Matter of Wolf v Enzo Biochem, Inc.

2025 NY Slip Op 33225(U)

September 2, 2025

Supreme Court, Suffolk County

Docket Number: Index No. 623946/2023

Judge: James Hudson

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INDEX NO.: 623946/2023

Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVI
Memorandum Decision

CORRECTED DECISION

***PRESENT*:**

HON. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE: 04/01/25 (005)
MOTION DATE 07/02/25 (006)
SUBMIT DATE: 08/06/2025
Mot. Seq. #: **005 -MG**
006 - MD

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In the Matter of the Application of:

JAMES G. WOLF, Individually and as the Trustee of the WOLF FAMILY CHARITABLE FOUNDATION; BARBARANNE R. WOLF; STEPHEN PAUL WOLF; and PRESTON M. WOLF,

Petitioners,

-against-

ENZO BIOCHEM, INC., a New York Corporation,

Respondent,

To Fix the Value of the Common Shares of Enzo Biochem, Inc., pursuant to Section 623 of the New York Business Corporation Law.

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WINSTON & STRAWN, LLP
Attorneys for the Petitioners
200 Park Avenue
New York, NY 10166

FARRELL FRITZ, P.C.
Attorneys for the Respondent
400 RXR Plaza
Uniondale, NY 11556

James G. Wolf, individually and as trustee of the Wolf Family Charitable Foundation ("Foundation"), Barbaranne R. Wolf, Stephen Paul Wolf and Preston M. Wolf

(collectively "Wolf Shareholders") request an order pursuant to **BCL 623** to compel payment from Enzo Biochem, Inc.

Enzo Biochem, Inc. ("Enzo") requests an order pursuant to **CPLR 3025 (b)** granting leave to file a verified amended answer alleging four new affirmative defenses: 1) a fourth affirmative defense for failure to perfect dissenters' rights pursuant to **BCL 623 (f)**; 2) a fifth affirmative defense for withdrawal of dissenters' rights pursuant to **BCL 623 (e)**; 3) a sixth affirmative defense for common law waiver of dissenters' rights; and 4) a seventh affirmative defense for common law setoff or offset.

This is a matter concerning the asset sale of a publicly held corporation. The terms of an asset purchase agreement ("Agreement") entitle dissenting shareholders to a determination of fair market value of their common stock and to receive payment for those shares. The Wolf Shareholders elected to deliver a combined 4.8 million shares of the common stock of respondent Enzo for valuation and payment upon proxy notice of the sale of Enzo Clinical Labs, Inc. to Laboratory Corporation of America Holdings, a/k/a Labcorp. Enzo subsequently filed a Schedule 14A SEC Proxy Statement which provided notice to stockholders of the asset sale proposal and dissenters' rights. Enzo also filed a Form 8-K Proxy Supplement which did not alter the dissenters' rights. The Wolf Shareholders dissented to the sale and requested notation of their shares pending valuation and payment. Enzo then filed a second Form 8-K which amended certain terms of sale ("Amendment"). Enzo alleges the Amendment constituted a new transaction not bound by the earlier dissent notice. On July 24th, 2023 the asset sale closed. Enzo refused to value the shares tendered by the Wolf Shareholders and did not make payment for those shares. The Wolf

Shareholders then filed the instant petition. They successfully moved to strike Enzo's affirmative defenses that their appraisal rights related to a transaction which was not consummated and that the consummated transaction did not give rise to appraisal rights. Enzo unsuccessfully sought reargument. The Wolf Shareholders now move to compel advance payment for their shares per **BCL 623 (g)**. Enzo has cross-moved for leave to amend their answer to include four new affirmative defenses related to dissenters' rights.

The Court will first consider the Wolf Shareholders' motion. The movants have requested oral argument. The Court, in its discretion will decide the motion on the papers submitted.

The Court has previously ordered that the Agreement and Amendment pertain to the same transaction and that the Amendment does not render the Wolf Shareholders' dissent notice and their tender of shares inapplicable to the mandates of **BCL 623** (NYSCEF Doc Nos. 48, 110). The Court has held that the Wolf Shareholders timely filed written notice of stockholder objection and election to dissent and tendered shares for notation in response to the Agreement by Enzo and Labcorp by which Enzo sold its clinical laboratory subsidiary to Labcorp.

