SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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RUSSELL KAYE,

Plaintiff,

-against-

MERCHANT FACTORS CORP., NEVILLE GRUSD, STEVEN KAYE, BONNIE ROBBINS, ADAM WINTERS, and RICHARD WOLLMAN,

Defendants.
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Index No.: 650974/2024

AMENDED COMPLAINT

Plaintiff RUSSELL KAYE ("Plaintiff" or "Russell") as and for his Amended Complaint against defendants MERCHANT FACTORS CORP. ("Merchant" or the "Company"), NEVILLE GRUSD, STEVEN KAYE, BONNIE ROBBINS, ADAM WINTERS, and RICHARD WOLLMAN (collectively, the "Director Defendants;" together with Merchant, "Defendants"), alleges the following upon knowledge as to his own acts and otherwise upon information and belief:

Nature of the Action

1. This action arises out of the unlawful actions Defendants have taken (a) to block Plaintiff from accessing Company records to which he was and is entitled as a shareholder and director, and (b) to remove him from the Company's Board of Directors (the "Board") in direct contravention of the Company's governing documents, including the specific bylaw provision under which he was removed, and the New York Business Corporation Law.

2. Russell individually owns over 11% of the shares of Merchant and is co-trustee of a trust owning more than 42% of the Company's shares, giving him at least partial control of more than half of the Company's shares. Per Merchants' Shareholders' Agreement, which authorizes each shareholder to appoint a director to the Board, Russell was a longstanding director of the Company,

serving for approximately 17 years. In May 2023, in his role as shareholder and director, Russell requested Company records of correspondence pertaining to indebtedness of the Company to shareholders, directors, or other insiders (as defined *infra*, the Sub-debt).

3. Counsel for Merchant acknowledged Russell's right to such records in his capacity as a shareholder and director but asked that Russell propose some limitations on the scope of the request, which Russell did.

4. The Company, however, did not provide the information. Instead, it fired its attorney and retained a new attorney. After making this change, and despite the unconditional and unqualified right of directors of New York corporations to access company records and despite the Company previously acknowledging Russell's right to these corporate records, the Company refused Russell's request for corporate records and stated that it would only provide the requested records if mandated by a court order.

5. Defendants continued their bad faith campaign against Russell when, on January 26, 2024, Defendant Wollman circulated a Notice of Special Board Meeting of the Board of Directors of Merchant Factors Corp. (the "Notice"), which purported to call a special Board meeting for the purpose of voting to remove Russell from the Board (the "Special Meeting").

6. The Notice was defective for multiple reasons—the most glaring of which was that under the by-law provision that the Notice invoked and identified as the basis for the contemplated action—Bylaw III.4—a director may be removed by only a *shareholder vote*, not by a vote of the Board.

7. Nevertheless, the Board moved ahead with the Special Meeting and, pursuant to a Bylaw provision that did not give them power to do so, the Director Defendants voted to strip Russell of his position as a director.

8. Accordingly, Plaintiff seeks an order declaring that the Board's action in removing him from the Board was ultra vires and unlawful, and reinstating him to his long-held director position, and an order compelling the Company to provide him with the requested books and records. Russell also seeks his costs and reasonable attorney's fees in bringing this action because Defendants knew that they were acting unlawfully at the time they (a) refused Russell's requests for books and records; (b) issued the Notice; and (c) voted to remove Russell from his position as a director of the Company.

The Parties

9. Plaintiff Russell Kaye is a New York resident who holds 12.5 shares of the Company, or approximately 11.8% of all outstanding shares. From 2007 until March 13, 2024, Russell served as a director of the Company.

10. Defendant Merchant is a domestic, closely held corporation organized under the laws of the State of New York, with its principal office located at 1441 Broadway, New York, New York 10018. The Company has 105.63 outstanding shares.

11. Defendant Neville Grusd is a resident of the State of New York and a director of the Company. Grusd holds seven (7) shares of the Company, or approximately 6.6% of all outstanding shares.

12. Defendant Steven Kaye ("Steven") is a resident of the State of Connecticut and a director of the Company. Steven holds 12.5 shares of the Company, or approximately 11.8% of all outstanding shares.

13. Defendant Bonnie Robbins is a resident of the State of New York and a director of the Company. Robbins holds six (6) shares of the Company, or approximately 5.7% of all outstanding shares.

14. Defendant Adam Winters is a resident of the State of New Jersey and a director of the Company. Winters holds 12.63 shares of the Company, or approximately 12% of all outstanding shares.

15. Defendant Richard Wollman is a resident of the State of New York and a director of the Company. Wollman holds 10 shares of the Company, or approximately 9.5% of all outstanding shares.

16. A relevant non-party to this action is the Crossing 18 Trust (the "Trust"), which holds 45 shares of the Company, or approximately 42.6% of all outstanding shares. Steven and Russell are co-trustees of the Trust.

The Corporate Documents

17. Merchant was formed in or about 1981 by Walter Kaye, Russell and Steven's father. Upon information and belief, for several years after forming the Company, Walter Kaye solicited investors, which effort culminated in the execution of the Company's Shareholders' Agreement (the "SH Agreement").

18. Merchant's SH Agreement was entered into on October 1, 1984. At the time of the SH Agreement, Merchant had four shareholders: Walter Kaye, Edward Wollman (the father of Defendant Richard Wollman), Manual Gordon (the father of Defendant Bonnie Robbins), and Stanley Rosenow (the "Initial Shareholders").

19. Section 3(a) of the SH Agreement sets forth the way directors of Merchant ("Directors") are appointed. Specifically, Section 3(a) reads, in part, as follows: "The Board of Directors shall consist of four (4) Directors. Each Shareholder shall have the right to appoint one (1) Director."

20. The Company's initial Board consisted of the Initial Shareholders.

21. The SH Agreement has been amended several times. Section 3(a) has not been amended.

22. While shares of the Company have changed hands over the nearly 40 years since the execution of the SH Agreement and the number of shareholders has increased, the Company's shareholders have maintained the practice set forth in the second sentence of Section 3(a) of the SH Agreement that each shareholder may appoint one Director to serve on the Board.

23. At present, the Company has seven shareholders (the Director Defendants, Russell, and the Trust) and five Directors (the Director Defendants).

24. Bernice Kaye, Russell and Steven's mother, served as a Director appointed by the Trust from approximately 2007 to 2018. After her death, no replacement Director was added to the Board in her place.

25. Because of the consistent practice of each shareholder appointing a Director and all shareholders appointing themselves, the Company has not held a shareholder meeting or voted on Directors in years and save for Bernice Kaye's passing, the Board's composition remained the same until it unlawfully removed Russell from his position as Director at the Special Meeting.

26. Merchant's by-laws were amended and restated on January 21, 2022 by resolution of the Board (the Amended and Restated Bylaws, being the "Bylaws"), over Russell's objection.

27. No shareholders' meeting was ever called to approve the Bylaws, as amended and restated, and there has never been a shareholder vote on the amendments.

28. Relevant to this action, Bylaw III.4 of the Bylaws adopted by the January 21, 2022 Board resolution is titled "REMOVAL OF DIRECTORS FOR CAUSE." It provides as follows:

> (a) Any director may be removed for Cause (as defined in these by-laws) by vote of the holders of a majority of the shares then entitled to vote in the election of any directors ("Shareholder Vote"). *Subject to the approval of these by-laws by Shareholder Vote*, a director may also be removed for Cause by resolution adopted by the affirmative vote of two-

> thirds of the Board members present at a meeting called for such purpose. At least 10 days' notice of such action shall be given to all shareholders and directors, including the affected Board member. (Emphasis added).

29. Accordingly, pursuant to the Bylaws, a Director may be removed from his or her position for Cause in only two scenarios: (i) by shareholder vote, or, if the Bylaws have been approved by shareholder vote (ii) by Board resolution.

