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.

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

In the Opposition,[1] Plaintiff doubles down on its theory that the Transaction was not "fair to the corporation" (Section 607.0832) because a hypothetical third-party buyer supposedly would have paid less. But the Opposition has no answer to the fatal flaw in Plaintiff's theory as applied here—any third party purchasing the Hunter Property would be buying a different and less valuable property interest than the rights EACO purchased. While a third-party buyer would be subject to and thus limited by EACO's Lease of the Hunter Property, confining the value of ownership to collecting rent, EACO was not so limited—it purchased a fee simple interest allowing it to occupy, rent out, or sell the property. The Opposition is devoid of a single case supporting the notion that the Transaction could be deemed unfair to EACO because the property would have had less value to a differently situated, third-party buyer purchasing different property rights. Plaintiff's *ipse dixit* cannot override Section 607.0832 requiring that fairness in price is measured from the perspective of *the corporation*, not a third party purchasing different property rights.

Similarly, the Opposition has no explanation for how the Directors could face a substantial likelihood of liability based upon a "conscious disregard for the best interest of the corporation" (Fla. Stat. § 607.0831(1)(b)(4)) while simultaneously admitting that the Transaction resulted in a cost-savings for—*i.e.*, was beneficial to—EACO.

For these reasons, the Complaint both fails to state a claim and to allege demand futility on the ground that the Directors face a substantial likelihood of liability. Plaintiff's alternative theory of demand futility—that a majority of the Directors lack independence from Ceiley—collapses under the weight of authority holding that a director's presumed independence is not undermined

[1] Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint is referred to herein as the "Opposition" or "Opp." Unless otherwise noted, capitalized terms have the same meanings as in Defendants' Motion to Dismiss the Amended Complaint and Incorporated Memorandum of Law (the "Motion" or "Mot.").

by employment relationships that ended decades ago. Plaintiff's single case offered in rebuttal turned on allegations that appear nowhere in the Complaint. The Complaint should be dismissed with prejudice.

I. THE OPPOSITION FAILS TO ESTABLISH THAT THE DIRECTORS FACE PERSONAL LIABILITY ARISING FROM PLAINTIFF'S CLAIMS.

A. The Directors Do Not Face Liability Under The Unfair Price Claim.

Plaintiff does not (because it cannot) dispute that Section 607.0832(2) bars liability absent facts demonstrating that the Transaction was not "fair *to the corporation.*" Nor does Plaintiff dispute that the Hunter Property was subject to the Lease which, from EACO's perspective as a buyer, imposed no constraints on EACO's ownership rights (once it owned the Hunter Property, it could rescind the Lease). Nonetheless, the Opposition repeats the theory underlying the Complaint that determining whether the Transaction was fair to EACO requires comparing the purchase price to what a third-party buyer would have paid for the Hunter Property. Plaintiff thus argues that "any other arms-length buyer would have paid only $10–15 million" for the Hunter Property because, given EACO's Lease, the property's value to the hypothetical arm's-length buyer is the present value of EACO's rent payments. Opp. at 10–11. The test, however, is not what is fair to a hypothetical third party; it is what is "fair to the corporation [EACO]." Section 607.0832(2). In the unique circumstances of this case, whether the Transaction was fair to EACO cannot be measured by what a third party would have paid, because while the third party might be purchasing the same physical property, they would not acquire the same *property rights*. As alleged, any hypothetical third party acquiring the Hunter Property would be subject to EACO's Lease—*i.e.*, acquiring a leasehold interest, the value of which is measured by the present value of EACO's payment of rent. EACO purchased a fee simple estate, the value of which is measured by EACO's ability to occupy, rent out, or sell the Hunter Property free of a leasehold encumbrance.

Accordingly, Plaintiff cannot rely on what a third party would have paid for the property encumbered by the Lease to determine what is "fair to [EACO]"—Plaintiff must allege what a third party would have paid for the Hunter Property *without the Lease*. The *only fact* alleged regarding *that inquiry*—the inquiry dictated by Section 607.0832(2)—[redacted]. With no facts alleged that could show the price was unfair, Plaintiff fails to state a claim.