BCL 623, the statutory procedure for the enforcement of shareholders' rights to receive payment for shares is a re-enactment and modification of the former **Stock Corporation Law §21**. The legislative history of **BCL 623** states:

> dissenting shareholders should be entitled to receive on an expedited basis payment of a large proportion of the undisputed value of their shares . . . The legislative declaration provides assistance to the courts in interpreting Section 623 . . . The amendments would render the statute less cumbersome

> and would make compliance less difficult for shareholders by requiring only a single written notice of election . . . paragraph (g) would be revised to require that the corporation pay to a dissenting shareholder, upon consummation of the corporate action and surrender of the certificates representing his shares, an amount equal to eighty percent of the amount which the corporation considers to be the fair market value of the shares. . . since the dissenters rights as a shareholder have been terminated, he should have immediate use of the money to which the corporation has no further claim. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed. Twenty percent of the amount of the offer would be held back under the proposal to take account of the possibility that the court might ultimately assess against the shareholder a portion of the corporation's litigation expenses if the matter is not resolved by agreement (**1982 NY Legis Doc No. 753** at 4-9).

BCL 623 (g) states:

> Within fifteen days after the expiration of the period within which shareholders may file their notices of election to dissent, or within fifteen days after the proposed corporate action is consummated, whichever is later (but in no case later than ninety days from the shareholders' authorization date), the corporation or, in the case of a merger or consolidation, the surviving or new corporation, shall make a written offer by registered mail to each shareholder who has filed such notice of election to pay for his shares at a specified price which the corporation considers to be their fair value . . . If the corporate action has been consummated, such offer shall also be accompanied by (1) advance payment to each such shareholder who has submitted the certificates representing his shares to the corporation, as provided in paragraph (f), of an amount equal to eighty percent of the amount of such offer.

It is uncontroverted that Enzo has not complied with **BCL 623 (g)**. It has not made a written offer in response by registered mail to the Wolf Shareholders to pay for their tendered shares at a specified price which Enzo considers to be the fair market value. To date, Enzo has not paid the Wolf Shareholders any advance payment.

Enzo opposes the motion to compel stock valuation and payment for the dissenting shares. Ms. Kara Cannon, Enzo CEO argues that the contested shares were never submitted to the transfer agent pursuant to **BCL 623 (f)**; therefore, the Wolf Shareholders "remain active shareholders in Enzo" and are not entitled to invoke the relief provided by **BCL 623 (g)** (NYSCEF Doc No. 136 at 3-4). Ms. Cannon contends that corporation records demonstrate post-dissent voting and post-dissent acceptance of stock dividends by the Wolf Shareholders. She states in her affirmation:

> However, the only exhibits Petitioners attach to their Petition in support are requests that they supposedly made to Enzo's transfer agent, Equiniti Trust Company LLC (formerly American Stock Transfer & Trust Company, LLC). They do not include any confirmation that Petitioners' shares were, in fact, submitted for notation in accordance with the requirements under **BCL 623 (f)** (NYSCEF Doc No.136, para 12).

This is a new argument by Enzo, not previously raised during the two-year duration of this case. It coincides with the instant cross-motion (seq. no. 006) to amend the answer to include affirmative defenses that the Wolf Shareholders have failed to perfect their dissenters' rights. Ms. Cannon does not address the written notifications from Petitioners' counsel to Respondent's counsel which state that the Wolf Shareholders stock has been submitted for notation pursuant to **BCL 623 (f)** (NYSCEF Doc Nos. 14, 15). She also does not discuss the June 1st, 2023 correspondence from James Wolf to transfer agent AST Financial regarding his delivery of shares in Enzo "pursuant to the requirements of my dissent action as of May 21, 2023 and as required of New York Business Corporation Law" (NYSCEF Doc No. 12). Nor does Ms. Cannon mention that following notation, procedure

provides that the dissenting shares are returned by the transfer agent pending receipt of the statutory advance payment. She also does not mention that shares held in street name are not surrendered, rather their status is noted on corporate records. No argument is made by Ms. Cannon or Enzo's counsel to demonstrate that the Wolf Shareholders are not entitled to stockholders' rights while their shares await the statutorially required valuation offer and payment. Contrary to Ms. Cannon's assertion, **BCL 623 (f)** does not require submission of confirmation that stock shares were delivered for notation. The balance of the arguments presented by Ms. Cannon in opposition to the motion to compel payment have been carefully considered and fail to persuade the Court.

