STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
CIVIL ACTION
DOCKET NO. BCD-CV-2020-32

BRIAN J. FOURNIER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**
	)	
FLATS INDUSTRIAL, INC., et al.,	)	
	)	
Defendants.	)	

INTRODUCTION

This is a case about a Maine family, their Delaware corporation, and a stretch of railroad in northern Ohio. The plaintiff, a son of the corporation's late founder and a minority shareholder, has brought direct and derivative claims against three of the other four shareholders, including the corporation's sole director and officer.

The matter presently before the Court is a motion to dismiss by Defendants Flats Industrial, Inc. ("Flats"), Douglas Fournier, Patrick Fournier, and Beth Fournier (together, "Defendants"). Plaintiff Brian Fournier ("Fournier") filed an initial Complaint on July 17, 2020. An Amended Complaint was filed on March 3, 2021, to which Defendants responded with a motion to dismiss, rendered moot by the filing of Fournier's Second Amended and Verified Complaint on April 22, 2021 ("Second Amended Complaint"), which is the operative pleading for purposes of analysis.

Now, Douglas and Patrick, individually and as shareholders of Flats, and Beth, individually and in her capacities as shareholder and sole director of Flats, move to dismiss Counts II and III of the Second Amended Complaint under Delaware Court of Chancery Rules 12(b)(6) and 23.1. Count II asserts a claim for breach of fiduciary duty; Count III asserts a claim for derivative action based on breach of fiduciary duty. Fournier opposes the motion. The Court heard oral arguments

on the motion on August 25, 2021 in which all parties appeared through counsel. For the reasons discussed below, the Court GRANTS Defendants' motion.

STANDARD OF REVIEW

The parties agree, and the Court concurs, that Delaware law applies to the substantive and procedural issues raised in the motion to dismiss. Under Delaware law, two standards of review are pertinent to Defendant's motion: Chancery Rules 12(b)(6) and 23.1.

Chancery Rule 12(b)(6) standards are based on fulfilling Chancery Rule 8(a)'s notice-pleading requirements, which are less rigorous than analysis under Rule 23.1. *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 39 (Del. 1996). "The standards governing a motion to dismiss for failure to state a claim are well settled." *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002). The Court's review is "limited to the well-pled facts contained in the Complaint which, viewing all inferences in a light most favorable to the plaintiff, [it] must take as true." *In re Tri-Star Pictures, Inc., Litig.,* Del. Supr., 634 A.2d 319, 326 (1995). "Conclusions . . . will not be accepted as true without specific allegations of fact to support them." *Id.* Dismissal is thus appropriate under Rule 12(b)(6) where the Court determines with "reasonable certainty" that the plaintiff cannot prevail on any set of facts which could be inferred from the complaint's well-pled factual allegations. *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001).

Chancery Rule 23.1 imposes heightened pleading requirements for derivative claims, requiring plaintiffs to "allege with particularity the efforts, if any, . . . to obtain the action the plaintiff desires from the directors . . . and the reasons for the plaintiff's failure to obtain the action or for not making the effort." Del. Ch. Ct. R. 23.1. These "stringent requirements of factual particularity differ substantially from . . . permissive notice pleadings." *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000). Rule 23.1 exists as a threshold standard of review for derivative claims to

ensure shareholders exhaust intra-corporate remedies before turning to the court. *See Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984).

Under either standard of review, the complaint typically circumscribes the universe of facts upon which the trial court may base its decision on a motion to dismiss for failure to state a claim. *Id.* at 1082. However, the Court is entitled to take judicial notice of publicly available facts for limited purposes insofar as those facts are "not subject to reasonable dispute." *In re GM (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006) (quoting D.R.E. 201); *see also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).

FACTUAL ALLEGATIONS

The Second Amended Complaint in this case sets forth the following factual allegations, which the Court assumes are true for the limited purpose of deciding the instant Motion to Dismiss.

Flats is a Delaware corporation with a principal place of business in Cleveland, Ohio, where it owns four miles of railroad track, among other assets, and provides related services. It was wholly owned by Arthur J. Fournier until his death in 2013, at which time, pursuant to his will, 50% of Flats' stock was conveyed to his widow Beth Fournier and the remainder divided equally among his four children: Brian Fournier, Douglas Fournier, Patrick Fournier, and Catherine McClarity, amounting to 12.5% interest each. Beth is the president and sole director of Flats. All the Fourniers involved as parties to this case reside in Maine and Flats has or had several bank accounts in Maine.

Brian Fournier requested in writing to inspect and copy certain corporate records on February 18, 2020 but Flats failed to provide the requested documents.

Flats has failed to make necessary repairs, maintenance, and improvements to its assets despite directives from federal regulatory authorities to do so. It has also struggled with customer

development and retention and has not taken advantage of possible new revenue streams, even with the aid of Riverside Management Group ("Riverside"), hired to oversee, manage, and operate Flats. Riverside has declined to sell Flats and/or certain of its assets to interested third parties and has ignored or failed to follow up on offers.

On or about July 13, 2020 Fournier made demand on Flats through his counsel to investigate and bring action against Beth, Douglas, and Patrick for their perceived mismanagement of the corporation (the "Original Demand Allegations"). On July 17, 2020, a mere four days later, Fournier filed his initial Complaint.[1] Fournier proactively objected to Flats using litigation counsel to investigate his demand. Instead, Flats retained Stanley Gorom, Esq. ("Gorom"), an attorney who had previously represented it, to investigate Fournier's demand. Beth was Gorom's primary client contact at Flats. On October 5, 2020, Flats informed Fournier of Gorom's selection. That same day, Fournier objected to the selection of Gorom due to his prior relationship with Flats. Fournier received no substantive response to his demand.

In due course, Gorom conducted an investigation. As part of his investigation, Gorom spoke with five individuals, did not obtain documents, had no email communications, and took no notes. On February 10, 2021, Fournier filed his First Amended and Verified Complaint, adding the instant shareholder derivative claim. The next day, February 11, 2021, Flats convened a shareholder meeting. Over Fournier's objections, the shareholders ratified having retained Gorom to investigate Fournier's Original Demand Allegations. The shareholders also voted to refuse the demand and to seek dismissal of Fournier's derivative claims.

[1] Fournier's initial Complaint contained a count for disclosure of records and a count stating a direct claim against Beth, Douglas, and Patrick for breach of fiduciary duties. The initial Complaint did not contain a shareholder derivative claim.

On April 22, 2021, Fournier filed a Second Amended and Verified Complaint to include further grounds for his derivative claim, including Flats' failure, through Riverside, to pursue a transaction with IRG Capital Partners ("IRG") (the "Additional Allegations"). IRG had attempted to purchase two parcels of Flat's land, later reducing that offer to a Letter of Intent on January 18, 2021. Fournier did not make demand on Flats to investigate the Additional Allegations.

Beth, Douglas, and Patrick have shown antipathy and hostility toward Brian and have consistently attempted to freeze him out of the entities in which they have or had mutual ownership interests. With regard to Flats, they have rarely held shareholder meetings or conveyed information to Fournier about Flats.

DISCUSSION

Causes of action based on breach of fiduciary duty are typically either direct or derivative and are categorized pursuant to the analytical framework set forth in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.* 845 A.2d 1031, 1035 (Del. 2004) (providing test to distinguish direct from derivative actions based on who suffered alleged harm and who would be entitled to recovery); *see Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 138-140 (Del. 2016) (confirming applicability of the *Tooley* analysis to fiduciary duty claims). Fournier's Complaint contains so-called dual claims, alleging both direct and derivative claims for breach of fiduciary duties based on a common set of underlying acts or omissions. Dual claims are available only in limited circumstances and the Delaware Supreme Court has expressed an unwillingness to permit them in other situations. *Compare Gentile v. Rossette*, 906 A.2d 91 (Del. 2006) (holding that claim of improper debt conversion transaction between CEO/controlling shareholder and corporation not exclusively derivative) *with El Paso Pipeline GP Co., LLC v. Brinckerhoff*, 152 A.3d 1248, 1263-64 (Del. 2016) (refusing to "expand the universe of claims that can be asserted 'dually'" beyond

