Celauro v 4C Foods Corp.
2018 NY Slip Op 30806(U)
May 1, 2018
Supreme Court, Kings County
Docket Number: 500373/12
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of May, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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NATHAN J. CELAURO, INDIVDUALLY; NATHAN J. CELAURO AS EXECUTOR OF THE ESTATE OF GAETANA CELAURO, THE DECEASED SOLE INCOME BENEFICIARY OF THE SALVATORE F. CELAURO REVOCABLE TRUST AND SALVATORE F. CELAURO IRREVOCABLE LIFE INSURANCE TRUST; NATHAN J. CELAURO AS VESTED BENEFICIAL OWNER OF THE SHARES OF 4C FOODS CORP. HELD BY SALVATORE F. CELAURO REVOCABLE TRUST AND SALVATORE F. CELAURO IRREVOCABLE LIFE INSURANCE TRUST; NATHAN J. CELAURO AS TRUSTEE AND LINDA CELAURO AS SUCCESSOR CO-TRUSTEE OF THE SALVATORE F. CELAURO CHILDREN'S TRUST F/B/O NATHAN CELAURO A/K/A THE NATHAN J. CELAURO IRREVOCABLE TRUST U/A DATED DECEMBER 26, 1991,

Plaintiffs,

- against -

Index No. 500373/12

4C FOODS CORP., JOHN A. CELAURO; ROSEANN CELAURO, INDIVIDUALLY; WAYNE J. CELAURO, INDIVIDUALLY, DIANE CELAURO CARTER, INDIVIDUALLY; ROSEANN CELAURO, MARCI PLOTKIN, AND MARY FRAGOLA, AS THE TRUSTEES OF THE JAC TRUST, DATED DECEMBER 1, 2003; SALVATRICE A. MCCRACKEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE ANGELA DOUGLASS IRREVOCABLE TRUST MADE BY JOSEPH SARATELLA U/A DATED 6/19/92; SALVATRICE A. MCCRACKEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE SALVATRICE A. MACCRACKEN IRREVOCABLE TRUST MADE BY JOSEPH SARATELLA U/A DATED 6/19/92; SALVATRICE A. MCCRACKEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE SALVATRICE A. MACCRACKEN IRREVOCABLE TRUST MADE BY SALVATRICE

A. MCCRACKEN U/A DATED 6/19/92; DIANE CELAURO CARTER AND WAYNE J CELAURO, AS TRUSTEES OF THE KELLY CELAURO TRUST U/A DATED DECEMBER 31, 1991; DIANE CELAURO CARTER AND WAYNE J. CELAURO, AS TRUSTEES OF THE JILLIAN CELAURO TRUST U/A DATED DECEMBER 31, 1991; WAYNE J. CELAURO, AS A TRUSTEE OF THE WAYNE J. CELAURO IRREVOCABLE TRUST U/A DATED 12/26/91; DIANE CELAURO CARTER AND WAYNE J. CELAURO, AS TRUSTESS OF THE DIANE CELAURO CARTER IRREVOCABLE TRUST U/A DATED 12/26/91; SAVATRICE A. MCCRACKEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE ANGELA DOUGLASS IRREVOCABLE TRUST MADE BY SALVATRICE L. SARATELLA U/A DATED 6/19/92; THOMAS J. ABBONDANDOLO AND LORRAINE ROSE EARLE, AS THE TRUSTEES OF THE LORRAINE ROSE EARLE IRREVOCABLE TRUST U/A DATED 12/30/91 AND THOMAS ABBONDANDOLO AND LORRAINE ROSE EARLE, AS THE TRUSTEES OF THE THOMAS JOHN ABBONDANDOLO IRREVOCABLE TRUST U/A DATED 12/30/91,

Defendants.

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The following papers numbered 1 to 3 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3

Upon the foregoing papers, defendants 4C Foods Corp. (4C Foods), John Celauro and all other named defendants[1] move, as is relevant here, for an order dismissing the first, second and third causes of action in the second amended verified complaint.[2]

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[1] Defendant John Celauro is 4C Foods' president and chief executive officer and its majority shareholder. The remaining named defendants hold or control another 20 to 21 percent of 4C Foods' stock, and are controlled by or aligned with John Celauro in how they vote their stock.

