SEKUK GLOBAL ENTERPRISES PROFIT SHARING PLAN, *Plaintiff*,	*	IN THE
	*	CIRCUIT COURT
vs.	*	FOR
	*	BALTIMORE CITY
HERVE A. KEVENIDES, et. al *Defendants*,	*	Case No.: 24-C-03-007496
	*	
----------X		
CHARLES D. HOFFMAN, et al., * *Plaintiffs*,		
	•	Case No.: 24-C-03-007876
v.		
DONALD J. RECHLER, et al., *Defendants*.	*	
----------X		
ROBETA CHIRKO, *Plaintiff*,	*	
v.		
RECKSON ASSOCIATES REALITY CORP. , et al.,	*	Case No.: 24-C-03-008010
Defendants.	*	

* * * * * * *

MEMORANDUM OPINION

This is a shareholder derivative action challenging the business judgment of the Independent Directors in approving a series of transactions involving the sale of a New York industrial portfolio to members of the Rechler family (herein referred to as the "Transaction"). The action is the consolidation of three lawsuits brought on behalf of shareholders of Reckson Associates Reality Corp. ("Reckson Associates") alleging

substantially the same facts and claims.[1] On October 29, 2003, Plaintiff Sekuk Global Enterprises Profit Sharing Plan ("Sekuk"), which brought the first of these actions, moved for a temporary restraining order or preliminary injunction to enjoin the Transaction but decided not to forward on the motion.

On January 20, 2004, Plaintiffs in all the actions filed a Consolidated Amended Complaint ("Complaint") alleging that Defendants breached their fiduciary duties of care, reasonable inquiry, oversight, good faith, supervision and loyalty.[2] The Independent Directors, Chairman of the Board Emeritus Walter Gross, and nominal defendant Reckson Associates Realty Corp. have filed Motions to Dismiss alleging that all of the claims are derivative and that Plaintiffs failed to make a demand on the Board to take remedial action

[1]On October 16, 2003, Plaintiff Sekuk Global Enterprises Profit Sharing Plan filed a complaint. On October 27, 2003, Charles D. Hoffman and Lydia J. Hoffman filed a complaint and on October 30, 2003, Roberta Chirko filed her complaint. On October 31, 2003, the cases were designated for the Business and Technology Case Management Program.

[2] The first of several shareholder derivative suits in response to the sale of certain industrial properties to the Rechlers was filed in the Supreme Court of New York, County of Nassau, on September 16, 2003. *Lowinger v. Rechler, et al.,* Index No. 03-014162 (Warshawsky, J.). Two additional suits were filed in Supreme Court of New York, County of Suffolk, on October 2 and 3, 2003. There are three consolidated actions pending in the United States District Court for the Eastern District of New York, the first of which was filed on September 26, 2003. *Tucker, et al. v. Rechler, et al.*, Case Nos. 03-CV-4917, 03-CV-4917, 03-CV-5008 and 03-CV-5718 (Platt, J.).

before filing suit and failed to allege facts to show that making a demand would have been futile.

STATEMENT OF FACTS

Reckson Associates, along with Reckson Operating Partnership, L.P. and its affiliates, operates as a real estate investment trust that owns, develops and manages offices and industrial properties in New York Tri-State area. The Rechler family founded Reckson Associates which is a Maryland Corporation. Plaintiffs Sekuk, Charles D. and Lydia J. Hoffman, and Roberta Chirko have owned equity securities in Reckson Associates at all times relevant to this action.

As of September 10, 2003, Reckson Associates had eleven voting directors. Five of those directors – Donald Rechler, Gregg Rechler, Roger Rechler, Mitchell Rechler, and Scott Rechler (the "Rechler Defendants") – were part of the Rechler family and served as executive officers of Reckson Associates. The Independent Directors, who were not members of the Rechler family, included Ronald H. Manaker ("Menaker"), Peter Quick ("Quick"), Herve A. Kevenides ("Kevenides"), Conrad D. Stephenson ("Stephenson"), Lewis S. Ranieri ("Ranieri"), and John V. N. Klein ("Klein"), and Walter Gross ("Gross"), who has served as Chairman of the Board Emeritus since the formation of Reckson Associates. Thus the Independent Directors made up a majority of the eleven-member Board of Directors.

