IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

ALLUVIAL FUND, LP, derivatively on behalf of Nominal Defendant EACO Corp., Plaintiff, v. GLEN F. CEILEY, WILLIAM L. MEANS, STEPHEN CATANZARO, ELLEN S. BANCROFT, and DONALD S. WAGNER, Defendants, EACO CORPORATION, a Florida Corporation, Nominal Defendant.	Case No. CACE-24-012180 Judge: Jack B. Tuter, Jr. Division: 07

PLAINTIFF ALLUVIAL FUND, LP'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff Alluvial Fund LP is a shareholder of Nominal Defendant EACO Corp. Plaintiff is bringing this derivative action on behalf of EACO because it is the only way to recover millions of dollars in damages EACO suffered when it paid its chairman, CEO, and 95% shareholder Defendant Glen Ceiley $31 million for a building that was worth only $10 - $15 million.

At the time of the transaction, EACO occupied the building under a long-term, non-cancellable lease pursuant to which it paid, and would pay for another 11 years, far below market rent. Such a lease reduces the fair market value of a building, because it reduces the rent the building can generate. Ceiley was aware of that well-known fact when he told his subordinate, Defendant Don Wagner, that he wanted to sell the building to EACO, and Wagner knew it when he arranged for an appraisal of the building. But the appraisal Wagner obtained ***did not take the lease or its below market rent into account at all***, because he either failed to disclose the lease to the appraiser or directed the appraiser to ignore it. The resulting appraisal valued the building at $31 million, while the exact same appraisal methodology would have valued the building at only $10 - $15 million if it had taken the lease and the below market rent into account.

Wagner shared the appraisal with Ceiley, and both therefore knew that it vastly overvalued the building. Nevertheless, Wagner convened a meeting of EACO's other three directors – Defendants William Means, Stephen Catanzaro, and Ellen Bancroft (the "Voting Directors") – told them that an appraisal had valued the building at $31 million, and asked them to approve the purchase at that price. Neither Ceiley nor Wagner ever disclosed to the Voting Directors that they knew the appraisal vastly overstated the value of the building. The Voting Directors knew that Wagner was Ceiley's subordinate and entirely beholden to Ceiley for his continued employment and compensation. Thus, they knew that they could not rely on Wagner to adequately represent EACO's interests in any negotiation with Ceiley. And the Voting Directors knew that $31 million

was an extraordinarily high price to pay for the building in light of the rent EACO was paying for it. Nevertheless, the Voting Directors never asked to see, and were never shown, the appraisal or any other document related to the transaction, and never asked to speak to anyone with any expertise in valuing commercial property. Instead, they simply rubber-stamped the purchase (the "Hunter Property Purchase" or "Transaction") based only on Wagner's statements.

The Amended Complaint alleges in great detail the circumstances of the Transaction, how the $31 million purchase price was unfair to EACO, and how the process for the Transaction was fatally flawed and unfair to EACO. Those allegations state claims for personal liability against Glen Ceiley for a violation of Fla. Stat. § 607.0832 - Director's Conflict of Interest Transaction (Count I) and for breach of fiduciary duty (Count III), and against the Voting Directors for aiding-and-abetting Ceiley's statutory breach (Count II) and for breach of fiduciary duty (Count III).

Because a majority (indeed, all) of the members of EACO's Board of Directors ("Board") faces personal liability for their actions related to the Transaction, any demand on them to bring this lawsuit would be futile. Therefore, Plaintiff was not required to make any such demand. Defendants argue otherwise by asserting that no real risk of personal liability exists because the Amended Complaint purportedly fails to state a claim against any of the Defendants. The Defendants' arguments misstate the law and ignore the Amended Complaint's specific factual allegations showing that Ceiley, Means, Catanzaro, and Bancroft face personal liability for those claims and lack independence from Ceiley. No more is required at the pleadings stage. Accordingly, the motion to dismiss should be denied.

STATEMENT OF FACTS

A. The Far Below Market Lease Is a Valuable Asset to EACO and Greatly Reduces the Value of the Trust's Interest in the Hunter Property

Glen Ceiley is the CEO, Board Chairman, and owner of more than 95% of the stock of

EACO. AC ¶¶ 18-19.[1] A trust that Ceiley controls and of which he is a beneficiary (the "Trust") owned an 80,000 square foot office building (the "Hunter Property") in California that was appraised for $15.3 million in 2019. *Id.* ¶¶ 49, 54. Also in 2019, EACO's wholly-owned subsidiary Bisco Industries, Inc. ("Bisco") and the Trust entered into a non-cancellable 10-year lease (the "Lease") on the Hunter Property that Bisco could extend for another five years at Bisco's option. *Id.* ¶¶ 59, 63. The initial annual rent on the Lease was $795,600 and increased at 2.5% per year through the end of the five-year extension. *Id.* ¶ 60. The Lease also gave Bisco the right to buy the Hunter Property at a price determined by the average of three independent appraisals. *Id.* ¶ 65.

