ORIGINAL

16

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL J. AKINS, et *al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil Action No. 18266
TIMOTHY S. COBB, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: October 26, 2001
Date Decided: November 1,200 1

Pamela S. Tikellis, Esquire, of CHIMICLES & TIKELLIS, Wilmington, Delaware; Of Counsel: Michael J. Boni and George W. Croner, Esquires, of KOHN, SWIFT & GRAF, Philadelphia, Pennsylvania, Attorneys for Plaintiffs.

M. Duncan Grant and Joseph S. Naylor, Esquires, of PEPPER HAMILTON, Wilmington, Delaware; Of Counsel: Laurence Z. Shiekman and Jacqueline V. Guynn, Esquires, of PEPPER HAMILTON, Philadelphia, Pennsylvania, Attorneys for Defendants.

STRINE, Vice Chancellor

R

Stockholders of nominal defendant Salient 3 Communications, Inc. ("Salient 3") filed this action to challenge allegedly excessive compensation packages awarded by Salient 3 to three members of its senior management team. The plaintiffs contend that the compensation packages resulted from breaches of fiduciary duty on the part of the directors of Salient 3.

According to the complaint, Salient 3's performance under the leadership of directors and officers Timothy S. Cobb, and Paul H. Snyder, and officer Thomas F. Hafer was dismal. As a result, the company's only viable strategy was to sell its operating businesses and put the company in liquidation. Despite having presided over this decline in the company's fortunes, Cobb, Snyder, and Hafer were rewarded with compensation packages that diverted money into their pockets that would otherwise have been paid to Salient 3's stockholders in the liquidation.

The defendants have moved to dismiss the complaint on various grounds, but the court needs to address only one of them: that the plaintiffs' claim is derivative and must be dismissed for failure to plead demand excusal under Delaware Court of Chancery Rule 23.1. In this opinion, I conclude that the plaintiffs' claim is derivative. I further conclude that the claim must be dismissed because: (1) the Salient 3 board is comprised of a majority of independent directors who can impartially consider a demand;

and (2) that the amended complaint fails to plead particularized facts that create a reasonable doubt as to whether the Salient 3 board complied with its fiduciary duties. As a result, the complaint must be dismissed under the governing standard of *Aronson* v. Lewis.[1] While the complaint contains many conclusory statements, it lacks any facts regarding the process used to make, or the substantive basis for, the Salient 3 board's decision to award compensation benefits to the senior managers. Therefore, the plaintiffs have failed to meet the burden imposed by Court of Chancery Rule 23.1 .[2]

I. The Defendants

The plaintiffs have named as defendants all eight members of the Salient 3 board of directors. Six of the defendant directors do not have management positions, and the complaint does not allege any other facts that would suggest their inability to act independently and disinterestedly as directors. Collectively, the six outside directors control 23% of the Company's Class B voting stock. As will be discussed more in a moment, the only class of the company's stock with voting rights is its Class B common stock.

---

[1] Del. Supr., 473 A.2d 805 (1984).

[2] *See Brehm v. Eisner,* Del. Supr., 746 A.2d 244, 254-55 (2000).

The other two defendant directors do have a personal stake in the compensation packages challenged in this action. Defendant Cobb is chairman of the board, president, and director of Salient 3. From 1999 to 2000, Cobb has controlled at least 25% of the company's Class B common stock, making him the Salient 3 stockholder with the most voting clout. Defendant Snyder is senior vice president, chief financial officer, and a director of Salient 3. During 1999 and 2000, Snyder controlled at least 10% of the Company's Class B voting stock.

The plaintiffs have also named Hafer, a non-director, as a defendant. Hafer is a senior vice president, general counsel, and secretary of Salient 3. In 1999 and 2000, he controlled nearly 8% or more of the company's Class B voting stock.

Cobb, Snyder, and Hafer together controlled 44% or more of the company's voting stock at all times during 1999 and 2000. The complaint alleges that these three defendants have acted together to control shareholder votes at the company and therefore owe fiduciary duties as controlling stockholders.

II. Factual Background[3]

Salient 3 was formed as Gilbert Associates, Inc. in 1942. The initial thrust of Gilbert involved the provision of engineering services to design power plants, through its engineering subsidiary Gilbert/Commonwealth, Inc. This was the company's core business until the mid-1980s.

Gilbert had two classes of common stock, which differed from one another in only one respect: the Class B common stock had voting rights, while the Class A common stock did not. The difference in rights was a function of the company's status as a professional engineering firm. To satisfy state rules regarding the control of professional engineering firms, the Class B voting stock was issued exclusively to the company's managers who were professional engineers.

In 1995, Gilbert changed strategic direction in a major way: its engineering subsidiary was sold, and the Class B stock held by the professional engineers was converted into Class A stock. Meanwhile, the Class B voting stock became increasingly concentrated in the hands of Gilbert's remaining managers, even though the rationale for the separate

[3] This recitation of facts is drawn from the amended complaint, in keeping with the procedural posture of the motion before the court.

classes of stock had dissolved as a result of the sale of its professional engineering business.

The sale of the company's engineering division was a part of a strategy undertaken in the early 1990s to concentrate the company's efforts on the telecommunications industry. Defendant Cobb became the company's president and chief executive officer during that period and is alleged to have guided the implementation of that strategy.

As part of the strategy, the company sold off all its non-telecommunications business assets and changed its name to Salient 3. The idea was to center Salient 3's future on three wholly owned "Operating Subsidiaries": SAFCO Technologies, Inc.; XEL Communications, Inc.; and GAI-Tronics Corporation.

Salient 3 had purchased GAI-Tronics – which developed, assembled, and marketed communications systems for industrial operations – in 1982. It bought XEL, a company that "designed and sold transmission products to the access products market," in 1996.[4] In 1997, it purchased SAFCO, which "provided products and services which focus on measurement, analysis and

[4] Am Comp. ¶ 31.

predictive tools, and engineering and technical services used by the wireless communication industry."[5]

The complaint alleges that the execution of the company's decision to focus solely on the telecommunications market was "marked by a lack of focus and by managerial incoherence. Corporate acquisitions were undertaken without adequate planning or any comprehensive concept of properly positioning the Company within its newly chosen business area."[6] An example cited by plaintiffs is Salient 3's purchase of XEL, a company focused on analog technology, at a time when the industry standard was changing to digital. The plaintiffs further assert that Salient 3 did not perform due diligence in connection with the XEL purchase or obtain an investment banker's opinion that it was receiving fair value. Likewise, the plaintiffs contend that the SAFCO acquisition was of dubious wisdom.

During the period when this strategy was being implemented, defendant Cobb allegedly used the company's resources to reward himself and his friends. Cobb, Hafer, and Snyder received generous loans with charitable terms to use to purchase company stock. One friend of Cobb was put in a well-paying position that allegedly was created solely to provide her

---

[5] *Id.* at ¶ 32.

[6] *Id.* at ¶ 34.

with a prominent position, to which she “telecommuted” from her North Carolina home four days a week, while staying at a “posh, two bedroom suite at a nice hotel” on the one day a week she spent at the company’s headquarters in Reading, Pennsylvania.[7] Meanwhile, Cobb’s “hand-picked” President of XEL was supposedly allowed to purchase items such as barbecue grills and hair dye with company money, all with Cobb’s approval. The plaintiffs insinuate that these examples are indicative of a larger problem at the company involving Cobb’s proclivity to allow himself and his friends to misuse corporate resources.

The plaintiffs contend that the poor management of Cobb, Hafer, and Snyder manifested itself in the company’s balance sheet. Before Cobb took charge in 1993, the company had over 3,600 employees, annual revenues in excess of $300 million, and net annual profits approaching $10 million. Much of this prosperity allegedly flowed from the company’s engineering business.

After Cobb assumed command, the company’s performance steadily declined, until it reached a 24-year low in 1999 during which it had revenues of only $115 million. Only once in Cobb’s tenure did the company make a profit — and that profit was attributable to the sale of the company’s

[7] Am. Comp. ¶¶ 43-44.

remaining engineering business. By 1998, the company had to eliminate its quarterly dividend, having posted a loss of over $17 million that year.