On September 10, 2003, Reckson Associates announced a strategic plan that involved the sale of certain industrial properties to the Rechler family, the resignation of several Rechler family members from executive management and board positions, and various other corporate governance changes. In connection with this strategic plan, the Reckson Operating Partnership agreed to sell 95 industrial properties on Long Island (the "industrial properties")

to the Rechler family for approximately $315.5 million – roughly $225.1 million in cash and debt assumption and $90.4 million in Reckson Operating Partnership units (3,932,111 units, valued by Citigroup at $23,00. per unit). The Transaction provided that the Rechler family would no longer own any Reckson Operating Partnership units. In addition, Gregg, Roger, and Mitchell Rechler were to resign as officers and directors, and Donald Rechler was to resign from management but still serve as non-executive Chairman of the Board. Reckson Associates was to settle some pre-existing financial obligations to the four resigning Rechlers.

The Transaction was reviewed by the Independent Directors, who, in turn, engaged Citigroup to provide a detailed fairness opinion for a special committee of the Board. All of the Directors voted to approve the Transaction.

DISCUSSION

"**In reviewing the grant of a motion to dismiss pursuant to Maryland Rule 2-322(b),**" **the Court must assume** "**the truth of all well pleaded facts and all inferences that can reasonably be drawn from [them].**" ***Bennett Heating & Air Conditioning, Inc. v. Nations Bank*, 103 Md. App. 749 (1995), *rev'd in part on other grounds*, 342 Md. 169 (1996).** "**Any ambiguity or want of certainty in [the] allegations must be construed against the pleader,**" ***Manikhi v. Mass Transit Admin.*, 360 Md. 333,345 (2000) (internal citations omitted) because in** "**moving to dismiss, a defendant is asserting that, even if the allegations of the complaint are true, the plaintiff is not entitled to relief as a matter of law.**" ***Hrehorovich v. Harbor Hosp. Ctr., 93 Md. App. 772, 784 (1992).*** "**Thus, in considering a motion to dismiss for failure to state a claim, the circuit court examines only the sufficiency of the pleading.**" ***Id.*** "**The complaint should not be dismissed unless**

it appears that no set of facts can be proven in support of the claim set forth therein." ***Bennett,* 103 Md. App. at 749.** Thus, all of the facts considered in this Opinion are drawn from the Complaint and the Court did not consider any of the documents or affidavits filed by any of the parties.

It is well-established that courts will not ordinarily consider a derivative action by a shareholder on behalf of a corporation "until it appears that the intra corporate remedies have been unsuccessfully pursued by the complaining stockholder," which means that "generally speaking, the complaining stockholder must make a demand upon the corporation itself to commence the action, and show that this demand has been refused or ignored." *Parish v. Milk Producers Assn.*, 250 Md. 24, 81-82 (1968). Because no such demand was made by Plaintiffs, Defendants urge that the complaint must be dismissed.

Noting that a shareholder derivative suit "necessarily intrudes upon the managerial prerogatives ordinarily vested in the directors," and because such actions may be abused by "disgruntled shareholders," the Court of Appeals recently adopted a strict pre-suit demand requirement for derivative actions. *Werbowsky v. Collomb,* 362 Md. 581, 600 (2001). The Court noted that in most instances, the pre-suit demand "is not an onerous requirement" and explained that the demand requirement provides an opportunity for the directors–"even interested, non-independent directors" to consider, or reconsider the disputed issue. *Id.* at 619. After receiving a demand, the Directors may decide "to seek the advice of a special litigation committee of independent directors . . . or they may decide . . . to accede to the demand rather than risk embarrassing litigation." *Id.* at 619.

The Court noted that a futility exception often "assures extensive and expensive judicial wrangling over a peripheral issue that may result in preliminary determinations

regarding director culpability that, after trial on the merits, turn out to be unsupportable," *id.* at 600-02, whereas if a demand is made and refused, it can be reviewed under the business judgment rule standard. *Id.* In recognition of this fact, the Court crafted a "very limited" exception, *id.*, and held that a demand is futile only when the allegations "clearly demonstrate, in a very particular manner" that:

> (1) making a demand, or the delay in waiting for a response to the 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 disputed decision that they cannot reasonably be expected to respond to a demand in good faith and in accordance with the business judgment rule.

