Matter of Cadus Corp. Stockholder Litig.
2020 NY Slip Op 30547(U)
February 25, 2020
Supreme Court, New York County
Docket Number: 653318/2018
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
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IN RE CADUS CORP.
STOCKHOLDER LITIGATION

DECISION AND ORDER
Index No.: 653318/2018

Mot. Seq. Nos.: 004 & 005

----------X

O. PETER SHERWOOD, J.:

Recitation pursuant to CPLR 2219(a) of the papers considered in these pre-answer motions to dismiss: documents numbered 44-53, 55, 56, 58, 62, 63, 67 and 68[1] listed in the New York State Courts Electronic Filing System (NYSCEF).

In this minority stockholder class action against controlling stockholders and corporate directors, defendants Jack Wasserman (Wasserman), Peter Liebert (Liebert) and Tara Elias Schuchts (Schuchts) move in Motion Seq. No. 004 (Doc No. 44)[2] to dismiss the Summons and Complaint (the Complaint)[3] (Doc Nos. 1 and 40), pursuant to (CPLR 3211 [a] [7]). In Motion Seq. No. 005 (Doc No. 51), defendants Cadus Corporation (Cadus), Starfire Holding Corporation (Starfire), Barberry Corporation (BC), High River Limited Partnership (HRLP), Carl C. Icahn (Icahn) and Hunter C. Gary (Gary) also move to dismiss the Complaint pursuant to CPLR 3211 [a][7]. Motion Seq. No. 004 and 005 are consolidated for disposition.

I. FACTUAL AND PROCEDURAL BACKGROUND

Because these applications are pre-answer motions to dismiss, "the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618, 622 [1st

[1] At oral argument, the parties were directed to submit limited letter memorandums. Plaintiffs shall upload their letter to NYSCEF forthwith.

[2] References to "Doc No." followed by a number refers to documents filed in NYSCEF.

[3] By decision and order dated 11/13/18 (Doc No. 36), the court granted Motion Seq. No. 003 (Doc No. 23) to consolidate the action entitled, *Emily Kahn-Freedman v Cadus Corp.* (Index No. 653318/18) with an action entitled *Brian Gorban v Cadus Corp.* (Index No. 654324/18), under a new caption title, *In Re Cadus Corp. Stockholder Litigation* (Index No. 653318/18) and, as directed, plaintiffs filed a Consolidated Action Complaint (the Complaint).

Dept 2018], *citing 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The following facts are alleged in the Complaint:

Cadus was a biotechnology company formed in 1992 by a group of investors[4] and Princeton University scientists. In 1999, Cadus ceased doing new drug research and began operating as a public shell. By 2014, Cadus transitioned into a luxury real estate holding company with properties in Southern Florida and East Hampton, New York.

Defendants Liebert, Wasserman, Gary and Schuchts served as members of Cadus' Board of Directors (collectively, the Board). Defendant Gary, Cadus' was Chief Executive Officer. It's controlling stockholders were Starfire, which owned 68% of Cadus stock, and its affiliates BC and HRLP (collectively, the Controlling Stockholders). Defendant Icahn owned 99.52% of Starfire and was its Chairman and Chief Executive Officer.

On September 20, 2017, the Controlling Stockholders delivered a letter to the Board offering to acquire Cadus' remaining unaffiliated common stocks at $1.30 per share (the Buyout proposal). The Buyout proposal was conditioned upon: (i) approval by a Special Committee of independent Cadus Board members empowered to select advisors and reject the buyout; and (ii) an informed vote by the unaffiliated shareholders.

Accordingly, on October 9, 2017, a Special Committee was formed consisting of Liebert, Wasserman, and Schuchts (the Special Committee). Gary, Icahn's son-in-law, was not appointed to the Special Committee. The Special Committee retained the legal services of Dorsey & Whitney LLP (the Legal Advisors), and financial advice services of Alvarez and Marcel Valuation Services LLC (the Financial Advisors) to assist it. About a month later, negotiations began between the Controlling Stockholders and the Special Committee as to the price of the common stock shares and the terms and conditions of a possible merger agreement.

Initially, the Special Committee determined that the Buyout offer of $1.30 per share was inadequate and countered with an offer of $1.78 per share. Thereafter, the Controlling Stockholders increased its offer to $1.51 per share. The Special Committee then instructed its Legal Advisors that it would consider an offer of $1.69 per share. After numerous negotiations among the parties' attorneys, including a discussion between the Legal Advisors and defendant

[4] In 1995, ImClone Systems, one of Cadus' investors, sold its shares to defendant HRLP, an entity controlled by Icahn Enterprises (IE), which is owned by defendant Icahn.