[2] As the court has already issued a judgment declaring the parties' rights with respect to the fourth cause of action for a declaratory judgment in its October 12, 2016 order (Knipel, J.), the defendants' current motion effectively seeks summary judgment dismissing the complaint.

Defendants' motion is granted, and the complaint is dismissed.

In this action, plaintiffs primarily claim that the defendant shareholders have improperly used the transfer provisions of the Agreement (Agreement § 4.3)[3] to bar plaintiff Nathan J. Celauro, in his role as executor of the estate of his mother, Gaetana Celauro, from transferring voting shares of 4C Foods stock from his mother's estate to Nathan Celauro pursuant to the terms of his mother's will and that defendants have manipulated the number of non-voting shares to dilute the price 4C Foods must pay to purchase these voting shares from the estate. The present claims arise out of a continuing shareholder dispute between the majority and minority shareholders of 4C Foods, a closely held family corporation.[4] John Celauro owns or directly controls approximately 56 percent of 4C Foods' stock and controls or has aligned with him the votes of the shareholders of another 21 percent of 4C Foods'

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[3] As relevant here, section 4.3 requires that any shareholder desiring to transfer shares (transferring shareholder) to a permitted shareholder (i.e. certain family members as defined in the amendments) has to give notice of the intent to transfer the shares to the remaining shareholders and 4C Foods, and allow the holders of the majority of the shares to approve or reject the transfer, or a portion thereof (Agreement § 4.3 [a]). To the extent that the holders of the majority of the shares reject the transfer, the fourth amendment requires that the transferring shareholder sell the shares for which transfer approval has not been granted to 4C Foods (Agreement § 4.3 [b]).

[4] The factual background is more fully detailed in this court's prior decisions in this action, which was initially commenced as a special proceeding (*Matter of Celauro v 4C Foods Corp.*, 38 Misc 3d 636 [Sup Ct, Kings County 2012]; *Matter of Celauro v 4C Foods Corp.*, 39 Misc 3d 1234 [A], 2013 NY Slip Op 50875 [U] [Sup Ct, Kings County 2013]; *Celauro v 4C Foods Corp.*, 2014 NY Slip Op 33011 [U] [Sup Ct, Kings County 2014]; *Celauro v 4C Foods Corp.*, 2016 NY Slip Op 31917 [U] [Sup Ct, Kings County 2016]; *Celauro v 4C Foods Corp.*, 2017 NY Slip Op 32371 [U] [Sup Ct, Kings County 2017]), and the decisions issued in an earlier Nassau County action (*Celauro v 4C Foods Corp.*, 30 Misc 3d 1204 [A], 2010 NY Slip Op 52264 [U] [Sup Ct Nassau County 2010], *affd* 88 AD3d 846 [2d Dept 2011], *lv denied* 19 NY3d 803 [2012]).

stock. As such, John Celauro controls slightly less than 78 percent of the shares of 4C Foods. Prior to December 16, 2011, the minority group was made up of plaintiff, Nathan Celauro, who owned, directly or beneficially, approximately 2 percent of 4C Foods' stock, and his mother, Gaetana Celauro, who owned directly, or beneficially, approximately 20 percent of 4C Foods' stock, for a total minority control of slightly more than 22 percent of 4C Foods' stock. 4C Foods' stock includes voting common stock and non-voting common stock and Gaetana Celauro and Nathan Celauro owned the same percentage of non-voting common stock as they owned of voting common stock.

On December 2, 2011, 4C Foods' board of directors unanimously passed a resolution, and shareholders holding over a 75 percent interest in 4C Foods adopted a resolution, to amend 4C Foods' certificate of incorporation to increase the number of authorized non-voting shares by four shares for every one non-voting share outstanding, declare a dividend to the holder of each of the non-voting shares by issuing four non-voting shares for every one non-voting share held, and amend the shareholders' agreement accordingly.[5] According to the second amended verified complaint, verified by plaintiff Nathan Celauro, at the time of the action by 4C Foods' board of directors and shareholders altering the number of non-

[5] Plaintiffs allege that before the amendment, there were a total of 14,400 voting shares and 921,600 non-voting shares and that after the amendment, there were a total of 14,400 voting shares and 4,608,000 non-voting shares. The amendments, however, did not change the proportionate percentage of the stock owned or controlled by the individual shareholders. In other words, after the amendments, Nathan Celauro and Gaetana Celauro (who together owned or controlled 3,220 of the 14,400 voting shares and 206,080 of the 921,600 non-voting shares before the amendment and 3,220 of the 14,400 voting shares and 1,030,400 of the 4,608,000 non-voting shares after the amendment) retained the same 22 percent total interest in 4C Foods.

voting shares, Gaetana Celauro was in hospice care, and she died on December 16, 2011 "after a long and public battle with cancer." In her will, Gaetana Celauro named Nathan Celauro as the sole beneficiary of the 4C Foods shares owned or controlled by her and Nathan Celauro has since been named the executor of her estate.

