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Case No. 2021-0649-MTZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PINE BROOK CAPITAL PARTNERS II, L.P.,	)	
Plaintiff,	)	
v.	)	C.A. No. 2021-0649-MTZ
BETTER HOLDCO, INC., AURORA ACQUISITION CORP. and AURORA MERGER SUB I, INC.,	)	**PUBLIC VERSION FILED:** October 8, 2021
Defendants.	)	

DEFENDANTS AURORA ACQUISITION CORP. AND AURORA MERGER SUB I, INC.'S OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED VERIFIED COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff Pine Brook's[1] original and amended complaints demonstrate that its real objective is to avoid Better's repurchase of Pine Brook's shares in connection with Better's upcoming de-SPAC merger with defendants Aurora Acquisition Corp. and Aurora Merger Sub I, Inc. (together with Aurora Acquisition Corp., "Aurora"). Pine Brook's claims for doing so (Amended Compl., Counts I-III) are not directed against Aurora. Indeed, they do not involve Aurora at all. Pine Brook's claims disputing Better's right to repurchase should be dismissed for the multiple reasons articulated in Better's Brief in Support of its Motion to Dismiss and in Opposition to Pine Brook's Motion for Summary Judgment ("Better's Brief"), and Aurora does not separately address them here.

As part of its strategy to avoid the repurchase of its shares, Pine Brook also alleges that the lockup provision found in Sections 3.2(b) and (c) of the Merger Agreement (the "Lockup") is unenforceable. As with its repurchase claims, the lockup claims are not well-pled, and on their face fail to address multiple fundamental issues, including (among others) that such lockups are routine in go-public transactions, that the Lockup restricts *all* large stockholders equally, and that Pine Brook previously did not dispute its validity. In addition, Better and Aurora

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[1] Capitalized terms not defined herein shall have the meaning ascribed to them in Pine Brook's Amended Verified Complaint for Declaratory Judgment and Damages (the "Amended Complaint").

have mooted Pine Brook's claim by [redacted] *See* Affidavit of Nicholas Calamari ¶¶ 3-5 (filed in support of Better's Brief). All of these arguments are again explained in Better's Brief, which Aurora joins as to the Lockup, and Aurora does not revisit them here.

Aurora writes separately to highlight the degree to which Pine Brook's allegations fail to implicate any facts—let alone an action or omission of Aurora, the SPAC entity—that would subject Aurora to any viable claim for relief. Having failed to allege facts as to the elements of its claims against Aurora, Pine Brook fails to state a claim, and this Court should dismiss Counts IV and V of the Amended Complaint as against Aurora. Nor has Pine Brook satisfied its burden to show that it is entitled to summary judgment. Pine Brook's own allegations about its lockup flip-flop add yet another reason, in addition to the disputes of material facts demonstrated by Better, why this Court should deny Pine Brook the summary determination it seeks.

II. FACTUAL BACKGROUND

A. The Side Letter.

Pine Brook devotes much of its Amended Complaint and briefing towards showing why it is not subject to the repurchase obligations in the Side Letter. Aurora is not a party to the Side Letter (Am. Compl. ¶ 7), or named as a defendant in any of

Counts I – III of the Amended Complaint that relate to the Side Letter. To the extent relevant to Counts IV and V of the Amended Complaint and its arguments to dismiss them, Aurora refers to and adopts herein the factual background regarding the Side Letter as set forth in Better's Brief.

B. The Lockup.

A far smaller portion of Pine Brook's Amended Complaint and briefing is devoted to its argument that the Lockup is inequitable and invalid under the DGCL. Am. Compl. ¶¶ 9, 11.