that established in *Gentile*). The carveout permitting dual claims is essentially restricted to specific types of interest dilution actions involving controlling shareholders.[2] The subject matter of the Second Amended Complaint does not fall into this narrow exception. Even if it did, for the reasons explained below Fournier's claims fail even if both direct and derivative claims are permitted on the instant facts.

I. Count II Must Be Dismissed Because It is Actually Derivative, Fails to State a Claim Even if Direct, and is Wrongly Premised on Closely Held Corporation Principles.

A. Count II fails to state a claim because under the *Tooley* test Fournier's purported direct claim is derivative.

In derivative actions, praised as "one of the most interesting and ingenious of accountability mechanisms" in corporate law, a shareholder sues on behalf of the corporation for harm done to the corporation and any recovery therefore flows to the corporation. *Tooley*, 845 A.2d at 1036 (quoting *Kramer v. Western Pacific Industries, Inc.,* 546 A.2d 348, 351 (Del. 1988)). Conversely, a shareholder who has been directly injured due to an infringement on his or her legal rights as a shareholder may bring a direct action to recover individually. *Id.* It is thus essential to distinguish between direct and derivative claims.

Count II of Fournier's Complaint purports to state direct claims against Douglas, Patrick, and Beth for numerous alleged breaches of fiduciary duties. Pl.'s Compl. ¶¶ 26-51. *Tooley* provides

[2] *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1278-79 (Del. 2007) (allowing dual claims under *Gentile* where value was improperly transferred by controlling shareholder to third party resulting in extraction of value or expropriation of voting power from public shareholders); *cf. Caspian Select Credit Master Fund Ltd. v. Gohl*, No. 10244-VCN, 2015 Del. Ch. LEXIS 246, at *12 (Ch. Sep. 28, 2015) (holding *Gentile* inapplicable, and thus claim exclusively derivative, where alleged corporate waste via debt instrument transaction resulted in dilution of share value experienced by all shareholders).

the test for determining whether an action for breach of fiduciary duty is direct or derivative, establishing two relevant questions—firstly, who suffered the alleged harm, and secondly, who would receive the recovery. *Id.* at 1035. If the answer to either is the company and not the plaintiff, the claim is derivative, not direct, and the nominally direct action fails. *Id.* at 1039 (holding that a court need only "look to the nature of the wrong and to whom the relief should go. . . . [A] claimed direct injury must be independent of any alleged injury to the corporation"); *see also Grimes v. Donald*, 673 A.2d 1207, 1213 (Del. 1996) (abrogated in part on other grounds by *Brehm*, 746 A.2d 244) (requiring that a plaintiff pursuing direct action allege "an injury which is separate and distinct from that suffered by other shareholders . . . which exists independently of any right of the corporation"); *Kramer v. Western Pacific Industries, Inc.*, 546 A.2d 348, 351 (Del. 1987) ("The distinction between derivative and individual actions rests upon the party being *directly* injured by the alleged wrongdoing.").

Count II of the Complaint alleges a variety of breaches of fiduciary duty, yet in none of them does Fournier allege he suffered a harm independent of the corporation. The specific allegations which Fournier lays out explicitly name Flats as co- or even sole victim. For example, Fournier alleges that Defendants improperly maintained Flats' assets and that their actions drove away an important customer. Pl.'s Compl. ¶¶ 32-33. Assuming these allegations are true for the purposes of the motion to dismiss, it is Flats which suffered the harm, not Fournier. Likewise, Fournier alleges Defendants' mismanagement has "resulted in *Flats* losing customers" and has "devalued and/or wasted *the company*." *Id.* at ¶¶ 34-35 (emphasis added). Interpreting the plain meaning of these and similar allegations, any loss in value experienced by the company was borne proportionally among all of Flats' shareholders with no cognizable unique harm inflicted upon

Fournier.[3] Even if Fournier had somehow suffered a direct injury from the alleged mismanagement, his damages would not be independent of the harm to Flats, rendering his claim necessarily derivative. *See Tooley*, 845 A.2d at 1039 (requiring a shareholder filing a direct claim to show "that he or she can prevail without showing an injury to the corporation"). Fournier's claims are derivative and Count II must be dismissed for failing to establish a direct claim.