30. Since the Bylaws have not been approved by shareholder vote, the only mechanism through which a Director may be removed for cause under the Bylaws is by a direct shareholder vote. The Board lacks the authority under Bylaw III.4 to directly remove a director.

The Company illegally rebuffed Plaintiff's requests to inspect books and records concerning subordinated debt.

31. Years ago, the Company issued subordinated debt notes to its shareholders to increase its liquidity.

32. At times, the subordinated debt held by shareholders (the "Sub-debt") was approximately $20 million.

33. The notes issued to different shareholders were not always uniform and, in some instances, carried different interest rates. For several years the notes held by the Trust earned significantly lower interest rates than those held by other shareholders.

34. In an effort to save the Company money, Russell has repeatedly offered to provide refinancing of the Sub-debt at a rate that is 400 basis points lower than the rate the Company is paying on the Sub-debt notes.

35. Despite that Russell's proposals would have saved the company hundreds of thousands of dollars annually, and more than a million dollars in total, the Company has neither accepted nor seriously evaluated his offers.

36. Upon information and belief, the Company's management has not taken steps to refinance the Sub-debt because of opposition from the Director Defendants who hold the Sub-debt and enjoy rates of return of prime plus 6%.

37. Accordingly, on or about May 19, 2023, through counsel, Russell requested that Merchant provide: "Correspondence since 2016 between or among any of the stockholders, directors or other insiders and the Company's counsel, accountants and/or any member of management regarding the creation or repayment of any indebtedness of the Company with stockholders, directors or other insiders and/or their affiliates."

38. The purposes of Russell's request were (i) to ensure that the Director Defendants were placing their fiduciary duties to the Company above their own personal interests; and (ii) to have a more complete understanding of why different shareholders/noteholders received disparate interest rates. Both are proper purposes for any reasonable books and records request made by a shareholder of the Company, let alone one made by a director with a legal, unfettered right to examine the Company's books and records.

39. After further communications between counsel for Russell and Merchant's counsel, Marc Leaf, Esq. ("Leaf"), Merchant acknowledged that Russell was entitled to the information and records he sought but requested that Russell evaluate ways to limit the scope of information to be provided.

40. Russell agreed to this request and in a June 14, 2023 email to Leaf, proposed search terms to limit the scope of information that would be provided.

41. During this same time, Russell again offered to refinance the Sub-debt at a rate of prime plus 2% rather than the prime plus 6% rate the Director Defendants who held Sub-debt were earning. Again, the offer was not seriously considered.

42. Sometime in the fall of 2023, the Company's management fired Leaf, who had served as Merchant's counsel for more than six years.

43. Management retained new counsel for the Company, and then reversed its position on granting Russell access to the records of correspondence regarding the Sub-debt he had requested and to which Leaf had acknowledged Russell was entitled.

44. Specifically, during a December 2023 Board meeting, the Company's new counsel, David Kaufman, Esq. ("Kaufman"), stated that Merchant was under no obligation to provide corporate email records to Russell—then a sitting director with an unfettered, unqualified right to examine the books and records of the Company he was charged with overseeing—without a court-ordered subpoena.

45. During that same Board meeting, Russell reiterated his proposal to provide refinancing of the Sub-debt at a rate that was 400 basis points lower than the Company was paying. And again, with little to no consideration, Russell's proposal was rejected by the very people—the Director Defendants—who held those Sub-debt notes and were being paid the higher interest rates.

46. On January 31, 2024, through counsel, Russell renewed his request for correspondence since 2016 concerning the Sub-debt, and, per the Company's earlier request, proposed search terms. In that email, Russell's counsel noted that under New York law, directors have "an absolute unqualified right" to corporate books and records (citing *Cohen v. Cocoline Products*, 309 N.Y. 119, 123 (1955)) and that the Company had previously acknowledged that Russell was entitled to the information sought.

47. In an email response two days later, Kaufman advised: "The requested information will not be provided … the scope of the request and suggested search parameters make clear that this information is not being sought in a good faith effort to carry out any duty or corporate obligation."

