2018 IL App (1st) 172450-U
No. 1-17-2450
December 3, 2018

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PAUL BERGER, on behalf of himself and all Others similarly situated and derivatively on Behalf of Swisher Hygiene, Inc.,	)	Appeal from the Circuit Court Of Cook County.
Plaintiff-Appellant,	)	No. 15 CH 13325
v.	)	The Honorable Pamela Meyerson, Judge Presiding.
ECOLAB INC.,	)	
Defendant-Appellee,	)	
SWISHER HYGIENE, INC.,	)	
Nominal Defendant-Appellee.	)	

JUSTICE WALKER delivered the judgment of the court.
Justice Pierce and Justice Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: When corporate directors of a Delaware corporation meet at corporate headquarters in North Carolina to approve sale of corporate assets to another corporation, the fact that the sale closed at an attorney's office in Illinois does not suffice to give Illinois courts jurisdiction over the directors of the Delaware corporation. A complaint that alleges only acts compatible with arm's length negotiations fails to state a cause of action for aiding a breach of fiduciary duties. When a shareholder has not asked the corporation board to sue

for fraudulent transfer, and the shareholder fails to overcome the presumption that the board would decide in good faith whether to pursue such a cause of action, the court must dismiss the shareholder's complaint for failure to show demand futility.

¶ 2 When Swisher Hygiene Inc., (Swisher) sold its assets to Ecolab Inc. (Ecolab), one of Swisher's shareholders, Paul Berger, (Berger) sued to void the sale. In Count I of the first amended complaint, Berger contended that Swisher's directors, aided by Ecolab, breached their fiduciary duties to the shareholders. In Count II, Berger asserted a derivative claim and contended the sale violated the Uniform Fraudulent Transfer Act (Act) (740 ILCS 160/1 *et seq.* (West 2014)). The circuit court dismissed the first amended complaint with prejudice.

¶ 3 We find the facts alleged in the first amended complaint cannot support a finding that Ecolab aided and abetted a breach of the Directors' fiduciary duties. However, Berger may be able to allege facts on remand which can state a claim for aiding and abetting Swisher's breach of fiduciary duty to its shareholders. Accordingly, we reverse the dismissal of Count I of the first amended complaint with prejudice, and we remand to allow Berger to re-plead this claim. We affirm the dismissal of Count II because Berger has not alleged sufficient specific facts to overcome the presumption that the Directors could decide whether to sue Ecolab under the Act. Because Berger failed to demand that Swisher's Directors authorize Swisher to sue Ecolab to void the sale, we affirm the dismissal of the claim under the Act. Therefore, we affirm in part, reverse in part, and remand.

¶ 4 BACKGROUND

¶ 5 Berger owned shares of the common stock of Swisher, a Delaware corporation headquartered in North Carolina. In 2012, Swisher publicly announced that investors should

not rely on the quarterly reports Swisher issued in 2011, and that Swisher had begun an investigation into alleged improprieties in its accounting for that year. Swisher later issued corrected financial reports for 2011 showing Swisher substantially understated its net losses for 2011. The Securities and Exchange Commission (SEC) and the United States Attorney's Office (USAO) investigated Swisher to determine whether it complied with reporting requirements or violated other laws.

¶ 6 In August 2015, the Directors entered into an agreement with Ecolab for the sale of substantially all of Swisher's assets for $40 million, with the sale contingent on the approval of Swisher's shareholders. Swisher distributed to its shareholders information about the government investigations, the proposed sale, and the proposed dissolution of Swisher. The documents Swisher distributed included a letter from Swisher's financial advisor, who expressed his opinion that Ecolab's offer was "fair, from a financial point of view," to Swisher's shareholders. Owners of 58% of the outstanding shares voted in favor of the proposed sale.

¶ 7 Berger filed a three-count class action complaint on behalf of Swisher's shareholders, naming as defendants Ecolab, Swisher, and Swisher's Directors. Count I purported to state a claim against the Directors for breach of fiduciary duties; Count II charged the Directors and Swisher with failing to disclose material facts in the documents distributed to the shareholders; Count III charged Ecolab with aiding and abetting the Directors' alleged breach of fiduciary duties. According to a report appended to the complaint, Swisher reached written settlement agreements with the SEC and USAO. Berger alleged that "on October 7, 2015, the Company entered into a Deferred Prosecution Agreement ('DPA') with the USAO

relating to the USAO's investigation of the Company's accounting practices. Pursuant to the DPA, the Company agreed to pay a $2 million fine to the USAO" and "the USAO agreed that it would file, but defer prosecution of, a criminal information charging Swisher with conspiracy to commit securities fraud and other charges relating to the Company's accounting and financial reporting practices."

