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

The Application of

ALAN ADES, for a determination of his rights as dissenting shareholder and to fix the value of his shares in accordance with BCL 623 of the Business Corporation Law,

Petitioner,

-against-

VAN DALE INDUSTRIES, INC.,

Respondent.

- X

Mot. Seq. No. 001

Index No. 160305/2021

Hon. Laurence L. Love

MEMORANDUM OF LAW IN OPPOSITION TO THE CROSS-MOTION OF VAN DALE INDUSTRIES, INC. TO DISMISS THE PETITION

Dated: New York, New York
March 4, 2022

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Preliminary Statement

Petitioner Alan Ades ("Ades") respectfully submits this Memorandum of Law in opposition to the Cross-Motion to Dismiss of Respondent Van Dale Industries, Inc. ("Van Dale"). By its Cross-Motion, Van Dale seeks an order pursuant to CPLR 404(a) and 3211(a)(7) dismissing the Petition filed in this Special Proceeding due to an alleged failure to state a cause of action. As explained in greater detail below, Van Dale's cross-motion is baseless, is an improper attempt to diminish Petitioner's statutory right to fair and just compensation for his ownership interests in Van Dale – a company in which he held an ownership interest for approximately thirty-nine (39) years – and must be denied in its entirety.

In the Petition, Ades seeks an appraisal pursuant to New York's dissenter's rights statute, BCL 623 of the New York Business Corporation Law ("BCL 623"), of his thirty-five (35) shares of Van Dale, a closely held New York corporation established in 1982. This Petition was filed after Ades' three co-shareholders in Van Dale unilaterally decided that they no longer wanted Ades to partake in the fruits and upside of Van Dale (whose sales had nearly doubled during the first four months of 2021) and, in order to divest Ades from the company, instigated a "freeze out" merger.[1]

The remedy of appraisal and payment was enacted to protect minority shareholders, such as the Petitioner, from oppression by majority shareholders by assuring such shareholder "fair and just compensation" when, as a result of certain corporate transactions (here, a "freeze out" merger initiated by the three majority shareholders), a minority shareholder's interests in a corporation are terminated, changed or limited by action of the majority. *See Anderson v. International Minerals &*

[1] In a separate action filed in this Court captioned *Ades v. Van Dale Industries, Inc., et. al*. (Index No. 656471/2021), Ades has invoked his rights under BCL 623(k) and is simultaneously seeking rescission of the freeze out merger because, among other things, there was no legitimate business purpose for the merger.

Chemical Corp., 295 N.Y. 343, 350 (1946). Petitioner here seeks a judicial appraisal, which is his right under BCL 623, because there can be no doubt that the "fair value" of his Van Dale stock as of the day prior to the alleged merger is significantly greater than the price offered to him for his shares – a price per share that was unilaterally established by Van Dale's three (3) controlling shareholders and timely rejected by Petitioner.[2]

Van Dale and its three remaining shareholders, however, seek to avoid scrutiny of their self-serving appraised value of Ades' shares and hope to prevent Ades from availing himself of his statutory remedy by alleging that Ades purportedly failed to make a timely surrender of his Van Dale stock certificate in accordance with BCL 623(f) – a certificate that Petitioner reasonably believes was never issued to him at the time of, or any time after, Van Dale's formation nearly forty (40) years ago.[3] Knowing this, just prior to the initiation of the freeze out merger process, the majority shareholders of Van Dale voted on by-laws (because the company never had by-laws during its 39 year existence) to include, among other things, indemnification provisions for its officers and

[2] The price per share was way below the "fair value" for Ades' shares because, among other things, (i) the alleged appraisals that formed the basis for the offer did not properly assess the fair value of the Company "on the day prior to the shareholders' authorization date" of the merger; (ii) the appraisals both improperly included DLOC and DLOM discounts; (iii) the information provided to JBV and Hilco by the Company from which the appraisals were prepared were not provided to Petitioner so that counter appraisals could be performed by Petitioner; and (iv) the valuation did not take into account the 15 – 20% annual growth as touted by the Company on its website, the recent uptick in sales of the Company and profits from 23 Mack, a company improperly spun off from the Company prior to the freeze-out merger. *See* Petition, ¶¶ 39-40.

[3] It is noteworthy that even though Van Dale is aware that Ades claims he was never issued a certificate in the Company, and although reference is made to that argument in its papers, Van Dale fails to annex any proof (i.e., a copy of that certificate or the stock ledger of the company) to demonstrate that certificates were actually issued to the Van Dale shareholders including Ades. Nor does Van Dale deny this allegation (which, for the purposes of this motion to dismiss, must be taken as true unless documentary proof is presented pursuant to CPLR 3211(a)(1) to dispel this allegation – which Respondent fails to do).

directors and an option granted to its directors to require a shareholder to provide a bond to the company in the event it is asked to replace or reissue a lost, misplaced or stolen stock certificate.

While the reasoning for the all-of-a-sudden need for by-laws was not revealed to Ades at the time they were proposed, it is now quite obvious why they were "needed". *First*, with regard to the indemnification, the directors knew that they would soon be embarking on a freeze out merger campaign and would be submitting a lowball offer to Ades to pay for his minority ownership interests. So the indemnification clause would now allow all litigation costs to be funded by the company. *Second*, with regard to the authorization to allow a director the discretion to require a bond, they knew that Ades did not have a certificate for his 35 shares, knew that a bond premium would be extremely expensive (i.e., at least $140,000) and knew that they would use a failure to deliver a bond as an excuse to block the issuance of a stock certificate and an appraisal proceeding under BCL 623. Thus, when Ades rejected the alleged "fair value" offer to purchase his shares, timely notified Van Dale of this rejection and, at the same time, notified the company that he could not locate his shares after a diligent search (and requested the issuance of a "new" certificate to simultaneously flip back to the company), Van Dale jumped on this opportunity, demanded a bond and claimed that a failure to deliver the bond (and have shares "reissued") were sufficient grounds for dismissal of this special proceeding. However, as explained herein, Van Dale's position is wrong on the facts, wrong on the law and wrong on the equities; this cross-motion has been brought by Van Dale solely to frustrate, impede and delay the legitimate exercise by Ades of long-established statutory rights enacted for the protection of minority shareholders.

While it is doubtful that the statutory *surrender* requirement even applies to the "shares" in question because it is very likely that those shares were never actually issued to the original

shareholders (including Petitioner) of this closely held corporation when (or after) it was formed thirty-nine (39) years ago, it is clear that, under the circumstances at hand, Ades acted reasonably and did everything required of him to comply with BCL 623(f). Indeed, as required by law, Ades, an octogenarian, performed a diligent search for his shares (which was very difficult for him to do during these Covid times), could not locate a certificate (which it is believed was never issued to him in the first instance) and timely notified Van Dale of that fact when he timely rejected the lowball offer made for his shares. However, as set forth above, instead of issuing a certificate to Ades so he could formally flip it back to Van Dale (or accept his notice as the tender of his certificate), Van Dale took the low road and demanded that, prior to the issuance of a certificate, Ades unnecessarily waste over $140,000 in premiums for a bond. Clearly, this was Van Dale's maneuver to try to stick Ades with an inadequate offer and use his known lack of a certificate to block him from invoking his statutory right under the BCL (which would clearly show this Court that his ownership interests are worth millions of dollars more than the amount being foisted upon him by his family members).

In any event, even if, *arguendo*, a certificate had actually been issued 39 years ago and Ades misplaced or lost that certificate, BCL 623(f) specifically affords to a court discretion to excuse non-delivery of the certificate upon a showing of "good cause." *See, infra*. BCL 623(f) has been applied liberally by the courts of this State to effectuate the equitable purposes of the appraisal statute in the absence of willful shareholder noncompliance or prejudice to the corporation. To the extent that there even was an arguable failure to make delivery here, Ades' good faith, diligence and timely compliance with every deadline imposed by BCL 623, coupled with Van Dale's bad faith in demanding that he (and no others) bond the "reissuance" of a certificate when they knew their uncle and cousin was, at all times since the inception of Van Dale, the owner of 35 shares of that company,

provides ample, indeed compelling, grounds for excusal. Van Dale has not only suffered no prejudice as a result of the alleged non-tender (and, indeed, Van Dale does not even make an attempt to argue prejudice in its papers), it is actually responsible for Ades' alleged failure to comply because there was no just reason for it to demand that Ades pay for and deliver a bond for a "replacement" certificate.[4]

The three majority shareholders of Van Dale created this situation when they decided to freeze Ades out; they must now live with the consequences of their actions and allow Ades to take discovery of the relevant finances of Van Dale, submit his own appraisal to this Court and be paid "fair value" for his shares.

Accordingly, Van Dale's cross-motion must be denied in its entirely and this Court should declare that Ades' dissenter's rights have been fully preserved and perfected.

THE FACTS

This special proceeding was commenced by Ades to determine his rights as dissenting shareholder of Van Dale, a New York closely held corporation with a mere four (4) shareholders, having its executive offices in this County. In the Petition filed with this Court, Ades seeks (a) a determination of his rights, as dissenting minority shareholder of Van Dale, and (b) to fix the value of his 35 shares of Common Stock (or 19.44%) of Van Dale.

Van Dale was established in or about 1982 (with Ades being one of its founding members). As of September 1, 2021, Petitioner, along with Maurice Setton (Ades' nephew), Jimmie Ades and

[4] We are sure that the corporate kit will reveal that no certificates were ever issued to the Van Dale shareholders and the original corporate kit should be produced for inspection.

