SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

The Application of	:	Index No. 160305/2021
ALAN ADES, for a determination of his rights as dissenting shareholder and to fix the value of his shares in accordance with Section 623 of the Business Corporation Law,	:	Assigned Justice: Laurence L. Love Mot. Seq. No. 001
Petitioner,	:	
-vs-	:	
VAN DALE INDUSTRIES, INC.,	:	
Respondent.	:	

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S CROSS-MOTION TO DISMISS THE PETITION

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Respondent Van Dale Industries, Inc. ("**Respondent**," "**Van Dale**," or the "**Company**") respectfully submits this memorandum of law in opposition to the Verified Petition (the "**Petition**"), dated November 11, 2021 (NYSCEF Doc. 1), and in support of its cross-motion to dismiss the Petition pursuant to CPLR §§ 404(a) and 3211(a)(7) (the "**Motion to Dismiss**").[1]

PRELIMINARY STATEMENT

The Petition presents on its face facts mandating dismissal. Petitioner Alan Ades ("**Petitioner**" or "**Alan**") concedes that, following a duly-approved and effectuated cash-out merger for his minority shares in the Company, Alan failed to comply with BCL § 623(f)'s requirement that he submit his stock certificates to the Company within a month of his Notice of Election to exercise dissenters' rights. Alan further concedes that the Company consequently exercised its option to terminate Alan's dissenters' rights under BCL § 623(f).

Because these undisputed facts bar Alan's claims for an appraisal proceeding as a matter of law, the Petition must be dismissed in its entirety.

FACTUAL BACKGROUND

This petition for a fair value appraisal proceeding arises out of a September 2, 2021, merger transaction duly approved by Van Dale's Board and its shareholders, pursuant to which Alan's shares (representing 19.44% of Van Dale) were to be redeemed for an aggregate cash purchase price of $7,780,050.25. Alan claims that this purchase price did not reflect Van Dale's fair value. But because Alan failed to timely submit his stock certificates in the Company as required by BCL § 623(f), Alan forfeited any rights he held as a dissenting shareholder to seek judicial appraisal of his shares.

[1] Respondent expressly reserves the right to answer the Petition in the event the Court does not grant Respondent's cross-motion to dismiss.

Van Dale is a New York corporation, established in 1982, that manages and/or licenses intimate apparel brands (Pet. ¶¶ 11, 14-15). At all relevant times prior to the merger, Van Dale's shareholders were Alan, Albert Ades, Maurice Setton, Jimmie Ades and Gabriel Ades (Pet. ¶ 14). Alan owned 19.44% of Van Dale's shares (Pet. ¶ 1).

On August 10, 2021, a Notice of Meeting was delivered to Van Dale's shareholders for a shareholders' meeting to be held on August 23, 2021 (Pet. ¶ 20). The Notice of Meeting stated the purpose of the meeting was to adopt proposed by-laws that were annexed to the Notice of Meeting, as well as to elect three additional members of the board of directors (*id*.). Among other things, the proposed by-laws provided for replacement of lost stock certificates as follows:

> **Lost Certificates.** The Corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost, stolen or destroyed, and the Corporation may require the owner of the lost, stolen or destroyed certificate, or his legal representative, to give the Corporation a bond sufficient to indemnify it against any claim that may be made against it on account of the alleged loss, theft or destruction of any such certificate or the issuance of such new certificate. (Pet., Ex. A, § IV.5)

At the August 23, 2021, shareholders' meeting, these proposed by-laws were adopted (Pet. ¶¶ 27-28).

Another Notice of Meeting was sent to the shareholders on August 23, 2021, notifying the shareholders that a Special Meeting would take place on September 2, 2021 (Pet. ¶ 29). The purpose of the Special Meeting would be to vote on a proposal to approve an Agreement and Plan of Merger between the Company and Van Dale Industries, Corp. that would create a newly merged entity owned entirely by Maurice Setton, Jimmie Ades and Gabriel Ades (Pet. ¶ 30). Pursuant to the Plan of Merger, Alan would be paid $222,287.15 for each of his 35 shares, for an aggregate purchase price of $7,780,050.25 (Pet., Ex. B ["Agreement and Plan of Merger" ¶ 5(b)]).