¶ 8 The Directors moved to dismiss counts against them for lack of personal jurisdiction. They supported their motion with certified declarations in which they all asserted they owned no property in Illinois, no discussions related to the sale of assets took place in Illinois, and they never traveled to Illinois in connection with the sale to Ecolab or the proposed dissolution of Swisher. Swisher's chief executive officer added that in 2014 he twice visited Swisher's Illinois plant on routine matters. Ecolab moved to dismiss Count III for failure to state a claim.

¶ 9 The circuit court granted the Directors' motion to dismiss Counts I and II of the complaint, with prejudice, for lack of personal jurisdiction. The court also dismissed count III against Ecolab, but granted Berger leave to amend that count.

¶ 10 Berger filed a first amended complaint in December 2016. Count I was a claim against Ecolab for aiding and abetting the breach of fiduciary duties by Swisher Directors. Berger alleged "the Swisher Directors breached their fiduciary duties to stockholders, aided and abetted by Ecolab, 'sold' off bits and pieces of Swisher's various assets *** to third parties, and substantially all of Swisher's other assets to Ecolab." An officer of Ecolab discussed the SEC and USAO investigations with a Swisher director during five separate meetings in March, April, and May 2015. According to the amended complaint, "[t]hereafter, the

Swisher directors, aided and abetted by Ecolab, caused Swisher to execute a series of transactions that are not in the best interests of Swisher's shareholders, including the transfer of *** assets to third parties, and the Asset Transfer to Ecolab without adequate consideration." Berger alleged "[a]s of June 30, 2015, Swisher had assets of approximately $91.524 million," and Ecolab paid only $40 million for those assets.

¶ 11 Although the first amended complaint does not include any source for the assertion that the assets had a value of $91.524 million, Berger explained in a memorandum to the court that he obtained the number from "Swisher's own books." A balance sheet distributed to Swisher shareholders showed as of June 30, 2015, Swisher's total assets had a book value of $94.326 million, and those assets included $1.903 million in cash. Berger does not explain the adjustments supporting the claim that the assets had a value of $91.524 million, but the prior sales to third parties of minor assets may account for the difference.

¶ 12 In the first amended complaint, Berger further alleged:

> "The Swisher Directors, aided and abetted by Ecolab, also harmed Swisher and its public shareholders by causing Swisher to agree to a no-solicitation provision to deter other bidders and a termination *** fee of $1,500,000.00 (3.75% of the cash consideration being paid by Ecolab) to be paid to Ecolab if, among other scenarios, Swisher's shareholders do not approve the Asset Transfer. Thus, Swisher's shareholders were coerced into supporting the Asset Transfer to preserve whatever funds might be left for distribution to shareholders.

*** Lastly, the Swisher Directors, aided and abetted by Ecolab, guaranteed a shareholder vote in favor of the Asset Transfer in breach of their fiduciary duties."

¶ 13 Berger restated his allegations against Ecolab, claiming that it aided and abetted the breach of fiduciary duties by:

• "exploiting the Swisher Directors' desire for a quick liquidity event to terminate the investigations of Swisher directors and management by the SEC and the U.S. Justice Department and to avoid any liability therefore;

• exploiting the Swisher Directors' divided loyalties to obtain the piecemeal division of assets and the Asset Transfer that was not in the 'best interest' of Swisher;

• exploiting the Swisher Directors' divided loyalties to obtain the Asset Transfer for less than the reasonably equivalent value of Swisher's assets;

• exploiting the Swisher Directors' financial self-interest in the accelerated vesting of restricted stock;

• executing Lock-Up Agreements with each of the Swisher Directors that obligated the Swisher Directors to vote for the Asset Transfer to coerce Swisher shareholders to vote for the Asset Transfer; and

• restricting Swisher's ability to solicit other potential buyers by requiring Swisher to agree to 'no talk' and 'no solicitation' provisions.

• obligating Swisher to pay a termination fee equal to 3.75% of the value of the transaction to deter other offers and to coerce the shareholder vote."

