



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

THE RAVENSWOOD INVESTMENT  
COMPANY, L.P., individually, derivatively  
and on behalf of a class of similarly situated  
persons,

Plaintiff,

v.

BASSETT N. WINMILL, THOMAS B.  
WINMILL, and MARK C. WINMILL,

Defendants.

and

WINMILL & CO. INCORPORATED,

Nominal Defendant.

**C.A. No. 3730-VCN**

**MEMORANDUM OPINION AND ORDER**

Date Submitted: February 2, 2011

Date Decided: May 31, 2011

R. Bruce McNew, Esquire of Taylor & McNew LLP, Wilmington, Delaware,  
Attorney for Plaintiff.

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Katzenstein & Jenkins LLP, Wilmington, Delaware, Attorneys for Defendants.

NOBLE, Vice Chancellor

## I. INTRODUCTION

The plaintiff in this case is a significant stockholder in a holding company managed by the individual defendants, a father and his two sons. The plaintiff alleges, both on behalf of a class and derivatively, breaches of fiduciary duty regarding the defendants' adoption of a stock buyback plan, their adoption of an options plan, issuance of the options to themselves, and the decision by the company to vote in favor of a transaction involving the sale of a subsidiary's interest in a third entity. This memorandum opinion is prompted by the Defendants' motion to dismiss.

## II. BACKGROUND

### A. *The Parties*

Winmill & Co. Incorporated ("Winmill" or the "Company"), the Nominal Defendant in the derivative claim, is a Delaware corporation that acts as a holding company of other companies.<sup>1</sup> There are 1,643,052 Class A shares and 20,000 Class B shares of Winmill outstanding; voting rights are vested solely in the Class B shares.<sup>2</sup> The Company trades in the OTC "Pink Sheets" and is not

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<sup>1</sup> Verified Class and Derivative Complaint (the "Complaint" or "Compl.") ¶ 2.

<sup>2</sup> *Id.* at ¶¶ 1, 3. The Company has authorized 1,000,000 shares of preferred stock, but none has been issued. *Id.* at ¶ 3.

registered under either the Securities and Exchange Act of 1934 or the Investment Company Act of 1940.<sup>3</sup>

Plaintiff The Ravenswood Investment Company, L.P. (“Ravenswood”) is the record owner of 10,000 Class A shares of Winmill, and, by itself and with related entities, it owns, or has investment authority with respect to, 119,852, or 7%, of the Company’s Class A shares.<sup>4</sup>

At all relevant times, Defendant Bassett N. Winmill has been the chairman of the Company.<sup>5</sup> Defendant Thomas B. Winmill, one of Bassett’s sons, is the president of the Company, and Bassett, Thomas, and Defendant Mark C. Winmill (also Bassett’s son), comprise its board of directors.<sup>6</sup> Bassett, Thomas, and Mark (together the “Winmills” or the “Defendants”) own, in the aggregate, all the Class B shares of the Company. Ravenswood alleges that the Winmills directly or indirectly own approximately 30% of Class A shares.<sup>7</sup>

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<sup>3</sup> *Id.* at ¶ 20.

<sup>4</sup> *Id.* at ¶ 1.

<sup>5</sup> *Id.* at ¶ 4. For convenience only, the Court will refer at times to each of the Winmills by first name.

<sup>6</sup> *Id.* at ¶¶ 5-7.

<sup>7</sup> *Id.* at ¶ 11. Although Ravenswood rounds the percentage down to 30%, the figures Ravenswood uses suggest that the Defendants own slightly less than 32% of Class A shares. *See id.* at ¶ 1 (alleging that there are 1,643,052 Class A shares outstanding); *id.* at ¶ 11 (alleging that shareholders other than the Defendants own approximately 1.12 million Class A shares). Accepting those allegations and using 1,643,052 as the number of outstanding Class A shares would imply that the Defendants own approximately 31.83% of that class of shares, or 523,052 shares. The Complaint includes no allegation regarding number of Class A shares owned by the Defendants before the transactions at issue in this action occurred.

