

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DEMETRIOS B. HASEOTES and)
GEORGE HASEOTES, individually and)
derivatively on behalf of CUMBERLAND)
FARMS, INC.,)

C.A. No. 19155 NC

Plaintiffs,)

v.)

LILY H. BENTAS and CUMBERLAND)
FARMS, INC., a Delaware corporation,)

Defendants.)

MEMORANDUM OPINION

Date Submitted: April 9, 2002

Date Decided: September 3, 2002

William D. Johnston, Danielle Gibbs and John J. Paschetto, Esquires of YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington Delaware; Robert J. Valihura, Jr., Esquire of ROBERT J. VALIHURA, JR., PA, Wilmington, Delaware; Rosanna Sattler, Esquire of POSTERNAK BLANKSTEIN & LUND, LLP, Boston, Massachusetts; and William F. Griffin, Jr. and Thomas S. Fitzpatrick, Esquires of DAVIS MALM & D'AGOSTINE, PC of Boston, Massachusetts; Attorneys for Plaintiffs.

Jesse A. Finkelstein and Catherine G. Dearlove, Esquires of RICHARDS LAYTON & FINGER, P.A., Wilmington, Delaware; Jeffrey B. Rudman, John F. Batter, III and Peter J. Kolovos, Esquires of HALE AND DORR, LLP, Boston, Massachusetts; Attorneys for Defendants.

JACOBS, VICE CHANCELLOR

Pending is a motion to dismiss claims brought both individually and derivatively on behalf of Cumberland Farms, Inc. (“Cumberland Farms” or “the Company”) in this action by two director-shareholders against the other two director-shareholders. The feuding directors and shareholders are all siblings. The defendants have moved to dismiss (i) for failure to satisfy the demand requirements of Court of Chancery Rule 23.1 and (ii) for failure to state cognizable claims under Rule 12(b)(6). For the reasons next discussed, the Court denies the Rule 23.1 motion in its entirety and the Rule 12(b)(6) motion to dismiss as to the first cause of action (Counts I-IV). The Court grants, however, the Rule 12(b)(6) motion to dismiss the second cause of action (Counts V and VI) for failure to state a legally cognizable claim.

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I. F A C T S

A. The Parties

The facts recited below are derived from the well-pled allegations of the complaint. The plaintiffs, Demetrios B. Haseotes (“Demetrios”), a former Chief Executive Officer of the Company, and his brother, George Haseotes (“George”) are directors and shareholders of Cumberland Farms. Each of the plaintiffs owns 2 shares of Cumberland Farms Class A voting common stock and 30,253.5 shares of its Class B non-voting common stock.

Together, the plaintiffs together hold 50% of the issued and outstanding shares of each class of stock.

The defendants are Cumberland Farms and Lily **Bentas** (“**Bentas**”), the Company’s current CEO and a director. Cumberland Farms is a **closely-held**, family-owned Delaware corporation in the business of operating and leasing gasoline stations and convenience stores throughout New England, the Mid-Atlantic states, and Florida. The Company’s principal place of business is located in Canton, Massachusetts.

The Company has four directors: Demetrios, George, **Bentas**, and their brother, Byron Haseotes (“**Byron**”), who is not named as a defendant. **Bentas** is a shareholder, Chairman of the Board, CEO, and President of Cumberland Farms. She owns 2 shares of Class A voting common stock, and 7,566 shares of Class B non-voting **common** stock, representing 25% and 6.25%, respectively, of the issued and outstanding shares of each class. Together, **Bentas** and Byron own 50% of the Company’s Class A voting stock.

The plaintiffs, Demetrios and George, have sued **Bentas** derivatively and individually. They claim that Byron is part of a “director faction” with **Bentas**, and that **Bentas** is attempting illegally to seize control of the board of directors and the Company.

B. Background of the Dispute

In December 1993, the Company underwent a federal bankruptcy reorganization. Before that time, the Board consisted only of the four above mentioned "family directors." Under the approved terms of the Bankruptcy Court, the Company's certificate of incorporation was amended to add five "independent directors," who were selected by **Bentas** and the Creditors Committee. The non-family directors' terms expired when the Company's debt obligations were satisfied in December 1998. After the Company emerged **from** bankruptcy, the four family directors were, once again, the only members of the Board.

Since at least 1998, there has been dissension among the four siblings about who should control the Company. **Bentas** proposed to create a Board structure that would include **non-family** directors and thereby eliminate the plaintiffs' ability to deadlock the Board. The plaintiffs rejected that proposal. After the **bankruptcy** was concluded and the Board returned entirely to the control of the four "family directors," the two opposing camps -- with Demetrios and George on one side and **Bentas** and Byron on the other -- could neither agree upon nor cooperate to resolve many critical issues. The result was a deadlock that prevented the Board from having a

productive meeting at which meaningful decisions were made, from December 1998 until April 2000.

