SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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FELIX GLAUBACH, individually and derivatively on behalf of PERSONAL TOUCH HOLDING CORP.,

Plaintiff,

-against-

PRICEWATERHOUSECOOPERS, LLP and GREATBANC TRUST COMPANY,

Defendants.

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DECISION AND ORDER
Index No.: 157993/2016

Mot. Seq. Nos.: 003-004

O. PETER SHERWOOD, J.:

Motion sequence Nos. 003 and 004 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

Defendant GreatBanc Trust Company (GTC) moves, pursuant to CPLR 3211 (a) (7), for an order dismissing plaintiffs Felix Glaubach's (Glaubach) and Personal Touch Holding Corp.'s (Personal Touch) first amended complaint (motion seq. No. 003). Defendant PricewaterhouseCoopers LLP (PwC) moves for an order, pursuant to CPLR 3211 (a) (1), (3), and (7), dismissing the first amended complaint against it. Plaintiffs cross-move for leave to amend the complaint.

BACKGROUND

As these are motions to dismiss, the fact allegations in the complaint are assumed true.

Glaubach is the founder, former president, and a minority shareholder, holding over 27% of the shares of outstanding stock of Personal Touch, a home health services company (exhibit A to April 26, 2017 Affirmation of Nick Wilder, first amended complaint [amended compl], ¶¶ 1,4).

GTC, the trustee of the company's employee stock ownership plan, owns 31% of the outstanding shares of the company, and is its largest shareholder (*id.*, ¶ 3). PwC was retained by Personal Touch to independently audit the company's financial statements (*id.*, ¶ 2). Glaubach also alleges that PwC directly and personally advised him at his office (*id.*).

In 2010 through 2011, while Glaubach took a medical leave of absence from the company, numerous Personal Touch executives, particularly chief executive officer David Slifkin (Slifkin), executive vice-president and general counsel Robert Marx (Marx), and vice-president Gertrude Balk (Balk), engaged in fraud, theft, looting, breach of fiduciary duty, corporate waste and mismanagement (*id.*, ¶ 8). These executives fraudulently caused millions of dollars of payments to be made by the company to them, which were then reported as "'continuing legal education' reimbursements" (*id.*, ¶ 25, 27).

When Glaubach recovered from his illness and returned to Personal Touch, he "blew the whistle on the fraud and improprieties" (*id.*, ¶ 39). In 2013, the Internal Revenue Service (IRS) audited the company. Personal Touch hired Schlam Stone & Dolan to represent it in the audit. The firm discovered the fraud, and advised Glaubach of it (*id.*, ¶ 26). Glaubach personally paid $827,759 to the IRS and the New York State Treasury to "mend the problems created by these others parties" (*id.*, ¶ 29).

On July 2, 2013, Slifkin resigned from the board of directors. Around the same time, Balk, his wife, resigned from the company, and Slifkin came up with an exorbitant severance package for her (*id.*, ¶ 38). In order to "negate his voice" at Personal Touch, Glaubach asserts that the board was stacked with people with ties to Slifkin. In July 2014, the board was expanded to include four new directors (*id.*, ¶39). In a July 21, 2014 letter to the board, Glaubach demanded that the newly

expanded or "packed" board take action with regard to the financial improprieties (*id.*, ¶ 41). In an October 30, 2014 letter, Glaubach demanded that the board deal with the fraud by Slifkin and Balk (*id.*, ¶ 42). Again, by letter dated January 22, 2014, he demanded that the board take action against Marx, Slifkin, and Balk (*id.*). In a March 30, 2015 email, Glaubach wrote to a board member complaining that the Audit Committee was not taking the problems seriously (*id.*, ¶ 43).

Subsequently, Slifkin and Balk "spearheaded a barrage of false sexual harassment claims" against him, and Glaubach was terminated as president and prohibited from coming to the company offices (*id.*, ¶¶ 44-45).

In March 2015, Glaubach commenced a derivative action in Supreme Court, Queens County, entitled *Glaubach derivatively on behalf of Personal Touch Holding Co. v Slifkin et al* (index No. 702987/2015), in which he asserted claims against all of the members of the board and company officers (*see* exhibits C and D to April 26, 2017 Affirmation of Nick Wilder). He claims that he incurred $5 million in legal expenses in that action (amended compl, ¶ 46).

