SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

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ALAN ADES,

Plaintiff,

- v -

VAN DALE INDUSTRIES, INC., MAURICE SETTON, ALBERT ADES, JIMMIE ADES, GABRIEL ADES

Defendants.

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INDEX NO. 656471/2021

MOTION DATE 03/18/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS.

Upon the foregoing documents, the decision on defendant's pre – answer motion to dismiss, pursuant to CPLR 3211(a)(7) is as follows:

Plaintiff's complaint alleges causes of action for i) "breach of fiduciary duty/rescission of the merger," ii) accounting, and iii) damages. A related action involving similar parties, arising out of the transaction and occurrence, *Alan Ades v. Van Dale Industries, Inc.*, 160305/2021, is also before this Court.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]). When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining "only whether the facts as alleged fit within any cognizable legal theory" (see

D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

Defendant, Maurice Setton alleges that, "the shareholders of Van Dale held a meeting to consider and vote on a proposal submitted by Van Dale's Board of Directors to approve an Agreement and Plan of Merger between Van Dale and Van Dale Industries, Corp. The merger would have the effect of reorganizing Van Dale's ownership to include only employee-managers Maurice Setton, Jimmie Ades, and Gabriel Ades. Non-employee non-management shareholder Alan Ades would be paid fair market value" (see NYSCEF Doc. No. 12 Par. 3).

As described in the affidavit of Alan Ades,

> "I am the plaintiff in this action and, for nearly thirty-nine (39) years, the owner of 19.44% of the common stock of defendant van Dale Industries, Inc. [A]mong other things, rescission of an illicit 'freeze out' merger initiated and approved by my nephew Maurice Setton and my cousins Albert Ades, Jimmie Ades and Gabriel Ades, in their capacity as members of the board of directors of Van Dale (and by Maurice, Jimmie and Gabriel in their capacity as majority shareholders of that company). The individual Defendants had no legitimate business purpose; they were sick and tired of sharing the fruits of Van Dale with me, a passive minority non-management owner for nearly four decades. Thus, under the guise of a phantom 'legitimate' business purpose, they illicitly used the freeze-out merger section of the New York Business Corporation Law as a sword to divest me of my interests in the company. On August 23, 2021, a Notice of Meeting was delivered to the shareholders. The purpose of the meeting was to consider and vote on a proposal to approve an Agreement and Plan of Merger between the Company and Van Dale Industries, Corp. (a recently formed New York corporation wholly owned by the three other shareholders of Van Dale) and that I would be frozen out of this newly merged entity. Maurice tries to justify … by claiming that 'potential conflicts of interest posed by [me]' would be avoided. [I]n the years 2018 through 2020 … Van Dale's aggregate gross sales were $357,300,000 (and projected sales for 2021 were $178,178,509)" (see NYSCEF Doc. No. 19 Pars. 1, 3 – 5, 8).

Plaintiff further submits a Hilco Valuation for Van Dale Industries Inc. (see NYSCEF Doc. No. 21).

"Because the power to manage the affairs of a corporation is vested in the directors and majority shareholders, they are cast in the fiduciary role of 'guardians of the corporate welfare;" (see *Wilson v. Dantas*, 29 N.Y.3d 1051, 1064 [2017]).

"[A] principal indicator of fair dealing is the relationship between the parties representing the corporations to be merged. When, however, there is a common directorship or majority ownership, the inherent conflict of interest and the potential for self-dealing requires careful scrutiny of the transaction" (see *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 570 [1984]).

Plaintiff's Memorandum of Law in Opposition cites the Court of Appeals in *Chelrob*,

> "The rule that must be applied in such a situation has been stated by the Supreme Court of the United States. 'The relation of directors to corporations is of such a fiduciary nature that transaction between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy.' Though the dual position of the directors does not itself render such transaction void, it does make 'the unprejudiced exercise of judgment by them more difficult' and 'should lead the courts to scrutinize these transactions with care' (see *Chelrob v. Barrett*, 293 N.Y. 442, 461 [1944]).

As this Court will "scrutinize [this] transaction[] with care" further analysis needed to determine fair market share.

ORDERED that the motion to dismiss is DENIED; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

7/15/2022
DATE

LAURENCE LOVE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE