[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12762

D.C. Docket No. 0:17-cv-61535-BB

ANGUS MCDOWELL,

Plaintiff-Appellant,

versus

GEORGE R. BRACKEN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 20, 2019)

Before ROSENBAUM, GRANT, and HULL, Circuit Judges.

PER CURIAM:

Angus McDowell brought a derivative action on behalf of National Beverage Corp. against the company's board of directors, certain executive officers, and related entities. McDowell alleged that the defendants violated Delaware law and Section 14(a) of the Securities and Exchange Act. The district court dismissed McDowell's claim, holding that he failed to show that demand on the board was futile for the issues giving rise to his state law claims and that he failed to show loss causation for his Section 14(a) claims. After careful review and oral argument, we affirm.

I.

National Beverage Corp. is a Delaware corporation publicly traded on the NASDAQ exchange. National Beverage was founded by Nick Caporella, who retains control over a significant majority of the company's shares. Caporella also serves as chairman of the company's five-person board.

National Beverage is managed by an entity named Corporate Management Advisors, Inc. Under the apparent terms of the management agreement between Corporate Management and National Beverage, Corporate Management is paid a fee of 1% of net sales each year. Corporate Management is wholly owned by Nick Caporella.

McDowell's derivative suit challenged the nature of the relationship between Corporate Management and National Beverage. McDowell focused in part on

purported discrepancies between the terms of the management agreement binding the two companies on the one hand, and certain proxies on the other—proxies that were issued in connection with shareholder votes regarding the re-election of directors and an advisory "say on pay" vote pursuant to 15 U.S.C. § 78n-1.[1]

For example, McDowell alleged that while the Agreement stated that Corporate Management was supposed to be paid 1% of net revenues as a management fee, the proxy statements separately indicated that Corporate Management was entitled to a duplicative fee for rendering advice and expertise in connection with significant transactions. McDowell also alleged other inconsistencies in the SEC filings—for example, that the filings failed to properly account for Nick Caporella's personal use of an airplane partially owned by National Beverage.

McDowell also argued that the board of directors breached their fiduciary duty by approving of the management agreement. For example, he cited the Agreement's provision for payment to Corporate Management for services that he believed National Beverage was already providing to itself, as well as the Agreement's one-year termination clause. McDowell also objected to the Standard of Care provision contained in the contract. Delaware law permits companies to

[1] McDowell also confusingly argued that the Board's failure to produce a signed copy of the management agreement was itself not a valid exercise of business judgment. The defendants acknowledge the accuracy of the agreement McDowell relied on in his complaint.

include in their certification of incorporation an exculpatory provision immunizing the company's directors from "liability for monetary damages as a result of a breach of their duty of care." *See McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 (Del. Ch. 2000); 8 Del. C. § 102(b)(7). That provision, however, applies specifically to the directors—not the officers—of the company. *See Gantler v. Stephens*, 965 A.2d 695, 709 n.37 (Del. 2009). McDowell claimed that the management agreement violated Delaware law by exculpating officers.

As "a prerequisite to a shareholder derivative suit, Delaware law requires an aggrieved shareholder to demand that the board take the desired action." *Stepak v. Addison*, 20 F.3d 398, 402 (11th Cir. 1994) (citing *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990)). That rule flows from the principle that under Delaware law "directors, rather than shareholders, manage the business and affairs of the corporation." *Id.* (citing *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled in unrelated part by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)). Federal Rule of Civil Procedure 23.1, in turn, applies a heightened pleading standard for derivative actions, requiring the named plaintiff to "state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or not making the effort." Fed. R. Civ. P. 23.1(b)(3). Failure to make a demand or to show why a

demand would be futile means dismissal. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. ex rel. Fed. Nat. Mortg. Ass'n v. Raines*, 534 F.3d 779, 788–94 (D.C. Cir. 2008) ("*Pirelli*"), *abrogated by Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553 (2017).

McDowell admitted before the district court that he did not make a pre-suit demand to the Board regarding any of the issues he raised in his lawsuit, and recognized that this meant he needed to show demand futility. When a plaintiff challenges a board action, the two-prong test in *Aronson v. Lewis* requires establishing a reasonable doubt that either: (1) a majority of the directors are disinterested and independent, or (2) the action did not result from a valid exercise of business judgment. 473 A.2d at 814. Under *Aronson*, demand is futile and the plaintiff's suit may proceed if either prong is satisfied—but when *Aronson*'s "first prong is not satisfied, there is a presumption that the Board's actions were the product of a valid exercise of business judgment." *See In re Intel Corp. Derivative Litig.*, 621 F. Supp. 2d 165, 170 (D. Del. 2009) (citing *Beam v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004)). Overcoming that presumption to succeed on the second prong requires McDowell to establish "a reason to doubt that the action was taken honestly and in good faith," *id.* (quoting *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 824 (Del. Ch. 2005)), such as if the directors faced a serious

likelihood of liability with regard to the challenged action. *See Wood v. Baum*, 953 A.2d 136, 141 n.11 (Del. 2008) (quoting *Aronson*, 473 A.2d at 814).

When "directors are contractually or otherwise exculpated from liability for certain conduct"—as National Beverages' directors were—"a serious threat of liability may only be found to exist if the plaintiff pleads a *non-exculpated* claim against the directors based on particularized facts." *Wood*, 953 A.2d at 141 (citing *Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003)). If, like here, "directors are exculpated from liability except for claims based on 'fraudulent,' 'illegal' or 'bad faith' conduct, a plaintiff must also plead particularized facts that demonstrate that the directors acted with scienter, *i.e.*, that they had 'actual or constructive knowledge' that their conduct was legally improper." *Id.* (citations omitted).

In an attempt to establish that making a demand would have been futile under *Aronson*, McDowell alleged that a majority of the Board was unable to consider a demand in a disinterested manner. The close familial ties between two of the board members, Nick Caporella and his son Joseph Caporella, are obvious. As for the others, McDowell alleged that each of the remaining three board members—Cecil Conlee, Samuel Hathorn, and Stanley Sheridan—were not independent due to their prior business relationships with Nick Caporella. For example, Sheridan had previously served as the President of Faygo Beverages, Inc. after National Beverage acquired that company. Conlee had previously served as

lead director of Burnup & Sims, Inc. during a time period when Nick Caporella was President, CEO, and Chairman of that company. Finally, Hathorn had previously served as a director of Burnup & Sims and had also served on National Beverage's board from 1985 (when the company was founded) through September 1993. McDowell alleged that each of these prior business relationships with Nick Caporella made the board members not disinterested. To buttress his allegations, McDowell alleged that Conlee, Hathorn, and Sheridan were not independent because Caporella, as majority shareholder, controlled whether they would remain directors at National Beverage.

The defendants filed a motion to dismiss, arguing that McDowell had failed to establish demand futility. The defendants argued that, under *Aronson* and its progeny, McDowell's allegations lacked sufficient detail to overcome the presumption that the board members were independent. They denied that any of the challenged transactions could plausibly have been taken in bad faith.

The district court granted the defendants' motion to dismiss, stating that the parties agreed that *Aronson* controlled the demand futility analysis. The court then found that McDowell failed to establish that demand on the Board would be futile regarding any of the issues giving rise to his claims under Delaware law, as each of the board members' prior business relationships with Nick Caporella did not make them dependent on Caporella as a matter of Delaware law, and the directors did not

face a substantial likelihood of liability on any of the claims. The court also found that McDowell failed to show loss causation to support his claims under Section 14(a). The court therefore dismissed McDowell's claims. McDowell timely brought this appeal.

II.

We review a district court's Rule 23.1 dismissal for abuse of discretion. *Stepak*, 20 F.3d at 402. We review de novo the district court's dismissal of a Section 14(a) claim for failure to state a claim. *See Edward J. Goodman Life Income Tr. v. Jabil Circuit, Inc.*, 594 F.3d 783, 789 (11th Cir. 2010).

III.

Because National Beverage is a Delaware corporation, McDowell must satisfy Delaware substantive law on demand futility. *See Stepak*, 20 F.3d at 402. McDowell has failed to satisfy *Aronson*'s first prong, which requires a showing that "a demand on the Board would have been futile because a majority of the Board was not 'disinterested' and 'independent.'" *See Pirelli*, 534 F.3d at 788. Both parties agree that Caporella and his son were not disinterested, so McDowell's complaint needed to create "a 'reasonable doubt' about the disinterestedness or independence" of only one other director. *Cf. id.* Still, the "naked assertion of a previous business relationship is not enough to overcome the presumption of a director's independence." *Orman v. Cullman*, 794 A.2d 5, 27

(Del. Ch. 2002). It is no surprise that directors of a corporation are quite likely to have some prior social or business relationship with each other, so only "professional or personal friendships that border on or even exceed familial loyalty and closeness" are sufficient to "raise a reasonable doubt whether a director can appropriately consider demand." *Pirelli*, 534 F.3d at 794 (quoting *Beam*, 845 A.2d at 1050 (internal quotation marks omitted).

The verified complaint's (brief) allegations do not adequately plead any relationship between Caporella and Conlee, Hathorn, or Sheridan that rises to that level. The complaint alleges, for example, that the three directors have "longstanding professional relationships" with Nick Caporella, but does not explain how those relationships edge anywhere near "familial closeness." *Cf. Orman*, 794 A.2d at 27 (citation and internal quotation marks omitted) ("[A]llegations of a long-standing 15–year professional and personal relationship between a director and the CEO and Chairman of the Board of his company were insufficient to support a finding of control."). McDowell's complaint also alleges that the directors are "beholden to Caporella" because they desire to maintain their positions as directors and continue receiving their directors' fee. Under Delaware law, however, allegations that directors are dependent because they receive fees, "without more, do not establish any financial interest." *Grobow v. Perot*, 539 A.2d 180, 188 (Del. 1988), *overruled in unrelated part by Brehm*, 746 A.2d 244.

One recent Delaware case cautioned courts applying Delaware law to consider the prior business relationships of the directors alongside the alleged nature of social relationships, drawing "all reasonable inferences from the totality of those facts in favor of the plaintiffs." *Delaware Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015). But the sum total of the facts at issue in that case—including a friendship spanning more than five decades and the allegation that the owner of the company was responsible for the wealth of both the director and the director's brother—go far beyond the more minimal ties alleged in McDowell's verified complaint. Given the "stringent" standard for excusing futility, the "commonplace business, professional, and personal relationships" alleged in the complaint "are not remotely sufficient under Delaware law to disqualify the challenged directors from evaluating demand in an independent manner." *See Pirelli*, 534 F.3d at 782, 794.

To satisfy *Aronson*'s second prong, McDowell needed to "create a reasonable doubt" that a challenged transaction "was the product of a valid exercise of business judgment." *See In re Intel Corp.*, 621 F. Supp. 2d at 170 (citing *Levine v. Smith*, 591 A.2d 194, 205 (Del. 1991), *overruled in unrelated part by Brehm*, 746 A.2d 244). As McDowell has not satisfied *Aronson*'s first prong, the directors are entitled to the "presumption that the Board's actions were the product of a valid exercise of business judgment." *Id.* (citing *Beam*, 845 A.2d at

1049). To overcome that presumption here, McDowell must show that the Board's actions were not taken in good faith—such as by showing that a decision was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *In re J.P. Stevens & Co., Inc. S'holders Litig.*, 542 A.2d 770, 780–81 (Del. Ch. 1988). If a plaintiff can show a lack of good faith, then demand may be excused on the theory that there is a "substantial likelihood of director liability" for approving the transaction. *See Aronson*, 473 A.2d at 815.

McDowell faces an uphill battle challenging any of the Board's actions. He claims mismanagement by the Board in approving the management agreement—noting, in particular, that the one-year termination clause, the Corporate Management fee provision, and the Standard of Care provision are all generous terms. But, as mentioned earlier, because each of National Beverage's directors is subject to an exculpatory provision from liability except for claims based on fraudulent, illegal, or bad faith conduct, McDowell is required to show that the directors had "'actual or constructive knowledge' that their conduct was legally improper." *Wood*, 953 A.2d at 141 (citation omitted).

As the district court recognized, McDowell's allegations simply don't demonstrate director knowledge of legally improper conduct. The one-year termination provision is not "so far beyond the bounds of reasonable judgment that

it seems essentially inexplicable on any ground other than bad faith." *See In re J.P. Stevens & Co.*, 542 A.2d at 780–81. Nor is it illegal or fraudulent. The provision that allows Corporate Management to earn additional fees for substantial projects similarly does not appear on its face to lie outside the bounds of reasonable judgment or to give rise to an inference of director illegality. And, as the district court found, McDowell's complaint was completely devoid of comparative financial data regarding the total fees Corporate Management has earned from the significant transactions provision, preventing any conclusion that the provision is "so facially unfair as to constitute a lack of good faith." *See Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 63–65 (Del. Ch. 2015). We may also set aside McDowell's assertion that the management agreement's contractual provision exculpating certain officers is illegal, because McDowell's complaint is devoid of any allegation that any director had actual or constructive *knowledge* of that clause's (potential) illegality when approving the agreement.

The verified complaint is similarly deficient with regard to its allegations that inaccuracies in the proxy statements support a finding that the directors knowingly acted illegally with regard to approving the management agreement.[2]

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[2] McDowell also asserts on appeal that if the defendants were unaware of the discrepancies between the proxies and the management agreement, then they "failed to exercise their oversight

The complaint's most important deficiency in this regard is that it does not contain particularized facts describing the directors' involvement in preparing the proxy statements and the degree of knowledge they would have possessed regarding the statements' accuracy. McDowell's failure to adequately allege scienter with regards to any of his claims means that he has not satisfied *Aronson*'s second prong.

III.

"Section 14(a) of the Securities Exchange Act and Rule 14a–9 collectively prohibit the use of false statements in proxy solicitations associated with registered securities." *Jabil Circuit*, 594 F.3d at 796 (citing 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a–9). In support of his Section 14(a) claim, McDowell repeats his assertion that the proxies generally failed to disclose relevant facts, including issues related

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and have an appropriate level of knowledge." He makes no other argument in support of this claim. This claim, if properly presented, would likely be subject to the *Rales v. Blasband* test, as it concerns board inaction. 643 A.2d 927 (Del. 1993); *see Wood*, 953 A.2d at 140 ("The second (*Rales*) test applies where the subject of a derivative suit is not a business decision of the Board but rather a violation of the Board's oversight duties."). "Liability predicated on a Board's failure to exercise oversight 'is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.'" *Pirelli*, 534 F.3d at 789 (quoting *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996)). To demonstrate director oversight liability with regards to those issues, McDowell needed to show that: "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 123 (Del. Ch. 2009) (internal citations omitted). McDowell's complaint is devoid of allegations that would satisfy those requirements.

to executive compensation (such as Nick Caporella's alleged private use of a corporate plane).

The district court chose to dismiss by McDowell's Section 14(a) claims by considering them on the merits, without addressing whether the demand requirement should also block those claims. McDowell argues that if he failed to show demand futility as to those claims, then the court should not have proceeded to the merits.

We may affirm the dismissal of a complaint "on any ground supported by the record, regardless of whether that ground was relied upon or even considered below." *Waldman v. Conway*, 871 F.3d 1283, 1289 (11th Cir. 2017) (citing *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1309 (11th Cir. 2012)). On appeal, McDowell and the defendants agree that the demand futility requirement applies to the Board's decision of whether to initiate litigation over Section 14(a) claims. *See, e.g.*, *St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler*, No. 06CIV688SWK, 2006 WL 2849783, at *6 (S.D.N.Y. Oct. 4, 2006) (explaining that the demand requirement applies to the business decision "as to whether derivative litigation should be initiated to remedy" a violation of Section 14(a)).

Because McDowell did not show that demand was futile, we may affirm on that ground. But that is not to say that the district court erred in discussing the merits of the claim. Under *Aronson*'s second prong demand is futile if the board

members face substantial personal liability in connection with the challenged activity—an inquiry that requires consideration of the merits. *See* 473 A.2d at 815. And the court did not err when it correctly concluded that proxies related to the election of directors and a non-binding "say-on-pay" vote were too indirectly connected to any alleged losses to find loss causation, because each of the actions McDowell challenges were not themselves the subject of the proxy solicitations. *See Jabil Circuit*, 594 F.3d at 797 (explaining that the election of directors only indirectly caused the shareholders' loss where the subject matter of the lawsuit concerned the directors' actions *after* election).

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To excuse his failure to make a demand on the Board before filing suit, McDowell was required to show that demand was futile. He has failed to do so. We therefore **AFFIRM** the judgment of the district court.[3]

[3]During oral argument, McDowell suggested that the district court should have dismissed his complaint without prejudice. We decline to consider an argument on appeal that was not raised in his briefing to this court. *See APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261, 1269 (11th Cir. 2007) (explaining that we generally "do not consider claims not raised in a party's initial brief and made for the first time at oral argument"); *see also Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc) (holding that a "district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court").