¶ 14 Berger added a new Count II to the first amended complaint, attempting to state a derivative claim on behalf of Swisher for fraudulent transfer of Swisher's assets to Ecolab.

¶ 15 Ecolab and Swisher's Directors moved to dismiss the first amended complaint for failure to state a cause of action. The Directors supported their motion with a number of documents, including its SEC filings for 2015, the bill of information the USAO filed against Swisher in October 2015, and the deferred prosecution agreement the USAO and Swisher signed in October 2015.

¶ 16 Berger filed a motion to strike some of the documents the Directors appended to their motion to dismiss. The circuit court found it should not consider evidence contrary to the allegations of the complaint in deciding a motion to dismiss the complaint for failure to state a cause of action. The circuit court granted the motion to strike the challenged documents.

¶ 17 On September 1, 2017, the circuit court issued a written order granting Ecolab's and the Directors' motions to dismiss the complaint. The court found that in Count I, Berger did not adequately allege facts showing that Ecolab knowingly participated in the Directors' alleged breaches of fiduciary duties. For Count II, the court held the Act did not permit Swisher, or shareholders raising a derivative claim on Swisher's behalf, to void Swisher's own transfer of its assets. Berger now appeals. Swisher's Directors cross-appeal from the decision to strike some of the documents appended to the Directors' motion to dismiss.

¶ 18 ANALYSIS

¶ 19 We review *de novo* the order dismissing the complaint under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)) for failure to state a cause of action. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). A motion to dismiss brought pursuant to section 2-615 of the Code challenges the legal sufficiency of a complaint by alleging defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004). In reviewing the sufficiency of a complaint, a court must accept as true all well-plead facts and all reasonable inferences that may be drawn from those facts while viewing all allegations in the light most favorable to the plaintiff. *Id*. at 441. As a result, a motion to dismiss pursuant to section 2-615 should not be granted unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Marshall v. Burger King Corp*., 222 Ill. 2d 1048 (2006).

¶ 20 Berger argues the circuit court had personal jurisdiction over the Directors because the sale of the assets to Ecolab closed in the offices of Ecolab's attorneys in Chicago, and because Swisher had an office in Chicago. Berger argues that he adequately stated claims against Ecolab for fraudulent transfer and for aiding and abetting breaches of fiduciary duties. To determine the sufficiency of the complaint, we "will consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record." *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005). Statements in documents Berger filed with the court constitute judicial admissions. *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 187 (1999). As previously stated, we review the dismissal of the complaint *de novo*. *Solaia Technology v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006).

¶ 21 Personal Jurisdiction

Our Supreme Court has clearly and consistently made manifest that "a party who files an amended pleading waives any objection to the trial court's ruling on the former complaint." If an amended complaint does not adopt or refer to the previous filed complaint, the previously filed complaint is no longer a part of the record and has been "abandoned and withdrawn." *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17. In this case, the trial court dismissed the original complaint, and Berger did not re-plead a claim against the Directors. Therefore, Berger abandoned its original complaint and has forfeited any review.

¶ 22 Berger contends that the Directors committed a tortious act and breached fiduciary duties in Illinois, within the meaning of section 2-209 of the Code of Civil Procedure (735 ILCS 5/2-209(a)(2), (a)(11) (West 2014)), because they approved the sale of Swisher's assets to Ecolab, and the sale formally closed in Chicago.

¶ 23 If he had not forfeited review, Berger, as the party asserting jurisdiction, bears the burden of alleging sufficient facts to establish personal jurisdiction over the Directors. *Alpert v. Bertsch*, 235 Ill. App. 3d 452, 458 (1992). To meet this burden, plaintiff must show that defendant committed one of the acts enumerated in the Illinois long-arm statute; his cause of action arose from the act; and personal jurisdiction is consistent with due process. [Citations.] The relevant inquiry in determining whether a nonresident defendant has the constitutionally requisite minimum contacts for personal jurisdiction to be asserted over him is whether the defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum. *Id.* at 458-59. "The mere fact that a corporation by which a nonresident is employed, or in which he is a stockholder is itself

subject to Illinois jurisdiction does not subject that non-resident to jurisdiction." *Mergenthaler Linotype Co. v. Leonard Storch Enterprises, Inc.*, 66 Ill. App. 3d 789, 797 (1978). "[T]he directors of a national corporation cannot be sued by its shareholders anywhere the corporation happens to be present." *West Virginia Laborers Pension Trust Fund v. Caspersen*, 357 Ill. App. 3d 673, 681 (2005). The *West Virginia* court accepted the defendants' arguments that "a contract entered into on behalf of a corporation does not establish jurisdiction over its officers or directors who are not parties to the agreement," and "the situs of plaintiff's claims for breach of fiduciary duty is where the board held its meetings and made its decisions." *Id*. at 679-80.