To end the Board deadlock, in June 1999, **Bentas** and Byron sought the appointment of a Court-appointed custodian in a previous action filed in this Court.’ In November 1999, the Court in that action denied **Bentas'** and Byron’s motion for summary judgment on the custodianship claim, and ordered the parties to conduct a stockholders’ meeting for the purpose of electing a board of directors.

Unfortunately, the Court-ordered shareholder meeting did not eliminate the deadlock. **Bentas** and Byron were reelected, because Demetios and George voted for them. The plaintiffs, however, continued in office as holdover directors, because **Bentas** and Byron did not vote for them. Because it appeared likely that the Board impasse would persist unchanged, this Court issued a Memorandum Opinion in March 2000 determining that a custodian should be appointed. Thereafter, in April 2000, R. Timothy Columbus, Esq. was appointed as Custodian.

In April 2000, the plaintiffs filed a lawsuit in the Superior Court of Massachusetts alleging claims similar to those pled **here**.² The defendants moved to dismiss that suit, and the Massachusetts Court dismissed the case

¹ *Bentas v. Haseotes*, Civ. Action No. 17223.

on the grounds of *forum non conveniens*, to enable this Court to determine the claims.

C. Facts Relevant to the Claims

1. The Allegations of Wrongful Conduct

The plaintiffs' claims center upon an alleged scheme by **Bentas** to entrench herself in her position as a director and officer, and to marginalize the voices and roles of Demetrios and George. The plaintiffs claim that **Bentas** attempted to carry out this plan in two ways: first, by wrongfully conditioning a refinancing of existing corporate debt upon the plaintiffs' agreeing to enlarge the Board, and second, by attempting to obstruct the plaintiffs from obtaining corporate information to which they were entitled.

Specifically, the complaint alleges that in September 1998' the Company owed approximately \$150 million in long-term debt to various creditors. That debt, which would mature in 2003, carried with it a weighted-average interest rate of approximately 10% per year. In early 1999, upon the recommendation of the plaintiffs, the corporation's officers were encouraged to explore refinancing alternatives to reduce the Company's interest expense. Proposals from several financial institutions were solicited and studied. In April 1999, Donald E. Holt, the Company's

² *Haseotes v. Cumberland Farms*, Civ. Action No. 00-1435-H.

Chief Financial Officer, selected Friedman, Turbidity & Company (“Friedman, Turbidity”) to carry out a private placement of \$150 million of debt to refinance the older, higher interest debt. It is alleged that this private placement would have resulted in interest savings of approximately 3%, or \$4.5 million per year, until maturity.

According to the plaintiffs, after Mr. Holt initiated the refinancing plan, **Bentas** instructed him and other Company employees to abandon the refinancing effort and to suspend payments to Friedman, Turbidity. The plaintiffs claim that **Bentas** did that to further her scheme to expand the Board. Specifically, they claim that **Bentas** refused to allow the refinancing to proceed unless and until Demetrios and George agreed to add new members to the Board, which would dilute the plaintiffs’ power as directors and the effectiveness of their dissenting voices.

After **Bentas** terminated the effort to refinance Cumberland Farms’ debt, the plaintiffs sought to revive the process. They contacted corporate officers in an effort to obtain the information required for them to proceed. In response, **Bentas**, without Board approval and in her capacity as a corporate officer, promulgated a memorandum entitled “Procedures for Directors’ Requests for **Information** and Operational Advice” (the “Memorandum”). The effect of those procedures was to require non-

management directors to channel all requests for information through the corporate secretary, who would then determine whether it was in the “best interests” of the Company to divulge the information to the director who requested it.

A similar memorandum, distributed to all corporate vice presidents, prohibited all Company employees from providing information to non-management directors or from taking directions, suggestions, or advice from those directors, upon their request. These director requests were to be sent to the corporate secretary, who in turn would send them to **Bentas**. The Memorandum provided that the procedures would be “strictly enforced.” This information policy directive, the plaintiffs **claim**, was essentially an effort by **Bentas** to coerce the plaintiffs into acquiescing in her plan to elect other like-minded directors who would be allied with her. The complaint does not allege that the plaintiffs were deprived of any essential information as a result of this new policy.

2. The Causes of Action

The Complaint alleges two claims. The first is derivative, and the second is an individual.

