IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARLES HOKANSON, JOHN HOKANSON, FOYE STANFORD, CHARLES SEITZ and ELIZABETH SEITZ Plaintiffs, v. WILLIAM PETTY, M.D. TREVOR MOODY, BUZZ BENSON, MARC GALLETTI, CRAIG CORRANCE and DAVID GRANT, Defendants, and, ALTIVA CORPORATION, Nominal Defendants.	))	C.A. No. 3438-VCS

DEFENDANTS WILLIAM PETTY, M.D., TREVOR MOODY, BUZZ BENSON MARC GALLETTI, CRAIG CORRANCE, DAVID GRANT AND ALTIVA CORPORATION'S OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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NATURE AND STAGE OF PROCEEDINGS

On January 2, 2008, plaintiffs, now former shareholders of Altiva Corporation ("Altiva" or the "Company"), filed their complaint (the "Complaint") challenging a not-yet consummated third-party merger (the "Merger") between Altiva and Exactech, Inc. ("Exactech"). Plaintiffs did not serve their Complaint until on or about February 5, 2008. On February 22, 2008, defendants moved to dismiss plaintiffs' Complaint. This is Defendants' Opening Brief in Support of Their Motion to Dismiss.

PRELIMINARY STATEMENT

The Complaint in this action challenges an unconflicted board's business judgment to enter into the arm's-length Merger, the terms of which were agreed to as a part of a buyout option approved in 2003 (by a board also not all alleged to be conflicted) and the proceeds of which were allocated according to an amendment to the Company's Certificate of Incorporation to which at least plaintiff Charles Hokanson agreed. Specifically, the Complaint claims that Altiva's five directors breached their fiduciary duties of loyalty and care with respect to the Merger. Plaintiffs also allege that the Merger was unfair because they did not receive sufficient consideration for their shares. But it cannot be wrongful exercise of business judgment for directors to follow the terms of the Company's validly adopted and unchallenged Certificate of Incorporation. Nor do plaintiffs allege any facts that would rebut the business judgment rule's presumption.

The Complaint claims that one of the five current Altiva directors, Petty, was not disinterested or independent. The Complaint alleges no facts to support a claim that the other directors were interested in the Merger or lacked independence. At best, the Complaint asserts in wholly conclusory terms that all directors will "substantially benefit personally" as a result of the Merger. This unsupported allegation is insufficient to state a claim for breach of the fiduciary duty of loyalty.

Nor does the Complaint state a claim for violation of defendants' duty for care. Altiva's Certificate of Incorporation contains a validly adopted exculpatory provision that immunizes the directors from monetary liability for due care violations, and plaintiffs' Complaint contains no valid claim for non-monetary relief.

To the extent that the Complaint (without including any allegations regarding the board of directors at the time or their lack of independence/interest) purports to challenge the buyout option grant in 2003, that claim is barred by the three-year statute of limitations.

Finally, the Complaint does not allege that defendant Grant -- who was not a director of the Company -- engaged in any conduct that could be construed as breaching his fiduciary duties as an officer of the Company. For all of these reasons, the Complaint should be dismissed.

FACTUAL BACKGROUND

A. The Merger

This case involves a merger transaction involving Altiva and Exactech that closed on January 2, 2008. (*See* Compl., ¶ 1.) As a result of the Merger, Altiva was merged with Exactech Spine, Inc., a wholly-owned subsidiary of Exactech, with Altiva being the surviving entity as a wholly-owned subsidiary of Exactech. (*Id.,* ¶ 37.)

B. The Parties

1. Plaintiffs

Plaintiffs Charles Hokanson, John Hokanson, Foye Stanford, Charles Seitz and Elizabeth Seitz (collectively "plaintiffs") owned common stock in Altiva prior to its merger transaction with Exactech on January 2, 2008 ("Merger"). (Compl,. ¶¶ 6-9.) They have filed a complaint alleging the Merger was unfair to them because their shares of stock were cancelled at the time of the Merger and they received no payment out of the Merger consideration. (*Id*.)

2. Defendants

The Complaint names Petty, Benson, Moody, Galletti, Corrance, and Grant as defendants.[1] While the Complaint states that it refers to them "collectively . . . as the Altiva directors" (Compl., ¶ 17), Grant was never an Altiva director. (*Id.,* ¶ 16.)[2] As for the five directors, the Complaint does not state they were directors in October 2003, when certain agreements were entered into between Altiva and Exactech. (*See id.*, ¶¶ 11-15.)

