IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GARY KOSSEFF,	)	
Plaintiff,	)	
v.	)	C.A. 188-N
JAMES CIOCIA, et al.,	)	
Defendants.	)	
and	)	
GILMAN & CIOCIA, INC.,	)	
Nominal Defendant.	)	

MASTER'S REPORT

Date Submitted: April 22, 2005
Additional Presentation: July 27, 2005
Draft Report: July 29, 2005
Final Report: August 3, 2006

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GLASSCOCK, Master

On August 8, 2002 nominal defendant Gilman & Ciocia, Inc. ("G+C") entered an Agreement ("the Agreement") that resulted in a change in the size and composition of the board of directors of G+C, resulted in a change in the CEO, and granted an option to purchase a substantial part of the revenue-producing assets of G+C to a group headed by the departing CEO, director-defendant Thomas Povinelli. The Agreement also terminated a proxy solicitation undertaken by a group of shareholders (the "Concerned Shareholders") which included defendants James Ciocia[1], Michael P. Ryan, Kathryn Travis and Steven Gilbert. Ciocia, Povinelli and Travis were members of the six-member board of directors that undertook the Agreement.

The plaintiff, Gary Kosseff, is a shareholder of G+C. He alleges that the defendant board members breached their fiduciary duties to the corporation in approving the Agreement. He brings this suit derivatively. Rather than answering, the defendants have moved to dismiss under Chancery Court Rules, Rule 12(b)(6).[2] The following facts are taken from the amended complaint and its exhibits.

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[1]Ciocia was a founder of G+C and served as CEO until 2000, when Povinelli assumed that post.

[2]After the defendants moved to dismiss the initial complaint, the plaintiff filed an amended complaint. The defendants again moved to dismiss. This report involves the defendants' motion to dismiss the amended complaint.

I. FACTS

G+C is in the business of providing tax preparation and financial planning services to individuals. At the time of the acts complained of, G+C offered these services at 140 offices in 16 states. On August 5, 2002 the Concerned Shareholders group solicited proxies to achieve two results: to expand the board of directors to include Cohen and Gilbert, and to replace Povinelli as CEO with Ryan. According to the complaint, the proxy statement "highlighted" the following in its paragraph headings:

> a) The company's stock has significantly underperformed its competition; b) The company's net income has declined during a period where revenues have almost tripled; c) Despite record revenues, the company's cash flow from operations has declined by over 52% from 1998; d) While its debt level has grown dramatically; and the company's core business has performed worse than the overall results suggest.[3]

On August 8, the company (together with the proxy battlers) entered into the Agreement[4], withdrawing the proxy solicitation. The Agreement achieved both the aims of the proxy solicitation: The board was expanded to include Cohen, Gilbert and Ryan,[5] and Ryan replaced Povinelli as CEO. CFO David Puyear also agreed to resign. The Agreement contained other provisions, however, that form the gravamen of the instant

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[3]Amended Complaint at ¶42.

[4]The Agreement is attached as an exhibit to the Amended Complaint. *See, e.g.*, Orman v. Cullman, Del.Ch., 794 A.2d 5, 16 (stating that Court may consider documents integral to and incorporated in complaint, in considering motion to dismiss).

[5]At the time the proxy solicitation was commenced by the filing, with the SEC, of the preliminary solicitation on July 1, 2002, Ryan was a director. According to the complaint, he "was removed as director" on July 17, 2002. He was then reinstated pursuant to the Agreement.

suit: The Agreement provided that the Concerned Shareholders would receive up to $250,000 for their fees and expenses in connection with the proxy solicitation;[6] provided for releases of liability for all the parties, including the company and Povinelli; and most significantly, provided that Povinelli and retiring CFO Puyear and other members of management allied with them (the "Povinelli group") were permitted to purchase certain G+C offices producing up to $25,000,000 in annual revenue. The purchase price for the offices selected by the Povinelli group was to be 30% of annual revenues attributable to offices with a positive EBITDA, and 25% of revenues attributable to offices which did not have a positive EBITDA. Pursuant to the Agreement, if the Povinelli group did not exercise this option to purchase, Povinelli and Puyear were entitled to one year's severance pay. On November 26, 2002, that portion of the Agreement permitting the Povinelli Group to exercise its purchase option was consummated by the Asset Purchase Agreement (the "APA"). The Povinelli group purchased offices accounting for $17,827,000 in annual revenue, or 19.29% of the total G+C revenue, under the terms set forth in the Agreement.

