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OF THE
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Re: *United Brotherhood of Carpenters Pension Plan v. Fellner*
C.A. No. 9475-VCN
Date Submitted: November 14, 2014

Dear Counsel:

Petitioners¹ are trust beneficiaries who collectively hold a 78.61% beneficial interest in each of Nominal Defendants Trade Street Property Fund I, LP Liquidating Trust (the “Master Trust”), TSPF Millenia Property Liquidating Series Trust (the “Millenia Trust”), and TSPF Stock Series Trust (the “Stock Trust” and with the Millenia Trust, the “Series Trusts”). They ask the Court to remove,

¹ Petitioners are United Brotherhood of Carpenters Pension Plan, Carpenters Labor Management Pension Fund, Southwest Carpenters Pension Fund, Florida UBC Health Fund, and South Florida Electrical Workers Pension Plan and Trust.

pursuant to 12 *Del. C.* § 3327, BSF-TSC GP, LLC (“BSF-TSC”) as trustee of the Master Trust and Michael J. Fellner (“Fellner” and with BSF-TSC, “Respondents”) as trustee of the Series Trusts. They further seek a declaratory judgment that Fellner has acted with gross negligence or willful misconduct in his role as the Millenia Trust’s trustee, supposedly entitling Petitioners subsequently to vote, pursuant to the trust agreement and independently of Section 3327, on his removal.

Respondents and Nominal Defendants have moved to dismiss Petitioners’ Amended Petition for Removal of Trustees (the “Petition”) for failure to state a claim.

I. BACKGROUND

A. Formation of the Trusts

Petitioners’ status as trust beneficiaries can be traced to their 2008 purchase of limited partnership interests in Trade Street Property Fund, I, L.P., formerly a Delaware limited partnership (the “Limited Partnership”).² BSF-TSC, which is

² The facts set forth herein are drawn from the Petition.

controlled by Michael Baumann (“Baumann”),³ managed the Limited Partnership as its general partner.

In June 2012, BSF-TSC converted the Limited Partnership into a publicly traded Real Estate Investment Trust (the “REIT”). The Limited Partnership exchanged its ownership interests in various entities for 2,904,910 REIT common shares, each valued at \$18. As a result, these shares, along with an indirect interest in two adjoining parcels of real estate (together, the “Millenia Property”), were the Limited Partnership’s only primary assets. Accordingly, the Limited Partnership entered into a Plan of Liquidation and Liquidating Trust Agreement (the “Plan”), whereby its assets were transferred to the Master Trust. BSF-TSC was named trustee and the former limited partners were designated as beneficiaries.⁴ The Master Trust was to manage the completion of the construction of an apartment project on one of the Millenia Property parcels, before selling the two parcels for cash and distributing the proceeds to the trust’s beneficiaries (the “Millenia Business Plan”).

³ Baumann is not a party to this litigation.

⁴ Petitioners became beneficiaries of a 78.61% interest in the Master Trust.

BSF-TSC subsequently divided the Master Trust's assets among three series trusts, with the Millenia Trust and the Stock Trust holding 98.5% of the Master Trust's total equity value. The Millenia Trust received the Millenia Property, and the REIT common stock was placed in the Stock Trust. BSF-TSC appointed Fellner, allegedly a close friend of its controller Baumann, as the trustee of both.⁵

B. Petitioners' Concerns

1. Fellner's Lack of Independence from BSF-TSC

According to Section 2.2(c) of the Plan, BSF-TSC was responsible for selecting a trustee for the Millenia Trust "who is not affiliated with and is independent of the [Limited] Partnership and [BSF-TSC]." However, BSF-TSC, which was controlled by Baumann, selected Fellner. While Fellner's relationship with Baumann alone may not disqualify him as a trustee, Petitioners allege that his actions (and non-actions) have confirmed his lack of independence and unfitness.

⁵ The relevant trust agreements are the Plan, the Series Trust Agreement of TSPF Millenia Property Liquidating Series Trust (the "Millenia Trust Agmt."), and the Series Trust Agreement of TSPF Stock Series Trust (the "Stock Trust Agmt.").