This reticence is unsurprising: Pine Brook admitted that it "intended to sign the Support Agreement (with a six-month lockup, not one year) . . . ." Am. Compl. ¶ 55; *see also* Verified Complaint for Declaratory Judgment ("Original Complaint"), Dkt. 1 ¶ 52. Pine Brook only reversed course after a dispute arose with Better's CEO regarding the applicability of the Side Letter. Am. Compl. ¶¶ 56 – 59. Pine Brook also alleges that in order to receive Merger consideration, "Pine Brook will be required to sign the Transmittal Letter – which contains the same stock transfer restrictions that Pine Brook ultimately refused to accept in connection with the proposed Support Agreement." Am. Compl. ¶ 61.

Nowhere in these allegations does Pine Brook identify any act or failure to act by Aurora. To the extent relevant to Counts IV and V of the Amended Complaint

and its arguments to dismiss them, Aurora refers to and adopts herein the additional factual background regarding the Lockup as set forth in Better's Brief.

III. ARGUMENT

A. Standards of Review

1. Motion to Dismiss Standard.

Aurora has moved under Delaware Court of Chancery Rule 12(b)(6) to dismiss Counts IV and V of Pine Brook's Amended Complaint. Under Rule 12(b)(6), the Court may grant a motion to dismiss if the complaint "fail[s] to state a claim upon which relief can be granted." Ct. Ch. R. 12(b)(6). "[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'" *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011). When considering such a motion, the Court must "accept all well-pleaded factual allegations in the [c]omplaint as true . . . , draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof." *Id.* at 536 (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)). But the Court need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party." *Price v. E.I. du Pont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

To survive dismissal, "a plaintiff must allege facts that, taken as true, establish each and every element of a claim upon which relief could be granted." *In re 3COM Corp.*, 1999 WL 1009210, at *2 n.5 (Del. Ch. Oct. 25, 1999) (quoting *Lewis v. Austen*, C.A. No. 12937, Mem. Op. at 4 (Del. Ch. June 2, 1999). Significantly, the actions that a plaintiff alleges must be attributable to the defendants named in the case. *See, e.g.*, *Raj & Sonal Abhyanker Family Tr. v. Blake*, 2021 WL 2477025, at *4 (Del. Ch. June 17, 2021) (observing that plaintiff did not allege any specific facts as to alleged conflicted director); *In re TrueCar, Inc. S'holder Deriv. Litig.*, 2020 WL 5816761, at *10, *26 (Del. Ch. Sept. 30, 2020) (dismissing aiding and abetting claims where "the Complaint [did] not allege *any* facts regarding" the defendant entity). "[S]o-called 'group pleading' will not suffice." *Raj & Sonal*, 2021 WL 2477025, at *4 (quoting *In re USG Corp. S'holder Litig.*, 2020 WL 5126671, at *23 (Del. Ch. Aug. 31, 2020)).

2. Summary Judgment Standard.

Aurora also requests that this Court deny Pine Brook's motion for summary judgment. "There is no 'right' to a summary judgment." *Chen v. Howard-Anderson*, 87 A.3d 648, 665 (Del. Ch. 2014) (citation omitted). A plaintiff is entitled to summary judgment only if it can show "that there is no genuine issue as to *any* material fact and that the moving party is entitled to a judgment as a matter of law." Ct. Ch. R. 56(c) (emphasis added). "[S]ummary judgment [will not] be granted if,

upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstances." *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962). "The Court maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application." *Zimmerman v. Crothall*, 2012 WL 707238, at *5 (Del. Ch. Mar. 27, 2012) (citations and internal quotation marks omitted).

"The moving party bears the burden of establishing that there are no issues of material fact, and the court must review all evidence in the light most favorable to the non-moving party." *Brown v. Kellar*, 2018 WL 6721263, at *4 (Del. Ch. Dec. 21, 2018) (internal quotation marks and citation omitted). "The evidence must be viewed in the light most favorable to the non-moving party, and summary judgment is warranted only where no rational trier of fact would fail to find that the moving party is entitled to judgment." *Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at *5 (Del. Ch. Sept. 11, 2015), *judgment entered by* 2015 WL 5703109 (Del. Ch. Sept. 25, 2015) (Order).

