has alleged with particularity facts rebutting the corporation's filing in its complaint or an amended complaint or in a written filing with the court." (emphasis supplied)

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not be entirely aligned with original shareholders who provided the funds to

found Sendlater, i.e., unlike these investors, they don't have any skin in the game.

Traditional case law, generally applying Delaware law, concerning the factors a court should consider in determining whether a board is sufficiently independent to consider a shareholder demand that it bring suit against a former officer/director does not suggest that any of these factors, standing alone, are sufficient to support a finding of disabling interest. In *Cede & Co. v. Technicolor, Inc.* 634 A. 2d 345, 361-364 (Del. Supr., 1992), the Delaware Supreme Court broadly defined the contours of the duty of loyalty: "Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally. . . . We have generally defined a director as being independent only when the director's decision is based entirely on the corporate merits of the transaction and is not influenced by personal or extraneous considerations. . . . This Court has generally and consistently refrained from adopting a bright-line rule for determining when a director's breach of duty of independence through self-interest translates into evidence sufficient to rebut the business judgment presumption accorded board action.") Further, in general, "to render a director unable to consider demand, a relationship must be of a bias-producing nature. Allegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence." *Beam Ex Rel. M Stewart Living v. Stewart*, 845 A.2d 1040, 1050 (Del. Supr., 2004). In this case, the materials presented by Brining do little more than allude to past business or other relationships between the three Board members and Donovan.

There are, however, certain confounding factors presented in this case. First, traditionally

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under Delaware law a court judges independence by considering the make-up of the board at the time of the demand. See *Rates v. Blasband*, 634 A.2d 927, 934 (Del. Supr., 1993) ("Thus, a court must determine whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand.") (emphasis added) Here, the board that decided not to pursue, or permit Brining to pursue, claims against Donovan was not the board directing the affairs of the company when the suit was filed or demand was made. Brining chose to send a demand, through Sendlater's litigation counsel, rather than alleging demand futility (see *id.*) and perhaps that should end the inquiry. Nonetheless, the court questions whether it is appropriate for Donovan to select individuals with whom he has pre-existing relationships as the members of the Board of Sendlater, when the principal business question facing the corporation is whether to pursue a claim against Donovan. It may be added, this is a claim that a court had preliminarily found has a likelihood of success on its merits. Often, when board independence is in question, a board will appoint a special litigation committee to consider the claim which is the subject of the demand. Under Delaware and Massachusetts case law, a court applies a different standard to the decision of a special litigation committee that a claim not be pursued than it does when an independent board acts. See, e.g., *Houle v. Low*, [407 Mass. 810](#), 825 (1990) (". . . reviewing judges [must] go beyond establishing the committee's independence, good faith and the adequacy of its investigation. The judge must determine, on the basis of the evidence presented, whether the committee reached a reasonable and principled decision." citing *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. Supr. 1981)). The court finds that Vermont would have applied this standard, if Sendlater had convened a

special litigation committee instead of electing a new

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board made up of individuals with whom Donovan had a prior relationship.

Additionally, the Report suggests that Board member and Sendlater president Zohar signed notes memorializing loans from Donovan to Sendlater in March, 2017, long after Donovan putatively provided the funds to Sendlater. The court questions why an independent director would sign such documents while AlixPartners was investigating financial transactions between Donovan and Sendlater. It would seem more appropriate that if Donovan had done nothing to document transactions between him and Sendlater while he controlled the corporation, Zohar should refrain from assisting Donovan in creating evidence of the transactions then under investigation by forensic accountants.

These confounding factors raise some concerns regarding the independence of the directors.

Application of the Business Judgment Rule

If one assumes that the Board is functionally independent of Donovan as it concerns its decision to dismiss this litigation, then the Board's decision is due the protection of the business judgment doctrine. This appears to be the standard of review applied to demand rejected cases regardless of which state's law is applied See *Halebian*, 457 Mass. at 627 n. 11 and cases and commentary cited there; *Harlen* 431 Mass. at 847; *Friedman v. Maffei*, 2016 WL 1555331 at *8 (Del. Ch., April 13, 2016) and cases cited there. Under this standard, the Board's decision not to pursue a claim, or permit it to be pursued by a shareholder derivatively, is binding unless sufficient facts are alleged to raise a reasonable doubt that the Board adequately investigated the claims or acted in good faith, consistent with its duty of loyalty. *Id.*

In this case, there is no question that an adequate investigation occurred. A highly regarded forensic accounting firm was given nearly four months to analyze the transactions

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between Sendlater and Donovan. However, the question of whether there is reasonable doubt that Board acted in good faith is clearly raised by the conclusions the Board reached and actions that it took in response to the Report.

As the Delaware Chancery Court recently explained:

Even if the majority of the directors were disinterested and independent, the presumptive validity of the business judgment rule can be rebutted where the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith. . . . Demonstrating that directors have breached their duty of loyalty by acting in bad faith goes far beyond showing a questionable or debatable decision on their part. In the demand refusal context, a board acts in bad faith if it intentionally act[s] in disregard of the Company's best interests in deciding not to pursue the litigation the Plaintiff demanded. . . . A board may in good faith refuse a shareholder demand to begin litigation even if there is substantial basis to conclude that the lawsuit would eventually be successful on the merits because the board may consider, in the exercise of its business judgment, whether it would be excessively costly to the corporation or harm its long-term strategic interests. (Internal citations and quotations omitted.)

Id. at *11-12. This case appears to present a situation in which the Board's conduct is so different from what an independent Board would be expected to do when confronted by the Report that it can raise reasonable doubt concerning the Board's good faith.

The Board's resolution states that the Board was "unable to determine whether or not there is a reasonable likelihood of success on the merits If, however, a meritorious result were achieved, the Board's investigation has led it to conclude that the award would not be of substantial value." There is, however, nothing in the Board minutes that explains how the Board reached this conclusion. From the court's perspective the Report suggests a strong likelihood of obtaining a substantial judgment against Donovan. \$2.5 million was invested in this corporation, none of it by Donovan. The Report finds that Donovan caused \$800,000 to be spent on goods or services not related to the business of Sendlater and another \$770,000 to be spent on goods or services that the auditors could not categorize. While the Report finds that \$1.2 million was

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spent on business related items, the largest single expenditure was \$601,000 paid to Savior Labs, and, as to that expenditure, the Report concludes that the auditors were unable to reach a conclusion as to the value of the services actually provided to Sendlater. Donovan certainly had an interest in providing AlixPartners with all of the materials to which he had access that would support the business purposes for the expenses that he paid with Sendlater funds. There is no apparent reason to believe that he would be able to muster better proof in a litigation.

The Report does state that Donovan "contributed assets to the Sendlater Entities valued at approximately \$813,701." However, none of the "contributed assets" are investments in Sendlater. \$202,074 are loans not documented until well after the cash was purportedly provided to Sendlater. Much of this sum came from loans to Donovan that could be converted to Sendlater stock, presumably to be issued by Sendlater. \$202,752 was apparently loaned by Donovan to Sendlater to pay off Brining's loan to the corporation. But, as to that loan, if it had not been repaid, Brining would have had direct claims against Donovan. [6] \$192,206 was attributed to the value of property a Donovan entity leased to Sendlater. There is evidence in the Report that Sendlater made some payments to this entity and no evidence that Sendlater required all of this property to conduct its business. \$173,866 was attributed to the value of Sendlater shares loaned back to Sendlater. There is nothing in the Report reflecting the reasons that Sendlater elected to borrow these shares from Donovan. \$42,803 is attributed to the direct payment of business expenses, but it appears that the majority of this sum was spent to pay legal fees that Sendlater incurred by reason of Brining's bringing this law suit against Donovan. If the claims were found meritorious, Donovan might not be entitled to credit for the payment of legal expenses that his wrongful conduct caused Sendlater to incur. Moreover, even if Donovan were

[6] The Report states that these funds were transferred after AlixPartners had completed its work. The Report does not state that AlixPartners saw any loan documents memorializing the terms of the funds transfer.

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entitled to offset a Sendlater recovery with some of these "contributed assets" that would be a benefit to the corporation because these are largely sums that would otherwise putatively be due Donovan.