Gabriel Ades, were the only shareholders in this closely held corporation.[5] Jimmie Ades and Gabriel Ades (who received their ownership interests from their father Albert Ades, who was also a founding member of Van Dale), are the cousins of the Petitioner.[6]

According to its website, Respondent is a leader in intimate apparel and foundations, including daywear, sleepwear, activewear and shapewear and manages private label and national brands in every distribution. Among the brands managed and/or licensed by Respondent are Steve Madden (madden girl), Lucky Brand, Anne Klein, Vince Camuto, Jessica Simpson, IZOD, Rampage and Dollhouse. The Company is also a key resource for Walmart, Kohl's and JC Penny.[7] According to its website, the Company has an annual growth rate of 15-20% per annum.[8] But in 2021, Van Dale was doing even better than that; in the first four (4) months of 2021, its sales increased by nearly 100%.[9]

First Notice of Meeting to Approve By-Laws

On or about June 3, 2021, a Notice of Meeting was delivered to the four shareholders of Van Dale at the direction of Maurice Setton. Among other things, the Notice of Meeting called a meeting on June 14, 2021 to adopt by-laws of the Company.[10] Among the clauses contained in the proposed by-laws were (i) indemnification provisions of the Directors and Officers of the corporation; (ii) indemnification provisions of non-officer employees of the corporation and (iii) a clause that provided that, in the case of a lost stock certificate, the corporation "may" require the stockholder to

[5] *See* Verified Petition dated November 11, 2021 ("Petition"), ¶ 14.
[6] Petition, ¶ 14.
[7] Petition, ¶ 15.
[8] Petition, ¶ 19.
[9] Affidavit of Alan Ades in Opposition to Cross-Motion ("Ades Aff."), ¶ 4, Exhibit B thereto.
[10] Ades Opp. Aff., ¶ 3, Exhibit A thereto.

post a bond sufficient to indemnify the corporation against any claim that may be made against it.[11]

On June 11, 2021, counsel for Petitioner wrote to Michael Mishaan, Esq., counsel for Van Dale, to advise that Petitioner intended to participate in the shareholders' meeting and, as offered in the notice, to participate via phone or videoconference. Counsel further requested that Mr. Mishaan arrange to have the phone and/or videoconference information sent to Petitioner in advance of the meeting to copy counsel with that information.[12]

That afternoon Mr. Mishaan responded to counsel's request and notified him that it was his understanding that the June 14, 2021 meeting had been postponed. Mr. Mishaan then informed Petitioner's counsel that he would forward more information to counsel about the meeting as he had it.[13]

On or about June 14, 2021, since "new" by-laws were being proposed, counsel for Petitioner asked Mr. Mishaan to provide Petitioner with a copy of the soon to be replaced by-laws of Van Dale.[14] Two days later, Mr. Mishaan responded by sending "a copy of the by-laws found in the Van Dale files" which consisted of only a partial set of form by-laws cut off at page 8. Mr. Mishaan explained in his cover email that he could not locate a resolution adopting those by-laws so he could not represent that the eight page partial document forwarded with his email was, in fact, the by laws of Van Dale or that they had ever been adopted.[15]

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[11] Ades Aff., ¶ 3, Exhibit A thereto.

[12] *See* Affirmation in Opposition to Cross Motion of Alan A. Heller, Esq. ("Heller Aff."), ¶ 3, Exhibit A thereto.

[13] Heller Aff., ¶ 4, Exhibit B thereto.

[14] Heller Aff., ¶ 5, Exhibit C thereto.

[15] *Id*.

Put another way, there was no record that Van Dale ever adopted by-laws (at or around the time it was organized in 1982 or at any time thereafter). Of significance, Mr. Mishaan's email confirmed that Van Dale never had by-laws or any provision therein during its thirty-nine (39) years of existence that addressed "indemnification of officers and directors" or "lost certificates" – clauses that Van Dale sought to adopt for the first time in June of 2021; nor did it have any provisions that allowed a director to require a shareholder to post a bond to indemnify Van Dale in the event a certificate was lost, stolen or damaged. It is now apparent (see below) that the sole reason for "need" to adopt "new" by-laws 39 years after its formation was to give its majority the "right" to demand, at their whim, that its minority shareholder (Ades) post a bond (at a cost of over $140,000) for a replacement certificate when Ades had no certificate to turn in to the corporation when processing secure his dissenters' rights.

First Meeting to Appoint a Director

On or about June 18, 2021, Van Dale sent Ades another Notice of Meeting scheduled to take place on August 10, 2021. This time, the purpose of the meeting was to elect a Director to serve as the sole member of the Board of Directors of Van Dale.[16] Unlike the previous notice of meeting, this notice did not affix a proposed by-laws and did not indicate that the parties will be voting on any by-laws for the corporation on August 10, 2021.[17]

At the August 10, 2021 meeting, Maurice Setton (Ades' nephew) was elected as the sole member of the Board of Directors of Van Dale.

[16] Ades Opp. Aff., ¶ 5, Exhibit C thereto.

[17] Ades Opp. Aff., ¶ 5.