In September 2016, a majority of the board voted to delegate all of its authority to conduct its responsibilities to an executive committee, consisting of all board members except Glaubach (*id.*, ¶ 47). That resolution declared the board and Glaubach to be "adverse" and "hostile," and included a provision that Glaubach not be privy to any information from that committee (*id.*). With regard to GTC, Glaubach alleges that, in a meeting on July 21, 2014, he made earnest efforts to inform GTC, as the largest shareholder, of what was going on, and urged GTC to use its control to help reconstitute the board. He states that GTC "allied with Slifkin and Marx," and told him not to communicate with it (*id.*, ¶ 50). From late July 2014 through December 2015, Glaubach made several other attempts to get GTC to act, but GTC failed to reconstitute the board, and voted to re-

elect all of the same board members who ignored the fraud (*id.*, ¶¶ 51-52).

In February 2015, the board appointed a committee consisting of newly appointed board members to investigate the allegations (*id.*, ¶53).

During this entire time, PwC continued to perform independent audits of Personal Touch's consolidated financial statements, and issued opinion letters certifying the financials for the years (*id.*, ¶ 55).

Glaubach asserts that for years he had a "direct relationship of trust" with PwC, and that each year PwC discussed the financial health of the company with Glaubach at Personal Touch's offices (*id.*, ¶ 57). He also asserts that he discussed with PwC his role as 27% shareholder, as a lender of $10 million, and the importance of the audits to his own financial decisions (*id.*). In 2013, PwC was told of the fraud and improper activities, and following this, PwC reexamined and reevaluated the previous years' financial statements, purporting to address these issues (*id.*, ¶ 60).

Glaubach asserts that since the fraud, looting, and accounting malpractice, the value of the company has severely declined, and the value of his shares have plummeted. He states that he loaned millions of dollars to the company, and that he has spent millions of dollars in legal fees to try to repair the damage to the company, and to his own reputation (*id.*, ¶ 62).

Glaubach commenced this action against PwC, asserting one derivative claim for accounting malpractice (first cause of action), and the remaining claims as direct claims for aiding and abetting breach of fiduciary duty, fraud, aiding and abetting fraud, fraudulent misrepresentation, negligent misrepresentation, and promissory estoppel (second through seventh causes of action). Glaubach asserted only direct claims against GTC for negligence, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty (eighth through tenth causes of action). For the first derivative

cause of action, Glaubach seeks the diminution in the value of shares for all holders of the company's stock, and $2,290,000 for the money fraudulently taken as reimbursement for educational expenses. For the second through tenth direct causes of action, he seeks damages of $827,759 for monies he personally paid to regulators to remedy the company's problems; $13.2 million for the decline in his share value; $812,500 for 15 months of lost salary; $5 million he spent in attorneys' fees; and money damages for the harm to his reputation.

PwC moves to dismiss, contending that plaintiffs' direct claims against it are actually derivative, and that it did not owe any duty to Glaubach independent of any duty it owed to Personal Touch. It contends that the nature of the damages Glaubach seeks demonstrates that the claims are derivative. As to the derivative claim, PwC contends that plaintiffs fail to sufficiently plead demand futility. Plaintiffs cross move to add a new category of damages to each of their claims against PwC in the amount of two loans Glaubach made to Personal Touch in 2010 and 2012.

GTC moves to dismiss the direct claims against it on the ground that it owed no duty to Glaubach. It asserts that it was not a controlling shareholder, and plaintiffs' conclusory allegations that it comprised a control group with Marx and Slifkin are insufficient as a matter of law.

DISCUSSION

Both motions to dismiss are granted and the cross motion for leave to amend is denied.

PwC's Motion to Dismiss

Glaubach's first cause of action for accounting malpractice is asserted derivatively. Since Personal Touch is incorporated in Delaware, Delaware law applies to the issue of whether Glaubach has adequately pleaded that he demanded that the company bring the claim, or that such demand would be futile for the purposes of his derivative claims (*see Asbestos Workers Phila. Pension Fund*

v Bell, 137 AD3d 680, 681 [1st Dept 2016]). Under Delaware law, and Delaware Chancery Court Rule 23.1, to have standing to pursue a derivative claim on behalf of a company, a plaintiff "must make a pre-suit demand that the board pursue the contemplated action" (*id.* at 681-682). Such a pre-suit demand "may be excused, however, if such a demand would have been futile" (*id.* [internal quotation marks and citation omitted]). Either presuit demand or demand futility must be pleaded with particularity in order for a derivative claim to survive a dismissal motion (*see Brehm v Eisner*, 746 A2d 244, 254 [Del 2000]).

