

9-16-2011

Order Granting Defendants' Motions to Dismiss (TEAMSTERS LOCAL 237 ADDITIONAL SECURITY BENEFIT FUND)

Melvin K. Westmoreland
Superior Court of Fulton County

Follow this and additional works at: <https://readingroom.law.gsu.edu/businesscourt>

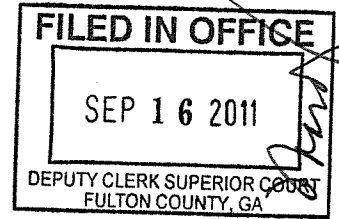
Institutional Repository Citation

Westmoreland, Melvin K., "Order Granting Defendants' Motions to Dismiss (TEAMSTERS LOCAL 237 ADDITIONAL SECURITY BENEFIT FUND)" (2011). *Georgia Business Court Opinions*. 200.
<https://readingroom.law.gsu.edu/businesscourt/200>

This Court Order is brought to you for free and open access by Reading Room. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of Reading Room. For more information, please contact mbutler@gsu.edu.

BUS J

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



TEAMSTERS LOCAL 237 ADDITIONAL)
SECURITY BENEFIT FUND and TEAMSTERS)
LOCAL 237 SUPPLEMENTAL FUND FOR)
HOUSING AUTHORITY EMPLOYEES,)
derivatively and on behalf of BEAZER HOMES)
USA, INC.,)
)
Plaintiffs,)
)
vs.)
)
IAN J. McCARTHY, ALLAN P. MERRILL,)
KENNETH F. KHOURY, ROBERT L.)
SALOMON, BRIAN C. BEAZER, LAURENT)
ALPERT, PETER G. LEEMPUTTE, NORMA A.)
PROVENCIO, LARRY T. SOLARI, STEPHEN P.)
ZELNAK, JR., PRICEWATERHOUSECOOPERS)
LLP and MARKSONHRC, LLC,)
)
Defendants,)
)
- and -)
)
BEAZER HOMES USA, INC., a Delaware)
corporation,)
)
Nominal Defendant.)

Civil Action No. 2011-cv-197841

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

This matter comes before the Court on (1) the Motion to Dismiss the Complaint filed by Defendants Ian J. McCarthy, Brian C. Beazer, Laurent Alpert, Peter G. Leemputte, Norma A. Provencio, Larry T. Solari, Stephen P. Zelnak, Jr., Allan P. Merrill, Kenneth F. Khoury, Robert L. Salomon, (collectively, the "Individual Defendants"), MarksonHRC, LLC ("Markson") and Nominal Defendant Beazer Homes USA, Inc. ("Beazer" or the "Company") and (2) the Motion to Dismiss the Complaint filed by Defendant PricewaterhouseCoopers LLP ("PwC"). This Court having carefully considered the parties' written submissions and oral argument on the Motions

held on August 3, 2011, it is hereby ORDERED that Defendants' Motions are GRANTED and that Plaintiffs' Complaint is DISMISSED for the reasons set forth herein.

I. THE PARTIES

Plaintiffs Teamsters Local 237 Additional Security Benefit Fund and Teamsters Local 237 Supplemental Fund For Housing Authority Employees ("Plaintiffs") allege in their Complaint that they are shareholders of Beazer and have been continuously since May 2010. Plaintiffs filed this action seeking to assert claims derivatively on behalf of Beazer, a leading American homebuilder incorporated under Delaware law with executive offices in Atlanta, Georgia. Defendants McCarthy, Beazer, Alpert, Leemputte, Provencio, Solari, and Zelnak (collectively, the "Director Defendants" or the "Beazer Board") were members of Beazer's board of directors at the time the lawsuit was filed. Defendants McCarthy, Merrill, Khoury, and Salomon were Beazer executives who were paid compensation for Beazer's fiscal year 2010 that Plaintiffs challenge as "excessive". Defendants PwC and Markson are alleged to have provided executive compensation consulting and/or advisory services in connection with the challenged executive compensation.

II. PLAINTIFFS' CLAIMS

The Complaint asserts four causes of action. In the *First Cause of Action*, Plaintiffs allege that the Director Defendants breached their duties of loyalty, candor, and good faith by (i) approving 2010 executive pay that Plaintiffs challenge as "excessive" and (ii) recommending that Beazer shareholders vote in favor of approving the challenged compensation pursuant to newly applicable "say on pay" provisions of the Dodd-Frank Wall Street Reform And Consumer Protection Act of 2010 (the "Dodd-Frank Act"). Plaintiffs allege that the challenged compensation was "excessive" because it involved pay raises for the Company's four most