Second Notice of Meeting to Approve By-Laws
and First Meeting to Appoint Additional Directors

On August 10, 2021, another Notice of Meeting was delivered to the shareholders at the direction of its newly elected sole director Maurice Setton. Among other things, the Notice of Meeting called a shareholders' meeting on August 23, 2021 to (i) adopt by-laws of the Company containing, among other things, the same indemnification and lost stock certificate clauses initially proposed in the by-laws circulated two months earlier and (ii) elect three (3) additional family members to the board of directors of Van Dale.[18]

Prior to the August 23, 2021 meeting, no governance document of the Company gave the Company discretion to require a bond prior to the issuance of a new certificate to replace a previously issued certificate that had been lost.[19]

On August 23, 2021, by 3 to 1 vote of the shareholders, the shareholders of the Company adopted the proposed by-laws annexed to the August 10, 2021 Notice of Meeting. Petitioner was the sole negative vote on the adoption of the proposed By-Laws.[20]

Also by 3 to 1 vote of the shareholders, at the August 23, 2021 meeting the shareholders voted to elect three additional individuals to the Board of Directors of the Company. Like his vote in connection with the by-laws, Petitioner was the sole negative vote on the vote to increase the size of the Board of Directors to four directors.[21]

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[18] Petition, ¶ 20. *See* initial Affidavit of Alan Ades ("Ades Initial Aff.") submitted with the Petition, Exhibit A thereto.

[19] Petition, ¶ 24.

[20] Petition, ¶ 27.

[21] Petition, ¶ 28.

The Notice of Special Meeting of Shareholders

On August 23, 2021, the very same day of the meeting that adopted first time By-Laws for the Company and increased the Board of Directors of the Company from one family Director to four family directors, another Notice of Meeting was delivered to the shareholders of the Company notifying all shareholders that a Special Meeting was going to take place on September 2, 2021.[22]

According to this August 23, 2021 Notice of Meeting, the purpose of the meeting was to consider and vote on a proposal to approve an Agreement and Plan of Merger (the "Merger Plan") between the Company and Van Dale Industries, Corp. (a corporation wholly owned by the three other shareholders of Respondent) and that Petitioner would be frozen out of this newly merged entity.[23] The Notice of Meeting provided that the business purpose for the freeze-out merger was the following:

> In connection with its determination to approve the Merger Agreement, the Board deliberated and concluded that the business of the Company would be best served with management of the Company and ownership being fully aligned, thereby avoiding all potential conflicts of interest based upon the current organizational structure, consisting of three employee-management shareholders and one non-employee non-management shareholder.[24]

No other purpose was provided in the Notice of Meeting.

The aforementioned alleged basis for the freeze-out merger of Petitioner was not a valid exercise of business judgment and/or a legitimate corporate purpose but was an illegitimate excuse to divest the Company of Petitioner – a 19.44% passive shareholder in that entity -- so that the

[22] Petition, ¶ 29. *See* Ades Initial Aff., Exhibit B thereto.
[23] Petition, ¶ 30. *See* Ades Initial Aff., Exhibit B thereto
[24] *Id*.

individual wealth of the remaining shareholders would be increased.[25]

At the September 2, 2021 meeting of the shareholders to vote on the freeze-out merger, Petitioner was the only shareholder of the four shareholders of the Company to vote no to the merger.[26]

Petitioner's Election of Dissent

On August 31, 2021, Petitioner timely sent the Company a Notice of Election pursuant to N.Y. Bus. Corp. Law § 623(a) exercising his dissenter's rights and demanding payment of the fair value for all of his 35 shares of the Company.[27]

The Merger Plan Was Approved by the Majority Shareholders

As hereinabove alleged, the Special Meeting of Shareholders was held (on September 2, 2021), and the Merger Plan was voted on and approved by the three majority shareholders (and sole post-merger shareholders) of the Company. Petitioner, who was being divested of his interests in the Company, was the sole negative vote to the freeze-out merger.[28]

As a consequence of the foregoing transactions, Petitioner was frozen out of a closely held company in which he held a 19.44% ownership interest for over 30 years.[29]

Upon information and belief, a Certificate of Merger was filed with the Secretary of State of the State of New York on September 2, 2021 and the merger allegedly became effective on that day.[30]

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[25] Petition, ¶ 31.
[26] Petition, ¶ 32.
[27] Petition, ¶ 33; Ades Initial Aff., Exhibit C thereto.
[28] Petition, ¶ 34.
[29] Petition, ¶ 35.
[30] Petition, ¶ 36.

Respondent's Offer to Petitioner

On September 3, 2021, one day after the shareholders' meeting to approve the alleged Merger Plan, the Company sent Petitioner a "Notice and Offer Pursuant to New York Business Corporation Law BCL 623" offering to pay Petitioner $222,287.15 for each one of his 35 shares, or an aggregate purchase price of $7,780,050.25.[31]

Petitioner's Rejection of Respondent's Offer

On September 27, 2021, in accordance with N.Y. Bus. Corp. Law § 623(g), Petitioner sent the Company a timely Notice of Rejection of Offer which, among other things, rejected the freeze-out price that the Company was willing to offer for Petitioner's Shares.[32]

While Petitioner was not required to give the Company a reason for his rejection of the offer, among the reasons for Petitioner's rejection were: (a) the alleged appraisals provided to Petitioner from JBV Business Valuation ("JBV") and Hilco Enterprise Valuation Services, LLC ("Hilco") did not properly assess the fair value of the Company "on the day prior to the shareholders' authorization date" of the merger; (b) the reports provided by JBV and Hilco both improperly included DLOC and DLOM discounts; and (c) the information provided to JBV and Hilco by the Company from which the appraisals were prepared were not provided to Petitioner so that counter appraisals could be performed by Petitioner.[33]

[31] Petition, ¶ 37; Ades Initial Aff., Exhibit D thereto.
[32] Petition, ¶ 38; Ades Initial Aff., Exhibit G thereto.
[33] Petition, ¶ 39; Ades Initial Aff., Exhibit G thereto.

