STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF WAKE	07 CVS 3449
DOUGLAS D. WHITNEY, individually and on behalf of all other similarly situated, Plaintiff v. CHARLES M. WINSTON, EDWIN B. BORDEN, JR., RICHARD L. DAUGHERTY, ROBERT W. WINSTON, III, THOMAS F. DARDEN, II, DAVID C. SULLIVAN, WINSTON HOTELS, INC., WILBUR ACQUISITION HOLDING COMPANY, LLC, WILBUR ACQUISITION, INC., INLAND AMERICAN REAL ESTATE TRUST, INC. and INLAND AMERICAN ACQUISITION (WINSTON), LLC, Defendants	**ORDER**

THIS CAUSE, designated a complex business case by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to Section 7A-45.4(b) of the North Carolina General Statutes, and assigned to the undersigned Special Superior Court Judge for Complex Business Cases, by Order of the Chief Special Superior Court Judge for Complex Business Cases, came to be heard upon the Motion for Application for Preliminary Injunction and Temporary Restraining Order (the "Motion")[1] of Plaintiff Douglas D. Whitney ("Whitney" or "Plaintiff")[2], and was so heard on June 19, 2007; and

[1] Though the Motion and Amended Class Action Complaint (the "Complaint") seek both a temporary restraining order and a preliminary injunction, the only meaningful difference between the two is the latter's requirement of notice, which Plaintiff provided; accordingly, the court treats the Motion as one for a preliminary injunction. *See Lambe v. Smith*, 11 N.C. App. 581, 582 (1971).

[2] Whitney purports to bring this civil action individually and on behalf of a class of the public shareholders of Winston Hotels, Inc. (See Compl. ¶ 1.) The court, however, has not had the occasion to address class certification issues and need not do so for purposes of ruling on the Motion.

THE COURT, having considered the arguments, briefs, other submissions of counsel and appropriate matters of record, FINDS that the evidence offered to date supports the following:

I.

BACKGROUND

1. Charles M. Winston ("Charles Winston"), Edwin B. Borden, Jr. ("Borden"), Robert W. Winston III ("Robert Winston"), Thomas F. Darden II ("Darden"), David C. Sullivan ("Sullivan"), and Richard L. Daugherty ("Daugherty") (each individually a "Director" and collectively, the "Director Defendants") constitute the Board of Directors of Winston Hotels, Inc. ("Winston Hotels" or the "Company"). Borden, Darden, Sullivan and Daugherty also made up the four members of the Special Committee (collectively, the "Special Committee") established to respond to a potential acquisition of Winston Hotels.[3]

2. This civil action concerns the proposed merger ("Merger") between Winston Hotels and an affiliate of Inland American Real Estate Trust, Inc. ("Inland"). Winston Hotels is a North Carolina corporation and a publicly held real estate investment trust ("REIT") with interests in hotel properties across the country.

3. Beginning in 2005, Winston Hotels engaged Salomon Smith Barney ("Salomon") to solicit acquisition proposals. (May 17, 2007, Form DEFM 14A (the "Proxy") at 25 (the Proxy is attached as Exhibit One to the Winston Defs.' Mem. of Law in Opp. to the Mot.) Salomon contacted ten to twelve parties, but none expressed an interest, and these efforts were abandoned in late 2005. (Proxy 25.)

[3] (Compl. ¶¶ 7-21.)

4. In mid-2006, Winston Hotels was approached by representatives of three companies regarding a potential acquisition of the Company. (Proxy 25.) In response, Winston Hotels formed the Special Committee. It is uncontested that the members of the Special Committee were each independent, outside Directors.

5. From the date of its appointment, the Special Committee handled or supervised all negotiations involving a possible acquisition of the Company. (Proxy 26.) The Special Committee retained Wyrick, Robbins, Yates & Ponton LLP ("Wyrick") as its legal counsel and Lehman Brothers ("Lehman") as its financial advisor. (Proxy 26.) The Special Committee retained Lehman to conduct an evaluation of the Company, identify and negotiate with potential acquirers, and, if requested, provide an opinion on the fairness of any proposed transaction. (Tr. Dep. Lisa Beeson (June 4, 2007) ("Beeson Tr.") at 23:19-24:4, Ex. 3.)

