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.	:	

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

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Respondent Van Dale Industries, Inc. ("Van Dale"), by its attorneys Herrick, Feinstein LLP, respectfully submits this Reply Memorandum of Law in further support of Van Dale's Cross-Motion to Dismiss the Petition filed in this action by Petitioner Alan Ades ("Alan") pursuant to CPLR §§ 404(a) and 3211(a)(7) ("Motion"), and for such other and further relief as the Court deems just and proper.

PRELIMINARY STATEMENT

Alan asks this Court to create new law in New York by holding that a shareholder seeking to enforce appraisal rights need not tender his stock certificates in conformity with BCL § 623(f) if doing so would require posting a bond to obtain replacement certificates in accordance with the corporation's bylaws and BCL § 508. According to Alan, these statutes do not apply if the shareholder believes that (i) compliance would be "extremely expensive" or (ii) the corporation's exercise of its rights was intended to impose obstacles to the shareholder's appraisal of his shares.

Of course, this is nonsense. Alan cites no legal authority finding "good cause" to excuse BCL § 623(f)'s certificate tender requirement based on burdens or expenses associated with valid corporate requirements. To the contrary, courts have consistently upheld a corporation's right to insist on posting of a bond as a condition to granting replacement stock certificates, and for good reason—the whole point of requiring a bond is that a corporation should not be compelled to risk liability for competing claims on its stock. *See, e.g.*, *Local 381 Pension Fund v. Chemical Bank*, 222 AD2d 415 (2d Dept 1995) (upholding corporation's insistence on undertaking as condition for granting replacement stock certificates necessary to participate in buyout).

This concern is especially heightened here in the context of a freeze-out merger, where (i) the corporation would be paying millions of dollars to an adverse litigant to repurchase his

shares, and (ii) the litigant was a business partner who had already acted in derogation of Van Dale's interests and undermined the trust and confidence of his co-shareholders by elevating personal interests above those of the corporation. Alan's conclusory assertion that Van Dale somehow "knew" that Alan had not transferred or sold his shares, and that therefore no undertaking was necessary, is unsupported and insufficient as a matter of law.

Nor is there any merit to Alan's attempt to manufacture a nefarious conspiracy out of Van Dale's updates to its corporate governance documents and procedures. These routine corporate actions, such as adoption of bylaws and appointment of directors, are as mundane as they are irrelevant to this proceeding. Alan was given timely notice of all transactions, and Alan does not allege that any corporate acts leading up to the merger were improper or inconsistent with applicable law.

ARGUMENT

I. Van Dale Offered to Purchase Alan's Shares at Fair Market Value

To distract from the lack of supporting legal authority, Alan falsely asserts that Van Dale enacted new bylaws in furtherance of an illicit scheme to offer a low purchase price for Alan's shares and then to trick Alan into forfeiting his appraisal rights. *See* Reply Affidavit of Maurice Setton ("Setton Reply Aff."), ¶ 3. To obtain a low purchase price, Alan claims that Van Dale's offer to purchase Alan's shares in connection with the merger was supported by valuations that included discounts for both lack of marketability and lack of control. *Id*. This is misleading—although the valuation reports calculate the value of Alan's shares subject to both marketability and control discounts ($6,578,000 by JVB Business Valuation ["JBV"] and $6,603,000 by Hilco Valuation Services ["Hilco"], the amount actually offered to Alan for his shares was $7,780,050.25. This amount exceeded both valuation reports' valuation of Alan's shares, because

Van Dale's actual offer only applied a discount for lack of marketability and disregarded any discount for lack of control. *Id.*; *see also* Setton Reply Aff., Exs. A & B.

Alan also claims that the information provided to JVB and Hilco was not provided to Alan so that counter appraisals could be performed. This is not true. At all relevant times, Alan has had unfettered access to request any financial information he desired concerning the appraisal of his shares, and in fact everything Alan requested was provided. *Id.* ¶ 4.

Alan also claims that the valuations failed to take into account Van Dale's annual growth, recent upticks in sales, and "profits from 23 Mack." None of this is true. Both appraisal reports considered management's five-year weighted revenue growth projections (*see id.*, Ex. A, p. 24; *id.*, Ex. B, p. 24). The purported "uptick in sales" in 2021 is attributable to the fact that for much of 2020, operations were shut down due to the pandemic. And 23 Mack Drive LLC had no profits—it exists solely as a vehicle for Van Dale to make tax efficient payments of salaries to owner-employees and to pay certain other expenses. *Id.* ¶¶ 5- 6. Alan's assertion that Van Dale's offer for his shares is below fair market value is therefore meritless.

II. Van Dale Demanded an Undertaking to Indemnify its Issuance of Replacement Certificates in Good Faith and in Accordance with BCL § 508

Alan's contention that Van Dale somehow "knew full well" that (a) Alan has never received a certificate for his shares, and (b) Alan had never sold his shares, is baseless. Indeed, it is precisely because Van Dale did *not* have sufficient knowledge or documentation of Alan's shares that it adopted bylaws requiring an undertaking to indemnify Van Dale for issuing replacement stock certificates. *Id.* ¶ 7. Nor does Alan cite any legal authority holding that a shareholder can be provided replacement stock certificates, much less payment for his shares, without first satisfying the corporation's demand for an undertaking.

Alan instead invites the Court to create two exceptions to BCL § 508:

First, Alan claims that a corporation may only enforce bylaws requiring an undertaking for replacement stock certificates if the corporation has reason to believe that the stock may have been sold to a third party. Alan does not explain how a corporation might determine whether it has reasonable grounds to question whether the stock had been sold or transferred; Alan's opposition papers only assert *ipse dixit* that Van Dale "knows certainly well" that his shares had not been sold, but fail to explain why this is so.

Second, Alan would have the Court hold that a corporation must first prove that it had previously issued stock certificates before it can demand an undertaking for providing replacement certificates. But whether stock certificates were previously issued is irrelevant to the policy behind BCL § 508 that a corporation should not have to assume liability for post-transaction disputes among purported shareholders.

Neither of Alan's proposed modifications to BCL § 508 has support in any case or legal authority, much less the statute's text. The cases Alan cites in arguing that "good cause" exists to excuse his non-tender of stock certificates are inapposite, because none involved a shareholder's refusal to post an undertaking for replacement certificates pursuant to the corporation's bylaws and BCL § 508. Thus, the court in *Albany-Plattsburgh United Corp v. Bell*, 202 AD2d 800 (3d Dept 1994) addressed only whether a shareholder's fruitless search for lost stock certificates constituted "good cause"—there was no issue of the shareholder's intentional refusal to post an undertaking.

Moreover, if the "good cause" language in BCL § 623(f) were interpreted in the manner Alan suggests to create an exception to BCL § 508, it would violate the canon of statutory interpretation to avoid unnecessary limitations on the statute's scope. *See Rocovich v. Consol. Edison Co.*, 78 NY2d 509 (1991) ("a statutory construction which renders one part meaningless

should be avoided"); *Lederer v Wise Shoe Co*., 276 NY 459, 465 (1938) ("[w]e do not by implication read into a clause of a rule or statute a limitation for which we find no sound reason and which would render the clause futile").

Finally, as a practical matter it is absurd for Alan to suggest that a purported $140,000 bond premium was somehow prohibitively expensive for him to exercise his appraisal rights. Not only would Alan be paid nearly $8 million for his shares, but Alan's net worth is believed to exceed $500 million. *See* Setton Reply Aff. ¶ 8.

III. Alan Should Not be Granted Additional Time to Tender Stock Certificates

Given that Alan's refusal to post an undertaking to obtain replacement stock certificates was intentional, the Court should not now grant Alan additional time to comply with his obligations under the BCL. *See Application of Wiedersum*, 41 Misc 2d 936, 938-39 (Sup Ct 1964) (holding that "cavalier relegation of the standards prescribed [in BCL § 623(f)'s predecessor]" justified forfeiture of appraisal rights). BCL § 623(f) is intended to grant a corporation repose after a reasonable period following a merger if stock certificates are not tendered, and Van Dale would thus be prejudiced if forced to engage in a delayed appraisal proceeding. Moreover, it would set dangerous precedent for the Court not to impose any consequence for a shareholder's willful non-compliance with the law by preserving his appraisal rights.

CONCLUSION

For the foregoing reasons, Van Dale respectfully requests that the Court enter an order: (i) pursuant to CPLR §§ 404(a) and 3211(a)(7), dismissing the Petition in this proceeding; and (ii) awarding Van Dale such other and further relief as the Court deems just and proper.

Dated: March 17, 2022
New York, New York

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