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1 Altiva is named only as a nominal defendant. (*See* Compl., ¶ 10.)

2 While the Complaint does not specifically state Corrance was an Altiva director (*see* Compl., ¶ 15), defendants do not dispute his status as an Altiva director at the time of the Merger.

The Complaint alleges the directors breached fiduciary duties of loyalty and care to plaintiffs but makes few factual allegations against them to support these claims.[3] With respect to Petty, it states:

> Upon information and belief, following Exactech's investment in Altiva [in October 2003], Defendant Petty was appointed to Altiva's board of directors. Petty was also on Exactech's board of directors at this time. Plaintiffs believe that Petty participated in negotiating the Merger, occupying both sides of the transaction.

(*Id.,* ¶ 41.)

As for the other directors, the Complaint only states: "Defendants comprise the board of directors of Altiva and also own a controlling interest in Altiva. Defendants will all substantially benefit personally as a result of the Merger." (*Id.,* ¶ 39.) The Complaint contains no facts describing how the defendants, individually or collectively, will all "substantially benefit personally" from the Merger. Nor does the Complaint allege that Benson, Moody, Galletti, or Corrance were dominated or controlled, or otherwise influenced in any improper way by Petty related to the Merger. (*See* Compl.)

C. <u>In 2002-2003, Altiva Was in Severe Financial Trouble</u>

As plaintiffs concede, Altiva was failing as a company, and on the "brink of financial ruin" in 2002-2003. (*Id.*, ¶¶ 3, 21, 26.) According to a letter sent to stockholders on October 7, 2003, and incorporated by reference into the Complaint (*id.,* ¶ 25):

> [T]he Company has experienced recurring losses for the past several years from the development and commercialization of its product line. We believe that this factor raises doubts about the Company's ability to continue as a going concern. The current cash balance of the Company is less than $1 million and there is currently minimal revenue produced from the Company's principal product – the NTR.

[3] In this brief, the term "directors" includes Petty, Benson, Moody, Galletti, and Corrance. It does not include Grant.

(Transmittal Affidavit of Jessica Zeldin ("Zeldin Aff."), filed contemporaneously herewith, at Ex. 1; Compl., ¶ 25.)[4]

Plaintiffs acquired shares of Altiva stock while it was in this precarious financial condition. (*See* Compl., ¶ 21.) In 2003, Altiva was trying to save itself "from impending financial ruin" by transitioning from the dental implant industry to the spinal implant industry. (*Id.*) To facilitate the transition, on August 29, 2003, Altiva bought a plate and screw system used in spinal fusion from Vertebral Systems, a company owned by plaintiffs, for a cash payment of $350,000 and some shares of Altiva common stock. (*Id.*, ¶¶ 20, 25-26.) Vertebral Systems had been formed by plaintiffs in or around 2001. (*Id.*, ¶ 20.) There is no allegation that the payment to Vertebral Systems in August 2003 for the plate and screw system was unfair. (*See* Compl.)

D. <u>As a Result of Its Financial Troubles, Altiva Entered Into Negotiations With Exactech in 2003 That Led to Agreements Providing Necessary Funding.</u>

As a result of Altiva's financial problems, it entered into negotiations with Exactech in 2003. (Compl., ¶ 25.) Exactech agreed to enter into two agreements with Altiva on October 29, 2003, a Securities Purchase Agreement ("SPA") and a Stockholder Agreement ("SA") that provided the funding necessary for Altiva to remain a viable going concern. (*See* Compl., Ex. 1.) Before Altiva could enter into these agreements, its stockholders had to approve a Third Amended and Restated Certificate of Incorporation of Altiva Corporation ("Restated

4 The Complaint incorporates by reference the following documents: October 7, 2003, letter, Third Amended and Restated Certificate of Incorporation of Altiva Corporation, Vertebral Systems Written Consent dated October 16, 2003, and December 13, 2007, Notice of Appraisal Rights and Action by Written Consent of Stockholders. They are provided to the Court under *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162 (Del. 2006).

Certificate") that permitted it to increase the number of shares of Altiva stock. (Zeldin Aff., Ex. 2; Compl., ¶ 33.)