Id. at 620. (emphasis added).

In *Werbowsky*, the Court affirmed the trial court's grant of summary judgment on the basis that a demand was not excused. Although *Werbowsky* involved a summary judgment, the Court made clear that the same standard applies to a motion to dismiss: "[o]bviously, if the complaint fails to allege sufficient facts which, if true, would demonstrate the futility of a demand, it is entirely appropriate to terminate the action on a motion to dismiss." *Id.* at 620-21.

Thus in determining whether to grant the motion to dismiss, the Court must determine whether Plaintiffs have alleged facts that "clearly demonstrate, in a very particular manner" that: (1) the issuance of a demand, or the delay in waiting for a response to the demand would have caused irreparable harm to Reckson Associates, or (2) a majority of the directors were "so personally and directly conflicted or committed to the decision...that they could not have reasonably been expected to respond to a demand in good faith and within the ambit of

the business judgment rule." *Id*. at 620.

1. PLAINTIFFS' ALLEGATIONS FAIL TO CLEARLY DEMONSTRATE THAT MAKING A DEMAND OR AWAITING THE BOARD'S RESPONSE WOULD HAVE CAUSED IRREPARABLE HARM.

It is unclear whether Plaintiffs contend that making a demand, or awaiting the Board's response would have caused irreparable harm, but it is clear that the Complaint fails to clearly demonstrate "irreparable harm." Parties may not create their own irreparable harm. *See, e.g., Quince Orchard Valley Citizens Ass'n v. Hodel,* 872 F.2d 75,79 (4th Cir. 1989) (affirming district court's denial of a preliminary injunction because "much of [plaintiffs'] potential harm was a product of its own delay in pursuing this action."). *See also, e.g., Vantico Holdings S.A. v. Apollo Mgmt*, 247 F. Supp. 2d 437, 454 (S.D.N.Y. 2003) (asserting that "[plaintiff] cannot rely on its own actions to create the risk of irreparable injury which it then seeks to avoid by the issuance of a preliminary injunction."); *Minzer v. Keegan*, 1997 U.S. Dist LEXIS 16445, at *18 (E.D.N.Y. Sept. 22, 1997) ("Because preliminary injunctions are predicated upon 'urgent need for speedy action,' delay in seeking the remedy suggests that the remedy is not really needed or that the harm is not really irreparable.") (citations omitted).

The sale of the industrial properties was announced on September 10, 2003, with an expected closing date in the fourth quarter of 2003. Plaintiffs could have made a demand on the Board on September 11th or shortly thereafter. Instead Plaintiffs filed the first of these consolidated cases on October 16th, over five weeks later and over four weeks after another Reckson Associates shareholder brought virtually the same derivative suit in New York (*see* note 2.). When Plaintiffs decided to not go forward on their request for injunctive relief, they effectively conceded that there was no irreparable harm.

Finally, "irreparable injury is suffered whenever monetary damages are difficult to

ascertain or are otherwise inadequate, " and Plaintiffs have failed to allege that they could not be adequately compensated for any breach through an award of money damages. *Chestnut Real Estate P'ship v. Huber*, 148 Md. App. 190, 205 (2002) (citation omitted)). *See also Coster v. Department of Personnel*, 36 Md. App. 523, 526 (1977) ("an injury is irreparable . . . where . . . it cannot be readily, adequately, and completely compensated for with money") (citation omitted).

In sum, Plaintiffs have failed to "clearly demonstrate, in a very particular manner" that "a demand, or a delay in awaiting a response to a demand, would [have] cause[d] irreparable harm to the corporation." *Werbowsky*, 362 Md. at 620.

2. Plaintiffs' Allegations Fail to Clearly Demonstrate That a Majority of the Directors Are So Personally and Directly Conflicted That They Could Not Have Reasonably Been Expected to Respond to a Demand in Good Faith and Within the Ambit of the Business Judgment Rule.

In support of their argument that Defendants were conflicted, Plaintiffs allege that Defendants were hand picked to sit on the Board by the Rechlers; had social and business relationships with the Rechlers; had a history of taking steps to protect the interests of the Rechlers at the expense Reckson Associates; and that after approval of the Transaction, the Board instituted a number of corporate governance changes to protect the Company from these alleged conflicts.

Werbowsky makes clear that a demand will not be excused lightly. Thus a conflict is not shown simply by alleging that the directors "were chosen ... at the behest of controlling stockholders." 362 Md. at 618. Nor will it be excused because "a majority of the directors approved or participated in some way in the challenged transaction or decision," or based on

"allegations that [the directors] are conflicted or are controlled by other conflicted persons." *Id.* In fact a simple allegation that the directors will be "hostile to the action" is not sufficient to excuse a demand. *Id.* Because "[d]irectors are presumed to act properly and in the best interest of the corporation, " *id.* at 618-19, a conflict will not be found based on "non-specific or speculative allegations of wrongdoing." *Id.* at 619.

As the Court noted in *Danielewicz v. Arnold*, 137 Md. App. 601, 631 (2001), *Werbowsky* requires that a complaint "demonstrate, [any alleged conflict by the directors] ... '*in a very particular manner.*" (emphasis added). In *Danielewicz*, the directors were the plaintiff's husband, a director the Court assumed *arguendo* was conflicted, and the alleged conflicted director's son. *Id.* at 629. The Court held that the allegations of a conflict were "conjecture and speculation." *Id.* at 631. The Court assumed the plaintiff's husband would have responded to her demand, and in reference to the conflicted director's son held that the plaintiff "has not presented sufficient evidence indicating that he would not have responded to [the plaintiff's] demand." *Id.* at 631. Thus evidence of familial relations, without more, is not sufficient to excuse a demand.

Nor is "[e]vidence of personal and/or business relationships" sufficient to excuse a demand even under the more permissive Delaware standard.[3] *Kohls v. Duthie*, 765 A.2d 1274, 1284 (Del.Ch. 2000) (citation omitted). There the Court held that the fact that the

[3]Because the requirement for pleading and proving demand futility articulated in *Werbowsky* is so recent, there are few Maryland cases applying it. The Delaware cases holding that a demand was not futile are helpful because the Delaware standard is more permissive and excuses a demand where Maryland would not. Delaware looks to determine if the facts alleged create a reasonable doubt that "(1) the directors are disinterested and independent, and (2) the challenged transaction was the product of a valid exercise of business judgment." *Werbowsky*, 362 Md. at 593 *citing Pogostin v. Rice,* 480 A.2d 619, 624 (Del.1984).

company's president, CEO, and inside director provided a summer job to an outside director when he was in business school and also played a role in his board appointment, did not show that the outside director lacked independence. *Id.* Nor was a conflict shown by alleging that a director had previously voted in favor of a generous cash severance payment that was paid to the CEO, despite the fact that the latter did not leave or change his job with the company. *Kohls v. Duthie*, 765 A.2d 772, 781 (Del. Ch. 2000). *See also Orman v. Cullman,* 794 A.2d 5, 28 (Del. Ch. 2002) (holding that outside director's former affiliation with the underwriter of a company's initial public offering and its present investment bank did not render director non-independent).

The requirement of specific evidence of an actual conflict was recently reiterated in *Beam v. Stewart*, 845 A.2d 1040 (Del. 2004). In rejecting the plaintiff's argument that a demand was futile because of an alleged conflict the Court stated that "to render a director unable to consider a 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." *Id.* at 1050 (emphasis added). One of the allegations in *Beam* was that one of the directors (i) was a long-standing personal friend of the controlling stockholder and the president and chief operating officer; (ii) had a prior business relationship with the company (through his position at Sears, which marketed a substantial volume of the company's products); and (iii) was recruited for the board by a longtime personal friend of the controlling director. *Id.* at 1045. The Court held that "[a]llegations that Stewart [the controlling stockholder] and the other directors moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as 'friends,' even

when coupled with Stewart's 94% voting power," failed to rebut the presumption of independence. *Id.* at 1051. The Court made clear that an inference of a conflict that excuses a demand must be such that "the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director." *Id.* at 1052.