Between 2019 and 2023, market rents increased far faster than the 2.5% annual increases in the Lease. An appraiser estimated that in August 2023 the annual market rent for the Hunter Property would be $1,686,741 (*id.* ¶ 147), but Bisco was paying only $856,774 (*id.* ¶ 60). And in 2023, the Lease, with the extension period, would run for 11 more years until August 2034. *Id.* ¶ 63. Thus, by 2023, the long-term and substantially below-market Lease represented a valuable asset to EACO, because it allowed Bisco to use property for far less than fair market cost. *Id.* ¶ 164.

Conversely, the Lease substantially reduced the value of the Hunter Property. *Id.* ¶ 135. Commercial buildings typically are valued based on the amount of cash flow they can generate for their owners, which, in turn, is driven by the amount of rent they generate. *Id.* ¶¶ 136, 144. Thus, a building that is encumbered by a long-term, non-cancellable and far below-market lease is worth far less than a building leased at market rents, because the latter building would generate far more cash flow for its owner than the building receiving far below market rents. *Id.* ¶¶ 136, 143.

[1] References to "AC ¶_" are to the paragraphs of the Verified Amended Shareholder Derivative Complaint ("Amended Complaint") filed in this action, dated December 19, 2024. "MTD" refers to Defendants' Motion to Dismiss the Amended Complaint and Incorporated Memorandum of Law, dated January 31, 2025.

B. Ceiley and His Direct Subordinate Wagner Negotiate a Conflicted Transaction That Ignores the Lease

Ceiley is a highly sophisticated businessman, as evidenced by the complicated transactions that gave him control of EACO. *See id.* ¶¶ 31-33, 39-44. He also signed the Lease (*id.* ¶ 56), and therefore knew its terms, including the below market rent. Thus, he also knew that the Lease substantially reduced what any arms-length buyer would pay for the Hunter Property. *Id.* ¶ 135.

In July 2023, Ceiley informed Wagner that he wanted to sell the Hunter Property to EACO. *Id.* ¶ 67. Wagner worked at Bisco for 30 years and by 2023 was its President and COO. *Id.* ¶ 25. Throughout that time, he reported to Ceiley, who determined both Wagner's compensation and whether he remained employed at Bisco. *Id.* ¶¶ 26, 194. In short, Wagner was beholden to Ceiley and could not effectively represent EACO in any negotiation with him. *Id.* ¶¶ 194-95.

Because Ceiley controlled both EACO and the Trust, the proposed sale was a conflicted transaction that should have been immediately referred to a special committee of independent Board directors, as Ceiley had done with prior conflicted transactions. *Id.* ¶ 40. But Ceiley did not do that; indeed, for over a month neither he nor Wagner even informed any of the Voting Directors about the planned transaction. *Id.* ¶¶ 68, 198. Instead, Ceiley began discussing a purchase price directly with Wagner. *Id.* ¶ 69.

C. Wagner Obtains an Appraisal that Ignores the Existence of the Lease

Wagner acted exactly as someone beholden to Ceiley would act. Wagner began his "negotiations" with Ceiley by sending him recent sales of purportedly comparable buildings. *Id.* ¶ 69. Next, in early to mid-August 2023, after asking the most junior member of the Board – Bancroft – whether he should obtain an appraisal of the Hunter Property (*id.* ¶¶ 71, 99), Wagner arranged for EACO's bank to retain an appraiser to value the Hunter Property (*id.* ¶¶ 71-78) and had himself listed as the person whom the appraiser should "make contact with" regarding the

appraisal *Id.* ¶ 82. Wagner then either deliberately failed to disclose the Lease to the appraiser or instructed him not to consider it. *Id.* ¶¶ 90, 95, 140.

The appraiser proceeded to estimate the value of the Hunter Property as if the Lease did not exist. *Id.* ¶¶ 89-90, 97, 143, 151-52. The appraiser first conducted a cash flow-based valuation that assumed fair market rents, rather than the far below market rent called for in the Lease. *Id.* ¶¶ 147-50. He then conducted a comparable sales valuation that did not adjust for the fact that the Hunter Property was encumbered by a long-term, below-market lease. *Id.* ¶¶ 157-59. Based on those flawed assumptions, the appraiser appraised the Hunter Property at $31 million. *Id.* ¶¶ 150, 160. If the appraiser had used the same methods but accounted for the undisclosed Lease, he would have valued the Hunter Property at only $10 - $15 million. *Id.* ¶¶ 154, 156, 159-61.

D. Both Ceiley and Wagner Knew that the Appraisal Vastly Inflated the Value of the Hunter Property but Do Not Disclose that to the Voting Directors

Wagner knew about the Lease (he signed it) and that he had either not disclosed it to the appraiser or instructed him not to consider it. *Id.* ¶¶ 56, 90, 95, 140, 168-73. It was also apparent on the face of the appraisal that the appraiser used market rents in his cash flow valuation and market-rent buildings in his comparable sales valuation. *Id.* ¶¶ 147-50, 157-59. Thus, simply by looking at the appraisal Wagner could confirm that it vastly overstated the fair market value of the Hunter Property. *Id.* ¶¶ 166, 176. Moreover, Wagner immediately sent the appraisal to Ceiley, who was also aware of the Lease and who would have seen that the appraisal vastly overvalued the Hunter Property. *Id.* ¶¶ 56, 166, 168-73, 175-76.