Icahn on January 3, 2018, the Controlling Stockholders increased their offer to $1.61 per share. The Special Committee countered with a price of $1.63 per share. The Controlling Stockholders responded that $1.61 per share was their best and final offer.

At a January 20, 2018, meeting, the Financial Advisors presented an updated Cadus financial analysis and the Special Committee accepted the Controlling Stockholders' best and final offer. The Board then approved sale of Cadus' remaining unaffiliated stocks at an agreed price of $1.61 per share (the Merger Agreement) and on January 22, 2018, Cadus issued a press release memorializing the Merger Agreement.

At a special meeting with Cadus' stockholders, 57.83% of the minority shareholders [5] approved the Merger Agreement. Subsequently the common stock was canceled and converted to the right to receive $1.61 per share, without interest. The Controlling Stockholders ultimately conveyed their interest in Cadus to Starfire, which then acquired the remaining 32% of Cadus' common stock at $1.61 per share. Cadus survived the buyout as a subsidiary of Starfire.

Plaintiffs Emily Kahn-Freedman and Brian Gorban commenced this action individually and derivatively on behalf of similarly situated Cadus stockholders seeking damages in connection with the subject transaction on grounds that defendants helped the Controlling Stockholders acquire Cadus through a partial buyout process that took the company "private" at an unfair price to its minority stockholders. The complaint alleged that the Special Committee was not "independent" but rather "interested" to the extent that its members were substantially connected to defendants Icahn and Starfire. Specifically, plaintiffs contend Wasserman served as a director of numerous Icahn controlled entities[6] and has been nominated in many proxy contests by Icahn himself. Liebert, an inexperienced director with no financial expertise and a current Starfire director, maintained a close personal and business relationship with Icahn since their college years at Princeton University, was one of Icahn's investors, has served as a director of an Icahn affiliated

[5] During oral arguments, defendants represented that 99% of the minority shareholders voted in favor of the "going private" transaction (court tr at 6:24-25; 7:1-5). By letter dated 8/28/19, plaintiffs submitted a copy of the U.S. Security and Exchange Commission's (SEC) Form 8-K demonstrating that in fact 57.63% of the minority shareholders approved the Merger Agreement. As have not disputed this percentage.

[6] Wasserman served as a director and/or Chairman of and/or partner for the following Icahn controlled entities: IE, American Entertainment Properties Corp., Icahn Enterprises LLP, Icahn Enterprises Finance Company, Icahn Finance Company (see court tr at 34:7-17), Icahn Holdings, LP, IEH Auto Parts and Trump Entertainment Resorts (see the Special Committee's Memorandum, Doc No. 45, page 8, section [a]).

entity, and is one of Icahn's preferred nominees in proxy contests. Schuchts, who neither had experience in finance nor in valuing a public company, was merely on Cadus' Board and served on the Special Committee because her husband was president of the exclusive Indian Creek Country Club located in Florida of which Icahn is a longtime member. Even the Legal Advisors to the Special Committee, plaintiffs aver, had a conflict of interest because they represented Icahn and/or his commercial partners in past transactions.

Plaintiffs claim that as a result of the aforementioned facts, the Definitive Proxy Statement (the Proxy) (Doc. No 48) filed with the SEC on May 15, 2018, and in accordance with Delaware law was materially misleading to Cadus stockholders because it failed to disclose that: (i) Icahn and Liebert had a personal and professional business relationship spanning 50 years; (ii) Schuchts' family had a close social relationship with Icahn; and (iii) the Special Committee's Legal Advisors' January 3, 2018, meeting with Icahn resulted in undisclosed changes presumed favorable to Icahn and the Controlling Stockholders.

Plaintiffs contend that although they cannot properly value Cadus' shares as of the time the buyout was being negotiated, the purchase price of the transaction was unfair as it was a mere 7% premium to book value price (court tr at 33:1-4) and because: (i) the Financial Advisors failed to take into account that properties affected by hurricanes, such as the ones owned by Cadus,[7] experience a 3% and 4% increase three years after such occurrences; (ii) the Controlling Stockholders proposed a low price of $1.30 per share in order to keep the acquisition price at a low point in potential value; (iii) the Financial Advisors did not accurately and independently disclose Cadus' value on the Proxy in that 10 of Cadus' 13 empty lots were undervalued, as only an implied current value range was recorded, rather than the potential increase in book value or potential cash flows from property improvements; (iv) the ultimate buyout price of $1.61 per share was below the Financial Advisors' estimate of Cadus' value under a Net Asset Approach which ranged from $1.69 to $1.95 per share and under the Guideline Public Company Approach which ranged from $1.55 to $1.74 per share; (v) Cadus' market value was not taken into consideration as third-party feedback was not sought; and (vi) Icahn and the Controlling Stockholders pressured the Special Committee to sell at $1.61 per share despite the fact that its long-term value was worth more than the agreed upon purchase price.