PLAINTIFFS' ALLEGATIONS OF ALLEGED CONFLICT

Plaintiffs allege that four of the seven Independent Directors had specific conflicts and that all seven were conflicted because they had a history of approving financial deals and payments to the Rechlers that favored the Rechlers and harmed Reckson Associates.

MENAKER

Plaintiffs allege that Menaker worked for JP Morgan & Co. Inc. ("JP Morgan") from 1966-99 holding various positions, including president, and that when he retired in 1999 he was managing director and head of Corporate Services of JP Morgan & Co. Inc. of New York. J.P. Morgan is the administrative agent that oversees the group of 14 banks that provides Reckson Associates a $500 million line of credit. A portion of the proceeds of the sale of the industrial properties was earmarked by Reckson Associates to pay down a portion of that outstanding credit facility. Assuming that J.P. Morgan benefitted from the Transaction because of a pay down of the credit facility, these facts do not show that Menaker had a conflict.

QUICK

Plaintiffs allege that Quick worked for Quick and Reilly, Inc. from 1982 to 2000, and that Quick and Reilly is now an affiliate of Fleet Boston Financial which does mortgage and financial business with Reckson Associates. This past and indirect business relationship fails to establish a conflict.

RANIERI

Plaintiffs allege that Ranieri was a former vice president of Salomon Brothers, Inc., which was one of the underwriters of Reckson Associates' 1996 public offering, and that Salomon Smith Barney (Salomon Brothers' successor), later merged into Citgroup, which participated in the valuation of the industrial properties. Plaintiffs also allege that a company related to Ranieri is a tenant in one of Reckson Associates' 178 properties. There are no allegations that the terms of the lease were unfair or not at arm's length. Plaintiffs also allege that Ranieri was "hand-picked" by the Rechlers. None of these allegations provide a factual basis of a conflict that would excuse a demand.

KLEIN

Plaintiffs allege that Klein assisted the late William Rechler and Defendant Gross in developing the first industrial park on Long Island when Klein was Smithtown's Supervisor in the 1960s, and that from 1988 Klein served as counsel to the Association for a Better Long Island (the "Association"), an organization founded by Donald Rechler, of which he was a former president and chairman of the board. The fact that 40 years ago, Mr. Klein, in his capacity as a town administrator, may have helped another Rechler family member– who is now deceased – and defendant Gross– in their pursuit of a successful business venture is not evidence of a conflict. Nor does the fact that he is or was counsel to an organization founded by Donald Rechler.[4]

[4]Plaintiffs allegation that "from at least 1988, Klein acted" as counsel, makes it impossible to determine if Plaintiffs are alleging that he is still counsel. Thus, for purposes of this motion, the Court assumes that he still is counsel.

GROSS

As discussed in the proceeding paragraph, Plaintiffs allege that in 1961, Gross together with the late William Rechler, and Defendant Klein, conceived and developed Vanderbilt Industrial Park on Long Island. This allegation is not sufficient to show a conflict

HAND-PICKED BY THE RECHLERS AND HISTORY OF APPROVING FINANCIAL TRANSACTIONS

Plaintiffs allege Gross, Klein, Kevenides, Stephenson and Ranieri were "hand-picked" by the Rechlers. For the reasons discussed above, that allegation does not show that there was a conflict. Plaintiffs also allege that Gross, Kevenides, Stephenson and Ranieri had a history of consistently approving financial deals, and the payment of millions of dollars in employment benefits to the Rechlers, which served no legitimate business and hurt the company. These allegations do not show a conflict under the cases discussed above and are simply an indirect way to attack the business judgment of these Directors, which is not properly considered in determining demand futility. *See* discussion below at **page 14**.

NO ALLEGATIONS OF A CONFLICT

In sum, Plaintiffs have failed to "clearly demonstrate, in a very particular manner" that the Directors were "so personally and directly conflicted" that they could not have been reasonably "expected to respond to a demand in good faith." *Werbowsky*, 362 Md. at 620.