Nevertheless, Ceiley and Wagner agreed that EACO would pay $31 million for the Hunter Property, Wagner hired lawyers to draft the paperwork, and they began "moving to go into contract." *Id.* ¶¶ 102, 200. Only at that point did Wagner alert all the Voting Directors about what he had done and ask for their approval. *Id.* At no point did either he or Ceiley disclose to the Voting

Directors that the appraisal vastly overstated the value of the Hunter Property. *Id.* ¶¶ 178, 180.

E. The Voting Directors Rubber Stamp the Transaction Without Conducting Any Review or Analysis of the Transaction

A properly functioning and independent Board would have seen that the Transaction was a conflicted transaction between EACO and Ceiley, was improperly negotiated by the controlling shareholder and his direct subordinate, was not in EACO's best interests, and would have stopped it. *Id.* ¶¶ 181-85. But the Voting Directors closed their eyes to reality and blessed the Transaction without conducting any review or analysis of it.

The Voting Directors owed their positions and/or much or all of their careers to Ceiley. Means and Catanzaro were long-time subordinates of Ceiley who helped Ceiley gain control of EACO. *Id.* ¶¶ 22-23, 33, 39, 221-22, 229. Moreover, they maintain close relationships with Ceiley (*id.* ¶ 223) and owe their continued Board positions (and the fees that go with them) to Ceiley, who could replace them at any time by voting his shares (*id.* ¶ 226). Similarly, Bancroft is a former law firm partner who helped Ceiley gain control of EACO via a merger and then represented EACO for many years as its outside counsel. *Id.* ¶ 224. Throughout that time, Ceiley owned the overwhelmingly majority of EACO's shares and had total control over EACO. *Id.* ¶¶ 41-48. Therefore, Ceiley effectively was her client, and she became accustomed to following his wishes regarding EACO's affairs.

The danger of having directors with such longstanding and close relationships with a controlling shareholder is that they operate with a "controlled mindset" that causes them to rubber stamp transactions that are in the controller's best interests, but not in the best interests of the company. *Id.* ¶ 228. That is exactly what happened here. On September 13, 2023, just two days after Means and Catanzaro first learned of the proposed transaction (*id.* ¶¶ 100-101, 200), the three Voting Directors had a telephone conference with Wagner. *Id.* ¶ 106. No counsel was present to

advise the Voting Directors about their duties related to the transaction. *Id.* ¶ 108. After a brief oral presentation by Wagner, the Voting Directors approved paying $31 million for the Hunter Property, and the Transaction closed shortly thereafter. *Id.* ¶¶ 111, 120-23.

Prior to approving the Transaction, the Voting Directors ***did not ask to see and did not review any documents*** related to the transaction, including the appraisal, and did not speak to any valuation expert or anyone who specialized in commercial real estate. *Id.* ¶¶ 113-15, 202. Instead, they simply deferred entirely to Wagner's statement that the Hunter Property had been appraised at $31 million. *Id.* ¶¶ 125-26, 204. Notably, while Wagner showed the appraisal to Ceiley, he never showed it to the Voting Directors. *Id.* ¶¶ 112-113, 175. Each of the Voting Directors, however, knew the terms of the Lease and the rent Bisco was paying under it. *Id.* ¶¶ 169-73. Thus, if they had even glanced at the appraisal, they would have seen that it vastly overvalued the Hunter Property. *Id.* ¶ 184. Moreover, each of the Voting Directors knew that $31 million was an extraordinarily high price to pay in light of the annual rent that Bisco was paying and would continue to pay for the next 11 years. *Id.* ¶¶ 181-83. And each of the Voting Directors knew that EACO had been represented in the negotiations exclusively by Wagner, who they knew could not adequately represent EACO because he was Ceiley's subordinate and entirely beholden to him. *Id.* ¶ 205. Nevertheless, the Voting Directors simply closed their eyes to these facts and rubber-stamped Wagner's decision to vastly overpay Ceiley for the Hunter Property. *Id.* ¶¶ 205-07.

LEGAL ARGUMENT

Under Fla. Stat. § 607.0742(2)(c), a derivative complaint must allege "with particularity . . . the reason or reasons the shareholder did not make [a demand]." When evaluating the sufficiency of the allegations in a derivative complaint, the normal motion-to-dismiss standards apply, *i.e.,* the facts alleged "must be accepted as true, and all reasonable inferences must be drawn in favor of" the plaintiff. *Taubenfeld v. Lasko*, 324 So. 3d 529, 537 (Fla. 4th DCA 2021) (citation

and quotations omitted) (reversing grant of dismissal of a claim for breach of fiduciary duty).

I. The Motion to Dismiss for Failure to Plead Demand Futility Must Be Denied

Defendants are wrong to argue that Plaintiff has not adequately allege demand futility. *See* MTD at 6-19. Demand is futile if any of the following three tests are met with respect to at least two of Ceiley, Means, Catanzaro, and Bancroft, EACO's four Board members at the time the Amended Complaint was filed:

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
>
> (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and
>
> (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.

Monetti v. Monetti, 2024 WL 3791881, at *3-4 (S.D. Fla. Mar. 26, 2024) (explaining test and that it must be met with respect to at least half of the Board).

The following chart summarizes which of these tests the Amended Complaint adequately pleads with respect to each of EACO's directors:

Director	**Grounds For Demand Futility**
Means, Catanzaro, and Bancroft (The Voting Directors)	1) Substantial likelihood of personal liability for aiding and abetting Ceiley's breach of Fla. Stat. § 607.0832 2) Substantial likelihood of personal liability for breach of fiduciary duty 3) Lack independence from Ceiley
Ceiley	1) Defendants admit that he lacks independence 2) He received a material personal benefit 3) He faces a substantial likelihood of personal liability for breaching Fla. Stat. § 607.0832 4) He faces a substantial likelihood of personal liability for breach of fiduciary duty

Because the Defendants admit that Ceiley is not independent (MTD at 16), demand is futile as to him. Thus, the Court must deny the motion to dismiss if the Amended Complaint adequately

pleads that demand is futile as to at least one of the Voting Directors.

A. Demand on All of the Voting Directors Is Futile Because They Face a Substantial Likelihood of Liability and Lack Independence

1. The Voting Directors Face a Substantial Likelihood of Personal Liability for Aiding and Abetting Ceiley's Breach of Fla. Stat. § 607.0832

Defendants acknowledge that a director faces a substantial likelihood of personal liability if a derivative complaint states a viable claim against them for monetary damages. *See, e.g.,* MTD at 6. In Count II, the Amended Complaint alleges the Voting Directors are liable for aiding-and-abetting Ceiley's violation of Fla. Stat. § 607.0832. The Voting Directors do not challenge the sufficiency of the aiding-and-abetting violations. Instead, they argue only that the Amended Complaint fails to plead an underlying breach of the statute by Ceiley. *See* MTD at 14.

Under Fla. Stat. § 607.0832, a director like Ceiley who participates in a "director's conflict of interest transaction" is liable to the corporation unless the transaction was "fair to the corporation at the time it" was authorized or approved. Fla. Stat. § 607.0832(2). Here, Defendants do not dispute that the Hunter Property purchase was a "director's conflict of interest transaction."[2] Thus, the only question is whether the Amended Complaint adequately alleges that the Hunter Property purchase was not "fair to the corporation."

A transaction is "fair to the corporation" only if "as a whole, [it] is beneficial to the corporation and its shareholders, taking into appropriate account whether it is: 1. [f]air in terms of the director's dealings with the corporation . . . and 2. [c]omparable to what might have been obtainable in an arm's length transaction." Fla. Stat. § 607.0832(1)(b). Defendants concede that these statutory factors overlap extensively with Delaware's "entire fairness" standard for

[2] Ceiley controlled and was a beneficiary of the Ceiley Trust, and $31 million is "material" to him. AC ¶¶ 21, 130. Thus, the Transaction was a "director's conflict of interest transaction." *See* Fla. Stat. § 607.0832(1)(a).

evaluating transactions between a corporation and its controlling shareholder. *See* MTD at 10 & n.8. As Delaware courts have emphasized, the "entire fairness" test is inherently fact intensive, which "normally will preclude a dismissal of a complaint [for failure to state a claim]." *Cumming v. Edens*, 2018 WL 992877, at *23 (Del. Ch. Feb. 20, 2018) (quotation marks omitted). The Amended Complaint more than adequately alleges sufficient particularized facts to show unfairness under both of the Fla. Stat. § 607.0832 statutory factors discussed above.

a) EACO Paid Far More For The Hunter Property Than It Would Have In An Arm's Length Transaction

The Amended Complaint alleges that EACO paid $15-$20 million more than it would have paid in an arm's length transaction. AC ¶ 161. In a true arm's length transaction, a buyer of the Hunter Property would have obtained an appraisal or other valuation ***that accounted for the far below market and long-term lease on the Hunter Property***. *Id.* ¶¶ 159, 163. Such an appraisal or valuation would have valued the Hunter Property at about $10 - $15 million. *Id.* ¶¶ 154, 156. An arms-length buyer would then either have paid something close to that valuation or declined to buy the property. *Id.* ¶¶ 161-63. In contrast, an arms-length buyer would not have failed to disclose the existence of the Lease or directed an appraiser not to consider it, as Wagner did here. *Id.* ¶¶ 90, 95, 140, 168-73. *See, e.g., Cumming*, 2018 WL 992877, at *24 (price is unfair when purportedly comparable transactions are "very different" from the transaction at issue). And an arms-length buyer certainly would ***not*** have paid $31 million. AC ¶¶ 161-63. Thus, the Amended Complaint's allegations sufficiently to allege that the Transaction was not "comparable to what might have been obtained in an arms-length transaction." Fla. Stat. § 607.0832