"[I]n order to withstand a motion for summary judgment, the plaintiff is required to present some evidence, either direct or circumstantial, to support all of the elements of the claim." *Watson v. Taylor*, 829 A.2d 936, 2003 WL 21810822, at *2 (Del. Aug. 4, 2003) (Table). "A motion for summary judgment is properly denied

if the moving party fails to make a showing sufficient to establish the existence of each element essential to the party's case." *Healy v. Healy*, 2006 WL 3289623, at *2 (Del. Ch. Oct. 31, 2006); *see, e.g.*, *Williams v. Geier*, 671 A.2d 1368, 1375, 1376 (Del. 1996) (upholding Court of Chancery's ruling against plaintiff on summary judgment where plaintiff advanced "no evidence to support [his] claim that the Defendants" had an improper "purpose in adopting [a] [r]ecapitalization" or otherwise engaged in "other inequitable conduct").

B. Plaintiff Fails to Allege Any Facts Implicating Aurora.

Pine Brook fails to allege any facts in support of Counts IV and V that demonstrate an act or omission committed by Aurora in relation to the Lockup. For example, Pine Brook recites the actions underlying the dispute over the Lockup in the Amended Complaint as follows:

- "**Better is** attempting to impose inequitable and invalid post-closing restrictions on Pine Brook, at its CEO's direction and for no consideration to Pine Brook." Am. Compl. ¶ 9.

- "On May 5, 2021, **Better's counsel circulated** a draft Support Agreement to Pine Brook [that] would have prohibited Pine Brook from disposing of its company shares for at least one year after the Merger's closing." Am. Compl. ¶ 54.

- "What had happened was clear: at Garg's direction, **Better decided** to unilaterally impose on Pine Brook the six-month lockup contained in the draft Support Agreement . . . ." Am. Compl. ¶ 59.

- "**Better is** attempting to punish Pine Brook not for business reasons, but out of personal animus or some other illegitimate motive." Am. Compl. ¶ 67.

- "**Better's actions** also violate 8 *Del. C.* § 202(b)." Am. Compl. ¶ 68.
- "**Better is** attempting to impose stock-transfer restrictions in two ways, both of which violate Section 202(b)." Am. Compl. ¶ 69.

The allegations of fact underlying Counts IV and V – again, the only counts naming Aurora – singularly implicate Better, not Aurora. Having failed to allege any facts as to Aurora, Pine Brook has failed to state a claim justifying a summary determination that Aurora is liable and subject to declaratory, let alone monetary, relief.[2] These counts should be dismissed as to Aurora for failure to state a claim.

C. Pine Brook's Claims Related to the Lockup Are Mooted by [redacted]

In Counts IV and V of the Amended Complaint, Pine Brook contends that the Lockup violates Sections 202 and 251 of the DGCL and is otherwise somehow generally inequitable. Am. Compl. ¶¶ 95-112.

For the reasons articulated in Better's Brief, Pine Brook's Lockup claims are moot. Better and Aurora have [redacted] Pine Brook was

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2 *Raj & Sonal*, 2021 WL 2477025, at *4 (Del. Ch. June 17, 2021) (dismissing all counts against defendant "[b]ecause there are no specific factual allegations" so "it is not reasonably conceivable that he breached his fiduciary duties.").

made aware after filing its opening summary judgment brief that Better and Aurora are [redacted] Accordingly:

- As Pine Brook acknowledged, [redacted] satisfies the requirements of Section 202, even under Pine Brook's interpretation of that statutory provision. [redacted]

- [redacted] also negates Pine Brook's arguments that receipt of Merger consideration is conditioned on its agreement to the Lockup (Op. Br. at 42), because [redacted]

- [redacted] Pine Brook's argument that the Merger Agreement conceals "other material conditions or requirements" represented by the Letter of Transmittal (Op. Br. at 46) will also be mooted.

- [redacted] also moots Pine Brook's argument that additional consideration is required (Op. Br. at 48), because the Lockup is (as it was previously) part of the Merger and requires no separate consideration.

