

Cumming v. Edens, et al. (New Senior Investment Group, Inc.)

COURT: Delaware Court of Chancery
CASE NUMBER: C.A. No. 13007-VCS
CASE LEADERS: Edward G. Timlin

On December 27, 2016, BLB&G filed a complaint in the Delaware Chancery Court on behalf of John Cumming and derivatively on behalf of Nominal Defendant New Senior Investment Group, Inc. (“New Senior” or the “Company”) against certain members of its Board of Directors, Fortress Investment Group LLC (“Fortress”), and certain affiliates of Fortress. An Amended Complaint was filed on June 8, 2017. The Amended Complaint was filed following an extensive investigation, including obtaining books and records of New Senior pursuant to Section 220 of the Delaware General Corporations Law.

This action arises out of an unlawful scheme by members of New Senior’s Board to enrich Fortress and its affiliates, at the expense of New Senior and its stockholders, through a self-dealing transaction (the “Holiday Acquisition”). The Complaint alleges that the transaction was designed to benefit Fortress at the expense of New Senior by, inter alia, causing New Senior to (i) overpay for the properties, (ii) issue a larger secondary offering than necessary to fund the acquisition, and (iii) pay higher management fees than necessary.

The Complaint further alleges that a majority of the New Senior board was either interested in the transaction or disabled by conflicts arising from various relationships with a principal of Fortress, Wesley Edens. It further alleges that the transaction, comprised of three related and equally unfair elements, is subject to the entire fairness standard of review.

On July 21, 2017 Defendants moved to dismiss the Complaint. On September 1, 2017 Plaintiffs filed their opposition to the motion to dismiss. On October 2, 2017 Defendants filed their reply in further support of their motion to dismiss.

On November 21, 2017 Vice Chancellor Joseph R. Sights heard argument regarding Defendants motion to dismiss. On February 21, 2018 the Court entered an order denying Defendants’ motion to dismiss in all respects.

On October 25, 2018, the Court granted Plaintiff’s Motion for Leave to File Verified Second Amended Derivative Complaint, which added a claim for declaratory judgment seeking a determination that New Senior is and was entitled to terminate the Management Agreement for cause.

Following the ruling on the motion to dismiss, the parties engaged in extensive discovery, including reviewing more than 800,000 pages of discovery, conducting 16 depositions, filing six motions to compel, and exchanging opening and rebuttal expert reports.

Following a mediation process, BLB&G obtained a proposed settlement consisting of \$53 million in cash to be paid to New Senior, as well as important corporate governance. The proposed governance changes include amendments to the Company’s certificate of incorporation and bylaws to eliminate the Company’s classified Board over a period of three years and an amendment to the bylaws providing for the election of directors by a majority of the votes cast in uncontested elections. The implementation of these changes is subject to approval by the Company’s

stockholders at the Company's 2019 annual meeting, and the Board has agreed to submit and recommend these changes to the stockholders at the annual meeting.

The Amended Complaint, the motion to dismiss decision, and the stipulation of settlement are available at the Case Documents page.

On July 31, 2019 Vice Chancellor Joseph R. Slights granted final approval of the settlement. This matter has concluded.

Case Documents

- July 10, 2019 - Plaintiff's Application for Approval of the Settlement, an Award of Attorneys' Fees and Expenses, and a Plaintiff's Incentive Award
- July 10, 2019 - Affidavit of Christopher M. Foulds in Support of the Settlement and Plaintiff's Application for Attorneys' Fees and Expenses
- April 26, 2019 - Scheduling Order
- April 23, 2019 - Stipulation and Agreement of Compromise, Settlement and Release
- November 26, 2018 - Verified Second Amended Derivative Complaint
- February 21, 2018 - Memorandum Opinion
- June 13, 2017 - Verified Amended Derivative Complaint