6. Lehman advised the Special Committee that the best way to maximize shareholder value was to negotiate with the three existing bidders, while not foreclosing the receipt of superior, unsolicited bids. (Proxy at 27-28; Beeson Tr. at 25:7-11.) Lehman also advised the Special Committee that this limited canvass was the advisable approach in light of the Company's 2005 canvass, the state of the hotel REIT industry, and the risks that often attend a public sale. (Proxy 27-28; Beeson Tr. at 28:4-29:12, 35:8-40:22.)

7. Lehman ultimately concluded that Wilbur Acquisition Holding Company, LLC and Wilbur Acquisition, Inc. (collectively, "Wilbur") was the Company's best prospect. After negotiations, the Special Committee agreed to merge with Wilbur. (Proxy 29-32.) The parties' final agreement included a merger price of $14.10 per share

and certain other terms, including a "no-shop," a "fiduciary out," an $11 million termination fee, and a provision requiring the reimbursement of expenses up to $9 million.[4] (Proxy 29-32.) Based upon its own evaluation and Lehman's opinion that the Wilbur offer was fair from a financial point of view, the Special Committee unanimously recommended that the Winston Hotel's Board approve the transaction. (Proxy 29-32.) On February 21, 2007, the full Winston Hotel's Board approved the merger. (Proxy 29-32.)

8. On March 5, 2007, Plaintiff filed his original Complaint. Plaintiff alleges here that the Director Defendants failed to maximize the value of the Company, failed to disclose material information, and inappropriately "locked up" the transaction with coercive deal protection measures such that Winston Hotels could not receive and accept a superior offer.

9. On March 9, 2007, Inland made an unsolicited offer to acquire Winston Hotels for $15.00 per share. (Compl. ¶¶ 3, 36; Proxy 32.) The Special Committee considered Inland's offer and concluded that it was superior to the Wilbur offer. (Proxy 32.) After Wilbur informed Winston Hotels that it would not revise its offer, (Proxy 32), the Special Committee unanimously recommended that the Winston Hotel's Board terminate the agreement with Wilbur and approve Inland's superior proposal. (Proxy 33.) On April 2, 2007, Winston Hotel's full Board approved the Merger. (Proxy 33.)

[4] These terms warrant a brief explanation. A termination fee is a fee a merger party agrees to pay if it terminates an agreement to accept a competing offer. A "no-shop" is a provision in a merger agreement that prevents a party from actively soliciting competing bids. Both types of provisions are common in merger agreements. *See, e.g., Matador Capital Mgmt. Corp. v. BRC Holdings, Inc.,* 729 A.2d 280, 291 (Del. Ch. 1998) ("these measures [in particular, a no-shop provision] do not foreclose other offers, but operate merely to afford some protection to prevent disruption of the Agreement by proposals from third parties that are neither bona fide nor likely to result in a higher transaction."). Finally, a "fiduciary out" is a provision that ensures that directors who have agreed to a "no-shop" are permitted to consider and accept unsolicited superior offers, if doing so is consistent with or required by their fiduciary duties.

10. As its agreement with Wilbur required, Winston Hotels paid an $11 million termination fee and $9 million expense reimbursement to Wilbur. (Compl. ¶ 38; Proxy 33-34.) As part of the agreement between Winston Hotels and Inland, Inland reimbursed Winston Hotels for those payments. (Proxy 34.)

11. The Inland agreement, like the Wilbur agreement, included a termination fee of $11 million and up to $9 million in expense reimbursement. (Compl. ¶¶ 40, 41.) The Inland agreement also provided that upon termination of the agreement under certain circumstances, Winston Hotels would have to repay to Inland the $11 million Wilbur termination fee and $9 million expense reimbursement that Inland had advanced to Winston Hotels. (Proxy 66-69, Exhibit A.)

12. On April 18, 2007, as required by federal law, Winston Hotels filed a Form PREM 14 A preliminary proxy statement (the "Preliminary Proxy") with the Securities and Exchange Commission ("SEC") describing the Merger. In the Preliminary Proxy, the Director Defendants urged shareholders to vote for the Merger. (Compl. ¶ 44.)

13. On April 30, 2007, Winston Hotels announced that it had scheduled a shareholder meeting to vote on the Merger for June 21, 2007. (Proxy 23.)

