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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: BANK OF AMERICA CORP.
SECURITIES, DERIVATIVE, AND
EMPLOYEE RETIREMENT INCOME
SECURITY ACT (ERISA) LITIGATION

Master File No. 09 MD 2058 (PKC)

MEMORANDUM AND ORDER

THIS DOCUMENT RELATES TO:

MICHAEL R. BAHNMAIER,

Plaintiff,

10 Civ. 1234 (PKC)

-against-

KENNETH D LEWIS, et al.,

Defendants.

MICHAEL R. BAHNMAIER,

Plaintiff,

09 Civ. 5411 (PKC)

-against-

BANK OF AMERICA CORP., et al.,

Defendants.

-----x
P. KEVIN CASTEL, District Judge:

In Bahnmaier v. Lewis, et al., 10 Civ. 1234 (PKC), plaintiff Michael Bahnmaier asserts derivative claims on behalf of Bank of America Corp. ("Bank of America") against certain of its current and former officers and directors (the "Derivative Complaint"). In Bahnmaier v. Bank of America Corp., et al., 09 Civ. 5411 (PKC), that same plaintiff asserts claims solely on his own behalf pursuant to the Securities Exchange Act of 1934 (the "'34 Act"),

15 U.S.C. § 78a, et seq., and seeks recovery from Bank of America, along with certain individual defendants who also are named in the derivative action (the “’34 Act Complaint”). The two actions were assigned to this Court by the Judicial Panel on Multidistrict Litigation for pretrial coordination as part of In re Bank of America Corp. Securities, Derivative and Employee Retirement Income Security Act (“ERISA”) Litigation, 09 MD 2058 (PKC).

At a pretrial conference of November 2, 2010, I asked the parties whether the allegations of the ’34 Act Complaint presented an impermissible conflict with the plaintiff’s status as a derivative plaintiff standing in the shoes of Bank of America. (Minute Entry, Nov. 2, 2010, 10 Civ. 1234 (PKC).) At the Court’s request, counsel submitted letter-briefs on the subject. Having reviewed the parties’ submissions and relevant authority, I conclude that the Bahnmaier derivative action may not be maintained by this plaintiff because he cannot fairly and adequately enforce a right of the corporation while suing that corporation.

Rule 23.1(a), Fed. R. Civ. P., governs the prerequisites for bringing a derivative action. It states in full:

This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(emphasis added). Under the text of this rule and the prevailing interpretations of it, a plaintiff who maintains a direct claim against a corporation is not a fair and adequate representative of other shareholders in enforcing a right of the corporation derivatively. See In re Bank of Am.

Corp. Sec., Derivative & Emp. Ret. Income Sec. Act (ERISA) Litig., 2010 WL 3448194, at *72 n.21 (S.D.N.Y. Aug. 27, 2010) (collecting cases).

Here, the plaintiff seeks damages from Bank of America under the '34 Act, while simultaneously standing in Bank of America's shoes to claim that the company was damaged by officer and director misconduct. The '34 Act Complaint alleges violations of Section 14(a) of the '34 Act, Rule 14a-9 promulgated thereunder, Section 10(b) of the '34 Act, Rule 10b-5 promulgated thereunder, and Section 20(a) of the '34 Act. 15 U.S.C. §§ 78n(a), 78j(b), 78t(a); 17 C.F.R. §§ 240.14a-9, 240.10b-5. The '34 Act Complaint claims that the plaintiff was injured by material misstatements and omissions made by Bank of America and others between January 11, 2008 and February 25, 2009 as to the acquisitions of Countrywide Financial Corporation ("Countrywide") and Merrill Lynch & Co. ("Merrill"). The Derivative Complaint asserts common-law claims on behalf of Bank of America, against directors and officers alleged to have injured Bank of America through material misstatements and omissions.

In bringing the '34 Act Complaint on his own behalf, the plaintiff seeks to prove unlawful conduct by Bank of America – the very entity in whose shoes he stands as a derivative plaintiff. His success in prosecuting the '34 Act Complaint depends on establishing Bank of America's violations of the federal securities laws in its acquisitions of Countrywide and Merrill. At the same time, in the derivative action, Bahnmaier must prove that Bank of America was injured by the conduct of its officers and directors during those same transactions, and is therefore entitled to recover under various common law theories of liability. "Essentially, then, [plaintiff] seeks to vindicate [his] own interests by demanding recovery . . . while also attempting to represent the interests of [the corporation] by requesting damages for the corporation in

connection with the same alleged wrongdoing.” St. Clair Shores General Employees Retirement Sys. v. Eibeler, 2006 WL 2894783, at *7 (S.D.N.Y. Oct. 4, 2006).

