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Hissong v. Hissong

MARVIN D. HISSONG, JERE D. HISSONG, GREGORY A. HISSONG, JERE D. HISSONG, JR., SHAWN P. HISSONG, and SPENCER R. HISSONG, Plaintiffs, v. LARRY W. HISSONG, DENNIS R. HISSONG, ANDREW R. HISSONG, IVAN D. HISSONG, KIRBY L. HISSONG, and HISSONG FARMSTEAD, INC., Defendants
Court of Common Pleas of the 39th Judicial District,
Franklin County Branch
Civil Action - Law, No. 2006-1935

The Pennsylvania Business Corporation Law; The business judgment rule;

Family-operated dairy farm; Demurrers

1. The involuntary dissolution of a solvent corporation is a drastic action to be invoked cautiously and only in extreme circumstances.

2. The Pennsylvania Business Law authorizes a court to involuntarily dissolve a corporation where the directors or those in control engage in acts which are illegal, "oppressive" or fraudulent, and this remedy can also be invoked where corporate assets are being misapplied or "wasted," as those terms are defined in the Act and case law.

3. Mere disagreement between a shareholder minority and the majority of the board of directors is not in itself grounds for involuntary dissolution; an objector can ask the court to determine the validity of any corporate action and to cure any resulting impropriety by a less extreme remedy, such as invalidating an illegal vote, imposing a surcharge, or directing the repayment of monies to the corporation.

4. The common law doctrine of the business judgment rule is embodied in the Business Corporation Law, and imposes on a corporate director or officer the duty to act in good faith and with disinterestedness, using reasonable skill and diligence on behalf of the best long-term and short-term interests of the corporation, which may entail following a course of action which does not serve the short-term interests of a particular group of shareholders.

5. The business judgment rule reflects a policy of judicial non-interference with decisions of corporate managers, presuming that they pursue the best interests of their corporations, insulating them from second-guessing or liability for their decisions in the absence of fraud, self-dealing or other malfeasance; the doctrine encourages competent individuals to become directors by insulating them from liability for errors in judgment insofar as business decisions frequently entail some degree of risk.

6. The business judgment rule does not insulate majority shareholders from liability for decisions designed with the sole purpose of "freezing out" a minority shareholder from meaningful participation in corporate governance and from all financial benefits from the corporation; a freeze-out occurs in a closely-held corporation when a minority shareholder is removed from his office, his voting rights are fundamentally diluted or his power or compensation is substantially diminished.

7. Action by a majority of a board of directors which has not yet been finalized is not grounds for dissolving a corporation which, by all accounts, is solvent.

8. The board's decision to place farmland owned by the corporation into the Agricultural Conservation Easement Program, which is part of the Agricultural Security Area Program, was protected by the business judgment rule; even if this decision later causes the land to lose market/development value, the decision falls within the scope of the board's discretion where placing farmland into the program may be viewed as a potential benefit to the corporation insofar as the program encourages farmers and those in related businesses to commit their financial resources to agriculture, thereby stabilizing that industry and enhancing its long-term profitability.

9. Involuntary dissolution of a solvent corporation is an inappropriate remedy for action taken years ago which the minority board members and shareholders now in hindsight allege was unwise and which

allegedly constituted waste of corporate assets and oppression of the minority.

Appearances:

Thomas B. Finucane, Esq., *Counsel for Plaintiffs*

John McD. Sharpe Jr., Esq., *Counsel for Defendants*

OPINION

Herman, J., August 13, 2007

Introduction

The parties are shareholders in a closely-held family corporation, Hissong Farmstead, Inc., which operates a dairy farm in Mercersburg, Franklin County.[1] The plaintiffs filed a complaint seeking the involuntary dissolution of the corporation, the appointment of a receiver, and a surcharge imposed on the defendants, who sit on the board of directors, for waste of the corporation's assets. The defendants filed preliminary objections in the nature of a demurrer to all Counts. Counsel presented written and oral argument. The objections are now before the court for decision.[2]

Factual Background

The corporation was founded in 1974 by Marvin D. Hissong and his wife who have five sons, four of whom are parties to this suit: Larry, Dennis, Jere, Sr., and Gregory. On the plaintiffs' side, Jere, Sr.'s three sons are Jere, Jr., Shawn and Spencer. On the defendants' side, Kirby and Andrew are Larry's sons, and Ivan is the son of Dennis. The 5-member board of directors consists of Larry, Dennis, Andrew, Jere, Sr. and Shawn. The defendant board members constitute the majority of the board, with Jere, Sr. and Shawn in the minority.

The plaintiffs state in the complaint that when the farmstead was incorporated they expected to be employed there and to play an active, meaningful role in farmstead operations. They also, as shareholders, expected a reasonable return on their investment and prudent management by those in control of the corporation. It is their contention that their expectations have not been met since 1995 when they were terminated from their employment once the defendants gained control of the corporation. Previous litigation occurred between the parties on this matter. In 1995, the plaintiffs Jere, Sr., Jere, Jr., Shawn and Spencer filed an application for involuntary dissolution of the corporation alleging minority shareholder oppression and wasting of corporate assets by the defendants. The suit was prompted by Dennis's election to board president and the plaintiffs being fired from farmstead employment. The Honorable John R. Walker denied the application after a bench trial on September 10, 1996. His ruling was affirmed on appeal on February 18, 1998.

Another dispute between the parties occurred after a shareholder meeting on February 21, 1998. This court was asked to decide several issues, including whether an election which placed Dennis, Larry and Andrew into the majority position on the board of directors was valid. The court held a bench trial on October 12-14, 1998 at which time we examined a 1991 shareholder agreement and two new stock plans implemented by the majority of the board. This court upheld the election and ruled that the board majority had not subjected the minority shareholders to fundamental unfairness under the Pennsylvania Business Corporation Law of 1988 ("the BCL"). The plaintiffs (then-respondents Marvin, Jere, Sr., Jere, Jr., Shawn, Spencer, and Gregory Hissong) claimed that the dilution of the voting power of the minority shareholders' shares via the new stock plans, the sole purpose of which was to allow Dennis, Larry, Andrew, Kirby and Ivan to retain control of the corporation, was fundamentally unfair under the BCL. We found no misconduct in derogation of the corporation's long-term interests, nor did we find persuasive the contention that Andrew, Kirby and Ivan were paid excessive salaries or had acted in a manner which constituted self-dealing.

A key factor in our analysis was the application of the doctrine known as the "business judgment

rule" which is embodied in various sections of the BCL as discussed more fully below. Application of Andrew R. Hissong, et al, Franklin County Vol. 8, Page 229, December 23, 1998. The basic premise of the doctrine is that courts should defer to decisions made by a corporation's board of directors regarding operations which the board reasonably believes are in the corporation's best long-term interests.

The plaintiffs filed the current suit to challenge more recent actions of the defendants as the controlling majority of the board. We will discuss these each in turn.

The Pennsylvania Agricultural Conservation Easement Program: The Hege, Friese, Hawbaker and Barnes Farms

On February 28, 2006, the defendant majority on the board voted to place farmland owned by the corporation into the Agricultural Conservation Easement Program which is part of the Agricultural Security Area Program, 3 P.S. §901 et seq. ("the Ag Program"). These lands total approximately 440.5 acres. Jere, Sr. and Shawn opposed this measure at the meeting of the board of directors on February 28, 2006. They and the other plaintiff shareholders allege that placing this acreage into the Ag Program will constitute waste of corporate assets in the amount of $8,589,750 because it will reduce the land's value by impairing development rights. Paragraph 29 of the complaint states: "The estimated reduction of the 440.5 acres is computed based on $30,000 per acre pre-program value, less $8,000 residual value, plus payment to the Farmstead for placing the land into the program of $2,500 per acre for a net reduction in the value of $19,500 per acre multiplied by 440.5 acres = $8,589,750." The plaintiffs allege this devaluation constitutes waste under the BCL and is therefore a violation of the fiduciary duty which the defendant board members owe to them as shareholders. (Amended Complaint, Count I.) It is important to note that these farms have not been placed into the Ag Program yet.

The Ag Program: The Anderson and Hissong Farms

During a board meeting on August 1, 2000, the defendant board members proposed to sell development rights to two farms owned by the corporation to the Ag Program in 2000 and 2001 - the Chester Anderson farm consisting of approximately 145 acres and the Ray Hissong farm consisting of approximately 92 acres. The defendant board members approved the measure over Shawn's objection and the sale was completed. The Farmstead received $1,649 per acre for the Ray Hissong easement and $1,729.99 per acre for the Chester Anderson easement. The plaintiffs contend the sale reduced the value of these corporate assets, thereby constituting waste. They also contend the board's action was oppressive because the funds received by the corporation were not distributed to the plaintiff shareholders and this was a violation of the board's fiduciary duty to them. (Amended Complaint, Count II.)

Land Sale to Dennis Hissong

At a December 13, 2005 meeting, the defendant board members voted to sell an improved tract on Lemar Road in Mercersburg owned by the corporation to Dennis and his wife Evelyn for $10,000. The property consists of 1.622 acres improved with a brick house and two-car garage. The plaintiffs aver the tract has an estimated value of $115,000. They allege the vote was illegal because the plaintiff board members did not receive proper notice of the meeting, the minutes were approved over their objection, and the sale of the property for below market value constituted a waste of corporate assets. The plaintiffs further allege Dennis's participation in the vote was improper self-dealing because he is president of the board. (Amended Complaint, Count III.)

Bonuses and Reduction of Corporate Rent Payments

The plaintiffs also challenge as oppressive two other board actions taken at the December 13, 2005 meeting. The board granted bonuses of $4,000 to the defendants (salaried employees Dennis, Larry and Andrew) and none to the plaintiffs. At the same time, the board approved a reduction of rent for land leased by the corporation from some of the shareholders, namely, Gregory and Jere, Sr., in addition to Dennis and Larry, without the agreement of Gregory and Jere, Sr. This allegedly reduced corporate expenses to the detriment of Gregory and Jere, Sr. (Amended Complaint, Count III.)

The Loan Program

The plaintiffs allege oppressive actions by the defendant board members in connection with loan rates available only to those board members. Specifically, since December 14, 1995, only the defendant board members and those in their immediate families have enjoyed the benefit of a 10% interest rate on loans made by them to the corporation, a rate which is higher than the prevailing market rates over the past 11 years. It was on that date when the defendant board members approved this loan program over the objection of plaintiff board members. The plaintiffs allege that payment of this high interest rate and the fact that this benefit has inured only to the defendant board members has defeated the reasonable expectations of the plaintiffs that all shareholders would be treated equally with regard to access to above-market interest rates. (¶¶54 and 58, Count IV, mislabeled as Count III.)

Dividends

The plaintiffs also allege the defendant board members have refused to authorize appropriate dividends and that this amounts to oppression. Between December 1995 and May of 2006, the corporation paid no dividends to shareholders. Then on April 18, 2006, the defendant board members approved a dividend of $6.00 per share. Andrew, the corporation's treasurer, issued the shares to all shareholders on May 22, 2006. The plaintiffs allege this dividend is grossly insufficient in light of the value of the land and the corporation's income.[3] They also imply (but don't directly allege) that the board's decision to pay this nominal dividend, made in the climate of contention surrounding the Ag Program, was made only to head off anticipated litigation based improperly withheld dividends in violation of the board's fiduciary duty. (Count V, mislabeled as Count IV.)

Actions Taken at the December 12, 2006 Board Meeting

The plaintiffs allege further oppression and waste of corporate assets in connection with various actions taken at a December 12, 2006 board meeting. First, the defendant board members increased the interest rate on the loan program from 7% for 2006 to 8.5% for 2007. (Complaint, ¶71.) It is unclear to the court whether this is the same loan program referred to in the earlier count and we will discuss this uncertainty below. Second, the defendant board members gave themselves and two other members of their families who work at the farm a 5% wage increase.[4] Third, the defendant board members decided that shareholders would receive no dividends based on the corporation's income in 2006. Fourth, the defendant board members approved the conveyance of a lot on Wood Road owned by the corporation to Larry and his wife Arlene for a price consistent with prices provided to other family members in the past, notably the sale of the Lemar Road property to Dennis and his wife for $10,000. This was opposed by the plaintiff board members and they maintain that allowing Larry to vote on the matter was improper insofar as his approval vote constituted self-dealing. (Count VI, mislabeled as Count IV.)

The defendants demurrer to all Counts. Their objections briefly are: (1) prospective action by the board of directors which has not yet occurred is not a basis for dissolving this solvent corporation. The defendants refer here to the vote to place certain farms into the Ag Program, the vote to sell the Lemar Road property to Dennis and his wife, and the vote to sell the Wood lot tract to Larry and his wife; (2) past action taken by the board which is alleged to be unwise based upon conditions five years later does not provide a basis for dissolving the corporation. The defendants refer here to the 2001 placement of farms into the Ag Program; and (3) the other allegations of oppression by the board, namely, the interest rate on the loan program, the bonus payments, the salary increase, and the board's decisions as to the payment of dividends, are insufficient as a matter of law to dissolve the corporation pursuant to the BCL and the business judgment rule.

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Guiding Legal Principles

Involuntary Dissolution

It is well-established that the involuntary dissolution of a solvent corporation is a drastic action to be invoked cautiously and only in extreme circumstances. Dyle E. Bray Post No. 739 v. Dyle E. Bray Post Home Association, Inc., 663 A.2d 300 (Pa.Cmwlth. 1995); Gee v. Bluestone Heights Hunting Club, 604 A.2d 1141 (Pa.Cmwlth. 1992). The court cannot direct dissolution unless it finds the right to that relief is free from doubt, the loss to shareholders is irreparable, there is no adequate legal remedy, and dissolution is necessary. Cerami v. Dignazio, 424 A.2d 881 (Pa.Super. 1980); Tate v. Philadelphia Transportation Co., 190 A.2d 316 (Pa. 1963).

The BCL authorizes the court to involuntarily dissolve a corporation where the directors or those in control engage in acts which are "illegal, oppressive or fraudulent." Section 1981(a)(1). "Oppressive action" is conduct which substantially defeats the reasonable expectations held by minority shareholder in committing their capital to the particular enterprise. Gee v. Bluestone Heights Hunting Club, 604 A.2d 1141 (Pa.Cmwlth. 1992). The remedy of dissolution can also be invoked where corporate assets are being "misapplied or wasted." Section 1981(a)(2). However, the mere fact that a minority of shareholders disagrees with or dissents from the actions of the majority of the board of directors is not sufficient grounds in itself for involuntary dissolution. Cerami, *supra*. If a shareholder objects to any proposed corporate action, section 1792(a) allows him to challenge that action through court review. He also has the right to have the court determine the validity of any corporate action which has already been taken and to cure any resulting impropriety or unfairness by a less extreme remedy than dissolution, such as imposing a surcharge or directing the re-payment of monies to the corporation. Section 1793(a).

Business Judgment Rule

In addition to these statutory provisions, the common law doctrine known as the business judgment rule protects corporate officers from liability for business decisions under certain circumstances. This rule is embodied in sections 1712, 1715, 1716 and 1717 of the BCL which pertain to actions taken by directors and officers in managing corporate operations. Section 1712 states that a director or officer owes a fiduciary duty to the corporation to act "in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances." Section 1717 provides that "the duty of the board of directors under section 1712.is solely to the business corporation.."

In determining the corporation's best interests, a board of directors and individual directors may consider a range of issues, including the impact of their decisions on shareholders, employees and other persons or entities associated with the corporation. It may also consider the long-term and short-term interests of the corporation, the intent and conduct of any person seeking to acquire control of the corporation and all other pertinent factors. Section 1715(a). The board has the discretion to pursue a course of action which it considers to be in the best interest of the corporation even if that course of action does not serve the short-term interests of a particular group of shareholders. Section 1715(b).

Directors and officers must act in a disinterested manner, particularly in situations involving the potential or actual acquisition of control over the corporation. A board, director or officer is presumed to have acted in the best interests of the corporation absent proof by clear and convincing evidence of a breach of fiduciary duty, a lack of good faith, or self-dealing:

> It is the 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. Absent an abuse of discretion, that judgment will be respected by the court. The burden is on the party challenging the decision to establish facts rebutting the presumption.

Cuker v. Mikalauskas, 692 A.2d 1042, 1045-1046 (Pa. 1997)(citations omitted). If the decision being challenged was within the scope of the directors' authority, if they exercised reasonable diligence, and if they honestly and rationally believed the decision was in the corporation's best interests, the actions of the board are beyond the court's scope of review unless the challengers can show fraud, self-dealing, or violations of statutory duties. Sections 1715(d) and (e). ".[I]f a court makes a preliminary determination that a business decision was made under proper circumstances.then the business judgment rule prohibits the court from going further and examining the merits of the underlying business." Cuker at 1047. The rule allows a board to make business decisions without the threat of an in-depth judicial inquiry any time a

shareholder or employee disagrees with those decisions. The court must examine the circumstances of the decision in a narrowly focused manner and minimize or forego judicial intervention where it is not warranted. Id.

The business judgment rule "reflects a policy of judicial noninterference with business decisions of corporate managers, presuming that they pursue the best interests of their corporations, insulating such managers from second-guessing or liability for their business decisions in the absence of fraud, self-dealing or other misconduct or malfeasance." Id. at 1046. The rule "encourages competent individuals to become directors by insulating them from liability for errors in judgment.[B]usiness decisions frequently entail some degree of risk and consequently [the doctrine] provides directors broad discretion in setting policies without judicial or shareholder second-guessing." Id.

As noted above, the court must make at least a preliminary examination of the circumstances surrounding the decision by a board, director or officer to ascertain whether the business judgment rule applies to bar further court intervention into corporate operations. This is so in situations where the complaint contains sufficient facts supporting an allegation that the board and/or director(s) acted in an interested manner or breached a fiduciary duty. "Until factual determinations are made in regard to these disputed issues, a trial court cannot conclude whether or not the business judgment rule requires dismissal of the action." Cuker, fn. 2 at 1048.

It has recently been held that the business judgment rule cannot be used to shield officers and directors when the case is in a posture of a motion to dismiss under the principles governing demurrers. In re Total Containment, Inc., 335 B.R. 589 (Bkrtcy.E.D. Pa. 2005)(the plaintiff alleged officers and directors of an insolvent corporation acted with self-interest, bad faith and fraud with respect to financial transactions and benefited either directly or indirectly from those transactions). Instead, defendants can assert the rule only as an affirmative defense at trial or if no material facts are in dispute, in the context of a motion for summary judgment. By the same token, to overcome the presumption of the business judgment rule, the plaintiff must sufficiently plead that the corporation's directors acted with fraud, bad faith, or self-interest. BCL, section 1715. Where there is a prima facie showing that the directors or majority shareholders have an interest in a particular transaction, the rule does not apply and the burden shifts to the directors to show the transaction is intrinsically fair, i.e., that it carried the earmarks of an arm's length bargain. Id., citing Cuker, *supra*. The affirmative defense of the business judgment rule must be developed after discovery unless there can be no dispute about whether the transactions had a legitimate business purpose. Id.

In closely-held corporations involving disputes between family members, the conduct of majority shareholders should be carefully scrutinized by the court where minority shareholders allege fraud, gross negligence or self-dealing. In such situations, self-dealing is an especially ambiguous concept to define and apply because the best interests of the corporation may also sometimes serve the personal interests of the directors, officers or shareholders. Orchard v. Covelli, 590 F.Supp. 1548 (1984). An allegation of oppressive conduct by the majority shareholders against the minority shareholders must also be carefully examined. At the same time, dissolution of a corporation remains an inappropriate remedy for a majority shareholder's breach of fiduciary duty to minority shareholders where the corporation is solvent and thriving. Id.

Freeze-Out/Oppression

The business judgment rule does not insulate majority shareholders from liability for business decisions designed with the sole purpose of "freezing out" a minority shareholder from meaningful participation in corporate governance and from all financial benefits from the corporation. A freeze-out occurs in a closely-held corporation when a minority shareholder is removed from his office, or his power or compensation is substantially diminished. BCL, section 1767, comment; Viener v. Jacobs, 834 A.2d 546 (Pa.Super. 2003); Arc Manufacturing Co. v. Konrad, 467 A.2d 1133 (Pa.Super. 1983). The issue in Viener was the prevention of a shareholder-director's participation in the governance of a closely-held corporation. The court found it necessary to analyze the relationship between the contending parties, and the majority shareholder could not use the business judgment rule as a shield to ward off all court inquiry. [5] In Arc, dissolution was not ordered, despite extreme measures taken to freeze out a minority shareholder. The court, after a full hearing, chose instead to appoint a custodian with limited powers.

Although the plaintiffs do not use the term "freeze out," they contend they have been prevented from playing a meaningful role in operations since 1995 when they were fired from farmstead employment (those actions were fully litigated before Judge Walker in 1996) and also by way of the votes cast by the defendant majority board members from the year 2000 to 2006. They contend the return on their investment is minor given the value of the land owned by the corporation, specifically, they have not

received adequate dividends and a return on their investment. Nevertheless, the payment of dividends is clearly discretionary with the board under section 1551(a) of the BCL and this matter must be analyzed using the business judgment rule.

Discussion

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I: Future Action

The first issue is whether action by a board of directors which has not yet been finalized is grounds for dissolving a corporation which, by all accounts, is solvent. The defendants maintain that such prospective action does not form a basis for such a drastic remedy given the fact that the BCL enables the plaintiffs to challenge any alleged impropriety or unfairness through court review pursuant to sections 1792(a) and 1793. Dyle, *supra*. The plaintiffs cannot obtain the extraordinary relief of involuntary dissolution based on merely potential harm to the corporation which has not yet actually occurred. The three board actions at issue here are the placement of the four farms into the Ag Program and the votes to sell Farmstead real estate to Dennis and to Larry.

The plaintiffs allege the proposed placement of the four farms into the Ag Program will cause corporate assets to be wasted because it will reduce the land's value by impairing development rights. We find this allegation lacks merit for two reasons. The preliminary reason is that, although they refer to certain acreage valuations in their complaint, the plaintiffs do not include any specific market information to support the assertion that participation in the Ag Program will cause the corporation to receive an unfair price for the land. The second, more critical reason stems from the interplay between underlying purpose of the Ag Program itself and the business judgment rule.

The purpose of the Agricultural Security Area Program is specifically set forth in the statute as follows:

> It is the declared policy of the Commonwealth to conserve and protect and to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. It is also the declared policy of the Commonwealth to conserve and protect agricultural lands as valued natural and ecological resources which provide needed open spaces for clean air, as well as for aesthetic purposes.Agriculture in many parts of the Commonwealth is under urban pressure from expanding metropolitan areas. This urban pressure takes the form of scattered development in wide belts around urban areas, and brings conflicting land uses into juxtaposition, creates high costs for public services, and stimulates land speculation. When this scattered development extends into good farm areas, ordinances inhibiting farming tend to follow, farm taxes rise, and hopes for speculative gains discourage investments in farm improvements. Many of the agricultural lands in the Commonwealth are in jeopardy of being lost for any agricultural purposes. Certain of these lands constitute unique and irreplaceable land resources of Statewide importance. It is the purpose of this act to provide means by which agricultural land may be protected and enhanced as a viable segment of the Commonwealth's economy and as an economic and environmental resource of major importance.

3 P.S. §902. In order to further this policy, the Commonwealth has established a program to purchase agricultural conservation easements. 3 P.S. §914.1. Such an easement is defined as

> [a]n interest in land, less than fee simple, which interest represents the right to prevent the development or improvement of a parcel for any purpose other than agricultural production. The easement may be granted by the owner of the fee simple to any third party or to the Commonwealth, to a county governing body or to a unit of local government. It shall be granted in perpetuity as the equivalent of covenants running with the land.

3 P.S. §903.

It is clear that an owner of agricultural land could view the conservation easement program as a potential benefit to his farming operations. This is because the Ag Program encourages farmers and those in related businesses to commit their financial resources to agriculture, thereby stabilizing that industry

and enhancing its profitability over the long term. The business judgment rule permits the board to consider a broad range of factors in making various decisions, including whether participation in the Ag Program would serve the best interests of the corporation over the long term. The plaintiffs allege no specific facts to indicate the defendant board members, in voting to place the farms into the Ag Program, acted beyond the scope of their authority or failed to exercise due diligence in making decisions about the corporation's long-term interests. Given that the complaint lacks any such facts to support this claim of waste, the defendants are entitled to the presumptions of the business judgment rule as embodied in the relevant sections of the BCL in terms of whether they have acted reasonably and according to their fiduciary responsibilities toward the corporation.

In addition, the plaintiffs have not even alleged that the defendant board members' decision to place these farms into the Ag Program was in any way marked by fraud, self-dealing or other active malfeasance and therefore under the business judgment rule and relevant provisions of the BCL, the court must refrain from subjecting the defendant board members' actions to our unwarranted scrutiny.

Next, although the plaintiffs assert they have been oppressed by various actions of the defendant board members, the complaint makes no specific allegations of oppression as that concept has been discussed in the law. First, as discussed above, the complaint does not contain facts to support the claim that the land committed to the Ag Program will lose value. Although one can fairly speculate that the per acre value of agricultural land without development rights would be less than land with development rights, the plaintiffs have not provided sufficient prima facie evidence of this. Second, the plaintiffs do not allege that their right to vote on matters before the board has been blocked or diluted such that their opportunity to participate in corporate governance has been hampered in any fundamental way. Mere disagreement with board decisions is not sufficient prima facie evidence that their reasonable expectations in committing capital to the corporation have been substantially defeated or that the minority has been oppressed. Moreover, as we stated, the board's decisions concerning conservation easements must be viewed in a broader context than the dollar value development rights. Based on the foregoing, the court cannot consider involuntary dissolution as a potential remedy for the plaintiffs' dissatisfaction with the proposed action to place these four farms into the Ag Program.

The two other actions which have not been finalized are the vote to sell the improved Lemar Road property to Dennis for $10,000 and the vote to sell the unimproved lot to Larry for an unspecified sum. As with the decision to place the four farms into the Ag Program, these transactions have not yet taken place and therefore their allegedly negative effect on the fiscal health of the corporation is purely speculative. Although the board members approved the conveyance to Larry for a price consistent with prices previously provided to other family members, notably the sale to Dennis, the complaint does not state the actual value of the unimproved lot to be conveyed to Larry and how much he will pay for it. The corporation will not be harmed nor its assets wasted if Larry ultimately pays full market value for the lot. Also, the defendant board members may have taken other factors into account than just the sale price in approving these transfers. The conveyances might have been considered a bonus based on job performance, for example. As with the Ag Program decision, the defendant board members' actions are entitled to the presumptions at play in the business judgment rule as embodied in the BCL.

The plaintiffs also allege self-dealing in connection with these two proposed transactions insofar as Dennis and Larry are majority members of the board. As the defendants point out, however, these two votes could be challenged and reviewed by the court under sections 1792(a) and 1793. The court would then make a preliminary, narrowly-focused inquiry into the motives of the board and the circumstances surrounding those votes pursuant to the business judgment rule in order to determine whether the actions taken were in good faith, comported with the board's fiduciary duty to the corporation and had a legitimate business purpose. Cuker, *supra*; BCL §1715. It would be the plaintiffs' burden to present facts to rebut the presumptions which are the earmarks of the business judgment rule. However, even if this court found that these votes constituted self-dealing and a breach of fiduciary duties and that the vote concerning the sale to Dennis was accomplished at an illegal meeting, there are insufficient grounds in the complaint to justify involuntary dissolution as a remedy. The court could instead invalidate the votes, impose a surcharge upon the defendant board members and/or order them to repay any losses caused to the corporation as a result of the conveyances. The plaintiffs have not alleged an adequate basis for seeking dissolution.

II: Action Taken Five Years Ago

The second issue is whether the corporation could be dissolved because the board of directors took certain action five years ago which the plaintiffs now in hindsight allege was unwise. The action was the board's decision in 2000 to place the Chester Anderson and Ray Hissong Farms into the Ag Program. (Development rights to those farms were actually conveyed to the Program in 2001.) The plaintiffs allege

both waste of corporate assets and that they have been oppressed because the value of the land was reduced when one compares 2000-2001 real estate market conditions with those same conditions in 2006.

The defendants correctly point out that the complaint lacks sufficient facts which, even if accepted as true, show that the sale of development rights reflected less than the full value of these farms in 2000-2001. Instead, the plaintiffs allege waste by referring to current market conditions, not market conditions in the 2000-2001 time frame when the decision and conveyances took place. This claim fails under the same analysis governing the decision to place the four other farms into the Ag Program in the future. There might indeed be long-term benefits to the corporation in placing these two farms into the Ag Program which the defendant board members may have considered and/or would have been entitled to consider in voting as they did. In addition, insofar as the plaintiffs do not even allege that these conveyances arose from fraud, self-dealing or other active malfeasance, the court may not undertake the preliminary review of this corporate action pursuant to the business judgment rule. Under these circumstances, there is no basis upon which the plaintiffs should be permitted to pursue the extraordinary remedy of involuntary dissolution of this admittedly solvent corporation.

III: Other Board Actions

The third issue is whether the board took any other actions which have oppressed the plaintiffs such that the involuntary dissolution of this admittedly solvent corporation would be justified. The plaintiffs attack the board's decision to grant bonuses, increase salaries, reduce the rent for land leased by the corporation from some shareholders, pay higher than prevailing rates on loans to the corporation from shareholders where the plaintiffs are not allowed to participate in that loan program and not pay dividends, except an allegedly inadequate dividend for 2006. As to this last, it is clear the decision to pay dividends is within the discretion of the board under section 1551(a) of the BCL. A board decision as to whether to pay dividends is protected by the business judgment rule and such a decision does not constitute sufficient grounds for the involuntary dissolution of a solvent corporation when other remedies are available to redress any wrongs committed by the board and/or its directors.

With regard to the loan program, it is unclear from the complaint as drafted whether there is more than one such program at play. In paragraphs 54 and 58, the plaintiffs object to the 10% rate of return enjoyed only by the defendant board members and their immediate families since 1995. In paragraph 71, however, the plaintiffs object to the fact that this interest rate increased from 7% for 2006 to 8.5% for 2007. The court cannot determine whether there are two separate loan programs at issue or whether the 10% rate decreased to 7% and then increased to 8.5%. Under either scenario, the plaintiffs plead no facts to support the allegation that paying such rates constitutes waste in that it is undermining the fiscal health of the corporation. Nor does this payment of higher-than-prevailing rates for the defendant board members and their immediate families constitute oppression because the plaintiffs' ability to vote and otherwise participate in the corporation has not been hampered in any fundamental way.

As for the other decisions made by the defendant board members, the complaint does not plead any facts to support the allegation that these actions are undermining the fiscal health of the corporation. The plaintiffs do not cite to past practices of the corporation and make no reference to industry comparables regarding appropriate compensation for employees engaged in certain kinds of work on dairy farms of this size in this county or surrounding counties. The court is aware that Jere, Sr., Jere, Jr., Shawn and Spencer sought to dissolve the corporation when they challenged their termination from farmstead employment in their 1995 complaint. They alleged minority shareholder oppression and waste of corporate assets. Judge Walker refused to dissolve the corporation. In later litigation, we addressed a challenge to the salaries and bonuses paid to employee-shareholders. The instant complaint does not allege facts to indicate the plaintiffs' basic contentions are fundamentally different from the contentions raised previously which centered on oppression and waste. For example, the plaintiffs do not allege they have been prevented from voting at board meetings, and the fact that they have been out-voted in the complained-of decisions is not in itself an indication of oppression or the defeat of reasonable expectations such than dissolving the corporation could be justified.

The defendant board members are in the majority by way of basic democratic numerical voting principles and are therefore in a position to control the direction and management of this corporation. The plaintiffs may bring suit under sections 1792(a) and 1793 of the BCL to have the court review any specific actions taken by the board of directors which are allegedly inappropriate under that statute and the business judgment rule. If the plaintiffs can overcome the provisions of that statute and the presumptions of that rule, less drastic remedies than dissolution are available to correct any wrongs. However, as the complaint is currently formulated, the plaintiffs cannot pursue the only remedy they now seek - involuntary dissolution of a solvent corporation - and therefore the court must dismiss the complaint.

ORDER OF COURT

Now this 13th day of August 2007, the court hereby sustains the demurrer filed by the defendants to the plaintiffs' complaint seeking involuntary dissolution of Hissong Farmstead, Inc. The court hereby dismisses the complaint for the reason that the factual allegations in the complaint, even if true, are insufficient to provide a basis for this court to conduct a preliminary inquiry into the reasons for the board's actions and to justify the involuntary dissolution of this solvent corporation.

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[1] A closely-held corporation is one which has no more than 30 shareholders. The Business Corporation Law of 1988, as amended, 15 Pa.C.S.A. §1103.

[2] Counsel appeared for oral argument in early October of 2006. The court issued an Order on November 21, 2006, sustaining the preliminary objections and dismissing the first rendition of the complaint pursuant to the Pennsylvania Rules of Civil Procedure 1007 and 1022. The court granted the plaintiffs 30 days to file a proper complaint, with the defendants to have 20 days thereafter to file amended preliminary objections. The plaintiffs were granted 20 days to answer any such objections. The court wrote to counsel on January 24, 2007 to inquire whether either counsel wished to submit supplemental written argument on the preliminary objections. Counsel for the defendants requested the opportunity to submit supplemental written argument, prompting the court to issue an Order on February 2, 2007 directing same to be filed no later than February 12, 2007. Counsel for the defendants complied, and the court received their written argument on or about February 13, 2007.

[3] According to the plaintiffs, the total number of shares issued was 1,519, which results in a total dividend of $9,114 to be divided among all shareholders. The plaintiffs also allege the Farmstead has a net fair market value of approximately 34 million dollars.

[4] The court believes these other family members are Ivan and Kirby, the sons of Dennis and Larry, respectively.

[5] We have also reviewed Warehime v. Warehime, 777 A.2d 469 (Pa.Super. 2001), reversed on other grounds, 860 A.2d 41 (Pa. 2004), handed down since these parties were last before this court. Warehime (which cites Viener) stands for the proposition that any plan which interferes with the effectiveness of a majority shareholders' voting right to elect a new majority directors in the wake of a disagreement about corporate management must be invalidated. This is so even if the directors enacting the plan acted in the good faith belief that the corporation would be well-served because the legitimacy of directorial power rests in the shareholder vote. In that situation, the business judgment rule does not apply because the ability to exercise one's voting power is so fundamental to the principles of corporate democracy which enable shareholders to control their own company. We note here that the instant plaintiffs do not allege any improper dilution of their voting power as shareholders or as minority members of the board of directors.