

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

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| AMERIVET SECURITIES, INC., | * | |
| | * | |
| Plaintiff | * | |
| | * | |
| v. | * | |
| | * | 2009 CA 005767 B |
| FINANCIAL INDUSTRY | * | Judge John M. Mott |
| REGULATORY AUTHORITY INC., | * | |
| | * | |
| Defendant | * | |

ORDER

This matter is before the court on defendant Financial Industry Regulatory Authority, Inc.’s (“FINRA”) Motion to Dismiss and Amerivet Securities Inc.’s (“Amerivet”) opposition thereto. The court finds that Amerivet has asserted a proper purpose for its inspection request pursuant to 8 Del. C. § 220, and is not barred by FINRA’s immunity at this stage. Therefore the court denies defendant FINRA’s Motion to Dismiss.

PROCEDURAL HISTORY

Amerivet, a member firm of FINRA, has requested access to some of FINRA’s books and records pursuant to Delaware law, under which FINRA is incorporated. This matter was removed to federal court and, subsequently, remanded to Superior Court, with Judge Walton explaining that the state court should have the capacity to assess whether the relief being sought should be ordered without in any way implicating the Securities Exchange Act or FINRA’s immunity. Both parties have agreed that Delaware law applies and is controlling in this case.

MOTION TO DISMISS

A Motion to Dismiss requires that all facts be viewed in the light most favorable to the nonmoving party and, therefore, the court cannot simply accept the conclusions of FINRA's investigation as accurate for the purposes of the Motion. *Kowal v. MCI Communications Corp.*, 16 F.3d 1271 (D.C. Cir. 1994) (affirming that when deciding a motion to dismiss, complaint is construed liberally in plaintiff's favor and the court must grant plaintiffs benefit of all inferences that can be derived from facts alleged). The court finds defendant FINRA's arguments unpersuasive and, therefore, denies the defendant's Motion to Dismiss.

BOOKS INSPECTION REQUEST UNDER DELAWARE LAW

Under Delaware law, a books and records inspection request must have a "proper purpose" to survive a motion to dismiss. The Delaware statute defines a proper purpose as one "reasonably related to such person's interests as a stockholder." 8 Del. C. § 220(b). Courts have recognized investigation of wrongdoing, mismanagement, or waste, and examination for the purposes of proposing reforms, as proper purposes. Where a party requesting access to books asserts its proper purpose as an investigation of wrongdoing, mismanagement, or waste, Delaware law requires that a "credible basis" exist from which the court can infer possible mismanagement to warrant further investigation. *City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*, 1 A.3d 281 (Del. 2010). In an action to inspect a corporation's books and records, a stockholder has the burden of proof to demonstrate a proper purpose by a preponderance of the evidence. *Seinfeld v. Verizon Communications, Inc.*, 909 A.2d 117 (Del. 2006).

In its complaint, Amerivet asserts the proper purpose of investigating potential wrongdoing, and “contemplates derivative action” (emphasis added), while FINRA argues (in its Supplemental Motion to Dismiss) that there is no credible basis to support the proper purpose of investigation of wrongdoing because FINRA conducted an investigation (as per a demand that Amerivet’s made subsequent to filing the complaint) and found no wrongdoing or actionable claims. As Delaware law requires, Amerivet has articulated, in the complaint and the attachments, that they can produce some evidence to suggest a credible basis from which a court can infer that mismanagement, waste, or wrongdoing may have occurred. *Melzer v. CNET Networks, Inc.*, 934 A.2d 912 (Del. Ch. 2007). Therefore, it would be improper to dismiss this case.

Although the complaint seems to allege only one purpose, other proper purposes are contained in the inspection demand, and these are clearly referenced as an exhibit attached to the complaint, which the court may consider part of the complaint under D.C. civil procedure. Exhibit A of Compl. ¶¶ 10-11. See *Bible Way Church of Our Lord Jesus Christ of Apostolic Faith of Washington, D.C. v. Beards*, 680 A.2d 419 (D.C. 1996) (interpreting D.C. Super. Ct. R. Civ. P. 8 and holding liberal rules of pleading normally protect plaintiff against dismissal of ambiguous complaint when it can be said to state claim if all reasonable inferences are drawn in plaintiff’s favor); see also *Indus. Bank of Washington v. Allied Consulting Services*, 571 A.2d 1166 (D.C. 1990) (denying dismissal in a case where although complaint did not refer to guaranty as exhibit or expressly incorporate it, the guaranty was attached to complaint, received by defendants with complaint, and understood by them to be integral part of cause of action alleged in complaint). Amerivet’s additional stated purpose of preparing suggestions and

recommending reforms is a proper purpose. Furthermore, Amerivet has provided a credible basis for this proper purpose, as it has offered proof that it is, and has continued plans to be, actively engaged in these types of activities. Finally, Delaware courts have stated, that stockholders may gain access to and use “information about corporate mismanagement in other ways, as well. They may seek an audience with the board to discuss proposed reforms or, failing in that, they may prepare a stockholder resolution for the next annual meeting....” *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002).