[7] The Buyout proposal was made several days after Hurricane Irma hit Florida.

Plaintiffs do not dispute that this transaction was an arms-length negotiated agreement (court tr at 28:23-24). Rather, the Complaint alleges (1) the Special Committee breached its fiduciary duty (the first cause of action) because it: (a) placed Icahn's interests ahead of those of the minority stockholders, (b) failed to negotiate a fair buyout price, and (c) engaged in an unreasonable transaction process with a common plan to unfairly deprive plaintiffs of the true value of their Cadus investment; and (2) the Controlling Stockholders breached their fiduciary duty to the minority stockholders (the second cause of action) because they: (a) were unjustly enriched, and (b) deprived plaintiffs of fair value in Cadus stock resulting in an amount of damages to be determined by the court. Plaintiffs further contend that Delaware's "fairness standard of review" must be applied because Starfire was Cadus' controlling majority stockholder at the time of the Buyout proposal and the Special Committee was required to be "independent," yet was not.

Defendants responded to the Complaint by filing the instant motions to dismiss.

II. ARGUMENTS

A. Motion Seq. No. 004

The Special Committee avers it acted in good faith and that the Complaint must be dismissed because: (1) a mere business/social/personal relationship with Icahn is insufficient to establish that its members were beholden to, or influenced by him in a way that could have "sterilized" their judgment; (2) plaintiffs failed to set forth facts demonstrating Icahn's purported influence over it; (3) there were no allegations explaining how the alleged business/social connections materially affected its consideration of the Buyout proposal; (4) the Special Committee had no actual economic circumstances/financial ties to Icahn affecting its independence; (5) the alleged personal/social relationship was not tantamount to a familial relationship; and (6) the minority shareholders received a fair price which was a 69% premium above what the shares were trading at when the Buyout proposal was first announced (see court tr at 6:19-23).

The Special Committee also contends Cadus' Certificates of Incorporation (COI) (Doc Nos. 49 and 50) include an exculpatory clause relieving its Board members of liability. Under Delaware law, dismissal of the Complaint is mandated where an exculpatory provision exists in the company's by-laws unless there is a plausible allegation in the Complaint that the Board acted in bad faith or breached its duty of loyalty, rather than simply an allegation of a breach of duty of care, as is the case here (court tr at 4:8-16). Lastly, the Special Committee maintains that since it

was independent and followed the structural requirements outlined in Delaware's seminal case, *Kahn v M & F Worldwide Corp.* (88 A3d 635 [Del 2014] [*MFW*]). Delaware's business judgment rule standard of review, rather than its fairness standard review, must be applied.

B. Motion Seq. No. 005

The Controlling Stockholders and defendant Gary incorporate the Special Committee's arguments to dismiss[8] the Complaint and add the following: (1) Delaware's fairness standard of review is not applicable to the Controlling Stockholders as they were not the parties responsible for recommending the Buyout proposal/Merger Agreement to the minority stockholders; (2) the Complaint fails to set forth facts to support a claim that the Controlling Stockholders, or Gary breached a fiduciary duty; (3) plaintiffs do not allege what terms the Controlling Stockholders supposedly dictated to the Special Committee to influence their judgment; (4) plaintiffs do not allege that the Special Committee failed to exercise its bargaining power at arms-length with the Controlling Stockholders; (5) the Net Operating Losses and any post-merger benefits cannot be used as a basis to analyze the value of shares, even under Delaware's fairness review standard; and (6) no facts are alleged against Gary to warrant a claim of any wrongdoing on his part. At oral argument the Controlling Stockholders further asserted that plaintiffs could not allege a claim for breach of fiduciary duty because it is subsumed into their claim that the fairness review standard applies (court tr at 12:16-25).

In opposition to these motions, plaintiffs contend movants' pre-answer motions must be denied because: (1) when Gary, who has a familial relationship to Icahn, approved the Merger Agreement at the recommendation of the Special Committee, he was a "conflicted insider" and stood on both sides of the buyout transaction in breach of his fiduciary duty to the minority shareholders (court tr at 13:6-13); (2) an "interested" party cannot be exculpated at the pleadings stage (court tr at 19:14-20); (3) the business judgment standard of review is not applicable because the Special Committee was tainted by Icahn's influence even if only one member is found to have been "interested" and therefore the fairness standard of review must be applied in this case; (4) there is no requirement that to substantiate an allegation that the Special Committee lacked independence, plaintiffs must assert that its directors were financially entangled with Icahn and/or that they received some compensation from the Controlling Stockholders; and (5) a mere assertion

[8] The Controlling Stockholders, however, do not adopt arguments raised respecting the Special Committee's role in this transaction.

that members of the Special Committee had a business/social/personal relationship with the Controlling Stockholders suffices to state a claim against defendants for breach of a fiduciary duty.