B. Count II fails to state a claim because a director's decisions are protected by the business judgment rule.

Under Delaware law, directors and controlling shareholders owe fiduciary duties of loyalty and care to the corporation and its shareholders. *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986). However, they are generally protected from suit for their actions in the ordinary course of business by the business judgment rule, which establishes a presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation." *Id.* (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). The burden is on the challenging party to rebut this presumption by establishing an abuse of discretion. *Aronson*, 472 A.2d at 812. This may be accomplished by showing both that the director in question was not disinterested and that his or her decision was not an informed one. *Id.* A disinterested director does not appear on both sides of a transaction and

[3] When asked at oral argument to succinctly identify the unique harm to Fournier, Plaintiff's counsel could only point to nondisclosure. Flats' alleged failure to disclose information requested by Fournier is addressed in Count I, which is not targeted by the instant motion to dismiss. Moreover, to the extent failure to disclose is embedded in Count II as a harm unique to Fournier, Fournier's argument is unpersuasive. In the context of a direct claim for breach of fiduciary duty, nondisclosure only creates a harm from which damages may stem where it is "concomitant with deprivation to stockholders' economic interests or impairment of their voting rights." *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 147 (Del. 1997). Fournier has not established a prima facie case of such concomitancy as he is merely a minority shareholder of Flats and thus has no right to participate in managerial decisions, regardless of whether he had the requested information.

does not derive any personal benefit therefrom beyond what the corporation and its shareholders at large anticipate. *Id.*

As the sole director of Flats, Beth owes fiduciary duties of loyalty and care to its shareholders, including to Fournier. Although Beth owns only a 50% interest in Flats, not a majority, she concedes she is a controlling shareholder because as the President and sole director she exercises actual control over the board. *See Zimmerman v. Crothall*, No. 6001-VCP, 2012 Del. Ch. LEXIS 64, at *36 (Ch. Mar. 5, 2012) (A shareholder who does not hold a majority interest may nonetheless be considered a controlling shareholder and consequently also owe fiduciary duties where he or she exercises actual control over the board.) In both capacities (director and controlling shareholder), it is Beth who owes the fiduciary duties to Fournier, not Douglas or Patrick. According to the Second Amended Complaint, Douglas and Patrick are minority shareholders in Flats with an identical interest to Fournier, namely 12.5%.[4] Pl.'s Compl. ¶ 12. Fournier does not allege that Douglas or Patrick are directors, or that Beth is in any way influenced by them or wields influence or control over them.[5] To the extent that Fournier purports to state a direct claim, it is only as to Beth.

Beth, however, is protected by the presumption of the business judgment rule. Fournier's conclusory statements to the contrary notwithstanding, he is unable to rebut this presumption. Based on the facts alleged, he is unable to show that Beth acted in bad faith, was not disinterested

[4] Status as a minority shareholder does not impose fiduciary duties in Delaware. *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987) ("Under Delaware law a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation."); *cf. Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) (holding that directors and officers equally owe fiduciary duties of loyalty and care).

[5] The Second Amended Complaint occasionally refers to Douglas and Patrick as controlling shareholders, but that is a conclusion of law which the Court is not bound to accept for purposes of the motion to dismiss. The Second Amended Complaint is quite clear that as a matter of fact, Douglas and Patrick each own 12.5% of the stock, the same as Fournier. The Second Amended Complaint is devoid of any factual allegations from which it can be reasonably inferred that Douglas and Patrick are somehow controlling shareholders.

in the relevant transactions, or that her decisions were not informed. Fournier's claims are limited to allegations of mismanagement, failure to hold shareholder meetings, and related poor business judgment and do not include allegations Beth derived any personal benefit from the acts or omissions in question. Allegedly poor business judgment is still business judgment and Fournier consequently fails to state a justiciable direct claim against Douglas, Patrick, or Beth.

C. Count II also fails to state a claim because Flats is neither a "Closely-Held" nor a "Close" corporation.

The Second Amended Complaint as a whole, and especially Count II, appears to be premised on the mistaken belief that Flats is a "closely held Delaware corporation." Pl.'s Compl. ¶ 2. In some states, shareholders in a closely held corporation, even minority shareholders, owe each other fiduciary duties akin to those owed by directors. *See, e.g., Moore v. Maine Indus. Servs*., 645 A.2d 626, 628-629 (Me. 1994). Whether Flats is a "closely held Delaware corporation" is legal conclusion which the Court need not—and indeed cannot—accept. Under Delaware law, the common law doctrine of "closely held corporation" has been preempted by the statutory definition of a "close corporation." *Nixon v. Blackwell*, 626 A.2d 1366, 1380 (Del. 1993) (holding that "the provisions of Subchapter XIV [of the Delaware Code] relating to close corporations and other statutory schemes preempt the field in their respective areas"). "Unless a corporation elects to become a close corporation under this subchapter . . . it shall be subject in all respects to this chapter, except this subchapter." DEL. CODE ANN. tit. 8, §§ 341-44 (2021). Consequently, a failure to meet the statutory requirements for becoming a close corporation results in a lack of special relief for minority shareholders. *Nixon*, 626 A.2d at 1380.

To qualify as a close corporation, the certificate of incorporation must contain the additional provisions specified in Subchapter XIV of the Delaware Code and must explicitly state

that the entity is a close corporation. Flats' certificate of incorporation does not meet these requirements.[6] Despite its small number of shareholders, Flats is not a close corporation, nor is it a "closely held" corporation as the latter is not recognized under Delaware law. The various shareholders of Flats, especially the minority shareholders, do not owe fiduciary duties to each other as they might were Flats a "closely held" corporation. And because Flats is not a closely held corporation, Fournier lacks the rights akin to those of a director to participate in Flats' management. "It is a 'basic principle' of Delaware corporate law that 'directors, rather than shareholders, manage the business and affairs of the corporation.'" *Rop v. Fed. Hous. Fin. Agency*, 485 F. Supp. 3d 900, 922 (W.D. Mi. 2020) (quoting *Spiegel v. Buntrock*, 571 A.2d 767, 772-73 (Del. 1990)). This appears to be the real rub of Fournier's myriad grievances. Accordingly, Fournier's claims in Count II of the Complaint against Beth, Douglas, and Patrick premised on the fiduciary duties owed by shareholders in a closely held corporation and the rights of a shareholder in a closely held corporation to participate in management decisions necessarily fail. *See Ivanhoe Partners*, 535 A.2d at 1344; *Nixon*, 626 A.2d at 1380. For all these reasons, Count II must be dismissed.

I. Count III Does Not Survive Rule 23.1 Review Because Demand Refusal Was Not Wrongful and Demand Regarding the Additional Allegations Was Not Futile.

A. Fournier conceded Beth was empowered to reject his Original Demand Allegations, and her refusal was not wrongful.

Count III purports to state a derivative claim. Because a derivative claim, by its nature, "impinges on the managerial freedom of directors," a shareholder filing such an action must either

[6] The certificate of incorporation is public document. Fournier has conceded that the Court can consider the Flats certificate of incorporation for the purposes of this motion to dismiss.

(i) allege that he or she made demand on the board to file the claim and that the board rejected the proposition or (ii) allege with particularity why he or she was justified in not making such demand, i.e., that demand was excused as being futile. *Grimes*, 673 A.2d at 1215-16 (quoting *Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984)) (abrogated in part on other grounds by *Brehm*, 746 A.2d 244); Del. Chancery Ct. R. 23.1(a). However, a shareholder who makes demand upon the board which is refused cannot subsequently argue that demand was excused because making the demand tacitly concedes demand is required; the shareholder concedes the board has the independence required to make a decision regarding the proposed suit. *Spiegel*, 571 A.2d at 775-77.

Here, Fournier conceded Beth's ability to accept or reject his demand by making it. The only remaining "arrow" in the shareholder's quiver after demand refusal is to argue that the demand was wrongfully refused. *Grimes*, 673 A.2d at 1218-19. Wrongful refusal may be found where (i) the board acted in bad faith, or (ii) where the board's investigation into the demand was not reasonable under the traditional business judgment rule. *Levine v. Smith*, 591 A.2d 194, 212-13 (Del. 1991); *see also Allison ex rel Gen. Motors Corp. v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1121 (D. Del. 1985) ("The business judgment rule controls . . . the propriety of rejection of a demand in a demand-required case."). Director liability under this rule is predicated on a showing a gross negligence. *Aronson*, 473 A.2d at 812.

Rule 23.1 requires particularized allegations as to why the derivative plaintiff "failed to obtain the action from the board." Del. Chancery Ct. R. 23.1(a). Fournier has pled no facts supporting an inference of bad faith or gross negligence underlying Beth's rejection of his demand. He admits that Flats did undertake an investigation into the demand, led by its outside counsel Gorom,[7] which contravenes an inference of negligence. Despite Fournier's objections to retaining

[7] Fournier's contention that engaging Gorom was improper solely due to the latter's prior relationship with Flats is unfounded. Fournier has not pled facts to indicate Gorom was actually conflicted. *See City of Tamarac*, No. 2017-

this attorney, he has made no specific factual allegations supporting the contention that the investigation was biased or unreasonable. Dissatisfaction with the number of witnesses interviewed, or the lack notes, does not allow or require an inference of bias or unreasonableness. There is no "prescribed procedure" for how an investigation should be undertaken and because reasonable minds may differ as to persons interviewed and the need for, e.g., a written report, shareholder criticisms on these bases do not rise to the level of showing gross negligence. *Belendiuk v. Carrión*, Civil Action No. 9026-ML, 2014 Del. Ch. LEXIS 126, at *20 (Ch. July 22, 2014). As such, Beth's informed decision to refuse Fournier's demand was not wrongful. Fournier has conceded he made demand on the board which was refused and has not shown such refusal was wrongful. Having failed to overcome the threshold hurdle of Rule 23.1, an analysis of Count III under Rule 12(b)(6) is unnecessary.

B. Fournier waived his right to argue demand futility, and even if he didn't, demand regarding the Additional Allegations was not futile.

Fournier argues that he did not need to make a demand on Flats to investigate the Additional Allegations because such a demand would have been futile. Fournier's argument fails for two reasons. First, Fournier made a demand in connection with the Original Demand Allegations. As discussed above, by making a demand Fournier conceded that the board has the necessary independence to act on the demand, and thus demand is required. *See Spiegel*, 571 A.2d at 775-77 (Del. 1990). Further, such concession applies *ex post* "to all or any part of the transaction,

0341-KSJM, 2019 Del. Ch. LEXIS 49, at *23 (Ch. Feb. 12, 2019) ("Generally, Delaware law allows board members to rely on counsel selected with reasonable care, and Plaintiff does not allege particularized facts impugning the selection of [this attorney]."); *see also Levine v. Liveris*, 216 F. Supp. 3d 794, 809-10 (E.D. Mich. 2016) (rejecting argument that demand was wrongfully refused on the basis that the investigating attorney had been previously engaged by corporation on other matters and had reputation for advising refusal of such demands).

or series of connected transactions, out of which the action [demand] arose." *Grimes*, 673 A.2d at 1219-20 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. a (AM. L. INST. 1982)); *see City of Tamarac Firefighters' Pension Tr. Fund v. Corvi*, No. 2017-0341-KSJM, 2019 Del. Ch. LEXIS 49, at *26-27 (Ch. Feb. 12, 2019).