The allegations of Berger's complaint support jurisdiction over Swisher, but not over the Directors. None of the alleged acts of the Directors illustrate that the Directors purposely invoked the benefits and protections of Illinois law. No director came to Illinois in connection with the negotiations with Ecolab or the sale of Swisher's assets. The Directors met in North Carolina, the state of its corporate headquarters, to decide whether to accept Ecolab's offer for Swisher's assets. The Directors agreed with Ecolab that Delaware law would govern the transaction. Following *West Virginia*, we agree with the circuit court's ruling that it did not have personal jurisdiction over the directors of Swisher.

¶ 24 Aiding and Abetting a Breach of Fiduciary Duties

¶ 25 In Count I of the first amended complaint, Berger sought to recover damages from Ecolab for aiding and abetting the Directors' alleged breach of their fiduciary duties. "[O]n issues related to corporate governance, Illinois courts apply the law of the state of incorporation." *Spillyards v. Abboud*, 278 Ill. App. 3d 663, 667 (1996). Under Delaware law,

"[a] third party may be liable for aiding and abetting a breach of a corporate fiduciary's duty to the stockholders if the third party 'knowingly participates' in the breach." *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001). "[A] bidder may be liable to the target's stockholders if the bidder attempts to create or exploit conflicts of interest in the board," but "a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting." *Malpiede*, 780 A.2d at 1097; see also *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1057 (Del. Ch. 1984).

¶ 26 Berger alleged Swisher, "aided and abetted by Ecolab," sold some of Swisher's assets to third parties and failed to conduct an auction for Swisher's principal assets. Stating a claim for aiding and abetting requires that: " '(1) the party whom the defendant aids must perform a wrongful act which causes an injury; (2) the defendant must be regularly aware of his role as part of the overall or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.' " *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 27-28 (2003).

¶ 27 Count I of the first amended complaint alleges that Ecolab obtained from Swisher (1) an agreement to propose to shareholders a sale to Ecolab of assets worth $90 million for $40 million; (2) a lock-up agreement obliging the directors to vote in favor of the proposed sale; (3) an agreement not to solicit bids from other potential buyers; and (4) an agreement to pay Ecolab 3.75% of the transaction price as a termination fee if the shareholders voted against the proposed sale.

¶ 28 Directors may breach their fiduciary duties by adopting measures designed to restrict bidding to a party who will serve the interests of directors where those interests diverge from

the interests of shareholders. *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986). In *Revlon*, Revlon's directors sold notes to avert a hostile takeover attempt. When the directors realized that they could not prevent a takeover of the company, they entered into a lock-up agreement and a no solicitation agreement with a party who promised to favor the interests of the noteholders over the interests of stockholders. *Id.* at 182. The directors sought to "shor[e] up the sagging market value of the Notes in the face of threatened litigation by their holders." *Id.* The *Revlon* court held, "when the Revlon board entered into an auction-ending lock-up agreement *** on the basis of impermissible considerations at the expense of the shareholders, the directors breached their primary duty of loyalty." *Id.*

¶ 29 However, directors may adopt measures including lock-up agreements, no solicitation agreements, and termination fees, as part of a legitimate business strategy. *Id.* at 183-84. "In coordinating the bidding process, the board can institute strategies, such as granting a 'lock-up' agreement, a breakup fee, or a no-shop agreement to a 'white knight', but only if their strategies enhance the bidding. [Citation.] Such arrangements may also be legitimately necessary to convince a 'white knight' to enter the bidding by providing some form of compensation for the risks it is undertaking." *Samjens Partners I v. Burlington Industries, Inc.*, 663 F. Supp. 614, 624 (S.D.N.Y. 1987); see also *Maz Partners LP v. Shear*, 204 F. Supp. 3d 365, 375-76 (D. Mass. 2016).

¶ 30 Berger alleged the Directors sought to sell off assets quickly so that Swisher could pay the agreed fine to the USAO and thereby delay prosecution of Swisher. This would reduce any possible threat that the USAO and the SEC might seek to penalize the Directors

personally if Swisher failed to meet its obligations under the agreement. The allegations here differ significantly from the allegations in *Revlon*. The *Revlon* directors chose a course that benefitted only themselves, and not the corporation and its shareholders, when they sought to placate the noteholders who threatened to sue them.

¶ 31 Here, the quick sales, were made so that Swisher could meet its obligations under the agreement with the USAO and the SEC, benefitted the corporation and all its shareholders. Berger has not asserted the shareholders would have benefitted if Swisher reneged on its obligations under the agreement to delay prosecution. Berger has not alleged facts showing Swisher could have complied with its obligations under the agreement without a quick sale of some assets. Berger has not alleged any facts from which a trier of fact could conclude that the Directors used the lock-up agreement, the no solicitation agreement, and the termination fee to the detriment of shareholders. The factual allegations of the complaint, if proven, remain compatible with a finding that the agreements with Ecolab served the interests of Swisher's shareholders by providing Ecolab with some compensation for the risks and effort it undertook in negotiating the purchase of Swisher's assets. See *Samjens Partners I*, 663 F. Supp. at 624.

¶ 32 Berger also alleged that Ecolab aided and abetted the Directors in their sale of some assets and in their failure to conduct an auction for Swisher's assets. Berger alleges no facts to support these conclusory allegations. Berger's "[c]onclusory allegations that the defendants agreed with others to achieve some illicit purpose are not sufficient" (*Reuter v. MasterCard Int'l, In*c., 397 Ill. App. 3d 915, 928 (2010)) to state a cause of action for aiding a breach of fiduciary duties.

¶ 33 The complaint adequately alleges facts showing Ecolab's officers met with directors and officers of Swisher on several occasions, and when they negotiated the purchase of Swisher's assets, Ecolab's officers knew about Swisher's accounting problems and the SEC and USAO investigations. The allegations of the complaint support the conclusion that Ecolab sought to obtain Swisher's assets for the lowest price Swisher would accept, while Swisher's Directors sought to maximize the amount Swisher would receive, subject to the constraint that Swisher needed to sell fairly quickly to comply with the settlement it reached with the SEC and USAO. No facts alleged in the complaint support a conclusion that Ecolab and Swisher engaged in an arrangement other than arm's length negotiations. We find the facts alleged in the first amended complaint cannot support a finding that Ecolab aided and abetted a breach of the Directors' fiduciary duties. Nonetheless, given the complexity of the transaction, Berger may be able to allege facts on remand which can state a claim for aiding and abetting Swisher's breach of fiduciary duty to its shareholders. Accordingly, we reverse the dismissal of Count I of the first amended complaint and remand to allow Berger to re-plead this claim and for further proceedings on the claim.

¶ 34 Fraudulent Transfer

¶ 35 Finally, Berger contends the circuit court erred when it dismissed Count II of the first amended complaint, in which Berger raised a derivative claim on behalf of Swisher seeking to void the transfer of Swisher's assets to Ecolab as fraudulent. The circuit court held that the transferor, Swisher, could not bring a cause of action to void the transfer Swisher itself made. The circuit court relied on *Edgewater Growth Capital Partners, L.P. v. H.I.G. Capital, Inc.*, No. 3601-VCS (Del. Ch. 2010), an unpublished decision. Some published decisions assert

that shareholders aggrieved by a fraudulent transfer must bring the claim as a derivative action on behalf of the corporation that fraudulently transferred the assets. See *Paclink Communications International v. Superior Court*, 109 Cal. Rptr. 2d 436, 440 (2001); *Green v. Bradley Construction, Inc.*, 431 So. 2d 1226, 1229 (Ala.1983).

¶ 36 Ecolab argues this court should affirm the dismissal of Count II because Berger never asked Swisher's Directors to sue Ecolab for the allegedly fraudulent transfer. Berger admits he made no such demand, but he claims an excuse under the doctrine of demand futility.

¶ 37 The parties agree Delaware law governs the determination of whether Berger has adequately alleged demand futility. See *Spillyards*, 278 Ill. App. 3d at 675-76. Delaware Chancery Court Rule 23.1 provides:

> "In a derivative action brought by one or more shareholders or members to enforce a right of a corporation * * * the complaint shall allege that the plaintiff was a shareholder * * *. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort."