The company's financial performance resulted in a sharp decline in the trading value of its shares. The shares evidenced an uneven but undeniable trend downward, as reflected in the difference between the 1999 average trading price of $7.50 and the 1993 trading price of $19.08. In the complaint, the plaintiffs provide the following chart illustrating the extent to which the company's performance trailed that of its industry peer group:

CUMULATIVE TOTAL RETURN (IN %)[8]

	SALIENT 3	PEER GROUP	NASDAQ
Dee-94	100	100	100
Dee-95	95	175	145
Dee-96	104	170	180
Dee-97	100	150	210
Dee-98	75	150	300
Dee-99	50	270	540

In the fall of 1999, Salient 3 retained a financial advisor to explore alternatives to enhance shareholder value. Eventually, the board decided that the best return could be obtained by selling each of the company's Operating Subsidiaries separately, and then liquidating the company.

[8] *Id.* at ¶ 52

In connection with its decision to sell the Operating Subsidiaries, the board also put into place the "Special Incentive Plan" that is the subject of the plaintiffs' ire. The Special Incentive Plan was adopted "'to provide incentives for our executives who are in positions to contribute materially to the sale of our businesses,'"[9] and was comprised of two components: Sale Bonus Awards and Stay Bonus Awards.

The pool from which the Sale Bonus Awards were to be paid is based on a percentage of the total amount gained by Salient 3 from the sale of the Operating Subsidiaries, as follows: [10]

If the Net Proceeds are	The Bonus Pool is:
Not Over $80 million	$0
Over $80 million but not over $90 million	5% of the excess over $80 million
Over $90 million but not over $100 million	$500,000 plus 6% of the excess over $90 million
Over $100 million but not over $110 million	$1,100,000 plus 7% of the excess over $100 million
Over $110 million but not over $120 million	$1,800,000 plus 8% of the excess over $110 million
Over $120 million	$2,600,000 plus 10% of the excess over $120 million

The Sale Bonus Award pool, however, was subject to reduction pursuant to the Stay Bonus Awards program,

[9] *Id.* at ¶ 58 (quoting a Salient 3 proxy statement).
[10] *Id.* at ¶ 59.

The Stay Bonus Awards were payable to each eligible employee following the completion of the sale of the operating subsidiaries so long as the employee remained employed through the closing date of the last of the sales, or if the employee was terminated without cause before that time. The amount of the Stay Bonus Award payable to a recipient was determined by the employee's base monthly salary as of the closing date of the last Operating Subsidiary sale, the net proceeds realized from the sale of the Operating Subsidiaries, and the employee's years of service.

The complaint alleges that the bulk of the Bonus monies to be awarded under the Special Incentive Plan was earmarked for defendants Cobb, Snyder, and Hafer. The three of them were to split 90% of the Sales Bonus Award pool, with Cobb receiving 40% of the pool and Snyder and Hafer 25% each. Cobb had the discretion to determine which executives received the other 10%.

Cobb, Snyder, and Hafer had their Sale Bonus Awards reduced dollar-for-dollar by any monies they received under the Stay Bonus Award program. Under the Stay Bonus Awards program, Cobb was expected (as of the drafting of the amended complaint) to receive nearly $ I .7 million, and Snyder and Hafer to receive $1 million each. Salient 3 also agreed to pay any federal excise taxes that may be imposed if Cobb, Snyder, and Hafer

receive bonus payments considered excessive under Internal Revenue Code provisions.’ [11]

The Salient 3 board took other action to improve the compensation arrangements of Cobb, Snyder, and Hafer. For instance, though none had a formal employment contract as of 1999, each was provided with such a contract effective January 1, 2000. In addition, according to plaintiffs, the sale of the Operating Subsidiaries triggered “change in control” severance benefits of $524,000 for Cobb, and $399,000 each for Snyder and Hafer. Further, if the three were terminated within two years of a change in control, they would be entitled under their employment contracts to non-compete payments worth $2 million in Cobb’s case, and nearly $600,000 apiece for Snyder and Hafer. Finally, in connection with the sale of the Operating Subsidiaries, the Salient 3 board voted to accelerate the lapse of restrictions on a total of 141,100 shares of stock held by Cobb, Snyder, and Hafer, thus increasing their proportionate shares of the liquidation proceeds. Taken together, I hereafter refer to the various benefits Cobb, Hafer and Snyder received as the “Employment Benefits.”

---

[11] The record is confusing about whether Cobb, Snyder, and Hafer were to benefit from the Stay Bonus Awards at all. At oral argument, the plaintiffs’ counsel seemed to indicate that the answer was no. The amended complaint, however, paints a somewhat different picture. In either event, the disposition of this motion would be the same.

In April, 2000, the Salient 3 board publicly announced its plans to sell the Operating Subsidiaries and liquidate the company. It projected that its stockholders would receive an initial distribution of $12.00 per share in September 2000, with additional distributions of $3.30 per share, for a total of $15.30.

The next month, the board approved the sale of SAFCO to Agilent Technologies for $120 million, before post-closing adjustments. In June, the board approved the sale of GAI-Tronics to Hubbel, Inc. for $40 million. Both the SAFCO and GAI-Tronics transactions were consummated in late 2000. By that time, the Class B stockholders of Salient 3 had approved the board's liquidation plans and the Special Incentive Plan. The initial $12.00-per-share liquidation payment was then made as scheduled in September 2000.

In January 2001, the company sold the last of its operating subsidiaries, XEL, for a $4.9 million promissory note. Salient 3 had purchased XEL for $30 million in 1996. Thus, its return on investment was dismal, and the company reduced its estimate of the remaining liquidation proceeds to be distributed down from $3.30 per share to $2.93 — assuming full payment of the purchase note.

III. The Single Count Pled In The Complaint

The plaintiffs' amended complaint sets forth only a single count for breach of fiduciary duty. That count alleges that the defendants breached their fiduciary duties by approving the various Employment Benefits awarded to Cobb, Snyder, and Hafer in connection with the liquidation. These improper Benefits operated to reduce the amount of the proceeds from the sale if the Operating Subsidiaries that would go to Salient 3's stockholders, and to divert that value to Cobb, Snyder, and Hafer personally. The complaint is, however, devoid of any facts relating to the process used by the Salient 3 board to decide to award the Employment Benefits, or the substantive reasons for the board's decision.

IV. Legal Analysis

A. Is The Plaintiffs Claim Derivative Or Individual In Nature?

The first question is whether the plaintiffs' claim is derivative or individual in nature. This inquiry is consequential because it affects the procedural standard governing the defendants' motion to dismiss. If the plaintiffs' claim is individual, the defendants' motion will be assessed under the pro-plaintiff standard of Court of Chancery Rule 12(b)(6). By contrast, if the plaintiffs' claim is derivative, then the defendants' motion is governed

by Court of Chancery Rule 23.1 and the implementing standard set forth in *Aronson v. Lewis*.[12]

To survive a motion to dismiss under Rule 23.1, the plaintiffs' complaint must: (1) set forth well-pled facts creating reasonable doubt whether a majority of the Salient 3 board could impartially consider a demand; or (2) make particularized allegations of fact supporting an inference that the board's approval of the Employment Benefits constituted a breach of fiduciary duty.[13] Thus, because it requires the plaintiff to plead a breach of fiduciary duty with particularity rather than under Rule 12(b)(6)'s liberal notice pleading standard, the Rule 23.1 burden is difficult for a plaintiff to meet where a majority of the board is disinterested and independent.[14]

In this case, the plaintiffs' allegation is that the Salient 3 board breached its fiduciary duties by awarding Cobb, Snyder, and Hafer excessive Employment Benefits. Because of these awards, they contend, the consideration that Salient 3 stockholders will receive in the liquidation is lower than it otherwise would have been.

---

[12] Del. Supr., 473 A.2d 805 (1984).

[13] Id. at 814.

[14] *Brehm 746* A.2d 244 at 254.

As thus pled, the plaintiffs' claim is clearly derivative in nature. By its plain terms, the amended complaint alleges that Salient 3 suffered a balance sheet injury because of the Employment Benefits. That reduction in Salient 3's bottom line reduced the amount of net cash available for distribution in the liquidation, working a harm to the Salient 3 stockholders on a *pro rata* basis.