3. **PLAINTIFFS' ALLEGATIONS FAIL TO CLEARLY DEMONSTRATE THAT A MAJORITY OF THE DIRECTORS WERE SO COMMITTED TO THE DECISION THAT THEY COULD NOT HAVE REASONABLY BEEN EXPECTED TO RESPOND TO A DEMAND IN GOOD FAITH AND WITHIN THE AMBIT OF THE BUSINESS JUDGMENT RULE.**

Plaintiffs argue that the Directors were "so ... committed to the decision...that they could not have reasonably been expected to respond to a demand in good faith and within the ambit of the business judgment rule." *Werbowsky*, 362 Md. at 620. In support of their arguments, Plaintiffs allege that the Defendants acted in bad faith and outside the ambit of the business judgment rule; that they had already committed the proceeds of the Transaction; and that the Directors would have been subject to personal liability if they did not go forward on the Transaction.

BAD FAITH AND OUTSIDE BUSINESS JUDGMENT RULE

The *Werbowsky* Court held that in determining if a demand was futile, a court should not address "issues that go to the merits of the complaint – whether there was, in fact, self dealing, corporate waste, or a lack of business judgment with respect to the decision or transaction under attack." 362 Md. at 620. Thus a demand is not excused by allegations that the "[d]efendants' approval of the [t]ransaction constitutes a breach of both their common law and statutory duties." Therefore, Plaintiffs' allegations that the Transaction was "facially inadequate, and unfair to Reckson" is not properly considered in determining the narrow issue of demand futility.

THE PROCEEDS WERE ALREADY COMMITTED

Plaintiffs argue that a demand was too late once the decision was announced because Rcskson Associates was committed at the time of the September 10th announcement to use the funds received to purchase 1185. According to Plaintiffs, "Defendants are asking the

Court to find that the decision and subsequent negotiations to purchase 1185 occurred only after the September 10th announcement of the Transaction, and therefore, reflected a wholesale change in Reckson's business strategy concerning use of the Transaction's proceeds." To the contrary, Plaintiffs argue that the decision to buy 1185 was "irretrievably" made before the proposed Transaction.

Because this is a Motion to Dismiss, the Court is not basing its decision upon either of those suppositions but only on the allegations in the Complaint. In Paragraph 15, Plaintiffs allege that an agreement to purchase 1185 was made on November 10th :

> On November 10, 2003, Defendants entered into an agreement to purchase the office building at 1185 Avenue of the Americas in New York ("1185"), which it could not otherwise close upon without the proceeds from the sale of the Industrial Portfolio, which were used as a contract deposit for the purchase of that property.

Arguing that in order to sign a contract on November 10th for property in Manhattan, the deal had to have been negotiated long before then, Plaintiffs ask this Court to ignore the allegation in Paragraph 15 of the Complaint. As further evidence that the deal was complete at the time of the September 10th announcement, Plaintiffs point to an alleged representation made on November 4, 2003 by one of Defendants' attorneys at a scheduling conference.[5]

[5]Plaintiffs claim that one of the Defendants' attorneys represented to the Court at the November 4, 2003 scheduling conference that absent an injunction, the Transaction was scheduled to close immediately due to the necessity to use the funds to purchase 1185. Defendants dispute this allegation. Because this was not a hearing, and no request was made, the scheduling conference was not recorded. For the reasons discussed above, the Court finds it unnecessary to decide what was or was not said.

However, neither the facts alleged in the Complaint nor the facts that Plaintiffs ask the Court to assume show that Defendants were so committed to the decision that they could not respond to a demand in good faith and within the ambit of the business judgment rule. Under the facts alleged in the Complaint, which the Court must accept as true for purposes of ruling on a motion to dismiss, the contract to purchase 1185 was entered into on November 10th, which was *after* the suit was filed and 2 months after the announcement of the Transaction. Under the facts Plaintiffs ask the Court to assume that negotiations to purchase property is not an "irretrievable commitment." Defendants may well have decided to purchase 1185 with the proceeds of the Transaction but that "decision" would not have prevented the Board from responding to a demand in good faith and within the ambit of the business judgment rule.[6] Finally, Plaintiffs fail to explain how they were excused from making a demand on September 11th based on facts they learned on November 4th .