In the instant case, the amended complaint fails to allege that Glaubach ever demanded that the Personal Touch board pursue an audit malpractice claim against PwC, or that such a demand would have been futile. First, while Glaubach alleges "demands" that he made on the board of directors, his demands were for the Board to investigate alleged wrong doing of certain company executives, not to investigate and commence an action against PwC for auditing malpractice (amended compl, ¶¶ 40-44). Specifically, he demanded that the Board take "action against all parties who received monies fraudulently characterized as 'educational expenses'" (*id.*, ¶ 43). This fails to satisfy Delaware's presuit demand requirement for the derivative accounting malpractice claim.

Moreover, the complaint fails to sufficiently allege demand futility. Where the "subject of the derivative suit is not a business decision of the board" but, instead, is a wrong committed against the company by a third party, or the board's inaction, demand is only excused when the plaintiff alleges particularized facts "rais[ing] a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand" (*Rales v Blasband*, 634 A2d 927, 934 [Del 1993]; *see In re Bristol-Myers Squibb Derivative Litig.*, 2007 WL 959081, * 8, 2007 US Dist LEXIS 25255, * 25

[SD NY 2007] [No. 02 CIV 8571 (LAP)]; *Asbestos Workers Phila. Pension Fund v Bell*, 137 AD3d at 682). A claim that the board failed to act, sometimes referred to as a "lack of oversight" claim, is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment" (*Asbestos Workers Phila. Pension Fund v Bell*, 137 AD3d at 684 [internal quotation marks and citation omitted]). In order "to rebut the presumption of disinterestedness [under the *Rales* test], the plaintiff must plead particularized facts that, if proved, would establish that a majority of the directors face a 'substantial likelihood' of personal liability for the wrongdoing alleged in the complaint" (*Wandel v Dimon*, 135 AD3d 515, 517 [1st Dept 2016]). Demand futility is examined with respect to the board's membership at the time the amended complaint is filed, unless the alleged claims were validly being litigated at the time of the original pleading (*see Braddock v Zimmerman*, 906 A2d 776, 785 [Del 2006]).

Here, the amended complaint fails to meet the requirements of demand futility. Glaubach's claim is that the board violated their oversight duties. There are, however, no particular facts establishing that a majority of the board at the time plaintiffs commenced this action was interested or lacked independence. Plaintiffs fail to allege that any, much less a majority, of the directors faced a substantial likelihood of liability for PwC's alleged malpractice. The complaint fails to allege that there were direct ties between PwC and Personal Touch's board members, or any allegations that the board was dominated by a director or officer who condoned PwC's alleged improper conduct (*see Wandel v Dimon*, 135 AD3d at 517; *In re Bristol-Myers Squibb Derivative Litig.*, 2007 WL 959081, at * 8). The amended complaint does not even detail the size of the board or its current composition, or that a majority of them were involved in, or even stood to gain by any alleged fraudulent conduct, or other improper conduct by PwC. It fails to meet the heightened pleading standard set forth in

Delaware Chancery Court Rule 23.1, as it fails to plead in a "director-by-director" fashion, instead, asserting conclusory and speculative statements about the board (*see Khanna v McMinn*, 2006 WL 1388744, at *12, 14-15, 2006 Del Ch LEXIS 86, * 54 [Del Ch May 9, 2006] [No. 20545-NC]). The Personal Touch executives Glaubach asserts were looting the company for their personal benefit, Slifkin, Balk, and Marx, were not a majority. In fact, Slifkin resigned from the Board in July 2013 (amended compl. ¶ 38), and these executives were not alleged to have control over the board. Glaubach's conclusory allegations that the board is populated by persons with "ties to" one of the alleged wrongdoers, falls far short of the requirement of particularized allegations that a majority of the board would face a substantial likelihood of personal liability. Accordingly, this first claim is dismissed for Glaubach's lack of standing (CPLR 3211 [a] [3]).

The remaining claims against PwC also are dismissed on the grounds of Glaubach's lack of standing. The second through seventh causes of action all are asserted as direct claims against PwC. However, these claims all belong to Personal Touch, not to Glaubach, and should have been pleaded as derivative claims, and were required to meet the demand requirements set forth above.

