EFiled: Nov 9 2004 10:46AM EST
Filing ID 4573402

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT I. UNANUE, FRANCISCO R. UNANUE and GOYA FOODS, INC.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 204-N
JOSEPH A. UNANUE and ANDREW UNANUE,	)	
Defendants.	)	

OPINION

Submitted: July 13, 2004
Decided: November 3, 2004
Revised: November 9, 2004

William J. Marsden, Jr., Esquire of FISH & RICHARDSON P.C., Wilmington, Delaware; Joseph J. Schiavone, Esquire, Richard M. DeAgazio, Esquire, Christopher P. Anton, Esquire of BUDD LARNER, P.C., Short Hills, New Jersey, *Attorneys for Plaintiffs*

Collins J. Seitz, Jr., Esquire, Matthew F. Boyer, Esquire of CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware; Michael R. Griffinger, Esquire, Thomas R. Valen, Esquire, Frederick W. Alworth, Esquire of GIBBONS DEL DEO DOLAN GRIFFINGER & VECCHIONE, *Attorneys for Defendants*

PARSONS, Vice Chancellor.

This action arises out of an intra-family dispute for control of Goya Foods, Inc. ("Goya" or the "Company"). The Goya board of directors consisted of three members of the Unanue family, Joseph A. Unanue ("Joseph"), Robert I. Unanue ("Robert") and Francisco R. Unanue ("Francisco") before the actions at issue in this litigation. Robert, Francisco and Goya (collectively, "Plaintiffs") brought this action pursuant to 8 *Del. C.* § 225. They seek a declaratory judgment that the removal of Joseph as a director and chairman of the board of directors by stockholder written consents was valid. Similarly, they seek to confirm the validity of certain actions taken by the board thereafter. This matter was tried on April 29 and 30, 2004, and argued on July 1, 2004. This Opinion reflects the Court's post-trial findings of fact and conclusions of law.

Goya and its related companies constitute a highly successful food company that operates facilities throughout the United States and in several foreign countries. As a third-generation business owned and operated by the Unanue family, Goya owes its success to the efforts of many members of that family. An important contributor to that success is Joseph, who served as president of the flagship company, Goya Foods, Inc., in Seacaucus, New Jersey from 1974 until earlier this year. The shares of Goya are approximately equally distributed among three branches of the family, each of which has a member on the board. In 2003, the board consisted of Joseph and two of his nephews, Robert and Francisco, who disagreed with Joseph on certain key issues. After more than six months of dissension over those and other matters, the nephews reluctantly obtained written consents from the stockholder members of their respective families and removed

Joseph as a director. Thereafter, they removed Joseph and his son Andrew from their positions as officers and employees of the Company.

In defending against this action, Joseph and Andrew seek a declaration invalidating the written consents and their resulting removal based on a failure to provide full and fair disclosure to the consenting stockholders. For the reasons stated in this Opinion, the Court concludes that written consents were valid and reflected the informed actions of the holders of a clear majority of Goya's stock. Therefore, the actions removing Joseph as a director, and Joseph and Andrew as officers and employees are valid.

I. FACTS

Goya is a closely held Delaware corporation with a principal place of business in New Jersey and related entities and subsidiaries throughout the United States, the Caribbean and Spain. Seventeen family members and two related estates own 100% of the outstanding voting stock. Spanish immigrants Prudencio Unanue ("Don Prudencio") and his wife, Carolina Unanue, founded Goya in 1936. The Company has remained family owned and operated ever since.

Don Prudencio and Carolina had four sons, Joseph, Anthony, Frank and Ulpiano (known as "Charles"). All four were active in the family business as stockholders, officers, and directors of Goya and related companies. Charles became estranged from the family and sold his stock back to Goya in 1974. The remaining three branches of the Unanue family (Anthony, Frank and Joseph's) each control roughly one third of Goya's

voting stock.[1] Anthony and Frank are deceased; their stock is controlled by their children and related trusts.

Joseph, age 79, is the only surviving "second generation" Unanue participating in Goya. He began working for the Company as a teenager, became a board member in 1946, acting president in the late 1960s and president, chairman and chief executive officer in 1974. Joseph held the latter positions until his removal in February 2004.[2] Although Joseph is no longer a Goya stockholder, his family owns stock through his children and related trusts.

After the deaths of Don Prudencio and Anthony (Robert's father) in 1976, Joseph and Frank ran the Company informally and through consensus and cooperation. They rarely held board meetings or prepared formal minutes.[3] Joseph managed the Company's operations in New Jersey, where he had his office. Frank managed a related Goya company in Puerto Rico.[4] Under their leadership, Goya became the largest Hispanic-owned food company and the fourth largest Hispanic-owned company of any kind in the United States. Over time, however, Joseph became more domineering.[5] Before his death in late 2002, Frank reluctantly went along with Joseph's decisions in an attempt to

---

1 One of Charles's sons, C. Randall Unanue, remains a Goya stockholder. JTX 26.

2 Trial Transcript ("Tr.") at 491-95.

3 Tr. at 225-28, 258-59, 500.

4 Tr. at 500-01.

5 Tr. at 51-52, 60-61, 140-42, 225-26.

maintain the family aspect of the business.[6] The evidence presented at trial made it abundantly clear that Joseph has controlled Goya's corporate operations for a number of years.

Joseph had two sons and four daughters. His older son, Joseph Unanue ("Joey"), was also active in Goya. Joey served as executive vice president until he was diagnosed with cancer in 1998. Joseph's younger son, Andrew, joined Goya in 1991 after graduating from college. Andrew has remained with the Company since then, except when he took a sabbatical to pursue a graduate degree in international business management. He served as president of a related Goya company from 1995 to 1998. When Joey was diagnosed, Andrew left business school to take over Joey's responsibilities at Goya.[7] After Joey died in 1998, Andrew assumed a greater role in the Company and was elected vice president. In 2000, Joseph named him chief operating officer ("COO").[8]

Like Andrew, Goya directors Robert and Francisco are among the "third generation" Unanue family stockholders. Robert has worked for Goya and related companies for all but two short periods since 1990.[9] He was elected to the board in

---

6 *Id.*

7 Tr. at 568.

8 Tr. at 512; Joseph Dep. at 87. References to depositions of members of the Unanue family in this Opinion are given by the deponent's first name and the page reference.

9 Tr. at 318-19.

1995.[10] Francisco began working for Goya-related companies in 1985. In 2003, after his father, Frank, died, Francisco was elected to the board of directors. Before the filing of this action, neither Robert nor Francisco regularly resided in New Jersey or spent time at Goya's headquarters there.[11]

Virtually all of Goya's stockholders take an active interest in their family's business. They receive significant dividends and attend and participate in the Company's annual meetings. For example, Mary Ellen (Robert's sister) testified that she attended the annual stockholders meetings, that she has received and had the ability to ask questions about audited financial statements at the annual meetings since 1999, and that she knew about Goya's recent financial trends.[12] Carlos (a son of Frank) attended the annual stockholders meetings, reviewed the audited financial statements and (because he worked for the Company) often received monthly unaudited financial statements.[13] Diana testified that, as the widow of Frank and executrix of his estate, she knew about the problems on the Goya board, but relied on her children, the beneficiaries of the estate, to make decisions about the Company and gave one of them (Francisco) the estate's proxy for the 2003 annual stockholders meeting.[14]

---

[10] Tr. at 224.