For the reasons set forth below, the Complaint shall be dismissed.

III. DISCUSSION

A. Motion to Dismiss Standard

It is undisputed that the laws of the State of Delaware govern this case because Cadus was incorporated in that state (see *Asbestos Workers Phila. Pension Fund v Bell*, 137 AD3d 680, 681 [1st Dept 2016]). New York's procedural law, applies as the matter was commenced here (see *Davis v Scottish Re Group Ltd.*, 30 NY3d 247, 252 [2017]).

Under Delaware law, the elements of a claim of breach of fiduciary duty are: (1) the existence of a fiduciary duty, and (2) defendants' breach of that duty (see *Schroeder v Pinterest Inc.*, 133 AD3d 12, 22 [1st Dept 2015], *citing Beard Research, Inc. v Kates*, 8 A3d 573, 601 [Del Ch 2010], *affd ASDI, Inc. v Beard Research, Inc.* 11 A3d 749 [Del 2010]). A Delaware corporation owes a fiduciary duty to its shareholders and the company (*see Agostino v Hicks*, 845 A2d 1110, 1122 [Del Ch 2004]) and the position of trust and confidence may not be used to further private interests (*see Cede & Co. v Technicolor, Inc.* 634 A2d 345, 361 [Del 1993], *mod on other grounds*, 636 A2d 956 [Del 1994]).

B. CPLR 3211 (a) (1)

Defendants' Notices of Motion invoke only CPLR 3211 (a) (7) but they cite CPLR 3211 (a) (1) along with 3211 (a)(7) their memoranda of law. Accordingly, defendants' demand for relief pursuant to CPLR 3211 (a) (1) was not properly referenced in the Notice of Motion in accordance with the CPLR 2214. Nevertheless, the court will consider the Special Committee and defendant Gary's contention that they are protected by an exculpatory provision in Cadus' COI and that plaintiffs' failure to "plead a non-exculpated claim against them" warrants dismissal of the action (*see In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A3d 1173, 1176 [Del 2015]). The copies of the COIs submitted to the court, however, do not establish that an exculpatory provision existed at the time the Buyout proposal was being considered.

The Special Committee submitted a copy of the Certificate of Amendment of Amended and Restated Certificate of Incorporation of Cadus Pharmaceutical Company dated June 20, 2001 (Doc No. 49). This COI pertained to Cadus as a "pharmaceutical company" rather than as the "luxury real estate holdings company" it was at the time the Special Committee considered the

Buyout proposal in 2017. Absent a clear indication that said terms in this COI were incorporated by reference into Cadus' subsequent COI when it transitioned into a real estate holdings company, any exculpatory provision contained in the COI of Cadus as a pharmaceutical company is not applicable here. Furthermore, defendants' reliance on Article 7 of the Second Amended and Restated Certificate of Incorporation of Cadus Corporation (Doc No. 50) as proof that an exculpatory provision existed relieving them of liability is misplaced as that two-page document is incomplete, undated, and unexecuted. Neither copy of the COIs, which are the only documentary evidence in the record, conclusively establishes a defense to the Complaint under CPLR 3211 (a) (1) that would warrant dismissal of this action as a matter of law (*see Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538, 538-539 [1st Dept 2019], *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

C. CPLR 3211 (a) (7)

When deciding whether or not to dismiss an action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (*see D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh*, 168 AD3d 505, 506 [1st Dept 2019]; and *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013]). In assessing the sufficiency of the complaint, the court must also consider the allegations made in both the complaint and the accompanying affidavits submitted in opposition to the motion as true and resolve all inferences which reasonably flow therefrom in favor of the plaintiff (*see Joel v Weber*, 166 AD2d 130, 135-136 [1st Dept 1991]). On a 3211 (a) (7) motion, the court need not determine the truth of the allegations (*see Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995]).

Additionally, CPLR 3013 requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. CPLR 3026 requires that pleadings be liberally construed, and defects ignored if a substantial right of a party is not prejudiced, placing the burden on the one who attacks a pleading for deficiencies to show it is prejudiced. Further, a claim for breach of fiduciary duty, as is the case here, is subject to heightened pleading standard under CPLR 3016 (b) which states that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting

the wrong shall be stated in detail" (*PF2 Sec. Evaluations, Inc. v Fillebeen*, 171 AD3d 551, 553 [1st Dept 2019]).