2. Departure from the Millenia Business Plan

As trustee of the Millenia Trust, Fellner “[agree]d to serve . . . in accordance with the terms of the Plan and the [Millenia Trust agreement].”⁶ The Plan initially envisioned the completion of the Millenia Business Plan. However, Fellner also had “full discretion to review the Millenia Business Plan and make modifications to the same in any manner deemed appropriate . . . [that he] believe[d would] generate the best results in the shortest period of time for the Beneficiaries”⁷

Fellner did depart from the Millenia Business Plan on December 3, 2012, when he caused the Millenia Trust to sell its interest in the Millenia Property to the REIT in exchange for REIT common stock valued at \$18 per share and REIT Class A preferred shares valued at \$100 per share (the “December 2012 Transaction”). Fellner accepted the \$18 valuation without the benefit of a fairness opinion.

Just over a year later, the REIT (of which Baumann had been CEO and was a significant stakeholder) announced that it had reached an agreement to

⁶ Millenia Trust Agmt. § 1.2 (Pet. Ex. B).

⁷ *Id.* § 2.3.

repurchase the Class A preferred shares at approximately \$45 per share (the “Proposed Repurchase”).⁸ Fellner agreed to the Proposed Repurchase’s binding term sheet, which would have resulted in a 55% diminution in value of the preferred stock from the time of the December 2012 Transaction. The Proposed Repurchase was never consummated. However, nearly five months after the December 2012 Transaction, the REIT’s common stock was being offered to the public for \$10 per share, and by September 30, 2013, it was valued below \$7 per share.

II. ANALYSIS

This Court will only grant a motion to dismiss for failure to state a claim if “[Petitioners] would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.”⁹ When making this determination, the Court accepts all well-pleaded factual allegations in the Petition as true and draws

⁸ Baumann is no longer the REIT’s CEO. However, Petitioners allege that he was involved with the Proposed Repurchase, which would have benefited him.

⁹ *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002) (internal quotation marks omitted).

every reasonable inference in Petitioners' favor.¹⁰ Vague allegations are considered well-pleaded so long as they provide Respondents with notice of Petitioners' claims.¹¹ At this stage, "[Petitioners are] not required to plead evidence. Rather, [they] need only state a claim upon which relief can be granted."¹²

*A. Counts II and III Cannot Be Dismissed*¹³

Count II seeks removal of Fellner from both Series Trusts while Count III seeks removal of BSF-TSC from the Master Trust. Both counts rely on the Court's

¹⁰ *Id.* at 896-97.

¹¹ *Id.* at 896.

¹² *Balin v. Amerimar Realty Co.*, 1993 WL 542452, at *4 (Del. Ch. Dec. 23, 1993).

¹³ Respondents argue that a forum selection clause in the Millenia Trust Agreement requires Petitioners to bring their claims in the State of Florida, Miami-Dade County. *See* Millenia Trust Agmt. § 6.1. However, while a

beneficial owner [of a trust] . . . may consent to be subject to the nonexclusive jurisdiction of the courts of . . . a specified jurisdiction[,] . . . a beneficial owner who is not a trustee may not waive its right to maintain a legal action or proceeding in the courts of the State [of Delaware] with respect to matters relating to the organization or internal affairs of a statutory trust.

12 *Del. C.* § 3804(e). This dispute relates to "the organization or internal affairs of a statutory trust." Accordingly, the forum selection clause does not require that this dispute be litigated elsewhere.

power to remove trustees pursuant to 12 *Del. C.* § 3327. The Court may remove a trustee on petition from a beneficiary if:

- (1) The trustee has committed a breach of trust; or
- (2) A lack of cooperation among co-trustees substantially impairs the administration of the trust; or
- (3) The court, having due regard for the expressed intention of the trustor and the best interests of the beneficiaries, determines that notwithstanding the absence of a breach of trust, there exists:
 - a. A substantial change in circumstances;
 - b. Unfitness, unwillingness or inability of the trustee to administer the trust properly; or
 - c. Hostility between the trustee and beneficiaries that threatens the efficient administration of the trust.¹⁴

The Court's removal power is ancillary to its "plenary equitable power over the supervision of trusts."¹⁵ "A conflict of interest is an appropriate ground for the removal of a trustee."¹⁶ Further, a "trustee, as a fiduciary, owes the beneficiaries

¹⁴ 12 *Del. C.* § 3327.