- Pine Brook's claims of disparate treatment (Op. Br. at 53) are also moot, as [redacted] treats Pine Brook exactly the same as every other holder of 1% or greater of pre-merger Better stock.

Because Pine Brook's Lockup claim has been mooted, this Court should dismiss Counts IV and V.

D. Count V Fails to Allege an Independent Cause of Action and Should be Dismissed for Failure to State a Claim.

In addition to the reasons presented in Better's Brief as to why Count V should be dismissed, Count V also fails because it does not allege an independent cause of action. The title of this amorphous cause of action is "violations arising from imposition of the Transmittal Letter Lockup Provision," but it repeats the allegations of Count IV and seeks one of the same remedies (damages) as Count IV, while merely stating, in conclusory fashion, that the Letter of Transmittal violates Sections 251 and 202 of the DGCL and is coercive and inequitable. Am. Compl. ¶ 105-112. "Where allegations are merely conclusory, however, (i.e., without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss."[3] Claims of inequitable conduct must be pled "with allegations supported by specific facts[.]"[4] No specific facts are alleged to support a claim of inequitable conduct, particularly not as to Aurora, so Count V should be dismissed.

E. Disputed Material Facts, Including as Contradictorily Pled by Pine Brook, Preclude Entry of Summary Judgment.

Pine Brook's Original and Amended Complaints contain contradictory factual allegations on fundamental issues, thereby setting up disputes of material fact that

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3 *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).

4 *Wyser-Pratte v. Smith*, 1997 WL 153806, at *1 (Del. Ch. Mar. 18, 1997).

preclude summary judgment. In the Original Complaint, Pine Brook alleged that it "rejected [the Lockup] in earlier negotiations . . ." Orig. Compl. ¶ 11. In the Amended Complaint, Pine Brook now alleges that it "ultimately rejected [the Lockup] in earlier negotiations." Am. Compl. ¶ 11. While only adding one word ("ultimately"), Pine Brook's amendment calls into question the timing of Pine Brook's initial rejection of the Lockup, Pine Brook's claim that it believes the Lockup is inequitable, and whether, as Pine Brook alleges, Pine Brook rejected the Lockup *because of* a May 8, 2021 change in the circumstances of the negotiation. Am. Compl. ¶ 57.

More fundamentally, Pine Brook initially admitted that it "intended to sign the Support Agreement under the shared assumption that the Side Letter would not apply." Orig. Compl. ¶ 52. But in the Amended Complaint Pine Brook now says that it

> intended to sign the Support Agreement (with a six-month lockup, not one year) based on the deal terms that had been presented to Pine Brook up to that point, including that the Side Letter would not apply. Such agreement was voluntary (at the time) and Pine Brook intended to sign the Support Agreement only based on the proposed deal terms in the aggregate.

Am. Compl. ¶ 55. Pine Brook's amendment does not simply add clarifying facts: it contradicts the initial allegation that there was an *assumption* among the parties that the Side Letter would not apply, now citing unspecified "deal terms." This is a material fact that goes to the heart of Pine Brook's arguments under Section 202 of

the DGCL, i.e., to the extent not mooted by [redacted] whether Pine Brook agreed to the Lockup. These disputes of material fact preclude entry of summary judgment, so Pine Brook's motion should be denied.

IV. CONCLUSION

For the foregoing reasons and those presented in Better's Brief, the Court should dismiss the Amended Complaint as to Aurora with prejudice and deny Pine Brook's Motion for Summary Judgment.

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October 8, 2021

CERTIFICATE OF SERVICE

I, Roger S. Stronach, hereby certify that on October 8, 2021, I caused a true and correct copy of the *PUBLIC VERSION of Defendants Aurora Acquisition Corp. and Aurora Merger Sub I, Inc.'s Opening Brief in Support of Their Motion to Dismiss Plaintiff's Amended Verified Complaint and in Opposition to Plaintiff's Motion For Summary Judgment* to be served upon the following counsel of record via File & Serve*Xpress*:

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