Defendants both ignore those allegations and fail to explain how, at this early stage of the case, the Court could determine as a matter of law that it was indisputably "fair to the corporation" for EACO to pay $31 million when any other arms-length buyer would have paid only $10 - $15

million. Instead, Defendants first assert a confusing argument about how the Amended Complaint is somehow flawed because it purportedly looks at the Transaction from the perspective of the Trust, rather than EACO. *See* MTD at 7. This argument makes no sense. As discussed above, the Amended Complaint alleges that the Transaction was unfair to EACO because an arms-length buyer in a comparable transaction (*i.e.*, someone in the exact position as EACO) never would have paid anything close to $31 million for the Hunter Property.

Next, Defendants ask the Court to speculate – and ultimately decide as a matter of law – that EACO's purported "unique interest" in the Hunter Property indisputably justified paying about twice what the building was worth. MTD at 8. Specifically, Defendants assert that because Bisco was the lessee, buying the Hunter Property would allow it to terminate the Lease and take full control and ownership of the building. *Id.* at 9. This argument completely misses the point. The question is not whether EACO might ultimately obtain some type of benefit from owning the building; the question is ***what price is fair to pay to obtain that benefit?*** And when assessing that question, an arms-length buyer would only pay a price that reflected the value embodied in the long-term, non-cancellable, and far-below market Lease that EACO already had. AC ¶ 163. That is precisely what the Defendants refused to do here. As a result, all the value in the Lease was improperly stripped from EACO and transferred to Ceiley (*id.* ¶ 165), and the price EACO paid was not "comparable to what might have been obtained in an arms-length transaction."[3]

b) The Transaction Was Not Fair in Terms of Ceiley's Dealings with EACO

Defendants acknowledge that an Amended Complaint adequately pleads unfairness once it pleads facts sufficient to infer that the price paid by the corporation was unfair. *See* MTD at 10

[3] Defendants' reliance on *In re Hennessy Capital Acquisition Corp. IV Stockholder Litig*., 318 A.3d 306 (Del. Ch. 2024) is misplaced. In that case, "[t]he plaintiff relie[d] on post-closing developments, strained inferences, and documents that contradict his theories," none of which is the case here. *Id.* at 323.

(asserting price is the "preponderant consideration"). Thus, the unfair price allegations discussed above are sufficient grounds to conclude that the Amended Complaint adequately pleads that the Transaction was unfair to EACO and thus violated Fla. Stat. § 607.0832.

The Amended Complaint also alleges specific facts showing that the Transaction was not fair in terms of Ceiley's dealings with EACO in violation of the second prong of the statutory unfairness test. "Allegations revealing unfair dealing should focus on when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and stockholders were obtained." *Cumming*, 2018 WL 992877, at *24 (quotation marks omitted). Here, the Amended Complaint pleads numerous particularized facts addressing each of those issues:

- Ceiley approached and negotiated directly with Wagner, not the Board, even though Wagner was his subordinate, beholden to him, and could not adequately represent EACO's interests in any negotiation with Ceiley (AC ¶¶ 67-68);

- Before all the Voting Directors were notified of the potential Transaction, Ceiley and Wagner agreed on the $31 million price for the Hunter Property, Wagner hired lawyers to draft the paperwork, and EACO began "moving to go into contract" (*Id.* ¶¶ 102, 200);

- Wagner either failed to disclose the Lease to the appraiser or directed him not to consider the Lease (*Id.* ¶¶ 90, 95, 140);

- Both Wagner and Ceiley knew that the appraisal vastly overstated the value of the Hunter Property, but neither of them disclosed that fact to the Voting Directors (*Id.* ¶¶ 166, 175-76, 178, 180);

- The Voting Directors failed to review any documents, including the appraisal, or talk to anyone with any expertise in valuing commercial real estate (*Id.* ¶¶ 113-15, 202);

- The Voting Directors relied entirely on the representations of Wagner about what the appraisal said and the purported benefits of the transaction to EACO, even though they knew Wagner was entirely beholden to Ceiley and could not adequately represent EACO's interests in any negotiation with him (*Id.* ¶¶ 125-26, 204-05);

- The Voting Directors ultimately approved the Transaction without ever having anyone with any independence from Ceiley negotiate on EACO's behalf or directly advise them about the Transaction (*Id.* ¶¶ 102, 200, 205); and

- The Voting Directors approved the Transaction even though they knew $31 million was an extraordinarily high price to pay in light of the rent EACO was paying under the Lease (*Id.* ¶¶ 181-83).

These allegations are more than sufficient to plead that the Transaction was not fair in terms of Ceiley's dealings with EACO. *Cumming*, 2018 WL 992877, at *24 (process unfair where lead negotiator for corporation lacked independence, compromised lead negotiator "ma[d]e her bids without direction from, or even consultation with, [the Board]," lead negotiator provided outside consultant with "flawed data to use in its fairness opinion," and the Board approved a material transaction "without even seeing the terms" of the deal).