The Original Demand Allegations asserted mismanagement of the corporation on a variety of grounds, including the performance of Riverside. The Additional Allegations were based on Flats' failure, through Riverside, to pursue a transaction with IRG Capital Partners ("IRG"). Both the Original Demand Allegations and the Additional Allegations are based on mismanagement of the corporation, and both sets of allegations involve the role of Riverside. Accordingly, the allegations arise from a series of connected transactions, and the demand concession of the Original Demand Allegations applies to the Additional Allegations. *See Grimes*, 673 A.2d at 1219-20. As a result, Fournier waived his right to argue demand futility in connection with the Additional Allegations.

Second, even if he had not already made demand, the result is no different. Pre-suit demand upon the board to pursue a claim on behalf of the corporation is only excused when such demand would fall upon deaf or biased ears, rendering it futile. Under Rule 23.1, a plaintiff must plead with particularity why making a demand would have been futile. Beth is the sole director, so to establish futility of demand regarding the transactions in question, Fournier must establish with particularity a reasonable doubt that (i) Beth is disinterested and independent, or (ii) that the transactions were otherwise the product of valid business judgment. *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984); *cf. Rales v. Blasband*, 634 A.2d 927, 933-34 (Del. 1993) (declining to apply the *Aronson* test where the challenged transaction was not one approved by the board). Fournier cannot make either showing.

Directorial interest exists where there are divided loyalties, or where a director has received (or is entitled to receive) some personal, financial benefit from the challenged transaction not proportionately shared by the shareholders. *Pogostin*, 480 A.2d at 624 84). "The question of independence flows from an analysis of the factual allegations pertaining to the influence upon the directors' performance of their duties generally, and more specifically in respect to the challenged transaction." *Id.* The Second Amended Complaint does not allege with specificity any basis to infer Beth is personally benefiting from her actions as director at the expense of Flats or that she is acting in the interest of any party or entity other than Flats itself. Significantly, the fact that Fournier's demand was based on the actions of Beth, Douglas and Patrick does not inherently render them interested. *Fisher v. Sanborn*, No. 2019-0631-AGB, 2021 Del. Ch. LEXIS 61, at *20 (Ch. Mar. 30, 2021) (quoting *Aronson*, 473 A.2d at 815) **("**It is black-letter law that 'the mere threat of personal liability . . . is insufficient to challenge either the independence or disinterestedness of directors.'") To demonstrate demand futility in this context, a plaintiff must allege with particularity facts showing a majority of the board faces a "substantial likelihood" of personal liability. *Aronson*, 473 A.2d at 815. Neither Patrick nor Douglas is a board member and thus they cannot be personally liable for managerial decisions, and Fournier has pled no facts which overcome the Business Judgment Rule's protections of Beth's decisions and actions. Because the likelihood that Beth may face personal liability for her acts is at best minimal, she cannot be deemed interested for the purposes of demand excusal due to futility.

Relatedly, the second *Aronson* inquiry, that of business judgment, pertains to the substantive nature of the transaction and the board's approval thereof. *Id.* Fournier takes issue with the way he perceives Flats is being run but fails to plead with particularity any facts establishing a lack of informed, good-faith decision-making in Beth's managerial practices. Allegations of

mismanagement and waste cannot overcome the presumption of Beth's proper exercise of business judgment such as to render demand futile. Hence, Fournier is precluded from raising the Additional Allegations without having first made demand upon the board, i.e., Beth. Since he did not do so, Count III must be dismissed.

CONCLUSION

For all the reasons set forth above, Defendant's Motion to Dismiss is Granted. Count II and III of the Second Amended Complaint are dismissed.

SO ORDERED.

The Clerk is instructed to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Date: **09/20/2021**

Judge, Business and Consumer Court

Entered on the docket: 09/20/2021