The amended complaint does not allege that the Employment Benefits had any effect on the terms of the sales of the Operating Subsidiaries. It does not allege that the price paid for the Operating Subsidiaries was unfair. Instead, it simply alleges that a portion of the proceeds of those sales was improperly diverted to Cobb, Snyder, and Hafer by way of the Employment Benefits.

Cases like *Parnes v. Bally Entertainment Corp.*[15] and *Kramer v. Western Pacific Indus., Inc.*[16] support the conclusion that the plaintiffs' claim is derivative. Under the reasoning of those cases, a claim that executives received improper employment benefits that decreased the consideration received by the target stockholders in a cash-out merger is not individual in nature unless the plaintiff alleges that the merger itself was

---

[15] Del. Supr., 722 A.2d 1243 (1999).

[16] Del. Supr., 546 A.2d 348 (1988).

unfair. The practical consequence of that teaching in the merger context is that the claims against the recipients of the excessive compensation are usually extinguished, because the target stockholders cashed-out in the merger lose standing and because arms-length acquirors rarely press claims against the departing executives of targets they acquire in friendly transactions.[17]

In the circumstances of this case, the application of *Parnes* and *Kramer* has far less severe consequences. After the sale of the Operating Subsidiaries, the plaintiffs continue to have standing to press their derivative claim, but must satisfy the requirements of Rule 23.1 before proceeding.

Nor have the plaintiffs persuaded me that Salient 3's decision to liquidate transforms a garden-variety derivative claim of excessive compensation into an individual claim. *Kramer* and *Parnes* stand in part for the proposition that the mere fact that the corporation is undertaking an end-game strategy such as a cash-out merger does not change every claim for

---

[17] *See Golaine* v. Edwards, Del. Ch., C.A. No. 15404, mem. op. at 10-14, Strine, V.C. (Dec. 21, 1999) (discussing this practical effect). *The* case of *Bershad v. Hartz,* Del. Ch., C.A. No. 6960, mem. op., Berger, V.C. (Jan. 29, 1987) illustrates the arguable harshness of this approach. In *Bershad,* the target company was bought by an acquiror who expressly agreed not to challenge the golden parachutes attacked by the target stockholders. The court held that the attack on the golden parachutes was, nonetheless, derivative and that, per the reasoning of *Lewis v. Anderson,* Del. Supr., 477 A.2d 1040 (1984), the buyer is presumed to have agreed to honor the parachute because it made the economic judgment that the litigation challenge to the golden parachutes would fail and "not because it ha[d] already accounted for the [cost of the golden parachutes] by reducing the merger price." *Bershad,* mem. op. at 6.

breach of fiduciary duty against the board into a direct claim. Whether it is liquidating or not, Salient 3 has a board of directors with the legal power to bring suit to recover the Employment Benefits on the grounds that those Benefits were wrongfully issued. It is not apparent to me why Delaware public policy would make it easier for plaintiffs to bypass normal board processes solely because a corporation is in the process of liquidating."

Likewise, the nature of any relief that might be granted in this action is not inconsistent with derivative treatment of plaintiffs' claims. If the plaintiffs were to succeed and Salient 3 were to recover the Employment Benefits, the result would be sensible. The Salient 3 board could add those proceeds to the funds available for distribution in the liquidation, thus benefiting each Salient 3 stockholder in proportion to her holdings. This would reap no windfall for the defendants.

For all these reasons, I conclude that the plaintiffs' claims are derivative in nature.

B. Is Demand On The Salient 3 Board Excused?

The plaintiffs essentially concede that they cannot satisfy the first prong of the *Aronson* demand excusal test. That prong focuses on the

---

[18] I decline the plaintiffs' invitation to read the fact-intensive decision in the limited partnership case of *In re Cencom Cable Income Partners, L.P. Litig.,* Del. Ch., C.A. No. 14634, mem. op., Steele, V.C. (Jan. 27, 2000) broadly and to extend that broad reading into the corporate context.

following question: is a majority of the Salient 3 board "incapable, due to personal interest or domination and control, of objectively evaluating a demand, if made, that the Board assert the corporation's claims that are raised by plaintiffs or otherwise remedy the alleged injury?"[19]