[11] Tr. at 319-20; Tr. at 22-23.

[12] Mary Ellen Dep. at 20-26.

[13] Carlos Dep. at 23-29.

[14] Diana Dep. at 8-25. *See also* Tr. at 43-44 (Francisco explaining that his mother and siblings were fully aware of what was going on at Goya).

Plaintiffs Robert and Francisco and certain stockholder family members felt that Joseph had been acting in an autocratic manner and not cooperating with the board.[15] They also were concerned that Joseph unilaterally was setting the stage for his son Andrew to become his successor.[16] The record shows that Joseph, indeed, made important decisions without consulting other board members and ignored the opinions of other board members.[17] For example, sometime after Robert joined the board in 1995, Joseph told him that only Joseph's vote mattered and that Robert's vote as a director would not count for anything.[18] Other examples include Joseph's unilaterally installing his daughter as president of Goya's Florida division,[19] unilaterally deciding to reduce by $2 million the amount Goya owed to Goya Puerto Rico for nectar products under a

---

[15] As discussed in the Analysis section, *infra,* there is no dispute that the holders of a majority of the Goya shares had the right under 8 *Del. C.* § 141(k) to remove Joseph as a director with or without cause. Defendants contend that the stockholders' motivations for removing Joseph are irrelevant to the issue presented in this case regarding the adequacy of the disclosures made to those who voted to remove Joseph. *See* Letter from Defendants' Counsel dated July 9, 2004, at 3. The Court disagrees. The facts recited herein touching upon the shareholders' motivations are relevant, at least as background, to put the challenge to the adequacy of disclosure in context.

[16] Tr. at 72, 79, 219, 350; Francisco Dep. at 121-26, 138-40; Robert Dep. at 151; Theresa Dep. at 73-78; Thomas Dep. at 90.

[17] Tr. at 50-52, 81-89, 95-103, 107-08, 196-203, 204, 252, 254-75; Carol Ann Dep. at 20-21, 32-33; Diana Dep. at 15, 16; Jorge Dep. at 100; Theresa Dep. at 15-16, 21; Mary Ellen Dep. at 33-50, 85, 91; Carlos Dep. at 43-44; Diana Dep. at 12-13; Peter Dep. at 82-90, 93, 110-11, 140-42, 218-19, 224-26; Thomas Dep. at 112; JTX 1, 12.

[18] Tr. at 224-25.

[19] Tr. at 52, 222-24.

preexisting contract on the ground that he could obtain them cheaper elsewhere and temporarily resigning when the other board members disagreed,[20] appointing his son Andrew as COO and failing to carry out his promise to drop the COO title,[21] and fighting working family members' efforts and the decision of the majority of the board (Robert and Francisco) to implement salary parity.[22] These issues evolved over the years and were discussed among the family member stockholders, eventually culminating in certain stockholders' decision to remove Joseph, as will be discussed.

Due to the concern among stockholder family members about the inability of the board of directors to work together, Goya's election of directors at its June 2003 annual meeting was conducted by secret ballot for the first time ever.[23] Six of the stockholders abstained or voted against Joseph.[24] Despite his concerns about the board's prior problems, Francisco voted his shares and the proxy for his father's estate in favor of Joseph in the hope that the three directors could begin working together better. If Francisco had voted otherwise, Joseph would not have been elected in June 2003.[25]

---

[20] Tr. at 58-61, 502-05.

[21] Tr. at 54-57, 71-72, 237-38, 343-45, 350-51.

[22] Tr. 29, 61-62, 72-73, 191-95, 203, 215-16. The working family members received significant salaries, but the evidence indicated that most of the shareholders live off the dividends of the Goya companies. Tr. at 29.

[23] Tr. at 68-69, 245-46.

[24] Tr. at 245-47.

[25] Tr. at 90-91.

At a June 27, 2003 board of directors meeting, Robert and Francisco introduced resolutions eliminating the COO title and setting all third generation working family members' salaries at $115,000 plus a $10,000 bonus.[26] Joseph, however, abruptly left the meeting before voting to go to a dinner appointment with a business associate.[27] Robert and Francisco, as a quorum of the Goya board, determined to continue the meeting and approved the resolutions in Joseph's absence.[28] Nevertheless, Joseph refused to carry out these decisions in his capacity as Goya's president, claiming (in a September 23, 2003 letter authored by his counsel) that the meeting was adjourned when he left.[29]

As an accommodation, and out of respect for their uncle, Robert and Francisco agreed to hold a second board meeting on September 11, 2003 to continue the discussion of the resolutions and to permit Joseph to register his vote.[30] At that meeting, Robert and Francisco again voted in favor of the resolutions. Joseph expressed his disagreement with both resolutions. Moreover, he told Robert and Francisco that he ran the company and if they didn't like it, there were two options: Joseph's family would buy out the others, or the others would buy out his family.[31]

---

[26] Tr. at 75-76; JTX 20.

[27] Tr. at 74-75; Joseph Dep. at 120-21, 123-26, 135, 137, 143-53.

[28] Tr. at 75-76; JTX 20.

[29] Tr. at 252; JTX 13; Joseph Dep. at 163, 188. By September 2003, Joseph had retained as his personal counsel, Michael Griffinger, who represents him and Andrew in this litigation. *See* Joseph Dep. at 163.

[30] JTX 21.

[31] Tr. at 253.

When Joseph again refused to implement the board's decisions, Robert and Francisco exchanged letters with him and also sought the advice of Goya's corporate counsel.[32] As he had before, Joseph raised technical objections (in letters authored by his counsel) to the manner in which the votes were taken and recorded,[33] and noted that he would only abide by the board's decisions if those decisions were, in his opinion, "rational and in the best interests of the company."[34] Robert and Francisco either described or provided copies of this correspondence to their family members and co-stockholders.[35] Both in-house and outside corporate counsel for Goya gave highly equivocal responses to Robert and Francisco. In each case, their reluctance to undercut Joseph, who had controlled the Goya corporate machinery for decades and conceivably could still have emerged victorious in the ongoing board dispute, was painfully evident.[36]

Robert and Francisco also claim that by late 2003 and early 2004 they had become concerned about the way Andrew was managing Goya. Specifically, they expressed

---

[32] Tr. at 81-89, 95-103, 107-08, 196-204, 254, 275; JTX 1-6, 8, 12, 17; PTX 11. Goya's in-house corporate counsel was Ira Matetsky; the Company's outside corporate counsel was Barry Garfinkel of Skadden, Arps, Slate, Meagher & Flom LLP. Robert and Francisco wrote to each of them to request a legal opinion regarding Joseph's failure to implement what they considered decisions by a majority of the board. JTX 3-11.

[33] JTX 13 (letter dated January 15, 2004 from Joseph to Robert and Frank claiming that the September 11, 2003 meeting had been suspended before the issues could be resolved).

[34] JTX 12; Tr. at 100, 204.

[35] Tr. at 103-04, 255-56, 260-61, 274-75.