The valuation also did not take into account the 15 – 20% annual growth as touted by the Company on its website, the recent uptick in sales of the Company and profits from 23 Mack, a company improperly spun off from the Company prior to the freeze-out merger.[34]

Accordingly, the Petitioner took the position that the fair value of the Shares materially exceeds the price fixed by the Company.[35]

Petitioner's Certificate of Shares of Common Stock

While pursuant to the technical requirement of N.Y. Bus. Corp. Law § 623(f), Petitioner was required to submit to the Company his certificate representing his 35 shares to the Company within one month of filing his Notice of Election, despite having exercised due diligence to find the stock certificate, Petitioner was not able to locate it.[36]

In fact, Petitioner is of the belief that a certificate representing his 35 shares in his closely held corporation was never issued to him at the time the corporation was formed 39 years earlier or at any time thereafter.[37]

Thus, in Petitioner's timely notice of rejection of Respondent's offer, on September 27, 2021 Petitioner wrote Respondent the following:

> 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).[38]

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[34] Petition, ¶ 40; Ades Initial Aff., Exhibit G thereto.

[35] Petition, ¶ 41.

[36] Petition, ¶ 42; *see* Ades Initial Aff., ¶ 7.

[37] Petition, ¶ 43; *see* Ades Initial Aff., ¶ 7.

[38] Petition, ¶ 44; *see* Ades Initial Aff., Exhibit G thereto.

By email from Maurice Setton to Petitioner dated September 27, 2021, Mr. Setton rejected Petitioner's submission of the Certificate and stated, among other things, the following:

> The Company acknowledges your demand that the Company either (1) issue a new certificate for your 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 your shares to the Company pursuant to New York Business Corporation Law (NYBCL) BCL 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.[39]

In other words, in an attempt to avoid its obligation under the New York Business Corporation Law to promptly pay Petitioner 80% of the offer, and knowing full well that Petitioner (like the other shareholders of this closely held family business) most likely never received a certificate for his Shares over 30 years ago when he became a shareholder of this closely held family owned Company, and knowing full well that there was no need for the Company to be indemnified against any third party claims vis-à-vis a claim to Petitioner's shares because the Company and its remaining three (3) shareholders knew full well that Petitioner never sold those Shares, Mr. Setton, Ades nephew, incredibly told Petitioner that he had to deliver to the Company a surety bond whose premium would exceed $140,000.[40]

[39] Petition, ¶ 45; *see* Ades Initial Aff., Exhibit H hereto.

[40] Petition, ¶ 46.

The alleged basis for this demand that Petitioner provide a bond to the corporation to secure a "re-issued" stock certificate was the clause adopted for the first time by the corporation one month earlier when by-laws were adopted by Van Dale. That clause, which stated that the corporation "may" require a bond (as opposed to it being an obligation for all shareholders at all times), was clearly put into play to give the new board leverage over Ades in the anticipated dissent to the freeze-out merger and appraisal proceeding. There was no other reason to include that clause in the company by laws.

No surety bond should have been required of Petitioner and Petitioner is sure that no surety bond was ever demanded at any time of other shareholders of the Company.[41]

On October 4, 2021, the Company wrote Petitioner again to notify him that, among other things, he purportedly failed to comply with his requirement of N.Y. Bus. Corp. Law § 623(f) to submit his certificate to the Company within one month following his dissent and that the Company had exercised its alleged right to deem his dissenter's rights lost.[42]

The claim by the Company that Petitioner did not timely submit his certificate to the Company was false, Petitioner did not lose his dissenter's rights, and the conduct by the Company in refusing to accept the September 27, 2021 letter as a timely submission of Petitioner's certificate was in bad faith, an act purely to harass Petitioner and avoid the required prompt payment to him of over $6,000,000 (80% of the offer price as required by the BCL) and contrary to the laws of the State of New York.[43]

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[41] Petition, ¶¶ 47-48.
[42] Petition, ¶ 49.
[43] Petition, ¶ 50.

Respondent has failed to make timely payment of advances due under N.Y. Bus. Corp. Law § 623(g)

Pursuant to N.Y. Bus. Corp. Law § 623(g), actual payment to Petitioner of 80% of Respondent's offer (*i.e.,* the $222,287.15 per share "Cash Merger Consideration") for Petitioner's 35 shares in the Company was to be "made by the corporation promptly upon submission of Petitioner's certificates."[44]

The September 27, 2021 notice should have been accepted by the Company as the timely submission of Petitioner's certificate and 80% of the Cash Merger Consideration should have been "promptly" delivered thereafter to Petitioner.[45]

Notwithstanding the requirements of N.Y. Bus. Corp. Law § 623(g), Respondent has been and continues to be delinquent in its payment obligation to Petitioner in the amount of $6,224,040.20 due as an advance for Petitioner's Shares.[46]