highly compensated executives, even though the Company suffered a net loss of \$34 million and an annual share price return of (-17.23%) for fiscal 2010, both of which Plaintiffs allege fell below industry averages as reflected in the S&P 500 HomeBuilders Index. Compl. ¶¶ 2, 29. According to Plaintiffs, “[t]he Beazer Board’s decisions to increase CEO and top executive pay in 2010, despite the Company’s massive \$34 million net loss, were disloyal, unreasonable, and not the product of a valid exercise of business judgment.” *Id.* ¶ 3. In addition, Plaintiffs allege that the results of the say on pay vote, in which a majority of voting Beazer shares voted against advisory approval of the challenged compensation, rebutted the presumption that Beazer directors’ decisions regarding the challenged compensation reflected valid business judgments deserving of deference. *Id.* ¶ 4. Plaintiffs also allege that the Board’s recommendation, made in Beazer’s Proxy Statement dated December 22, 2010 (the “December 2010 Proxy Statement”), that shareholders vote to approve the compensation in the say on pay vote, was “materially false and misleading when made” because it “omitted to disclose that the 2010 raises for Beazer’s CEO and top executives were excessively large and irrational, based on Beazer’s negative 2010 results.” *Id.* ¶ 3. Plaintiffs also allege that “Beazer has been damaged by the Beazer Board’s failure to publicly rescind the 2010 pay hikes to Beazer’s CEO and top officers” following the say on pay vote. *Id.* ¶ 5; *see also id.* ¶¶ 35, 38, 39 & 44. In the *Second Cause of Action*, Plaintiffs allege that Defendants PwC and Markson aided and abetted the breaches of fiduciary duties alleged in the *First Cause of Action*. The *Third Cause of Action* alleges breach of contract claims against Defendants PwC and Markson. The *Fourth Cause of Action* alleges unjust enrichment claims against Defendants McCarthy, Merrill, Khoury, and Salomon.

III. DEFENDANTS' MOTIONS TO DISMISS

The Defendants move to dismiss Plaintiffs' Complaint on three grounds. *First*, Defendants argue that Plaintiffs lack standing to assert these claims derivatively on Beazer's behalf due to Plaintiffs' failure to allege contemporaneous and continuous ownership of Beazer stock. *Second*, Defendants contend that Plaintiffs have failed to properly allege legal excuse for their failure to make a pre-suit demand on Beazer's Board that it investigate and make a decision whether to pursue these claims. *Third*, Defendants contend that the Complaint fails to state a claim upon which relief may be granted. As set forth below, this Court agrees that dismissal of the Complaint is warranted on each of the grounds asserted by Defendants.

A. **Plaintiffs Have Not Alleged The Contemporaneous And Continuous Stock Ownership Required For Standing To Assert These Derivative Claims.**

Because Beazer is incorporated under Delaware law, this Court must apply Delaware law in adjudicating matters that implicate Beazer's internal corporate affairs. *See* O.C.G.A. § 14-2-747; *Diedrich v. Miller & Meier & Assoc. Architects and Planners, Inc.*, 254 Ga. 734, 735-36, 334 S.E.2d 308, 310 (Ga. 1985). One such matter governed by Delaware law relates to Plaintiffs' standing to assert derivatively on the Company's behalf legal claims that belong to Beazer. To have standing to sue derivatively, Delaware law requires Plaintiffs to have owned the Company's stock contemporaneously with the alleged wrongful conduct about which they are complaining and to have held the stock continuously since that time and throughout the duration of the lawsuit. *See Strategic Asset Mgmt., Inc. v. Nicholson*, No. Civ. A. 20360-NC, 2004 WL 2847875, at *2 (Del. Ch. Nov. 30, 2004). Delaware adheres to this "contemporaneous ownership" requirement in order to ensure that only plaintiffs who are properly representative of fellow shareholders and properly incited to pursue the company's best interests will be permitted to bring derivative claims and to deter "strike suits" brought by shareholders who

attempt to purchase standing to sue by buying stock *after* the challenged conduct has already occurred. *Id.* Plaintiffs are required to allege in their Complaint that they satisfy the contemporaneous and continuous stock ownership requirement. 8 Del. C. § 327; Del. Ct. Ch. R. 23.1(a).

Plaintiffs allege that they have continuously held Beazer stock “since May 2010.” Compl. ¶ 8. However, the corporate acts and decisions that determined the 2010 executive compensation that Plaintiffs challenge in this lawsuit occurred prior to that time. As discussed in Beazer’s December 2010 Proxy Statement filed with the United States Securities and Exchange Commission (“SEC”), which Plaintiffs quote in their Complaint, and earlier SEC filings referenced in the December 2010 Proxy Statement, the challenged 2010 compensation was paid based on (i) executives’ achievement of specific incentive performance goals that the Company’s Compensation Committee established at the outset of Beazer’s fiscal 2010 and that were disclosed to investors in the Company’s Proxy Statement filed with the SEC on February 25, 2010; and (ii) the guidelines set forth in a 2010 Equity Incentive Plan whose terms were also disclosed to Beazer shareholders in the February 2010 Proxy Statement and were approved by 89% of voting Beazer shares at the Company’s 2010 Annual Stockholders Meeting held on April 13, 2010.¹ The allegations in Plaintiffs’ Complaint neither contradict any part of that sequence of events nor in any way suggest that the challenged 2010 executive compensation was not paid in accordance with the pre-established performance goals and the terms of the 2010 Equity Incentive Plan.

¹ The Court may take notice of the contents of Beazer’s SEC filings in evaluating this motion. *See In re JDN Realty Corp. Sec. Litig.*, 182 F. Supp. 2d 1230, 1239 (N.D. Ga. 2002) (in adjudicating a motion to dismiss a court may consider the contents of documents that were “legally required by and publicly filed with the SEC”); *NationsBank, N.A. (South) v. Tucker*, 231 Ga. App. 622, 623 (1988) (court may consider matters that are “readily ascertainable by reference to some reliable source, and are beyond dispute”); *McGraw v. State*, 85 Ga. App. 857, 860, 70 S.E.2d 141, 145 (1952) (Georgia courts may take “judicial cognizance of matters of common and public knowledge.”).