On August 31, 2021, Alan sent the Company a Notice of Election purporting to exercise his dissenter's rights and demanding payment of the fair value for all of his 35 shares of the Company (Pet. ¶ 33). The Special Meeting was held on September 2, 2021, and the Agreement and Plan of Merger was approved by the majority of shareholders, with Alan the sole dissenting vote (Pet. ¶ 34). The same day, a Certificate of Merger was filed with the Secretary of State of the State of New York and the merger became effective (Pet. ¶ 36).

On September 3, 2021, the Company sent Alan a "Notice and Offer Pursuant to New York Business Corporation Law Section 623" offering to pay Alan $222,287.15 for each one of his 35 shares, for an aggregate purchase price of $7,780,050.25 (Pet. ¶ 37). On September 27, 2021, Alan sent the Company a Notice of Rejection of Offer, which rejected the purchase price that the Company had offered for Alan's shares (Pet. ¶ 38, Ex. G).

Alan concedes that he has not submitted to the Company within one month of the Notice of Election his stock certificate representing his 35 shares (Pet. ¶ 42). Alan claims that "despite having exercised due diligence to find the stock certificate, Petitioner was not able to locate it" (*id*.). Alan further asserts that, "[u]pon information and belief, certificates were never actually issued by the Company to its shareholders but, if they were, they were issued over 30 years ago" (Pet. ¶ 43).

Alan thus included in his September 27, 2021 Notice of Rejection of Offer the following demand:

> The undersigned has conducted a diligent search for the Certificate and is unable to locate the Certificate. The Company shall therefore either (i) issue a new certificate for the shares pursuant to BCL § 508(e) and accept the reissued certificate as timely submission of the Certificate by the undersigned pursuant to BCL § 623(f); or (ii) deem this notice as timely submission of the Certificate pursuant to BCL § 623(f).

By email dated September 27, 2021, the Company's President Maurice Setton responded:

> The Company acknowledges your demand that the Company either (1) issue a new certificate for you shares or (2) deem your notice as timely submission of the Certificate (as defined in the Rejection) (the Certificate Demand). The Company rejects the Certificate Demand, noting that you have not fulfilled the requirements of submitting the certificates representing our shares to the Company pursuant to New York Business Corporation Law (NYBCL) Section 623(F). Furthermore the required procedures to replace a share certificate of the Company pursuant to its bylaws and NYBCL Section 508(E) require that you provide the Company with suitable surety bond from a creditworthy insurance company for an amount of no less than $7,780,050.25, which is demanded by the Company. Additionally, the Company hereby refuses to accept the Rejection as timely submission of the Certificate. (Pet., Ex. H.)

The Petition does not allege that Alan made any effort to comply with the Company's demand for a surety bond in order to obtain a replacement certificate. On October 4, 2021, the Company wrote to Alan that he had failed to comply with the requirement of BCL § 623(f) to submit his certificate to the Company within one month following his dissent and that the Company had exercised its right to deem his dissenter's rights lost (Pet. ¶ 49, Ex. I).

ARGUMENT

CPLR § 404(a) authorizes the respondent in a special proceeding to move to dismiss a petition. "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action" (CPLR § 3211[a][7]). Although the Court should accept the facts as alleged in the petition as true, "allegations consisting of bare legal conclusions … are not entitled to any such consideration" *(see Nisari v Ramjohn*, 85 AD3d 987, 989 [2d Dept 2011]). The Petition fails to state a claim based on the plain language of the BCL and the Company's by-laws, and therefore the Petition must be dismissed.

The BCL provides strict requirements that must be followed for any dissenting shareholder who seeks to initiate a special proceeding to fix the fair value of their shares (*see* generally BCL § 623). Among other things, a dissenting shareholder must file within twenty days of notice of the

merger a written notice of his election to dissent (*see* BCL § 623[c]). The BCL further requires that within one month of filing the notice of election to dissent, the dissenting shareholder must "submit the certificates representing his shares to the corporation, or to its transfer agent, which shall forthwith note conspicuously thereon that a notice of election has been filed and shall return the certificates to the shareholder or other person who submitted them on his behalf" (BCL § 623[f]). Particularly relevant here, the BCL further provides:

> Any shareholder of shares represented by certificates who fails to submit his certificates for such notation as herein specified shall, at the option of the corporation exercised by written notice to him within forty-five days from the date of filing of such notice of election to dissent, lose his dissenter's rights unless a court, for good cause shown, shall otherwise direct. (*Id*.)

