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

ALAN ADES,	:	Index No. 656471/2021
Plaintiff,	:	Hon. Laurence L. Love
-vs-	:	Mot. Seq. No. 001
VAN DALE INDUSTRIES, INC., MAURICE SETTON, ALBERT ADES, JIMMIE ADES and GABRIEL ADES,	:	
Defendants.	:	

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

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Defendants Van Dale Industries, Inc., Maurice Setton, Albert Ades, Jimmie Ades and Gabriel Ades (collectively "Defendants"), by their attorneys Herrick, Feinstein LLP, respectfully submit this Reply Memorandum of Law in further support Defendants' Motion to Dismiss the Complaint filed in this action by Plaintiff Alan Ades pursuant to CPLR 3211(a)(7) ("Motion"), and for such other and further relief as the Court deems just and proper.

PRELIMINARY STATEMENT

The central issue in this action is whether Van Dale Industries, Inc. ("Van Dale") had a legitimate business purpose for engaging in a freeze-out merger to buy out Alan Ades' ("Alan's") shares. That purpose can be distilled simply—in 2018, Alan's 50%-owned company A&E Stores, Inc. ("A&E"), while in financial distress, ordered goods from Van Dale (which Alan owned approximately 19%) and then refused to pay for those goods. Alan's co-shareholders in Van Dale — all of whom are family — requested that Alan make good on A&E's outstanding debt. Alan refused, putting his own personal interests above those of Van Dale. A&E subsequently liquidated, leaving Van Dale and other creditors holding debts to the tune of approximately one million dollars. Alan's treatment of Van Dale and other creditors of A&E presented conflicts of interest that have hamstrung Van Dale's collection efforts and threatened Van Dale's reputation, ability to secure financing and supply terms, and damaged employee morale. All of these issues have been recognized under New York law as legitimate business purposes for undertaking a freeze-out merger.

Alan's opposition papers consist largely of falsehoods. Alan did *not* forewarn Van Dale in advance that A&E was not creditworthy, nor did he attempt to prevent Van Dale in advance from engaging in credit transactions with A&E. Alan easily could have used his position of control over A&E to prevent it from placing orders from Van Dale. Instead, Alan had the gall to

blame Van Dale for engaging in the transactions, and he refused to take responsibility for A&E's debts, undermining any trust and confidence that Van Dale's other shareholders had in Alan as a co-shareholder and illustrating that Alan had no concerns beyond his own personal profit.

Nor is there any merit to Alan's claim that Van Dale lacked an evidentiary basis for perceiving a threat of potential harm. New York law does not require a corporation to wait until it is unable to secure financing or supplier credit before it is permitted to take action.

Alan ultimately relies on a single case preventing a freeze-out merger, in which a real estate holding company that engaged in no operations other than collecting rent was found not to be affected by a minority shareholder's divorce proceedings. That case is inapposite to Van Dale, which is a large company with international operations and wide-ranging relationships affected by its association with Alan. Moreover, the case Alan cited only reaffirms the liberal standard for permitting freeze-out mergers out of deference to a corporate board's business judgment. The Court should therefore grant Defendants' Motion in all respects.

ARGUMENT

Alan selectively cites language from old New York cases in an effort to suggest that the court must carefully scrutinize the business purpose behind the merger. While it is true that a freeze-out merger must be intended to benefit the corporation, rather than its remaining shareholders, courts have consistently held that this "corporate benefit" requirement does not impose a high hurdle. *See Alpert v. 28 Williams St. Corp*., 63 NY2d 557, 573 (1984) ("The benefit need not be great, but it must be for the corporation").

Alan does not dispute that eliminating conflicts of interest, improving morale, protecting financing, and optimizing supplier terms are legitimate business purposes for undertaking a

merger. Instead, Alan denies that his continued involvement as an owner of Van Dale implicated any of these issues. But this denial is neither supported by the law nor the record.

Alan's argument that Van Dale's concerns about employee morale, financing, and supplier terms are "speculative" is meritless. Van Dale's motion is supported by the affidavit of Maurice Setton, who is the principal charged with responsibility for Van Dale's day-to-day operations. Mr. Setton's affidavit details first-hand observations of the negative effect on employee morale caused by Alan's refusal to cause A&E honor its debts. *See* Affidavit of Maurice Setton, dated January 21, 2022 ["Setton Aff.," NYSCEF Doc. 12], ¶ 21; Reply Affidavit of Maurice Setton, dated March 17, 2022 ["Setton Reply Aff."], ¶ 7. Mr. Setton's affidavit also details Van Dale's reliance on its reputation to secure financing and favorable supplier terms. *See* Setton Aff. ¶ 23; Setton Reply Aff. ¶¶ 8-9. Although Van Dale's association with Alan had not yet manifested any specific supplier or financing issues that Van Dale was aware of, that does not mean that Van Dale's concerns were unfounded or speculative. Nor was Van Dale required to wait until it had suffered negative consequences before it could take actions to prevent future harm.