[36] JTX 3-11.

concerns about his professionalism,[37] extensive use of outside consultants,[38] certain changes that he was pushing regarding Goya's marketing and distribution,[39] and the effect of a recent restructuring on employee morale.[40] Robert and Francisco also expressed concern that Andrew and Joseph had not discussed these changes with them as board members. Instead, they only learned about the restructuring after hearing about an internal corporate memorandum announcing it.[41] Robert discussed this memorandum with members of his immediate family and with Francisco.[42]

In January 2004, after talking with other stockholders about the above events and correspondence, Francisco sent written consent forms to each of the stockholders in his and Robert's families.[43] The forms contained the following resolutions:

> RESOLVED, that Joseph A. Unanue be and hereby is removed as a Director of the Corporation; and be it further

---

[37] Tr. at 270-71. The testimony on this topic at trial was conflicting. The Court, however, does not consider Andrew's professionalism or alleged lack of it to be relevant to the issues in this case. Thus, the Court does not need to decide how professional Andrew was.

[38] Tr. at 279-80.

[39] *Id.*; PTX 41.

[40] Tr. at 105, 279-83, 438-39.

[41] Robert discussed the memorandum with his siblings, including specifically Peter. Tr. at 279; PTX 41.

[42] Tr. at 280-81.

[43] Francisco Dep. at 64-66, 116.

> RESOLVED, that Joseph A. Unanue be and hereby is removed as the Chairman of the Board of Directors of the Corporation; and be it further
>
> RESOLVED, that the remaining members of the Board of Directors of the Corporation be and they hereby are authorized to take any and all actions necessary or appropriate to carry out the foregoing resolutions.

Between January 22 and 24, 2004, twelve stockholder family members representing over 62% of the outstanding shares of Goya's voting stock (the "Consenting Stockholders") executed the written consents.[44] Diana, Francisco's mother, succinctly described the impetus for the action:

> Q. What happened since your husband's passing in January 2004 that necessitated the action suggested by [the written consent]?
>
> A. The situation increasingly deteriorated through the years, and I guess it reached a point that it was untenable.
>
> Q. In what way, to your knowledge?

---

[44] PTX 3. Specifically the Consenting Stockholders are Carol Ann Unanue-Freebord, Robert Unanue, Muriel Unanue, Mary Ellen Unanue Yorio, Thomas Unanue, Theresa Elizabeth Unanue, Peter Unanue, Diana Unanue (signing as executrix of Frank J. Unanue's estate), Francisco Unanue, Carlos Unanue, Anne-Marie Unanue, and Jorge Unanue. *Id.* Robert, Muriel, Carol, Mary Ellen, Thomas, Theresa and Peter are all members of Anthony Unanue's family. JTX 25. Diana, Francisco, Carlos, Anne Marie, and Jorge are all members of Frank Unanue's family. *Id.* Of the twelve Consenting Stockholders, six (including Robert and Francisco) worked for Goya or its related companies.

When they sent the stockholders the written consent forms, Robert and Francisco did not state why they wanted them to execute written consents. Robert Dep. at 78. The twelve stockholders who executed written consents already knew the reasons. *See, e.g.*, Theresa Dep. at 29 ("I had already read the letters prior."); Thomas Dep. at 101.

> A. Joe was – it wasn't on a consensus. He wasn't listening to other people's point of view. He was very autocratic, intractable and he was very one-sided.[45]

The written consents were not sought from members of Joseph's family.

During this same time period, Andrew and Joseph issued severance agreements to eight Goya employees without advising Robert or Francisco. These agreements were out of the ordinary for Goya and were very favorable to the employees.[46] For example, the agreements provided the employees with two years of total compensation if they were terminated without "Cause" or resigned for "Good Reason," including any change in their reporting level or status as an employee. The agreements also purported to obligate Goya to pay each employee's attorneys fees in any future litigation relating to the agreements, regardless of who prevailed.[47]

Unaware of the contemplated severance agreements, Robert and Francisco sent a letter to Joseph on January 24, 2004 requesting that Joseph temporarily refrain from implementing any further management restructuring until the board could meet to discuss any changes. They specifically requested that Joseph,

> not hire or fire any further employees at corporate headquarters, change any titles of employees at the corporate headquarters, put into effect any changes in salaries or other compensation of corporate headquarter employees, make any organizational changes with respect to whom employees (at

---

45 Diana Dep. at 12-13.

46 See Tr. at 446-48.

47 PTX 8.

> the level of department manager or above) report, or hire any further consultants or independent contractors.[48]

Robert and Francisco also noticed a board meeting for January 29, 2004, so that the management issues and board resolutions from June and September could be discussed once more.[49]

On Thursday, January 29, 2004, the board met to discuss the above events and the prior votes of Robert and Francisco. Corporate counsel attended the meeting, as well as personal counsel for Joseph and for Robert and Francisco.[50] In the afternoon, Robert and Francisco and Joseph and Andrew agreed to a standstill agreement roughly reflecting the requests in Robert and Francisco's January 24, 2004 letter.[51] Robert and Francisco chose not to deliver the executed written consents to the Company at that time. As Francisco testified, when he and Robert obtained the consents, Francisco still "had the hope that we could talk it through and work through it."[52]

Over the next weekend, however, Robert and Francisco learned that Joseph and Andrew had issued the severance agreements after the January 24, 2004 letter and had continued to seek signatures on at least one of them after the January 29 standstill

[48] JTX 15.

[49] Tr. at 108-09, 209-10; JTX 18.

[50] Tr. at 110-11.

[51] Tr. at 112-13, 546; JTX 15.

[52] Tr. at 42.

agreement.[53] Although neither the letter nor the standstill agreement expressly mentioned severance agreements, Robert and Francisco considered those agreements to be inconsistent with at least the intent, if not the letter, of the standstill agreement. Francisco explained his reaction upon learning about the severance agreements as being like "another slap on the face" and said that he did not know "what else to believe anymore, because you say something; something else happens, and it was as if they – as if, you know, whatever we said was not going to be listened to."[54] In response to further questioning at trial, Francisco testified as follows:

> Q. Did Joe or Andy ever disclose at the meeting on the 29th [of January] that they were – they had sent out or were obtaining – that they were entering into severance agreements with a number of the employees of the company?
>
> A. No.
>
> Q. They didn't – did they raise that when the standstill, the maintenance of the status quo was discussed?
>
> A. No.
>
> Q. Did you feel that the entering into this type of agreement was not consistent with maintaining the status quo?
>
> A. Yes, I felt that.
>
> Q. And why – why did you feel that?
>
> A. Because this is a major, you know – major exposure for the company. They're giving this benefit out after we had expressly said, written and asked, please not –

---

53 PTX 6-13; Joseph Dep. at 208-30.

54 Tr. at 117.

> not to do anything until we work through all these things, you know, until we – we talked about things.[55]

For his part, Joseph testified that the severance agreements were not something for the board, but rather were an issue for him as president to decide.[56]

---

[55] Tr. at 118-19.

[56] Tr. at 529-30. In attempting to downplay the importance of the severance agreements, Defendants cite to transcript excerpts from an interview counsel for Robert and Francisco conducted of GFI's Co-General Counsel, Ira Matetsky, shortly after they removed Joseph and Andrew. Mr. Matetsky was not under oath. Plaintiffs objected to use of the interview on hearsay grounds. *See* D.R.E. 801(i), 802. Defendants concede that the interview is hearsay, but argue that because Plaintiffs submitted excerpts from the interview in support of their motion to disqualify the Gibbons law firm, they have waived any objection to it.