E. Plaintiffs Were Informed of the Pending Agreements and Details of a Possible Merger with Exactech and Approved a Restated Certificate That Provided Details on the Payout Allocation for Any Such Merger

The Complaint references both a letter and the Restated Certificate sent to stockholders on October 7, 2003. (Compl., ¶¶ 25, 33-35; Zeldin Aff., Exs. 1 and 2.) The 2003 letter described Altiva's move into the orthopedic spinal market and informed stockholders that Altiva had "entered into negotiations with a corporate investor to infuse the Company with working capital and provide funds to acquire additional spine and spine-related product lines and/or businesses." (Zeldin Aff., Ex. 1.) The letter described the financing transaction with Exactech as follows:

> The proposed Company financing transaction with the corporate investor involves a commitment by the corporate investor to make up to $5 million of loans to the Company, subject to the satisfaction of specified conditions. The corporate investor will provide these loans only to fund Company acquisitions of spine and spine-related products and/or businesses and these loans will be secured by the assets of the acquired businesses. The corporate investor will have the right to convert the outstanding principal and accrued interest from these loans into shares of a new Series C Convertible Preferred Stock (the "Series C Preferred Stock"). The rights, preferences, privileges, restrictions and other terms of the Series C Preferred Stock are set forth in the Restated Certificate attached to the written action. If the entire $5 million is not loaned to the Company, the corporate investor will be granted an option to buy additional shares of Series C Preferred Stock equal to such number of shares into which the stated on loan amounts would be convertible if such amounts had been loaned to the Company. Anti-dilution provisions will provide that at any time the Company issues additional shares of its capital stock or convertible securities, the Company will issue additional shares to the corporate investor to maintain the corporate investor's ownership interest in the Company.
>
> In addition, at the time the Company makes the loan commitment with the corporate investor, the corporate investor will purchase $1 million of Series C Preferred Stock, which will be convertible into Company Common Stock equal to 16.7% of the outstanding shares

> of the Company's Common Stock on a fully-diluted basis. If the corporate investor loans the entire $5 million to the Company and then elects to convert the entire outstanding principal and accrued interest into shares of the Series C Preferred Stock, then the corporate investor would hold shares of Series C Preferred Stock which is convertible into Company Common Stock equal to approximately 54.5% of the outstanding shares of the Company's common stock on a fully-diluted basis. The corporate investor will also supplement this investment with a guarantee of a $6 million working capital line of credit.

(*Id.*) The letter further explained that the corporate investor was to be granted a buyout option to purchase the Company based on an established formula:

> The corporate investor will be granted an option to purchase the Company that may be exercised at any time between the two to five year anniversary of the corporate investor's initial investment. The buyout option will be based on a Company valuation that is obtained through a multiple which is indexed to the corporate investor's stock price multiplied by the Company's trailing 12 months revenue at the time the buyout option is exercised. The minimum Company valuation will be set at $25 million. The corporate investor will also have the right to designate one member of the Company's board of directors.

(*Id.*) The letter informed stockholders, including plaintiffs, that it was necessary to increase the number of shares of Altiva stock so that Altiva could issue shares to Exactech and that the shares were preferred stock, adding another layer above common stock in the preference set out in the Restated Certificate. (*Id.*; Compl., ¶ 33.)

The Restated Certificate sent to the stockholders along with the letter also disclosed that Altiva intended to enter into the SPA and the SA with Exactech and that the transaction included a buyout option. (Zeldin Aff., Ex. 2, Art. II(B)(2)(d).) The Restated Certificate stated the stock preferences in the event Exactech exercised the buyout option. (*See id.*) Specifically, this provision informed the stockholders that they would be entitled to receive distributions from Altiva in the event Exactech exercised the buyout option in the following order of priority: Series C Preferred Stock, Series C-1 Preferred Stock, Series A Preferred Stock, Series B

Preferred Stock, and, last, Common Stock. (*Id.*) Charles Hokanson signed the Written Consent to the Restated Certificate on October 16, 2003, as "Managing Partner Vertebral Systems." (Compl., ¶ 34; Zeldin Aff., Ex. 3.)