Few New York decisions directly address what constitutes "good cause" for a court to direct that a shareholder not lose its appraisal rights for failure to submit stock certificates, but the few that do generally have required a reasonable explanation for why the stock certificates could not timely be submitted. In *Application of Wiedersum*, (41 Misc 2d 936, 938-39 [Sup Ct 1964]), the petitioners submitted their stock certificates "six months and sixteen days beyond the date prescribed by the statutory timetable," and offered no excuse for their late submission. Instead, the petitioners argued that their substantive right to an appraisal had vested upon filing their notice of election, and the submission of stock certificates for notation was "merely the procedural mechanics by which one enforces his already vested right to payment" (*id*.). The court rejected this "cavalier relegation of the standards prescribed in [BCL § 623's predecessor] to the status of a meaningless formality" (*id*.). The court found that the stock certificate submission requirement "embodies the very essence of the right," adherence to which was an express precondition to the right to payment (*id*.). While the court noted that, under certain circumstances, "minor departures from the literal requirements" of the statute had been excused, "to grant such relief to the present

petitioners would so drastically tilt the sensitive equilibrium of interests created by section 21 of the Stock Corporation Law as to constitute complete rejection of the unequivocal legislative mandate" (*id*.). In other words, a petitioner whose only excuse for non-compliance is to assert the unimportance of the governing statutory requirement is barred from seeking appraisal.

Courts outside of New York have also opined on a dissenting shareholder's loss of rights by failing to comply with substantially similar statutes requiring timely submission of stock certificates. In *In re Glosser Bros., Inc.*, (555 A2d 129, 144 [Pa Super Ct 1989]), the court held that a non-compliant shareholder whose rights to a judicial appraisal had been terminated at the corporation's option had the burden of showing "why he should be afforded dissenters' rights." The court analyzed "the good cause shown" requirement "as properly focusing on whether there was a reasonable explanation for the failure to comply or other reason why the corporation's termination of the shareholder's dissenters' rights was unwarranted, and not whether there was prejudice to the corporation" (*id*.). The shareholders offered no explanation for their failure to tender their shares, instead arguing that they were treated unfairly because another shareholder who had not tendered his shares had not had his appraisal rights terminated by the corporation. The court found this unequal treatment insufficient reason for reinstating the shareholders' appraisal rights (*id*.).

Pritchard v Mead, (455 NW2d 263, 267 [Wis Ct App 1990]), is also instructive. In *Pritchard*, the dissenting shareholder argued that tendering his shares for notation was unnecessary under the doctrine of "substantial compliance," because he had already provided notice of election to dissent, voted against the merger, and issued a written demand for payment of fair value (*id*.). But the court found the doctrine of "substantial compliance" inapplicable because the statute explicitly provided for a penalty in the event of non-compliance with the stock certificate

submission requirement (*id*.). The court also noted the "importance of deadlines in business transactions." The court thus concluded, citing *Wiedersum* and *Glosser*, that substantial compliance with the appraisal procedures did not constitute "good cause" to forgive the certificate submission requirement where the shareholder had not offered any explanation for not submitting his certificates (*id*.).

The court has only found good cause to excuse non-compliance with the certificate submission requirements in narrow circumstances. In *Sasseen v Danco Indus., Inc.*, (20 AD2d 657, 657-58 [2d Dept 1964]), the Second Department found "good and sufficient cause" based on the corporation's continuous communications with the shareholder affirming intent to seek appraisal and the perceived lack of prejudice to the corporation by permitting an appraisal proceeding, whereas the consequences to the dissenting shareholder by relinquishing appraisal rights would be relegation to status as minority stockholder in a close corporation with no market in its shares. And in *Albany-Plattsburgh United Corp. v Bell*, (202 AD2d 800, 802-03 [3d Dept 1994], *affd as mod and remanded*, 85 NY2d 948 [1995]), the Third Department excused a shareholder's failure to tender lost share certificates where there was "no demonstrable prejudice" shown by the corporation.