ARGUMENT

THE MOTION TO DISMISS SHOULD BE DENIED

a. The Relevant Standard on a Motion to Dismiss

When evaluating respondents' motion to dismiss the petition under CPLR § 3211 (a)(7), the court must accept petitioner's allegations as true, liberally construe them, and draw all reasonable inferences in his favor. *Phillips v. New York City Citywide Administrative Services*, 58 Misc. 3d 1225(A) (S. Ct. N.Y. Cty. 2017); *Nash v. City of New York*, 63 Misc. 3d 1210(A) (S. Ct. N.Y. Cty. 2019); *see also Carroll v. Seacroft, Ltd.,* 141 A.D.2d 726 (2nd Dept. 1988) (affirmed denial of

[44] Petition, ¶ 51.
[45] Petition, ¶ 52.
[46] Petition, ¶ 53.

motion to dismiss petition for judicial valuation pursuant to BCL 623). Dismissal is warranted only if the petition fails to allege facts that fit within any cognizable legal theory. *Id.* Pursuant to CPLR § 3211(a)(7), the proper standard on a motion to dismiss is failure to state a cause of action, not establish one. *Nash, supra.*

Measured in light of these standards, Defendant's motion to dismiss fails. As set forth below, each of Plaintiff's causes of action is amply supported by the facts and law -- particularly when measured in light of the standards applicable to motions to dismiss.

b. Good Cause Existed for any Alleged Non-Compliance with the Statutory Delivery Requirement of the Stock Certificate

In its cross-motion to dismiss, Van Dale argues that Ades somehow forfeited his dissenters' rights because he did not strictly comply with the BCL 623(f) requirement to submit his non-existent stock certificate to Van Dale within one month of his timely Notice of Election exercising his dissenters' rights. Van Dale is wrong.

BCL 623(f) provides in relevant part, as follows:

> At the time of filing the notice of election to dissent or within one month thereafter the shareholder of shares represented by certificates shall 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. 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***.

Emphasis supplied.

Here, there is certainly good cause for Ades' failure to timely deliver a stock certificate to Van Dale. As set forth above, Ades believes that thirty-nine (39) years ago, when Van Dale was formed, no stock certificates were issued in this closely held, family owned business. Moreover, in the years since then, no certificates were ever issued to him or, upon information and belief, to any other shareholder; and, we are certain, no bond was ever required of any shareholder to issue, re-issue or replace any lost certificates of any of these family members.

On September 27, 2021, in response to the offer made by Van Dale and its three remaining shareholders to Ades, Ades wrote the following:

> 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).

This should have sufficed. But, instead of issuing a stock certificate to Ades so he could officially flip it right back to the company, or deeming his letter as the submission of the stock certificate (and trigger the payment of 80% of the offer amount, or $6,224,040.20 to Ades as required by BCL 623(g)), Van Dale invoked newly enacted one-month old by-laws and a newly inserted bond discretion clause for "lost certificates" and demanded that Ades post a bond prior to the issuance of a certificate – at a premium cost to Ades of over $140,000. There is no doubt that the new by-laws and new option given to management to require a bond to replace "lost" certificates were ploys to obtain an unfair advantage over, and prejudice, Ades. Van Dale knew that the bonding expense would be exorbitant given the price they intended to offer Ades for his shares in Van Dale and knew that Ades would not kowtow to such a ridiculous and unnecessary bonding demand. So

by inserting the bonding clause into its new by-laws and invoking that clause even though there was no obligation to do so (i.e., the clause provides that Van Dale "may" require, not "must" require, the posting of a bond), Van Dale's board of directors knew that they would use Ades' refusal to lay out $140,000 in bond premiums to contest his dissenters' rights (and block his statutory right to an appraisal that would surely demonstrate that he was being shortchanged by millions of dollars). Put another way, the posting of a bond requirement was as being used as a sword against Ades, rather than a shield to protect the company against future claims.[47]

Surely Ades has demonstrated "good cause" for not having a stock certificate to deliver to the corporation – no certificate was ever issued to him (and, as such, none was found after a diligent search). Moreover, Van Dale has not, in any way, been prejudiced by the "delay" in turning the stock certificate. Indeed, Van Dale does not even make an attempt to claim or argue prejudice. Because there is none. Ades, on the other hand, will be severely prejudiced should he be precluded from invoking his statutory appraisal rights.

Albany-Plattsburgh United Corp v. Bell, 202 A.D.2d 800, 802-03 (3rd Dept. 1994), *aff'd as modified*, 85 N.Y.2d 948 (1995), is directly on point. In that case, like here, a notice of election to dissent was properly and timely served prior to the vote on the "freeze out" merger. The only issue was the defendant's failure to timely tender the share certificates themselves. The Third Department, in "excusing noncompliance with the statutory requirements 'for good cause shown'," held as follows:

[47] While the Respondent argues that the bond requirement is authorized by BCL 508(e), it fails to mention that it is an "option" to the company, not a "requirement". Thus, BCL 508(e), like the newly adopted by-laws of Van Dale, specifically says the board "may" require the owner to post a bond – not "must" require. So Van Dale, who knew at all times that Ades never had a stock certificate and, even if he did, did not transfer it to a third party, should have avoided the

> This authority should be liberally exercised when a reasonable excuse is presented and there has been no prejudice demonstrated. Here, the fact that defendant did not have possession of the certificates, or did not, despite having exercised due diligence to find them, know of their location, constitutes sufficient good cause to excuse his failure to tender the shares in a timely manner. No demonstrable prejudice having been shown by plaintiff, we find that defendant has not lost his dissenter's rights with regard to [the corporation].