Here, a majority of the Salient 3 board is comprised of outside directors. None of these directors are alleged to be materially dependent on the good graces of Cobb, Snyder, or Hafer and therefore incapable of exercising his independent judgment. Collectively, all of the outside directors own 23% of the Class B stock in Salient 3 and thus had a personal interest to maximize the liquidation proceeds. At most, the amended complaint pleads facts that suggest that Cobb, Hafer, and Snyder had a firm grip over their managerial subordinates, and that those subordinates were unlikely to resist their instructions. But these facts do not support an inference that the independent Salient 3 board majority was under the domination and control of Cobb, Hafer, and Snyder. The Salient 3 outside directors have no discernible reason to yield their independent judgment to

[19] *Brehm,* 746 A.2d at 257.

company management.[20] As a result, the first prong of the *Aronson* test is not satisfied.[21]

The plaintiffs' argument that the second prong of *Aronson* is satisfied turns on a simple chain of logic:

1) They plead facts that support the inference that the performance of Salient 3 has been poor during the time it has been managed by Cobb, Snyder, and Hafer.

2) In a far more conclusory way, the plaintiffs then attribute that poor performance to deficient management by Cobb, Snyder, and Hafer, and accuse Cobb, Snyder, and Hafer of misusing corporate reimbursement and employment policies for the benefit of themselves and their friends.

3) Based on 1) and 2), the plaintiffs then assert that the Salient 3 board must have breached its fiduciary duties by approving the Employment Benefits for Cobb, Snyder, and Hafer. Because Cobb, Snyder, and Hafer were so obviously incompetent and harmful to Salient 3, they argue, how could the board reward them with the Employment Benefits when their own deficiencies caused the need for the company to liquidate?[22]

---

[20] For the same reason, the amended complaint does not state particularized facts supporting a claim that the Salient 3 independent directors breached their fiduciary duties by acting under Cobb's, Hafer's, and Snyder's domination and control to benefit those top managers at the expense of the company.

[21] The fact that Cobb, Snyder, and Hafer control nearly half the company's voting stock and therefore might have the practical power to decide who serves as a Salient 3 director is not sufficient under Delaware law to call into question the ability of the outside directors to consider a demand impartially. *Aronson, 473* A.2d at 8 15; see *also In re Western Nat'l Corp. Shareholders Litig.,* Del. Ch., Cons. C.A. No. 15927, mem. op. at 41, Chandler, C. (May 22, *2000).*

[22] The plaintiffs' brief summarizes this reasoning:

> The Amended Complaint describes a company that never achieved competitive competence in its field under the stewardship of the Control Group, and that suffered a progressive deterioration in its financial condition during the tenure of defendant Cobb as President and Chief Executive Officer — a deterioration directly reflected in the steady decline of the one barometer used by every corporate director — Salient's stock price.

The amended complaint admittedly sets forth a factual scenario that is somewhat unsettling. Were poor managers permitted to stock their own larder at the shareholders' expense?

The problem for the plaintiffs is that our law requires them to plead specific facts that create a reasonable doubt that the Salient 3 board breached its fiduciary duties in approving the Employment Benefits. In a situation like this, where a compensation decision was made by a board comprised of a majority of independent directors, this burden is stringent:

> Pre-suit demand will be excused in a derivative suit only if the Court of Chancery in the first instance . . . conclude[s] that the particularized facts in the complaint create a reasonable doubt that the informational component of the directors' decisionmaking process, measured by concepts of gross negligence, included consideration of all material information reasonably available.[23]

In this case, the amended complaint fails to set forth any facts at all about the decisionmaking process that the Salient 3 board undertook in awarding the Employment Benefits. Instead, it simply falls back on the accusation that Cobb, Snyder, and Hafer were poor managers who should

---

> (Am. Compl. ¶¶ 38, 49, 5 1.) With this information readily available to them, the Individual Defendants carelessly endorsed the transactions complained of in the Amended Complaint while ignoring the Control Group's record of corporate futility and lavishing an excessive and unwarranted compensation package on each member of that Group.

Plaintiffs' Br. at 27-28.

[23] *Brehm*, 746 A.2d at 259.

not be rewarded with any remuneration at all. This is inadequate to meet the plaintiffs' burden.