The questions presented are: (1) whether Plaintiffs waived their right to object to the interview; and (2) if not, whether the interview falls within one of the exceptions to the hearsay rule. Plaintiffs did not waive their right to object to the interview. The disqualification motion raised a collateral, procedural issue. Plaintiffs never attempted to rely on the interview transcript at trial for any purpose. Furthermore, the cases from other jurisdictions relied upon by Defendants do not support finding a waiver in the circumstances of this case. In one of those cases, plaintiffs were held to have waived a hearsay objection to certain SEC forms that plaintiffs, themselves, had relied on in their complaint. *See In re Silicon Graphics, Inc., Sec. Litig.*, 970 F. Supp. 746 (N.D. Cal. 1997). Here, Plaintiffs did not rely upon or refer to the Matetsky interview in their complaint or in support of their case at trial. The two criminal cases plaintiffs cited are also inapposite. *See* DOB at 37 n.15. In both cases, the objecting party failed to assert a timely objection at trial for apparently tactical reasons. Plaintiffs timely objected to the interview transcript in this case.

Defendants also argue that the transcript is admissible under the catch-all exception to the hearsay rule, D.R.E. 807. Defendants did not even attempt, however, to demonstrate how the criteria of Rule 807 are met in this case. Because Defendants failed to show that Mr. Matetsky could not have been called as a witness or deposed, the interview transcript does not meet the requirement that it be "more probative on the point for which it is offered than any other evidence which [Defendants could have] procure[d] through reasonable efforts." For that reason and because the interview was not under oath, the Court sustains the objection.

The board continued the January 29th meeting on Monday, February 2, 2004, but Joseph again failed to satisfy Robert and Francisco's concerns about the outstanding issues. Consequently, Robert and Francisco decided to use the written consents.[57]

The next day, February 3, 2004, Robert and Francisco delivered the written consents to Goya's registered agent, effectively removing Joseph as a director.[58] Later that day, acting as a unanimous board, Robert and Francisco executed a written consent in lieu of a special meeting of the directors containing the following resolutions:

> RESOLVED, that Robert Unanue be and hereby is appointed Chairman of the Board of Directors of the Corporation; and
>
> FURTHER RESOLVED, that Joseph Unanue's employment with the Corporation as Chief Executive Officer and President, as well as from all other positions that he may have with the Corporation or for the Corporation is hereby terminated immediately; and
>
> FURTHER RESOLVED, that And[rew] Unanue's employment with the Corporation as Chief Operating Officer and Vice-President, and from all other positions that he may hold with the Corporation or for the Corporation, is hereby terminated effective immediately; and
>
> FURTHER RESOLVED, that Robert Unanue be and hereby is appointed President of the Corporation.

Later the same day, Plaintiffs filed this action to confirm the validity of these actions and the earlier stockholders' action removing Joseph as a director. Plaintiffs later sought to disqualify Mr. Griffinger and his law firm from representing Joseph, based on

---

[57] Robert, Francisco, and the other Consenting Stockholders were not aware of the severance agreements when they executed the written consents. *See* Carlos Dep. at 96.

[58] Tr. at 36-38; PTX 3, 4.

their previous and allegedly contemporaneous representation of Goya. The Court denied that request, ruling that notwithstanding a possible conflict of interest under Delaware Lawyers' Rule of Professional Conduct 1.7, Plaintiffs had failed to make a sufficient showing that Mr. Griffinger's continued representation of Joseph would prejudice the fairness and integrity of the proceedings.[59] After that ruling, the parties and their counsel promptly completed discovery, appeared for trial and presented their post-trial briefs and arguments.

II. ANALYSIS

The primary issue in this case is whether the removal of Joseph as director and chairman of the board of Goya by stockholder written consent is valid under 8 *Del. C.* § 228. The secondary issues are whether Robert and Francisco are the only valid board members, and whether their termination of Joseph and Andrew as officers of Goya was valid.

Joseph had long controlled the corporate machinery of Goya and, in recent years, ran the company almost like a sole proprietorship. The record shows that Joseph made important decisions without consulting, and often ignored the opinions of, other board members.[60] Joseph, however, owned no Goya stock and the members of his immediate

---

59 *Unanue v. Unanue*, 2004 WL 602096 (Del. Ch. Mar. 25, 2004).

60 Tr. at 50-52, 81-89, 95-103, 107-08, 196-203, 204, 252, 254-75; Carol Ann Dep. at 20-21, 32-33; Diana Dep. at 15, 16; Jorge Dep. at 100; Theresa Dep. at 15-16, 21; Mary Ellen Dep. at 33-50, 85, 91; Carlos Dep. at 43-44; Diana Dep. at 12-13; Peter Dep. at 82-90, 93, 110-11, 140-42, 218-19, 224-26; Thomas Dep. at 112; JTX 1, 12. Examples of Joseph's conduct are described *supra* pp. 7-8. They include his telling Robert that his vote as a director would not count for anything

family controlled only approximately one-third of the shares. Consequently, in 2003 and early 2004, Joseph did not have the voting power to override the decisions of his two co-directors, who constituted a majority of the board and whose immediate families represented a majority of the shares. Because of the ownership structure of Goya, a closely held, family owned and operated business, the Consenting Stockholders were aware of the tension that Joseph's autocratic management practices created.[61] Beginning in June 2003 and continuing through January 2004, Joseph took a series of actions that obstructed the functioning of the duly elected board of directors. Displeased with Joseph's continued inability to work constructively with his nephews and co-directors, Robert and Francisco, they and the members of their immediate families, who collectively held over 62% of Goya's stock, signed written consents between January 22 and 24, 2004 to remove Joseph as a director. Robert and Francisco delivered those consents to Goya on February 3, 2004, thereby effectively removing Joseph from the board. Defendants challenge the validity of that action.

(Tr. at 224-25), appointing his son Andrew as COO and failing to carry out his promise to drop the COO title (Tr. at 54-57, 71-72, 237-38, 343-45, 350-51), fighting working family members' efforts and the decision of the majority of the board (Robert and Francisco) to implement salary parity (Tr. 29, 61-62, 72-73, 191-95, 203, 215-16) and unilaterally giving eight high-level Goya employees lucrative severance agreements that had no precedent in the Company and materially hindered the board's flexibility in future personnel decisions (*see* discussion *supra* at pp. 13-15). These severance agreements exposed Goya to potential payments totaling over $2.5 million. PTX 6-13; Tr. at 545.

[61] Tr. at 42 (Francisco), 44 (Annie, Carlos, Jorge), 293-94 (Robert), 330-32 (Muriel, Robert's wife), 463-64 (Peter); Diana Dep. at 12-13; Carol Dep. at 42-44; Mary Ellen Dep. at 59-60; Theresa Dep. at 29-31; Thomas Dep. at 97-98.

It is well settled that the holders of a majority of a company's stock may remove a director with or without cause.[62] The Consenting Stockholders purported to remove Joseph by signing written consents under 8 *Del. C.* § 228. The Court therefore turns to whether that action was valid.