Citation omitted.

This liberal exercise of excusing compliance for good cause shown has been adopted by other New York cases. *See Application of Davis*, 33 A.D.2d 1100 (4th Dept. 1970) (excused delay in absolute filing requirement of petition and held that dissenters rights were not lost because "good and sufficient cause", there was an "absence of prejudice" to the corporation and there was "substantial prejudice" to the stockholder); *Carroll v. Seacroft*, 141 A.D.2d 726, 728 (2nd Dept. 1988) (excused the delay in strict compliance with the timing of service of a notice of objection because there was "good and sufficient cause to excuse the delay and [the corporation] was not prejudiced thereby"); *In re Kunin*, 281 A.D. 635, 638 (1st Dept. 1953) (because Petitioner opposed the transfer from the start, gave respondent formal and timely notice of their opposition and even appeared, by counsel, in opposition at a stockholders' meeting, the failure to timely deliver the stock for notation was excused).

The First Department has also held that where, as here, the company has "frustrated" the shareholder "in the exercise of [his] rights as dissenting shareholders" that would suffice as a special circumstance to "warrant a departure from the strict requirements of [BCL] 623(a)." *Marvin Josephson Associates, Inc. v. Randeria*, 52 A.d.2d 523 (1st Dept 1976). Clearly where, as here, one month prior to the freeze out merger Van Dale added a clause by 3 to 1 (Ades) vote to a first time

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unnecessary burden imposed on Ades and dispelled with the need for a bond.

by-laws granting, among other things, an option to management to require a bond when a replacement certificate is requested and then exercise that option by demanding that Ades to post a bond (with an exorbitant six-figure premium) to receive a "replacement" certificate, epitomizes the frustration that gives rise to an excusable circumstance to warrant a departure from the stock delivery requirement of the BCL.[48]

The New York precedent has been utilized by a number of out-of-state courts with statutes similar to BCL 623 to preclude the forfeiture of dissenters' rights where, as here, a stock certificate was not delivered to the company.

Thus, in *Matter of Fair Value of Shares of Bank of Ripley*, 184 W. Va. 96 (1990), the Supreme Court of Appeals of West Virginia referenced, among other cases, *Sasseen, infra,* and *Application of Davis, supra,* and held that a dissenter's rights are not automatically forfeited based on the failure to timely tender stock for notation. The court held that "where a dissenting shareholder has otherwise complied with the provisions of [its statute], but has failed to timely tender his shares for notation as required [by the] statute, his failure will not terminate his dissenter's rights if the delay is insubstantial and the corporation is shown not to have suffered any prejudice." *Id.* at 102. *See also, Parrillo v. R.I.S.A.T., Inc.*, 2007 WL 1971523 (2007) (relying, in part, on *Albany-Plattsburgh, supra,* and "allowed the valuation proceeding [to] go forward without a tender of certificates for notation").

[48] It is noteworthy that the bonding option in the by-laws is only for "lost certificates" not for certificates that have never been issued.

Application of Wiedersum, 41 Misc. 2d 936, 938 (S. Ct. N.Y. Cty. 1964), referenced a number of times in Respondent's papers, is the sole reported New York decision wherein shareholder dissenter's rights were lost as a consequence of failure to tender certificates after a timely election to dissent. *Wiederstrom*, however, has no applicability to the matter at hand. In *Wiederstrum*, tender of stock was first attempted by the dissenting shareholders over six months after the statutory period had expired (while the tender here was attempted within the time frame set forth in BCL 623). The decision makes apparent, however, that the court's denial of judicial excusal was not based merely on the length of the delay, nor even the lack of any actual excuse but, more importantly, on the complete willfulness of the dissenter's non-compliance. Not only, according to the court, did the dissenters offer "no excuse" but the dissenter had been "cavalier" in attempting to relegate the procedural requirement of the statute to a "meaningless formality." The contrast between *Wiedersum* and the circumstances of the case before this court could not be more extreme. Here, rather than being cavalier, Ades timely contacted Van Dale to notify it that it had not been able to locate his certificate after a diligent search (and, in fact, would not have located it under all circumstances because it was most likely never issued to him in the 39 years he owned those shares). Ades asked for a certificate to be issued or, in lieu thereof, that the company deem his September 27, 2021 notification as the tender of the stock. In other words, Ades took all steps within his power to see that his certificate would be timely surrendered for notation and did not in any way consider the certificate tender as a "meaningless formality".