F. On October 29, 2003, Altiva and Exactech Entered Into the Securities Purchase Agreement and Stockholder Agreement.

On October 29, 2003, after the stockholders approved the Restated Certificate that was necessary for the buyout option, Altiva and Exactech entered into the SA. (*See* Compl., Ex. 1.) The SA recites that Altiva and those stockholders that were signatories to the SA believed it was in their best interest to enter into the SA in order to, in part, preserve Altiva's business. (*Id.*, § B.) The execution of the SA was a condition to the obligations of Exactech under the SPA. (*Id.*, § C.)

The SPA was also entered into by Altiva and Exactech on October 29, 2003. (*See* Compl., Ex. 1.) Under the SPA, Altiva issued to Exactech shares of Series C Preferred Stock that were convertible to Common Stock represented 16.7% of the outstanding shares of Common Stock (on a fully diluted basis) and in exchange for a $1 million investment by Exactech. (*Id.*) Exactech also agreed to loan Altiva $5 million, as evidenced by a Promissory Note convertible into shares of Series C Preferred Stock and to guarantee a line of credit with another lender in favor of Altiva not to exceed $6 million. (*Id.*; Compl., ¶ 27.)

The SA provided that Altiva would grant Exactech a buyout option permitting Exactech to purchase all outstanding shares of Altiva common stock, preferred stock and securities. (Compl., ¶ 28.) The buyout option was exercisable from October 29, 2005 to October 28, 2008. (*Id.*) The SPA provided that Exactech's purchase of Altiva would be based on a valuation of Altiva that could be no less than $25 million, plus any cash held by Altiva, less certain of its liabilities. (*Id.*, ¶ 29.)

Plaintiffs have not alleged that Exactech ever bought more Altiva stock or converted its debt into Altiva Stock after October 29, 2003. (*See* Compl.)

G. <u>In Late 2007, Exactech Exercised the Buyout Option</u>

In late 2007, Exactech exercised the buyout option included in the SPA. (Compl., ¶ 36.) Altiva and Exactech entered into an Agreement and Plan of Merger by which Altiva and Exactech Spine, Inc., a wholly-owned subsidiary of Exactech, would merge with and into Altiva, with Altiva being the surviving entity as a wholly-owned subsidiary of Exactech. (*Id.,* ¶ 37.) There is no allegation that Exactech ever owned more than approximately 16.7% of shares of Altiva stock. Neither it nor the Merger subsidiary are named as defendants.

By Notice of Appraisal Rights and Action by Written Consent of Stockholders ("Appraisal Notice") dated December 13, 2007, Altiva informed its stockholders, including plaintiffs, that Altiva had approved the Merger by written consent and apprised them of their appraisal rights. (Zeldin Aff., Ex. 4; Compl., ¶ 38.) The Appraisal Notice states:

> The total Merger consideration of $15,420,503 million (the "Merger Consideration") payable to Altiva stockholders will be distributed subject to the order of priority described above. The aggregate Merger Consideration is sufficient to pay in full only those amounts payable to the holders of Series C Stock, the holders of Series C-1 Stock and those who hold options to acquire Series C-1 Stock. The entirety of the remaining proceeds will be used to pay the holders of the Preferred Stock approximately 37.5% of the Preferred Stock Preference Amount. . . . Because the aggregate Merger Consideration is insufficient to fully fund the Preferred Stock Preference Amount, no portion of the Merger Consideration will be available for distribution to the holders of Common Stock, and all such shares will be cancelled at the effective time of the Merger.

(Zeldin Aff., Ex. 4 at 2.) The Preferred Stock Preference Amount was defined as the "original per share issuance price for all such shares of Preferred Stock." (*Id.*) The distribution described in the Appraisal Notice and used after the Merger was the distribution set forth in the Restated

Certificate as approved by the stockholders, including plaintiff Charles Hokanson, in 2003. (*Id.*) Plaintiffs' shares were cancelled. They did not receive any proceeds from the Merger consideration. (*Id.*) The holders of Series A Preferred Stock and Series B Preferred Stock received a portion of the Merger consideration equal to only approximately 37.5% of the original per share price of such stock as originally invested by them. (*Id.*)

H. The Restated Certificate Included an Exculpatory Provision Giving Directors of Altiva Exemption From Personal Liability for Breaches of Their Fiduciary Duty of Care

Article 7 of the Restated Certificate states as follows:

> A director of the Company shall, to the fullest extent permitted by the General Corporation Law as it now exists or as it may hereafter be amended, not be personally liable to the Company or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Company or its stockholders, (ii) for acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the General Corporation Law, or (iv) for any transaction from which the director derived any improper personal benefit.