14. On May 2, 2007, Plaintiff filed his Complaint, naming Inland as an additional defendant. The Complaint again alleges that the Director Defendants failed to maximize the value of the Company and failed to disclose material information. It also alleges that the termination fee provisions of the Inland deal would prevent another potential bidder from topping Inland's bid. (Compl. ¶¶ 40-42.)

15. On May 17, 2007, Winston Hotels filed the Proxy with the SEC. The Proxy describes the Merger in great detail and includes the opinion from Lehman

regarding the fairness of the Merger from a financial point of view, as well as a description of the work underlying the fairness opinion. (Proxy 25-46.)

16. By way of his Motion, Plaintiff seeks an order preliminarily enjoining the Company shareholder vote currently scheduled for June 21, 2007.

BASED UPON the foregoing FINDINGS, the court CONCLUDES:

II.

THE PRELIMINARY INJUNCTION MOTION

1. A preliminary injunction is an extraordinary measure, and will only be issued (a) if a plaintiff is able to show a likelihood of success on the merits of his case and (b) that he is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401 (1983). The burden is on the Plaintiff to establish his right to a preliminary injunction. *Pruitt v. Williams*, 25 N.C. App. 376, 379 (1975)(citing to N.C.Gen. Stat. § 1A-1, Rule 65(b)).

A.

Likelihood of Success on the Merits.

2. In considering whether the Plaintiff has met its burden of showing a likelihood of success on the merits of his case, the court has considered each of the claims for relief fairly pled in the Complaint.

3. In this regard, Plaintiff claims, among other things, that the Director Defendants breached their various duties to Winston Hotels and its shareholders by: (a) failing to disclose pertinent information enabling shareholders to cast informed votes,

(b) failing to maximize shareholder value, and (c) agreeing to a coercive and unreasonable termination fee with regard to the Merger.

4. Despite Plaintiff's failure to cite to or otherwise reference the North Carolina Business Corporation Act (the "Act"),[5] or the "Business Judgment Rule,"[6] it can be inferred that, under the liberal concept of notice pleading,[7] Plaintiff alleges violations by the Director Defendants of Section 55-8-30 of the Act ("Section 55-8-30"). Section 55-8-30(a),[8] provides that:

> A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances;[9] and
>
> (3) In a manner he reasonably believes to be in the best interests of the corporation.

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[5] N.C. Gen. Stat. §§ 55-1-01 to -17-05.

[6] The Business Judgment Rule is a matter of common law in North Carolina. It applies in addition to the Act, and creates an evidentiary presumption that directors acted reasonably and fairly in discharging their corporate duties. *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 601 (1999). The *Long* Court described the business judgment rule as follows:

> [The business judgment rule] creates, first, an initial evidentiary presumption that in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation, and second, absent rebuttal of the initial presumption, a powerful substantive presumption that a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business purpose.

Id. at 602 (quoting Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 14.6 at 281 (5th ed. 1995)).

[7] *See*. N.C.R.Civ.P. 8 ("A pleading which sets forth a claim for relief…shall contain [a] short and plain statement of the claim sufficient to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief…."

[8] Though Plaintiff persistently alleges that the Director Defendants breached "fiduciary duties", "[u]nder North Carolina law, directors of a corporation generally owe a fiduciary duty *to the corporation*, and where it is alleged that directors have breached this duty, the action is properly maintained by the corporation rather than any individual creditor or stockholder." *Governor's Club, Inc. v. Governor's Club Ltd. P'ship*, 152 N.C. App. 240, 248 (2002) (quoting *Underwood v. Stafford*, 270 N.C. 700, 703 (1957)). This civil action is not maintained in such manner. In fact, it is uncertain whether any of the Plaintiff's claims are properly brought as direct rather than derivative claims. *C.f. Harbor Finance Partners v. Balloun*, 2003 N.C.B.C. 10 (N.C. Super. Ct. Dec. 19, 2004).

[9] The duty of care requires every director to become informed about the background facts and circumstances before taking action on the matter at hand. Official Comment to Section 55-8-30(a).

Further, subpart (b) of that section provides that:

> In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
> (2) Legal counsel…or other persons as to matters the director reasonably believes are within their professional or expert competence; or
>
> (3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

Still further, Section 55-8-30(d) provides that:

> A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section. The duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section.[10]

5. Accordingly, in substance, the likelihood of Plaintiff succeeding on his claims against the Director Defendants turns on whether Plaintiff can show a violation of Section 55-8-30 by the Director Defendants.