Where the wrong is against a corporation, the shareholder does not have an individual claim, even if the shareholder loses the value of his or her shares, or incurs personal liability in an attempt to keep the corporation solvent (*see Abrams v Donati*, 66 NY2d 951, 953 [1985]; *Serino v Lipper*, 123 AD3d 34, 40 [2014]). "The distinction between derivative and direct claims is grounded upon the principle that a stockholder does not have an individual cause of action that derives from harm done to the corporation, but may bring a direct claim when 'the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation'" (*Accredited Aides Plus, Inc. v. Program Risk Mgmt., Inc.*, 147 AD3d 122, 132 [3d Dept 2017], quoting *Serino*

v Lipper, 123 AD3d at 39; *see Lawrence Ins. Group v KPMG Peat Marwick*, 5 AD3d 918, 919 [3d Dept 2004]). In determining whether a claim is direct or derivative, a "court must look to the nature of the wrong and to whom the relief should go" (*Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1038 [Del 2004]). Specifically, the court should consider "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)" (*Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012] [internal quotation marks and citations omitted]; *see Maldonado v DiBre*, 140 AD3d 1501, 1503-1504 [3d Dept 2016]). To determine the sufficiency of the allegations in a complaint, "[t]he pertinent inquiry is whether the thrust of the plaintiff's action is to vindicate his [or her] personal rights as an individual and not as a stockholder on behalf of the corporation" (*Maldonado v DiBre*, 140 AD3d at 1504 [internal quotation marks and citation omitted]). The plaintiff must show that the duty allegedly breached was owed to the shareholder, and that he or she can prevail without showing an injury to the corporation (*Yudell v Gilbert*, 99 AD3d at 114). If the individual claim of harm is "confused with or embedded" within the harm to the corporation, then it must be dismissed (*Serino v Lipper*, 123 AD3d at 40; *see Abrams v Donati*, 66 NY2d at 953-954; *Patterson v Calogero*, 150 AD3d 1131, 1133 [2d Dept 2017] [even where individual harm is claimed, if it is confused with or embedded in the harm to corporation, it cannot stand separately]; *Maldonado v. DiBre*, 140 AD3d at 1504; *Yudell v Gilbert*, 99 AD3d at 115).

Here, Glaubach's claim for damages based on the lost value of his shares is derivative. "The lost value of an investment in a corporation is quintessentially a derivative claim by a shareholder" (*Serino v Lipper*, 123 AD3d at 41; *Kramer v Western Pacific Indus., Inc.*, 546 A2d 348, 353 [Del 1988] [actions involving claims of waste and mismanagement which cause a depression in the value

of stock allege a wrong to the corporation to be enforced by a derivative action]). Because Glaubach's alleged damage for lost share value is not any different from the losses suffered by any other shareholder, and his claim is supported by the identical proof, it is not viable as a direct claim, as a matter of law (*Serino v Lipper*, 123 AD3d at 41 [dismissing lost share value claim despite plaintiff's personal individual relationship with PwC]). All of the shareholders of Personal Touch are harmed by PwC's alleged auditing failures and would recover pro rata in proportion with their ownership of the company's stock because they are stockholders. Thus, the claims are derivative (*see El Paso Pipeline GP Co., L.L.C. v Brinckerhoff*, 152 A3d 1248, 1261 [Del 2016]). Glaubach's unsupported allegations that PwC made misrepresentations to him personally, or that PwC knew that he had a financial interest in the company, are insufficient to convert this to a direct claim (*see Serino v Lipper*, 123 AD3d at 40).

In addition, his claim for damages in the amount of $2.2 million for the allegedly false continuing education reimbursements clearly alleges injuries suffered by the company, which would receive the benefit of any recovery, not the individual shareholders (*see Yudell v Gilbert*, 99 AD3d at 114).

Similarly, his claims for irreparable damages to his reputation "as a pioneer in the health services industry" and for lost earnings (amended compl at p 34) are barred, because they are inextricably intertwined within the derivative claim (*Serino v Lipper*, 123 AD3d at 41). While Personal Touch does not have any right to recover for damage to Glaubach's reputation in the health services community, it is the financial difficulties that the company suffered as a result of the financial mismanagement and purported looting that could have negatively impacted his reputation (*id.*). His claim that, had PwC informed him about the financial irregularities, he could have

stemmed the damage, is indistinguishable from the embedded claims the First Department found in *Serino v Lipper* (123 AD3d at 41). In that case, the Court held that damages to the reputation of the principal and founder of the hedge funds upon the overvaluation and alleged mismanagement was part of the derivative claim against PwC that should be dismissed (*id.*).