¶ 38 The courts presume that directors act "in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). A plaintiff in a shareholder's derivative suit asserting demand futility bears the burden of establishing facts to overcome the presumption that directors would decide in good faith whether to pursue the proposed cause of action. *Id.* at 812; *In re Abbott Laboratories Derivative Shareholders Litigation*, 325 F.3d 795, 807 (7th Cir. 2003). "[D]emand can only

be excused where facts are alleged with particularity which create a reasonable doubt that the directors' action was entitled to the protections of the business judgment rule." *Aronson*, 473 A.2d at 808. "[D]emand futility is established if, accepting the well-pleaded facts as true, the alleged particularized facts raise a reasonable doubt that either (1) the directors are disinterested or independent or (2) the challenged transaction was the product of a valid exercise of the directors' business judgment." *In re Abbott Laboratories*, 325 F.3d at 807.

¶ 39 Berger claims he adequately alleged that the directors have an interest in the challenged transaction because he alleged they faced a threat of personal liability if Swisher failed to comply with the terms of the settlement with the SEC and the USAO. Berger suggests that the three directors who had served on the board during 2011 might face liability for failure to discover the accounting problems sooner. But "the mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge either the independence or disinterestedness of directors." *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993). "[C]onclusory allegations, however, are not sufficient to state a claim for failure of oversight that would give rise to a substantial likelihood of personal liability, which would require particularized factual allegations demonstrating bad faith by the director defendants." *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 127 (Del. 2009). We note that three of the six director defendants did not serve on the board at the time of the accounting misdeeds, and Berger has not alleged facts suggesting the other three director defendants had any special responsibility for overseeing the accounting processes. Berger has not alleged particularized facts showing that the Swisher directors faced a substantial likelihood of personal liability.

¶ 40 Berger also argues the directors had a special interest in the sale because of the accelerated vesting of their options. "The accelerated vesting of options does not create a conflict of interest because the interests of the shareholders and directors are aligned in obtaining the highest price" for Swisher's assets. *MAZ Partners*, 204 F. Supp. 3d at 375.

¶ 41 Berger claims he adequately alleged facts showing that the Directors did not exercise their business judgment because they sold assets worth almost $90 million for $40 million. To substantiate his claim that the assets had a value of $90 million, he alleged only Swisher's books showed the assets' value at $90 million.

¶ 42 "[B]ook value of assets merely reflects the historical cost of an asset, adjusted for depreciation. The book value of rapidly appreciating [or depreciating] assets *** will have little relationship to its actual or market value." *Simplot v. Simplot*, 526 P.2d 844, 850 (Idaho 1974). "It is a well known fact that there may be a vast difference between book value and actual or fair cash market value *** [B]ook value does not usually reflect fluctuations in marketability caused either by inflationary-deflationary trends, nor going concern against salvage values of a nongoing business." *County of Cook v. Vulcan Materials Co.*, 16 Ill. 2d 385, 390-91 (1959).

¶ 43 Swisher's financial consultant told the shareholders that Ecolab's bid was "fair, from a financial point of view." Berger alleged no facts that any bidder would pay more than $40 million for Swisher's assets if Swisher had not so quickly accepted Ecolab's bid. Here, as in *Spillyards*, "[t]he plaintiff merely speculated that had the [assets] been offered to other interested investors a better price could have been procured." *Spillyards*, 278 Ill. App. 3d at 680.

¶ 44 We hold that Berger has not alleged sufficient particularized facts to overcome the presumption that the directors would exercise independent, disinterested judgment to decide whether to sue Ecolab for fraudulent transfer. Because Berger failed to plead facts showing demand futility, we affirm the circuit court's judgment dismissing Count II of the first amended complaint. We need not address the Directors' cross-appeal from the decision to strike some documents appended to the Director's motion to dismiss.

¶ 45 CONCLUSION

¶ 46 Berger did not allege facts showing that Illinois courts have jurisdiction over Swisher's directors. We reverse the 2-615 dismissal of Count I for aiding and abetting a breach of fiduciary duty, and remand with instructions that plaintiff be allowed to re-plead Count I. We affirm the trial court's order dismissing Court II of the first amended complaint with prejudice. We remand for further proceedings on only Count I.

¶ 47 Affirmed in part and reversed in part; remanded.