Unsurprisingly, the Opposition cites no law to the contrary. It relies on a single case for the unremarkable proposition that a price is unfair when comparable transactions are "very different" from the challenged transaction. Opp. at 10 (quoting *Cumming v. Edens*, 2018 WL 992877, at *24 (Del. Ch. Feb. 20, 2018)). In *Cumming*, however, the company's lead negotiator sought to justify a transaction's price using an inapt comparator and unverifiable numbers. *See id.*, at *7. Here, the Opposition confirms that, as alleged, [redacted]. Opp. at 5 ([redacted]). More importantly, *Cumming* in no way supports Plaintiff's argument that, in applying Section 607.0832, the relevant metric is what *the Trust would have received* if it sold its leasehold interest to an arm's-length buyer, as opposed to what *EACO received* when it purchased fee simple ownership of the Hunter Property—appropriately measured by what the market would charge for the same property rights (*i.e.*, [redacted]). Thus, Plaintiff fails to plead demand futility on the basis that the Directors face liability for a violation of Section 607.0832 or aiding and abetting thereof (Counts I and II).[2]

[2] The Opposition attempts to distinguish *In re Hennessy Cap. Acquisition Corp. IV S'holder Litig.*, 318 A.3d 306 (Del. Ch. 2024), but misses the point. There, as here, the plaintiff failed to "plead some facts indicating unfairness" and thus could not evade dismissal merely by characterizing pleading flaws as "'fact-based' matters that cannot be resolved on a motion to dismiss." *Id.* at 326.

B. The Directors Do Not Face Liability Under The Unfair Process Claim.

As with Plaintiff's price claim, the fatal flaws in its process claim are best seen by what the Opposition does *not* argue. It does not dispute that, in deciding entire fairness claims, "price is the 'preponderant consideration.'" Opp. at 11–12. It similarly concedes that courts do not require a "perfect" transactional process, as that is an "unattainable standard." Mot. at 11 (quoting *In re BCG Partners, Inc. Deriv. Litig.*, 2022 WL 3581641, at *18 (Del. Ch. Aug. 19, 2022)). It also ignores the Motion's lengthy description of the process—derived from the Complaint's allegations—that reflect a fully informed majority of the Board approving the Transaction, indisputably saving the Company costs (a fact alleged in the Complaint and then tellingly ignored in the Opposition). Mot. at 11–12. Nonetheless, the Opposition claims that Defendants "ignore" the Complaint's process-based allegations and argues that those allegations give rise to liability under two Delaware cases. It is wrong on both counts.

First, in the Motion, Defendants addressed at length and disposed of *all* of Plaintiff's process-based allegations. *See* Mot. at 12–14. Defendants will not repeat those arguments here, as the Opposition makes no attempt to rebut them.[3]

Second, Plaintiff's short legal analysis is unavailing. It cites two cases in support of its unfair process claim: *Cumming* (*supra* at 3) and *Berteau v. Glazek*, 2021 WL 2711678 (Del. Ch. June 30, 2021). Both feature the types of allegations that *can* sustain an unfair process claim but, as they are missing from the Complaint here, support dismissal. In *Cumming*, the company's lead negotiator was a director of, and investor in, the company's counterparty (2018 WL 992877, at *3), making her a dual fiduciary and self-interested in the transaction. She personally received shares of stock in the transaction—putting her "on both sides" of the deal—on terms unknown to

[3] By way of illustration only, Defendants explained how the Directors' alleged failure to consider the Lease's optional Purchase-Option Provision in no way supports an unfair process claim (Mot. at 13), an allegation Plaintiff has apparently abandoned.

the board (among other unknown terms) until after the deal closed. *Id.*, at *8, *13.[4] She concealed from the board her rationale for the company's opening bid, and later justified her (unilaterally determined) revised bid using an inapt comparator and unverifiable numbers. *Id.*, at *5, *7.