Contrary to Glaubach's contentions, the amended complaint fails to allege and seek recovery for any personal damages for an individual, personal contractual relationship with PwC. Glaubach does not allege that he ever hired or paid PwC to perform any services for him individually. The annual engagement letters demonstrate that PwC was retained by Personal Touch, not Glaubach, and that it was for services for the company, not for him personally (*see* exhibits E-K of affirmation of Alvin Lee in support of PwC; *cf. Serino v Lipper*, 123 AD3d at 41 [plaintiff alleged that he retained and paid PwC for individual financial services, and only those claims were held to be direct]). Glaubach was not a party to a commercial contract with PwC that he was seeking to enforce in his own right (*cf. NAF Holdings, LLC v Li & Fung [Trading] Ltd.*, 118 A3d 175, 179 n9, 182 [Del 2015] [plaintiff's claim based on contractual duty owed directly to it by defendant]). His allegations that he made personal financial decisions in reliance upon PwC's audits of Personal Touch do not convert these derivative claims into direct claims.

Glaubach's claim for payments he made to the IRS and attorneys in an attempt to remedy the harm allegedly caused by the Personal Touch executives, and to address the fraud in the company, also does not give him standing. An individual shareholder lacks standing to bring a claim on behalf of a company even where he or she "incurs personal liability in an effort to maintain the solvency of the corporation" (*Abrams v Donati*, 66 NY2d at 953; *see Serino v Lipper*, 123 AD3d at 39). His proposed additional claim for damages for $10 million in personal loans he made to the company

in 2010 and 2012, purportedly in reliance on PwC's audits, are subject to dismissal based on the statute of limitations, as discussed further below.

Glaubach's reliance on *Citigroup Inc. v AHW Inv. Partnership* (140 A3d 1125 [Del 2016]) is misplaced. In *Citigroup*, the court analyzed "holder" claims in which the stockholder alleges that its decision not to sell shares was based on its reliance on the corporation's misstatements about its true financial condition as the stock diminished in value (*id.* at 1128). The Delaware Supreme Court held that, under the laws of either New York or Florida, which governed the claim, the corporation could not pursue this claim because it was not harmed by the wrongdoing. Instead, the corporation was the wrongdoer, the primary defendant, and not a holder, and the claim only belonged to the shareholder who did not sell in reliance on the corporation's misrepresentations (*id.* at 1126). Thus, the holder claims, like the commercial contract claims in *NAF Holdings, LLC v Li & Fung [Trading] Ltd.* (118 A3d 175), were direct claims, because only the holders could assert them, not the issuing corporation (*id.* at 1138). Here, in contrast, Glaubach's claims are not holder claims, that is, he is not claiming that he held onto shares based on misrepresentations by the company. In fact, he asserts that he personally was aware of the fraud since 2013, and still did not sell his shares (plaintiffs' memorandum in opposition at 27). Personal Touch was not the wrongdoer, all of the shareholders have suffered, and Glaubach is not the only one who could asserts the claims against PwC, Personal Touch could as well.

Glaubach's contention that his claim is direct because the misrepresentations were made to him after the damage to the company was already done (*id.* at 31-32) fails to support his claim. As in *Serino v Lipper* (123 AD3d at 38-39), the assertion that, if he knew of the problem earlier, he could have acted to stem the losses (plaintiffs' memorandum in opposition at 18), shows that the

claim is not direct, but instead, is derivative. The waste and mismanagement by Personal Touch's officers and directors, which was allegedly permitted to continue by PwC's failure to uncover and disclose the improper educational expenses, resulting in the decrease in the value of corporate shares, is suffered by the corporation as a whole. Thus, it is a derivative claim (*see Feldman v Cutaia*, 951 A2d 727, 734-735 [Del 2008]; *In re Massey Energy Co. Derivative and Class Action Litig.*, 160 A3d 484, 503 [Del Ch 2017]).

Plaintiff's Cross Motion for Leave to Amend

Glaubach's cross motion for leave to amend is denied. While leave to amend shall be freely granted, where the amended pleading seeks to assert claims that are "plainly without merit," or insufficient as a matter of law, it should be denied (*see Prestige Caterers v Kaufman*, 290 AD2d 295, 295 [1st Dept 2002]; *Rivera v New York City Tr. Auth.*, 141 AD3d 441, 441 [1st Dept 2016]; *Aerolineas Galapagos, S.A. v Sundowner Alexandria, LLC*, 74 AD3d 652, 652 [1st Dept 2010]).