(Zeldin Aff., Ex. 2, Art. VII.)[5]

[5] The Court may take judicial notice of this provision, which is also incorporated by reference in the Complaint, because it is not a matter subject to reasonable dispute. *See e.g., In re General Motors (Hughes) S'holders Litig.*, 897 A.2d at 169; *McMillian v. Intercargo Corp.*, 768 A.2d 492, 501 n.40 (Del. Ch. 2000).

LEGAL ARGUMENT

Plaintiffs claim that Altiva's directors were interested in approving the Merger because they benefited from the transaction. Plaintiffs fail to provide any basis to find that any benefit the majority of the directors received from the Merger placed their interests in opposition to the plaintiffs. Except for the director representing Exactech on Altiva's board, all directors had an interest in obtaining the highest possible price for Altiva's stockholders. Under these circumstances, and in light of Altiva's exculpatory Charter provision, plaintiffs' Complaint fails to state a claim and must be dismissed.

I. PROCEDURAL STANDARDS

A court must dismiss a complaint under Rule 12(b)(6) if it "determines with 'reasonable certainty' that the plaintiff could prevail on no set of facts that may be inferred from the well pleaded allegations in the Complaint." *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001) (citing *Solomon v. Pathe Communications Corp.*, 672 A.2d 35, 38 (Del. 1996)). To defeat a Rule 12(b)(6) motion, "a complaint must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks. If a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be granted." *Desimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007); *In re General Motors Class H S'holders Litig.*, 734 A.2d 611, 615 (Del. Ch. 1999) ("'Conclusory statements without supporting factual averments will not be accepted as true for purposes of a motion to dismiss.'") (quoting *Grimes v. Donald*, 673 A.2d 1207, 1213-14 (Del. 1996)); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 500 (Del. Ch. 2000) (a court should not "rely upon conclusory allegations of wrongdoing or bad motive unsupported by pled facts"). Also, a claim may be dismissed if allegations in the complaint "or in exhibits incorporated into the complaint effectively negate the claim as a matter of law." *Malpiede*, 780 A.2d at 1083. Such is the case here.

II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM[6]

A. Altiva's Restated Certificate Protects Defendants from Liability on Plaintiffs' Duty of Care Claims, as Permitted by 8 *Del. C.* § 102(b)(7)

Here, plaintiffs seek only money damages.[7] However, the Restated Certificate approved by plaintiffs in October 2003 contains an exculpatory provision as provided by 8 *Del. C.* § 102(b)(7). (*See* infra at 9.) This provision immunizes Altiva's directors from money damages as a result of a breach of their duty of care. *McMillan*, 768 A.2d at 501. As a result, Count II for breach of the duty of the care must be dismissed and plaintiffs may recover damages *only* if their Complaint states a claim for breach of the duty of loyalty. *Id.*; *Malpiede*, 780 A.2d at 1094. Because it does not, the Complaint should be dismissed in its entirety.

B. The Complaint Does Not State a Claim for Breach of the Duty of Loyalty Upon Which Relief May Be Granted

In the most detailed of their allegations, plaintiffs claim the defendants:

> [B]reached their fiduciary duties of loyalty and good faith to Plaintiffs by failing to exercise business judgment, engaging in unfair processes and entering into the Merger Agreement with Exactech without determining the fair-market value of Altiva or disclosing all aspects of the merger to Plaintiffs.

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6 Count I of the Complaint is stylized as a claim for breach of defendants' fiduciary duties of loyalty and good faith. Court II is stylized as a claim for breach of defendants' duty of care. Count III is a hybrid of Counts I and II that seeks a declaratory judgment that the Merger is unfair. It adds no new allegations or theories of relief and should be dismissed for all the reasons stated herein with respect to Counts I and II.

The Complaint, which is not brought on a class wide basis, purports to plead demand futility in paragraphs 44-46. To the extent plaintiffs assert derivative claims, they must be dismissed for lack of standing. Delaware law is clear that "[a] plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit." *Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del. 1984). Because the Merger was consummated on January 2, 2008, plaintiffs have no standing to bring derivative claims.

7 Had plaintiffs even sought rescission, it would not be a practical remedy because the Merger has been consummated. *See McMillan*, 768 A.2d at 495.