Defendants ignore most of these allegations, and instead argue that unfair process is unimportant. *See* MTD at 10-11. Defendants are incorrect. Fla. Stat. § 607.0832 expressly provides that "fair to the corporation" means both fair price and fair process. Also, Defendants largely ignore that the Court is considering a motion to dismiss, rather than a motion for summary judgment. Specifically, Defendants cite only one case involving a motion to dismiss, *Monroe County Employees' Retirement System v. Carlson*, 2010 WL 2376890 (Del. Ch. June 7, 2010). That case is easily distinguishable because the complaint there failed to allege any facts "geared towards proving that the [transaction was] executed at an unfair price. Unfair dealing [was] the sole theme of the factual allegations." *Id.* at *1. In contrast, as later decisions have explained, *Carlson* does not justify dismissal where the complaint adequately alleges unfair price:

> *Carlson* is distinguishable because the Complaint contains well-pleaded allegations that [the company] TPB and its stockholders ***could have secured a greater portion of the economic benefit derived from the [Transaction]***. Here, the Complaint contains well-pleaded allegations of both unfair process and unfair price, and Plaintiff has met his burden to plead entire fairness.

Berteau v. Glazek, 2021 WL 2711678, at *18 (Del. Ch. June 30, 2021) (emphasis added). Here, the Amended Complaint contains extensive, particularized allegations about both the unfair price EACO paid in the Transaction (*see* pp. 10-11, above) ***and*** the unfair process for the Transaction.

All of the other cases Defendants cite are post-trial or summary judgment decisions, where discovery was taken, evidence was presented, and the Court decided on a full record whether the price and process were fair and whether unfair process impacted fair price.[4] As such these decisions do not support an argument that the Court should find at the pleading stage that fair process is unimportant or that the process here was fair.

The Defendants only argument about the liability of the Voting Directors on Count II, aiding and abetting Ceiley's breach of the statute, is that the Amended Complaint purportedly failure to plead a primary violation the statute. *See* MTD at 14. For the reasons discussed above, the Amended Complaint adequately alleges that Ceiley breached Fla. Stat. § 607.0832. Accordingly, demand is futile as to all Voting Directors because they face a substantial likelihood of liability for aiding-and-abetting Ceiley's violation of Fla. Stat. § 607.0832.

c) The Directors Face a Substantial Likelihood of Personal Liability for Breach of Fiduciary Duty

Each of Voting Directors also faces a substantial likelihood of personal liability because the Amended Complaint states claims against them for breach of fiduciary duty. Under Florida's version of the business judgment rule, directors are personally liable for damages when their breaches of duty amount to "conscious disregard for the best interest of the corporation, or willful or intentional misconduct." Fla. Stat. § 607.0831(1)(b)(4). A director acts in conscious disregard by "intentionally failing to act in the face of a known duty to act." *In re TOUSA*, *Inc.*, 437 B.R. 447, 460 (Bankr. S.D. Fla. 2010) (quotation marks omitted); *accord, e.g., F.D.I.C. v. Dodson*, 2014

[4] *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 702 (Del. 1983) (post-trial appeal); *In re Tesla Motors S'holder Litig.*, 298 A.3d 667, 678 (Del. 2023) (post-trial appeal); *In re BGC Partners, Inc. Deriv. Litig.*, 2022 WL 3581641, at *18 (Del. Ch. Aug. 19, 2022) (post-trial decision); *Tobacco Tech., Inc. v. Taiga Int'l N.V.*, 626 F. Supp. 2d 537, 541 (D. Md. 2009) (summary judgment decision).

WL 11511068, at *6-7 (N.D. Fla. Feb. 27, 2014).[5]

Here, the Voting Directors – who are either long-time EACO directors or a highly experienced corporate lawyer – knew they had two general duties:

- Duty of loyalty: they had to act in "good faith" and "in a manner [they] reasonably believe[] to be in the best interests of the corporation," Fla. Stat. § 607.0830(1); and
- Duty of care: they had to "discharge their duties with the care that an ordinary person in a like position would reasonably believe appropriate under similar circumstances," Fla. Stat. § 607.0830(2).

In addition, the Voting Directors knew that the Hunter Property purchase was a conflicted transaction that offered a very substantial benefit to Ceiley. Based on their experience, they knew the additional duties such transactions impose on Board members considering whether to approve them. AC ¶¶ 191-97. In sum, the directors knew they had a duty to act prudently and in the best interests of EACO, rather than in the best interests of Ceiley.

The Voting Directors knowingly and intentionally failed to meet those duties by:

- Allowing Wagner to negotiate with Ceiley without any oversight, and approving the transaction agreed to by Wagner with any independent evaluation of the fairness of the price to EACO, *id.* ¶¶ 102, 112-15, 125-26, 200-04.
- Refusing to request or review ***any*** documents related to the transaction, including the appraisal and failed to speak to any real estate valuation expert, *id.* ¶¶ 202, 207;
- Relying entirely on the statements of Wagner, even though they knew he was Ceiley's subordinate and entirely beholden to Ceiley, *id.* ¶¶ 126, 204; and
- Approving the purchase price of $31 million even though they knew it was far in excess of a fair price to pay for the Hunter Property in light of the Lease, *id.* ¶ 181-83.