The First Cause of Action (Claims I-IV) charges the defendant, **Bentas**, with breaching her fiduciary duty to Cumberland Farms by

preventing the refinancing of the Company's debt, in order to further her personal goal of entrenching herself at the Company's expense. The plaintiffs seek judgment in Cumberland Farms' favor against **Bentas**, in an amount equal to the lost interest savings, plus pre-judgment and post-judgment interest.

The Second Cause of Action (Claims V and VI), is an individual claim that seeks to nullify the 1999 **Bentas** information policy directive designed to prevent non-managerial directors (i.e., the plaintiffs) from seeking corporate information directly from officers and employees.

II. THE APPLICABLE LAW AND THE PARTIES' CONTENTIONS

The defendants advance two separate grounds in support of their motion to dismiss. The first is that the complaint fails to comply with the demand requirements of the Court of Chancery Rule 23.1. The second is that the plaintiffs have not stated a claim upon which relief can be granted under Rule 12(b)(6).

Under Rule 23.1, for the plaintiffs to demonstrate that they have standing to maintain a derivative action, they must first make a demand on

the Board to provide the directors an opportunity to address the claim.³

Failing that, the plaintiffs must show that they were excused from making a demand, on the basis that a demand would have been futile.⁴ Because the plaintiffs here did not make a demand upon the Board, they must establish that a demand would have been futile.⁵

Where the lawsuit attacks a decision made by the board, the appropriate futility standard is that articulated in *Aronson v. Lewis*.⁶ Here, however, no Board decision is being challenged. Rather, the decisions attacked were made by **Bentas** in her capacity as an officer. Therefore, the rule articulated in *Rales v. Blasband* is the appropriate standard for determining whether demand is excused.⁷ That standard has been articulated by the Delaware Supreme Court thusly:

[I]t is appropriate in these situations to examine whether the board that would be addressing the demand can impartially consider the merits without being influenced by improper considerations. Thus, a court must determine whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time of the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to the demand. If the derivative plaintiff

³ *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726,730 (Del. 1988).

⁴ *Id.*

⁵ *Aronson v. Lewis*, 473 A.2d 805,812 (Del. 1984).

⁶ *Id.* at 814.

⁷ *Rales v. Blasband*, 634 A.2d 927 (Del. 1993).

satisfies this burden, then demand will be excused as futile.*

Thus, the plaintiff must plead with particularity facts creating a reasonable doubt that at the time the complaint was filed, the Board could have exercised a disinterested and independent business judgment in responding to a **demand**.⁹ Whether or not a demand would have been futile is gauged solely from the non-conclusory factual allegations of the complaint.¹⁰ A lack of independence may be shown where the particularized facts pled in the complaint establish a reasonable doubt whether the director is able to consider impartially a demand when “financial, familial, or other relationships” with the conflicted director are implicated.’¹

In short, the Rule 23.1 issue is whether the Complaint contains particularized factual allegations that establish that it would have been futile to make a demand. That issue is addressed in Part III A of this Opinion.

The defendants also seek dismissal under Rule 12(b)(6) for a failure to state a claim upon which relief can be granted. In considering that motion, the Court will assume that all well-pled allegations of the complaint are true and will give the plaintiff the benefit of all reasonable inferences that can be

⁸ *Id.* at 934.

⁹ *In re Cooper Companies, Inc. Shareholders Derivative Litigation*, 2000 Del. Ch. LEXIS 158 (Del. Ch. Oct. 31, 2000).

¹⁰ *White v. Panic*, 783 A.2d 543,548 (Del. 2001).

drawn from the pleading.¹² To obtain a dismissal, the movant must demonstrate that the non-moving party would not be entitled to relief under any of the facts (or reasonable inferences therefrom) alleged in the complaint.¹³ Where the factual allegations are conclusory in nature, those allegations will not be accepted as true for purposes of the motion.¹⁴

The Rule 12(b)(6) motion is addressed in Parts III B 1 and B 2 of this Opinion.

III. ANALYSIS

A. The Rule 23.1 Motion

I first consider whether the complaint must be dismissed for failure to make demand upon the family directors, in particular, Byron Haseotes. Thereafter, I address the demand issue as it relates to the Custodian.

1. Demand upon the Family Directors

The focus of the demand futility analysis is whether the complaint creates a reasonable doubt that, as of the time the complaint was filed, the Board could have properly exercised its independent and disinterested

¹¹ *Grimes v. Donald*, 673 A.2d 1207, 1216 (Del. 1996).

¹² *Grimes* at 1213-14.

¹³ *Siegman v. Tri-Star Pictures, Inc.*, 1989 Del. Ch. LEXIS 56 (Del. Ch. May 5, 1989, revised May 30, 1989), slip op. at 32 (citing *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 502 (Del. 1982)).