D. Delaware Legal Standard of Review

Delaware's business judgment rule presumes the directors' business decisions were informed, made in good faith, and taken in the company's best interest (***see Gantler v Stephens***, 965 A2d 695, 705-706 [Del 2009]). When applying the business judgment rule at the pleading stage, courts consider whether plaintiffs' complaint supports a rational inference that material facts were not disclosed to the stockholders (*see Morrison v Berry*, 191 AD3d 268, 282 [Del 2018]). An omitted fact is considered material if it is likely that a reasonable shareholder would have considered it important in deciding how to vote, not whether the material fact would have changed the stockholder's vote (see *id.* at 282-283).

For the business judgment rule to apply, a majority of disinterested board members must approve the transaction (*see Pallot v Peltz,* 289 AD2d 85, 86 [1st Dept 2001] [applying Delaware law]). However, if a majority of the directors who approved the transaction were "interested" and lacked independence, plaintiffs may obtain review under Delaware's fairness standard (*see In re Primedia, Inc. Shareholders Litig.,* 67 A3d 455, 485-486 [Del Ch 2013]). "The concept of fairness has two basic aspects: fair dealing and fair price ... . However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness" (*Weinberger v UOP, Inc.,* 457 A2d 701, 711 [Del 1983]).

To overcome the presumption that the directors acted in good faith, plaintiffs must allege and show sufficient facts to support a finding that the majority of the board members had an interest, or lacked independence, which arose because of a breach of loyalty, or receipt of, or entitlement to receive, a personal financial benefit from the transaction not shared by the stockholders (*see Orman v Cullman*, 794 A2d 5, 24-25, n 50 [Del 2002]).

In *MFW,* 88 A3d 635, the Delaware Supreme Court held that challenges to a "going-private" merger, such as here, are subject to the business judgment rule standard of review when: "(i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the

vote of the minority is informed; and (vi) there is no coercion of the minority" (the Protective Conditions) (*MFW* at 645).

The Protective Conditions set forth in *MFW* for application of the business judgment rule has been narrowly tailored in a more recent Supreme Court of Delaware case, *Flood v Synutra Intl., Inc.*, 195 A3d 754 (Del 2018). There, the Court clarified that the business judgment rule standard of review is applied when: (1) at the beginning stages of the "going private" proposal and before any economic negotiations are commenced, the controlling stockholders conditions the sale upon the approval of an independent and empowered special committee that fulfills its duty of care, and (2) there is an uncoerced informed vote of the majority of the minority stockholders (collectively, the Dual Key Procedural Protections) (id. at 756). The Court further noted that there is no litigable question of due care if the complaint fails to state that an independent special committee acted with gross negligence, which "is only satisfied by conduct that really requires recklessness" (*Swomley v Schlecht*, 2014 WL 4470947 [Del Ch, Aug. 27, 2014, No. 9355-VCL], *affd* 128 A3d 992 [Del 2015]). Moreover, merely questioning the sufficiency of the sales price is not enough to plead a violation of a duty of care (*see Synutra* at 768).

In light of *Synutra* and its recent interpretation of the *MFW* case, the business judgment rule shall be applied here.

E. Special Committee Members

The Complaint alleges that all members of the Special Committee were "interested" and lacked independence. Under Delaware law a "disinterested" director is defined as a person who does not appear on both sides of the transaction and derives no personal benefits from the transaction (*see Central Laborers' Pension Fund v Blankfein*, 34 Misc 3d 456, 569 [Sup Ct, NY County 2011] [applying Delaware law], *affd* 111 AD3d 40 [1st Dept 2013]). In other words, to demonstrate the Special Committee was "interested", plaintiffs must plead that Special Committee members stood on both sides of the transaction or received a personal financial benefit from self-dealing (*see Orman v Cullman*, 794 A2d at 21-22; *Marx v Akers*, 88 NY2d 189, 202 [1996] [applying Delaware law]). "To determine whether the directors approving the transaction comprised a disinterested and independent board majority, the court conducts a director-by-director analysis" (*In re Trados Inc. Shareholder Litig.*, 73 A3d 17, 44-45 [Del Ch, Aug. 16, 2013]).

> "Directors have a fiduciary duty to disclose fully and fairly all material information within the board's control that would have a significant effect upon a stockholder vote when it seeks or recommends a shareholder action. Omitted information is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available. To be material the missing information does not have to cause a reasonable shareholder to change her vote"

Olenik v Lodzinski, 208 A3d 704, 719 (Del 2019) (internal quotation marks and citations omitted).

Ordinarily, if the proxy statement acknowledges a director's potential conflict, the minority stockholders are neither deemed to have been misled, nor misinformed (*see Deason v Fujifilm Holdings Corp.*, 165 AD3d 501, 501-502 (1st Dept 2018), *citing Mills Acquisition Co. v Macmillan, Inc.*, 559 A2d 1261, 1264 [Del 1989]). Additionally, Del. Code Ann. Title 8 Section 144 (a) (2) provides that a transaction is valid even though a non-independent director was present or participated in the approval/vote of the transaction if "material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders" (the Safe Harbor provision).

Undoubtedly, Wasserman held director positions at Icahn owned entities when the Buyout proposal was being considered. The Special Committee contends, however, that his director positions and affiliations were disclosed on the Proxy (see court tr at 11:4-6) and therefore the Safe Harbor provision applies because the material facts were disclosed to Cadus' stockholders. On pages 68 and 69 of the Proxy entitled, "Important Additional Information Regarding Cadus – Executive Officers and Directors," the stockholders were notified of Wasserman's affiliation with Icahn-owned entities. Moreover, plaintiffs did not specifically contend at oral argument, in their post hearing letter to the court, in their motion papers, or in the pleadings, that Wasserman failed to give notice of his director positions and business affiliations with Icahn owned entities. The Complaint alleges that Wasserman was "interested" by virtue of his director positions, or nominations by, Icahn in many proxy contests, without more. It fails to comply with CPLR 3016 and the statements are conclusory. Although at oral argument plaintiffs' counsel alleged for the first time that Wasserman derived "hundreds of thousands of dollars a year in board fees" as a director to Icahn entities (court tr at 34:7-11), this statement was not alleged in the Complaint and

cannot be considered by the court in review of this application pursuant to CPLR 3211 (a) (7) as it was not in affidavit form (*see Joel v Weber*, 166 A2d 130, at 135). Moreover, board members are not rendered "interested" as a result of the mere fact that the corporation's director's receive compensation for services rendered to the company.

Plaintiffs allege the Proxy statement did not disclose that Icahn and Liebert have known each other for approximately 50 years and had business dealings together, that Schuchts had a "connection" to Icahn and that the details of the meeting between the legal advisors and Icahn on January 3, 2018, were not disclosed to the stockholders. The assertion that defendant Liebert is a longtime friend of defendant Icahn, one of his investors and Icahn's preferred nominee was not demonstrated to be "material" and is not, in and of itself, enough to establish that Liebert was an "interested" member of the Special Committee because, among other reasons, a mere social or business relationship is not enough to rebut the presumption of independence as there must be some material fact pleaded that could have affected Liebert's impartiality (*see Matter of Kenneth Cole Prods., Inc., Shareholder Litig.*, 27 NY3d 268, 279 [2016]). Here, plaintiffs do not allege any facts to demonstrate what interest Liebert had that could have compromised his duty of care. The unstated insinuation that Liebert's friendship with Icahn made him an "interested" director lacks any factual support. Moreover, the claim that Liebert is a current member of Starfire's board of directors does not demonstrate that he was an "interested" director at the time the Buyout proposal was made because "the possibility that any one of the directors would be named to [the new company] alone [is] not a material benefit such that it [would be] a disabling interest" (*Deason v Fujifilm Holdings Corp.*, 165 AD3d at 501-502).

With respect to defendant Schuchts, plaintiffs fail to set forth any supporting facts which would give rise to an inference that she lacked independence and was an "interested" director as that term has been defined in Delaware law (*see Orman,* 794 A2d at 25, n 50). The mere allegation that Schuchts' husband was the president of an exclusive club which Icahn may have frequented as a member is devoid of the requisite particularity mandated by CPLR 3016 and fails to show she derived any financial or other benefit by approving the merger at the expense of the minority stockholders. Indeed, there is nothing in the Complaint to suggest there was such a close relationship between Schuchts, her husband, and defendant Icahn that would substantiate a finding that Schuchts was an "interested" director who lacked the independence to negotiate the Buyout proposal.

Plaintiffs' allegations in the Complaint "that the proxy statement sent to the Company's shareholders was incomplete and misleading" is insufficient, absent identification of specific facts that was so materially significant that its omission rose to the level of breach of a duty (*see Matter of Kenneth Cole Prods., Inc., Shareholder Derivative Litig.*, 122 AD3d 500, 501 [1st Dept 2014]). Nor have plaintiffs alleged facts to demonstrate that Cadus stockholders' vote was "coerced" or uninformed (*see Synutra,* 195 A3d at 756).