The *Werbowsky* Court noted that "a pre-suit demand on the directors is not an onerous requirement." 362 Md. at 619. In fact, the making of such a demand is far less onerous than the preparation and filing of a shareholder derivative complaint – a task that lawyers for nine different plaintiffs, including the three Plaintiffs before this Court, managed to accomplish in far less than two months.

LACK OF FIDUCIARY OUT CLAUSE

Plaintiffs point out that the Transaction with the Rechlors had no fiduciary out clause

[6]Frankly it would be difficult to conclude that Defendants were "irretrievably committed" even if there had been a contract to purchase 1185 signed simultaneously with the contract to enter into the Transaction. Contracts are broken regularly.

that would allow the Directors to exit the contract if faced with a challenge to the Director Defendants' decision to approve the sale. If the Directors subsequently terminated the contract, the beneficiaries of the contract, in particular the Rechler family members who were not directors of Reckson Associates, could have brought suit against Reckson Associates for breach of contract. And if such a suit was filed and won, Plaintiffs contend that Reckson Associates would in turn sue the Independent Directors for contribution and the Directors' and Officers' ("D & O") insurance coverage would probably not cover any judgement against the directors and officers because D & O policies commonly contain an "insured versus insured" exclusion. That exclusion would preclude the insurance carrier from paying for any breach of contract claim by Reckson Associates against its own directors. Thus, such a suit would expose the Independent Directors to "ruinous personal liability," and thus they would not respond to any demand in good faith and within the ambit of the business judgment rule.

In *Werbowky* one of the allegations was that " it was likely that, by reason of language in the corporation's directors' and officers' liability insurance policies, the corporation would be precluded from bringing an action against the directors." 362 Md. at 590. *See also id.* at 592. Although the issue was not directly addressed by the appellate court, that Court noted that the trial court had "rejected the notion, drawn from *Edge Partners, L.P. v. Dockser,* 944 F.Supp. 438 (D.Md.1996), that a lack of insurance coverage for named directors can excuse a demand." 362 Md. at 594. Based on the rationale of *Werbowsky*, this Court concludes that that when it does directly address the issue, the Court of Appeals will most likely follow the lead of other courts which have held that an insured-versus-insured provision does not excuse a pre-suit demand. *See, e.g., In re Prudential Ins.Co. Derivative Litig.*, 659 A.2d 961, 973 (N.J. Ch. Ct. 1995) ("routine excuse of demand based on the existence of such standard

exclusions would eviscerate the demand requirement"); *Stoner v. Walsh*, 772 F. Supp. 790,

805 (S.D.N.Y. 1991) (rejecting argument that liability insurance policy exclusion rendered board "interested").

Plaintiffs' reliance on *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) does not suggest a different result. First, as discussed previously Delaware excuses a demand where one would be required by Maryland. *See* note 3. Second, even the *Rales* Court recognized that the "mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge either the independence or disinterestedness of directors ...." *Id.* at 936 (citing *Aronson v. Lewis*, 473 A.2d 805, 815 (1984). Third, the Plaintiffs do not include allegations concerning the lack of a fiduciary out clause and the inclusion of an insured-versus-insured provision.

Finally this argument is based on a lot of "ifs," "ands," and "buts." It assumes that *if* a demand had been made, the Outside Directors would have decided to delay or terminate the contract with the Family Group [7]; if the contract with the Family Group was delayed or terminated, the Family Group would not renegotiate the contract, but file suit to enforce the contract; *if* suit were filed, Reckson Associates would be found liable for the contract damages; *if* Reckson Associates were found liable, it would sue the directors for contribution; *if* Recskon Associates sued the Directors for contribution, the suit would be successful; and *if* it is successful the Directors would not be covered by insurance. And finally and most importantly based on that potential liability, the Directors would not have considered a demand in good faith and within the ambit of the business judgment rule. Well as my mother

[7]The Family Group is members of the Rechler family who, according to the allegations in the Complaint, "controlled" Reckson Associates' Board.

often said, “if ‘if’ were a skiff, we’d all drown.”

CONCLUSION

For all the reasons stated above, the Court will enter an order granting the Independent Director Defendants' and Walter Gross's Motion to Dismiss and Reckson Associates Realty Corporation's Motion to Dismiss.

Dated: May 25, 2004

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Judge Evelyn Omega Cannon

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