¹⁴ *Id.*

business judgment in responding to a demand. The Cumberland Farms Board consists of four members, two of whom are the plaintiffs. The third director, **Bentas**, must be assumed to be incapable of exercising independent and disinterested judgment on the issue of whether to cause Cumberland Farms to sue her. That leaves only the fourth director -- Byron. If Byron would not have been capable of exercising a disinterested and independent judgment regarding whether to sue his sister, then the entire Board would be conflicted, indeed, deadlocked 2-2. Demand would therefore be futile and, thus, excused. Accordingly, the focus of the demand analysis is upon whether Byron was disinterested and independent.

I conclude that **the** facts alleged in the complaint create a reasonable doubt whether Byron could impartially consider a demand. The complaint alleges that **Bentas** and Byron have voted as a bloc on all issues that have come before the Board. Indeed, the complaint characterizes **Bentas** and Byron as a “faction.” The complaint also describes Byron as a “lock-step ally” who in the past has refused to initiate litigation against his sister, while having no similar inhibition against suing his brothers, the plaintiffs.

Specifically, in *Byron Haseotes v. KS. Haseotes & Sons Limited Partnership et al.*,” Byron sued the family Partnership claiming that he was

¹⁵ Civ. Action No. 01-0086-A.

owed over \$2 million. Byron sued Demetrios and George as general partners who were liable for the debts of the partnership. Byron did not, however, join **Bentas** as a defendant, even though she was also a general partner. Byron's lawsuit was initiated in January 2001, after the deadlock had occurred, and after the two opposing camps had formed within the Cumberland Farms Board.

The defendants insist, that the plaintiffs have alleged no particularized facts that would establish that Byron had a conflicting interest or lacked independence. Because of Byron's substantial ownership interest in the Company, the defendants urge, Byron's interests are perfectly aligned with those of the firm. Accordingly, if the refinancing would be profitable to the Company, Byron would be capable of objectively considering a lawsuit against **Bentas** for having blocked that refinancing. Furthermore, the defendants argue, there is no claim that Byron played any role in terminating the refinancing efforts or in implementing the new information procedures, or that Byron otherwise sought to entrench himself.

I cannot agree with the defendants' arguments. The plaintiffs have pled facts from which it is reasonably inferable that Byron had countervailing interests which could disable him from disinterestedly and objectively considering a demand. If, as the plaintiffs allege, **Bentas** and

Byron constituted a “faction” that voted together on all disputed issues, it is reasonable to conclude that Byron would be more strongly motivated to support his sister rather than oppose her to promote the short-term increase in the value of the Company. At least at the pleading stage, there is reason to doubt that Byron could have responded disinterestedly to a demand.

Regarding independence, the defendants contend that the facts do not show that Byron was dominated or controlled by **Bentas**. They brush aside any adverse inference that the plaintiffs draw from Byron’s failure to sue **Bentas** in *Byron Haseotes v. V.S. Haseotes General Partnership*, arguing that that suit was against the partnership, of which **Bentas** was a general partner. Therefore, defendants urge that in substance, the litigation was as much a suit against **Bentas** as it was against Demetrios and George.

Again, I cannot agree. The complaint alleges that the Board was equally divided on virtually all issues that came before it, that Byron and **Bentas** consistently voted together, and that they share a common vision for the Company’s future. Those factual allegations create a reason to doubt whether Byron could consider a proposal to sue an ally (**Bentas**) whose decisions would be directed towards accomplishing and implementing that common vision. Buttressing that doubt is Byron’s suit against the family partnership, in which he named as a defendants all of the general partners

except **Bentas**. If **Bentas** and Byron were as closely aligned as alleged here, there is reason to question whether Byron has ceded to **Bentas** his ability to vote independently. Therefore, a reasonable doubt has also been shown as to whether Byron could independently consider a demand?

2. Demand upon the Custodian

The defendants next argue that the Custodian was capable of considering a demand impartially and that the plaintiffs have failed to plead facts that would excuse a demand upon the Custodian. In my view, that argument lacks merit as well.

The flaw in this argument is that it rests upon an invalid premise. The Custodian was appointed by the Court and was vested with the power to vote on certain matters of corporate governance when the Board was deadlocked. The Amended Order Appointing the Custodian does not, however, require the Custodian to cast a tie-breaking vote on every issue. Rule 23.1 presupposes that the persons to whom a demand is addressed will actually vote to accept or reject a demand. Here, it is alleged that the Custodian has expressly disclaimed any authority to vote, and has taken the position that even if he did have the authority, he would not exercise it. That being the

¹⁶ The defendants also make a third argument regarding this issue of demand based on the “second prong” of the test articulated in *Aronson*. However, this argument lacks merit because, as already mentioned, *Aronson* is not the applicable futility standard.

case, the issue of the Custodian's disinterestedness and independence is never reached. By **definition**, a demand upon the Custodian would be futile, because it is futile to demand that a person take action where that **person has** clearly and in advance declined to do so.