Neither *Sasseen* nor *Bell* involved the key issue presented by Alan's Petition—namely, Van Dale's demand, pursuant to its by-laws and BCL § 508, that Alan provide an undertaking to indemnify Van Dale as a condition to replacing the missing stock certificate. This demand is explicitly authorized by BCL § 508(e), which allows a corporation's board to "require the owner of the lost or destroyed certificate, or his legal representative, to give the corporation a bond sufficient to indemnify the corporation against any claim that may be made against it on account of the alleged loss or destruction of any such certificate or the issuance of any such new certificate."

Courts have long upheld a corporation's right to demand such an undertaking (*see Martin-Trigona v Capital Cities/ABC, Inc.*, 145 Misc 2d 405, 407 [Sup Ct, NY County 1989] [imposing sanctions against litigant pursuing "baseless" claim that corporation lacked authority to require posting of indemnity]). "An indemnity protects [the corporation] against a future claim from a future holder of lost stock. It ensures they will not have to redeem the stock more than once. It thereby reduces inaccurate claims of loss" (*id*.).

Particularly relevant here, the court has upheld a corporation's right to require an indemnity bond as a condition to providing replacement shares necessary for a shareholder to redeem its shares in connection with a merger. In *Local 381 Pension Fund v Chem. Bank*, (222 AD2d 415, 416 [2d Dept 1995]), a going-private merger agreement between Kraft and Philip Morris provided that the plaintiff shareholder would not be entitled to redemption proceeds until it surrendered its share certificates. The plaintiff argued that Kraft had never sent physical share certificates for all of plaintiff's shares and therefore plaintiff had been wrongfully denied the redemption proceeds during the period required for plaintiff to obtain replacement shares. But the court rejected this argument:

> Upon submission of satisfactory proof that that stock certificate for 30,000 shares was lost and submission of an indemnity bond, the defendants promptly redeemed the 30,000 shares. Pursuant to the merger agreement between Kraft and Philip Morris, the plaintiff was not entitled to redemption proceeds until it surrendered its shares and was not entitled to interest upon the redemption proceeds. Further, the defendants had the right to demand that the plaintiff post an indemnity bond "against any claim that [might] be made against [them] on account of the alleged loss" of the stock certificate for 30,000 shares (Business Corporation Law § 508 [e]). (*Id*.)

Thus, under *Local 381*, if the exercise of shareholder rights in connection with a merger requires physical surrender of stock certificates, a corporation is within its rights to demand an

indemnification bond to replace lost certificates, and a shareholder—such as Alan here—is not excused for failure to abide by these demands.

Alan argues in his Petition that a surety bond should not have been required of him. First, Alan complains that "no surety bond was ever demanded of the other shareholders of the Company" (Pet. ¶ 48). This argument makes no sense, as none of the other shareholders were seeking to exercise appraisal rights. Even so, as the court noted in *Glosser Bros., Inc.*, (555 A2d at 144), the Company's differing treatment of shareholders is not an excuse for a shareholder's failure to tender shares. Next, Alan asserts that he "most likely never received" a certificate for his shares when he first became a shareholder (Pet. ¶ 46). This same argument was rejected in *Local 381* when the court found that a corporation could nonetheless demand an undertaking to replace lost certificates (222 AD2d 415). Third, Alan argues that the Company somehow "knew full well" that Alan had never sold his shares (*id*.). This is a species of the "substantial compliance" argument rejected in *Wiedersum* and *Pritchard* that strict compliance with the statutory requirements was not necessary.

Given the availability of replacement physical stock certificates upon compliance with statutorily authorized bond indemnity requirements, Alan's purported inability to locate his share certificates cannot constitute "good cause" to excuse Alan's failure to comply with the requirements of BCL § 623(f). Accordingly, the Petition should be dismissed under CPLR § 3211(a)(7) for failure to state a claim.

CONCLUSION

For the reasons cited herein, the Company's Motion to Dismiss should be granted in its entirety together with such other and further relief as the Court deems just and proper.

Dated: January 21, 2022
New York, New York

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