¹⁵ *In re Unfunded Ins. Trust Agreement of Capaldi*, 870 A.2d 493, 496 (Del. 2005).

¹⁶ *Gans v. MDR Liquidating Corp.*, 1991 WL 114514, at *3 (Del. Ch. June 25, 1991).

the duty of loyalty and must exclude all self interests.”¹⁷ Trustees of statutory trusts owe general common law duties to their beneficiaries “[e]xcept to the extent otherwise provided in the governing instrument of a statutory trust”¹⁸

The relevant trust documents here provide limited protection for a trustee for actions taken in good faith “unless caused by or arising from *gross negligence, willful misconduct, fraud or any other breach of fiduciary duty* of the [trustee] or any of its employees, agents, representatives or attorneys.”¹⁹ Actions taken while operating under a conflict of interest would likely breach a duty of loyalty.

Both Counts II and III state claims under 12 *Del. C.* § 3327(b). According to the Petition, Baumann is BSF-TSC’s owner and controlling member. BSF-TSC, through Baumann, is charged with administering the Master Trust’s assets. In that role, BSF-TSC (through Baumann) created the Series Trusts and appointed Fellner, Baumann’s friend, to manage those entities. Petitioners allege that Baumann appointed Fellner because of the influence he would be able to exert over his

¹⁷ *Id.*

¹⁸ 12 *Del. C.* § 3809.

¹⁹ Millenia Trust Agmt. § 3.1(d); Stock Trust Agmt. § 2.1(d) (Pet. Ex. C); Plan § 5.1(d) (Pet. Ex. D) (emphasis added).

appointee. Fellner subsequently agreed to a series of transactions with the REIT (of which Baumann had been CEO), which if consummated, would have enriched Baumann, at the Petitioners' expense. One could infer that Baumann created the Series Trusts in an attempt to cleanse planned self-dealing transactions through approval by an "independent" trustee. Taking this inference in Petitioners favor, it is reasonably conceivable that the Court might later deem BSF-TSC unfit to serve as the Master Trust's trustee.

Further, Petitioners have alleged not only that Fellner is a friend of Baumann, but that his actions while serving as trustee have demonstrated his lack of independence. Accepting the inference that Fellner agreed to transactions to benefit Baumann, at the beneficiaries' expense, it is reasonably conceivable that the Court could later deem him unfit to serve as trustee of the Series Trusts. While it is unclear exactly how Fellner himself would be self-interested in the transactions to which he agreed, Respondents and Nominal Defendants are on adequate notice of Petitioners' allegation that Fellner acts as a surrogate for Baumann.

B. Count I Cannot Be Dismissed

If Fellner approved the December 2012 Transaction and the Proposed Repurchase with the intent to enrich Baumann at the expense of the Millenia Trust's beneficiaries, then he could be charged with willful misconduct.²⁰ "Willful misconduct is one standard for evaluating whether a fiduciary breached the duty of loyalty by acting in bad faith."²¹ Therefore, Count I, seeking a declaration that Fellner's conduct is the product of gross negligence or willful misconduct, cannot be dismissed.²²

²⁰ Thus, it is not necessary to reach the question of whether his conduct amounted to a breach of the duty of care.

²¹ *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. 2012).

²² The Millenia Trust Agreement allows for removal of the trustee by a 75% vote of beneficiaries if the trustee is "found by a court of competent jurisdiction, in a final, non-appealable judgment, to have been guilty of gross negligence, willful misconduct or fraud in connection with its serving as Designated Series Trustee." Millenia Trust Agmt. § 3.7. Now is not the time to determine the import of the term "guilty" as used in the agreement. Further, while the vote is conditioned upon the entry of a "final, non-appealable judgment," the Court can address that issue in the first instance at the appropriate time.

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III. CONCLUSION

Because it is reasonably conceivable that Petitioners could support their claims, Respondents and Nominal Defendants' Joint Motion to Dismiss is denied.²³

IT IS SO ORDERED.

Very Truly yours,

/s/ John W. Noble

JWN/cap

cc: Ronald L. Daugherty, Esquire
Register in Chancery-K

²³ With the conclusion that the Petition cannot be dismissed for failure to state a claim, there is no need, at this stage, to address all of the specific forms of relief that Petitioners have identified.