6. In support of his claims, Plaintiff contends that the Director Defendants: "violated fiduciary duties of…loyalty, good faith…owed to [Plaintiff]"[11]; "in bad faith are attempting to unfairly deprive [shareholders] of the true value of their investment in Winston Hotels"[12]; "and in bad faith failed to exercise care and diligence…."[13] These

[10] This last sentence of Section 55-8-30(d) is interpreted to be an explicit instruction from the legislature that North Carolina does not recognize Delaware's *Revlon* doctrine, whereby, when faced with a change of control situation, the nature of a director's duty changes from corporate maintenance to maximizing share value. *See First Union Corp. v. Sun Trust Banks, Inc.*, 2001 N.C.B.C. 9 ¶ 69 (N.C. Super. Ct. August 10, 2001). Notably, many of Plaintiff's claims and arguments are couched in terms of *Revlon* claims. (See, for example, Compl. Prayer for Relief (b).)

[11] (Compl. ¶ 51.)

[12] (Compl. ¶ 52.)

[13] (Compl. ¶ 58.)

allegations[14] reasonably put the Director Defendants on notice that Plaintiffs will attempt to prove a violation of Section 55-8-30.

7. However, Plaintiff himself points out that the Special Committee purports to have retained and met with legal counsel, Wyrick, and considered and obtained financial advisors, Lehman.[15] Though Plaintiff contends that the Preliminary Proxy provided insufficient information regarding the qualifications and/or prudence of selecting Wyrick and Lehman,[16] Plaintiff does not offer any evidence, or even allege, that there is any reason to suspect that either Wyrick or Lehman were outside their professional or expert competence or that either the Director Defendants or the Special Committee had any reason to believe that to be the case.[17] Further, the Plaintiff has not alleged or demonstrated that those Director Defendants who were not members of the Special Committee had any reason to believe the Special Committee did not merit confidence.

8. Further, despite Plaintiff's allegations that the Director Defendants had conflicts of interest due to their ownership interest in Winston Hotels,[18] and the inference of his arguments that such conflicts reflect a lack of good faith in violation of Section 55-8-30, Plaintiff has failed to demonstrate a likelihood that he can successfully show that any such ownership interests (a) constitute a conflict, or (b) were unknown to the shareholders.

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[14] (See also Compl. ¶ 55.)
[15] (Compl. ¶¶46-47.)
[16] (See Compl. ¶¶46-47.)
[17] Though Plaintiff points to a potential disparity in the position of Lehman and a decision of the Special Committee to only pursue three buyers, the same reference demonstrates that such decision was made on reliance from advice from Lehman and counsel from Wyrick. (Pl.'s Mem. 8-9.)
[18] As highlighted in Section II, Paragraph 6, *infra*.

9. It is true that Section 55-8-30(c) limits the degree of protection subsection (b) affords directors who act in reliance on advice, providing that:

> A director is not entitled to the benefit of subsection (b) if he has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

However, Plaintiff has similarly failed to allege or demonstrate any such actual knowledge.

10. The court concludes that Plaintiff has failed to meet his burden of showing a likelihood of success on the merits of his claims against the Director Defendants.

B.

Irreparable Injury.

11. In view of the court's determination that Plaintiff has failed to demonstrate a likelihood that he will succeed on the merits of his claims against the Defendants, it is unnecessary to resolve the issue of whether Plaintiff has shown that he will suffer a substantial or irreparable injury if injunctive relief is not granted.

12. However, the court further concludes that Plaintiff will have an adequate remedy at law with regard to his actions against the Defendants, in the form of claims for money damages; and that such claims are not prejudiced by entry of this Order.

C.

Balancing the Equities.

13. In considering and weighing the interests of Plaintiff and Defendants, the court concludes that injunctive relief is not necessary for the protection of Plaintiff's rights during the course of this litigation, and that equity and the ends of justice weigh against the issuance of a preliminary injunction.

NOW THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, it is ORDERED that Plaintiff's Motion for Application for Preliminary Injunction and Temporary Restraining Order should be, and the same hereby is, DENIED.

This the 20th day of June, 2007.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge
For Complex Business Cases