Once one proper purpose has been established, any ulterior motives or other purposes become irrelevant. *CM&M Group v. Carroll*, 453 A.2d 788 (Del. 1982). While it is only necessary that Amerivet allege one proper purpose, in this case they have provided at least two, either of which, standing alone, would be enough to make granting the Motion to Dismiss improper.

FINRA’S IMMUNITY

D.C. authority has acknowledged that whenever possible, the question of absolute immunity should be determined at the outset of the litigation. *Dist. of Columbia v. Jones*, 919 A.2d 604, 610 (D.C. 2007); *Moss v. Stockard*, 580 A.2d 1011, 1020 n.18 (D.C. 1990). D.C. courts also recognize, however, that sometimes discovery will be necessary and helpful in making this determination. *See, e.g., Dist. of Columbia v. Simpkins*, 720 A.2d 894, 899 n.9, 900 (D.C. 1998) (remanding for further proceedings after noting that the plaintiff had not had the benefit of discovery); *Moss*, 580 A.2d at 1021 (remanding after noting that the existing record did not enable the court to weigh the pertinent factors).

Even if Amerivet's purpose of proposing reform is not considered proper under Delaware law, and if the court were to assume that Amerivet's sole purpose is to investigate for potential derivative litigation, Amerivet's case still should not be dismissed. On the issue of investigating mismanagement, the burden of proof to justify investigating corporate mismanagement may be satisfied by a credible showing through documents, logic, testimony or otherwise, that there exist legitimate issues of mismanagement or wrongdoing. *Carapico v. Philadelphia Stock Exchange, Inc.*, 791 A.2d 787 (Del. Ch. 2000). Amerivet has accomplished this credible showing of potential mismanagement through the specific facts it alleges in its complaint, such as the large losses that FINRA sustained on its investments during the same period that FINRA increased its executive compensation. Compl. ¶¶ 17-18, 20-21.

As a self-regulating organization (SRO), FINRA enjoys absolute immunity from private suits seeking damages for actions within the scope of FINRA's regulatory authority. *See DL Capital Group, LLC v. Nasdaq Stock Market, Inc.*, 409 F.3d 93 (2d Cir. 2005) (absolute immunity applies as long as the SROs "engage in conduct consistent with the quasi-governmental powers delegated to them pursuant to the Securities Exchange Act of 1934"). As this suit does not seek damages, but rather the ability to examine records, FINRA is not immune from this suit. Whether immunity applies will turn on whether an action against FINRA arises from conduct within the scope of FINRA's regulatory authority and only in those cases seeking damages. Immunity of the exchanges, as is the case with FINRA, is limited to activities relating to the regulatory function and not to its proprietary or profit-making activities. *See Weissman v. NASD*, 468 F.3d 1306 (11th Cir. 2006), *affirmed in relevant part and reversed in part on other*

grounds, 500 F.3d 1293 (11th Cir. 2007) (immunity applies only to regulatory activities but not to the other functions such as advertising to further the profit-making activities of an SRO).

Since FINRA enjoys an SRO's immunity, the derivative action that is "contemplated" by Amerivet would only be valid if the suit were premised on actions by FINRA that are outside of its regulatory authority. However, a determination of whether the alleged misconduct did or did not fall within FINRA's regulatory function depends on facts that Amerivet will only be able to determine if it is given the ability to inspect FINRA's books. Amerivet makes twenty-five allegations, ten of which are alleged regulatory failures that FINRA would likely be immune to any actions arising from such failures, but the remaining fifteen deal with executive compensation and FINRA's investment strategy. At this stage, it is impossible to tell whether Amerivet would have standing for a derivative suit and therefore impossible to know whether FINRA's immunity should prevent the records inspection request. Since a motion to dismiss requires all facts be viewed in the light most favorable to the non-moving party, this once again requires that the Motion to Dismiss Amerivet's books and records request be denied.

The court finds that none of the defendant FINRA's arguments support dismissal of the plaintiff Amerivet's claims at this time. Therefore, it is this **1st** day of **March, 2011**, hereby

ORDERED that the defendant FINRA's Motion to Dismiss is **DENIED**.

A handwritten signature in black ink, appearing to read 'J. Mott', is written over a horizontal line.

The Honorable John M. Mott
Associate Judge
(Signed in Chambers)

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