A. Validity of the Written Consents

Section 228(a) provides:

> Unless otherwise provided in the certificate of incorporation, any action required by this chapter to be taken at any annual or special meeting of stockholders of a corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted . . . .

Goya's certificate of incorporation does not prohibit stockholder action by written consent; indeed, its bylaws expressly permit such action.[63] Defendants stipulated that Robert and Francisco satisfied all of the statutory and technical requirements necessary under section 228 to perfect the written consents they obtained. Defendants' sole challenge to the stockholder written consents is that Plaintiffs failed to fully and fairly disclose to the Consenting Stockholders all material information related to the requested stockholder action.

---

[62] *See* 8 *Del. C.* § 141(k).

[63] JTX 27, 28.

1. Applicable standard

The applicable provision of the DGCL, 8 *Del. C.* § 228, contains no disclosure requirements other than that the written consents be in writing, set forth the action to be taken, and be signed by the holders of the stock. The parties agree that the written consents at issue here met those requirements.

Defendants argue, however, that Robert and Francisco's fiduciary duties as directors, included a duty of disclosure comparable to what is generally required in proxy solicitation cases for public companies subject to the federal securities laws. Specifically, Defendants content Robert and Francisco had a duty to disclose "fully and fairly all material information" related to the stockholder action sought.[64] As discussed below, there are legitimate grounds to question the application of a broad duty of disclosure in a situation such as this, where the challenged action is a written consent calling for the removal of a director in a closely held, family run business. The Court, however, need not decide that issue because the facts of this case demonstrate that there was no material nondisclosure.

The Court, therefore, will assume for the sake of argument that the generally stated duty of directors to disclose material information when seeking stockholder action applies in the circumstances of this case. A material fact is one that a reasonable investor

64 *See, e.g., Zaucha v. Brody*, 1997 WL 305841, at *5 (Del. Ch. June 3, 1997), *aff'd*, 697 A.2d 749 (Del. 1997).

would view as significantly altering the total mix of information made available.[65] In applying the duty of disclosure, it is well settled that the Court must use an objective standard in determining whether nondisclosures are material.[66] Accordingly, the materiality of a particular piece of information must be addressed from the point of view of a reasonable stockholder of Goya.[67]

---

65 *Zaucha*, 1997 WL 305841, at *5 (citing *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)).

66 *See Zirn v. VLI Corp.*, 621 A.2d 773, 779 (Del. 1993) (The standard "is an objective one, measured from the point of view of the *reasonable investor*."), *aff'd,* 681 A.2d 1050 (Del. 1996).

67 The objective standard focuses on a reasonable stockholder of the particular company whose stockholders have taken the challenged action. *See, e.g., Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992) ("The directors' duty to disclose all material facts in connection with contemplated shareholder action does not exist in a vacuum."); *Zirn*, 621 A.2d at 780 ("Upon remand, the court should apply an objective standard [of materiality] to determine what information a reasonable VLI shareholder should possess in order to [make the decision at issue] . . . ."). Materiality also is intensely contextual. *See In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 63 (Del. Ch. 2001).

In a supplemental submission, Defendants argue for an even broader standard that would look to a reasonable investor in the abstract. See letter from Defendants' counsel dated July 9, 2004. Citing *Hubbard v. Hibbard Brown & Co.*, Defendants contend that it would be improper for the Court to consider the existence of any relationships among individual shareholders of Goya and the plaintiff-directors who sought the written consents. 633 A.2d 345 (Del. 1993). The Court rejects that argument. In *Hubbard*, the Supreme Court found that the Court of Chancery erred when it determined the adequacy of disclosure based on the lack of sophistication of the actual investors involved. *Id.* Here, the Court is not looking to each of the Consenting Stockholder's specific relationships with plaintiff-directors. Rather, in the context of Goya, a private, family owned company with a relatively small number of stockholders, it is not feasible to characterize a *reasonable* Goya stockholder for purposes of evaluating the validity of a written consent (as directed by *Stroud* and *Zirn*) without recognizing the existence of underlying family relationships. Moreover, the language in *Hubbard* against considering the "attributes of the particular investor at issue" is

a. Is there an affirmative duty to disclose all material facts when collecting written consents of stockholders under the DGCL?

At the outset, it is important to recognize what this case is not. It is not a case where Robert and Francisco had an affirmative duty to disclose certain information under the federal securities laws. Nor is it a case where Robert and Francisco are accused of making misrepresentations to the stockholders or where the corporation's former disclosure policy was changed in order to effectuate an action. Rather, Robert and Francisco admittedly followed the letter of the law embodied in section 228 of the DGCL by setting forth the action to be taken by written consent and providing consent forms to certain stockholder family members. In essence, Defendants complain that Robert and Francisco failed to disclose to their family member stockholders information that would reveal Joseph's "side" of the story.

Under Delaware law, as noted above, directors generally have a fiduciary duty to disclose all material facts when they seek stockholder action or communicate with stockholders.[68] The fiduciary duty to disclose often overlaps the affirmative duties to

---

distinguishable because *Hubbard* dealt with the disclosure of a securities broker-dealer to various individuals, not the disclosure of a specific company's director to its stockholders. *Id.* at 352.

[68] *Stroud,* 606 A.2d at 84. Unlike the federal securities laws, the DGCL imposes no affirmative duty to provide financial information or other substantive information about the corporation in public filings. *See Malone v. Brincat*, 722 A.2d 5 (Del. 1998). Even where the DGCL mandates stockholder action, the provisions dealing with notice to stockholders of the proposed action do not require the corporation to supply substantive information to the stockholders relating to the exercise of their franchise. Instead, this statutory void is filled with the equitable principles embodied in the fiduciary duties of the board of directors. *See* David A.

disclose under the federal securities laws. Where the federal laws mandate disclosure, Delaware law requires that any disclosure made be full and fair.[69] There need not be an affirmative disclosure requirement under federal law, however, for a fiduciary duty to disclose to arise under Delaware law.[70]

In *Stroud v. Grace*, the Delaware Supreme Court confirmed that whenever directors communicate publicly or directly with stockholders about the corporation's affairs they must fully and fairly disclose all material facts.[71] The Court went on, however, to reject an attempt to graft affirmative disclosure obligations onto sections 222 and 242 of the DGCL beyond what is explicitly required by those sections. The contested board meeting in *Stroud* concerned amendments to its corporate charter and bylaws. The Court of Chancery had invalidated the notice of the stockholder meeting for failure to disclose the difference between the proposed charter amendments and earlier proposed amendments that had been withdrawn. In reversing the Court of Chancery, the Supreme Court stated:

Drexler, Lewis S. Black & A. Gilchrist Sparks, *Delaware Corporation Law and Practice* § 15.07A (Dec. 2003).

69 *Stroud*, 606 A.2d at 84; *see also Zirn,* 681 A.2d at 1058 ("The goal of disclosure is to provide a balanced and truthful account of those matters which are discussed in a corporation's disclosure materials.").

70 *Malone*, 722 A.2d at 10-11 (recognizing that stockholders are entitled to rely on the truthfulness of information furnished to them (1) in connection with requests for stockholder action, (2) in public statements made to the market generally, and (3) in other communications to stockholders unrelated to requests for stockholder action).