Defendants do not acknowledge those allegations. Instead, they assert that Fla. Stat. § 607.0830(5)(b) immunizes the Voting Directors from any claim for breach of fiduciary duty

[5] The *TOUSA* case applied Delaware law, but it has been relied on as an accurate statement of Florida law. *See, e.g., Dodson*, 2014 WL 11511068, at *6-7. Also, Florida courts often look to Delaware decisions on corporate law matters. *See Williams v. Stanford*, 977 So. 2d 722, 727-28 (Fla. 1st DCA 2008).

because "[p]laintiff does not dispute that the Board relied on the Appraiser's valuation, or that such reliance was justified." MTD at 15.

Defendants' argument mischaracterizes the allegations of the Amended Complaint and the law. To begin with, the Voting Directors did not rely "on the Appraiser's valuation;" indeed, they never even asked to see the appraisal and did not review it. AC ¶¶ 202, 207. Instead, the Voting Directors relied entirely on ***Wagner's representations about the appraisal***. *Id.* ¶¶ 126, 204. So, the question is whether, under the circumstances, it is clear from the face of the Amended Complaint that Section 607.0830(5)(b) immunizes the Voting Directors' complete reliance on Wagner's representations.

The answer is clearly "no." Fla. Stat. § 607.0830(5)(b) provides that directors are "entitled to rely on . . . persons retained by the corporation . . . as to matters involving skills or expertise the director reasonably believes are matters . . . within the particular person's professional or expert competence; or as to which the particular person merits confidence[.]" Here, there is no allegation that Wagner was a commercial real estate valuation expert or any other basis to conclude that the Voting Directors "reasonably believed" he had such competence.[6]

Moreover, Defendants fail to acknowledge that reliance on a qualified individual is statutorily-protected only where the director "does not have knowledge that makes reliance unwarranted[.]" Fla Stat. § 607.0830(4). Here, the Voting Directors knew (i) that Wagner was beholden to Ceiley, and thus his representations about the transaction were inherently unreliable, and (ii) that the purported valuation of $31 million was far more than was reasonable to pay in

[6] Further, the appraiser retained by the Bank, not EACO. Defendants' try to explain this away by arguing EACO paid the bill and the Bank only acted as an intermediary. But the statute is clear, and a properly functioning and informed Board would have known that and retained its own appraiser. The Voting Directors did not.

light of the rent EACO was paying (AC ¶¶ 181-83). Thus, the Amended Complaint alleges specific facts showing that the Voting Directors had knowledge that made reliance on Wagner's representations unwarranted. No more is required at the pleadings stage.[7]

2. Demand is Futile as to the Voting Directors Because They Lack Independence from Ceiley

The Voting Directors' potential liability is sufficient to make demand futile with respect to them, and thus the Court need not assess whether the Amended Complaint adequately alleges they lack independence from Ceiley. Nevertheless, the Amended Complaint alleges a lack of independence.

As the Delaware Supreme Court recently recognized in the demand futility context, "[l]ongstanding business affiliations, particularly those based on mutual respect, are of the sort that can undermine a director's independence. Directors who owe their success to another will conceivably feel as though they owe a 'debt of gratitude' to the individual." *In re Match Grp*., *Inc. Deriv. Litig.,* 315 A.3d 446, 472 (Del. 2024). In *Match*, a director approved a conflicted transaction with the corporation's controlling parent company in 2019, seven years after he retired. The director had worked at the parent company from 1999 to 2012, including seven years as CFO, and when the director left that employment, he expressed gratitude to the Chairman, senior executive, and large stockholder of the controlling parent for the "opportunities" the parent and Chairman had given him. *Id.* at 471. The Chairman in turn stated he had "total respect" for the director's "ability, trustworthiness, and decency." *Id.* The director also earned substantial compensation on affiliated boards over approximately 9 years. *Id.* The Delaware Supreme Court found these

[7] Defendants' attempt to minimize Wagner's misstatements to the Voting Directors concerning cost savings (MTD at 16) fails. The fact that Wagner gave incorrect information makes his entire presentation to the Voting Directors suspect. Further, the question is not whether there were some cost savings, but whether the price EACO paid to obtain any such savings was fair.

allegations raised a "reasonable inference that [the director] was not independent of [the controller]." *Id.* at 472.

The Amended Complaint alleges similar facts with respect to each of the Voting Directors:

- Means and Catanzaro were long-time subordinates of Ceiley who helped Ceiley gain control of EACO. AC ¶¶ 22-23, 33, 39, 221-22, 229. Moreover, they maintain close relationships with Ceiley (*id.* ¶ 223) and owe their continued Board positions (and the fees that go with them) to him (*id.* ¶ 226).

- Bancroft represented Bisco and Ceiley for many years as outside counsel, including in Bisco's merger with EACO, and also owes her Board service to Ceiley. *Id.* ¶¶ 24, 224, 226.

These specific facts suggesting longstanding professional relationships with Ceiley alongside "personal ties of respect, loyalty, and affection," are sufficient under *Match* and are much more than the mere "naked assertions" claimed by Defendants.[8]

Defendants other arguments also fail. A current business relationship is not necessary to show lack of independence. The director found to be conflicted in *Match* left the employ of the controlling parent corporation seven years before the actions at issue in that case. Defendants' reliance on the NASDAQ Rules to show independence is irrelevant, as those rules only consider whether the Voting Directors are independent of EACO, not Ceiley. The Amended Complaint does not rely only on Ceiley's ability to nominate and the elect the Voting Directors, but rather that information in combination with the other allegations of the Amended Complaint, including long term employment by Means and Catanzaro, expressions of mutual respect, and admiration

[8] Defendants' reliance on *Owens on Behalf of Esperion Therapeutics, Inc. v. Mayleben*, 2020 WL 748023 (Del. Ch. Feb. 13, 2020), *aff'd sub nom. Owens v. Mayleben*, 241 A.3d 218 (Del. 2020), is misplaced. The allegations in that case were that the Board member at issue earned money when the company was sold, revealing a "sense of owingness." 2020 WL 748023, at *11. The allegations here are much more detailed, and include allegations of longstanding employment relationships and mutual respect and admiration, or allegations that *Owens* stated was missing in that case: "very warm and thick personal ties of respect, loyalty, and affection that would support an inference [the Voting Directors] would be more willing to risk [their] reputations than risk the relationship with the interested director." *Id.*

between Ceiley, Means, and Catanzaro, the fact that Ceiley re-appointed Means and Catanzaro for 25 years, and the Voting Directors' controlled-mindset actions in this case.

B. Demand Is Futile as to Ceiley

Defendants concede that, for the purposes of demand futility, Ceiley lacks independence. *See* MTD at 16. No more is required for demand to be futile as to him. But elsewhere in their brief, Defendants make various arguments about demand on Ceiley. Accordingly, we briefly summarize three additional reasons why demand is futile with respect to Ceiley:

First, $31 million represented a material personal benefit to Ceiley. *Second*, as discussed at pages 9-14, the Amended Complaint states a claim that Ceiley breached the Director Conflicted Transaction Statute, Fla. Stat. § 607.0832. Thus, he faces a substantial risk of personal liability under that statute. *Third*, Ceiley faces a substantial risk of liability for consciously disregarding and willfully breaching his fiduciary duties as a director, officer, and controlling stockholder of EACO. For example:

- Ceiley knew the appraisal failed to take into account the Lease and therefore vastly overstated the value of the Hunter Property. AC ¶¶ 95, 141, 175-76.
- Ceiley knowingly failed to disclose that fact to the Voting Directors and then agreed to accept $31 million, a price that he knew was far in excess of fair value for the Hunter Property. *Id.* ¶¶ 116, 141, 175-76, 178, 180.

A director is also liable for a breach of fiduciary duty if "the transaction at issue is one from which the director derived an improper personal benefit, either directly or indirectly." Fla. Stat. § 607.0831(1)(b)(2). Defendants argue that Ceiley did not receive an "improper personal benefit" because the Hunter Property transaction purportedly was "fair to the corporation" under Fla. Stat. § 607.0832. *See* MTD at 16. For the reasons discussed in pages 9-14 above, the Amended Complaint adequately pleads a violation of Fla. Stat. § 607.0832. Thus, the Complaint also adequately alleges personal liability for breach of fiduciary duty against Ceiley through a violation

of Fla. Stat. § 607.0831(1)(b)(2).

II. Defendants' Motion to Dismiss Under Fla. R. Civ. P. 1.140(b)(6) Must Be Denied

Defendants also argue that the Complaint should be dismissed because it fails to state a cause of action. For the reasons set forth above at pages 9-17, the Complaint states a claim on all four causes of action and the Defendants' motion to dismiss on this ground should be denied. Although not relevant to the demand futility analysis, the motion to dismiss Count IV must also be denied. Count IV is asserted against Wagner for aiding and abetting Ceiley's and the Voting Directors' breaches of fiduciary duty. As with Count II (*see* pp. 9, 14, above), the Defendants only argue that the claim should be dismissed for failure to plead a primary violation. MTD at 20.

III. Conclusion

For the reasons stated above, Plaintiff Alluvial Fund, LP respectfully requests that the Court deny Defendants' motion to dismiss in its entirety. In the alternative, Plaintiff requests that the Court grant Plaintiff leave to replead to correct any deficiencies identified by the Court. *See* Fla. R. Civ. P. 1.190(a); *Cousins Rest. Assocs. ex rel. Cousins Mgmt Corp. v. TGI Friday's, Inc.*, 843 So. 2d 2003 (Fla. 4th DCA 2003).

Dated: March 14, 2025

By: /s/ *Robert D. Klausner*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished through the Court's electronic filing system and by email on March 14, 2025 to:

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