The allegations here could not be more disparate. [redacted], was *not* a dual fiduciary, was *not* self-interested in the Transaction, received *no* personal financial benefit from the Transaction (*i.e.*, he did not "stand on both sides" of the deal), and *disclosed* to the Voting Directors all material terms of the proposed Transaction before it was approved, including the basis for the proposed price of $31 million [redacted], that it would result in a cost-savings, and how the Company would finance the purchase. *See* Mot. at 11–12. Plaintiff also fails to allege that [redacted]. Opp. at 5.

In *Berteau*, the company, upon discussing a potential merger with its controlling stockholder, formed a special committee because 4 of the company's 7 directors were also directors of, or investors in, the controller. 2021 WL 2711678, at *3. When the committee made demands the controller found unacceptable (such as an equitable exchange ratio), the recused directors took control of the negotiations from the committee (which inexplicably withdrew its demands) and closed the merger on its own terms. *Id.*, at *16–18. Here, by contrast, there is no allegation that Ceiley forced [redacted] to abandon demands, or that Ceiley reversed his recusal so he could unilaterally dictate terms of the Transaction in his favor. *See* Compl. ¶ 109 (conceding Ceiley recusal). The allegations supporting an unfair process in *Berteau* do not exist here.

[4] In addition, while the board retained a financial advisor, it only did so after the lead negotiator had submitted the company's final offer. *Id.*, at *7 n.97. Also, the advisor did not opine on several material components of the transaction, including the negotiator's personal receipt of shares. *Id.*, at *8, *9.

Given the Complaint's failure to plead with particularity facts as required to overcome the Motion, it is not surprising that Plaintiff resorts to a plea for discovery.[5] That worn fallback carries no weight here for several reasons. First, as explained above (*supra* at 2–5), the Complaint suffers from insurmountable *legal* deficiencies arising from a misconstruction of Section 607.0832—more facts cannot save it. Second, the Opposition omits that, prior to filing this action, Plaintiff sought and received EACO's books and records related to the Transaction, including, *inter alia*, Board minutes, emails among the Directors and between [redacted]. Plaintiff does not, because it cannot, identify any further discovery it needs to rescue this case from dismissal (and, moreover, dismissal with prejudice). For this additional reason, Plaintiff fails to plead demand futility on the basis that the Directors face personal liability for a violation of Section 607.0832 or aiding and abetting thereof.

C. The Directors Do Not Face Liability For Breach Of Fiduciary Duty.

Plaintiff concedes that its breach of fiduciary duty claim must allege "conscious disregard for the best interest of the corporation, or willful or intentional misconduct." Opp. at 14 (quoting Fla. Stat. § 607.0831(1)(b)(4)). As explained in the Motion, this standard is not and cannot be met here where the parties do not dispute that the Transaction resulted in a cost-savings for the Company. Mot. at 15–16. The Opposition does not even acknowledge this argument, let alone attempt to rebut it. It instead rehashes allegations (Opp. at 15) which suffer from the same legal defects as those identified above in connection with its Section 607.0832 claim (*supra* at 2–5).[6]

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[5] Opp. at 14 (purporting to distinguish the Motion's cited cases as being post-trial or summary judgment opinions "where discovery was taken [and] evidence was presented").

[6] Oddly, the Opposition appears to suggest that the "consciousness" or "willfulness" requirement for a well-pled breach of fiduciary duty claim is satisfied if the directors allegedly knew their "general duties"—*i.e.*, if they knew simply that they owed the duties of loyalty and care. Opp. at 15. If this were the law, *every* alleged breach of fiduciary duty would be "conscious" or "willful" so long as the directors were fully informed of their legal duties. Plaintiff cites no case holding as much, likely because none exists.

Where the Opposition *does* attempt to refute the Motion's arguments, it fails. As the Motion explained, Florida's business judgment rule statute protects the Directors from a claim for breach of fiduciary duty, as a matter of law, [redacted]. Mot. at 15 (citing Fla. Stat. § 607.0830(5)). The Opposition's arguments to the contrary find no support in the text of the statute or otherwise.