As a general matter, it was unquestionably rational for a board in Salient 3's position to adopt employment policies that create an incentive for senior employees to stay in place during a sale of the company's operating businesses. Likewise, it is sensible for a board to adopt policies that create an incentive for top managers to assist in selling those businesses at the highest price. The plaintiffs do not quibble with these propositions, except to indicate that they do not reasonably apply to poor managers such as Cobb, Snyder, and Hafer.

The amended complaint, however, is wholly devoid of any facts relating to the board's own assessment of the performance of Cobb, Snyder, and Hafer. While the sharply declining performance of Salient 3 under their management is clearly relevant, the complaint does not plead particularized facts specifying how their decisions caused the company's problems. With the exception of the XEL purchase, the plaintiffs are unable to point to particular business decisions that did not work out — they simply point to Salient 3's descending fortunes and ask the court to infer that management deficiencies, rather than other market and financial developments, caused that plummet. Moreover, in the case of the XEL purchase, the amended

complaint merely sets forth a cursory accusation that the purchase was poorly thought out and resulted in a sale at far less than the purchase price some five years after its acquisition by Salient 3.

As to the SAFCO acquisition, the amended complaint only suggests that SAFCO's management team turned out to be weaker than was required for success and that one Salient 3 manager thought in hindsight the acquisition "was possibly a serious mistake."[24] It does not allege that SAFCO was sold by Salient 3 at a loss or provide specifics on how the decision to acquire SAFCO was made. And the amended complaint's oblique insinuation that the company's decision to get out of the engineering decision many years ago was unwise — a decision that was apparently made when engineers had voting control of the company — is not the kind of particularized fact pleading that rationally creates a reasonable doubt whether the provision of the Employment Benefits to Cobb, Snyder, and Hafer in 1999 and 2000 was a proper exercise of fiduciary duty.

Without specific facts regarding the board's process in determining to award the Employment Benefits, the amended complaint fails to provide the court with any basis to infer that the independent directors on the Salient 3 board failed to consider the material facts in determining to award the

---

[24] Am. Comp. ¶ 37.

Employment Benefits. It could be that the board carefully assessed the past (positive or negative) performance of Cobb, Snyder, and Hafer, concluded that their continued and enthusiastic assistance during the liquidation process was beneficial (because of their past positive performance) or was necessary (in spite of their prior negative performance), and made a reasoned decision to award the Employment Benefits. The board could have also made the judgment that the non-compete agreements would be helpful in securing the best price for the Operating Subsidiaries. Or it could be otherwise.

But under our law, it is incumbent upon the plaintiffs to plead particularized facts that create a reasonable doubt that the board's decisionmaking process was grossly negligent. That burden has not been satisfied.

In a similar vein, the plaintiffs have not seriously attempted to show that the Employment Benefits constitute corporate waste. As noted, the Salient 3 board's decision to award the Employment Benefits had a plausible business purpose. Without particularized facts supporting an inference that Salient 3 board majority could not reasonably believe that the continued service and active assistance of Cobb, Snyder, and Hafer during the sale and

liquidation process was of value to Salient 3, the amended complaint fails to satisfy the second prong of *Aronson*.[25]

V. Conclusion

For the foregoing reasons, the plaintiffs' amended complaint is dismissed without prejudice.[26] IT IS SO ORDERED.

---

[25] *Brehm, 746* A.2d at 266.

[26] At oral argument, plaintiffs' counsel candidly admitted that they had yet to seek books and records under 8 Del. C. § 220, choosing instead to rely upon information provided by the plaintiffs themselves, most of whom are former employees. The plaintiffs' counsel asked for another opportunity to plead a claim. Because of the teaching of *Brehm* on this score, see 746 A.2d at 266-67, and the fact that this motion was being briefed as new Court of Chancery Rule 15 (aaa) came into effect, I assent to that request. In so doing, I expect that plaintiffs' counsel will be mindful of the defendants' offer to share information relating to the Salient 3 board's decisionmaking process regarding the Employment Benefits, and will take care not to replead if the information relating to that process does not sustain a claim that meets the test set forth in cases like *Brehm.*