The amended complaint is oddly silent about the actions of the G+C board of which it complains. There is no allegation as to when, or if, the board met to consider the Agreement (signed on behalf of the corporation by Ted H. Finkelstein, as "General Counsel & Vice President") or the APA, and if it did meet, and did vote, what its vote

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[6]The amended complaint alleges that the parties agreed to reimburse "defendant Ryan"--¶40--but the Agreement itself refers to reimbursement of the Concerned Shareholders.

was. The complaint also refers to the Agreement and the APA interchangeably. It is difficult to understand precisely what acts constitute the breaches of fiduciary duty on the part of the defendants about which the plaintiff complains.[7] I note the following facts, and draw the following inferences, however. The Agreement was signed on behalf of the corporation on August 8, 2002 and consummated, at least in part, by the appointment of Ryan to the board on August 9, 2002, and by the appointment of Cohen and Gilbert, also in August 2002. Amended complaint, ¶¶ 23, 25, 26. This ratification of the Agreement can have been accomplished only by a vote of the directors. Indeed, the defendants in briefing this matter state that "[i]n approximately August 2002, as part of the settlement of the proxy contest…G+C directors voted to expand the board from six to nine seats…." Opening Brief, at 2. The Agreement required the board to "authorize this agreement" and to authorize Finkelstein to execute it on behalf of the corporation. It required the board to implement the changes involving the number of seats on the board and its composition. I can infer from the facts plead in the complaint, then, that by August 9, 2002, the board of directors had approved the Agreement in settlement of the proxy contest and had begun to implement its terms. Because the plaintiff has failed to plead what number of the directors voted in favor of implementing the agreement, I assume any vote was

[7]Plaintiff's counsel during a teleconference on July 27, 2005 represented that the plaintiff had demanded corporate minutes which disclosed board discussions and votes concerning adoption of the Agreement, but that none were produced by the defendant corporation.

unanimously favorable, and indeed the briefing, in which the parties hotly contest the independence of each member of the board (other than Povinelli), indicates that this is so.

The plaintiff sought books and records related to this transaction, which ultimately he received. According to the complaint, the corporate records failed to include any "formal prepared evaluation materials" on which the board relied in considering the agreement, nor did they include any documents indicating how the payment metric for the sale of assets to Povinelli was arrived at.[8] This suit followed, alleging breaches of fiduciary duty,[9] contending that the purchase price received from the Povinelli Group was "grossly inadequate," and seeking recission of the agreement, together with rescissory or compensatory damages on behalf of G+C.

II. MOTION TO DISMISS: THE LEGAL STANDARD

The defendants here seek dismissal of the action under Rule 12(b)(6). Under that Rule, accepting all well-plead allegations as true and construing all inferences in favor of the plaintiff, I must grant the motion to dismiss only where I determine the plaintiff is not entitled to relief under any set of facts which could be reasonably inferred. *E.g.*,

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[8]Amended Complaint, at ¶¶17, 43.

[9]The complaint also alleges that the defendants deprived the plaintiff and other shareholders of a "right to vote" on a "change of control" of G+C. The plaintiff has failed to allege facts demonstrating that a right to vote existed under Delaware law and was denied; and while not explicitly waiving this claim plaintiff fails to defend it in a substantive way in his brief opposing dismissal. Because the plaintiff has failed to state a claim on his "right to vote" allegations, this portion of the action should be dismissed.

Carmody v. Toll Bros., Inc, Del.Ch., 723 A.2d 1180, 1184 (1998); Grobow v. Perot, Del.Supr., 539 A.2d 180, 187 (1988). Moreover, this is a derivative action. In order to survive a motion to dismiss, where (as here) the plaintiff has failed to make a demand on the directors to take the action or provide the relief sought in the suit, I must find that the plaintiff has stated with particularity facts reasonably indicating that such a demand would have been futile. *E.g.*, Brehm v. Eisner, Del.Supr., 746 A.2d 244, 248 (2000).