(Compl., ¶ 50.) While plaintiffs claim "[u]nfair also is the price of the Merger," (*id.*, ¶ 2), they never allege defendants failed to obtain the highest value for Altiva reasonably attainable. Further, they never allege defendants failed to obtain the highest value because of their own bad faith or disloyal conduct. Indeed, it is undisputed that the terms of the Merger were determined in 2003 by a board about which there are no allegations of conflict and that the allocation of the Merger proceeds were set forth in the Company's Certificate of Incorporation to which at least plaintiff Charles Hokanson agreed. Under these circumstances, defendants' actions are entitled to business judgment protection and thus the Complaint should be dismissed. *See McMillan,* 768 A.2d at 502.

The business judgment rule 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 company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *see also Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024 (Del. Ch.) (Ex. A hereto). The burden is on the party challenging the decision to establish facts rebutting the presumption. *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002). The presumption can be rebutted by facts showing that "the *board* was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of the company and all of its shareholders." *Id.* at 3. If the plaintiffs' fail to meet that burden, the business judgment rule protects the directors and officers from personal liability. *Id.* at 22-23.

1. Plaintiffs' Complaint States No Facts to Suggest that a Majority of Altiva Directors Were Interested in Any Transaction with Exactech.

A board member is interested in a transaction if he appears on both sides of the transaction or expects a personal financial benefit from it, or where the decision has a materially detrimental impact on the director, but not on the company or its stockholders. *Orman*, 794 A.2d at 22. The director's interest in the transaction must be material; that is, it must make it improbable that the director could perform his fiduciary duties without being influenced by the director's personal interest. *Id.*

In 2007, the five member Altiva board consisted of Petty, Corrance, Benson, Galletti, and Moody. Plaintiffs identify only one board member, Petty, as having a conflict, stating Petty was both a director of Exactech and Altiva and they "believe that Petty participated in negotiating the Merger, occupying both sides of the transaction." (Compl., ¶¶ 41, 56.)[8] Accepting the allegation as true, Petty was the only director interested in the transaction.

With respect to the other directors—Benson, Galletti, Moody, and Corrance—the Complaint contains only the conclusory statement that they were interested in the Merger with Exactech because as Altiva shareholders they benefited from it. (Compl., ¶ 39.) While plaintiffs state the directors collectively "own a controlling interest in Altiva," they do not state the ownership of any individual defendant claim that they had any ownership interest in Exactech or state how they stood to gain (collectively or individually) from the Merger. (*Id.*) If anything, this alleged ownership supports the notion that defendants' interests are aligned with other shareholders' interests in getting the highest value. As the court in *McGowan v. Ferro,* 859 A.2d 1012, 1030 (Del. Ch. 2004) said, "Delaware law is clear that substantial stockholdings in a company by directors create powerful incentives to get the best deal in the sale of that company." Because holders of series A and B preferred stock received only approximately 37.5% of their original per share issuance price of such stock, the directors holding preferred stock had a direct

[8] This alleged conflict could only exist in 2007 since Petty was not on the board when Altiva entered into its agreements with Exactech in 2003. To the extent plaintiffs' claims relate to events in 2003, this alleged conflict did not then exist. Petty's board service post-dated the SPA. (*Id.*, ¶ 41.)

incentive to pursue the highest available value for Altiva. Unless a director has a material financial interest in a board decision not shared with other stockholders, the presumption that the director was at all times acting in the best interest of the company stands unrebutted. *Id.*

The directors were not acting out of self-interest in allocating the Merger consideration. They had no choice in the allocation. The allocation scheme was set out in Article IV(B)(2) of the Restated Certificate approved by plaintiffs in October 2003. The preferred stockholders did not stand to gain by paying as little as possible to the common stockholders. In sum, plaintiffs allege no facts suggesting that Corrance, Benson, Galletti, and Moody, a majority of the board, had a motive to sell Altiva for less than its value.

In any event, plaintiffs acquiesced to the priority described in Article IV(B)(2) of the Restated Certificate by approving it. Plaintiff Charles Hokanson signed the consent as the managing partner for Vertebral Systems. “If informed, uncoerced stockholders wish to challenge a transaction, the least that can be expected of them is that they not endorse it through a yes vote in the first instance.” *In re PNB Holding Co. S’holders Litig.*, 2006 WL 2403999, *21 (Del. Ch. 2006) (Ex. B hereto). There is no basis to claim coercion or lack of notice with respect to the priority, which plaintiffs have not alleged. “Investors should be deemed responsible, intelligent readers with a duty to read what is provided to them.” *Sample v. Morgan*, 914 A.2d 647, 667 (Del. Ch. 2007).