Plaintiffs bought stock *after* Beazer's Compensation Committee had established Beazer executives' 2010 base salaries and the performance goals that determined Beazer executives' 2010 cash bonuses payments and *after* the Company's shareholders had overwhelmingly approved the 2010 Equity Incentive Plan that established the guidelines for awards of incentive stock compensation. Plaintiffs concede as much, but argue that they have alleged that they held stock before at least portions of the challenged pay were actually awarded (which could not happen until after the close of Beazer's fiscal 2010). This Court is not persuaded that Plaintiffs' purchase of stock *after* the conditions on which challenged pay would be awarded were established, albeit before the pay was actually awarded pursuant to those pre-established terms, suffices to satisfy the letter and spirit of the contemporaneous and continuous stock ownership requirement. Clearly, Plaintiffs lack standing to challenge the actual decisions setting the 2010 compensation guidelines, which Plaintiffs do not dispute occurred before they became Beazer shareholders. Furthermore, at minimum, Plaintiffs knew of, or are chargeable with knowledge of, the compensation guidelines existing at the time that they decided to invest in Beazer stock. They cannot now be heard to complain that Beazer executives were ultimately paid the amounts they *earned* in accordance with those compensation guidelines. The Court finds that Plaintiffs have not satisfied the contemporaneous and continuous stock ownership and, therefore, Plaintiffs' lack of standing to challenge the 2010 executive compensation about which they complain. 8 Del. C. § 327; Del. Ct. Ch. R. 23.1(a).

B. The Complaint Fails To Properly Allege Excuse From The Demand Requirement.

In addition to Plaintiffs' failure to plead the contemporaneous and continuous stock ownership required for standing to assert these derivative claims, the Court finds that the

Complaint fails to adequately allege excuse for Plaintiffs' admitted failure to make a pre-suit demand on Beazer's Board.

1. The Demand Requirement

Delaware law requires would-be derivative plaintiffs to make a pre-suit demand on the company's board that it investigate and evaluate whether to bring the claims or to plead particularized facts demonstrating legal excuse from the demand requirement. *See Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); Del. Ch. Ct. R. 23.1(a). These requirements follow from the well-settled corporate governance principle that decisions concerning whether a company should initiate litigation to pursue legal claims, like the management of other matters of internal corporate affairs, should ordinarily be left to the judgment and discretion of the company's board. *See Aronson*, 473 A.2d at 811-12; 8 Del. C. § 144(a). Derivative lawsuits, in which shareholder plaintiffs seek to compel the litigation of claims that legally belong not to them but to the company on whose behalf they are asserted, inherently impinge on this managerial prerogative of the board. Hence, Delaware law requires a pre-suit demand or allegations of particularized facts sufficient to show legal excuse from the demand requirement. *Aronson*, 473 A.2d at 811-12.

Under Delaware law, shareholders who file suit without first making a demand must allege *particularized facts* in their complaint demonstrating legal excuse from the demand requirement. *See* Del. Ch. Ct. R. 23.1(a). Demand excuse allegations "must comply with stringent requirements of factual particularity that differ substantially from the permissive notice pleadings governed solely by [] Rule 8(a). Rule 23.1 is not satisfied by conclusory statements or mere notice pleading." *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).

The test to be applied in assessing whether a complaint adequately alleges excuse from the demand requirement depends on the nature of the claims being asserted. Where a claim

seeks to challenge a decision undertaken by a company's board, the test articulated in *Aronson* applies. Under the *Aronson* test, in order to properly allege excuse from the demand requirement, the complaint must allege particularized facts raising a reasonable doubt that either (i) a majority of the board was "disinterested" (*i.e.*, not motivated by some unique personal financial interest in the decision, in the sense of self-dealing) and "independent" (*i.e.*, able to exercise business judgment free from the dominion and controlling influence of another "interested" party); or (ii) the challenged decision was the result of a valid exercise of business judgment. 473 A.2d at 814. Where, on the other hand, the claim is not one that attacks any particular decision of the board, the applicable test is set forth in *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993). Under the *Rales* test, excuse from the demand requirement is adequately alleged only if the complaint alleges particularized facts sufficient to create a reasonable doubt that a majority of the board members could have exercised independent and disinterested business judgment in responding to the demand. *Id.*

2. Analysis Of Plaintiffs' Demand Allegations

a. Plaintiffs' Insufficient Allegations That The Beazer Board Breached Its Fiduciary Duties By Approving And Recommending The Challenged Compensation

Plaintiffs' allegations that the Beazer Board breached its fiduciary duties of loyalty, candor, and good faith by allegedly approving "excessive" compensation for the Company's executives in 2010 and recommending that shareholders vote to approve the compensation in the say on pay vote implicates the *Aronson* test. Plaintiffs make no attempt to satisfy the first prong of the *Aronson* test. Of the seven directors comprising the members of Beazer's Board, only *one* – Mr. McCarthy – is alleged to have received the 2010 compensation Plaintiffs challenge. Plaintiffs do not allege any basis to doubt that a majority of Beazer directors were disinterested as to challenged compensation decision. *See Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984)

(“Directorial interest exists whenever divided loyalties are present, or a director either has received or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the shareholders.”); *Litt v. Wycoff*, No. Civ. A. 19803-NC, 2003 WL 1794724, at *3 (Del. Ch. Mar. 28, 2003) (“A director is ‘interested’ when he or she appears on both sides of the challenged transaction or expects to derive a personal benefit from it, such as in a self-dealing transaction.”). Nor do Plaintiffs allege that a majority of Beazer directors were subject to the dominion and control of Mr. McCarthy (or any other person who benefited from the challenged compensation) such that those directors were incapable of making an independent evaluation of the merits of the challenged compensation. Thus, Plaintiffs do not allege that demand is excused because a majority of directors lacked independence. *See Aronson*, 473 A.2d at 816 (“Independence means that a director’s decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences.”).

Plaintiffs instead focus on the second prong of the *Aronson* test, which requires allegations raising a reasonable doubt that the Beazer directors’ decisions with respect to the challenged compensation reflected valid business judgments. The Court’s analysis of the second prong of the *Aronson* test is informed by Delaware’s business judgment rule, a legal presumption that, in making business decisions regarding 2010 executive pay, Beazer’s directors acted on an informed basis, in good faith, and in the honest belief that those decisions were in the best interests of the Company. *Id.* at 812. Only by alleging particularized facts that rebut the presumptions of the business judgment rule can Plaintiffs satisfy their burden under *Aronson*’s second prong.

The Complaint fails to allege any particularized facts suggesting that the challenged decisions regarding the 2010 executive pay were made on an informed basis. The Complaint

also lacks particularized factual allegations raising any doubt that the challenged compensation decisions were made in good faith and in directors' honest belief that the decisions were in Beazer's best interests. To the contrary, Plaintiffs' own allegations acknowledge the Company's statement that the challenged compensation was "premised on [executives'] achievement of predetermined financial and non-financial goals and targets that the Compensation Committee and the Board of Directors believe are critical to enhancing stockholder value." Compl. ¶ 27 (quoting the December 2010 Proxy Statement). Plaintiffs do not allege that the challenged compensation was not in fact awarded consistent with executives' performance against those predetermined financial and non-financial goals and targets. Nor do they allege the Beazer Board did not in good faith believe that those performance goals and targets were critical to enhancing stockholder value, and, thus, appropriate metrics upon which to base executives' compensation.

Instead, Plaintiffs contend that the adverse vote by a majority of Beazer shares voting in the "say on pay" vote held at the Company's 2011 Annual Stockholders meeting in April 2010 constitutes evidence that rebuts the presumption that the Beazer directors' *prior* decisions approving the challenged compensation and recommending that Beazer shareholders vote for it in the say on pay vote reflected valid business judgment. *See* Compl. ¶¶ 4, 35, 43. The court rejects that argument as wholly unpersuasive both factually and legally. First, because the say on pay vote had not yet been held when the challenged decisions to approve the pay at issue and recommend that shareholders vote to approve it were made, the Beazer Board could not have considered the results of the vote in making those decisions. Thus, the outcome of the vote, which was not known when the challenged decisions were made, does not suggest that, in making those decisions, the directors failed to act on an informed basis, in good faith, and in the

honest belief that the decisions were in Beazer's best interests. Hindsight second-guessing and Monday morning quarterbacking of the sort Plaintiffs urge are fundamentally inconsistent with the business judgment analysis. See *In re Cox Radio, Inc. S'holders Litig.*, No. 4461-VCP, 2010 WL 1806616, at *14 (Del. Ch. May 6, 2010) (rejecting challenge to board's business judgment based on events transpiring after the challenged decision was made and observing that "[w]hile hindsight is generally 20/20, it cannot be used to second guess the business judgment of Delaware directors"), *aff'd*, 9 A.3d 475 (Del. Nov. 22, 2010); *Litt v. Wycoff* No. Civ. A. 19083-NC, 2003 WL 1794724, at *10 (Del. Ch. Mar. 28, 2003) (board's exercise of business judgment must be evaluated by reference to facts on the ground as of the time of the board's decision).

Second, Plaintiffs' contention that the "independent business judgment" of Beazer's shareholders suffices to rebut the presumption of business judgment protection finds no support either in governing Delaware law or in the Dodd-Frank Act's new say on pay provisions. The Dodd-Frank Act expressly and unambiguously states that shareholder say on pay votes are advisory and "***shall not be binding on the issuer or the board of directors*** of an issuer, and ***may not be construed*** (1) ***as overruling a decision by such issuer or board of directors***; (2) ***to create or imply any change to the fiduciary duties of such issuer or board of directors***; [or] (3) ***to create or imply any additional fiduciary duties for such issuer or board of directors***." See Dodd-Frank Act, 124 Stat. 1376, 1900 (emphasis added); 15 U.S.C. § 78n-1(c). Thus, the Dodd-Frank Act expressly preserved the pre-existing fiduciary duty framework concerning directors' executive compensation decisions.

Delaware law, which supplies the standards that govern here, has long been settled that directors' authority to manage corporate business and affairs includes "wide discretion" to set executive compensation. *Brehm*, 746 A.2d at 262 n.56; see also *Aronson*, 473 A.2d at 817;

Haber v. Bell, 465 A.2d 353, 359 (Del. Ch. 1983) (observing that “generally directors have the sole authority to determine compensation levels”); 8 Del. C. § 122(5). “Informed decisions regarding employee compensation by independent boards are usually entitled to business judgment rule protection.” *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 799 (Del. Ch. 2004); *see also Orban v. Field*, No. Civ. A. 12820, 1997 WL 153831, at *10 (Del. Ch. Apr. 1, 1997) (“Where, as here, a payment decision has been approved by a majority of disinterested directors, it is entitled to the protection of the business judgment rule.”).

Although Plaintiffs concede that the Dodd-Frank Act did not change directors’ fiduciary duties or alter the business judgment rule, they argue that the negative say on pay vote is “evidence” the Court should consider in assessing whether they have rebutted the business judgment rule. *See* Pl. Br. at 14. Plaintiffs cite no authority supporting this novel contention. Given that Delaware law, which the Dodd-Frank Act explicitly declined to alter, places authority to set executive compensation with corporate directors, not shareholders, this Court will not conclude that an adverse say on pay vote *alone* suffices to rebut the presumption of business judgment protection applicable to directors’ compensation decisions. Plaintiffs have not rebutted the presumption of business judgment rule protection as to the Beazer directors’ decisions to approve and recommend that shareholders vote for the challenged compensation. Accordingly, Plaintiffs have not alleged excuse for their failure to make a demand as to their claim that those acts constituted breaches of the directors’ duty of loyalty, candor, or good faith. Their claims must be dismissed on that basis.

b. Plaintiffs’ Insufficient Allegations Concerning The Beazer Board’s Failure To “Rescind” The Challenged Compensation After The Vote

Plaintiffs’ allegations that Beazer’s Board has not “rescinded” the challenged 2010 executive compensation since learning the results of the say on pay vote, Compl. ¶¶ 5, 35, 38, 39,

44, likewise fail either to (a) rebut the business judgment rule or (b) properly allege excuse for Plaintiffs' failure to make a pre-suit demand. As noted, governing Delaware law empowers directors to make executive compensation decisions and affords those decisions wide discretion. *See* 8 Del. C. § 122(5); *Brehm*, 746 A.2d at 262 n.56; *Aronson*, 473 A.2d at 817; *Haber*, 465 A.2d at 359; *Prod. Res. Grp.*, 863 A.2d at 799; *see also Orban*, 1997 WL 153831, at *10. The Dodd-Frank Act provisions requiring say on pay votes expressly preserve that fiduciary duty framework and explicitly state that say on pay votes "shall not be binding . . . and may not be construed [] as overruling a decision" by corporate directors concerning executive compensation. 124 Stat. at 1900; 15 U.S.C. § 78n-1(c). Thus, the say on pay vote did not require that the challenged pay be rescinded and does not support a reasoned inference that any alleged failure to do so was not a valid business judgment. Indeed, Plaintiffs have not alleged any basis on which the Beazer Board could have rescinded the challenged pay, which Beazer's executives earned based on their performance in satisfying the incentive compensation targets and guidelines established by Beazer's Compensation Committee at the outset of fiscal 2010. Even if there were some basis for rescinding the challenged compensation, in order to rebut the presumption of business judgment protection as to the Beazer Board's determination not to rescind the compensation, Plaintiffs were required to plead particularized facts supporting a reasonable inference that such determination was not made on an adequately informed basis, in good faith, and in the honest belief that allowing executives to keep the pay they earned was in the Company's best interests. Plaintiffs have not alleged such facts, and have alleged nothing to suggest that the Beazer Board's failure to rescind the challenged pay rebuts the business judgment rule or suffices to excuse demand.

c. Plaintiffs' Insufficient Allegations That The Beazer Board Faces A Substantial Likelihood Of Liability

Plaintiffs' allegations that demand was excused because the Beazer Board faces a "substantial likelihood of liability," Compl. ¶¶ 42, 43, likewise fail to excuse demand. To adequately allege excuse from the demand requirement, plaintiffs must allege *particularized facts* showing that a majority of the board faces a "substantial likelihood" of personal liability. *Aronson*, 473 A.2d at 815; *see also Rales*, 634 A.2d at 936; *Seminaris v. Landa*, 662 A.2d 1350, 1355 (Del. Ch. 1995). Plaintiffs' allegations fall far short.

As discussed above, Plaintiffs have not properly alleged a reasoned basis to doubt that the Beazer Board's alleged decisions to approve the challenged compensation and recommend that Beazer's shareholders vote in favor of it in the say on pay vote reflected valid business judgments to which this Court is bound to defer. Plaintiffs allege that the Board's recommendation to shareholders in advance of the say on pay vote "omit[ed] material facts from Beazer shareholders regarding the Company's 2010 executive compensation." Compl. ¶ 48. Plaintiffs' allegations in that regard are entirely conclusory, however, and therefore do not suffice to adequately allege the "substantial likelihood of liability" required to excuse demand. *See Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 (Del. 1997) ("[I]t is inherent in disclosure cases that the misstated or omitted facts be identified and that the pleading not be merely conclusory.").

Nowhere does the Complaint specify which "material facts" Plaintiffs allege were omitted. Plaintiffs allege generally that the Beazer Board failed to disclose that the challenged 2010 executive compensation was "excessively large and irrational, based on Beazer's negative 2010 results," citing the Company's loss of \$34 million for fiscal 2010 and an alleged 17.23% decline in the Company's share price return on the year. Compl. ¶¶ 2, 3. The allegation that the

challenged executive compensation was “excessively large and irrational,” however, does not identify any undisclosed material *fact*, but rather states an unsupported conclusion. The Complaint does not allege that the Director Defendants (or any Defendants) shared Plaintiffs’ conclusion. To the contrary, under the business judgment rule, which Plaintiffs have failed to rebut, the Court must presume that Beazer’s directors arrived at their decisions concerning the 2010 executive compensation based on adequate information, in good faith, and in the honest belief that the compensation was appropriate and in Beazer’s best interests. Delaware law is clear, moreover, that in their communications with shareholders, directors are not required to engage in “self-flagellation” by drawing negative inferences or legal conclusions concerning their decisions. *See, e.g., Loudon*, 700 A.2d at 143.

In any event, Plaintiffs’ own allegations suggest that the challenged compensation was not at all “irrational,” but instead was paid pursuant to the executives’ achievement of pre-established performance targets that the Compensation Committee determined were “critical” for 2010 and likely to “directly lead to meaningful Company improvements” and the terms of the shareholder-approved 2010 Equity Incentive Plan. Compl. ¶¶ 27, 32. Further, the “negative 2010 results” to which Plaintiffs point as the basis for their contention that the challenged executive compensation was “excessive and irrational” were not “omitted,” but instead were matters of public knowledge well known to Beazer’s shareholders at the time of the Board’s say on pay recommendation made in Beazer’s December 2010 Proxy Statement. In fact, the Company had publicly reported its \$34 million loss for fiscal year 2010 in its Form 10-K filed with the SEC on November 5, 2010. Further, Plaintiffs’ tacitly concede that Beazer shareholders were well aware of the allegedly “omitted” information in their allegation that “*[b]ased on the same information as the Beazer Board*, Beazer shareholders concluded, in their independent

business judgment, that the Beazer Board's 2010 CEO and top executive pay hikes were not in the best interest of Beazer and its shareholders." Compl. ¶ 43 (emphasis added).

Plaintiffs likewise fail to plead particularized factual support for their conclusory allegation that the December 2010 Proxy Statement "falsely represented . . . that Beazer follows a pay-for-performance executive compensation policy when, in fact, it did not in 2010." Compl. ¶¶ 10-19. Plaintiffs purport to quote a portion of the December 2010 Proxy Statement addressing the Company's "Compensation Philosophy and Objectives," *id.* ¶ 27, but allege no facts whatsoever suggesting that any specific statements contained therein misrepresented the Company's policies with respect to executive compensation or that the challenged 2010 executive compensation "violated" those policies. Plaintiffs' allegations fail to demonstrate excuse from demand on the grounds that the Beazer Board faces a substantial likelihood of liability for any conduct challenged in the Complaint.

d. Plaintiff's Insufficient Allegations Of Board "Hostility" To Plaintiffs' Claims

Likewise insufficient is Plaintiffs' allegation that demand is excused because the Beazer Board has allegedly "demonstrated . . . hostility towards the relief sought in the action," by "first recommending that Beazer shareholders approve the excessive 2010 executive compensation, and then ratifying their own prior decisions to award the 2010 compensation by not rescinding it after a majority negative vote." Compl. ¶ 44. Such director "hostility" allegations, based on directorial approval of matters challenged in the complaint, have been repeatedly rejected by Delaware Courts. *See, e.g., Aronson*, 473 A.2d at 814 (observing that, were courts to presume that "any board approval of a challenged transaction automatically connotes 'hostile interest' and 'guilty participation' by directors, or some other form of sterilizing influence upon them[,]. . . the

demand requirements of our law would be meaningless, leaving the clear mandate of Chancery Rule 23.1 devoid of its purpose and substance”).

e. Plaintiffs’ Insufficiently Pled Second and Third Causes Of Action

Plaintiffs have not alleged any basis on which demand was excused on the Second and Third Causes of Action. These counts – alleging aiding an abetting liability against PwC and Markson (Second Cause of Action) and breach of contract against PwC and Markson (Third Cause of Action) – do not challenge decisions by the Beazer Board, but instead challenge alleged conduct by PwC and Markson. The demand test applicable to those claims is the *Rales* test, which requires particularized facts sufficient to create a reasonable doubt that a majority of the Beazer directors could have exercised independent and disinterested business judgment in responding to the demand. The Complaint alleges no basis whatsoever upon which Beazer’s Board could not have disinterestedly and independently considered a demand to sue third parties PwC and Markson. Instead, Plaintiffs’ demand futility allegations, Compl. ¶¶ 42-45, relate to reasons why Plaintiffs contend the Beazer Board purportedly could not be expected to “sue themselves.” Delaware courts have repeatedly rejected efforts to excuse demand based on allegations that the directors will not “sue themselves.” *See, e.g., Aronson*, 473 A.2d at 818. It follows, *a fortiori*, that demand cannot be excused where Plaintiffs allege no reason why the Beazer Board could not independently and dispassionately consider a demand to sue third parties.

In briefing, Plaintiffs argued that Beazer’s Board could not impartially consider a demand on the aiding and abetting and breach of contract claims because those claims “stem from the wrongful conduct alleged against the Board.” Pl. Br. at 27 n.17. Plaintiffs cited no legal authority supporting that contention, and the same argument was rejected by a court applying

Delaware law in *Garcia v. Carrion*, No. Civ. A. 09-1507 (JAG), 2010 WL 3662593, at *11 (D.P.R. Aug. 11, 2010). See also *In re Bristol-Myers Squibb Deriv. Litig.*, No. 02 Civ. 8571(LAP), 2007 WL 959081, at *8 (S.D.N.Y. Mar. 30, 2007). In any event, the asserted relationship between the aiding and abetting and breach of contract claims on the one hand, and Plaintiffs' allegations challenging the Beazer Board's decisions regarding 2010 executive compensation on the other, fails to help Plaintiffs, because, as discussed above, the Complaint fails to raise any reasonable doubt that the Beazer Board acted within its discretion and valid business judgment.²

f. Plaintiffs' Insufficiently Pled Fourth Cause Of Action

The Court also finds that Plaintiffs have not properly alleged excuse from demand on the Fourth Cause of Action alleging unjust enrichment against Defendants McCarthy, Merrill, Khoury, and Salomon. Again, Plaintiffs allege no reason why six of the seven Directors sitting on the Beazer Board at the time the Complaint was filed could not have disinterestedly and independently considered a demand to sue those Beazer executives. Nor have Plaintiffs alleged any reason to doubt that decisions setting the compensation those executives received for 2010 were valid exercises of business judgment.

C. The Complaint Fails To State A Claim.

The Complaint must also be dismissed for failure to state any claim for which relief can be granted as to any of the alleged causes of action.

² For similar reasons, Plaintiffs' contention that *Aronson* demand futility test applies to the Second and Third Causes of Action and the Fourth Cause of Action, even if correct, would not alter this Court's finding that Plaintiffs' allegations fail to adequately allege demand excuse.

1. Plaintiffs' Claims That Beazer's Directors Breached Their Fiduciary Duties In Making Challenged Compensation Decisions Are Barred Due To Plaintiffs' Failure To Rebut The Business Judgment Rule.

As discussed above, the Complaint fails to allege particularized facts rebutting the business judgment rule's presumption that the Beazer Board appropriately acted in good faith, on an informed basis, and in the honest belief that their decisions concerning the 2010 executive compensation were in the best interests of Beazer's shareholders. Where a plaintiff fails to rebut the business judgment rule's presumptions, there is no basis for imposing liability on the directors. *See Brehm*, 746 A.2d at 266. Accordingly, Plaintiffs fail to state a claim for breach of fiduciary duty based on the Beazer Board's acts and decisions relating to the challenged compensation.

2. The Complaint Fails To State A Claim That The Beazer Directors Breached Their Fiduciary Duties Through Alleged Misrepresentations Or Omissions Concerning The 2010 Executive Compensation.

The Complaint also fails to state a claim that the Beazer Board breached fiduciary duties to Beazer's shareholders by allegedly "omitting material facts from Beazer's shareholders regarding the Company's 2010 executive compensation," Compl. ¶ 48, or "falsely represent[ing]" in the December 2010 Proxy Statement that "Beazer follows a pay-for-performance executive compensation policy," *id.* ¶¶ 10-19. As discussed above, the Complaint wholly fails to identify (i) any material *facts* that were withheld from Beazer shareholders or (ii) any misrepresentations regarding the Company's executive compensation policies. At minimum, such allegations were required to state a claim. *See Loudon*, 700 A.2d at 140; *see also Bell Atl. Corp., v. Twombly*, 550 U.S. 544, 555 (2007) (holding that "on a motion to dismiss, courts are not bound to accept as true a legal conclusion couched as a factual allegation" and that, "to

withstand a motion to dismiss,” a complaint must include “[f]actual allegations” sufficient “to raise a right of relief above the speculative level”).

3. Plaintiffs Have Not Stated A Claim For Aiding And Abetting Against PwC or Markson.

To prevail on a claim for aiding and abetting a breach of fiduciary duty, Plaintiffs must establish the following:

(1) through improper action or wrongful conduct and without privilege, the defendant acted to procure a breach of the primary wrongdoer’s fiduciary duty to the plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and with malice and the intent to injure; (3) the defendant’s wrongful conduct procured a breach of the primary wrongdoer’s fiduciary duty; and (4) the defendant’s tortious conduct proximately caused damage to the plaintiff.

White v. Shamrock Bldg. Sys., Inc., 294 Ga. App. 340, 343, 669 S.E.2d 168, 172 (Ga. App. 2008).

First and foremost, Plaintiffs’ aiding and abetting claims against PwC and Markson fail and must be dismissed because Plaintiffs have not alleged any underlying breach of fiduciary duty by Beazer’s directors upon which an aiding and abetting claim might be premised. *See Globis Partners, L.P. v. Plumtree Software, Inc.*, No. 1577-VCP, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007) (dismissing aiding and abetting claim where plaintiff failed to state a claim for underlying breach of fiduciary duty).

In addition, these claims fail because the Complaint lacks any substantive allegations identifying what conduct by PwC or Markson Plaintiffs are challenging or explaining how such alleged conduct constituted aiding and abetting. For example, Complaint paragraphs 25 and 26 under the heading “Aiding and Abetting and Concerted Action” contain nothing more than conclusory allegations with respect to an undefined set of “defendants.” Those allegations simply recite various parts of the legal standard set forth above, such as “defendants further aided

and abetted and/or assisted each other in breach of their respective duties,” “defendants aided and abetted and rendered substantial assistance in the wrongs,” “each defendant acted with knowledge of the primary wrongdoing,” and “defendants have pursued or joined in the pursuit of a common course of conduct.” The few allegations regarding the aiding and abetting claim that mention PwC or Markson by name – Compl. ¶¶ 20, 21, 53, 54 – are of the same conclusory nature. Such formulaic and conclusory allegations are insufficient and need not be accepted as true on a motion to dismiss. *See Charles H. Wesley Educ. Found. Inc. v. State Election Bd.*, 282 Ga. 707, 714 n.7, 654 S.E.2d 127, 132 n.7 (Ga. 2007).