Overall, plaintiffs fail to elaborate how or what the Special Committee's disabling interest was, and the mere assertion of an "association" with the Controlling Stockholders, or Icahn, without more, is insufficient to support a claim for breach of fiduciary duty where there are no facts pleaded as to how they placed defendant Icahn's interests ahead of that of the minority stockholders, what their "financial interests" were in approving the transaction, or how the Controlling Stockholders exercised "control" and dominance over the Special Committee (*see Orman,* 794 A2d at 22). "Control over individual directors is established by facts demonstrating that through personal or other relationships the directors are beholden to the controlling person or so under their influence that their discretion would be sterilized" (*Benihana of Tokyo, Inc. v Benihana, Inc.*, 891 A2d 150, 174 [Del Ch 2005] [internal quotation marks and citation omitted], *affd* 906 A2d 144 [Del 2006]). There are no factual allegations in the Complaint stated with any particularity to show that members of the Special Committee stood on both sides of the transaction, or even that any of them engaged in "fraud, had a conflict of interest or divided loyalties, or were otherwise incapable of reaching an unbiased decision regarding the proposed merger" (*Kenneth Cole,* 27 NY3d at 279). Thus there can be no "reasonable inference" that in proceeding with the transaction, the directors breached their duty of loyalty or their duty of care (*see Gantler*, 965 A2d at 704).

Assuming, arguendo, that Wasserman's extensive involvement as a director in numerous Icahn-owned entities, alone, demonstrates that he was "interested" (*see* court tr at 10:16-21), one "interested" director does not taint the entire process and necessitate application of Delaware's fairness standard of review. A majority of the Special Committee members would have to have been "interested" in order for the fairness standard of review to apply (*see Orman,* 794 A2d at 24-25). Notably, in a case where the directors engaged outside advisors and discussed the proposed transaction on numerous occasions prior to voting and presenting it to the minority stockholders, as was the case here, the business judgment rule standard of review was applied as the transaction

was held to be reasonable on its face (*see In re MeadWestvaco Stockholders Litig.*, 168 A3d 675, 683 [Del Ch 2017]).

Plaintiffs' additional claim that the Legal Advisors somehow had a conflict of interest because they may have represented Icahn and/or affiliate entities at some point in the past, is not sufficient to show that the Buyout proposal process was influenced in its entirety by Icahn absent any specific facts to substantiate the claim that the non-party Legal Advisors were really just representing Icahn and the Controlling Stockholders rather than Cadus and its minority stockholders. In sum, the mere allegation of the lack of any "semblance of independence" does not satisfy the factual specificity necessary to sustain a claim for breach of fiduciary duty (*see Beam v Stewart*, 845 A2d 1040, 1050 [Del 2004]; CPLR 3016).

Plaintiffs' bare assertion that Schuchts and Liebert lacked the experience to consider the Buyout proposal and negotiate the Merger Agreement is factually unsubstantiated and conclusory (*see Albert v Alex Brown Mgt. Servs., Inc.* 2005 WL 2130607, at *5 [Del Ch, Aug. 26, 2005, No. Civ. A. 762-N, Civ. A. 763-N]). A lack of experience, standing alone, is insufficient to establish a lack of independence, as the Delaware Courts do not discourage "regular folks" from membership on corporate boards, even where they might "face allegations of being dominated by other board members, merely because of the relatively substantial compensation provided by the board membership compared to their outside salaries" (*Chester Cty. Employees' Ret. Fund v New Residential Inv. Corp.*, 2017 WL 4461131, *8 [Del Ch, Oct. 6, 2017, C.A. No. 11058–VCMR] [challenged director's experience was as employee in New York City's Board of Education, Department of Health, and Department of Social Services] *quoting In re Walt Disney Co. Deriv. Litig.*, 731 A2d 342, 360 [Del Ch 1998], *affd in part and revd in part sub nom., Brehm v Eisner*, 746 A2d 244 [Del 2000] [challenged director was principal of the elementary school that the CEO's children once attended]).

F. The Buyout Sales Price

Plaintiffs base their breach of fiduciary duty claim, in part, on allegations that the negotiated sales price was not fair. The duty to seek the best available price for the sale of a company is triggered when a change of corporate control is present, as was the case here (*see Revlon, Inc. v MacAndrews & Forbes Holdings, Inc.* 506 A2d 173, 182 [Del 1986]). However, questioning the sufficiency of the sales price alone, without an allegation that the Special

Committee members were grossly negligent in their duty to seek the best available price for the sale, cannot sustain a finding that they breached their duty of care (*see Synutra*, 195 A3d at 768).

"Any ambiguity arguably created by the confusing dicta in *MFW* - suggesting that challenging price was sufficient to state a duty of care violation - was clarified" in *Synutra* when it upheld the findings made in the *Swomley* case which reiterated there must be some showing of gross negligence on the part of the Special Committee, as strategic and tactical negotiations in these types of transactions are debatable and a **mere suggestion** that they "could have negotiated differently" cannot sustain a claim for breach of a **duty of care (*see Synutra*, 195 A3d at 767)**. Here, plaintiffs have not set forth facts to support the claim **that the Special Committee** acted recklessly in negotiating the sales price.