Having concluded that a demand is excused, I next turn to the motion to dismiss the claims under Rule 12(b)(6).

B. The Rule 12(b)(6) Motion

1. Counts I-IV

In support of their Rule 12(b)(6) motion, the defendants contend that none of Counts I-IV states a cognizable claim that **Bentas'** actions breached a fiduciary duty to the Company, or inflicted any harm derivatively upon the Company or individually upon the plaintiffs. I disagree with the defendants' analysis, and conclude those Counts do state a cognizable claim for relief.

The complaint alleges that (i) **Bentas'** decided to terminate prematurely the proposed refinancing project and (ii) **Bentas** issued an ultimatum to Demetrios that he agree to expand the Board in exchange for her reconsidering the refinancing proposal. The defendants urge that those allegations do not state valid cognizable claims. Rather, the defendants say, those actions represented the exercise by **Bentas** of her business judgment as

CEO. That the plaintiffs disagree with that business decision does not constitute a basis for holding the decision-maker liable.

While that view of the matter might be adopted after a trial based on a full factual record, that view cannot be reached as a matter of law at this stage, where the only portion of the record being considered is the complaint. That complaint alleges that as of the end of September 1998, the Company had approximately \$150 million in long-term debt at a **weighted-average** interest rate of 10% per year. The directors then studied and decided upon a plan to refinance the debt – a plan that, if adopted, would have saved the Company about \$4.5 million in interest costs. Nonetheless, **Bentas** halted the transaction, specifically to further her personal goal of extracting a concession **from** the plaintiffs relating to her plan to restructure the Board.

These allegations state a cognizable claim because, if they are true, they would establish that **Bentas** breached her fiduciary duty of loyalty by placing her own personal interests and objectives ahead of the best interests of the **corporation**.¹⁷ It is claimed that **Bentas** was holding up a refinancing plan that would benefit the Company, to obtain a concession that would

¹⁷ To the extent that **Bentas** argues that she is exculpated by the Cumberland Farms charter provision modeled after 8 **Del.C. §102(b)(7)**, that argument need not be addressed because by its terms, **§102(b)(7)** exculpates only a judgment for money damages based on a violation of the duty of care.

benefit her personally. Specifically, it is alleged that **Bentas** told Demetrios that she would not allow any further exploration of a refinancing unless and until he agreed to increase the size of the Board. While **Bentas** may ultimately be able to show after a trial that she had a legitimate, unselfish motive for her actions, at this stage it must be concluded that the facts alleged in this complaint state a cognizable derivative claim for relief. Accordingly, the motion to dismiss Counts I-IV will be denied.

2. Counts V and VI

The final two Counts are direct claims which the defendants urge must also be dismissed, because (i) the Bentas-promulgated Information Procedures did not violate 8 Del.C. §141 or §220(d) and (ii) it is not alleged that the plaintiffs were actually deprived of information that they needed in their capacity as directors. Therefore, because no harm has been suffered, there is no basis to award judicial relief.

8 Del.C. 220(d) gives directors the right to inspect corporate books and records for a proper purpose relating to their director roles. The complaint here does not allege any denial or unreasonable abridgement of the directors' statutory right of inspection. All that the complaint alleges is that **Bentas** adopted a policy that established procedures for **non-**management directors to obtain corporate information. Delaware law does

not proscribe the imposition of reasonable conditions or limitations for obtaining access to corporate books and records, so long as those conditions do not deprive the directors of, or impermissibly infringe upon, their information rights.

The Court acknowledges that the plaintiffs are claiming that **Bentas** adopted the information policy to hinder the plaintiffs in their efforts to pursue a refinancing. But even if that is true, without a cognizable injury, there can be no remedy. In this case, there is no claim that the directors were actually deprived of information to which they are entitled, or that the plaintiff directors were hindered in the performance of their directorial duties. For these reasons, Counts V and VI fail to state a cognizable claim for relief.

IV. CONCLUSION

For all of the reasons discussed, the defendants' Motion to Dismiss on Rule 23.1 grounds and their Rule 12(b)(6) motion as it relates to Counts I-IV, are denied. The Rule 12(b)(6) motion to dismiss is granted insofar as that motion relates to Counts V and VI, without prejudice to the plaintiffs' right to move for leave to amend. **IT IS SO ORDERED.**