III. DISCUSSION

A) The Demand Requirement

The plaintiff has alleged his claim derivatively on behalf of G+C. Such a derivative claim must first be brought before the corporate board with a demand that the harm complained of be remedied, unless such a demand is excused. *See* Chancery Court Rules, Rule 23.1. The plaintiff here failed to make a demand upon the board. In order for demand to be excused as futile, the plaintiff must plead particularized facts creating a reasonable doubt either that the director defendants were disinterested and independent, or that their actions were protected by the business judgment rule. Brehm, 746 A.2d at 248; In re Walt Disney Co., Del.Ch., 825 A.2d 275, 285 (2003) *citing* Aronson v. Lewis, Del.Supr., 473 A.2d 805, 814 (1984). If the well-plead facts create a reasonable doubt that the board could consider the relief demanded disinterestedly or impartially, the demand must be deemed excused. Carmody, 723 A.2d at 1189. Because the acts complained of here resulted in a change in the composition of the board of directors of

G+C, and because directors resigned in the interval between the acts complained of and the filing of the initial complaint, it is important to define the composition of the board relevant to the analysis of demand futility.

At the time of the proxy solicitation and the entry of the August 8, 2002 Agreement, the board consisted of Chairman Ciocia, Travis (both members of the Concerned Shareholders group pursuing the proxy solicitation), Povinelli (the CEO of G+C targeted for replacement by the Concerned Shareholders) and Louis P. Karol, Seth A. Akabas and Doreen M. Biebusch (collectively, the "old board"). As a result of the August 8 Agreement and its aftermath, the board was expanded to nine members: Steven Gilbert, Edward H. Cohen and Michael P. Ryan were added to the board. Over the next several months, Povinelli, Karol, Akabas, and Biebusch resigned from the board. By the time the initial complaint in this action was filed in January, 2004 the five members of the board of directors were Ciocia, Ryan, Travis, Cohen and Gilbert (the "new board").

In addition to Ciocia and Travis, who were involved in the promotion of the proxy solicitation and the Agreement which are at the heart of the breach of fiduciary duty claim here, the three other members, Ryan, Cohen and Gilbert, constituted a majority of the new board which (according to the defendants) was independent and disinterested with respect to the fiduciary claims here at issue, and which could therefore have evaluated plaintiff's allegations and exercised judgment on behalf of the shareholders in deciding what, if any, remedy is appropriate. Therefore, defendants argue, the plaintiff cannot show that a demand would have been futile and this action should be dismissed under Rule 23.1.

This assertion, I find, is not supported by the facts alleged in the Amended Complaint. Ciocia, Travis, Ryan and Gilbert were Concerned Shareholders, who were entitled to up to a quarter of a million dollars under the Agreement. Ryan, Cohen and Gilbert were placed on the board as a result of the Agreement about which the plaintiff complains. The complaint seeks damages for breach of fiduciary duty or rescission. Should there be a rescission of the August 8 Agreement and its consummation via the APA, Ryan's, Cohen's and Gilbert's position on the board of directors, at least theoretically, would ceased to exist. Entrenchment of one's position on a corporate board, of course, is an interest sufficiently at odds with the interests of the shareholders to render a board member seeking such entrenchment interested in the transaction at issue. *E.g.*, Carmody, 723 A.2d at 1198. Clearly, a board member whose tenure is placed at risk by a request from a shareholder that the director take action on behalf of the corporation is not "disinterested," and such a demand on a director is likely to be futile.

The defendants point out that, under Delaware law, it is the shareholders who choose the board of directors. It follows, according to the defendants, that is beyond the power of this Court to grant a requested rescission if the effect of that request would be to change the composition of a board of directors. I find this proposition dubious, but in any event not dispositive. The question is whether from the facts alleged in the complaint it appears that a demand on the board of directors would have been futile. A request that the directors remedy breaches of fiduciary duty by rescinding an Agreement to which they owe their tenure on the board is the quintessence of futility, even if that request when made to this Court should ultimately prove beyond its power.

Having found that the plaintiff's complaint is in compliance with Rule 23.1 because the demand upon the board of directors otherwise required is properly excused, I must examine the complaint to determine whether it states a claim under Rule 12(b)(6).

B) The Old Board and Fiduciary Duty

According to the complaint, the Concerned Shareholders believed G+C was underperforming under then-current management, as led by CEO and director Povinelli. As a result, the Concerned Shareholders mounted a proxy solicitation which would have the result of adding Gilbert and Cohen to the board of directors, ousting Povinelli as CEO and replacing him with Ryan. The final proxy solicitation was mailed to G+C stockholders on August 5, 2002.