Beyond its legal conclusions, the Complaint alleges nothing substantive whatsoever to describe PwC’s or Markson’s conduct with respect to the alleged breaches of fiduciary duty (*i.e.*, the approval and recommendation of the executive compensation). The Complaint fails to allege that PwC or Markson took any action at all, let alone something that could be considered “improper” or “wrongful” in aiding and abetting a breach of fiduciary duty. Moreover, Plaintiffs do not allege that PwC or Markson acted with “malice and the intent to injure” or what, if anything, Plaintiffs contend PwC or Markson did to “procure” a breach of fiduciary duty or caused damage.

In short, Plaintiffs’ allegations are nothing more than a formulaic, conclusory recitation of the elements of the cause of action. That sort of faulty pleading does not provide PwC or Markson with fair notice of the claim and the grounds upon which the claim rests. *See O.C.G.A. § 9-11-8; Charles H. Wesley Educ. Found.*, 282 Ga. at 714, 654 S.E.2d at 132 (citing *Twombly*, 550 U.S. 544). The Complaint’s allegations do not even meet the Rule 8 standard for notice pleading because they are insufficient “to raise a right of relief above a speculative level.”

Twombly, 550 U.S. at 555. Plaintiffs' aiding and abetting claim against PwC and Markson is, therefore, dismissed for failure to state a claim.

4. The Complaint Fails To State A Claim for Breach Of Contract.

Plaintiffs' breach of contract claim against PwC and Markson fares no better and fails for similar reasons. The Complaint contains not a single allegation regarding any specific contract or contract provision that PwC or Markson purportedly breached. Instead, the Complaint only generally alleges that "PwC and Markson entered into a contract with Beazer to provide advice and assistance with respect to Beazer's 2010 executive compensation program," Compl. ¶ 56, and then conclusorily asserts that, "[b]y reason of" Beazer's directors having approved executive compensation that Plaintiffs contend is excessive, "PwC and Markson breached their contract with Beazer." *Id.* ¶ 57. Thus, Plaintiffs' breach of contract allegations also fail to provide PwC or Markson with fair notice of the bases of the claim and therefore fail to meet the pleading requirements O.C.G.A. § 9-11-8. The breach of contract claim is dismissed accordingly for failure to state a claim.

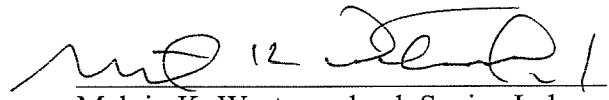
5. The Complaint Fails To State A Claim For Unjust Enrichment.

Plaintiffs also fail to state a claim for unjust enrichment. As noted above, Plaintiffs have not alleged that the compensation awarded to the Beazer executives against whom this claim is asserted was in any way inconsistent with those executives' achievement of performance targets the Company's Compensation Committee established at the outset of the fiscal year or the terms of the shareholder-approved 2010 Equity Incentive Plan. Nor does the Complaint raise a reasonable doubt that the Beazer Board's decisions regarding the challenged compensation reflected appropriate exercises of business judgment to which this Court should defer. Plaintiffs' conclusory allegation that the 2010 executive compensation was "excessive" because Beazer lost money during fiscal 2010 and the Company's stock price return allegedly declined is simply not

enough to state a claim for unjust enrichment, and Plaintiffs allege nothing else. Plaintiffs do not allege that the Beazer executives who received the compensation failed to perform their job duties for fiscal 2010, and the Complaint acknowledges those executives' achievement of key performance targets established to benefit the Company. *See* Compl. ¶¶ 27, 32. The unjust enrichment claim must be dismissed for failure to state a claim. *See Highland Legacy Ltd. v. Singer*, No. Civ. A. 1566-N, 2006 WL 741939, at *7 n.73 (Del. Ch. Mar. 17, 2006) (“[A]s a matter of law, the court cannot reasonably conclude that the defendants were unjustly enriched when [defendants] received compensation for providing services to [the company] pursuant to a contractual agreement approved by the [company’s] board.”).

For the reasons set forth herein, this Court hereby GRANTS Defendants’ Motions in their entirety and DISMISSES Plaintiffs’ Complaint.

SO ORDERED this 15th day of ^{*Singer*}~~August~~, 2011.


Melvin K. Westmoreland, Senior Judge
Superior Court of Fulton County
Business Case Division

Copies to:

Attorneys for Plaintiffs	Attorneys for Defendants
<p>John C. Herman E. Joseph Benz III ROBBINS GELLER RUDMAN & DOWD LLP Monarch Centre, Suite 1650 3424 Peachtree Road, NE Atlanta, GA 30326</p>	<p><u>Attorneys for Defendants McCarthy, Merrill, Khoury, Salomon, Beazer, Alpert, Leemputte, Provencio, Solari, Zelnak</u></p> <p>M. Robert Thornton Benjamin Lee David E. Meadows KING & SPALDING LLP 1180 Peachtree Street, NE Atlanta, GA 30309</p> <p><u>Attorneys for Defendant PricewaterhouseCoopers LLP</u></p> <p>Todd R. David John A. Jordak, Jr. Elizabeth P. Skola ALSTON & BIRD LLP 1201 West Peachtree Street Atlanta, GA 30309</p> <p><u>Attorneys for Defendant MarksonHRC LLC</u></p> <p>M. Robert Thornton Benjamin Lee David E. Meadows KING & SPALDING LLP 1180 Peachtree Street, NE Atlanta, GA 30309</p>