The Opposition contends that [redacted]. Opp. at 16 n.6. Plaintiff simply ignores the documents incorporated in the Complaint (*see* Mot. at 15), [redacted]." *Id.* at 11. Plaintiff responds cryptically: [redacted] Opp. at 16 n.6. Nothing in the statute (or the English language) suggests that [redacted]. The Court should not credit Plaintiff's unsupported theory.

Plaintiff also argues that the Board somehow did not "rely" on [redacted]. Opp. at 16. Nowhere does the statute provide, or suggest, that a director is deemed to have "relied" upon a retained expert *only* if he personally communicated with the expert and flyspecked the expert's written work product. The Court should reject Plaintiff's amendment of the statute. In any event, *Plaintiff itself expressly alleges:* [redacted] Compl. at 33 (emphasis added; capitalization altered). For these reasons, Plaintiff's breach of fiduciary duty claim is legally defective and does not give rise to personal liability against the Directors.[7]

[7] Even if Plaintiff's creative reading of Fla. Stat. § 607.0830(5) were valid, there is no dispute that [redacted] undermining allegations that the Board engaged in "conscious disregard for the best interest of the corporation, or willful or intentional misconduct." Fla. Stat. § 607.0831(1)(b)(4)).

In sum, the Opposition confirms that Plaintiff fails to plead demand futility on the basis that a majority of the Board faces personal liability. For the same reasons, all counts should be dismissed under Fla. R. Civ. P. 1.140(b)(6) for failure to state a cause of action. Mot. at 19.[8]

II. THE OPPOSITION FAILS TO ESTABLISH THAT THE VOTING DIRECTORS LACK INDEPENDENCE FROM CEILEY.

The Opposition also does not overcome Plaintiff's failure to plead particularized facts showing that the Voting Directors lack independence from Ceiley, Plaintiff's only other basis for claiming that demand is futile. Mot. at 16–19. Again, what Plaintiff does not say speaks volumes.

As set forth in the Motion, Plaintiff alleges two reasons why the Voting Directors supposedly lack independence from Ceiley, one of which is that they "owe their current positions as directors on the Board to Ceiley." Mot. at 17 (quoting Compl. ¶ 226). The Opposition ignores, however, that such allegations do not impugn a director's presumed independence absent allegations that their board position is material to that director. *Id.* at 19. It also ignores that pleading materiality requires particularized facts regarding the director's compensation from their board service and their overall financial circumstances. *Id.* The Complaint alleges neither and the Opposition does not respond. The reason is obvious—as noted in the Motion, Plaintiffs fail to meet their pleading burden because it is utterly implausible that EACO's publicly disclosed annual Board compensation of $15,600–16,800 (undisputed in the Opposition) is somehow material to the Voting Directors absent pled facts establishing as much. *Id.* at 19 n.17.

Nor does the Opposition save Plaintiff's other basis for pleading a lack of independence—*i.e.*, that the Voting Directors' alleged "long-standing professional and/or personal relationships with Ceiley . . . preclude them from making an independent decision on whether to bring suit

[8] Defendants concede demand is futile as to Ceiley. Mot. at 16. Because the Complaint fails to allege that the Transaction was unfair to the Company, however, Ceiley is protected from Plaintiff's claim for breach of fiduciary duty by Florida's business judgment rule statute. *Id.* (citing Fla. Stat. § 607.0831(1)(b)2).

against Ceiley." Mot. at 17 (quoting Compl. ¶ 220). With respect to Means and Catanzaro—whose tenures at Bisco ended 14 and 22 years ago, respectively—Plaintiff contends that "a current business relationship is not necessary to show lack of independence." Opp. at 18. Defendants do not argue otherwise. Rather, as established in the Motion's many cited cases, ignored in the Opposition, a long-term employment relationship standing alone—whether current or not—is insufficient to impugn a director's presumed independence for demand futility purposes.[9] The additional fact that these Directors' tenures ended decades ago only further supports their independence. *See Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 60 (Del. Ch. 2015) (cited in Mot. at 18; ignored in Opposition) (16-year employment with controller that ended almost 3 years before action filed held insufficient to undermine director's independence).[10]