Three days later, on August 8, the Concerned Shareholders, Povinelli and the company entered the Agreement, which terminated the proxy solicitation. As a result of the Agreement the Concerned Shareholders achieved the precise result aimed at in the proxy solicitation: the expansion of the board to include Ryan,[10] Cohen and Gilbert, and the resignation of Povinelli as CEO and his replacement by Ryan. In return, the Povinelli

[10]See footnote 5, *supra.*

group received an option[11] to purchase up to $25,000,000 of tax and financial planning revenue and up to 70 of the company's offices. This option to purchase was to be at a price based on a percentage of EBITDA at those offices selected for purchase by the Povinelli group.[12] In other words, the proxy battle was avoided by the board agreeing to give the Concerned Shareholders what they wanted (the board expanded to nine members with three new members being Concerned Shareholders' designees, and replacement of CEO Povinelli with Ryan) and by allowing Povinelli to purchase something like a quarter of G+C's business. Ultimately, the Povinelli group exercised the option to purchase just under 20% of the revenue of G+C. The plaintiff argues that, in approving this agreement, the defendant directors breached their fiduciary duty to G+C.

According to the defendants, the Agreement should be looked at as a simple sale of corporate assets. Since this sale of assets was approved by the board, and since only Povinelli among the board members received the assets and is thus conflicted, the board's approval of the Agreement is entitled to the benefit of the business judgment rule (as well as the benefits of the safe harbor provision of 8 Del.C. §144). Therefore, say the defendants, the plaintiff has failed to state a claim, and the matter should be dismissed. I view the situation differently, however.

[11]The option was granted to a company controlled by Povinelli and resigning CFO Puyear known as Pinnacle Tax Advisors LLC.

[12]If Povinelli and Puyear elected not to exercise the option, the Agreement guaranteed them severance pay equivalent to one year's salary.

The well-plead facts, together with the reasonable inferences therefrom, viewed in the light most favorable to the plaintiff, disclose that a group of shareholders, the Concerned Shareholders, a group which included two members of the board, wished to wrest executive control from then CEO-Povinelli. Neither the Concerned Shareholders nor Povinelli and his allies in the "Povinelli Group" controlled a majority of shares of G+C, and thus neither faction had voting control of the corporation. The Concerned Shareholders attempted to prevail, therefore, with a proxy solicitation which would, if successful, have increased their representation on the board from three of seven to five of nine; and replaced CEO Povinelli with Concerned Shareholder Ryan. The proxy solicitation entailed certain risks: the outcome was in doubt, and there were certain costs involved to the Concerned Shareholders. The proxy solicitations were mailed to the shareholders on August 5, 2002. Instead of pursuing this battle for the support of the non-aligned shareholders, the Concerned Shareholders faction negotiated an Agreement with the Povinelli group which, if approved by the board, would make the solicitation moot. Under that agreement, the Concerned Shareholders would receive what they desired: Ryan as CEO, five designees of the Concerned Shareholders as directors, one of whom would be Ryan (thus ensuring Concerned Shareholder control of the new board) and reimbursement of up to $250,000 of expenses in connection with the aborted proxy solicitation to be paid to the Concerned Shareholders. Both Povinelli and CFO Puyear would resign as executives of G+C, and Povinelli would surrender his stock in G+C. In return, the Povinelli group was given an option to purchase assets representing up to

$25,000,000 of G+C annual revenue.[13] The Agreement provided that Povinelli would purchase these revenue-producing offices based on a percentage of EBITDA.

In other words, the litigants in the proxy battle agreed to settle their differences by Povinelli yielding to the Concerned Shareholders in return for a substantial portion of G+C's tax-preparation business assets being split from the company and delivered to him, at a price that I must assume was advantageous to Povinelli.[14] The Concerned Shareholders group achieved their ends and aborted a proxy contest by agreeing to split off a portion of G+C and sell it to Povinelli, in return for his acquiescence. The question is whether, in approving this agreement on behalf of G+C, the directors complied with their fiduciary duties to G+C and its shareholders.

[13] Ultimately, Povinelli purchased 19.29% of G+C annual revenue, or $17,827,000, for $4,410,000 in cash, assumption of $2,630,000 of G+C debt, and the surrender of Povinelli's shares of G+C stock.