Glaubach's proposed second amended complaint (exhibit E to April 26, 2017 Affirmation of Nick Wilder) seeks to add allegations that he relied on advice from PwC about the financial condition of the company in making loans to the company in 2010 and 2012 and that, Personal Touch has defaulted on interest payments on those loans. Plaintiff also seeks the entire principal amount on the loans ($10 million) as damages from PwC. (*Id.*, ¶ 78.) While Glaubach now alleges that Personal Touch is failing to pay interest on the 2012 loan, and has defaulted on the 2010 loan, he does not allege that the company is incapable of paying him, or that PwC has any responsibility for making sure that the company makes the loan payments. In any event, these claims are barred by the statute of limitations.

The essence of all plaintiffs' claims against PwC are accountant malpractice (*see Meyer v Shearson Lehman Bros.*, 211 AD2d 541, 542 [1st Dept 1995] [look to essence of claim, not label in applying statute of limitations]). Under CPLR 214(6), the limitations period applicable to accounting malpractice is three years, which period may not be circumvented by framing the claim as a negligence or fraud claim (*see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 542 [2004] [professional malpractice claim is subject to three year limitations period]; *Kinberg v Garr*, 60 AD3d 597, 597 [1st Dept 2009] [contract and fraud claims are essentially legal malpractice, subject to three-year limitations period]). Here, Glaubach's claims against PwC are essentially malpractice in that they seek to hold PwC liable for allegedly faulty audits. For example, the proposed second amended complaint alleges that PwC advised him "directly and personally at his offices regarding their opinions and finding from their audits," and PwC "failed to meet [applicable auditing] standards" (exhibit E to April 26, 2017 Affirmation of Nick Wilder, ¶¶ 2, 7). Such a claim "accrues upon the client's receipt of the accountant's work product since this is the point that a client reasonably relies on the accountant's skill and advice" (*Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 8 [2007] [internal quotation marks and citation omitted]). The advice upon which the 2010 and 2012 loans were made occurred, at the latest, on the dates upon which those loans were made. The limitations periods for the claim with regard to the 2010 loan ran in 2013, and, for the 2012 loan, in 2015. Because this action was not commenced until September 2016, Glaubach's malpractice claims based on these additional

allegations are time-barred.[1] Therefore, leave to amend is denied as the addition of a untimely claim for these damages is plainly without merit.

GTC's Motion to Dismiss

GTC's motion to dismiss the eighth, ninth, and tenth causes of action against it for failure to state a claim is granted. All of these claims are pleaded as direct claims against GTC for negligence, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. They are all based on the allegations that GTC, as 31% minority shareholder, owed a duty to Glaubach, a 27% minority shareholder, because GTC was the largest and allegedly a "controlling" shareholder, and that GTC "in conjunction with" shareholders Marx and Slifkin formed a controlling 62% block (amended compl, ¶¶ 129, 139-140). All of these claims are based on Glaubach's assertion that GTC owed a fiduciary duty to him.

Delaware law, which controls in cases where the internal affairs of a Delaware corporation are at issue, recognizes two possible situations in which one shareholder may owe a fiduciary duty to another shareholder: (1) where the shareholder owns a majority of the shares; or (2) where the shareholder actually dominates the board (*In re Morton's Rest. Group, Inc. Shareholders Litig.*, 74 A3d 656, 664-665 [Del Ch 2013]).

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[1] Plaintiffs did not file a reply to PwC's opposition to the cross motion, and indicated in a phone conference with all counsel that the decision not to reply was intentional. Plaintiffs then filed an untimely reply, without court permission, asserting for the first time a continuous representation doctrine toll. Even if this court were to consider this late argument, plaintiffs fail to show that there was any mutual understanding between Glaubach and PwC for the need for further representation of him directly on the specific subject matter of PwC's alleged advice regarding these loans (*see Williamson v PricewaterhouseCoopers LLP*, 9 NY3d at 10; *Apple Bank for Sav. v PricewaterhouseCoopers LLP*, 70 AD3d 438, 438 [1st Dept 2010]). Again, Glaubach also has not pleaded that he directly hired PwC, or that they agreed to do accounting work directly for him.

> "When a stockholder owns less than 50% of the corporation's outstanding stock, a plaintiff must allege domination by a minority shareholder through actual control of corporate conduct. The bare conclusory allegation that a minority shareholder possessed control is insufficient. Rather, the Complaint must contain well-pled facts showing that the minority stockholder exercised actual domination and control over . . . [the] directors"

(*id.* [internal quotation marks and citations omitted]). Thus, a minority shareholder is not considered controlling "unless it exercises such formidable voting and managerial power that [it] as a practical matter, [is] no differently situated than if [it] had majority voting control" (*id.* at 665 [internal quotation marks and citations omitted]). Its power must be "so potent that independent directors . . . cannot freely exercise their judgment, fearing retribution" from the controlling minority shareholder (*id.* [internal quotation marks and citations omitted]). When evaluating such assertions, "at the pleading stage, the facts pled in the complaint must, if true, imply actual control. If such facts are lacking in the complaint, then the control question can be determined as a matter of law on a motion to dismiss" (*In re Rouse Properties, Inc.*, 2018 WL 1226015, *12, 2018 Del Ch LEXIS 93, *28-29 [Del Ch March 9, 2018]).