Among Winmill's affiliates are Bexil Corporation ("Bexil") and Tuxis Corporation ("Tuxis"), which are both Maryland corporations, and Midas Management Corporation ("Midas").<sup>8</sup>

Bexil is a holding company, and from 2002 until April 28, 2006, its primary asset was a 50% interest in York Insurance Service Group, Inc. ("York").<sup>9</sup> At all relevant times, Bassett and Thomas were directors of Bexil; Thomas was Bexil's president and chief executive officer.<sup>10</sup> There are approximately 880,000 shares of Bexil outstanding: 222,644 are held by the Company, 276,292 by Bassett, 91,412 by Thomas, and approximately 26,000 by Thomas's spouse and sons.<sup>11</sup>

Tuxis is engaged in the real estate business and operates primarily in the Northeastern United States. Mark is the president of Tuxis, Bassett its chairman of the board, and Thomas its general counsel.<sup>12</sup>

Midas is a subsidiary of Winmill.<sup>13</sup> By contract, Midas acts as the master payer of compensation and benefits to all officers and directors of the Company and of affiliates of the Company such as Bexil and Tuxis.<sup>14</sup>

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<sup>8</sup> *Id.* at ¶¶ 2, 21, 37. The Complaint does not report Midas's state of incorporation.

<sup>9</sup> *Id.* at ¶¶ 2, 5.

<sup>10</sup> *Id.* at ¶¶ 5, 7.

<sup>11</sup> *Id.* at ¶¶ 37-38.

<sup>12</sup> *Id.* at ¶¶ 2, 6, 38.

<sup>13</sup> *Id.* at ¶ 21.

<sup>14</sup> *Id.*

## B. *The Facts*

### 1. Allegations regarding the Company's Performance Equity Plan and the 2006 stock buyback plan

Ravenswood alleges that the book value of Company was \$5.22 per share on March 31, 2005, and approximately \$5.40 per share on December 31, 2004.<sup>15</sup>

In May 2005, the Company adopted a "Performance Equity Plan" under which the Company may grant up to 500,000 options to purchase Class A common stock to directors, officers or key employees of the Company or its affiliates.<sup>16</sup> The Performance Equity Plan further provides that "[t]he option price per share may not be less than the fair value of such shares on the day the option is granted . . . ."<sup>17</sup> The Company's 2006 Annual Report disclosed that sometime in 2006, the Company granted 305,000 options at a weighted average exercise price of \$2.96.<sup>18</sup>

The Company also engaged in a program to repurchase up to 500,000 of its own shares, beginning on July 10, 2006.<sup>19</sup> In 2006, the Company purchased 10,147 shares at \$4.29 per share.<sup>20</sup> Through October 23, 2007, the Company had purchased a total of 187,235 shares at an average price of \$5.90 per share.<sup>21</sup>

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<sup>15</sup> *Id.* at ¶ 30. The facts are drawn from the well-pleaded allegations of the Complaint.

<sup>16</sup> *Id.* at ¶ 25.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at ¶ 29.

<sup>19</sup> *Id.* at ¶ 32.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

## 2. Allegations regarding Bexil's sale of its interest in York

On December 23, 2005, Bassett, Sara Winmill (Bassett's wife), Thomas (both individually and on behalf of the Company through a subsidiary), and two other Bexil stockholders and directors, Charles Carol and Edward Webb, voted in favor of a transaction by which Bexil would sell its shares in York to a buyer that is not specified in the Complaint. Bexil solicited approval of the transaction from its stockholders, and the proxy informed stockholders that a Special Committee consisting of directors other than the Winmills had been formed to evaluate the transaction.<sup>22</sup> It also stated that Bexil had had taken steps, beginning in the fall of 2004, to find some transaction to sell its shares in York.<sup>23</sup> The proxy informed stockholders that the Special Committee had not sought alternative bids with respect to the pending transaction.<sup>24</sup> The December 23, 2005 Schedule 13D related to the sale lists the Winmills as interested directors.<sup>25</sup>

On April 27, 2006, Bexil's stockholders approved the sale of its shares of York for approximately \$39,000,000 in cash.<sup>26</sup> In connection with the transaction, Bassett and Thomas received bonuses from Bexil of \$500,000 and \$2,000,000,

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<sup>22</sup> *Id.* at ¶ 42.