Plaintiffs claim the stock issued to Exactech provided for in the SPA in 2003 had the effect of diluting their ownership interest in Altiva. (Compl., ¶ 32.) They were aware of this fact when they approved the Restated Certificate, knowing the issuance of stock was a condition to the agreements with Exactech. (*See* Zeldin Aff., Ex. 1.) Thus, the issuance of additional stock and resulting dilution of plaintiffs’ ownership interest in Altiva was not improper.

2. Plaintiffs' Complaint States No Facts to Suggest that a Majority of Altiva Directors Lacked Independence

An independent director is one whose "decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson*, 473 A.2d at 816. A lack of independence can be shown by facts demonstrating that a director was so influenced by another director that he or she could not exercise independent discretion. *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 174-75 (Del. Ch. 2005).

Here, plaintiffs have failed to allege that directors Moody, Benson, Galletti or Corrance were "dominated or controlled, or otherwise influenced in any way," by Petty. *See McMillan*, 768 A.2d at 495. Thus, there is no basis from which to infer that the majority of directors were not independent.

3. Plaintiffs' Complaint Does Not Plead Facts Suggesting Defendants Acted in Bad Faith

"The failure to act in good faith may result in liability because the requirement to act in good faith 'is a subsidiary element[,] i.e., a condition of the fundamental duty of loyalty.'" *Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006); s*ee also Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) (a director cannot act loyally to a corporation unless she acts in the good faith belief her actions are in the corporation's best interest).

Plaintiffs' have pled no facts sufficient to show the Defendant directors acted in bad faith. Even if plaintiffs' allegations could be described as "grossly negligent conduct," without more, such negligence "does not and cannot constitute a breach of the fiduciary duty to act in good faith." *In re Walt Disney Co. Derv. Litig.*, 906 A.2d 27, 65 (Del. 2006). There is nothing in plaintiffs' Complaint that plausibly suggests the directors "intentionally fail[ed] to act in the face of a known duty to act" or "demonstrat[ed] a conscious disregard for [their] duties." *Walt*

Disney, 906 A.2d at 67. Indeed, such a claim makes no sense in the absence of any motivation on the part of a majority of the directors to undervalue Altiva.

C. Plaintiffs' Allegations of Disclosure Violations Are Misleading and Do Not Support Their Claim of Breach of Duty of Loyalty

"A claim based on disclosure violations must provide some basis for a court to infer that the alleged violations were material. For example, a pleader must allege that facts are missing from the proxy statement, identify those facts, state why they meet the materiality standard and how the omission caused injury." *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 141 (Del. 1997). "Material facts are those facts for which 'there is a substantial likelihood that a reasonable person would consider [them] important in deciding how to vote.'" *Id.* at 916 (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)).

Plaintiffs allege (1) that Altiva did not inform them of the SPA or SA (Compl., ¶ 31), (2) that Altiva's board of directors "withheld the details of this transaction from" them (*id.*)[9], (3) that the consent action on the Restated Certificate "did not *specifically* reveal that, in the event Exactech exercised the Buy-Out Option, Altiva's holders of common stock would be squeezed out and receive no payment for their shares," (*id.*, ¶ 35, emphasis added), and (4) that they did not learn of the Merger until December 17, 2007, two weeks after the Merger agreement was signed. (*Id.*, ¶ 38.) All of these items were in fact disclosed and no reasonable inference of breach of the fiduciary duty of loyalty can be gleaned from plaintiffs' allegations, especially in light of the Company's exculpatory Charter provision.

There can be no doubt that plaintiffs were informed of the existence of SPA and SA. The Complaint refers to the Restated Certificate (*id.*, ¶¶ 33-35), which was provided to plaintiffs on or about October 7, 2003. It specifically mentions the SPA and SA. The existence of the SPA

[9] It is assumed that "this transaction" refers to the buyout option in the SPA, although there is no way to know this for sure.

and SA was not withheld from Altiva shareholders. Plaintiffs were also provided details about the buyout option in both the Restated Certificate and the October 7, 2003, letter. While plaintiffs' claim neither "specifically" revealed that holders of common stock could receive no payment in the event Exactech exercised the buyout option, this was because on October 7, 2003, the directors did not know what the exact terms of the merger would be. They did not purposely conceal material information from stockholders or breach a duty of disclosure in bad faith, and the Complaint contains no such allegations. *See McMillan*, 768 A.2d at 507 n.66.[10]

As for the Merger, plaintiffs allege only that notice was late. This is not sufficient to support a claim of disloyalty or bad faith. On December 13, 2007, Altiva sent to its shareholders the Appraisal Notice (s*ee* Zeldin Aff., Ex. 4.) and stockholders' written consent action approving the Merger in accordance with 8 *Del. C.* § 228. Plaintiffs' have not alleged that they had a right to vote on the matter.

The above facts show plaintiffs mischaracterize the disclosures they received and provide nothing for the court to examine in considering the materiality of claims. Examination of the actual disclosures plaintiffs received shows they had notice of all the relevant agreements and transactions. Moreover, plaintiffs do not allege facts suggesting that any alleged disclosure violations were due to a majority of the board being interested or dependent when they approved the Merger or that any failure to disclose was the result of bad faith or divided loyalties. Any alleged lack of detail or material information is attributable only to a breach of the duty of care and must be dismissed as a result of the exculpatory provision in the Restated Certificate and Section 102(b)(7).

[10] Such claims (to the extent that they lie against these defendants) are also outside the applicable statute of limitations. *See infra*, at 20.

III. PLAINTIFFS' CLAIMS THAT RELATE TO EVENTS PRIOR TO JANUARY 2, 2005 ARE BARRED BY THE STATUTE OF LIMITATIONS

Delaware law imposes a three-year statute of limitations to claims for breach of fiduciary duty. 10 *Del. C.* § 8106; *Dofflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372, 379 (D. Del. 1983). The statute of limitations begins to run when there has been a harmful act by a defendant, "even if the plaintiff is unaware of the cause of action or the harm." *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007).

Plaintiffs claim the Altiva directors committed various breaches of fiduciary duty in connection with the SPA and the SA, of which plaintiffs were informed more than four years before the Complaint was filed. Plaintiffs allege that defendants "entered into a Securities Purchase Agreement wherein they failed to reasonably set forth a mechanism to accurately account Altiva's fair market value;" "failed to appoint an independent agency to calculate Altiva's value prior to entering into the Securities Purchase Agreement;" and "failed to notify the shareholders of Altiva regarding the Securities Purchase Agreement [or] the Stockholders' Agreement." (Compl., ¶¶ 31, 54, 55, 57.) To the extent these allegations are the sole support for any of plaintiffs' claims, such claims are barred by the statute of limitations. Where, as here, the Complaint fails to specify the alleged improper acts of the directors that arose on January 2, 2005 or thereafter support any of their claims, the claims should be dismissed.

IV. DEFENDANT DAVID GRANT SHOULD BE DISMISSED BECAUSE HE HAS NEVER SERVED AS AN ALTIVA DIRECTOR AND THE COMPLAINT CONTIANS NO WELL-PLED ALLEGATIONS OF WRONGDOING IN HIS CAPACITY AS AN OFFICER

Plaintiffs fail to state a claim on which relief may be granted against David Grant, CFO of Altiva. The Complaint states that Grant "is an officer of Altiva, presently the CFO." (Compl., ¶ 16.) The next paragraph states that the defendants, including Grant, are "collectively referred to as the Altiva Directors." (Compl., ¶ 17.) Plaintiffs do not allege that Grant was ever a director of

Altiva and they do not allege that Grant engaged in any conduct that could be construed as breaching his fiduciary duties to the stockholders as an Altiva officer. All of plaintiffs' claims relate to decisions made Altiva's directors. Accordingly, Plaintiffs have failed to state any plausible claim against Grant and he should be dismissed.

CONCLUSION

For the above stated reasons, defendants William Petty, Trevor Moody, Buzz Benson, Marc Galletti, Craig Corrance, and David Grant, and nominal defendant Altiva, respectfully ask that the Court grant their Motion to Dismiss under Rule 12(b)(6).

ROSENTHAL, MONHAIT & GODDESS, P.A.

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