In the first amended complaint, plaintiffs' allegations of GTC's control as a minority shareholder are entirely conclusory. The complaint alleges that GTC "was and is the largest shareholder at Personal Touch and a controlling shareholder. GTC alone had dominant control, but in conjunction with shareholders Marx and Slifkin GTC formed a controlling shareholder block of over 62% control" (exhibit A to April 26, 2017 Affirmation of Nick Wilder, amended compl, ¶¶ 129, 140). These allegations lack any factual support at all, and clearly fail to meet the requirement of showing such "formidable voting and managerial power" (*In re Morton's Rest. Group, Inc.*

Shareholders Litig., 74 A3d at 665; *In re Rouse Properties, Inc.*, 2018 WL 1226015, at *12). Glaubach also fails to make sufficient allegations to support a claim that GTC was part of a "control group" with Marx and Slifkin (*see Dubroff v Wren Holdings, LLC*, 2009 WL 1478697, *3, 2009 Del Ch LEXIS 99, *11 [Del Ch May 22, 2009] [CIV A 3940-VCN]). He fails to set forth any facts to show that GTC, Marx and Slifkin were connected in a "legally significant way-e.g., by contract, common ownership, agreement, or other arrangement-to work together toward a shared goal" (*id.*). An allegation that these parties simply had parallel interests is insufficient as a matter of law to support an inference that they were part of a control group (*id.*, 2009 Del Ch LEXIS 99, *12). While Glaubach asserts in his opposition (plaintiff's memorandum in opposition to motion seq. No. 003 at 23), that there was such a relationship, pointing to allegations in his complaint that GTC was "tied closely" with Slifkin and another board member, and that it was "allied with Slifkin and Marx" (exhibit A to April 26, 2017 Affirmation of Nick Wilder, amended compl, ¶¶ 12, 50; *see also* ¶ 129), those allegations, again, lack any factual detail. He fails to identify or give the substance of any contract, common ownership agreement, or any other arrangement. Moreover, most of the complaint paragraphs he refers to have no allegations at all about any relationship (*see id.* ¶¶ 9, 16, 18, 36, 37, 134, 136, and 156). Further, the fact that GTC voted its shares for directors whom Glaubach alleges engaged in wrongdoing, fails to establish a relationship. GTC as a shareholder was entitled to vote based on its own self-interest (*see Dubroff v Wren Holdings, LLC*, 2009 WL 1478697, *3, 2009 Del Ch LEXIS 99, * 11). In sum, the amended complaint fails to allege any basis for the allegations that GTC actually controlled the board, or any basis for treating GTC as part of a control group of minority shareholders. Therefore, there is no fiduciary duty owed to Glaubach, and ninth cause of action for the breach of fiduciary is dismissed.

Similarly, Glaubach fails to sufficiently allege a duty to support the negligence claim. Glaubach's claim is based on GTC's alleged inaction: that it "fail[ed] to help the minority shareholder Dr. Glaubach to preserve the company" and "fail[ed] . . . to reconstitute the new 'packed' Board which sanctioned the fraud" (exhibit A to April 26, 2017 Affirmation of Nick Wilder, amended compl, ¶¶ 134-135). In order to allege a negligence claim based on a failure to act, Glaubach must allege a special relationship between himself and GTC (*see Price v E.I. DuPont de Nemours & Co.*, 26 A3d 162, 167 [Del 2011]; *see also Matter of New York City Asbestos Litig.*, 5 NY3d 486, 493-494 [2005]). As with the fiduciary duty claim, Glaubach uses GTC's status as alleged "controlling shareholder" as the basis of this special relationship (amended compl, ¶ 131). As set forth above, however, Glaubach's allegations of such a special relationship lack any factual support, and are insufficient to support this claim as well. Without a duty to act, the eighth cause of action for negligence is insufficient as a matter of law.

Finally, the tenth cause of action against GTC for aiding and abetting a breach of fiduciary duty is dismissed. This claim alleges that Personal Touch's officers and board members violated their fiduciary duties to Glaubach, and that GTC "provided substantial assistance" and "affirmatively assisted in the concealment and perpetration of the breaches of fiduciary" duties (*id.*, ¶¶ 151-152). The elements for a claim of aiding and abetting a breach of fiduciary duty include: (1) "breach by a fiduciary of obligations to another; (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]; *see also Gatz v Ponsoldt*, 925 A2d 1265, 1275 [Del 2007] [same]). "A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator (*Kaufman v Cohen*, 307 AD2d at 125 [internal

quotation marks and citation omitted]). The defendant must either affirmatively assist, help conceal or fail to act when obligated to do so (*id.*; *see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]). The participation must be meaningful (*see Goldin v TAG Virgin Is., Inc.*, 149 AD3d 467, 468 [1st Dept 2017]). "[M]ere inaction of an alleged aider and abettor constitute substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (*Kaufman v Cohen*, 307 AD2d at 126). In "some circumstances, the terms of [a] negotiated transaction themselves [may be] so suspect as to permit, if proven, an inference of knowledge of an intended breach of trust" (*Gatz v Ponsoldt*, 925 A2d at 1276 [internal quotation marks and citation omitted]). Nevertheless, even in the case of an inference, there must be some factual allegations from which "knowing participation" can be inferred (*Jackson Natl. Life Ins. Co. v Kennedy*, 741 A2d 377, 392 [Del Ch 1999]). A claim for aiding and abetting breach of fiduciary duty must be pleaded with particularity (*see* CPLR 3016 [b]; *Roni LLC V Arfa*, 72 AD3d 413, 413-414 [1st Dept 2010], *affd* 15 NY3d 826 [2010]; *Schroeder v Pinterest, Inc.*, 133 AD3d 12, 25 [1st Dept 2015]).

Here, Glaubach's claim against GTC fails to plead any facts showing that GTC knew about the alleged corporate waste and other misdeeds when they were occurring. His bare allegations that "GTC knowingly provided substantial assistance to the primary violators of fiduciary duties" (amended compl, ¶ 152), without further detail, fails to meet the requirements for knowing participation. The amended complaint fails to contain any allegations suggesting that GTC was aware of the alleged fraud until Glaubach informed it in July 2014. His allegation that GTC "helped [officers and board members] try to conceal or minimize the fraud and to remain in power" (*id.*, ¶ 153), similarly provides no more factual detail regarding even the manner or timing of any alleged

assistance. Moreover, there are no factual allegations that GTC undermined or prevented any investigation into the purported fraud (*cf. Gantler v Stephens*, 965 A2d 695, 709 [Del 2009] [defendant corporate officers, who were responsible for preparing due diligence materials for firms that expressed interest in acquiring company, attempted to sabotage the due diligence process, and, thus could be liable for breach of their fiduciary duties and for aiding and abetting chairman of board's breach]). The assertion that GTC "reelect[ed] known participants in fraud to the board" (amended compl, ¶ 155), occurred well after the purported breaches of trust, and thus "[e]ven if viewed in the light most favorable to the plaintiff[s] . . . do not support a claim that [defendant] participated at all (let alone knowingly participated) in any . . violations" (*Weinberger v Rio Grande Indus., Inc.*, 519 A2d 116, 131 [Del Ch 1986]). Since, as discussed above, GTC did not owe any fiduciary duty directly to Glaubach, any knowing participation cannot be satisfied by mere inaction. Therefore, because none of Glaubach's conclusory allegations are sufficient to support an inference of knowing assistance, this cause of action is dismissed (*see Roni LLC v Arfa*, 15 NY3d at 827 [conclusory allegations insufficient to give rise to an inference that defendants had actual knowledge]; *Schroeder v Pinterest Inc.*, 133 AD3d at 26; *Brasseur v Speranza*, 21 AD3d 297, 299 [1st Dept 2005] [bare allegations that defendant "knew or should have known" insufficient to sustain claim]; *Kaufman v Cohen*, 307 AD2d at 125–126, [absence of facts in complaint to infer actual knowledge of the fiduciary relationship warrant dismissal]). Therefore, GTC's motion to dismiss is granted.

Accordingly, it is

ORDERED that the motion to dismiss of defendant Greatbanc Trust Company (motion seq. No. 003) is granted and the complaint is dismissed in its entirety as against said defendant, with costs

and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion to dismiss of defendant PricewaterhouseCoopers, LLP (motion seq. No. 004) is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

This constitutes the decision and order of this court.

Dated: May 9, 2018

ENTER,

O. PETER SHERWOOD J.S.C.