Alan's argument that Van Dale has not shown *actual* harm to its financing and supplier relationships arising from its association with Alan is a "straw man." Whether this harm had yet manifested is beside the point. Because Mr. Setton's affidavit is evidence of what the Board reasonably perceived as *potential* harm to Van Dale, rather than as evidence of actual harm, the affidavit cannot be disregarded as speculative. None of the cases Alan cited involving speculation held that a Board's apprehension of potential harm was impermissibly speculative to justify a freeze-out merger; indeed, none factually involve a freeze-out merger. *See Silverstein v. Westminster House Owners, Inc.*, 50 A.D.3d 257, 258 (1st Dept 2008) (granting motion to

dismiss claim for breach of fiduciary duties against coop board premised on "speculative allegations … [that] lack an evidentiary basis") (refusal to authorize sale of plaintiff's coop shares); *Costantino v. Webel*, 57 A.D.3d 472, 472 (2d Dept 2008) (granting summary judgment motion dismissing complaint where "plaintiff could not identify the cause of her fall without engaging in speculation") (personal injury case); *Lopez v. Yannotti*, 24 A.D.2d 758, 759 (2d Dept 1965) (reversing judgment where police officer's testimony opining on the direction and speed of automobiles involved in collision were insufficiently supported by facts and were, "in effect, mere speculation.") (automobile accident).

Alan does not dispute that eliminating conflicts of interest among owners, improving employee morale, and protecting creditworthiness are all proper, independent business purposes. Alan instead argues there is insufficient evidence these purposes were served by the merger. Alan contends that the true purpose of the merger was to remove Alan so that the remaining shareholders could "keep for themselves all of the profits and enormous financial upside of this highly prosperous company" (Alan Aff. ¶ 3).

Alan is incorrect that the merger lacked a legitimate purpose or that Van Dale's owners intended to keep Van Dale's financial upside for themselves. To the contrary, Van Dale offered to compensate Alan in full for the "financial upside" of his shares. In connection with the merger, Alan's shares were to be redeemed for an aggregate cash purchase price of $7,780,050.25, an amount that was supported by two independent appraisals of the shares' Fair Market Value. *See* Alan Aff., Ex. B, p. 7. These appraisals took into account valuation multiples under a market valuation approach and five-year discounted projected cash flows under an income valuation approach, which were intended to incorporate projected future profitability of

the business (aka, "the financial upside"). *See id.* at pp. 19-28. Alan's claim that Van Dale's owners intended to keep this future profitability to themselves ignores these facts.

Alan's attempt to portray Van Dale's business justification for the merger as an after-the-fact concoction is likewise meritless. The primary event driving the Board's determination that Van Dale's then-current organizational structure posed potential conflicts of interest and misalignment between ownership and management was Alan's failure to repay approximately $89,000 in goods ordered from Van Dale by his 50%-owned company, A&E Stores, Inc. Alan does not deny that he knew this receivable existed, that he could have paid it, and that he chose not to pay it. Setton Reply Aff. ¶ 2. Although Alan disputes that the receivable could have caused financing, supply, and morale issues because (a) he was not told about these issues, and (b) the receivable represented a small percentage of Van Dale's revenues, these arguments miss the point. Van Dale generally did not discuss financing, supply and employee morale issues with Alan, who was a non-employee owner. *Id*. And it was not the size of the unpaid A&E debt that caused alarm at Van Dale; it was Alan's behavior, particularly his willingness to profit at the expense of Van Dale. *See id*. ¶ 3.

Alan's behavior caused legitimate concern among Van Dale's Board that Van Dale's access to financing and favorable supply terms could be negatively impacted. While this negative impact was not 100% certain to manifest, the Board's concern was far from mere speculation. Van Dale's ability to secure financing and supplies on favorable terms relies heavily on its unblemished record and reputation for honoring its obligations. Unique in its industry, Van Dale's obligations are not secured by any personal guarantees from its owners, including its nearly $50 million line of credit. Thus, banks and suppliers evaluating financing with Van Dale must base their decisions on Van Dale's assets, track record, and reputation. The Board

perceived at the time it approved the merger that a fellow owner such as Alan failing to pay for goods ordered from Van Dale would surely provoke questions in the minds of bankers and suppliers, regardless of the amount of those goods. *See id.* ¶¶ 8-10.

Alan falsely claims that he attempted to forewarn and discourage Van Dale from sending goods to A&E on credit. *See* Alan Aff. ¶¶ 11-12. First, Alan does not identify who at "Van Dale" he told this to, nor most importantly does he indicate ***when*** it was said. But even if Alan somehow warned someone at Van Dale, it could not have been until approximately January 2019, when Maurice first asked Alan for assistance in getting payment for the past due receivable (which at that point was approximately $160,000). But by that point, Van Dale had already stopped accepting new orders from A&E. Second, Alan was the 50% owner and CEO of A&E. If Alan truly believed that engaging in business with A&E was not in Van Dale's interests, then Alan could easily have prevented A&E from placing orders from Van Dale in the first place. But Alan lacked the incentive to prevent the transfer of goods from Van Dale (which he owned 19%) to A&E (which he owned 50%), and he lacked the scruples to take personal responsibility when A&E refused to pay. Instead, Alan stood by and allowed A&E to rack up large debts—with full knowledge that A&E lacked the resources to pay them—without attempting to intervene or warn Van Dale until it was too late. *See* Setton Reply Aff. ¶¶ 4-5.

