

STATE OF NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 8287

ALAN W. (“A”) CONE, JR. and LOUIS
 (“BILLY”) CONE individually and
derivatively on behalf of BLUE GEM,
INC.,

Plaintiffs,

v.

BLUE GEM, INC.; STEPHEN B.
CONE; and ELAINE BULLUCK,

Defendants.

**ORDER AND OPINION
ON MOTIONS TO DISMISS**

1. Plaintiffs, shareholders in a family-owned corporation, seek a judicial dissolution of the business after their unsuccessful attempts to redeem their interests. The case is before the Court on two motions to dismiss—one filed by the corporate defendant, Blue Gem, Inc., and the other filed by the individual defendants, Stephen B. Cone and Elaine Bulluck (“Defendants’ Motions to Dismiss”), (ECF Nos. 20, 22).

2. After hearing Defendants’ Motions to Dismiss but prior to the Court’s ruling, Plaintiffs filed their own Motion to Dismiss Without Prejudice (“Plaintiffs’ Motion to Dismiss”), (ECF No. 55). That motion is also before the Court.

3. Having considered the motions, the related briefing, the arguments of counsel, and other appropriate matters of record, the motions are hereby GRANTED in part and DENIED in part, as provided below.

Brooks, Pierce, McLendon, Humphrey & Leonard LLP, by Clinton Shepperd Morse and Amanda Hawkins, for Plaintiffs Alan W. (“A”) Cone, Jr. and Louis (“Billy”) Cone.

Block, Crouch, Keeter, Behm & Sayed, by Christopher K. Behm, for Defendant Blue Gem, Inc.

Ward and Smith, P.A., by Jenna F. Butler and Joseph Anthony Schouten, for Defendants Stephen B. Cone and Elaine Bulluck.

Earp, Judge.

I. BACKGROUND

4. The Court does not make findings of fact when ruling on motions to dismiss. It recites below the factual allegations in the Amended Complaint that are relevant and necessary to the motions before the Court.

The Parties

5. Blue Gem, Inc. (“Blue Gem” or the “Company”), a North Carolina corporation, is a commercial real estate holding company. (First Am. Compl. [“Am. Compl.”] ¶¶ 3, 15, 17, ECF No. 11.) It was incorporated by Alan Cone, Sr. (“Senior”), a “wealthy descendant of the Cone Mills family” as a C corporation. (Am. Compl. p. 1.)¹

6. Senior used Blue Gem to accumulate wealth at the corporate tax rate and rarely took dividends. (Am. Compl. pp. 1-2.) Upon his death in 2019, Senior left his interest in Blue Gem to a trust for the benefit of his children. (Am. Compl. ¶ 29.)

¹ Pages 1-3 of the First Amended Complaint contain unnumbered paragraphs. The Court refers to allegations on those pages by page number.

7. Plaintiff Alan W. Cone (“A Cone”), one of the four Cone siblings who are named parties in this action, is a resident of Virginia. He owns 23.146 percent of the voting stock of Blue Gem. (Am. Compl. ¶¶ 1, 29.)

8. Plaintiff Louis (“Billy”) Cone is a resident of North Carolina. He also owns 23.146 percent of the voting stock of Blue Gem. (Am. Compl. ¶¶ 2, 29.) In addition, Billy serves as a director of the Company. (Am. Compl. ¶ 31.)

9. Defendant Elaine (“Bunny”) Bulluck is a resident of North Carolina. She owns 23.146 percent of the voting stock of Blue Gem. (Am. Compl. ¶¶ 5, 29.) Bunny is also a director of the Company. (Am. Compl. ¶ 31.)

10. Defendant Stephen B. Cone (“Steve”) is a resident of North Carolina. He owns 29.748 percent of the voting stock of Blue Gem and serves as both a director of the Company and its President. (Am. Compl. ¶¶ 4, 29, 31.)

Cone Family Wealth

11. Billy, A Cone, Bunny, and Steve are Senior’s children. (Am. Compl. pp. 1-2.) During his lifetime, Senior was a beneficiary of family wealth that he invested in a number of businesses, including Blue Gem. (Am. Compl. ¶¶ 6-12.) Because Senior had other sources of income, he did not take dividends from Blue Gem. Instead, Senior allowed his investments in Blue Gem to grow and to be taxed at the corporate rate. (Am. Compl. pp. 1-2.)²

² Senior incorporated Tareyton Corporation (“Tareyton”) as another holding company for his investments. During the 1980s, he moved his commercial real estate to Blue Gem. (Am. Compl. ¶¶ 9, 15.) He then merged Tareyton into Blue Gem in 1993. At the time of his death in 2019, Blue Gem was Senior’s only investment vehicle. (Am. Compl. ¶¶ 17-18.)

12. At times, Senior used his assets to assist his family members when they were in financial need. (Am. Compl. ¶ 19.) He provided Bunny’s family significant financial support during the 1990s when their apparel company fell on hard times. (Am. Compl. ¶¶ 20-23.) In addition, Plaintiffs believe that “sometime in the early 2000s,” Senior assisted Steve when his boat building business experienced financial difficulties. (Am. Compl. ¶ 24.)

13. In 1998, as part of his estate planning, Senior “redeemed”³ all the stock he had previously gifted his children. (Am. Compl. ¶ 25.) Plaintiffs do not allege how the value of the stock was determined when it was redeemed.

14. In 2014, Senior began an annual practice of gifting non-voting Blue Gem stock to A Cone, Billy, and Bunny, and gifting voting stock to Steve, who by then was employed as the Vice President of Blue Gem. (Am. Compl. ¶¶ 25-26.)

15. Senior later redeemed Billy’s non-voting stock in Blue Gem “as needed” for Billy’s personal living expenses. (Am. Compl. ¶ 27.) Again, Plaintiffs do not allege how the value of the stock was determined when it was redeemed.

16. In addition to financial support, Senior took proactive steps to minimize family strife within Blue Gem. For instance, when Senior foresaw the potential for conflict among members of his extended family, he substituted his vacation home for Blue Gem shares owned by his second wife’s children so that ownership of Blue Gem would be limited to his natural offspring. (Am. Compl. ¶ 28.)

³ It is unclear from the Amended Complaint whether Senior caused Blue Gem to redeem the stock or bought it himself.

Blue Gem's Management

17. Bunny, Steve, and Billy are currently on Blue Gem's Board of Directors. Steve serves as its President. (Am. Compl. ¶ 31.) Because he was gifted voting stock and the other siblings received non-voting stock while Senior was alive, Steve now owns 29.748 percent of the voting shares, while A Cone, Billy, and Bunny each own 23.146 percent. (Am. Compl. ¶¶ 26, 29.)

18. Plaintiffs allege that Steve and Bunny are "acting together as a block" with respect to decisions regarding Blue Gem. (Am. Compl. ¶ 32.) Together they have 52.894 percent of the voting shares of the Company. (Am. Compl. ¶ 32.) This majority voting power—along with their two board seats—gives Steve and Bunny ultimate control. (Am. Compl. ¶¶ 52-70.)

19. Plaintiffs complain that "Steve and Bunny have not continued to run Blue Gem with an eye toward avoiding family drama or to provide solutions for the entire family as needed[.]" (Am. Compl. ¶ 33.) Among their grievances, A Cone and Billy complain that Blue Gem is wasting assets by paying excessive taxes, and that Steve and Bunny refuse to redeem their shares without minority and illiquidity discounts that Plaintiffs believe are unfair. (Am. Compl. ¶¶ 52-70.)

20. With respect to the tax issue, A Cone and Billy contend that because profits are taxed twice in a C corporation—once at the corporate level and again at the individual level when shareholders receive dividends—allowing Blue Gem to remain a C corporation constitutes corporate waste. Although the parties agree that something should be done about the tax issue, Plaintiffs state that the shareholders

are “deadlocked on any remedy” and “at complete loggerheads.” (Am. Compl. ¶¶ 33, 54-55.)

21. Plaintiffs further complain that Blue Gem’s investments are “extremely conservative[,]” (Am. Compl. ¶ 39), and they believe their returns would improve if they were able to access the value of their shares and reinvest in another vehicle. Consequently, Plaintiffs state that they want to “liquidate their positions in Blue Gem[.]” (Am. Compl. ¶ 42.)

22. In addition, Billy contends that because Senior periodically redeemed his non-voting stock for “fair value,” and because in 1998, Senior redeemed all his children’s gifted stock for “fair value,” there is a “pattern and practice” giving rise to an expectation with respect to redemption. He claims that his inability to redeem his shares at will “is an additional source of irreconcilable frustration among the shareholders.” (Am. Compl. ¶¶ 45-51.)

23. In short, Plaintiffs’ inability to access the principal of their inheritance, as well as their disagreement with their siblings over tax issues, have caused Plaintiffs to conclude that “this is not the business [to benefit the family and avoid strife] that Senior foresaw.” (Am. Compl. ¶ 36.)⁴

24. In pursuit of a resolution, the siblings have considered different options, but they cannot agree on a path forward. (See Am. Compl. ¶¶ 55-65.) One option considered was for Blue Gem to make an S corporation election. However, Plaintiffs

⁴ In addition to these two central grievances, Plaintiffs point to other unpleasant interactions with Defendants, their belief that Blue Gem’s investment strategy is overly conservative, and a general increase in family drama and tension between the siblings as additional reasons they seek to exit Blue Gem. (Am. Compl. ¶¶ 34, 36, 40.)

allege that they have been advised that such an election would result in tax liability that could exceed \$3 million. (Am. Compl. ¶¶ 57-58.) Consequently, A Cone and Billy have rejected the S corporation election option. They allege that they “reasonably desire to end their business relationship” with their siblings and “certainly have no interest in paying \$3 million in taxes to remain in Blue Gem.” (Am. Compl. ¶ 59.) Because IRS Code § 1362(a)(2) requires all shareholders to consent to an S election, A Cone and Billy’s refusal makes an S election impossible. (Am. Compl. ¶¶ 57, 59.)

25. A second option considered would be for Plaintiffs to sell their shares to Steve and Bunny. While Plaintiffs are willing to sell, the parties cannot agree on a price. Plaintiffs contend that Steve and Bunny have “rejected A Cone and Billy’s reasonable buy-out proposal” because “Steve and Bunny are only willing to buy-out or redeem A Cone and Billy’s stock with illiquidity and minority discounts that A Cone and Billy are not willing to give.” (Am. Compl. ¶ 63.) Consequently, this option has been a nonstarter.

26. Similarly, converting Blue Gem to an LLC would trigger A Cone and Billy’s statutory appraisal rights pursuant to N.C.G.S. § 55-13-02(a)(8) and entitle them to redeem their shares at fair value, which they allege would not involve illiquidity or minority discounts. They allege that, for this reason, conversion to an LLC would be unacceptable to their siblings. (Am. Compl. ¶¶ 60-61.)

27. Another solution discussed was a tax-free spinoff “whereby the shareholders would create a subsidiary and then transfer 42.6% of the real estate to the subsidiary.” (Am. Compl. ¶ 64.) A Cone and Billy would then be able to “exchange

their shares in Blue Gem for shares in the subsidiary in a tax-free transaction.” (Am. Compl. ¶ 64.) After consideration, however, Bunny and Steve did not find the proposal to be “reasonable or in the best interest of Blue Gem[,]” and they rejected it. (Am. Compl. Ex. 8, ECF No. 11.8.)

28. Having exhausted these options, Plaintiffs allege that the siblings are “hopelessly deadlocked while Blue Gem wastes its assets through unnecessary taxes,” and they assert that “judicial dissolution procedures present the only option available to breach the deadlock and waste.” (Am. Compl. ¶ 65.)

29. Furthermore, Plaintiffs attribute Steve and Bunny’s rejections of Plaintiffs’ preferred solutions to a failure on the part of Steve and Bunny to exercise business judgment. They claim that this failure is motivated by a personal desire not to pay fair value for A Cone and Billy’s interests. (Am. Compl. ¶ 69.) Plaintiffs conclude that “[i]n the exercise of any business judgment, Steve and Bunny should either liquidate, buy-out at fair value, or agree to a tax-free spin off.” (Am. Compl. ¶ 68 (emphasis omitted).) By not accepting one of these three options, Plaintiffs allege that Steve and Bunny have breached their fiduciary duties to Blue Gem. (Am. Compl. ¶ 70.)

Procedural Background

30. Plaintiffs initiated this suit on 25 October 2022 by filing their Complaint, (ECF No. 3). After designation to the Business Court, Plaintiffs filed an Amended Complaint on 12 December 2022, asserting a claim for judicial dissolution and a derivative claim for breach of fiduciary duty, (ECF No. 11). Defendants

subsequently filed Defendants' Motions to Dismiss, and the Court held on hearing on the motions on 11 April 2023. (*See* ECF No. 50.)

31. On 9 August 2023, following an unsuccessful mediation and prior to the Court's ruling on Defendants' Motions to Dismiss, Plaintiffs filed their own motion seeking a dismissal without prejudice of this case in its entirety.⁵

II. LEGAL STANDARD

32. With respect to Defendants' Motions to Dismiss filed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, (the "Rule(s)"), dismissal of a claim is proper if "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 615 (2018). Otherwise, "a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103 (1970) (emphasis omitted).

33. When deciding a motion to dismiss, the Court construes the complaint liberally and accepts all allegations as true. *See, e.g., Sykes v. Health Network Sols.*,

⁵ Steve and Bunny moved to strike certain material in the pleadings and their attached exhibits (the "Motion to Strike"), (ECF No. 15). Further, shortly after Defendants filed their Motions to Dismiss and Motion to Strike, Plaintiffs filed a Motion for Summary Judgment, along with a supporting brief. (*See* ECF Nos. 39, 43.) The Court entered an order staying briefing on the Motion for Summary Judgment until it ruled on the pending motions to dismiss. (*See* ECF No. 49.) For the reasons stated herein, both Defendants' Motion to Strike and Plaintiffs' Motion for Summary Judgment are denied as moot.

Inc., 372 N.C. 326, 332 (2019); *Laster v. Francis*, 199 N.C. App. 572, 577 (2009). Nonetheless, the Court is not required “to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Good Hope Hosp., Inc. v. N.C. Dep’t of Health & Hum. Servs.*, 174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)). Furthermore, the Court “can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint.” *Laster*, 199 N.C. App. at 577; *see also Moch v. A.M. Pappas & Assocs., LLC.*, 251 N.C. App. 198, 206 (2016).

34. As for Plaintiffs’ Motion to Dismiss, Rule 41(a)(1) of the North Carolina Rules of Civil Procedure permits a plaintiff, “[s]ubject to the provisions of . . . any statute of this State” to voluntarily dismiss “an action or any claim therein . . . without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case[.]” N.C. R. Civ. P. 41(a)(1). “Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice[.]” *Id.*

35. Our Supreme Court has explained,

[t]he purpose of our long-standing rule allowing a plaintiff to take a voluntary dismissal . . . is to provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit. The range of reasons clearly includes those circumstances in which the plaintiff fears dismissal of the case for rule violations, shortcomings in the pleadings, evidentiary failures, or any other of the myriad reasons for which the cause of action might fail. The only limitations are that the dismissal not be done in bad faith and that it be done prior to a trial court’s ruling dismissing plaintiff’s claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial.

Brisson v. Santoriello, 351 N.C. 589, 597 (2000).

36. Thus, “two limitations exist on the general rule permitting voluntary dismissals.” *Mkt. Am., Inc. v. Lee*, 257 N.C. App. 98, 103 (2017). “[V]oluntary dismissals may not be taken in bad faith[.]” and “a voluntary dismissal cannot be taken after the plaintiff has rested its case.” *Id.* (citing *Boyd v. Rekuc*, 246 N.C. App. 227, 231 (2016)). See *Eubank v. Van-Riel*, 727 S.E.2d 25, 32 (N.C. App. 2012) (“[a] dismissal taken for the purpose of defeating a substantive decision about to be rendered by a trial court is of no effect.”).

37. However, Rule 41(d) provides, “[a] plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis.” N.C. R. Civ. P. 41(d).

38. And, when the dismissal involves a derivative claim, the North Carolina Business Corporation Act requires, as an additional step, that the dismissal be approved by the Court. N.C.G.S. § 55-7-45(a).

III. ANALYSIS

A. Claim for Judicial Dissolution

39. Plaintiffs’ Amended Complaint contains two claims, one for judicial dissolution, and a second for breach of fiduciary duty asserted derivatively on behalf of Blue Gem. By statute, dismissal of the derivative claim requires court approval. However, dismissal of the claim for judicial dissolution does not. According to Rule 41(a), Plaintiffs may unilaterally dismiss a claim “at any time before the plaintiff rests his case[.]” N.C. R. Civ. P. 41(a)(1). Accordingly, Plaintiffs’ motion serves to dismiss their judicial dissolution claim without prejudice.

40. Defendants Steve and Bunny argue that the claim for judicial dissolution should be dismissed *with* prejudice because “Plaintiffs’ claims have no place before this Court.” (Defs.’ Stephen B. Cone’s and Elaine Bulluck’s Br. Opp. to Pls.’ Mot. to Dismiss [“Steve and Bunny’s Br. Opp.”] p. 10, ECF No. 57.) Similarly, Defendant Blue Gem argues that the first claim should be dismissed *with* prejudice “because Plaintiffs failed to adequately allege any of the elements required to succeed in judicial dissolution pursuant to [N.C.G.S.] 55-14-30[.]” (Def. Blue Gem, Inc.’s Br. Opp. to Pls.’ Mot. to Dismiss [“Blue Gem’s Br. Opp.”] p. 7, ECF No. 60.)

41. Although it is true that a dismissal may not be taken in bad faith, *see e.g., Mkt. Am.*, 257 N.C. App. at 103, Defendants argue that it is the lawsuit itself that was brought in bad faith, not the filing of the voluntary dismissal. In a letter to the Court attached as an exhibit to Plaintiffs’ Motion to Dismiss, Plaintiffs explain that a significant factor in their decision to dismiss the claim was the cost of pursuing it. (Letter, ECF No. 55.1.) There is no indication that Plaintiffs sought to defeat a substantive decision about to be rendered by the trial court or otherwise acted in bad faith when they filed their dismissal.

42. The dismissal is not without a problem, however. Plaintiffs include in their motion a demand that each side bear its own costs and attorneys’ fees. Pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure, “[a] plaintiff who *dismisses an action or claim* under section (a) of this rule *shall be taxed with the costs of the action* unless the action was brought in forma pauperis.” N.C. R. Civ. P. 41(d) (emphasis added).

43. Rule 41(d) “serves as a mandatory directive to the trial court[.]” *Woodcock v. Cumberland Cnty. Hosp. Sys.*, 2021 NCBC LEXIS 65, at *5 (N.C. Super. Ct. July 26, 2021) (quoting *Sealey v. Grine*, 115 N.C. App. 343, 346 (1994)). Our Appellate Courts “have emphasized the mandatory nature of Rule 41(d) and the duty of courts to strictly apply its mandate.” *Id.* at *8; *see, e.g., Sims v. Oakwood Trailer Sales Corp.*, 18 N.C. App. 726 (stating that “the language of Rule 41(d) constitutes a mandatory directive of the trial court”), *cert. denied*, 283 N.C. 74 (1973).

44. Case law establishes that there are two purposes to Rule 41(d): “(1) reimbursing defendants for costs when through no fault of their own they are denied a hearing on the merits, and (2) curtailing vexatious lawsuits by creating consequences for the plaintiff’s voluntary dismissal.” *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 732-33 (2004). Accordingly, Plaintiffs’ request that each side bear its own costs is of no effect. Plaintiffs shall be taxed with the costs of the action.

45. Accordingly, Plaintiffs’ Motion for Voluntary Dismissal Without Prejudice is **GRANTED** as to the claim for judicial dissolution, but Plaintiffs shall be taxed with the costs of this action. Plaintiffs’ voluntary dismissal of this claim **MOOTS** Defendants’ Motions to Dismiss with respect to it.

B. Derivative Claim for Breach of Fiduciary Duty

46. As stated above, by statute “[a] derivative proceeding may not be discontinued or settled without the court’s approval.” N.C.G.S. § 55-7-45(a).

47. Plaintiffs contend that dismissal of the derivative claim is in the best interests of the shareholders because both the direct and indirect costs of litigation are high. (Pls.’ Br. Supp. of Mot. to Dismiss [“Pls.’ Br. Supp.”] p. 2, ECF No. 56.) Defendants Steve and Bunny agree that dismissal is in the best interests of the shareholders, but they argue that any dismissal should be with prejudice for the reasons they present in their Motions to Dismiss. (Steve and Bunny’s Br. Opp. p. 10.) Blue Gem agrees that a dismissal with prejudice is warranted because it “should not face the risk of having to defend against Plaintiffs’ . . . claims asserted in this action ever again.” (Blue Gem’s Br. Opp. p. 13.)

48. “In determining whether to approve the [dismissal] of a derivative action, the court is to balance (1) any legitimate corporate claims as brought forward in the derivative shareholder suit against (2) the corporation’s best interests.” *Lee v. McDowell*, 2022 NCBC LEXIS 129, at *4 (N.C. Super. Ct. Nov. 2, 2022) (quoting *Scott v. Sokolov*, 1996 NCBC LEXIS 1, at *6 (N.C. Super. Ct. Dec. 2, 1996)). Here, the Court evaluates the legitimacy of the claim pursuant to Rule 12(b)(6) and determines that it is subject to dismissal with prejudice.

49. Plaintiffs complain that Steve and Bunny, as directors of Blue Gem, have breached the fiduciary duty of care they owe the Company by refusing to structure it to avoid “double taxation[.]” (Am. Compl. ¶¶ 52-53, 65, 67-70, 88.) Plaintiffs argue that “unnecessary” corporate taxes, as well as attorneys’ fees

accruing as a result of this action, are wasting corporate assets. They contend that Steve and Bunny are using their majority voting power to reject options to remedy the perceived tax issue in order to deny Plaintiffs the opportunity to receive fair value for their shares. (Am. Compl. p. 3, ¶¶ 32, 36, 62-70, 87-91.)

50. Defendants respond first that Plaintiffs do not have standing to assert a derivative claim because they have not alleged facts sufficient to show that they have complied with the pre-suit demand requirement found in Section 55-7-42 of the General Statutes. Second, they argue that the Amended Complaint lacks factual support for Plaintiffs' conclusion that Steve and Bunny have acted in bad faith or self-interest and, therefore, the business judgment rule controls. (Defs.' Stephen B. Cone's and Elaine Bulluck's Reply to Pls.' Opp. to Mot. to Dismiss ["Steve and Bunny's Reply"] pp. 2-7, ECF No. 40; Defs.' Memo. L. Supp. Mot. Dismiss Am. Compl. ["Defs.' Br. Supp."] pp. 22-28, ECF No. 19.)

51. The Court concludes that Plaintiffs have sufficiently alleged compliance with the demand requirement in Section 55-7-42 by attaching the derivative demand itself to their Amended Complaint. (See Am. Compl. Ex. 6, ECF No. 11.6.) See *Oberlin Cap., L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001) ("when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers"). Therefore, Plaintiffs have standing to bring the claim. Even so, the Court determines that Plaintiffs have failed to state a derivative claim for breach of fiduciary duty against Steve and Bunny.

52. To state their claim, Plaintiffs must allege: “(1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff.” *Sykes*, 372 N.C. at 339.

53. It is elementary that directors of a corporation owe fiduciary duties to the corporation. *See Governor’s Club Inc. v. Governors Club Ltd.*, 152 N.C. App. 240, 248 (2002) (“directors of a corporation generally owe a fiduciary duty to the corporation” (emphasis omitted)); *Seraph Garrison, LLC v. Garrison*, 787 S.E.2d 398, 403 (N.C. App. 2016) (“corporate directors . . . act in a fiduciary capacity in the sense that they owe the corporation the duties of loyalty and due care.”); *see also* N.C.G.S. § 55-8-30(a).

54. Actions and decisions by corporate directors are subject to review under the business judgment rule. *Adum v. Albermarle Plantation Prop. Owners Ass’n*, 2021 NCBC LEXIS 6, at **38 (N.C. Super. Ct. Jan. 19, 2021) (“[t]he standard of conduct applicable to officers and directors is subject to review under the business judgment rule”). The business judgment rule creates an initial presumption that “in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation[.]” Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.06, at 281. Absent rebuttal of this initial presumption, a powerful substantive presumption arises “that a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business

purpose.” *Id.*; *see also Adum*, 2021 NCBC LEXIS 6, at **38-39 (applying the rule); *Holland v. Warren*, 2020 NCBC LEXIS 146, at **19-24 (N.C. Super. Ct. Dec. 15, 2020) (same). “The business judgment rule recognizes that business decisions are best left in the hands of informed and experienced boards of directors and managers.” *Emrich Enters. v. Hornwood, Inc.*, 2022 NCBC LEXIS 19, at **46 (N.C. Super. Ct. Feb. 15, 2022).