G. The Controlling Stockholders and Defendants Icahn and Gary

Plaintiffs asserted at oral argument that this action cannot be dismissed as against defendant Gary because he wrongfully approved the "going private" transaction following the recommendation of the Special Committee and as Icahn's son-in-law he was a "conflicted insider" "on both sides" of this going-private transaction. First, these allegations were raised for the first time during oral arguments (court tr at 13:6-13) and assert facts that were never alleged in the Complaint. Second, the factual allegations in the Complaint regarding the lack of "independence" **all pertained to the Special** Committee. Other than the lone statement that Gary was Icahn's son-in-law, no other facts were alleged against Gary in the pleadings. In fact, the court understood plaintiffs to argue Gary was precluded from becoming a member of the Special Committee because of the familial relationship with Icahn, but it was not clear plaintiffs contended Gary's mere approval of the transaction resulted in a breach of fiduciary duty by Gary. At oral argument, when plaintiffs first presented this contention, the court directed plaintiffs to provide case law that would support this position (court tr at 16:7-22). Plaintiffs failed to do so. Even so, since the Complaint fails to set forth particular facts supporting this alleged breach of fiduciary duty against Gary, as mandated by CPLR 3106 (b), the action is dismissed as against him.

Plaintiffs further contend Delaware's fairness standard of review applies to the Controlling Stockholders and Icahn because they breached their fiduciary duties of care and loyalty and as a result: (a) were unjustly enriched, and (b) deprived plaintiffs of fair value in the Cadus stocks resulting in an amount of damages to be determined by the court. "Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against

the fundamental principles of justice or equity and good conscious" (*Eastern Savings Bank, FSB v Cach, LLC,* 124 A3d 585, 592 [Del 2015], *quoting Nemec v Shrader,* 991 A2d 1120, 1130 [Del 2010] [internal quotation marks omitted]). Specifically, plaintiffs must establish they had a sufficiently close relationship with the Controlling Stockholders, Icahn, and Gary that could have caused reliance or inducement (*see Schroeder v Pinterest Inc.*, 133 AD3d at 26, *quoting Georgia Malone & Co., Inc. v Rieder,* 19 NY3d 511, 516 [2012] [internal quotation marks omitted]). Since these elements for an unjust enrichment claim are not alleged in the Complaint, plaintiffs have failed to state a cause for unjust enrichment and/or breach of fiduciary duty resulting in an unjust enrichment claim. Lastly, plaintiffs' failure to allege a causal connection between a claim for breach of fiduciary duties and the alleged damages warrants dismissal of the action (*see Glick v KF Pecksland LLC,* 2017 WL 5514360, *19 [Del Ch, Nov. 17, 2017, C.A. No-12624-CB]).

IV. CONCLUSION

Plaintiffs' conclusory allegations cannot defeat a CPLR 3211 (a) (7) motion to dismiss or meet the heightened pleading requirement applicable to this case pursuant to CPLR 3016 (b) (*see Schroeder*, 133 AD3d at 25). "As long as a board attempts to meet its duties, no matter how incompetently, the directors did not consciously disregard their obligations" (*In re MeadWestvaco Stockholders Litigation*, 168 A3d at 686, *quoting Chen v Howard–Anderson*, 87 A3d 648, 683 [Del Ch 2014]; *see also Matter of Baltic Trading Stockholders Litig.,* 160 AD3d 599 [1st Dept 2018]).

After reviewing the Complaint under Delaware's business judgment rule and giving plaintiffs the benefit of all reasonable inferences, the bare assertions in the Complaint fail to allege sufficiently that the Special Committee, the Controlling Stockholders, Icahn, or Gary breached a fiduciary duty to Plaintiffs. Plaintiffs failure to demonstrate the existence of fraud or bad faith and failure to overcome the presumption of loyalty and good faith under Delaware law warrants dismissal of the Complaint (*see Auerbach v Bennett*, 47 NY2d 619, 631 [1979]).

Accordingly, it is hereby

ORDERED that the motions to dismiss (Motion Seq. Nos. 004 and 005) of Jack Wasserman, Peter Liebert, Tara Elias Schuchts, Cadus Corporation, Starfire Holding Corporation, Barberry Corporation, High River Limited Partnership, Carl C. Icahn and Hunter C. Gary, respectively, are granted and the Clerk of the Court shall enter judgment in favor of moving defendants against plaintiffs Emily Kahn-Freedman and Brian Gorban, dismissing the Complaint

together with costs to be taxed in amounts fixed by the Clerk upon presentation of proper bills of costs.

This constitutes the decision and order of the court.

DATED: February 25, 2020

E N T E R,

O. PETER SHERWOOD J.S.C.