Alan also attempts to muddy the record by suggesting that the true intention of the merger was to avoid inquiry into 23 Mack Drive LLC, an entity which was formed in 2017 for the sole purpose of paying a portion of Van Dale's salaries to its owner-employees to optimize tax efficiencies and to pay certain other Van Dale expenses. Alan is wrong that 23 Mack Drive LLC was a "spin off" of Van Dale's business; as Alan knows 23 Mack Drive LLC has no business operations. For every dollar paid from Van Dale to 23 Mack Drive LLC, the salaries of

Van Dale's owner-employees were reduced commensurately. The net effect of this structure was neutral to Van Dale, which only paid slightly more total compensation in 2018 ($3,658,308) when 23 Mack Drive LLC first came into existence than in 2017 ($3,410,770). Although compensation to Van Dale's owner-employees increased between 2018 and 2019/2020, those same total salary increases would have occurred without 23 Mack Drive LLC. Alan was not an employee of Van Dale and did not receive salary, so Alan had no reason to share in any payments through 23 Mack Drive LLC. Aside from paying the salaries of Maurice, Jimmie, and Gabriel and various other expenses in a tax-efficient manner, none of Van Dale's revenues were ever transferred to 23 Mack Drive LLC. All of this was explained to Alan by Van Dale's accountant and is reflected as salaries in the spreadsheet Alan annexed to his affidavit. *See* Alan Aff., Ex. D [NYSCEF Doc. 23]). More importantly, the salaries paid by 23 Mack Drive LLC were listed as salaries in the valuations supporting Van Dale's offer to purchase Alan's shares. *See* Setton Reply Aff. ¶ 6. In sum, 23 Mack Drive LLC is completely irrelevant to the merger or the business purpose therefor.

Alan's attempts to distinguish the cases cited by Van Dale in support of this Motion all follow the same pattern—Alan concedes that each case presented legitimate corporate purposes for a merger, but argues that those purposes were supported by an evidentiary basis lacking from Van Dale's merger deliberations. *See* Opp. Mem. [NYSCEF Doc. 24], pp. 17-20. Yet Alan ignores the uncontroverted fact that the Notice of Shareholder Meeting to approve the merger set forth the business purpose for the merger, and likewise ignores the facts submitted in Maurice's affidavit in support of this Motion (summarized above). *See generally* Setton Reply Aff. Alan can only disparage Van Dale's stated business purpose for the merger as "speculation," "buzz words," and "not plausible." But, because he was not present during the Board's deliberations

and is not actively involved in the management of the company, Alan is in no position to refute the stated business purpose for the merger.

Alan relies on a single case, *Van Horne v Ben-Dov*, in support of his "pretextual business purpose" argument, but it is unavailing. In *Van Horne*, the court noted that freeze-out mergers "are not difficult to effectuate," and that "court have been liberal in permitting them." *See* Opp. Mem. [NYSCEF Doc. 24], Ex. A. "So long as the corporation can articulate any valid business purpose for the freeze-out, the court will defer to its business judgment and permit it." *Id*. However, the court drew the line at "rank pretext," where the corporation asserted for the first time after the merger that the merger's purpose was to avoid entanglement in a divorce proceeding involving the minority owner. The court rejected the argument that the soon-to-be-ex-wife of a shareholder of the subject company might become a shareholder and thereby have a negative impact on the corporation, because the corporation existed solely as a real estate holding company whose operations were limited to collecting rent. *Id*. By contrast here, Van Dale is a large company with dozens of employees that does business internationally with suppliers, distributors and retailers in connection with its licensing agreements for branded women's intimate apparel. In the years leading up to the freeze-out merger, Van Dale was engaged in collections efforts against a company owned 50% by Alan, whose reputation in Van Dale's industry threatened Van Dale's access to favorable financing and supplier terms, as well as its employees' morale. These conflicts of interest were considered by the Board at the time of the merger and were expressly stated in the Notice of Shareholder Meeting. *See* Setton Reply Aff. ¶¶ 7-10. While Alan may take issue with the Board's perception of his threat to Van Dale, the court in *Van Horne* cautioned that where a bona fide corporate benefit has been articulated the court should "defer to management's business judgment." That is what the Court should do

here — defer to the business judgment of Van Dale's management-aligned shareholders and dismiss the Complaint in its entirety with prejudice.

CONCLUSION

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

Dated: March 17, 2022
New York, New York

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