Counsel for Enzo argues that post-dissent conduct by the Wolf Shareholders violates "the mandates of **BCL 623 (e)**" (NYSCEF Doc No. 150 at 1). Counsel repeats the argument made by Ms. Cannon that the post-dissent participation in accepting stock dividends by the Wolf Shareholders in Enzo "indicates their withdrawal of dissent and waiver of appraisal rights, which would preclude a final fair market value award and the advanced interim payment they seek here" NYSCEF Doc No. 150 at 2).

BCL 623 (e) states:

> Upon consummation of the corporate action, the shareholders shall cease to have any of the rights of a shareholder except the right to be paid the fair market value of his shares ***and any other rights under this section***. A notice of election may be withdrawn by the shareholder at any time prior to his acceptance in writing of an offer made by the corporation, as provided in paragraph (g). . . ***except that if the corporation fails to make a timely offer***, as provided in paragraph (g), the time for withdrawing a notice of election shall be extended until sixty days from the date an offer is made. ***Upon expiration of such time, withdrawal of a notice of election***

> ***shall require the written consent of the corporation*** (italics, bold – Ct).

In the case at bar, two years have elapsed following the notice of election to dissent. Enzo has not made a timely offer for the stock held by the Wolf Shareholders. They have not withdrawn their dissent, nor has Enzo stated that a written consent to a withdrawal of that notice has been submitted as required by **BCL 623**.

As noted by counsel for the Wolf Shareholders, acceptance of stock dividends after dissenting to the noted sale does not constitute a waiver of their rights to appraisal and recovery of the value of their stock (***Rudel v. Eberhard Faber Pencil Co.***, 2 Misc2d 957, 146 NYS2d 498 [Sup Ct Kings County 1955]). Enzo, by making dividend payments and permitting post-dissent participation by the Wolf Shareholders has elected to waive its right to withhold those benefits of stock ownership.

The balance of the arguments presented in opposition have been carefully considered and fail to persuade the Court.

The Court will now discuss the method to value the dissenting shares.

The fair value of the stock held by the dissenting Wolf Shareholders will be determined by an appraisal proceeding on the worth of the shares in a going concern, not liquidation (***Matter of Miller Bros. Indus. v. Lazy Riv. Inv. Co.***, 272 AD2d 162, 709 NYS2d 162 [1st Dept 2000], *lv denied* 95 NY2d 761, 714 NYS2d 711, 737 NE2d 953 [2000]). That valuation will be fair value, rather than market value (***Friedman v. Beway Realty Corp.***, 87 NY2d 161, 638 NYS2d 399, 661 NE2d 972 [1995]; ***Endicott Johnson Corp. v. Bade***, 37 NY2d 585, 376 NYS2d 103, 338 NE2d 614 [1975]),

The Court will grant the request by the Wolf Shareholders to compel Enzo to make the eighty (80%) percent advance payment to them for their dissenting shares pursuant to **BCL 623 (g)**. A virtual hearing on the question of stock valuation and the related request for interest and attorneys' fees will be scheduled as part of this decision (**BCL 623 [h] [4], [7]**).

The Court will now consider the cross-motion for permission to file an amended answer to include four new affirmative defenses.

The determination of whether to grant leave to amend is within the discretion of the Court and will not be lightly set aside (***Hofstra Univ. v. Nassau County, N.Y.***, 166 AD3d 861, 863, 89 NYS3d 1 [2d Dept 2018]; ***Board of Education of Sachem Central School Dist. V. Eugene J. Donohue Associates, Inc.***, 298 AD2d 482, 483, 748 NYS2d 504 [2d Dept 2002]).

Leave to serve an amended pleading is freely given (**CPLR 3025 [b]**; ***McCaskey, Davies and Associates, Inc. v. New York City Health & Hospitals Corp.***, 59 NY2d 755, 757, 463 NYS2d 434, 450 NE2d 240 [1983]). The Court must determine whether the proposed amendments are palpably insufficient, cause prejudice to the Wolf Shareholders, or are totally devoid of merit (***Urias v. Daniel P. Buttafuoco &Associates, PLLC***, 173 AD3d 1244, 1245, 104 NYS3d 712 [2d Dept 2019]: ***Alatorre v. Hee Ju Chun***, 44 AD3d 596, 484 NYS2d 174 [2d Dept 2007]). The legal sufficiency or merits of a proposed amendment will not be examined unless the insufficiency or lack of merit is clear and free from doubt (***Lucido v. Mancuso***, 49 AD3d 220, 227, 85 NYS2d 238 [2d Dept 2008]).

The four (4) proposed affirmative defenses with regard to the Wolf Shareholders are: 1) pursuant to **BCL 623 (f)**, that they have failed to perfect their dissenters' rights; 2) pursuant to **BCL 623 (e)**, for withdrawal of their dissenters' rights; 3) pursuant to common law, that they have waived their dissenters' rights; and 4) for common-law setoff or offset.

Counsel for Enzo argues that the proposed amendments cannot cause surprise to the Wolf Shareholders because the amendments concern their conduct. Counsel also asserts that the Wolf Shareholders cannot demonstrate that the proposed amendment is palpably insufficient or devoid of merit in reliance upon the affirmation of Ms. Cannon, discussed *supra*.

Counsel for the Wolf Shareholders argues that the law of the case doctrine bars the proposed affirmative defenses. The doctrine operates to foreclose re-examination of the issue of dissenters' rights which was previously resolved on the merits by the Court (***Ramanathan v. Aharon***, 109 AD3d 529, 970 NYS2d 574 [2d Dept 2013]). Counsel contends in essence, that the new affirmative defenses are nothing more than parsing the phrasing of that which was previously decided by the Court. Counsel further argues that Enzo has not asserted a change in the law or a showing of new evidence which would be necessary to show "extraordinary circumstances" to justify an exception to the doctrine; citing ***Brownrigg v. New York City Hous. Auth.***, 29 AD3d 721, 722, 815 NYS2d 681 [2d Dept 2006].

Counsel also argues that the proposed affirmative defenses are meritless as a matter of law. He states that the documentary evidence demonstrates the Wolf Shareholders complied with the requirements of **BCL 623 (f)**. They timely dissented, surrendered shares

to the transfer agent for notation and advised Enzo for notation on their shareholders' records. The NYSCEF case file demonstrates that compliance. Counsel avers that the proposed affirmative defenses are unsupported by an evidentiary showing establishing their merit. Counsel correctly argues that the issue of surrender of stock for notation of dissent only applies to physical certificates, not those maintained in book entry form; in which case the appropriate notation is made by the corporation upon its stock registry (***2 White, N.Y. Bus. Entities***, B623.05 [1] (3) [2025 ed]).

Enzo has not stated any supporting facts demonstrating that the Wolf Shareholders have withdrawn their dissent. The time for Enzo to file a special proceeding to determine the rights of the Wolf Shareholders and fix the fair value of their shares has expired; and they are now estopped from claiming that the Wolf Shareholders are barred from receiving payment of the fair value of their shares (**BCL 623 [h] [1]**; ***Petition of Bowman***, 98 Misc2d 1028, 414 NYS2d 951 [Sup Ct New York County 1978]).

Counsel for the Wolf Shareholders has demonstrated that the proposed affirmative defenses are insufficient as a matter of law and devoid of merit (***Silverite Const. Co., Inc. v. Town of North Hempstead***, 285 AD2d 456, 727 NYS2d 342 [2d Dept 2001]; *see* ***Urias,*** *supra.*). The balance of the arguments made in the cross-motion have been carefully considered and fail to persuade the Court. The request for amendment of the verified answer to include the four (4) proposed affirmative defenses will be denied.

Accordingly, it is

ORDERED, that the motion (seq. no. 005) by James G. Wolf, individually and as trustee of the Wolf Family Charitable Foundation, Barbaranne R. Wolf, Stephen Paul Wolf

and Preston M. Wolf which requests pursuant to **BCL 623 (g)** to compel Enzo Biochem, Inc. to pay the advance payment to the dissenting shareholders, is granted; and it is further

ORDERED, that a Virtual Hearing via Microsoft TEAMS will be held on September 10th, 2025 at 11:00 a.m. to determine the value of the 4.8 million shares of the common stock of Enzo Biochem, Inc. interest due, and associated attorneys' fees; and it is further

ORDERED, that the cross-motion (seq. no. 006) by Enzo Biochem, Inc. which requests pursuant to **CPLR 3025 (b)** permission to file an amended verified answer to include four new affirmative defenses, is denied in its entirety.

This memorandum also constitutes the Order of the Court.

Dated: September 2nd, 2025
Riverhead, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court