Rather than accept this, Van Dale imposed on Ades a hefty bond requirement – a requirement that (i) was not mandatory, (ii) was at the option of management (who had an incentive to hinder Ades' attempt to turn in a stock certificate so that his appraisal rights would be forfeited) and (iii)

was not part of the company's governance for its entire 39 years of existence. Other than to frustrate Ades, there was no reason to impose an obligation that would cost him $140,000+ in an up-front bond premium.[49]

Accordingly, if this Court somehow finds that there has been non-compliance with the surrender requirement of BCL 623(f), it is respectfully requested that such non-compliance be excused for good cause shown.[50]

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[49] While both *Local 381 Penson fund v. Chemical Bank*, 222 A.D.2d 415 (2nd Dept 1995) and *Marin-Trigona. v. Capital Cities/ABC, Inc.*, 145 Misc. 2d 405 (S. Ct. N.Y. Cty. 1989) both agree that a corporation "could" require a shareholder to provide a surety bond to indemnify the company against a claim relating to a lost stock certificate, they beg the issue. First, there is no dispute that the bond requirement is discretionary (and that is why the word "may" is used in BCL 508(e) and was used in the newly contrived by-laws). The issue in this case is that Van Dale knew it did not need to impose that requirement on Ades, who they all knew was one of four shareholders of the company and had been a shareholder for over 39 years. *Second*, while in *Local 381* the plaintiff claimed it never got the stock certificate that was issued by the defendant corporation, in the matter at hand, there is no allegation that the certificate was ever issued at all to the Petitioner. So, until Van Dale can prove that it actually issued and delivered a certificate to Ades, which it clearly has not, *Local 381* has no applicability to the matter at hand. But, if it somehow can, *Local 181* is still distinguishable from the matter at hand because the facts of this case clearly show that the bond requirement was a mere ploy to hinder and discourage Ades in his attempt to enforce his dissenters' rights under the BCL. *Martin-Trigona*, has no applicability to the matter at hand because it involved a crazed lawyer who commenced hundreds of pro-se litigations over the same issues; not a legitimate shareholder who was simply trying to enforce his dissenters' rights under the BCL.

[50] Respondents' reliance on the Pennsylvania and Wisconsin cases of *In re Glosser Bros., Inc*., 555 A.2d 129 (Pa Super Ct 1989) and *Pritchard v. Mead*, 455 N.W.2d 263 (Wis Ct. App. 1990) in support of its position that a dissenter's rights should be denied when the shareholder has failed to tender his shares for notation in accordance with the statutory time frame, are entirely misplaced. As stated by the West Virginia Supreme Court of Appeals in *Matter of Fair Value, supra,* when it distinguished those very same cases from the matter before it, "[i]n neither of these cases did the shareholders attempt to tender their shares. For example, in *Pritchard,* the court observed: 'As of the filing of this appeal, however, Pritchard had not submitted his stocks to the corporation for notation on them of his demand, nor does he offer any explanation for that omission.' 155 Wis.2d at 439, 455 N.W.2d at 267." Here, there is no dispute that Ades attempted to tender his shares well within the statutory time frame but was rebuffed by Van Dale who insisted on his procurement of a bond before it "reissued" his shares and accepted their tender.

Should this court somehow agree with the Respondent and hold that Ades should nevertheless have presented Van Dale with a bond at a premium cost of over $140,000 so that a "new" or "initial" certificate could be issued and immediately flipped to the corporation, then this court should grant the Petitioner a reasonable period of time to procure the bond so a certificate can be issued and delivered back to Van Dale. Indeed, in *Sasseen v. Danco Industries, Inc.*, 20 A.d.2d 657, 658 (2nd Dept. 1964), in allowing a reasonable time to cure, held as follows:

> It is undisputed that petitioners made their objection to the sale and their demand for payment of the value of their shares of stock, as required by section 20 of the Stock Corporation Law. They therefore were entitled to have their shares appraised and paid for in the manner provided in section 21 of that statute, were it not for the fact that they failed to make timely submission of their stock certificates to the corporation for notation thereon.

Because "denial of relief to petitioners would result in substantial prejudice to them," the Second Department gave the petitioner five (5) days from the date of entry of the order to deliver the stock certificates to the corporation for notation. *Id*. *See Application of Wood*, 103 N.Y.S.2d 110, 114 (S. Ct. N.Y. Cty. 1951) (court gave petitioners twenty days from the date of the decision to comply with the provisions of the statutes).

While we do not agree that Ades must post a bond, if such is the determination of the court then, like the Second Department in *Sasseen, supra,* and the New York County Supreme Court in *Application of Wood, supra*, it should grant Ades a reasonable amount of time to do so.[51]

[51] Ades has alleged in his Affidavit in support of the Petition (and throughout these papers) that he believes he was never issued a Van Dale certificate. *See* Ades Initial Aff., ¶ 7. While the Respondent addresses the issue in its papers, it did not do the obvious. It did not provide any proof that one was ever issued and it should not be allowed to do cure this deficiency in its Reply. *See Thomas v. Kane Const. Group Inc.,* 153 A.D.3d 1189 (1st Dept. 2017); *Esdaille v. Whitehall Realty Co*., 50 A.D.3d 251 (1st Dept. 2008).

CONCLUSION

For the foregoing reasons, Van Dales's cross-motion should be denied in its entirety and the Court should issue an Order declaring that Ades has effectively exercised dissenter's right with respect to his Van Dale shares.

Dated: New York, New York
March 4, 2022

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