[14] Since Povinelli chose to give up his job as Chief Executive Officer and forego one year's worth of salary as severance pay by exercising the option and purchasing about 20% of the G+C assets, I assume the Povinelli group found the terms of the option in Agreement to be favorable to them.

i) The Duty of Loyalty

The plaintiff contends that the old board was not disinterested, and thus that its actions are not entitled to the protection of the business judgment rule. Povinelli, the purchaser of the assets, was, defendants concede, conflicted. As for Ciocia and Travis, those individuals were simultaneously board members and members of the Concerned Shareholders involved in the proxy battle. The Concerned Shareholders avoided the expense and uncertainty of the proxy battle by agreeing to give the Povinelli group the option to purchase G+C assets. As members of the Concerned Shareholders, they agreed, and as board members ratified, the reimbursement to the Concerned Shareholders of up to $250,000 in expenses for the proxy battle incurred up to the date of the Agreement. Based on the facts in the complaint and construing as I must inferences in a way favorable to the plaintiff, I find for purposes of this motion that Ciocia and Travis—as both Concerned Shareholders reaching an Agreement with the Povinelli group and as directors ratifying that Agreement—stood on both sides of the transaction, and cannot therefore be considered independent with respect to the evaluation of the Agreement by the board of directors.

Also approving the Agreement were three potentially independent directors: Karol, Akabas and Biebusch. Of these, Karol was clearly independent.[15] The plaintiff contends

[15] The plaintiff contends that because Karol was a board member both before and after voting for the Agreement, he must have been acting to entrench himself by voting for the Agreement. This argument is unpersuasive. He also points to the fact that the August 8 Agreement acknowledges that all directors (other than Karol) had "potential conflicts," and argues that this admission must end the Court's analysis of director interests. For the reasons

that Biebusch had worked as a consultant for G+C and that Akabas' law firm had similarly worked for G+C. Plaintiff theorizes that a vote against the Agreement would have endangered these profitable relationships, and thus that Biebusch and Akabas had a material conflict which rendered them unable to act out of loyalty to G+C. The plaintiff also points out that Biebusch was a creditor of G+C, and conjectures that a vote against the Agreement would have endangered the repayment of the loan to her from G+C. The plaintiff, however, has not plead sufficient facts to demonstrate how a vote against the Agreement would have put at risk a material financial interest of Akabas or Biebusch. He has not shown that any threat was either made or apparent to Akabas or Biebusch that their legal or consulting fees would be diminished in a material way, nor has he explained how a vote purportedly against company interest would make Biebusch more likely to have her loan repaid. In other words, taking the facts in light most favorable to the plaintiff and drawing all reasonable inferences therefrom, I am still unable to conclude based on the current state of the record that Akabas, Biebusch or Karol were materially interested in the outcome of the board vote which in a way makes their loyalty to the corporation suspect. I must for purposes of the motion to dismiss evaluate this as a transaction between the corporation and its officers and directors ratified by the disinterested directors.

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that follow in the text of this report, however, I find that Akabas and Biebusch, as well as Karol, were disinterested.

ii) The Duty of Care and "Safe Harbor"

The basic precept of our corporate law is that the directors, and not the shareholders or the Court, manage the affairs of the corporation. The Court, therefore, presumes that the exercise of business judgement by a disinterested board is taken in the best interest of the shareholders. *E.g.* Orman v. Cullman, Del.Ch., 794 A.2d 5, 19-20 (2002). However, where (as here) a shareholder challenges board approval of a transaction between the corporation and a director, because of the interested nature of the transaction, the transaction will only stand where the transaction is shown to be intrinsically fair to the shareholders; or if the transaction is entitled to the "safe harbor" provisions of 8 Del.C. §144(a). *See, e.g.,* Kahn v. Roberts, Del.Ch., No. 12324, Steele, V.C. (December 6, 1995)(Mem. Op.) at 5. That statute provides, in pertinent part:

> (a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because any such director's or officer's votes are counted for such purpose if: (1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a Quorum; . . .

I have found that the Agreement was approved by the three independent directors.[16] Under the "safe harbor" provision of section 144 quoted above, the actions of the board in entering an agreement are deemed not voidable, but only where the action is approved by a majority of the independent directors, and those directors meet three requirements: That each be informed of the interested nature of the transaction; that each be informed of the facts material to the interests of the corporation regarding the transaction (that is, that each employ due care); and that each authorize the transaction in "good fath." 8 Del.C. §144(a)(1). These duties, in this context, have been described as requiring that the disinterested directors were "truly independent, fully informed, and [that they] had the freedom to negotiate [with the interested directors] at arm's length." Cooke v. Oollie, Del.Ch, No. 11134, Chandler, V.C. (June 23, 1997)(Mem. Op.) at 9, *citing* Kahn v. Lynch Communication Systems, Del.Supr., 638 A.2d 1110, 1120-21 (1994). If the Plaintiff has plead facts sufficient to raise a reasonable doubt that the approval here was the product of good faith and due care, then the motion to dismiss must be denied.