After Nathan Celauro was appointed executor of Gaetana Celauro's estate, he, by way of a notice dated November 26, 2012, requested, pursuant to section 4.3 of the Agreement, permission to transfer all voting and non-voting shares of 4C Foods formerly held by Gaetana Celauro, or held in trusts under her control, to him. Once defendants received the notice, they responded, as is relevant here, by serving on plaintiffs a document dated January 11, 2013 that they called the "CONSENT" in which they expressly consented to the transfer of the *non-voting* shares to Nathan. Defendants did not consent to the transfer of the *voting* shares at issue. Defendants, however, conditioned this denial of consent on the court's determination of an declaratory judgment action commenced by defendants in Nassau County. Plaintiffs thereafter sought a declaratory judgment regarding the effect of the conditional CONSENT. This court, in an order dated November 17, 2014 (Schmidt, J) (*Celauro v 4C Foods Corp.*, 2014 NY Slip Op 33011 [U] [Sup Ct, Kings County 2014]), declared, among other things, that the CONSENT allowed the transfer of the non-voting shares, that the CONSENT served, in effect, as an unconditional denial of the transfer of the voting shares from the estate to Nathan Celauro, and, thus, that the CONSENT required 4C Foods to purchase the voting shares pursuant to section 4.3 (a) (ii) of the Agreement.

Following this November 17, 2014 decision, the parties began the appraisal process under sections 8.1, 8.2 and 8.3 of the Agreement in order to assess the value of 4C Foods for purposes of determining how much 4C Foods must pay plaintiffs based on its purchase of the voting shares under 4.3 (a) (ii) of the Agreement. The parties have not completed this appraisal process.[6]

On November 13, 2015, plaintiffs filed the second amended verified complaint (hereinafter known as the "sav complaint"). As pled here, the factual basis for plaintiffs' claim is the combined effect of: (1) the amendment to the Agreement allowing 4C Foods' majority shareholders to block a transfer of shares (or any portion thereof) from the estate of a deceased shareholder to the beneficiary of the estate (Agreement § 4.3) (sav complaint ¶¶ 70-75); (2) the amendment to the certificate of incorporation and the Agreement which increased the number of non-voting shares and which diluted the value of the voting shares (sav complaint ¶¶ 76-87); and (3) the majority shareholders using the provisions of section 4.3 of the Agreement to bar the transfer of the voting shares from Gaetana Celauro's estate to Nathan Celauro and force the sale of these voting shares to 4C Foods at the now diluted price for voting shares (sav complaint ¶¶ 88-104).

According to the amended pleading, the defendants knew at the time they approved the amendment increasing the number of non-voting shares that Gaetana Celauro was on her

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[6] This appraisal process has not gone smoothly as shown by prior decisions addressing disputes relating to the appraisal process (*see Celauro v 4C Foods Corp.*, 2016 NY Slip Op 31917, * 8-10 [U] [Sup Ct, Kings County 2016]; *Celauro v 4C Foods Corp.*, 2017 NY Slip Op 32371 [U] [Sup Ct, Kings County 2017]).

deathbed, and that Nathan Celauro would receive ownership or control of her shares in 4C Foods as the sole beneficiary of her will (sav complaint ¶¶ 56, 77-78, 80).[7] This amendment, plaintiffs argue, diluted the value of the voting shares because, under the Agreement, each voting share and non-voting share is deemed to have the same value (sav complaint ¶ 82-83). Plaintiffs allege, for example, that if the total value of their 22.36 percent interest in 4C Foods is $30,000,000, the per share value of their 3,220 voting shares and 209,300 non-voting shares would be $143.33 prior to the amendment. However, after the amendment, the per share value of their 3,220 voting shares and 1,033,620 non-voting shares would be $29.02, a 79.75 percent diminution of the per share value (sav complaint ¶ 84).[8] Using these figures, this amendment, coupled with defendants' election to bar the transfer of only the voting shares, allows 4C Foods to purchase the 2,920 voting shares owned or controlled by Gaetana Celauro's estate for $84,738.40,[9] rather than the $418,523.60 4C Foods would have had to pay for these shares prior to the amendment. Plaintiffs further emphasize that barring the transfer of the voting shares leaves Nathan Celauro with only the approximately 2.1