<sup>23</sup> *Id.* at ¶ 43.

<sup>24</sup> *Id.* at ¶ 42.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at ¶ 40.

respectively.<sup>27</sup> This compensation was approved by Bexil's independent directors.<sup>28</sup>

### III. CONTENTIONS

Ravenswood filed the Complaint individually, derivatively, and on behalf of a putative class of similarly situated stockholders in the Company. Count I of the Complaint alleges that the Defendants breached their fiduciary duties to the class by adopting the Performance Equity Plan and the stock buyback plan, by granting stock options with exercise prices that were below the stock's market value on the day they were issued in violation of the Performance Equity Plan, and by approving Bexil's sale of its interest in York.

Count II alleges that the Defendants breached their fiduciary duties to the Company by the same actions as well as by receiving improper compensation from the Company.<sup>29</sup> Count II also alleges that Bassett and Thomas improperly accepted bonuses in connection with the sale of York, which, Ravenswood argues, reduced the value of the Company's holdings in Bexil.

The Defendants have moved to dismiss some of these claims pursuant to Court of Chancery Rule 12(b)(6), for failure to state a claim, and Rule 23.1, for

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<sup>27</sup> *Id.* When Bexil entered the sales agreement, each of Thomas and Bassett was paid 32.65% of his respective bonus, with the balance, totaling \$2 million, to be paid on closing.

<sup>28</sup> *Id.* at 41.

<sup>29</sup> *See Id.* at ¶ 52. The Defendants characterize the claim regarding improper compensation by the Company as a claim for waste; Ravenswood did not expressly address this claim either in its brief or at oral argument.

failure to allege adequately that demand upon Winmill's board of directors is excused. Specifically, the Defendants argue that all of Ravenswood's claims regarding the stock buyback plan must be dismissed because Ravenswood has not alleged facts suggesting that the transactions were interested or were otherwise outside the protections of the business judgment rule; with regard to Count II, the Defendants further argue that Ravenswood has not adequately alleged facts that would excuse demand.

The Defendants next contend that the claims pertaining to Bexil's sale of its interest in York must be dismissed with respect to Count I because it is a derivative claim and cannot be brought individually. They argue that the claims under Count II pertaining to the York sale must be dismissed for failure to plead that the requirement to make demand upon the board of directors is excused and because no allegations suggest that the transaction was unfair to Winmill. The Defendants contend that the claims of Count II that challenge the bonuses Bexil paid to Bassett and Thomas must be dismissed because Ravenswood has not alleged that the Winmill board took any wrongful action with regard to such bonuses.<sup>30</sup> Finally, the Defendants argue that the derivative allegations that they received improper

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<sup>30</sup> The Defendants' Opening Brief in Support of their Motion to Dismiss ("OB") also addresses the possibility that the Complaint may be read to advance disclosure claims. Ravenswood has clarified that it is not advancing any such claims. Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss ("AB") at 1 n.1.

compensation from the Company are so vague that they must be dismissed for failure to state a claim.<sup>31</sup>

The Defendants' motion does not seek dismissal of Ravenswood's claim related to the actual granting of options under the Performance Equity Plan.<sup>32</sup>

#### IV. DISCUSSION

##### A. *Standard for the Motion to Dismiss under Court of Chancery Rule 23.1*

Where, as here, a plaintiff does not make a pre-suit demand on a company's board of directors, a derivative claim must be dismissed under Court of Chancery Rule 23.1 unless the plaintiff pleads, with particularity, facts demonstrating that demand is excused.