71 606 A.2d at 84. *See also Malone*, 722 A.2d at 9.

> Significantly, the [DGCL] does not require any further disclosures in the absence of a proxy solicitation.
>
> * * * *
>
> All of our previous decisions requiring disclosure requirements, and subsequent shareholder ratification, involved proxy solicitations. In the absence of that circumstance, questions of disclosure beyond those mandated by statute become less compelling.[72]

The Supreme Court went on to caution this Court against grafting equitable fiduciary duties onto the clearly delineated statutory requirements.

> The trial court's extension of the duty of disclosure beyond that mandated by statute effectively amends the law. It is important that there be certainty in the corporation law. We emphasize that the Court of Chancery must act with caution and restraint when ignoring the clear language of the [DGCL] in favor of other legal or equitable principles.[73]

Following the Delaware Supreme Court's instructions, I question whether additional disclosure duties should be required in the written consent context. In one prior case, *Zaucha v. Brody*, Vice Chancellor Balick applied the fiduciary duty of disclosure to written consents that effectively amounted to a proxy contest.[74] *Zaucha,*

---

72 *Stroud*, 606 A.2d at 85-86.

73 *Id.* at 87.

74 1997 WL 305841. Unlike a proxy solicitation, persons organizing other stockholders to act by written consent under section 228 generally are not bound by an affirmative duty to disclose under the federal securities laws. Moreover, because action by written consent requires individual acts of volition by the stockholders, the potential for abuse that gives rise to the federal proxy rules is not present. *See Stroud*, 606 A.2d at 86 (noting that the Court's decision is limited to privately held companies). Goya is a privately held company much like the company at issue in *Stroud*, Milliken Enterprises, Inc. ("Milliken"). Both Milliken and Goya are closely held and family owned. *Id.* at 79. In fact, Goya has less

however, addressed a scenario where a dissident director of a public company retained a proxy solicitation firm and sent out written consents seeking, among other things, replacement of the board with his own slate.[75]

Here, the issue presented is whether the duty of disclosure should apply to written consents seeking removal of a director in a private, family run business in which all the stockholders are either active in the business or intimately connected with someone who is active within the business. Our cases have recognized that directors of a Delaware corporation have a duty to disclose material information when seeking stockholder action.[76] Neither the federal securities laws nor the DGCL, however, mandates affirmative disclosure of all material facts when stockholders are provided written consent forms. Additionally, the Delaware Supreme Court has cautioned this Court against grafting affirmative equitable disclosure obligations onto the clear statutory requirements of the DGCL. Recognizing the tension between these potentially conflicting principles, I consider it important, even if a duty of disclosure does apply, to guard against a wooden or mechanistic application of that duty to Robert and Francisco's solicitation of written consents in the context of Goya's ownership structure.

---

stockholders and a greater degree of family participation. Most of Milliken's 200 stockholders were descendants of its founder, while Goya is controlled by just seventeen family members and two related estates. *Id.* Also, Milliken's board was comprised of four family members and six outside directors, while Goya's board was comprised entirely of three family members. *Id.*

[75] 1997 WL 305841, at *2.

[76] *Malone*, 722 A.2d at 9.

2. Was all material information disclosed?

Assuming, *arguendo*, the duty of disclosure applies to the solicitation of written consents for director removal, Defendants' challenges to the written consents fail. Only information that is material to the stockholder decision and adds to the total mix of available information constitutes a violation of the duty of disclosure.[77] Given the unique factual context of this case, the proffered nondisclosures were not material to the Consenting Stockholders' decisions to remove Joseph.

a. Burden of proof

The burden of proving that a director's removal is invalid rests with the party challenging its validity.[78] Defendants selectively quote *Stroud v. Grace* for the proposition that the burden "remains on those relying on the vote to show that all material facts relevant to the transaction were fully disclosed."[79] The burden referred to in that sentence, however, does not control here. Rather, it applies to a party relying on a stockholder vote to ratify a fiduciary's action where a conflict of interest exists. In fact, the very next paragraph in *Stroud* confirms that the *evidentiary* burden remained with the party challenging the validity of the vote.[80] Defendants have failed to present any valid

---

[77] *See, e.g., Rosenblatt*, 493 A.2d at 944.

[78] *See, e.g., Oberly v. Kirby*, 592 A.2d 445, 457 (Del. 1991) (in a § 225 action, the burden of proving the invalidity of the election rests on the party challenging its validity).

[79] DOB at 12 (citing *Stroud*, 606 A.2d at 84 and *In re Bigmar*, 2002 WL 550469, at *23 (Del. Ch. April 5, 2002)).

[80] *Stroud*, 606 A.2d at 84.

reason why the evidentiary burden should be shifted to Plaintiffs in this case. Thus, the burden of proving that Joseph's removal was invalid rests with Defendants, the parties challenging its validity.

b. Materiality of nondisclosures

Defendants challenge the validity of Joseph's removal solely on the basis of nondisclosure. The duty of disclosure requires that all material information must be disclosed when seeking stockholder action.[81] In *Rosenblatt v. Getty Oil Co.*,[82] the Delaware Supreme Court adopted the materiality standard set forth by the United States Supreme Court in *TSC Industries, Inc. v. Northway, Inc.,*[83] holding:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote . . . . What it does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberation of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[84]

---

[81] *Malone*, 722 A.2d at 9.

[82] 493 A.2d 929, 944 (1985).

[83] 426 U.S. 438, 439 (1976).

[84] *Rosenblatt*, 493 A.2d at 944 (quoting *TSC Industries*, 426 U.S. at 449). As discussed above, the *Rosenblatt* materiality standard is an objective standard that analyzes the nondisclosure from the point of view of a reasonable investor of the company involved. *Id.*

Therefore, to establish a violation of the duty of disclosure, Defendants must prove that the omitted fact would have been material to the stockholder action sought.[85] Here, that action was the removal of Joseph from the board of directors.

As discussed above, the Consenting Stockholders were all immediate family members of Robert or Francisco, and represented the lines of Frank and Anthony Unanue, Joseph's brothers. Six of the twelve Consenting Stockholders worked in management positions at Goya or one of its related companies.[86] All of the Consenting Stockholders knew about the problems that Joseph's autocratic management style created in the working relationship of the board.[87] Many of them cited this factor as the reason they signed the written consents.[88] Based on the evidence presented, the Court also finds that a reasonable stockholder of Goya in January of 2004 would have known about the problems on the board in terms of the lack of cooperation between Joseph, on the one hand, and Robert and Francisco, on the other.

---

[85] *Zaucha*, 1997 WL 305841, at *4 ("A material fact is one that a reasonable investor would view as significantly altering the 'total mix' of information made available."); *Rosenblatt*, 493 A.2d at 944 ("the materiality standard is an objective one, determined from the prospective of the reasonable stockholder, not the directors or the other party who undertakes to distribute information.").

[86] Tr. at 27. They are Robert, Peter, Thomas, Carlos, Jorge, and Francisco.

[87] *See supra* n.61. Defendants rely primarily on the deposition testimony of Diana Unanue ("Diana") for their contention that the Consenting Stockholders were uninformed. Diana, the widow of Frank Unanue, who was a director of Goya until he died in December 2002, is the executrix of his estate. Through her years of marriage to Frank, Diana was fully aware of the rift in the board of directors. Diana Dep. at 12-13.

[88] *See, e.g.,* Carol Ann at 66 ("My reason for signing this was solely due to the cooperation of the board"); Diana Dep. at 12-16.

Defendants contend that Robert and Francisco breached their fiduciary duties by failing to disclose the following information: the most recent financial performance information of Goya; Robert and Francisco's future management plans; whether, when, or under what circumstances they would deliver the written consents; that Robert and Francisco intended to terminate Joseph and Andrew as officers and employees; and, that Robert would replace Joseph as president and CEO.[89] Defendants also contend that these nondisclosures were further compounded by the secrecy with which the written consents were distributed, which deprived Joseph of an opportunity to tell his side of the story.[90] As explained below, the purported nondisclosures were not material in the circumstances of this case to the decision to remove Joseph. The fact that none of the Consenting Stockholders has complained about the adequacy of disclosure further supports this conclusion.

i. Materiality of Goya's financial performance and Robert and Francisco's future management plans[91]

Defendants contend that Robert and Francisco breached their fiduciary duties by failing to disclose the most recent information about the financial performance of Goya and their future management plans for Goya. The decision to remove Joseph, however, was not about the finances of Goya or even Robert and Francisco's future plans for the

[89] DOB at 21-23.

[90] DOB at 28.

[91] The Court has grouped together Defendants' arguments regarding nondisclosure of the financial performance of Goya and Robert and Francisco's business plans, because they raise similar issues. The Court has used the same approach in addressing Defendants' other nondisclosure arguments, as well.

Company's management. It was about the internal relations of the Unanue family as related to Goya, specifically the lack of cooperation among members of the board.[92] The evidence showed that the Goya board was not working in a way that a reasonable stockholder would have expected. The continuing dispute Robert and Francisco had with Joseph regarding Andrew's use of the COO title and the issue of salary parity for working family members corroborate this conclusion. Joseph's repeated insistence that he would only go along with the majority's decisions on those issues, if they convinced him that they were "rational and in the best interests of the company," is telling. Through his intransigence, Joseph effectively conferred upon himself a veto power, which reflects the seriousness of the board's dysfunction. That is especially true in the circumstances of this case, where Joseph controlled the day-to-day operations of the Company. A reasonable stockholder of Goya from the immediate family of Robert or Francisco (as the Consenting Stockholders were) most likely would view Joseph's actions as reflecting disrespect for and disregard of the opinions of their representatives on the board. The record shows that considerations of this nature were an important part of the "total mix" of information available to the Consenting Stockholders.

While it may be unusual for financial statements not to be material to a reasonable investor's decision, it is not unheard of. In *Zaucha*, the Supreme Court concluded that "[t]he audited financial statements were not what this consent solicitation was about . . . [and] the financials would not have been particularly helpful in evaluating the issues . . .

---

[92] *See, e.g.,* Carol Ann at 66, 69.

that were the focus of the consent solicitation."[93] Just as in *Zaucha*, the written consents here were not about the Company financials or future business plans; they were about removing Joseph because of his autocratic management practices that ignored the views of a majority of the board. Moreover, the evidence demonstrates that the Consenting Stockholders were reasonably aware of Goya's general financial performance.[94] The vast majority of the stockholders (16 of 19) attended the annual meeting in June 2003 at which the audited financials for 2002 were reviewed. Notably, those were the only audited financials available as of late January 2004, when the written consents were executed.[95]

Furthermore, it is disingenuous for Joseph, the individual in control of the corporate machinery, to accuse Robert and Francisco of failing to distribute audited

---

[93] *Zaucha*, 697 A.2d at 756 (affirming the Court of Chancery's findings that the financials were not material to the issues involved in the consent solicitation).

[94] For example, Mary Ellen (who did not work for the Company) testified that she had such awareness. Mary Ellen Dep. at 20-26.

[95] Tr. at 335; Carlos Dep. at 22-23. Carlos testified that as of April 13, 2004 he had not seen the 2003 audited financials, but generally saw the unaudited financials every month. Carlos Dep. at 23-29. Robert testified that the audited financial statements were not completed when the written consents were executed. Robert Dep. at 86.

With regard to the timing of the written consents, the Court notes that no evidence was presented that the directors were trying to circumvent affirmative disclosure requirements by persuading the stockholders to act by written consent. In such a case, the *Schnell* doctrine might demand a different result. *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) ("inequitable action does not become permissible simply because it is legally possible."); *see also Zaucha*, 697 A.2d at 755 (holding that Zaucha did not misuse his statutory right to conduct a consent solicitation to gain control of the board of directors).

financials in a more timely manner than he historically had done. Despite having controlled Goya's operations for years, Joseph presented no evidence of previously having distributed audited or unaudited financial information to the stockholders other than at the annual meetings. Insiders of a closely held corporation may choose to proceed in that fashion. It is unreasonable, however, for such insiders, when faced with removal by written consents, then to insist that those seeking their removal must meet a higher disclosure standard more akin to that of a public company.

Defendants' allege that "2003 was a record year for GFI in gross sales and profits."[96] The evidence presented on this point was deficient.[97] Even assuming Defendants' allegation was true, however, the Court concludes that it would not have been viewed by the reasonable Consenting Shareholder as having significantly altered the "total mix" of information made available to them.[98]

---

[96] DOB at 24.

[97] The only evidence Defendants offered to show that 2003 was a record year were copies of unaudited financial statements for 2003 (DTX 11) and of charts allegedly based on those unaudited statements and other information (DTX 12-14). Plaintiffs objected to those documents on relevance and hearsay grounds. Plaintiffs also objected to the charts because they were not business records, had been created specifically for this litigation and were presented without adequate foundation. The Court reserved decision pending post-trial briefing. Defendants did not address the admissibility of this evidence in their briefs.

The Court overrules the objection to the unaudited financial statements for 2003 (DTX 11), but sustains the objection to the proffered charts (DTX 12-14). The charts are hearsay and were not sufficiently supported by testimony or other evidence to render them either reliable or relevant. *See* Tr. at 584-85, 588-90.

[98] The absence of disclosure regarding the future business plans of directors Robert and Francisco is immaterial for similar reasons. The stockholders of Goya elected both of them in June 2003 with full knowledge that they would constitute a

For all of these reasons, the Court finds that Robert and Francisco's failure to inform the Consenting Stockholders of the 2003 financial results and their plans for the future management of Goya did not constitute a material nondisclosure.

ii. Materiality of Robert and Francisco's allegedly undisclosed intent to execute consents, terminate Joseph and Andrew's employment with Goya, and appoint Robert as President and CEO

Defendants contend that Robert and Francisco breached their fiduciary duties by failing to disclose that the consents would be delivered to the Company, that Joseph and Andrew would be terminated as officers and employees, and that Robert would replace Joseph as president. To the extent Defendants base their argument on the premise that, at the time they obtained the written consents, Robert and Francisco had formed an intent to take the specific actions mentioned, the Court finds that the record does not support that premise. Rather, the record shows that when Robert and Francisco obtained the consents they did not know whether they would need to use them. In fact, they remained hopeful that they and Joseph could work out their differences as directors, which would make delivery of the consents unnecessary. Thus, the Court finds that Robert and Francisco's intent when they obtained the written consents was simply that they would deliver or use

---

majority of the board. This Court infers, therefore, that the Consenting Shareholders believed in Robert and Francisco's ability to direct the Company. Moreover, there is no evidence that Robert or Francisco intended to alter significantly the way Goya did business when they obtained the written consents. Indeed, somewhat ironically, Robert and Francisco preferred to continue operating Goya the way it successfully had been operated in the past. Tr. at 46.

them, if necessary. Defendants failed to prove that either Robert or Francisco had formed an intent to terminate Joseph and appoint Robert as president at that time.

To argue that the Consenting Stockholders did not know that their signed written consents voting for Joseph's removal might be delivered and made effective is illogical, absent an allegation of misrepresentation. There has been no such allegation. The Court credits Francisco's testimony that he hoped that they would not need to exercise the written consents.[99] Moreover, Robert and Francisco's actions after receiving the written consents are consistent with Francisco's testimony. They did not immediately deliver the consents, but instead sent a letter to Joseph on January 24, 2004 requesting that Joseph temporarily refrain from implementing any further management restructuring until the board could meet to discuss any changes and arranged for the January 29 board meeting to attempt to work things out with him. It was not until Robert and Francisco learned about the severance agreements on or about January 29, 2004 and of Joseph and Andrew's continued pursuit of at least one of those agreements after the January 29 meeting, that they decided to deliver the written consents. Even if the Consenting Stockholders (including Robert and Francisco) hoped that the written consents would not need to be used, the stockholders' execution of those consents authorized Robert and Francisco to use them, if they decided they should, unless the consents were revoked in

[99] Tr. at 42, 45-46.

the meantime.[100] Thus, the Court finds that the Consenting Stockholders knew that the consents might be used.

Similarly, the Consenting Stockholders were aware, as a matter of law, that the business and affairs of Goya were to be managed by the board of directors under Delaware law and Goya's certificate of incorporation. Robert and Francisco had constituted a majority of the board of directors since early 2003. In view of the broad powers invested in the board of directors by the organic documents of Goya and the express testimony of certain witnesses, the Court finds that the Consenting Stockholders would have known that Robert and Francisco, acting as the board, would have the power to terminate Joseph and Andrew.[101] Therefore, the Court finds that no material nondisclosure existed with regard to Robert's or Francisco's intent to deliver the written consents and to terminate Joseph and Andrew's employment, if they determined those actions were appropriate.

---

[100] Carol testified that she was told that the written consents would be used if necessary. Carol Dep. at 72. *Accord* Theresa Dep. at 48-49. Mary Ellen knew that she could revoke her written consent and that the written consents might be used. Mary Ellen Dep. at 95-96. Peter also testified that he was aware of this possibility and put his "complete confidence" in Robert and Francisco. Peter Dep. at 111-12. *Accord* Theresa Dep. at 65; Thomas Dep. at 103, 119.

[101] Diana Dep. at 22. ("Q. When you signed this consent, did anyone tell you that in addition to being removed as a Director and as Chairman of the Board, that Joe was also going to be fired as President and CEO. A. There was a looming possibility."); Peter Dep. at 111-12, 127; Thomas Dep. at 99.

iii. Materiality of an opportunity for Joseph to tell "his side of the story"

Defendants emphasize that the written consents were obtained "secretly" and without affording Joseph the opportunity to tell his side of the story. They also describe the delivery of the written consents as a "corporate coup."[102] The characterization of action by the holders of a clear majority of Goya's shares as a "coup" is misplaced, especially when the criticism stems from Joseph's claimed inability to tell his "side" of the story. Joseph controlled Goya for years. Nothing prevented him from telling is side of the story. Likewise, the fact that the written consents were obtained "secretly" and without advance notice to Joseph is irrelevant. Section 228 permits action by written consent "without a meeting, without prior notice and without a vote." Moreover, this Court has held that section 228 "clearly and unambiguously permits a majority of the stockholders to act immediately and without prior notice to the minority."[103] Thus, Plaintiffs had no duty to give Joseph an opportunity to tell his side of the story.

3. The requirements for equitable relief

Even if Defendants had demonstrated the existence of a material nondisclosure (which they have not), they still would have to show that such violation would justify setting aside the removal of Joseph from the board. Defendants, however, have not shown any right to relief. The determination of the appropriate remedy would be within

---

[102] DOB at 7.

[103] *Allen v. Prime Computer Inc.,* 540 A.2d 417, 420 (Del. 1988).

the Court's discretion and may be guided by "practical considerations."[104] The Consenting Stockholders were all members of the Unanue family. The testimony presented at trial and in the form of deposition designations demonstrated that the Consenting Stockholders felt that they had made a sufficiently informed decision. None came forward to challenge the validity of the written consents. Moreover, the Consenting Stockholders, as the holders of over 62% of the voting stock of Goya, have the power to express new written consents re-appointing Joseph to the board if they so choose.[105] Defendants, as the removed individuals, failed to demonstrate that any purported disclosure violation justifies the discretionary equitable relief of setting aside the Consenting Stockholders' action by written consents, even if inadequate disclosure was made to the Consenting Stockholders.[106]

---

104 *See Zaucha*, 1997 WL 305841, at *5 ("The question before the court is not simply whether there was a disclosure violation, but whether any such violation warrants setting aside the result [of the stockholder action by written consents]."). *But see Zaucha*, 697 A.2d at 753 (affirming the Court of Chancery's determination that there had been no disclosure violations, but "express[ing] no view" on the issue of whether the Court of Chancery may properly consider "practical considerations" in framing the appropriate equitable relief.)

105 In fact, it has come to the Court's attention that, since the trial, Thomas Unanue provided significant documentary materials to and collected written consents from his fellow stockholders re-electing Robert and Francisco and filed a second section 225 action on the basis of those written consents. *See* Ltrs. dated August 10, 13 & 16, 2004.

106 *See Zaucha*, 1997 WL 305841, at *8 ("Any arguable disclosure violations were relatively minor and do not justify setting the result aside.").

B. Validity of Termination

Because the removal of Joseph was valid, the rest of this case is predetermined. It is well settled that officers of a corporation serve at the pleasure of the board of directors.[107] Robert and Francisco, as the two remaining members of Goya's board of directors had the authority to terminate Joseph as president and CEO and Andrew as COO and vice president as they determined appropriate in the exercise of their business judgment. Defendants have not presented any evidence that would warrant the Court's interfering with the business judgment exercised by the Goya board in this instance.

III. CONCLUSION

For the reasons stated above, the Court holds that Joseph was validly removed by the holders of 62% of Goya's stock, acting by written consent. Goya's board of directors as of February 3, 2004 and through the time of trial consisted of Robert and Francisco. Their actions terminating Joseph and Andrew from their officer positions were valid. Plaintiffs' counsel shall submit, after notice to Defendants, a proposed form of judgment.

IT IS SO ORDERED.

---

[107] *See* 8 *Del. C.* § 142(b); *Stellini v. Oratorio*, 1979 WL 2703 (Del. Ch. Sept. 5, 1979); JTX 28 (Goya bylaws).