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[7] Gaetana Celauro's intent to leave the entirety of the shares of stock owned or controlled by her to Nathan Celauro is noted in the Nassau County court's decision upholding the validity of the transfer restricions (*see Celauro*, 2010 NY Slip Op 52264, *4).

[8] Although the $30,000,000 figure may not represent the actual total value of the shares owned or controlled by plaintiffs, the increase in the number of non-voting shares decreases the per-share value by this 79.75 percent figure whatever the appraised value of 4C Foods may be.

[9] The court notes that the $93,444.40 figure noted in the sav complaint appears to be based on the 3,220 voting shares owned or controlled by plaintiffs, rather than the 2,920 voting shares owned or controlled by the estate that are subject to the transfer bar (sav complaint ¶¶ 76, 81, 95).

percent of the voting shares he already held and prevents him from obtaining the at least 20 percent of 4C Foods' voting shares necessary for him to have standing to commence a dissolution proceeding under Business Corporation Law § 1104-a (sav complaint ¶ 96).

Based on these factual allegations, plaintiffs allege that the majority shareholder defendants have breached the fiduciary duty and the implied covenant of good faith and fair dealing owed to plaintiffs (first and second causes of action) and that the board of director defendants have breached the fiduciary duty they owed to plaintiffs (third cause of action). This court, in a October 13, 2016 decision, denied defendants' motion to dismiss the sav complaint, finding that, plaintiffs have stated claims that the defendant shareholders breached the implied covenant of good faith and fair dealing and fiduciary duties and 4C Foods' directors breached their fiduciary duties in manipulating the number of 4C Foods' non-voting shares in order to allow 4C Foods to purchase the voting shares for which transfer has been denied pursuant to the CONSENT (*Celauro v 4C Foods Corp.*, 2016 NY Slip Op 31917, *7 [U] [Sup Ct, Kings County 2016]).

In moving for summary judgment, defendants now submit a copy of an amendment to the Agreement dated December 22, 2016 that was approved by 4C Foods' directors and by the shareholders holding a 75 percent interest in 4C Food. This amendment provides that the purchase price of the voting shares of stock for which 4C Foods has refused to transfer and must purchase from plaintiffs are to be valued as if the non-voting stock dividend made by 4C Foods on December 2, 2011 - when it increased the number of non-voting shares - had

not occurred. The undisputed effect of this amendment to the Agreement is that 4C Foods has eliminated any dilution in value of plaintiffs' voting shares that occurred as a result of the December 2, 2011 non-voting stock dividend. Since this court, in its October 13, 2016 decision, identified this dilution in value of the voting shares as the basis for plaintiffs' damages in this action (*Celauro v 4C Foods Corp.*, 2016 NY Slip Op 31917, *7), defendants assert that the amendment has eliminated any cognizable damage claim plaintiffs may have with respect to the breach of fiduciary duty and breach of the covenant of good faith and fair dealing causes of action contained in the sav complaint, and is thus entitled to summary judgment dismissing those causes of action.

Damages are an essential element of a claim for breach of fiduciary duty (*see McSpedon v Levine*, 158 AD3d 618, 622 [2d Dept 2018]; *Fownes Bors. & Co., Inc.*, 92 AD3d 582, 583 [1st Dept 2012]; *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684 [2d Dept 2011]) and breach of the covenant of good faith and fair dealing (*see Lefkara Group, LLC v First Am. Int. Bank*, 150 AD3d 450, 451 [1st Dept 2017], *lv denied* 29 NY3d 916 [2017]; *Schmueli v Witestar Dev. Corp.*, 148 AD3d 1814, 1814 [4th Dept 2017]; *Strattenberg v Fairfield Pagma Assoc., L.P.*, 95 AD3d 873, 875 [2d Dept 2012]). A plaintiff's failure to allege or prove such damages is thus grounds for dismissing breach of fiduciary duty and breach of covenant of good faith and fair dealing causes of action (*see McSpedon*, 158 AD3d at 622; *Lefkara Group, LLC*, 150 AD3d at 451). As noted above, plaintiffs' in the sav complaint here identify two theories of liability warranting damages: (1) the dilution of the

value of their voting shares by the increase in the number of non-voting shares through the non-voting share dividend; and (2) the reduction of plaintiffs' voting interest in 4C Foods below the 20 percent threshold necessary to commence a statutory dissolution proceeding under Business Corporation Law § 1104-a.[10]