A number of factors here are problematic to a determination that the independent directors exercised due care/good faith. The proxy solicitation was mailed to stockholders on August 5, 2002. On August 8, the corporation entered the Agreement to

[16] My analysis would be substantially the same even if Ciocia and Travis were considered to be independent directors.

reimburse the Concerned Shareholders and grant Povinelli the option to purchase up to $25 million of G+C revenue, and expand the board. By August 9, the board had approved the Agreement and expanded the board to nine members. During that brief period, then, the Concerned Shareholders and the Povinelli group must have come to an agreement; that agreement must have been presented to the board, and the board must have made a diligent effort to assemble all reasonably available relevant information and determine whether the terms of the agreement, including the $250,000 reimbursement to the Concerned Shareholders, the sale of up to $25 million in assets to Povinelli and the formula for fixing the price upon the exercise of that option, all were in the best interest of the shareholders. The plaintiff, plausibly, points out that these actions, taken together, raise questions about the judgment of the board. Despite the fact that this was an Agreement to sell a large percentage of corporate assets to an insider board member who would use them for purposes of his own, and despite the fact that three of the six board members stood on both sides of this transaction, the board did not designate a special committee to opine on the fairness of the transaction. It did not hire outside legal counsel to render advice on the transaction. It did not consult with any expert to opine on the fairness of the formula for establishing the option price. The plaintiff, in response to his §220 demand, did not receive any documents indicating how the payment metric for the purchase of assets by the Povinelli group was arrived at. The board reached its decision during a scant three or four day period, which logically must be reduced by the time it took to negotiate the Agreement between the Concerned Shareholders and the Povinelli group. The defendant points out that the APA was not entered until some three months after the Agreement, and argues that the board thus had ample time to consider (or reconsider) the ramifications of the Agreement, consistent with the directors' fiduciary duties. In accepting the Agreement and putting it into effect by expanding the board in compliance with its terms, however, the directors had by August 9, 2002 taken the actions which the plaintiff alleges were breaches of duty here. The defendants also point out, correctly, that the brief period within which the board considered and approved the Agreement does not, of itself, demonstrate a breach of duty. It is, however, of some persuasive value in determining whether the plaintiff may ultimately demonstrate that such a breach took place.

The defendants argue strenuously that our case law does not require a board considering sale of assets to an insider to form an independent committee, or hire outside legal representation, or have an independent body render a fairness opinion, or take any particular length of time to deliberate in order to demonstrate due care (or good faith under section 144). The facts alleged here, however, taken together, present a reasonable possibility that the plaintiff may prevail. These include: 1) the fact that a proxy solicitation had been commenced; 2) that the two factions involved in the proxy battle agreed to abort the solicitation and end their disagreement by obtaining the resignation CEO/director Povinelli, in return for selling him a significant portion of the assets of the corporation; 3) the ratification or implementation of this deal after a very brief consideration by the board; 4) which board had only three independent members out of six but which failed to appoint a special committee or independent directors to evaluate the Agreement; 5) and which acted without any independent advice as to legality or valuation, and without any documentation of how the payment metric was arrived at. These factors all contribute to raise a reasonable possibility that the proxy battlers resolved their disagreement at the expense of the corporation and that the remaining three independent members rubber-stamped that Agreement without exercising their independent judgment. Of course, if that is the case, the safe harbor provisions of section 144 would not apply, and the board would have to demonstrate that the Agreement was entirely fair to the corporation.[17]

[17]My finding is bolstered by, but not dependant on, allegations that the Agreement had unintended negative consequences for G+C. These include an allegation that the change in CEO/Chairman brought about by the Agreement resulted in G+C being in default on a large commercial loan, leading in turn to a forebearance agreement raising the interest rate applicable to repayment by G+C. The plaintiff also alleges that the general release of Povinelli in the Agreement may be harmful to the corporation's ability to obtain restitution from Povinelli in connection with an ongoing SEC investigation, should that become otherwise appropriate.

CONCLUSION

Considering the well-plead facts, and drawing, as I must all reasonable inferences in favor of the plaintiff therefrom, I find that there is a reasonable possibility that the plaintiff can demonstrate that the board's ratification of the Agreement was not consistent with its fiduciary duties, and that the motion to dismiss must be denied.

/s/ Sam Glasscock
Master in Chancery

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