48. In response, counsel for Russell sent two emails. In the first email, counsel noted, again, the absolute and unqualified right of directors to inspect books and records and asked if Merchant (or its counsel) was aware of any legal authority that allows a company to deny a books and records request based on the company's evaluation of a director's motivation for the request.

49. In the second email, counsel for Russell referred to additional legal authority regarding the absolute and unqualified right of directors to inspect corporate books and records, the untenability of Merchant's position that a company's management may act as a gatekeeper regarding what information it will make accessible to directors responsible for managerial oversight, that Russell's investigation of correspondence regarding Sub-debt was an appropriate inquiry, and encouraging Merchant to re-think its unlawful position. A copy of this email exchange is attached as Exhibit 1.

50. Merchant has never identified any legal justification for refusing Russell's request for books and records and has continued to refuse to provide Russell with the requested books and records.

The Director Defendants unlawfully remove Russell from the Board.

51. Shortly after Russell retained new counsel to renew his efforts to obtain corporate records of correspondence concerning the Sub-debt, Defendants sent the Notice to Plaintiff.

52. The Notice stated that, "The agenda of the Special Board Meeting will be the removal of Russell Kaye pursuant to Article III, Section 4 of the Amended and Restated By-Laws of the Company."

53. The Notice specified that "[o]nly directors are entitled to notice of and to vote at the Special Meeting and at any adjournment or postponement of the Special Meeting."

54. Bylaw III.4 expressly states that, in order for a Director to be removed by an act of the Board, the Bylaws must first have been ratified by shareholder vote.

55. The Bylaws, which were adopted in January 2022, have not been ratified by a vote of the shareholders of the Company. Nor could they have. Russell owns or otherwise exerts control over approximately 54.4% of Merchant's outstanding shares and opposes ratification.

56. Thus, the triggering event that Bylaws III.4 requires to empower the Board to remove a director pursuant thereto has not occurred and the Board lacked (and continues to lack) power to remove Russell or any other Director under Bylaw III.4.

57. In addition to being void under Merchant's own Bylaws, the Director Defendants' removal of Russell violated BCL § 706, though which the New York Legislature has addressed the way directors may be removed from company boards. Section 706(a) reads, in relevant part: "Any or all of the directors may be removed for cause by vote of the shareholders. The certificate of incorporation or *the specific provisions of a by-law adopted by the shareholders* may provide for such removal by action of the board[.]" (emphasis added).

58. Here, the Board invoked a specific provision of the Bylaws (Article III, Section 4(b)(ii)), which it adopted in January 2022, as its basis for removing Russell. Those Bylaws, however, and that specific provision, have never been adopted by the shareholders. Accordingly, on the face of the Bylaws and under State law, the Director Defendants acted in an ultra vires manner in voting to remove Russell from the Board.

59. While the issue need not be reached because the Board plainly lacked the authority to remove a fellow director, the Bylaw provision at issue, Bylaw III.4(b)(ii), itself is void because it conflicts with the Company's SH Agreement.

60. The SH Agreement specifies that "The Board of Directors shall consist of four (4) Directors. Each Shareholder shall have the right to appoint one (1) Director." This provision of the SH Agreement has never been revised or otherwise amended.

61. The Company's shareholders have consistently acted in accordance with the procedure whereby each shareholder appoints a board member.

62. The Company's shareholders have not held annual (or any) meetings and have not voted on the composition of the Board in years, further demonstrating that the shareholders have always understood that the provision of Section 3(a) of the SH Agreement that each shareholder appoints a Director controls the way the Board is elected.

63. Notwithstanding the SH commitment to allow each shareholder to appoint a director, under New York law, the shareholders of Merchant maintain the common law right to remove an unfaithful director if that director is engaged in malicious activity or malfeasance towards the Company.

64. Subsections (i), (iii), and (iv) of Bylaw III.4(b) address circumstances where the shareholders (or Board if the Bylaws are at some point approved by shareholder vote) may exercise the right to remove a faithless director. Subsection (ii) however, which has been referred to as the "Civility Provision" of the Bylaws, is more expansive than what has been understood as cause to remove a director at common law. Moreover, there is no reference in the SH Agreement to any "civility" requirement to serve on the Board.

65. The Civility Provision would allow the shareholders (and the Board if the Bylaws are at some point approved by shareholder vote) to remove a director if they deemed the director's behavior to be uncivil and that the individual was difficult or unpleasant to work with.

66. This structure acts as an effective backdoor amendment of the SH Agreement and would allow a majority of shareholders to strip another shareholder of its rights under the SH Agreement without amending the SH Agreement itself.

67. Since the SH Agreement cannot be amended via a bylaw provision passed by the Board and can be changed only through an amendment to the SH Agreement, Bylaw III.4(b)(ii) is a legal nullity.

AS AND FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment – Reinstatement to the Board)

68. Plaintiff repeats and realleges each and every allegation mentioned and set forth above as if set forth verbatim and at length herein.

69. The Director Defendants purported to remove Russell from the Board pursuant to Bylaw III.4(b)(ii).

70. Pursuant to Article III, Section 4 of the Bylaws, the Board will only have the authority to remove a director pursuant to that Bylaw provision if the Bylaws are approved by a vote of the Company's shareholders.

71. Bylaw III.4 has not been voted on or approved by the Company's shareholders.

72. Accordingly, under the very Bylaw provision that the Director Defendants were purporting to act, they lacked the authority to remove Russell as a director.

73. Additionally, under BCL § 706(a), a board of directors will have the authority to remove a fellow director only if the specific provision of the bylaw under which they are acting has been approved by the company's shareholders.

74. Bylaw III.4(b)(ii) was never approved by the Company's shareholders.

75. Accordingly, under state law, the Director Defendants lacked the authority to remove Russell as a director.

76. Plaintiff is entitled to and hereby requests a judgment (a) declaring that the Board's March 13, 2024 action removing Plaintiff from his position as Director of the Company was ultra

vires and unlawful and is void and of no force or effect, and (b) reinstating Plaintiff to his position as a Director of Merchant.

AS AND FOR A SECOND CAUSE OF ACTION
(Demand for Books and Records)

77. Plaintiff repeats and realleges each and every allegation mentioned and set forth above as if set forth verbatim and at length herein.

78. At all times relevant prior to March 13, 2024, Plaintiff was a Director of the Company.

79. Plaintiff has, on numerous occasions prior to March 13, 2024, lawfully requested to examine Merchant's books and records relating to the Sub-debt.

80. Under New York law, a director of a company has an absolute and unqualified right to inspect the books and records of such company, regardless of the director's motives for doing so.

81. Additionally, as a shareholder of Merchant, Plaintiff has a right, under BCL § 624 and common law, to examine the Company's books and records for any purpose reasonably related to Plaintiff's interest as a shareholder of the Company.

82. The Company has previously acknowledged Plaintiff's right to inspect its books and records, and likewise previously agreed to produce the same to Plaintiff.

83. Now, however, Merchant is unlawfully refusing to produce books and records of the Company to Plaintiff for his inspection.

84. Accordingly, Plaintiff is entitled to specific performance in the form of an order compelling the Company to immediately make available its books and records relating to the Company's Sub-debt for Plaintiff's inspection.

WHEREFORE, Plaintiff requests judgment as follows:

a. Declaring that the Board's removal of Plaintiff from his position as Director of the Company is void and of no force or effect;

b. Declaring that Plaintiff is reinstated to his position on the Board;

c. Compelling Merchant to promptly make available for Plaintiff's inspection the Company's books and records regarding correspondence concerning the Company's Sub-debt; and

d. Granting to Plaintiff such other and further relief as to the Court may seem just, proper and equitable, including but not limited to reasonable attorneys' fees, costs and expenses.

Dated: White Plains, New York
May 7, 2024

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