Turning first to defendants' use of the transfer restrictions to bar the transfer of the voting shares, the court notes that courts have commonly upheld share transfer restriction provisions contained in shareholder agreements that allow a corporation to repurchase shares upon a shareholder's death (*see Allen v Biltmore Tissue Corp.*, 2 NY2d 534, 543-544 [1957]; *Matter of Cetta*, 288 AD2d 814, 815 [3d Dept 2001], *lv denied* 97 NY2d 611 [2002]; *Matter of Gusman*, 178 AD2d 597, 598-599 [2d Dept 1991], *lv denied* 80 NY2d 753 [1992]; *Matter of Hesek v 245 S. Main St.*, 170 AD2d 956, 957 [4th Dept 1991]). Such restrictions are particularly compelling in the context of closely held corporations, where the corporation has an interest in assuring a succession of shareholders who are most likely to act in harmony with the other shareholders (*see Miller Waste Mills, Inc. v Mackay*, 520 NW2d 490, 494-495 [Minn Ct App 1994]; *Renberg v Zarrow*, 667 P2d 465, 469 [Okla 1983]; *see also Allen*, 2 NY2d at 543; *Celauro*, 88 AD3d at 846-847). Moreover, the transfer restrictions contained in section 4.3 of the Agreement have been declared to be legal and enforceable (*see Celauro*

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[10] Although plaintiffs, in their ad damnum clause ask for damages in excess of $30,000,000, elsewhere in the complaint, plaintiffs represent that the value of all of their shares in 4C Foods was $30,000,000 (sav complaint § 84) or the total value of the voting and non-voting subject to transfer to Nathan Celauro was $30,000,000 (sav complaint § 94), it is unclear how defendants actions under either theory of liability would allow plaintiffs to recover the entire value of their shares held in 4C Foods.

v 4C Foods Corp., 30 Misc 3d 1204 [A], 2010 NY Slip Op 52264 [U] [Sup Ct Nassau County 2010], *affd* 88 AD3d 846 [2d Dept 2011], *lv denied* 19 NY3d 803 [2012]).

Concededly, this case law does not specifically address the use of a transfer restriction to bar transfer of only a portion of the stock, such as defendants' barring transfer of the voting shares of stock here. Given, however, that the primary purpose of transfer restrictions is to insure orderly succession of corporate governance and veto participation of a new participant (*see Allen*, 2 NY2d at 543; *see also Miller Waste Mills, Inc.*, 520 NW2d at 494-495; *Renberg*, 667 P2d at 469), this court sees no impropriety in defendants using the transfer restriction provision to limit Nathan Celauro's voting power. Since the transfer restriction provisions of section 4.3 of the Agreement have been found proper, since they provide a fair process for determining the value of the shares for which transfer has been denied, and since they allow the majority of 4C Foods' shareholders to reject the transfer of all or a portion of the shares, the use of the provisions to bar the transfer of voting shares for the purpose of depriving Nathan Celauro of the ownership interest necessary to maintain a dissolution proceeding under Business Corporation Law § 1104-a likewise does not constitute a breach of any fiduciary duty (*see Matter of TDA Indus.*, 240 AD2d 262, 262-263 [1st Dept 1997] [amendment to shareholders agreement barring trustees from voting shares held in trust could be used to eliminate trustees' right to commence dissolution proceeding under Business Corporation Law § 1104-a], *lv denied* 91 NY2d 805 [1998]; *Matter of Gusman*, 178 AD2d at 598-599; *Matter of Hesek*, 170 AD2d at 957; *Miller Waste Mills, Inc.*, 520 NW2d at 494-

495).[11]