In order to determine whether demand is excused, the Court applies the familiar two-pronged test from *Lewis v. Aronson*: (1) the Court considers "whether, under the particularized facts alleged, a reasonable doubt is created that . . . the directors are disinterested and independent"; and (2) the Court looks to whether the complaint creates a reasonable doubt that "the challenged transaction was otherwise the product of a valid exercise of business judgment."<sup>33</sup> "These prongs

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<sup>31</sup> Ravenswood has not advanced this claim either in its brief or at oral argument, and the Complaint alleges no facts suggesting that the Company, as contrasted with Midas or Bexil, paid compensation to the Defendants. To the extent that Ravenswood maintains a claim that the Defendants received improper compensation from the Company, that claim is dismissed under Court of Chancery Rule 12(b)(6) for failure to state a claim.

<sup>32</sup> OB at 7.

<sup>33</sup> 473 A.2d 805, 814 (Del. 1984).

are in the disjunctive. Therefore, if either prong is satisfied, demand is excused.”<sup>34</sup>  
“[T]he demand requirement and the strict requirements of factual particularity under Rule 23.1 exist to preserve the primacy of board decisionmaking regarding legal claims belonging to the corporation.”<sup>35</sup>

*B. Standard for the Motion to Dismiss under Court of Chancery Rule 12(b)(6)*

When considering a motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6), the Court will assume the truth of all well-pled facts as alleged in the complaint and draw all inferences in a light most favorable to the plaintiff.<sup>36</sup> To survive such a motion, the complaint must allege sufficient facts to suggest plausible, ultimate entitlement to the relief sought.<sup>37</sup> The Court is not required to accept conclusory allegations unsupported by specific factual allegations, nor must it accept every strained interpretation of the plaintiff’s allegations, but instead must only make those reasonable inferences that “logically flow from the face of the complaint.”<sup>38</sup>

*C. Ravenswood’s Claims Regarding the Performance Equity Plan and the Stock Buyback Plan*

Ravenswood brings class and derivative claims that the Defendants breached their fiduciary duties (1) by adopting the Performance Equity Plan; (2) by issuing

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<sup>34</sup> *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000).

<sup>35</sup> *In re Citigroup Inc. S’holder Deriv. Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009).

<sup>36</sup> *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007).

<sup>37</sup> *Id.* at 929.

<sup>38</sup> *In re Gen. Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citation omitted).

options under the plan at a price more favorable to the Defendants than that prescribed by the plan; and (3) by adopting and executing a plan to repurchase up to 500,000 shares of the Company's Class A shares. Ravenswood argues that, together, these actions amounted to a scheme by the Defendants "to erode the equity of the Class's shares, to permit the Defendants to pursue a going private transaction, [and to] enhance the equity of these individual Defendants . . . ,"<sup>39</sup> both "at the expense of the Class . . . and at the expense of the Company."<sup>40</sup> The Defendants have moved to dismiss all of these claims except for the claim that options were actually issued to the Defendants with exercise prices below the value of the Company's shares on the day of issue.

1. The claims regarding adoption of the Performance Equity Plan

The parties dispute whether Ravenswood's allegations regarding the adoption of the Performance Equity Plan are individual or derivative or both. In the end, this is a dispute without consequence because these allegations, as they are presented in the Complaint, fail to state a claim under Rule 12(b)(6).

The Complaint alleges that the Performance Equity Plan authorized the Company to grant up to 500,000 options to purchase Class A common stock to its key employees, directors, and officers, and that "[t]he option price per share may

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<sup>39</sup> Compl. ¶ 48.

<sup>40</sup> *Id.* at ¶ 51.

not be less than the fair value of such shares on the date the option is granted.”<sup>41</sup> Further, Ravenswood alleges that the plan was adopted at a time when there were only approximately 1,509,867 Class A shares of the Company outstanding, meaning that the Performance Equity Plan could potentially expand the number of share outstanding by almost one third.<sup>42</sup>

Although the manner in which a company compensates its executives is generally a matter that falls within the board’s business judgment,<sup>43</sup> where the individuals comprising the board and the company’s management are the same, the board bears the burden of proving that the salary and bonuses they pay themselves as officers are entirely fair to the company unless the board employs an independent compensation committee or submits the compensation plan to

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<sup>41</sup> *Id.* at ¶ 25. The Defendants report that the Company’s 2005 Annual Report, upon which Ravenswood apparently relied for its description of the Performance Equity Plan, inaccurately summarized the plan’s terms. Because the Performance Equity Plan itself is not part of the record, the Court will not now take judicial notice of its language. For purposes of the pending motion to dismiss, however, the specific difference that the Defendants have identified between Ravenswood’s allegations and what the Defendants say is the actual language of the plan is not material because the Defendants have not moved to dismiss Ravenswood’s claims regarding the issuance of options under the plan. In case the reader is curious, the Defendants have informed the Court that the exercise price must be at least 110% of the market price when the options are issued.

<sup>42</sup> *Id.* at ¶ 26.

<sup>43</sup> *Haber v. Bell*, 465 A.2d 353, 359 (Del. Ch. 1983) (“A corporation, however, may utilize stock options, purchases, and other means, both present and deferred, to pay compensation to its employees. . . . And generally directors have the sole authority to determine compensation levels and this determination is protected by the presumption of the business judgment rule in the absence of a showing that the business judgment rule does not apply because of a disabling factor.”) (citation omitted); *see also Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) (“[T]he size and structure of executive compensation are inherently matters of judgment.”).

shareholders for approval.<sup>44</sup> Because neither safeguard was employed here, the Defendants must demonstrate that the adoption of the Performance Equity Plan was entirely fair to the Company and its shareholders; nonetheless, Ravenswood bears the burden of alleging facts that suggest the absence of fairness.<sup>45</sup>

Along with the other allegations of the Complaint, Ravenswood's allegations can be read to allege that the Defendants adopted the plan with the intention to acquire a larger percentage of the Company's Class A shares, thus diluting public shareholders' equity.<sup>46</sup> Any options plan, however, has a dilutive effect on shareholders' equity, and this effect alone does not render an options plan unfair.<sup>47</sup> Where the Complaint alleges that (1) the Performance Equity Plan only authorizes the Board to grant stock options with an exercise price not lower than the market value as of that event,<sup>48</sup> (2) the Defendants already control all of the Company's voting rights through their ownership of its Class B shares,<sup>49</sup> and

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<sup>44</sup> *Valeant Pharms. Int'l v. Jerney*, 921 A.2d 732, 745-46 (Del. Ch. 2007).

<sup>45</sup> *Monroe County Employees' Ret. Sys. v. Carlson*, 2010 WL 2376890, at \*2 (Del. Ch. June 7, 2010) ("Delaware law is clear that even where a transaction between the controlling shareholder and the company is involved—such that entire fairness review is in play—plaintiff must make factual allegations about the transaction in the complaint that demonstrate the absence of fairness.")

<sup>46</sup> See Compl. ¶¶ 27, 35.

<sup>47</sup> Indeed, any dilutive effect of an options plan can only be measured by examining how options were actually issued under the plan. See *La. State Employees' Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at \*7 (Del. Ch. Sept. 19, 2001). Because the Defendants' motion does not seek dismissal of Ravenswood's claims regarding the issuance of options under the Performance Equity Plan, the Court does not address this aspect of the dilution claim here.

<sup>48</sup> Compl. ¶ 25.

<sup>49</sup> *Id.* at ¶ 3. Ravenswood correctly points out in its brief, that the Class A shares do have certain voting rights that are guaranteed under Delaware law, such as the right to vote on a merger.

(3) even if all options authorized under the plan were to be granted to the Defendants they would not obtain a majority interest in the Class A shares,<sup>50</sup> Ravenswood has not alleged facts suggesting unfairness in adopting the Performance Equity Plan.<sup>51</sup> Therefore, to the extent that the Complaint seeks to challenge the adoption of the plan, the Court dismisses Counts I and II pursuant to Rule 12(b)(6).<sup>52</sup>

2. The claims regarding the adoption and execution of the stock buyback plan

Ravenswood next claims that the stock buyback plan also eroded the equity of the equity of the Company's public shareholders. Whether viewed as a claim

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AB at 8, 11-12. The Court does not address whether a claim that those voting rights were harmed by adoption of the Performance Equity Plan might survive a motion to dismiss. This is because the Complaint itself contains no such allegations.

<sup>50</sup> According to the Complaint, options granted under the plan would allow the Defendants to obtain slightly under one-third of Class A shares. Compl. ¶ 26. Even if all options authorized under the Performance Equity Plan were eventually issued to the Defendants and all repurchases authorized by the stock buyback plan, discussed more fully below, were eventually completed, the Defendants would still own only about 47% of the Class A shares.

<sup>51</sup> In its brief, as opposed to in the Complaint, Ravenswood challenges the necessity of using stock options to retain and to incentivize the Defendants' services to the Company. AB at 10. Although the Court may also question whether the Company's controlling shareholders need such incentives to ensure that they perform well on behalf of the Company, Ravenswood has not alleged facts suggesting that the adoption of the plan was unfair in this regard. Given the contours of the Defendants' motion, the Court expresses no view at this time as to whether the way options were actually granted to the Defendants under the Performance Equity Plan was entirely fair to the Company or its shareholders.

<sup>52</sup> To the extent that Ravenswood is concerned that its claim regarding the adoption of the Performance Equity Plan must survive in order to preserve its claim regarding the actual granting of options under it at less than fair value (*see* AB at 10), it need not be. *See Ryan v. Gifford*, 918 A.2d 341, 358 (Del. Ch. 2007) (holding that an intentional violation of a shareholder approved stock option plan may be actionable). Moreover, in contrast to *Ryan*, the Company's plan was never presented to its stockholders.

that the repurchases diminished the Company's value or as a claim that they reduced the public shareholders' proportional ownership of Class A shares, there is neither a claim that the stock buybacks were completed at other than market value—indeed, Ravenswood uses these transactions to determine the market value of the Class A shares for purposes of its other claims—nor an allegation that the repurchases harmed shareholders' voting rights. The Complaint identifies no harm that the buybacks might have caused to the individual shareholders, and instead alleges harm to the corporation itself: under *Tooley*, this is a purely derivative claim.<sup>53</sup> Accordingly, the Court dismisses Count I with respect to its direct claims regarding the adoption and execution of a plan to repurchase the Company's Class A shares.

With regard to its derivative claim that the stock buyback program harmed the Company, Ravenswood has not alleged with sufficient particularity facts indicating that the Defendants were interested parties to the stock buybacks or that the decision to engage in the buyback program was not the product of a valid business judgment. Although the repurchases increased the proportionate ownership represented by the Defendants' Class A shares, they increased the proportionate ownership represented by every Class A share equally and reduced the assets of the Company in a way that affected all shareholders in proportion to

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<sup>53</sup> *Tooley*, 845 A.2d at 1033.

their respective ownership levels. Had the Complaint included particularized allegations regarding the effects of the buyback program on the Defendants' and the Class's rights to vote their Class A shares, the Court might have reached a different outcome. As the Complaint is written, however, the Court cannot discern any particularized allegation that would excuse Ravenswood from making demand with regard to this claim. Accordingly, the derivative claims regarding the stock buyback plan are dismissed under Court of Chancery Rule 23.1.<sup>54</sup>

*D. Ravenswood's Claims Regarding the Sale of Bexil's Holdings in York*

Ravenswood's remaining claims that are the subject of the Defendants' motion concern the approval by the Company, in its role as a 22% shareholder in Bexil, of the sale of Bexil's 50% interest in York (the "York Sale"), and the acceptance by Thomas and Bassett of separate compensation from Bexil in connection with that sale. The thrust of Ravenswood's claim is that the compensation Thomas and Bassett would receive in connection with the York Sale tainted the decision to vote the Company's shares in favor of the sale with self interest.<sup>55</sup> Ravenswood further argues that Bexil's payment of the compensation to Thomas and Bassett violated the terms of the contract under which Midas was to

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<sup>54</sup> Because the Complaint gives no indication that the repurchases were made at other than fair market value, there is also question as to whether these claims would survive the motion to dismiss under Rule 12(b)(6). Because the Court grants the motion to dismiss the claim under Rule 23.1, it need not reach that question here.

<sup>55</sup> Compl. ¶ 41.

pay all compensation to the officers and directors of the Company and its affiliates, and that paying this compensation reduced the value of the York Sale to the Company.<sup>56</sup>

When the York Sale closed, the Company received 22% of the pre-tax proceeds of the sale, or approximately \$38,471,143.<sup>57</sup> Having carried its investment in Bexil at approximately \$1,000,000, the Company thus realized a pre-tax gain of almost \$37.5 million from the transaction.<sup>58</sup> Thomas and Bassett received, in the aggregate, \$2,500,000 for their roles in the transaction; of this amount, \$2,000,000, or 80%, was contingent upon the deal closing; \$2.5 million equals approximately 1.43% of the total deal price, or, as Ravenswood frames it, 6.5% of the Company's share of the proceeds of the York Sale.<sup>59</sup>

1. Whether the claims regarding the York Sale are derivative or direct

Both the claim that Thomas voted the Company's shares in Bexil in favor of the York Sale out of self-interest and that Thomas and Bassett improperly received compensation from Bexil that should have instead gone to Bexil's shareholders, including the Company, involve injuries to the Company as a whole, and not to individual shareholders of the Company. Any remedy for the alleged wrongs

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at ¶ 40.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at ¶ 41. Extrapolating from the Company's pre-tax proceeds of approximately \$38,471,143 yields a total deal price of approximately \$174,868,831.82, of which \$2,500,000 is 1.43%; AB at 15.

would also go to the Company and not to any particular individuals or class of individuals. Accordingly, under *Tooley*, Ravenswood's claims regarding the York Sale are derivative and are not direct. The Court therefore dismisses the direct claims of Count I relating to the York Sale.

2. Whether the derivative claims regarding the York Sale survive the motion to dismiss under Rule 23.1

Ravenswood argues that the Complaint's allegations regarding the \$2.5 million Thomas and Bassett received in connection with the York Sale (of which \$2 million was contingent upon closing the transaction) show that they were interested in the Company's decision to vote its shares in Bexil in favor of the transaction.<sup>60</sup> Ravenswood further argues that its allegations are sufficiently particularized to satisfy the requirements of Rule 23.1.

The Defendants counter that the requirement to plead demand futility with particularity requires a plaintiff not only to allege that directors received a benefit, but also that the benefit was material to the allegedly interested directors,<sup>61</sup> and that the Complaint does not address this latter requirement.

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<sup>60</sup> Compl. ¶¶ 38, 41; OB at 13-14. The Complaint also suggests, apparently based solely on Bexil's designation of Bassett and Thomas as interested (Bexil) directors with regard to the York Sale, that there is "a distinct possibility" that the Winmills might have an interest in the buyer of York. This possibility is not alleged with the factual particularity that Rule 23.1 requires. Compl. ¶ 42.

<sup>61</sup> See *Solomon v. Armstrong*, 747 A.2d 1098, 1118 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000) ("[I]t is well established that when a party challenges a director's action based on a claim of the director's debilitating pecuniary self-interest, that party must allege that the director's interest is material to that director.").

The Complaint can fairly be read as alleging that Thomas and Bassett voted the Company's shares in favor of the York Sale as least partially out of a motivation to collect the additional \$2 million they were to receive upon the closing of the deal.<sup>62</sup> Although it might be possible to argue that a \$2 million cash payment would not be material to Thomas and Bassett Winmill under the circumstances, the Court is satisfied that the Complaint supports an inference that they acted, in part, *because* of that expected payment, and that it, therefore, satisfies the requirement to plead materiality.

Accordingly, because the Complaint properly pleads that two of the Company's three directors had a material, disqualifying self-interest when they voted the Company's shares in favor of the York Sale, the claims regarding the York Sale survive the motion to dismiss under Rule 23.1.

3. Whether the derivative claims regarding the York Sale survive the motion to dismiss under Rule 12(b)(6)

The Complaint alleges, albeit in a rather barebones way, that the Company's approval was "required" for completion of the York Sale.<sup>63</sup> It also alleges that a majority of the Company's Board had a disqualifying self-interest in closing the York Sale when it voted its shares in favor of the transaction. Thus, the Complaint

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<sup>62</sup> See Compl. ¶¶ 38, 41.

<sup>63</sup> *Id.* at ¶ 41. Although this allegation, based upon Ravenswood's belief, is sufficient for purposes of a motion to dismiss under Rule 12(b)(6), on which a plaintiff is entitled to have factual inferences drawn in its favor, the Court recognizes that the situation may change once Defendants have the opportunity to introduce evidence.

properly alleges that the York Transaction was a product of an interested decision by the Company's board, and the Court may not dismiss the claim at this stage if the Complaint also contains an allegation that the York Sale was unfair to the Company.<sup>64</sup>

The Defendants contend that, far from alleging that the York Sale was unfair to the Company, the Complaint actually alleges that the Company benefited the Company: "The Company had carried the investment at approximately a \$1,000,000 and recognized a pre tax gain from the sale of \$37,471,143."<sup>65</sup> That the Company received a considerable benefit from the York Sale, however, does not necessarily indicate that the transaction was "entirely fair" to the Company. According to the Complaint, because of the compensation paid, allegedly wrongfully, to Thomas and Bassett in connection with the transaction, the benefit to the Company was smaller than it should have been.<sup>66</sup> These allegations of wrongful conduct and harm to the Company are sufficient to defeat a motion to dismiss under Rule 12(b)(6).<sup>67</sup>

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<sup>64</sup> See *Carlson*, 2010 WL 2376890, at \*2.

<sup>65</sup> Compl. ¶ 40.

<sup>66</sup> *Id.* at ¶ 41 ("The payment to these officers and directors of Winmill directly effected [sic] the value of the transaction to Winmill and arose from the transaction in which Winmill's consent was solicited, obtained, and, Plaintiff believes, required.").

<sup>67</sup> To the extent that there may have been a viable derivative claim that the Company should have brought suit to enforce the agreement with Midas to prevent Bexil from paying compensation to Thomas and Bassett outside of that contract, on the basis that benefits of the contract run to the Company, such a claim is not alleged adequately, if at all, in the Complaint. See Mot. to Dismiss Hr'g Tr. at 14-15. The Court thus dismisses any such claim under Rule 12(b)(6).

## V. CONCLUSION

For the foregoing reasons, the Court denies the Defendants' motion to dismiss Count II only with regard to the claim that the Defendants' vote of Winmill's interest in Bexil in favor of the York Sale was self-interested and unfair to the Company. The Court otherwise grants the Defendants' motion, as set forth above.

**IT IS SO ORDERED.**

*/s/ John W. Noble*

Vice Chancellor