A judgment might also not be of substantial value if the judgment debtor had no assets from which to recover. The Board minutes do not suggest that any consideration was given to that factor.

The Board also grounded its decision on its conclusion that the pendency of the law suit would impair Sendlater's ability to succeed on its business plan. Part of this conclusion appears to be based on Brining's and her attorney's detrimental communications with potential investors and employees of Sendlater. Of course, even if this suit were dismissed, that would not stop these parties from having those communications. On the other hand, if Brining were permitted to proceed with this action, she would be acting on behalf of the corporation and all of its shareholders. She would be expected to undertake no actions that were not directly related to the recovery of a judgment against Donovan. If Brining or her attorney engaged in conduct that was not directed to that end and impaired Sendlater's ability to execute its business plan, the court might well conclude that she was not an appropriate representative of Sendlater. [7] The purpose of the lawsuit would be limited to serving the financial interests of Sendlater and not punishing Donovan or vindicating positions that Brining had previously taken.

The Board's resolution expressed concerns that potential investors and business partners have been reluctant to partner with Sendlater because of this litigation; however, the resolution simply states this as a conclusion. The minutes do not indicate who these investors and partners

[7] See Mass.R.Civ.P. 23.1 ("The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.")

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are (or were) nor even why such potential joint venturers would be dissuaded from investing or partnering, if Sendlater's business plan is sound and its prospects good. Sendlater is under new management. The Board members report that they are not beholden to Donovan, and there is nothing in the minutes that reflects on management's belief that Donovan's continued participation in Sendlater is critical to its success. There is no apparent reason why an investor or business partner otherwise convinced in Sendlater's ability to execute on its plan would be dissuaded from participating because Sendlater was attempting to recover corporate funds wrongfully used for personal purposes.

The resolution expressed concern for the expense of proceeding with the litigation; however, if the case were not dismissed, Brining would be prosecuting the action in Sendlater's name but at her expense. Moreover, any attorneys' fees and litigation expenses that Brining might recover could only come from a judgment entered against Donovan, and the amount would be determined by the court in its discretion and have to be fair considering the benefits provided to the corporation by the derivative plaintiff's prosecution of the claim. See *Samia v. Central Oil Co. of Worcester*, 339 Mass 101, 129 (1959) and *Shaw v. Harding*, [306 Mass. 441](#), 450-451 (1940).

In considering whether an adequate showing of reasonable doubt concerning the validity of Board's decision has been demonstrated, the court is substantially influenced by that part of the resolution in which the Board "resolves that it is not in the best interests of Sendlater, Inc. to pursue legal action against Professor Donovan at any point now or in the future." (emphasis added) Sendlater has, to the date of the Report, generated only approximately \$11,000 in revenue. The Board minutes suggest that the Board is hopeful that investments and partnerships will be consummated that will assist Sendlater in achieving its goals. However, there does not

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appear to be any such transactions presently forecast. It may well be that Sendlater's only significant asset is its claim against Donovan.

Notwithstanding this, and in the face of very serious questions concerning the validity of Donovan's use of the funds that Sendlater's investors entrusted to him, the Board made no effort to attempt to settle Sendlater's claims against Donovan or even to negotiate a tolling agreement that would allow Sendlater to delay prosecuting these claims until some time when the litigation would not impair business prospects or, perhaps, it became clear that the Sendlater business plan would not succeed. To the contrary, the Board resolved not to pursue the claims now or in the future. That decision raises serious questions both concerning the independence of the Board and the good faith of its decision to seek no redress for the serious financial improprieties at least strongly suggested by the Report.

Conclusion

For the foregoing reasons, the court has concern about the independence of the Board. As explained above, the court finds that the Report suggests the likelihood of a substantial recovery from Donovan and finds no rationale supporting the Board's contrary conclusion. The Board's reasons for not permitting Brining to pursue the claims against Donovan at her own expense are suspect. Further, the court finds no basis for the Board's failure to take any steps to attempt to preserve Sendlater's claims against Donovan, let alone its decision that the claims should never be prosecuted.

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ORDER

For the foregoing reasons, Sendlater's motion to dismiss is DENIED.

Mitchell H. Kaplan, Justice of the Superior Court

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