Plaintiff argues that it alleges more than just prior employment relationships, likening its allegations to those held sufficient to establish demand futility in *In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446 (Del. 2024) (cited in Opp. at 17, 18). The Opposition's own description of *Match* shows why this argument fails. In that case, in addition to the director's prior employment at the company (during which he earned over $55 million), the director expressed that he owed a debt of gratitude to the controlling stockholder's chairman for the "opportunities" he had given the director. *Id.* (citing *Match*, 315 A.3d at 471). Such opportunities included service on numerous boards affiliated with the controller, for which the director earned "substantial compensation" (Opp. at 17)—specifically, "over $4.5 million." *Match*, 315 A.3d at 472.

No allegations of this sort appear in the Complaint. While the Opposition supposedly cites allegations of "mutual respect and admiration" between Ceiley and the Voting Directors, and

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[9] *See* Mot. at 18 & n.16 (citing cases unaddressed in the Opposition).

[10] *See also In re Camping World Holdings, Inc. S'holder Deriv. Litig.*, 2022 WL 288152, at *18 (Del. Ch. Jan. 31, 2022) (director's employment that ended 25 years before suit filed—deemed a "distant business relationship"—held insufficient to undermine independence for demand futility purposes).

"personal ties of respect, loyalty, and affection" (Opp. at 18), it cites only a single paragraph from the Complaint that purports to allege something *other than* prior employment and ongoing Board service. Specifically, it cites Paragraph 223 for the proposition that Means and Catanzaro also "maintain close relationships with Ceiley[.]" *See id.* This paragraph alleges only that Means and Catanzaro were recently inducted into Bisco's "Hall of Fame"—*i.e.*, recognition of, critically, *their prior employment and ongoing Board service*. *Id.* Nowhere does Paragraph 223, or any other paragraph in the Complaint, allege an admitted "debt of gratitude" owed to Ceiley by Means or Catanzaro, or "personal ties of respect, loyalty, and affection," as alleged in *Match*.

Seemingly lost in the shuffle is Bancroft, who is barely mentioned in the Opposition. There is no contention that she ever had an employment relationship—current or otherwise—with EACO, Bisco, or Ceiley. She is not alleged to "maintain [a] close relationship[] with Ceiley[.]" Opp. at 18 (addressing Means and Catanzaro only). She is not alleged to have been inducted into Bisco's "Hall of Fame." She is not alleged to owe Ceiley a "debt of gratitude" to Ceiley, nor has she or Ceiley allegedly "express[ed] mutual respect and admiration" for one another. Opp. at 17, 18. In short, Plaintiff makes little attempt to plead that Bancroft lacks independence.[11]

CONCLUSION

For these reasons, the Complaint should be dismissed in its entirety. In addition, because any further amendment would be futile, it should be dismissed with prejudice. *Kalmanson v. Lockett*, 848 So. 2d 374, 381 (Fla. Dist. Ct. App. 2003) (affirming trial judge's dismissal of complaint with prejudice where amendment would have been futile).

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[11] Plaintiff claims the Voting Directors' independence under NASDAQ rules (Mot. at 17) is "irrelevant" because "those rules only consider whether the Voting Directors are independent of EACO, not Ceiley." Opp. at 18. Not so. In assessing directors' independence *from an alleged controlling stockholder*, courts have held that stock exchange rules "cover many of the key factors that tend to bear on independence" and thus "they are a useful source for this court to consider when assessing an argument that a director lacks independence." *In re MFW S'holders Litig.*, 67 A.3d 496, 510 (Del. Ch. 2013) (directors held independent from controlling stockholder). Plaintiff cites no case to the contrary, as likely none exists.

Dated: April 4, 2025

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 4, 2025, a true and correct copy of the foregoing was filed using the Florida Courts E-Portal which will serve a copy by email pursuant to Fla. R. Jud. Admin. 2.526 on all counsel of record.

/s/ David W. Marston Jr.
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