Under the text of Rule 23.1(a), it does not “appear[] that the plaintiff . . . fairly and adequately represent[s] the interests of shareholders . . . who are similarly situated in enforcing the right of the corporation” This conflict between a plaintiff who asserts both a direct shareholder claim on his own behalf and a derivative claim on behalf of the corporation has been explored several times by the district courts of this Circuit. Priestley v. Comrie, 2007 WL 4208592, at *6 (S.D.N.Y. Nov. 27, 2007), a case relied upon by the plaintiff, held that advancing both a direct and derivative claim presented “an impermissible conflict of interest” and raised “economic antagonisms” between the plaintiff’s success in the direct and derivative actions. See also St. Clair Shores, 2006 WL 2894783, at *7 (“Courts in this Circuit have long found that plaintiffs attempting to advance derivative and direct claims in the same action face an impermissible conflict of interest.”); Tuscano v. Tuscano, 403 F. Supp. 2d 214, 223 (E.D.N.Y. 2005) (plaintiff’s claim for direct personal recovery “cannot be maintained considering the derivative nature of the remainder of the plaintiff’s action.”); Wall St. Sys., Inc. v. Lemence, 2005 WL 292744, at *3 (S.D.N.Y. Feb. 8, 2005) (“an individual shareholder has a conflict of interest, and therefore cannot adequately represent other shareholders, when he simultaneously brings a direct and derivative action”); Ryan v. Aetna Life Ins. Co., 765 F. Supp. 133, 136 (S.D.N.Y. 1991) (in scrutinizing a plaintiff’s conflict, “early intervention [is] the more prudent, and, ultimately, the more efficient course,” as opposed to resolving a conflict at the remedial stage).

The plaintiff’s letter-brief does not explain why the plaintiff may adequately maintain both an individual direct action and a shareholder derivative suit. The letter

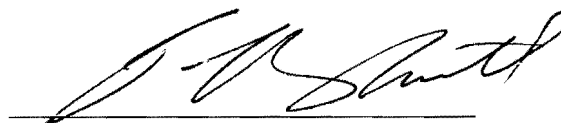
“recognize[s]” the risk “of a theoretical or potential conflict,” but suggests that the conflict has not yet materialized, and may, in any event, be resolved by the Court at the remedial stage. (Pl. Letter, Nov. 10, 2010, at 1.) It further asserts that the plaintiff’s individual recovery “should not have a tangible detrimental impact on the derivative claims,” since the individual recovery sought is an order of magnitude smaller than the potential derivative recovery. (*Id.* at 3.) But according to the ’34 Act Complaint, the plaintiff owned 70,000 Bank of America shares, which he purchased for a total cost of \$2.14 million. (’34 Act Compl. ¶ 31.) Should he succeed in his ’34 Act claims, his personal recovery could well be substantial. Further, the plaintiff filed the Derivative Complaint on February 17, 2010, slightly less than one year after he filed the ’34 Act Complaint on February 27, 2009. *See Bahnmaier v. Bank of America, et al.*, 09 Civ. 2099 (DWL-DJW) (D. Kan., Docket # 1). Given the complaints’ similar factual allegations, this one-year lag does not reflect a zealous approach to the derivative claims. (*See* Pl. Letter, Nov. 10, 2010, at 2-3 (arguing that simultaneous direct and derivative actions will heighten the zeal of plaintiff’s advocacy).)

Plaintiff’s letter-brief argues that any assessment of a conflict would be premature at this time, and should instead be made as part of the Court’s review at the close of the case. But as Judge Leisure noted in the *Ryan* case, it is more efficient and prudent to address a conflict earlier in the action. 765 F. Supp. at 136.

The plaintiff has engaged in the litigation equivalent of riding two horses until the rider determines which is stronger and faster. This might be acceptable if only Bahnmaier’s private rights were at issue. But a willingness to cast aside a derivative claim, if it is the slower and weaker horse, does not speak well of a person’s adequacy as a representative of others.

For the foregoing reasons, I conclude that the derivative action, Bahnmaier v. Lewis, 10 Civ. 1234 (PKC), may not proceed with Mr. Bahnmaier acting as the derivative plaintiff. The action is dismissed without prejudice.

SO ORDERED.

A handwritten signature in black ink, appearing to read 'P. Kevin Castel', written over a horizontal line.

P. Kevin Castel
United States District Judge

Dated: New York, New York
December 13, 2010