55. To survive a motion to dismiss in the face of the business judgment rule, “the Complaint must allege, *in other than conclusory terms*, that the board was inattentive or uninformed, acted in bad faith, or that the board’s decision was unreasonable.” *Green v. Condra*, 2009 NCBC LEXIS 20, at **20 (N.C. Super. Ct. Aug. 14, 2009) (quotations omitted) (emphasis added). Conclusory assertions in the pleadings are not enough. Allegations of bad faith must be pleaded through facts. *See Mauck v. Cherry Oil Co.*, 2022 NCBC LEXIS 39, at **28-29 (N.C. Super. Ct. May 2, 2022).⁶

56. Plaintiffs argue that their allegations that Steve and Bunny are acting in bad faith without using “any business judgment” are sufficient to satisfy their pleading obligations. (Pls.’ Br. Opp. to Defs.’ Mot. to Dismiss [“Pl.’s Br. Opp.”] pp. 7-11, ECF No. 27.) They accuse Steve and Bunny of refusing to address Blue Gem’s

⁶ Ultimately, the burden is on the Plaintiffs to overcome the business judgment rule. *See Winter v. First Union Corp.*, 2001 NCBC LEXIS 5, at **11 (N.C. Super. Ct. July 12, 2001) (“At a minimum, to overcome the presumption of the business judgment rule, the burden is on the plaintiff to show the defendant directors failed to act (1) in good faith, (2) in the honest belief that the action taken was in the best interest of the company, or (3) on an informed basis.” (cleaned up)).

tax status because of their “self-interested desire” to force A Cone and Billy to sell shares at a substantial discount. Plaintiffs argue that leveling this accusation is sufficient to meet their pleading requirement. (Pls.’ Br. Opp. p. 10.)

57. The Court disagrees. Plaintiffs’ conclusion that Steve and Bunny have acted in bad faith and self-interest is based on their own assumptions, not alleged facts. *See Good Hope Hosp., Inc.*, 174 N.C. App. at 274 (the Court is not required “to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences”).

58. Nowhere in the Amended Complaint do Plaintiffs allege facts suggesting that Steve and Bunny are attempting to force them to sell their shares. To the contrary, Plaintiffs allege that it is they who want out, but their exit proposals have been voted down. (*See* Am. Compl. p. 3, Exs. 7, 8, ¶¶ 37-51, 59, 78, 88.) In addition, Plaintiffs’ allegations reflect that Steve and Bunny are not ignoring the shareholders’ desire to reduce their tax burden, a burden they share. Exhibits to the Amended Complaint evidence that Steve and Bunny have participated in negotiations and discussions regarding the various options; they simply disagree with Plaintiffs. (Am. Compl. ¶ 64, Exs. 7, 8.) In the meantime, the Company has continued to pay its taxes, as it must.

59. Without the requisite factual allegations of bad faith, Plaintiffs cannot overcome the business judgment rule. *See Wachovia Cap. Partners, LLC v. Frank Harvey Inv. Family L.P.*, 2007 NCBC LEXIS 7, at **12 (N.C. Super. Ct. Mar. 5, 2007)

(absent “specific allegations, the board’s decision is entitled to a presumption of reasonableness” (quotations omitted)).

60. Accordingly, the Court **GRANTS** the Motions to Dismiss with respect to the derivative claim for breach of fiduciary duty and **DISMISSES** that claim with prejudice. Plaintiffs’ Motion to Dismiss the derivative claim without prejudice is **DENIED**.

IV. CONCLUSION

61. **WHEREFORE**, the Court hereby **ORDERS** as follows:

- a. Plaintiffs’ Motion to Dismiss is **GRANTED** with respect to their claim for judicial dissolution, and that claim is **DISMISSED without prejudice**. In all other respects, Plaintiffs’ Motion to Dismiss is **DENIED**.
- b. Defendants’ Motions to Dismiss are **GRANTED** with respect to Plaintiffs’ derivative claim for breach of fiduciary duty, and that claim is **DISMISSED with prejudice**. Except as stated, Defendants’ Motions to Dismiss are **DENIED** as **MOOT**.
- c. Defendants Steve and Bunny’s Motion to Strike, (ECF No. 15), and Plaintiffs’ Motion for Summary Judgment, (ECF No. 39), are **DENIED** as **MOOT**.
- d. Pursuant to Rule 41(d) Plaintiffs are taxed with the costs of this action.⁷

⁷ For purposes of Rule 41(d), the definition of costs does not include attorneys’ fees. *See* N.C.G.S. § 7A-305(d). Therefore, with respect to attorneys’ fees, the Court will consider separately Blue Gem’s Motion for Recovery of Reasonable Expenses, Including Attorneys’

IT IS SO ORDERED, this the 13th day of October, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases

Fees (ECF No. 61) and Defendants Stephen B. Cone's and Elaine Bulluck's Motion for Payment of Expenses or, in the alternative, for Indemnification (ECF No. 58).