Similarly, shareholders in a close corporation do not have a right to demand that the corporation buy their shares absent a provision to the contrary in the shareholder agreement or absent corporate actions giving rise to statutory or common-law buy-out rights (*see* Business Corporation Law §§ 806 [b], 910, 1104-a and 1118; *Matter of Cusato v Glen at Great Kills Homeowners Assn.*, 23 AD3d 464, 464 [2d Dept 2005]; *Matter of Ferega Realty Corp.*, 132 AD2d 797, 798-799 [3d Dept 1987]; *Matter of Dubonnet Scarfs*, 105 AD2d 339, 342-343 [1st Dept 1985]; *Goode v Ryan*, 397 Mass 85, 90-91, 489 NE2d 1001, 1004-1005 [1986]). As such, the decision to allow the transfer of the non-voting shares (or, from plaintiffs' perspective - 4C Foods' refusal to purchase those shares) was likewise allowable and was not a breach of any fiduciary duty or covenant of good faith and fair dealing (*see Matter of Dubonnet Scarfs*, 104 AD2d at 342-343; *Goode*, 397 Mass at 91-92, 489 NE2d at 1004-1005).

In view of this finding that defendants' committed no breach of fiduciary duty or

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[11] Contrary to plaintiffs' reading of this court's October 13, 2016 decision, the court in that decision likewise stated that barring the transfer of the voting shares was not improper (*see Celauro*, 2016 NY Slip Op 31917, *6). Although the court made statements in the December 5, 2012 decision (*Celauro*, 38 Misc 3d at 644) and in the November 26, 2014 decision (*Celauro*, 2014 NY Slip Op 33011, *7) suggesting that defendants' action in barring the transfer of the voting shares to prevent Nathan Celauro from having the 20 percent of voting shares necessary to petition for dissolution under Business Corporation Law § 1104-a might constitute a breach of fiduciary duty, those statements were not necessary to the decision in either case. The statements thus constitute dicta and are thus not binding as law of the case (*see 191 Chrystie LLC v Ledoux*, 58 AD3d 411, 412 [1st Dept 2009]; *Donahue v Nassau County Healthcare Corp.*, 15 AD3d 332, 333 [2d Dept 2005], *lv denied* 5 NY3d 702 [2005]).

breach of the covenant of good faith and fair dealing in preventing Nathan Celauro from obtaining the 20 percent interest in 4C Foods necessary to bring a dissolution proceeding pursuant to Business Corporation Law § 1104-a, the only viable theory of liability alleged in the complaint is the allegation that defendants used the December 2, 2011 amendment to the certificate of incorporation increasing the number of non-voting shares to dilute the value of the voting shares in order to purchase them at a lower price at the time of the transfer. However, the December 22, 2016 amendment to the Agreement, as noted, provides that, in the appraisal process, the voting shares to be purchased by 4C Foods must be valued as if there had been no dilution and thus effectively eliminates any damages arising from the dilution.[12] Accordingly, defendants have demonstrated their prima facie entitlement to summary judgment by showing that plaintiffs' claims in this action have been rendered moot (*see Prince v American Airlines, Inc.*, 1999 WL 796178, *5-7 [SDNY 1999]; *see also Villafane v Macombs Grocery Superette Corp.*, 126 AD3d 578, 579 [1st Dept 2015]; *Murphy v RMTS Assoc., LLC*, 71 AD3d 582, 582-583 [1st Dept 2010] [once defendant paid plaintiff the stipulated value of her interest in defendant's corporation, plaintiff could not obtain additional damages on her fraudulent conveyance claim]). As plaintiffs, in opposing the motion, have failed to identify any other factual or legal grounds for obtaining damages, plaintiffs' have failed to demonstrate the existence of a factual issue warranting denial of

[12] In other words, through the December 22, 2016 amendment to the Agreement, plaintiffs have obtained what they would be entitled to in any judgment, namely payment of the non-diluted value of the voting shares upon completion of the Agreement's appraisal process.

defendants' motion (*see Murphy*, 71 AD3d at 583; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). Plaintiffs' additional assertion that summary judgment is premature as discovery has not been completed is rejected because plaintiffs have failed to identify any information that may be in the exclusive possession of defendants that would warrant denial of the motion (*see Salameh v Yarkovski*, 156 AD3d 659, 660 [2d Dept 2017]; *Rungoo v Leary*, 110 AD3d 781, 783 [2d Dept 2013]; CPLR 3212 [f]).

This constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL